

- Industrial Relations
- Employment
- Occupational Health & Safety
- Human Rights & Equal Opportunity
- Change Management
- Legal Risk Management

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Please reply to: Sydney office

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29 June 2012

House Standing Committee on Education & Employment
House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600

Attention: Secretary

By email: workplacebullying.reps@aph.gov.au

Dear Secretary

INQUIRY INTO WORKPLACE BULLYING

1 Introduction

1.1 Harmers Workplace Lawyers is one of Australia's largest boutique employment and industrial law practices with offices in Sydney, Melbourne and Brisbane. As a firm we act for all participants in the workplace, including employers, employees, contractors and industrial associations. The issue of workplace bullying is a concern that is regularly raised by clients of our firm – not just by our employee clients, but also by many of our employer clients who see their business efficiency and productivity negatively impacted by inappropriate workplace conduct.

1.2 It is the view of our firm that it is not in anyone's interest for workplace bullying to prevail, and it is critical that good workplace culture is promoted across Australian workplaces. It is in this context that we respectfully put forward the following submission for consideration by the House Standing Committee on Education and Employment as part of its inquiry into workplace bullying.

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2 Terms of Reference

2.1 We note the terms of reference for this inquiry are as follows:

- The Prevalence of workplace bullying in Australia and the experience of victims of workplace bullying
- 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
- 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
- Whether there is scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent workplace bullying
- 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
- Whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying
- The most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another
- Possible improvements to the national evidence base on workplace bullying

2.2 While we have not addressed each term of reference individually as part of this submission, this submission covers the problems associated with the prevalence of workplace bullying in Australia; identifies gaps in the current regulatory framework; and deals with the ways in which good workplace culture can be cultivated, and workplace bullying can be more effectively deterred.

3 Our Submission

3.1 Workplace bullying is regularly raised as a concern by our clients.

3.2 By way of example, the types of incidents of workplace bullying that have been raised by clients are:

- Constant verbal abuse (e.g. employees being yelled, sworn at etc)
- Physical assaults
- Employees being significantly over-worked by their supervisor or manager (knowingly, or at least recklessly)
- Name calling

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- Spreading of rumours
 - Isolation / exclusion of particular employees
 - Pressure to be in the office excessive hours
 - Pressure not to take leave for fear of negative repercussions for ongoing career prospects
 - Humiliating criticism made in front of colleagues
 - Management by intimidation/fear
 - Extreme micro-management
 - Vexatious allegations targeted at an individual
 - Sexual harassment
 - Victimisation of people who raise a complaint
 - Mishandling of investigations into complaints of workplace bullying

3.3 Workplace bullying has negative implications for both employees and employers.

3.4 In our experience advising and assisting employees we have found that:

- (a) victims of workplace bullying are often senior executive employees, not just junior or more vulnerable employees;
- (b) while some incidents of workplace bullying involve one-off incidents, most commonly workplace bullying takes place over a period of time (some times over multiple years);
- (c) the cumulative impact of ongoing workplace bullying over a prolonged period of time can be incredibly harmful to a person's health and wellbeing and can result in a person:
 - (i) suffering psychological injury;
 - (ii) requiring hospitalisation;
 - (iii) attempting suicide.
- (d) the impact of workplace bullying and the subsequent health implications can also have a devastating effect on a person's career such that a person's career prospects are often significantly damaged, and in some cases irreparably ruined.

3.5 In our experience advising and assisting employers we have found that the prevalence of workplace bullying results in:

- (a) staff turnover, and thus additional recruitment costs – this is often because the person who complains about workplace bullying decides to leave their job because the person finds it too difficult to stay
- (b) management down-time – due to the significant time involved in responding to and investigation allegations of workplace bullying
- (c) loss of productivity – for example due to sick leave and/or workers compensation claims arising from workplace bullying

- (d) diminishment of workplace culture – employee morale can be negatively impacted due to workplace bullying
- (e) impact on company reputation – this can occur when litigation is commenced against a company

3.6 In our experience the current legal and regulatory framework does not adequately address the issue of workplace bullying.

The Legal Framework

3.7 The current areas of the law that can be accessed by an employee that has experienced workplace bullying are:

- (a) State & Federal discrimination laws

However, these laws can only assist to the limited extent that the workplace bullying relates specifically to a ground of discrimination. Racial taunts would be an example of workplace bullying that could be pursued via discrimination laws.

- (b) The general protections provisions of the *Fair Work Act 2009 (Cth)*

However, these laws only assist to the extent that the workplace bullying meets the particular legislative criteria for a general protections claim. For example, this could include workplace bullying in response to an employee lodging a complaint at work (being adverse action in response to a recognised “workplace right” under section 340 of the *Fair Work Act 2009 (Cth)*).

- (c) State occupational health and safety laws

While an employee is entitled to make a complaint to an authority such as WorkCover NSW about incidents of workplace bullying, these laws provide no meaningful way for an employee to pursue a civil remedy to redress the impact of workplace bullying on their health and career.

- (d) Civil claims for breach of contract and/or negligence

Civil litigation for many employees in Australia is prohibitive by reason of the significant time and cost involved in such cases.

In addition, the *Civil Liability Act 2002 (NSW)* imposes caps on damages that can be awarded for personal injuries (including those caused by workplace bullying – with some limited exceptions) which can be a further disincentive to an employee looking to pursue their rights through the Courts (particularly in the case of more senior employees that have experienced workplace bullying whose lost income is often significantly in excess of the cap).

- (e) State workers compensation laws

While we are not workers compensation lawyers, our clients who have experienced workplace bullying often seek independent advice in relation to their workers compensation rights. In our experience the weekly payments that our clients receive through the workers compensation regime is often much less than their previous salary, and workplace injury damages are capped by the *Civil Liability Act 2002 (NSW)*. Therefore workers compensation laws provide only limited monetary relief for many employees suffering psychological injuries as a result of workplace bullying.

- 3.8 It is not uncommon for a client to have experienced significant workplace bullying (and subsequently suffer psychological injury with devastating impacts on ongoing employment prospects), yet have little redress under any of the above legal avenues (apart from some limited workers compensation payments that they may be available).
- 3.9 For this reason, it is our submission there is a gap in the current regulatory framework.
- 3.10 There would appear to be a need for a stand-alone legislative prohibition on workplace bullying, which does not necessarily need to “hinge off” a discrimination law, or a general protections law or any of the other limited avenues within the existing framework as described at paragraph 3.7 above.
- 3.11 One challenge in developing such a stand-alone prohibition against workplace bullying would be the question of defining what is, and what is not, workplace bullying. In this respect:
- (a) there are existing definitions of workplace bullying used by regulatory authorities that could be used as a basis for developing a statutory definition of workplace bullying (for example a description used by WorkCover NSW is set out at paragraph 3.12 below);
 - (b) in order to ensure that employers are entitled to properly manage and monitor the conduct of their workers, any definition of workplace bullying must include an exemption for:
 - (i) reasonable performance management by an employer;
 - (ii) reasonable disciplinary action by an employer; and
 - (iii) reasonable management action.
- 3.12 WorkCover NSW describes workplace bullying as any behaviour that is unwanted, inappropriate, aggressive or unreasonable, which can cause psychological or physical injury. Bullying can be carried out verbally, physically or in writing.

The need for a deterrent

- 3.13 Given the prevalence of workplace bullying within Australian workplaces, and in light of the identified gaps in the current regulatory and legal framework, it is our

submission that the current system does not provide a sufficient deterrent against workplace bullying.

- 3.14 In order to provide a meaningful deterrent to workplace bullying we submit there must be three key elements:
- (a) a stand-alone legislative prohibition on workplace bullying;
 - (b) real penalties to discourage the conduct; and
 - (c) efficient and timely access to a court/tribunal to enforce penalties for such conduct.
- 3.15 Penalties for both individuals and corporations involved in workplace bullying must be set at a level that is significant enough to incentivise employers in Australia to prioritise workplace bullying and take real and meaningful steps to eliminate it from their workplaces.
- 3.16 Penalties could include, for example:
- (a) uncapped statutory damages to compensate an employee for the loss caused by the workplace bullying;
 - (b) civil penalties; and
 - (c) for serious cases of workplace bullying - a civil penalty set as a percentage of a corporation's profit in the period in which the workplace bullying was found to have occurred (based upon existing legal principles relevant to punitive damages).
- 3.17 The proposed penalty for serious cases of workplace bullying has merit in ensuring that workplace bullying is given priority at the senior managerial and board levels of an organisation. Promoting good workplace cultures is pivotal to eliminating workplace bullying. If workplace bullying is condoned by the leadership and management of an organisation, such conduct will inevitably continue to prevail. Organisational cultures that turn a "blind eye" to workplace bullying allow such behaviours to thrive.
- 3.18 It is our submission that efficient access to a court or tribunal to seek redress for cases of workplace bullying could be achieved by a process where:
- (a) Claims of workplace bullying are made initially to Fair Work Australia so as to allow an opportunity for a compulsory conciliation conference to occur.

The members of Fair Work Australia not only have extensive experience in dealing with a range of workplace issues and disputes, but are also very experienced in facilitating early intervention in claims with a view to achieving a resolution by way of conciliation.
 - (b) If conciliation is unsuccessful, claims can be progressed to either the Federal Magistrates Court or the Federal Court.

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- 3.19 We would also support a proposal to nationalise the changes made to the crimes legislation in Victoria, commonly known as “Brodie’s laws”. Under these laws workplace bullies can be jailed for up to 10 years if found guilty of the offence of stalking which includes serious bullying
- 3.20 Finally, we would encourage the Committee to give consideration to the implementation of a National System of Accreditation for employers across Australia whereby employers are required to become accredited for compliance with the Australian Charter of Employment Rights (‘the Charter’) and the Australian Standards of Employment Rights (‘the Standard’).
- 3.21 The Charter and the Standard have been developed by the Australian Institute of Employment Rights (‘AIER’), and are designed as vehicles to improve workplace cultures and eliminate (among other things) inappropriate workplace conduct such as workplace bullying.
- 3.22 Similarly, we encourage the Committee to give consideration to implementing WorkRight as a teaching resource within schools. The AIER collaborated with the Teacher Learning Network to produce WorkRight, which is a curriculum resource for teaching young people about workplace rights and responsibilities.
- 3.23 We endorse the work of the AIER in developing the Charter, the Standard, the National Accreditation system, and the WorkRight resource, and note that the Committee can obtain further information in relation to the work of the AIER on the AIER’s website: www.aierights.com.au.

We confirm that Michael Harmer, Chairman of Harmers Workplace Lawyers, would be pleased to appear at the inquiry should the Committee consider that of assistance to its review. Please do not hesitate to contact us should you have any queries.

Yours faithfully

HARMERS WORKPLACE LAWYERS

Michael Harmer

Jenny Inness