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29 June 2012

Minister for Employment and Workplace Relations, Bill Shorten MP
Standing Committee on Education and Employment
House of Representative Committees

BY EMAIL: workplacebullying.reps@aph.gov.au

Dear Sir,

Re: Inquiry into workplace bullying

The prevalence of workplace bullying in Australia and the experience of victims of workplace bullying

For many years, this firm has acted for both employees and employers in relation to workplace matters. The issues that we see arising on a regular basis are allegations by employees that they have been bullied in the workplace.

The unfortunate effect of bullying is that some employees raise the matter with their employer, and in the absence of policies or a culture of investigating complaints, employers may just ignore the matter. Employers may dismiss them as trivial and not relevant. Other employers may say merely get on with the job.

By dismissing or failing to investigate allegations of bullying, the workplace culture in an organisation can change to one of an adversarial approach. This further exacerbates workplace stress. This workplace stress can flow throughout the whole of the workplace.

An employee who has been the victim of bullying currently only has the following courses to adopt.

- A. To refer the matter to WorkCover NSW. When this happens WorkCover may do an investigation and in the event there are policies in place in relation to bullying that will be the end of the matter. If there are no policies in place relating to bullying WorkCover will advise the employer that they should put those policies in place. Invariably what happens is that WorkCover takes no action; or



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- B. If the employee is so distressed and anxious that they cannot remain at the workplace they will obtain a WorkCover medical certificate and make a claim for worker's compensation.

In the absence of any discriminatory conduct the only rights that an employee has in the event that a bullying allegation has been made and the bullying continues, or the employee has been adversely effected is to go on worker's compensation sick leave. This is not satisfactory. Employees are not given justice and do not have their concerns dealt with properly.

Some of the complaints that have been raised in this office in relation to workplace bullying include the following:

1. We acted for an employee of a medium sized telecommunications company who was subject to bullying on a daily basis from their direct manager. This employee made a complaint to HR which resulted in no finding. The employee was subsequently diagnosed with depression and anxiety disorder and obtained a worker's compensation certificate. The employee was away on worker's compensation sick leave for a period of time when they received a letter advising that if they haven't returned to their duties that their employment will be terminated. To terminate somebody because they are not fit to return to work because of the bullying issues gives rise to a claim for discriminatory conduct and/or adverse action. However, in this instance the employee invariably just walked away from the workplace.

The role of workplace cultures in preventing and responding to bullying and the capacity for workplace-based policies and procedures to influence the incidence and seriousness of workplace bullying

This firm mainly acts for small to medium sized employers. We have elected not to act for large employers as it is appropriate for large employers to go to large city firms of solicitors.

Our experience in respect of small employers is that although the proprietor or the owners of the business tend to want to have a happy and productive workplace, they do not fully understand what the concept of workplace culture is. Workplace culture tends to devolve from the owners or the managers of the business. There is invariably not a statement that is made as to what the culture of the organisation is or what the mission is.

We have taken some trouble in recent times to include on our website the concept of workplace culture and organisations' mission and philosophy.

If an organisation can clearly enunciate what their mission and philosophy is or their workplace culture is, then there will be a starting point for all employees to know when they apply for the position what the employer expects and the values that the employer adopts. If a workplace culture document is created when employees are working at the workplace then they should receive an induction or training process in relation to how the employer develops culture.

In recent times, John Morrissey was talking to a retired panel-beater and he indicated that he and his father had conducted the panel-beating shop for more than 60 years.



The shop was originally located in the inner-western suburbs and then moved to the far-western suburbs about 40 years ago. Over the period of years the panel-beater had employed various groups of employees and in recent times had employed people from different cultural and ethnic backgrounds. This employer had a philosophy that all employees were treated with respect and he wished to be treated with respect. Poor language was not tolerated and certainly cultural sledging was not tolerated.

At Christmas time when he had a Christmas barbeque the employees who come from a non-Christian background were encouraged to bring the foods that were appropriate for them to celebrate the end of the year.

At times during Ramadan my client acknowledged that the employees would take time away from the workplace and he provided facilities for them to start work early and to have food at the workplace both before sunrise and after sunset.

These sorts of attitudes exist with a great many employers but they have not been able to write them down, they have merely devolved from employers.

A concept of employers developing policies and procedures relating to workplace culture, and the mission of the organisation based around an obligation that each employee is to be treated fairly and justly, with an ability to have any grievances or complaints dealt with properly and independently, should be the basis on which the employment contract is founded.

The committee should look at establishing an obligation that employers have to properly document all aspects of the employment relationship.

Procedures associated with investigating complaints in relation to bullying need to be part of an obligation that employers have.

The current trend in employment documentation is that the policies and procedures of the workplace do not form part of the contract of employment and employers are not bound to follow them. Employees are bound to follow the policies and procedures.

A change to current legislation or regulations could be introduced to require all employers to provide proper and effective policies and procedures relating to investigations. The best outcomes to those investigations would create a mutual onus on the part of employers and employees to be respectful to each other in the workplace and thereby reducing and hopefully eliminating the incidents of bullying in the workplace.

We recently acted for a small upholstering company where there was a change in management whereby the Director's wife and son were placed in charge of the family company as a result of the Director passing away. The manager, who had a background of bullying behaviour did not take to this new arrangement very well and turned the workplace into a very hostile environment, turning employees against each other and employees against the employer. The manager's behaviour included making derogatory comments to female employees and clients. Some employees elected to resign whilst many were fearful to approach the manager with their concerns, which resulted in accidents and errors not being reported. The manager would frequently use the work computer to view pornography and sent inappropriate emails to other staff members.



Unfortunately, the employer did not have any policies or procedures in place in regards to bullying or workplace health and safety, which made it very difficult to discipline the manager. The manager was subject to disciplinary action which resulted in him being ultimately terminated. The manager commenced proceedings with Fair Work Australia for unfair dismissal. The proceedings were settled at conciliation with the employer having to pay an amount of money to the employee.

The adequacy of existing education and support services to prevent and respond to workplace bullying and whether there are further opportunities to raise awareness of workplace bullying such as community forums;

Since the beginning of 2012 in New South Wales WorkSafe Australia has been responsible for supervising the occupational health and safety obligations that all employers have.

Prior to this WorkCover NSW had an obligation to ensure that employees were not injured at the workplace. Part of their obligations was to ensure that there was the ability for employees to lodge complaints and to ensure that there were policies and procedures in place that enable those complaints to be dealt with properly. Other than this general obligation that WorkCover had there seems to be no statutory or legal obligation on the employers to provide training and education to employees.

Some worker's compensation insurers will require employers to have policies and procedures in place, these will have the effect of requiring the workforce to be trained in relation to occupational health and safety matters, which would include bullying.

For small to medium sized employers who are happy to get on with the job, the ability to have workplace training, such as toolbox sessions and other matters, are dealt with infrequently and only when problems arise. There is invariably not a proactive approach taken to understanding the serious impact of bullying on a person's health and welfare, the flow-on effect to the other employees of the workplace, and potential profitability of the workplace.

Legislation should be in place where there is an obligation on the part of employers to provide on-site training to all employees in respect of their obligations not to bully, victimise or sledge other employees. Further, a required acknowledgement by employers that they must provide training and support and have particular policies in place where grievance will be investigated.

Without a legislative framework where employers must comply, the current system will remain in place where matters are only dealt with when they arise as distinct from ensuring that employees are not bullied.

We have seen an enormous number of cases where bullying has had dramatic effect on employees, particularly relating where they have taken their life. For example, the incident in 2006 whereby Brodie Panlock committed suicide after being bullied at Café Vamp in Hawthorn, Victoria. If there were policies in place where employees felt that they could complain and other employees knew that they should not behave in a certain way, then this sudden distressing fact would not continue.

We would happily offer our services to participate in such forums and training days.



Whether the scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent workplace bullying;

I spent some time in the earlier parts of this submission indicating how I think it is important that policies and procedures be in place.

The introduction by WorkSafe Australia of a draft code of conduct in respect of bullying is a movement forward. This code of conduct is a careful and well-considered document.

The code of conduct should not be a draft document, it should be a formal document that all employers are due to comply with. The government should put in place a training program which would be devolved to organisations such as business partnerships, small firms of solicitors and accountants, as well as some not for profit organisations, that will deal with the obligations should the employers adopt the concept of WorkSafe Australia's code of conduct relating to bullying and the appropriate policies and procedures and transparent investigation processes are in place.

In the past we have had some experience in relation to the training programs that the Department of Employment and Workplace Relations rolled out in relation to the introduction of the *Fair Work Act*. These training programs were not sufficiently focused to local areas. They dealt with larger industry groups and those larger industry groups invariably represented the interests of employers.

Now it is time for the department to look seriously at how it would roll out a training program to small employers where persons delivering that program would be independent and impartial, and not seen to be representative of employer groups. These organisations should be able to explain to the participants in the programs, which would be both employers and employees, that they have a duty not to cause injury or harm to others at the workplace. A clear and transparent program would be the best way to ensure that bullying is eradicated in the Australian workplace.

As an example of what can happen if employers don't have policies in place, we acted for an employee of a medium sized mining supplier. This employee was a part of a hostile work environment which involved emails being sent to other employees on a daily basis berating other employees, and making fun of them. One manager had these emails brought to his attention one day by a particular victimised employee. The manager called a group meeting and told his employees to ease up on the emailing during work time. No disciplinary action was taken. Our client admitted to being a part of this culture and was not proud of it. Ultimately, an employee took the matter too far one day and wrote the name of the victim employee in faeces on the toilet wall. The company attempted to investigate the matter, however could not identify the culprit. The employer suspected my client and called him into a meeting advising him that he had engaged in serious misconduct. Our client denied having anything to do with the toilet incident and advised that he was not anywhere near the toilets at the time. The employer then advised that his employment was being terminated for emails that were sent almost 3 months earlier and referred to above whereby the manager had not taken any action. The employee commenced proceedings with Fair Work Australia for unfair dismissal. Had the company had proper policies and procedures in place, these incidences could be avoided. Employers should have in place proper grievance procedures which would identify the processes to be taken in these matters, to limit the risk of litigation and potential workers compensation matters.



Whether there are regulatory, administrative or cross-jurisdictional and international legal and policy gaps that should be addressed in the interests of enhancing protection against and providing an early response to workplace bullying, including through appropriate complaint mechanisms;

There are a number of areas that do in some respects deal with the concept of bullying at the workplace and they include:

1. The *Fair Work Act* in respect of its provisions relating to adverse action or general protections claims. Adverse action and general protections claims are becoming more prevalent and the committee will note from the research provided to it that there is a significant increase in the growth of those claims. It is difficult for a person who has been bullied to establish that they have been terminated because they have lodged a complaint in respect of being bullied.

The *Fair Work Act* should be expanded to ensure that a person who believes that they have been bullied at the workplace and have had their grievance failed to be investigated or not properly investigated, and thereafter either resigns or is terminated does not meet the significant legislative hurdles that currently the adverse action and general protections provisions under the *Fair Work Act* deal with. The benefit of having some bullying matters dealt with under the *Fair Work Act* is the matters can be dealt with in a prompt and quick manner which is available under the *Fair Work Act* particularly by way of prompt and early conciliations at Fair Work Australia. The writer is of the view that the conciliation process at Fair Work Australia is an efficient and good method of resolving a significant number of workplace disputes and if this process was available for persons who were aggrieved by bullying at the workplace or failure to carry out investigations then Fair Work should be able to engage in that process to bring about a prompt and appropriate resolution.

2. The Anti-Discrimination legislation. A number of employees who have no alternative but to look at if they have been bullied whether they have also been discriminated against. It is very easy for an employee who has been bullied to then be subject to some adverse comments in relation to their gender, race, sexual preference or family responsibilities. Invariably the bullying starts out as a light-hearted jab about the person's e.g. parental responsibilities, disability or other issues and after that those matters tend to become part of the culture of the organisation where someone is referred to in a derogatory manner that may amount to discriminatory conduct.
3. The Australian Human Rights Commission is currently inundated by matters which have a basis for discriminatory conduct but really started out as bullying at the workplace.

The Australian Human Rights Commission should be given greater powers and expanded to ensure that matters can be dealt with promptly. We are now observing that discriminatory conduct matters in the Australian Human Rights Commission are not getting conciliation dates for some six to eight months after the matter was lodged. Previously these conciliations were dealt with within a month. Failing to have the matters dealt with properly creates further stress and anxiety on both the employer and the employees and others who have been joined as parties to the proceedings.



Stopping bullying really starts at the time a person is hired. Part of the legislative process that the committee could consider is requiring all employees and employers to prepare a document that states the culture and philosophy of the organisation, identifies their anti-bullying policies, identifies their grievance investigation policies and confirms that both the employee and the employer will be bound by those policies.

A failure by the employer to meet the obligations in respect of those employment aspects would be best dealt with by Fair Work Australia and it could be dealt with by way of a conciliation conference and even though the employment would be maintained the conciliation should be dealt with in the same method that the initial conciliations are dealt with in respect of unfair dismissal matters by way of a phone conciliation. This may result in the parties endeavouring to resolve the workplace issues and then a follow up being taken by the phone conciliator maybe a fortnight afterwards to see that the matters have been resolved. The writer has great respect for the good work that the conciliators do at Fair Work Australia and a majority of matters that this firm deals with are resolved at conciliation as a result of the quality assistance that is provided by the conciliators in respect of sometimes difficult and aggressive conciliation. The Federal Government should acknowledge the work that these hard-working people do and they should be further empowered to address bullying issues.

Whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying;

The easy answer to this question is no. The regulatory framework only deals with matters such as discriminatory conduct as identified above and worker's compensation matters.

Employees have no ability to have their complaints dealt with or reviewed outside the workplace. If the workplace elects not to do much about the complaint or, even worse, carries out an investigation that is one-sided or unjust and without an appropriate framework being identified as to how the investigation will be carried out and a decision made or if the employee feels that they cannot lodge a complaint and that if they do lodge a complaint it will only result in an inequity or not dealt with.

Our experience is a majority of employees who do lodge complaints in respect of workplace bullying do not last long at the workplace. The majority of them have invariably left the workplace or been subject to performance issues within the next 6 to 12 months after the grievance has been lodged.

On other occasions the investigation process that has been followed by employers has been seriously flawed and this applies to some very large employers such as banks. These employers do not properly train the people who are carrying out the investigation and they do not adopt the policies of procedural fairness.



In addition, employers have failed to provide support to employees who have had bullying allegations made against them and have been stood down. Invariably they are merely referred to an employee assistance program which does some phone counselling which is completely inadequate. Managers should be in contact with employees that have been stood down at least weekly to ensure that the employee is alright. To be away from the workplace for weeks and weeks on end and not knowing how the investigation is proceeding is unfair, unjust and in some respects harsh on employees and could result in them having a significant stress-related injury. This stress-related injury is not compensable under the current worker's compensation regime in New South Wales. Accordingly, some employees who have been subject to an allegation of bullying which has been found unsubstantiated invariably elect to leave the workplace because they feel that they have been isolated and victimised by an unjust or inappropriate complaint.

One of the main concerns that we see is that people carrying out investigations go on "fishing expeditions". A person lodges a complaint and then they go out broadly into the workforce and endeavour to find out if there are other complaints. This fishing expedition is unjust and is unwarranted. Unfortunately, the law of the employment contracts do not give rise to an employee to say that the fishing expedition is a breach of contract which will give rise to damages.

This injustice that is sometimes visited upon the alleged perpetrator of bullying needs to be considered as well. The best way to resolve the potential injustices that may exist is to have a code of conduct that is adopted as to the processes that need to be followed in relation to workplace investigations.

As a guide to the committee, the following processes need to be appropriate.

1. When an allegation of bullying is known the person who is the subject of the allegation should be informed.
2. A decision is made as to whether that person is to be stood down and if they are to be stood down a reason is given they are not merely stood down.
3. The process that would be followed in respect of the investigation needs to be communicated to the persons that are subject to the allegation within 24 hours.
4. A support person of the organisation needs to be provided to the person who was subject to the bullying allegation.
5. The investigation process needs to be undertaken and an independent person will make a decision based on the evidence gathered.
6. The person who is subject to the allegation needs to have a right to be able to respond to any relevant matters that the investigator believes need to be responded to.
7. The decision maker should communicate to the person subject to the investigation and the person who was the subject of the bullying the length of time that the matter will take to be resolved and that time limit should be strictly adhered to.



8. If a decision is made that the alleged perpetrator carried out the bullying then the bull should have an opportunity to put a written or a formal face-to-face submission to the decision maker as to what the outcome of the allegation of bullying is i.e. a submission in respect of what penalty will be imposed whether it be a counselling, a warning or dismissal.
9. The decision maker should outline what the basis is of the decision they have made and a penalty be imposed and the basis on which they have made those decisions.
10. All decisions should be made on the balance of probabilities.

Each of these steps need to be addressed in a policy and could be best addressed by way of regulation to ensure that the employers comply with these obligations.

The most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another; and

Training is an important obligation that all employers have to ensure that their workplace is safe. Each employee needs to ensure that they acknowledge that they are bound by the employer's code of conduct and that they have participated in the anti-bullying training.

An employee that does not sign the code of conduct and participate in the anti-bullying training should be given an option that they either comply with the obligations or their employment will be terminated.

Accuracy in references and communications in relation to their termination of employment is important. If an employee has been terminated because of a proven allegation of bullying then a certificate of service is issued and not a reference. If a request for reference is made the organisation should elect to either make no statement or say that the employee was terminated because of a decision that the employee was guilty of bullying. The black mark will then follow the bully from workplace to workplace. Accuracy in respect of investigations, acknowledgement of the employee's obligation and accuracy in respect of references and certificates of services are extremely important.

Effective policies and procedures and an information statement similar to that of the Fair Work Information Statement which should be provided to employees by employers.

Possible improvements to the national evidence base on workplace bullying.

A database that will do case studies that is available on the internet to explain what bullying is and what the potential the outcome would be appropriate.

A simple anti-bullying policy that could be adopted by small to medium sized businesses would be appropriate.

A simple document that would outline how the employer identifies the culture of their organisation would be appropriate.

A simple document in relation to the training for workplace safety in respect of bullying would be appropriate.



A simple investigation document would also be appropriate.

These documents should be available on websites provided by the Department of Employment and Workplace Relations. Ongoing training should also be available on a regular basis.

Yours Faithfully,

JOHN MORRISSEY