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Bradley John Beasley
LLM, LLB, Grad Cert Legal Practice
Principal Barrister & Solicitor

Legal Practitioner of the
Supreme Courts ACT, NSW, and
The High Court of Australia

Unit 15, Level 5, 44 Bridge Street, Sydney NSW 2000
16 of 36 Gosse Street, Kingston ACT 2604

[redacted]
ABN: 54 289 391 478

Inquiry into workplace bullying

workplacebullying.reps@aph.gov.au

By

Bradley John Beasley, Principal Barrister & Solicitor, LLM, LLB, Grad Cert Legal Practice

And

Maja Costovic, Para Legal, LLB (Hons)

INTRODUCTION

Despite the positive developments that have been introduced by the *Fair Work Act*, the legal landscape which ultimately confronts the targets of workplace bullying is fragmented, uncertain and in some instances, totally inadequate. Indeed, gaps in the existing framework are so substantial, that many victims of workplace bullying may find themselves with no attainable avenues of recourse at all.

As the ILO has reported, there seems to be widespread acceptance that psychological violence or bullying at work is a 'major though still under recognised issue' which poses an 'extremely costly burden to the worker, the enterprise and the community'.

The Australian Council of Trade Unions have found that the most common source of stress at work is bullying by employers and in a study conducted in 2002, psychological violence at work in Australia was shown to be far more prevalent than physical violence, with 67% of respondents reporting verbal abuse and 10.5% reporting mobbing and bullying.

In fact, in 2005 WorkCover (ACT) estimated that the "financial cost of workplace bullying to business in Australia is estimated to be between $6 billion and $13 billion a year." This includes indirect costs, such as

absenteeism, labour turnover, loss of productivity and legal costs. Accordingly, "the average cost for a stress claim is $41,186 compared to $23,441 for a physical injury claim".

Current Available Avenues of Redress

Avenues of redress that are available under the *Fair Work Act*, whether through the enforcement of modern awards and enterprise agreements or through the general protections of the Act against discrimination, adverse action and unfair dismissal, may be extremely useful to those who are able to utilise them. It remains, however, that many targets of workplace bullying may find that they are not covered by the Act in these senses.

Even assuming that a worker is covered by the Act in the sense that they are a national system employee, if that worker does not have a modern award or enterprise agreement which addresses workplace bullying, cannot show that adverse action has occurred, has not been discriminated against or has not been dismissed, constructively or otherwise, the behaviour in question may not be unlawful under the Act. In other words, though the *Fair Work Act* provides a number of avenues which *may* be useful to *some* targets of workplace bullying, the Act does not prohibit workplace bullying in itself and most of the time targets will have no recourse pursuant to its provisions.

Reforms

We submit that legislation addressing the problem of workplace bullying in specific terms be enacted under the auspices of the *Fair Work Act*. Addressing this issue under the umbrella of Australia's national industrial legislation elevates the issue of workplace bullying as a matter of importance in law and highlights the issue as one of mainstream significance. This will assist in naming, understanding, proscribing and preventing workplace bullying as a serious, legal workplace issue.

It is proposed that the suggested legislation would specifically proscribe persons from bullying others in the workplace by providing that:

> *"A person, must not bully, harass or victimise another person in the workplace"*

It would be necessary for such legislation to provide a non-exhaustive legal definition of workplace bullying, such as the definition used by Safe Work Australia in its Draft Code of Practice Preventing and Responding to Workplace Bullying which provides that:

> *Workplace bullying is repeated, unreasonable behaviour directed towards a worker or a group of workers, that creates a risk to health and safety*.

'Repeated behaviour' refers to the persistent nature of the behaviour and can refer to a range of behaviours over time.

'Unreasonable behaviour' means behaviour that a reasonable person, having regard for the circumstances, would see as victimising, humiliating, undermining or threatening.

Furthermore, a wide definition of 'workplace' should also be included. A useful model is the ILO definition of workplace as 'all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer'. This allows for the inclusion of non-traditional workplaces which are 'mobile or geographically diverse' or based within the home of the employee.

In addition the Fair Work Act should be amended so preventative remedies can be sought along with punitive remedies.

Further, in light of changes to workers compensation laws that encourages bullying and harassment of employees by the tardy excuse: "reasonable administrative action" employers who engage in conduct that causes injury to an employee due to the employers conduct. On evidence persuasive to Fair Work Australia Tribunal or the Court these are matters that should be taken into account for awarding damages.

It is stated: *"Workplace bullying is fast becoming one of the biggest health and safety issues facing Australian businesses."*[1]

We submit that employers, employees or agents conduct that amounts to workplace bullying and/or harassment and/or victimisation. Should be made accountable for such conduct whether or not an injury arises and if injury arises it should be evidenced by a report by a legally qualified medical practitioner.

This should also recognise unfair, harsh or unconscionable conduct of the employer, their employees or agents where the conduct is designed to, or does, avoid the provisions of an industrial instrument or contractual arrangements.

The above rights have been adversely affected by workers compensations laws in most jurisdictions throughout this nation at all levels without justification when one reviews contract, industrial and employment law.

Fair Work Australia Powers

[1] http://ohshandbook.net.au/hot-topics/workplace-bullying/?gclid=CNnPlJiHoa4CFYeBpAod5STY5A

Fair Work Australia powers should be expanded to allow it to intervene in the employer and the employee relationship at work to make and order that if not observed may be enforced by the Court.

In light of the changing nature of workplace matters and the focus on individuals who are the less powerful in the employer and employee relationship, then remedial power should be enactment under the Fair Work Act for the settlement of workplace bullying disputes by the tribunal.

To Conclude
We include two case studies and both persons Mr Hill and Mr Beasley are willing to appear before the inquire and give evidence.

If you have any questions of me please do not hesitate to contact me on [redacted].

Bradley Beasley

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29 June 2012