



Our ref: JH

29 June 2012

The Committee Secretary
Standing Committee on Education and Employment
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam,

INQUIRY INTO WORKPLACE BULLYING

1. Executive summary

People + Culture Strategies (“PCS”) is a specialist workplace relations law firm that assists clients, mostly employees, in dealing with workplace bullying matters. PCS engages with its clients in both contentious and non-contentious matters.

Workplace bullying is often defined as “repeated, unreasonable behaviour directed towards an employee or group of employees that creates a risk to health and safety”. However, bullying can also be a one-off event. It is our view that the current Australian federal, state and territory regulatory regime provides a variety of appropriate and adequate avenues by which individuals can seek remedies for workplace bullying. This can be seen through the rapid growth in successful workplace bullying claims and prosecutions under work, health and safety legislation, which in turn have placed employers on notice to address this issue. In our experience, many employers have responded appropriately through introducing and re-enforcing bullying policies and conducting training tailored to the individual organisation which addresses workplace bullying. The use of policies and training to complement existing legal avenues allows workplace bullying to be addressed at both the micro and macro level within an organisation. As such, additional regulation in this area will exacerbate the pre existing conflict between performance management and workplace bullying as it will further limit the ability of managers to performance manage staff. Therefore, the creation of a definition of workplace bullying and associated regulations must be implemented with due care. Lastly, such regulation must not have the unintended consequence of a workplace bullying claim being used as a delaying tactic in litigation which is already prevalent by some litigants and their legal representatives.

2. What is the prevalence of workplace bullying and the impact on employers?

Workplace bullying already constitutes the basis for a large number of WorkCover compensation claims, which in 2010 cost employers over \$60 million. Workplace bullying also has other further tangible impacts on an organisation through; decreased productivity, low employee morale, increased absenteeism and increased staff turnover. As a result many employers have this issue at front of mind and are already taking adequate reactive and proactive steps to prevent a culture of workplace bullying arising. This can be seen through the development and use of comprehensive workplace behaviour policies which target bullying. In our experience adequate policies and training given to all staff can have a real impact on reducing and eliminating the adverse effects of workplace bullying on culture and individual employees.

Some best practice steps which the majority of employers already implement which have a positive impact on addressing workplace bullying include: specific policies and procedures that address workplace bullying, internal policies and procedures for resolving workplace bullying complaints, training all employees on the issue, monitoring the implementation of policies and monitoring the effectiveness of policies. These policies and procedures can have a real impact as they can be tailored to suit the individual needs, culture and practices of an organisation and have a real impact on forcing cultural change. Culture is very important, as if an organisation appears to accept or tolerate a bullying culture, this will make employees less likely to complain about bullying, or make them believe that the bullying behaviour is acceptable. In addition, having a policy which defines bullying and gives examples of bullying behaviour has assisted the organisations we advise in dealing with the bully in the workplace. It has also strengthened their decision to commence disciplinary action as their actions are supported by their policies.

Evidently, policies provide a strong complement to the already existing legal avenues for claims in response to workplace bullying thereby removing the need for specific stand alone legislation to address workplace bullying. In our experience, more employees are bringing to their employers attention bullying behaviour and generally feel that their complaints are taken seriously. The training we give generally educates managers and makes them more aware of acceptable/unacceptable behaviour in the workplace. Following the training, employees are often more engaged and discuss bullying more openly and without fear of retribution.

3. The inherent conflict between performance management and workplace bullying

The main practical challenge facing employers is ensuring that their conduct (particularly in a performance management context) does not get caught under the broad and subjective definition of bullying which currently exists. Bullying is commonly defined as the “repeated, unreasonable behaviour directed towards an employee or group of employees that creates a risk to health and safety”. However, bullying can also be a one-off event. This definition can potentially capture a wide range of behaviours such as yelling, screaming, inappropriate comments about a person, belittling opinions, constant criticism, denial or limitation of training or development opportunities and isolating employees from normal work interaction. In addition, an individual’s view of what behaviour constitutes bullying often involves a subjective assessment of their circumstances. This can therefore make individuals have differing views of activities which can be characterised as bullying

such as as overwork or underwork, undermining work performance or creating unnecessary pressure will often be perceived differently by different individuals and management.

Perhaps, the most striking example of where the broad and subjective nature of activities which may constitute bullying can be seen is within the performance management context. It is in this situation where in our experience, employers often face the most difficulty. This arises as there is a fine balance between action to performance manage a poor performing employee being perceived as and potentially leading to a claim of workplace bullying and bullying itself. One such example can be comments made by a manager to a poor performing employee which may be perceived as an insult or ridicule. In addition, changes made to workload in the context of performance management may lead to allegations of workplace bullying if the employee sees these changes to workload as leading to additional pressure or overwork.

Therefore, it is proposed that any regulation which directly defines a bullying offence, provides a definition of bullying which is narrow and specific so as to avoid being triggered in a genuine performance review situation. Otherwise, employers run the risk of a potential workplace bullying claim when they performance manage an individual, which will invariably place a large amount of constraint on the actions able to be performed by management.

4. The adequacy of existing regulatory frameworks to deal with workplace bullying

As mentioned above, a broad variety of legal remedies exist to allow an individual or a regulatory authority to bring a claim following an incident of workplace bullying, and also serve to sufficiently deter such conduct. Although, bullying is not a stand alone offence under anti discrimination legislation, it can be addressed if the bullying behaviour towards an employee is shown to be based upon one of the protected grounds of discrimination. Furthermore, Work Health and Safety legislation potentially captures bullying conduct and culture in the positive requirement to provide a safe working environment. This responsibility also extends to individual officers and workers who both face liability under the new model work health and safety laws, thus deterring individuals as well as organisations. In recent times case law in these two areas for workplace bullying, has been successful. In addition, further relief is provided by state and territory workers compensation schemes, the common law duty of care and unfair dismissals under general industrial law. It is recommended that these areas are sufficient in providing potential legal remedies to address workplace bullying and provide a sufficient deterrent. Perhaps the most telling evidence of the success in existing avenues of law in addressing bullying claims is the growth in bullying cases in recent times, particularly in the discrimination context. Currently, the legal causes of action available for workplace bullying, outlined above, are so broad that in practice some litigants and their representatives are inventing a pretext of workplace bullying as a delaying tactic in a legitimate performance management context. Therefore, if further legislation is enacted to prohibit workplace bullying it is highly likely that this will lead to vexatious bullying claims which has the unfortunate impact of detracting attention from genuine claims.

In conclusion it is recommended that the current regulatory regime remain unchanged, with internal policies and procedures the best means by which to address a culture of workplace bullying. As well as the potential for Work Health and Safety prosecutions, which is one of the most serious consequences facing organisations, officers and workers.

We would be pleased to address the Committee on our experience.

Yours faithfully

PEOPLE + CULTURE STRATEGIES

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