

jobwatch
Employment Rights Legal Centre



**Submission to the House of
Representatives House Standing
Committee on Education and
Employment's Inquiry into Workplace
Bullying**

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1. Introduction

Job Watch Inc (**JobWatch**) welcomes this opportunity to make a submission to the House of Representatives' House Standing Committee on Education and Employment's Inquiry into Workplace Bullying.

JobWatch has long been concerned that the current state of rights, protections, procedures and remedies afforded to employees in relation to workplace bullying is inadequate and impracticable.

Although this submission is formulated in response to the Terms of Reference, it is based on the experiences of JobWatch's clients and callers and the experience, knowledge and insight of JobWatch's legal practice. Real life case studies are used to highlight the seriousness and prevalence of workplace bullying. The case studies are those of actual but de-identified callers to JobWatch's telephone information service (**TIS**).

JobWatch's comments and suggestions are made both from the perspective of its legal practitioners who advise and represent clients in relation to workplace bullying matters and from the perspective of the callers to our TIS.

2. About JobWatch

JobWatch is an employment rights community legal centre committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by the Victorian and Commonwealth Governments to do the following:

- Provide information and referral to Victorian workers via a free and confidential telephone information service;
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- Represent and advise vulnerable and disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected over **148,000** records (we start a new record for each new caller or for callers who have contacted us before but who are calling about a new matter. One record may canvass multiple workplace problems, including, for example, discrimination, sexual harassment, bullying and underpayment of wages). Our database allows us to report on our callers' experiences, including what particular workplace problems they face and what remedies, if any, they may have available to them at any given time.

Traditionally, and up until recently, JobWatch's TIS has received approximately 20,000 calls per year.

3. Defining the Concept of Workplace Bullying

As far as JobWatch is aware, there is no legislated recognition or definition of workplace bullying in any of Australia's legal jurisdictions.

WorkSafe Victoria defines workplace bullying in a guidance note as repeated unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety.¹

The guidance note explains that a broad range of behaviours can be bullying, and that these behaviours can be direct or indirect.

The following examples are then provided:

Examples of direct forms of bullying include:

- verbal abuse
- putting someone down
- spreading rumours or innuendo about someone
- interfering with someone's personal property or work equipment.

Examples of indirect bullying include:

- unjustified criticism or complaints
- deliberately excluding someone from workplace activities
- deliberately denying access to information or other resources
- withholding information that is vital for effective work performance

¹ WorkSafe Victoria - Preventing and responding to bullying at work, Edition No.3 June 2009.

- setting tasks that are unreasonably above or below a worker's ability
- deliberately changing work arrangements, such as rosters and leave, to inconvenience a particular worker or workers
- setting timelines that are very difficult to achieve
- excessive scrutiny at work.

Single incidents do not amount to bullying but can still cause a risk to health and safety.

The guidance note further explains that bullying can be carried out verbally, physically or in writing, eg via email, internet chat rooms, instant messaging and mobile phone technologies such as text messaging. Bullying can be directed in a range of ways in a workplace – downwards (from supervisors or managers to workers), sideways (between workers or co-workers) and upwards (from workers to supervisors or managers). Bullying can be directed at a single worker or at more than one worker. It can be carried out by one or more workers.² It should be noted that non-compliance with a guidance note does not necessarily entail a breach of the relevant legislation being the *Occupational Health and Safety Act 2004* (Vic).

Clearly, one of the difficulties in dealing with workplace bullying is that its forms can be many and varied and often involve some subjective element, for example, differing views on what is reasonable management action in certain circumstances, making it difficult for legislators to arrive at a simple yet meaningful definition. Nevertheless, JobWatch submits that there should be a legislated definition of workplace bullying.

Recommendation 1: There should be a legislated definition of workplace bullying.

² SafeWork Australia has so far provided a draft Workplace Bullying code that is largely modelled on WorkSafe Victoria's guidance note.

4. Database Statistics

JobWatch's database collects data on workplace bullying under three headings: Harassment Verbal, Harassment Psychological and Harassment Physical.³

JobWatch's statistics, as detailed below, highlight that workplace bullying is prevalent across a wide range of industries, age groups and is not gender specific.

JobWatch does not intend to replicate other studies and submissions as to the causes, forms and costs of workplace bullying. In JobWatch's opinion, it is a self-evident fact that workplace bullying is a serious problem that needs to be tackled by reforming the law.

STATISTICS FOR WORKPLACE BULLYING – FROM 1/1/2011 TO 31/12/2011

Total records = 5,662

Harassment Problem	Total	%
Verbal	457	8.07
Psychological	582	10.28
Physical	48	0.85
TOTAL	1,087	19.20

AGE	Verbal	Psychological	Physical
15 – 18	8	8	3
19 – 24	30	40	7
25 – 34	58	81	11
35 – 44	68	128	11
45 – 59	86	122	10
60+	22	23	0
Unknown	185	180	6

Gender	Male	Female
Verbal	151	306
Psychological	183	399
Physical	23	23

³ For the purposes of these statistics, JobWatch has excluded bullying by sexual harassment.

Type of Industry	Verbal	Psychological	Physical
Accommodation, cafes & restaurants	32	35	4
Agriculture, Forestry and Fishing	8	9	2
Communication Services	16	19	0
Construction	13	11	5
Cultural & recreational services	20	19	1
Education	32	32	1
Electricity, gas & water supply	6	6	0
Finance and insurance	28	34	1
Government Administration & Defence	21	27	1
Health & community services	64	100	7
Manufacturing	49	50	7
Mining	1	1	0
Personal & other services	26	29	2
Property & business services	48	75	6
Retail trade	60	76	5
Transport & storage	23	30	4
Wholesale trade	20	24	2
Unknown	3	5	0
TOTAL	457	582	48

5. Workplace Bullying: the Problem

Bullying, including workplace bullying, is a complex societal problem lacking any clear, simple or practicable solution. In relation to workplace bullying, there is no panacea. Every case of workplace bullying is unique with its own set of circumstances, reasons, responses and outcomes. Yet the problem of workplace bullying must be tackled. Not only does workplace bullying cost up to \$36 billion annually⁴, it costs lives.⁵ With the rise of social networking, it must be anticipated that incidents of workplace bullying will only increase into the future.

⁴ Productivity Commission, Performance Benchmarking of Australian Business Regulation: Occupational health and safety, 2010. p 279.

⁵ See Victorian WorkCover Authority v Map Foundation Pty Ltd trading as Cafe Vamp (Magistrates Court of Victoria 9 February 2010). It should be noted that the defendants all pleaded guilty in this case.

6. Case studies

The following real life case studies further illustrate the problem of workplace bullying:⁶

6.1 *Bullying (verbal) and race discrimination*

Juan works fulltime as a fitter and welder in a work shop. For several months now he has been bullied by his manager. While he treats other employees well he often swears at Juan and throws his work on the ground in front of all the other employees. His manager constantly verbally abuses him. Things came to a head when he gave Juan an impossible target to achieve in a day and told him he had to stay back at work until it was finished. Juan said that he had to leave as normal to pick up his children. Juan was shaking from the stress and intimidation and cut himself. His manager said that this was proof that he was no good at his job.

Juan complained to his manager about being bullied. His manager screamed at him, called him several derogatory words and fired him on the spot. Juan went to see a supervisor who refused to intervene. Juan thinks that part of the reason that he was bullied was because he is Chilean and all the other employees are Caucasian.

6.2 *Bullying (verbal & psychological) and victimisation*

Juno works as a program coordinator for a large educational organisation. Over the past 2 and half years she has been constantly bullied by the deputy CEO of the organisation. This bullying behaviour has included writing a "joke" report about Juno's work using obscene and denigrating language, micro managing her and humiliating and demeaning her. Juno has complained to the CEO and unusually the organisation has responded. The deputy has been put on notice about his conduct. However he has decided to blame Juno for his predicament and recently took over the administrative side of her role, effectively demoting her.

⁶ As far as possible, the case studies are written in the manner and style of the particular caller.

6.3 *Bullying (verbal & physical) and sex discrimination*

Alison worked as an apprentice mechanic and was the only female employee. Although she was apparently good at her job, she did not “fit in” at the workshop and her boss sacked her. She suffered severe bullying by her fellow workers. This took the form of verbal abuse such as calling her a “f*^\$ing s#@”, a “dumb b##%” and asking her how she dared to walk into the workshop, right through to physical abuse such as letting down jacks on cars that she was working on, and setting her on fire. She is suffering stomach ulcers and anxiety attacks.

6.4 *Bullying (verbal, physical & sexual) and workplace violence*

Elaine has worked as a permanent part time Personal Assistant for the past 2 years. She has been bullied during this time in a variety of ways; by being sexually harassed and physically and verbally assaulted by her employer.

Her employer made constant sexual advances and comments towards her. She always made it clear to him that his advances were unwanted.

Unfortunately his demeanour has become increasingly unpredictable, violent and intimidating towards her since she recently entered into a romantic relationship. This culminated in a particularly frightening incident recently when Elaine attended her workplace with her two children. Elaine went into her employer's office alone to discuss some work matters. Her employer became verbally abusive towards her and made inappropriate comments about Elaine's new partner.

When Elaine said her private life was none of her employer's business, her employer grabbed Elaine by the nose, pushed her into a wall and clenched his fist as though he was going to punch her in the face. He claims to have feelings for her. Elaine says she fears for the safety of her children.

Elaine says the verbal abuse, throwing of objects around the room and sheer rage towards her has induced a great deal of anxiety, sleeping problems and other psychological problems.

6.5 *Bullying (verbal & physical) and resignation*

Jessie has worked part time for 3 and a half years in a take away food shop. She is the only employee apart from the owner, his wife and their 18 year old nephew.

The nephew has been harassing & verbally abusing Jessie since she started working at the shop but only when the owner or his wife were not present. He continually obstructed her path and tripped her up; she complained but the owner insisted he 'was only a boy' and refused to intervene or say anything.

Recently Jessie was confronted by the owner in the shop. He was screaming about her wasting time and accusing her of talking about him. She kept trying to calm him down and ask what she'd done wrong but got nowhere. The nephew intervened and pushed her and told her 'not to talk to my uncle like that'.

Jesse felt so intimidated she called the police. She tried to make a formal statement but was persuaded by 2 police officers that there was no point as 'there are three against one'.

She also rang WorkSafe and was told they could do nothing as 'it was not about race or age' which confused her but she was too distressed to ask more questions. Although Jessie wanted to keep her job as there was little work in her small town, she eventually resigned as she decided that she could not return to a violent workplace.

6.6 *Bullying (physical) and resignation*

Katrina has been a full-time sales manager for about 4 years. For about the last two years she has been bullied by Steve, the owner of the business. He usually physically bullies her by pushing her, sometimes until she falls over. She gets bruises and scratches. He says he wants to punch her in the face. He has grabbed her around the throat.

He is a big guy in his 30s and a lot stronger than her. For some reason, she doesn't know why he's targeted her. He doesn't do this to other people. The abuse is quite out in the open. Even customers have commented to about what Steve does to her. Other staff can see what's going on, but they are scared of him, so they won't say anything.

She doesn't feel like she can do anything about the bullying, so she is just going to leave.

6.7 *Bullying (verbal) and victimisation*

Rhonda worked full time as a salesperson for a construction company until she was summarily dismissed. Up to her dismissal she was severely bullied by a director of the business. This director constantly verbally abused Rhonda by swearing at her, calling her obscene names, screaming and yelling in her face, throwing objects around the room in a rage, and threatening to kill her and other staff. Rhonda put in written complaints about this director's behaviour and also spoke with her employer many times about the severe bullying. The offending director was asked by other directors not to yell at Rhonda or call her obscene names, but he has continued to treat Rhonda in this way.

Rhonda says the other employees are not bullied. The events leading to Rhonda's dismissal were that this director verbally abused and screamed at Rhonda in the office, threw objects and stood over her. Rhonda feared for her life and left the premises. She went to a nearby café and rang head office. Another director called her back and advised her that if she didn't return to the workplace immediately, she would be sacked. She returned but no-one spoke to her and the receptionist told her that her position had been terminated and she was to leave immediately. Rhonda now suffers severe anxiety and panic attacks. She called WorkSafe but they were unwilling to assist.

6.8 *Bullying (psychological) and race discrimination*

Actar, a Sri Lankan Australian has worked as a bank teller for nearly two years without incident. A new manager has been appointed to the branch and she now feels bullied by this manager. She has been put on a "Performance Improvement Plan" and even though she has done her best the manager is adamant that her performance is not up to scratch. She is also being given demeaning cleaning work that others are not. She feels that there is an element of racial discrimination too as when the manager arrived at the branch there was an Aboriginal employee as well as an Indian employee. They have now left and Actar feels that they were also bullied.

Actar has become mentally unwell, is on sick leave and has submitted a WorkCover claim.

Actar's union advised her that the Bank investigated her complaints and found them unproven.

6.9 *Bullying (psychological & verbal) and race discrimination*

Jan is a casual employee and worked for one employer in two roles: one in the office doing sales and one in another division. She was being bullied by several bullies in the office area (including her boss) and she was temporarily moved to the other division and lost some of her hours.

The bullying by her co-workers and boss included threatening emails and posts on Facebook, spreading rumours about her, reducing her hours, using her Pacific Islander background to denigrate her and asking if she thinks her background affects the way she does her work. He says that she is misinterpreting everything.

Although one of the bullies was fired (for another reason) her boss still won't restore her retail role or her original hours of work. He told her she was lazy and had no initiative, even though this was not true. The workplace was very disorganized and Jan had actually tried to improve the systems.

Jan is very stressed and is seeing her GP and counsellors. She is now only making half her income.

6.10 Bullying (psychological) and stress leave

Mylie works full time as a child care worker in a crèche. She is being bullied by her co-workers. They are playing pranks on Mylie which aren't funny to her at all and are making her very anxious and upset. These things include putting her handbag in the fridge and saying and doing other silly things to harass her.

There was also a serious incident that has really upset Mylie. A 2 year old child was removed from the children in her room who are under her care. This child was taken by the cook and hidden in the staffroom. All the other staff members were told not to say anything. The only reason that this was done was to make Mylie panic as to where the child was. Mylie complained to the manager and was told it was "a drill". But this has never been done with any staff before.

She is so upset she has been to the doctor and has taken a week off for stress. She has rung her union and they have asked her to write up her grievance and to give to her manager.

6.10 Bullying (psychological & verbal) and stress leave

Jake works full-time for a large retailer as a store person and is the team leader. About 2 years ago a new supervisor was employed. Since her arrival Jake has been constantly harassed and bullied. She scrutinizes all of his work, she screams at him in front of customers, she follows him to the toilets and she threatens others that they will lose their jobs if they speak to him.

Jake has become very stressed and his doctor has given him some time off work.

Jake has spoken to his supervisor about her behaviour towards him. Jake has spoken to the HR department about this bullying and he has even spoken to the CEO.

He has made a claim to WorkCover but it was rejected. He then appealed the decision and went to conciliation with WorkCover but lost there as well. He has been advised that to take his matter to court will cost \$15,000.

Jake called JobWatch in an extremely stressed state. He cannot face the idea of working with this supervisor again.

6.11 *Bullying (psychological) and demotion*

Jenny works full-time for a government department. She is the only female employee at that location. She has been sexually harassed and bullied by her immediate supervisor for about a year.

Her supervisor lewdly propositioned her, and when she declined his advances, began to bully her. He did things such as taking away her overtime shifts. Jenny complained. While this supervisor is well known within the organisation as a harasser, the organisation claims to have given him some 'training'. They also moved Jenny to another office. However he simply started appearing at her room without reason, making his presence known. Jenny reported this, yet nothing was done.

Jenny went through the organisation's internal grievance procedures and the employer claims to have investigated. The only real action was that she was moved from head office to a smaller off site location and now to an even smaller location. Because they are smaller offices she is doing different work which pays less, is of lower status, and is not sustainable as it involves heavy lifting etc.

Caller has complained to WorkSafe who sent in investigators. They told Jenny that their hands were tied, while they weren't happy with what was going on they could do no more.

Jenny really wants to return to working at the head office location in her previous role as it is a higher paying, higher status job. She does not feel it is fair that she has to suffer detriment because of employer's failure to deal with her harasser. However she does not want to be bullied at work and feels she has no option but to resign.

6.12 *Bullying (verbal & psychological) & WorkCover*

Jana works as an administrative assistant with a small employer. For several months her supervisor was bullying her by verbally harassing her, picking on her for small problems and trying to make her look stupid in front of customers and at meetings. Happily, 4 months ago, her employer stepped in and told her supervisor to stop bullying her in that way. However since that time her supervisor has not spoken a word to her - not even at social gatherings away

from office. Jana has to find out all her work information from other sources. He has found a new way to bully her by ostracising her.

Jana has started having panic attacks and has been to her GP, who is prepared to advise her employer regarding the effect that this bullying is having on her health. She may put in a WorkCover claim.

6.13 *Bullying (verbal, psychological & physical) and resignation*

Paul was in his 1st year as an apprentice plumber. Paul had to resign from his job due to being bullied by his employer verbally, psychologically and physically. This included regularly exposing himself to Paul and wanting him to take pictures.

Paul and his family complained to the Police, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and WorkSafe with no result. The police weren't interested, Worksafe investigated but no other employee backed up Paul's complaint and a conciliation at the VEOHRC got nowhere so Paul had to leave.

6.14 *Bullying (psychological) and sexual harassment*

Feng is an outworker/pieceworker sewing clothing in her home. She is currently separated from her husband. Her employer is harassing her by sending her threatening text messages, and threatening her in person that if she reconciles with her husband she will not have a job. He has also broken into her house. One night she heard a noise and called the police who found her employer sitting in her backyard at about 2am.

He is also sending her sexually harassing text messages.

She rang Job Watch asking what her options were.

6.15 *Bullying (psychological) and sexual orientation discrimination*

Jakob works full time as a manager for a water retailer. Recently a work colleague told him that he had "friended" him on Facebook. Since Jakob was not on Facebook, he investigated and found that someone had set up a fake profile for him. Jakob is gay, but was not however "out" to his work

colleagues. This fake Facebook profile page listed him as “seeking other gay men” when in fact he has a long term partner. Jakob is suspicious that work colleagues were involved in setting up the page as there was information in the Facebook profile that only his work colleagues would know. His employer’s HR department and their lawyers were initially helpful in getting Facebook to take down the page. The staff were also interviewed as to whether they were involved in creating the fake profile. HR concluded that the culprits were probably outside the organisation. However he has been subject to some “gay jokes” recently and feels the culprits are closer to home. When a female colleague broke the heel of her shoe, she joked that he might have been wearing them.

Jakob has now been off work for 3 weeks while this mess is being sorted out. He is very stressed and is seeing a psychologist and taking medication. He fears returning to his workplace. He has spoken to the Police and they were sympathetic but can’t act without a named suspect.

As evidenced by the above statistics and case studies, workplace bullying is and continues to be a serious and pervasive problem that affects, not just the individual or individuals directly involved, but also families and friends of those involved are affected, community resources, e.g. provision of health services, are drained, employer costs increase and, of course, economic productivity suffers.

As evidenced by the above statistics and case studies, workplace bullying is and continues to be a serious and pervasive problem that affects, not just the individual or individuals directly involved, but also families and friends of those involved are affected, community resources, e.g. provision of health services, are drained, employer costs increase and, of course, economic productivity suffers.

7. Current legal options and the need for law reform

JobWatch believes that part of the solution to the problem of workplace bullying lies in empowering affected persons to take legal action on their own behalf and in their own right in a forum that is practicable, user-friendly and inexpensive and where meaningful outcomes can be achieved. Affected employees should also be encouraged to act quickly to minimise the damage that can be caused by workplace bullying. Currently, this type of legal option does not exist and the options that do exist are manifestly inadequate.

The main current legal options for bullied employees and the inadequacies of those options are as follows:

7.1 *Police complaint*

In Victoria, the *Crimes Amendment (Bullying) Act 2011* (Vic) amended the *Crimes Act 1958* (Vic) to broaden the offence of stalking to capture some bullying situations such as the making of threats, use of threatening or offensive words to or in presence of the victim, doing threatening or offensive acts, acting in any other way that could reasonably be expected to cause a victim to engage in self-harm.

The offender must intend to cause physical or mental harm or to arouse an apprehension of fear in the victim for their own safety.

Victims can apply for an intervention order against the perpetrator.

Problems:

- (i) After more than 1 year, there have not been any prosecutions completed or even started.⁷
- (ii) It is a criminal offence so there is a higher standard of proof, i.e. beyond reasonable doubt, and *mens rea* must be proved, i.e. intention, making prosecutions less likely to be successful compared with a civil action.
- (iii) Police may not prosecute due to a lack of resources and/or evidentiary difficulties.

⁷ The Age - Brodie's law still unused a year later (11/06/12)

- (iv) Employers cannot be held liable or vicariously liable, only individual perpetrators.
- (v) Courts are and will be loath to make intervention orders which would effectively mean the employee perpetrator having to become jobless.

7.2 WorkSafe Victoria complaint

Workplace bullying may be a breach of occupational health and safety legislation. The Occupational Health and Safety Act 2004 (Vic) obliges employers to provide and maintain a working environment that is safe and without risks to health. Failure to do so amounts to an indictable offence.

Problems:

- (i) The aggrieved employee does not have standing to commence proceedings as proceedings may only be commenced by the authority or an inspector. Additionally, an employee's loss and suffering is not compensable.
- (ii) Due to a lack of resources, WorkSafe cannot possibly investigate all the workplace bullying complaints it receives, even where the complaint may be able to be substantiated. In the year to 24 June 2011, workplace bullying complaints to WorkSafe had more than doubled to 6000 with only 10% of these being referred to the bullying response unit. Of those referrals, one in 10 resulted in an inspector visiting a workplace to make further inquiries.⁸
- (ii) Due to there being a criminal standard of proof, i.e. beyond reasonable doubt, WorkSafe seems to prosecute only where there is an admission of bullying by the employer and/or its employees or where there is other overwhelming evidence e.g. video evidence etc.

The criminal standard of proof is therefore prohibitive to obtaining penalties against workplace bullies and to creating any real deterrent affect.

⁸ The Age - Most workplace bullying claims fall short (24/7/11)

7.3 WorkCover Insurance claim

An employee who has suffered a work related injury because of bullying is entitled to make a WorkCover claim and may receive payments for pre-injury average weekly earnings, medicals and other like expenses.

Problems:

- (i) Injuries received as a result of workplace bullying are usually non-physical e.g. stress, depression, anxiety etc and so it can be difficult to prove that they actually exist (as opposed to a physical injury received because of a faulty machine etc) or it may be difficult to prove that the injuries are work related.
- (ii) As a result, it is usual for WorkCover insurers to deny workplace bullying claims at first instance forcing already vulnerable employees who don't have the resources to take their matter to Court to abandon their claim.
- (iii) It is a defence if the reason for the work related injury was management action taken on reasonable grounds and in a reasonable manner e.g. performance reviews or disciplinary action.
- (iv) A bullied employee can only claim damages for a serious injury in very limited circumstances.

7.4 Anti-discrimination laws (excluding under the Fair Work Act 2009 (Cth))

If an employee is the target of workplace bullying because of an actual or perceived attribute protected by state or federal anti-discrimination laws e.g. race, religion, sexual preference, age, mental or physical disability etc including sexual harassment and victimisation, then the aggrieved employee may make a complaint of discrimination to either the Victorian Civil and Administrative Tribunal or the Australian Human Rights Commission.

The individual employee has standing to make a complaint and can claim economic loss and general damages for pain and suffering. The employer will be found to be vicariously liable unless it can show that all reasonable steps or precautions were taken to prevent the discrimination.

Problems:

- (i) The bullied employee can only make a complaint where the bullying is because of a protected attribute, e.g. age, meaning this course of action will not be open to all employees affected by workplace bullying.
- (ii) Discrimination complaints can be a long, slow and expensive process. In JobWatch's experience, it can take up to 18 months for a complaint of discrimination to run its course to final hearing.
- (iii) The employee has the burden of proof.
- (iv) Traditionally compensation in discrimination matters has not been high and this may be prohibitive. Also, the complainant may have to pay respondent employer's legal costs if their complaint is unsuccessful which can also be prohibitive.

7.5 General protections – unlawful adverse action - Fair Work Act 2009 (Cth)

It is unlawful to take certain adverse action against an employee which may include termination or demotion etc where an employee has certain workplace rights e.g. where the employee has made a complaint to their employer about occupational health and safety, or has a protected attribute similar to anti-discrimination laws. There are no eligibility criteria, unlike unfair dismissal (see below), and the unlawful action may even include refusal to employ. The onus also rests with the employer to prove that unlawful adverse action did not occur and the prohibited reason only has to be part of the reason for the unlawful adverse action. The employee can claim economic loss, pain and suffering and seek pecuniary penalties against the employer and individuals involved. Importantly, the employee can also seek an injunction preventing the unlawful behaviour from continuing.

Problems:

- (i) Not all bullied employees will have this protection because bullying is not unlawful in and of itself and so, to be actionable, the bullying must occur because or partly because of an unlawful reason.
- (ii) An employer may defend a claim so long as they have a reason for the adverse action taking place that is not unlawful e.g. performance issues and, because it is not an unfair dismissal claim, it's irrelevant if

the employee wasn't informed of the reason or given a chance to respond etc. An employer may even defend a claim on the basis of an erroneous reason e.g. where the reason for the adverse action was that the employer thought the employee had breached a workplace policy even though the employee had, in fact, not breached the policy.

7.6 *Unfair Dismissal/Constructive Dismissal - Fair Work Act 2009 (Cth)*

If eligible for unfair dismissal protection, a bullied worker may allege that their employer's conduct essentially breaches its obligations under their common law contract of employment or occupational health and safety (OHS) legislation to the point where the employee may accept that the employment contract is at an end. So long as Fair Work Australia accepts that the termination of the employment is at the initiative of the employer, the employee may succeed in an unfair dismissal claim because the employer will usually not have a valid reason for the termination and so the termination will be harsh, unjust or unreasonable.

Problems:

- (i) The employee has to leave their employment and the employer will argue that it was a voluntary resignation.
- (ii) Not all employees are protected against unfair dismissal. For example, there is a qualifying period for protection of 6 or 12 months depending upon the size of the employer and, if an employee earns over the high income threshold, currently being \$118,100, and is not employed under a modern award or enterprise agreement, then the employee is not eligible for unfair dismissal protection.
- (iii) The employee has the burden of proof and has to prove that the termination of their employment was at the employer's initiative. This can present a high bar in bullying cases because the employee essentially has to prove that they had no other option but to leave due to workplace bullying.
- (iv) Compensation in unfair dismissal can only be ordered for economic loss and is capped at 26 weeks wages. Rarely is the maximum ordered. Furthermore, as compensation is not available for emotional distress, a bullied worker who has been constructively dismissed and

is also unfit for work due to illness or injury stemming from the bullying will not be entitled to any compensation for lost wages even if their unfair dismissal claim is successful.

7.7 Dispute Resolution Procedures

Enterprise Agreements and modern awards have dispute resolution clauses that may, in certain circumstances, be activated by bullied employees on the basis of OHS issues caused by bullying. The dispute may even be conciliated or arbitrated by Fair Work Australia.

Problems:

- (i) Not all employees are covered by an award or enterprise agreement.
- (ii) The standard dispute resolution clause in modern awards only applies where the dispute is about a matter contained in the award and modern awards do not deal with workplace bullying or OHS.

Clearly, as evidenced above, the main current legal options for bullied employees are manifestly inadequate.⁹ No one course of action stands out as being the most effective way of dealing with workplace bullying and often different courses of action taken at the same time may negate each other e.g. a person who files an unfair dismissal claim seeking compensation for lost wages who also makes a WorkCover claim due to a work related injury is essentially admitting that they don't have any lost wages because they are unfit for work. As a result, the current legal framework in relation to workplace bullying is in dire need of reform.

8. Improving protections against workplace bullying

As stated above, JobWatch believes that part of the solution to the problem of workplace bullying is to empower aggrieved employees with the right to take legal action in their own right and on their own behalf. From a psychological standpoint, this would ameliorate to some extent the feelings of powerlessness associated with being bullied. As it currently stands, this psychological state is only exacerbated by the current legal framework in which complaints about bullying to the relevant

⁹ Sometimes an employee's common law contract of employment may provide a remedy in relation to workplace bullying but this is fairly uncommon – see *Goldman Sachs JB Were Services Pty Ltd v Nicholich* (2007) 163 FCR 62.

authorities, i.e. WorkSafe and the police, are not usually acted upon and, should the aggrieved employee be able to obtain legal advice, the current legal courses of action and the associated problems with those courses of action effectively leave the aggrieved person with no viable option for redress. This change would also allow the aggrieved person or persons to intervene early on in their own matter thereby reducing the impact of the bullying which would in turn limit any other negative flow on effects and costs.

Options:

There are a number of ways that this situation could be remedied. The options that JobWatch has considered include:

- (i) giving the aggrieved individuals standing to commence a private civil action under state and federal OHS legislation;
- (ii) making workplace bullying a stand alone actionable discrimination claim in state and federal anti-discrimination laws, similar to the protection against sexual harassment; and
- (iii) amending the *Fair Work Act 2009* (Cth) to include an actionable workplace bullying protection that is available to all employees without exclusion.

Preferred option – the general protections

Given that what is required to best remedy the problem of workplace bullying is access to a court with broad powers to make necessary orders to stop and prevent bullying and to satisfactorily compensate the aggrieved person whilst also being quick, user-friendly and inexpensive, JobWatch submits that the general protections in chapter 3 part 3-1 of the *Fair Work Act 2009* (Cth) should be amended to include an actionable right not to be bullied at work or in connection with employment that is available to all bullied employees without exclusion.

Recommendation 2: The general protections in chapter 3 part 3-1 of the Fair Work Act 2009 (Cth) should be amended to include an actionable right not to be bullied at work or in connection with employment.

JobWatch believes that the framework of the general protections in the *Fair Work Act 2009* (Cth) is the best way to tackle the problem of workplace bullying via an individual complaints mechanism because:

1. Workplace bullying is a separate and distinguishable occupational health and safety issue as compared to the traditional concerns of OHS legislation and so it should also stand alone and outside OHS legislation;
2. State and territory anti-discrimination law cannot directly assist for obvious jurisdictional and other reasons;
3. Generally, federal anti-discrimination law currently covers sex discrimination, age discrimination, race discrimination and disability discrimination so it is difficult to see where anti-workplace bullying laws could fit in with federal anti-discrimination laws;
4. Workplace bullying legislation is really about the law of employment and workplace relations so anti-workplace bullying laws should sit within the framework of the *Fair Work Act 2009* (Cth) instead of anti-discrimination or OHS laws;
5. Broadly, the general protections already deal with workplace rights, discrimination, coercion and undue influence or pressure and so the addition of a further right not to be bullied in connection with work logically seems to fit within the general protections framework;
6. The general protections framework allows access to the quick, inexpensive user-friendly Fair Work Australia tribunal, e.g. for an informal conference, as well as to the Federal Court and the Federal Magistrates Court which have extensive powers to make any orders they think fit including as to injunctions, pecuniary penalties and compensation and can also make orders against individuals who have contravened the *Fair Work Act 2009* (Cth) as accessories; and
7. There are no qualifying periods or high income exclusions regarding the general protections and so all bullied employees would have the benefit of the protection against workplace bullying.

Process

It is envisaged that, should the general protections be amended to include a right not to be bullied in connection with work, the complaints process would utilise the quick, inexpensive and user-friendly informal conferencing offered by Fair Work Australia whereby the aggrieved employee/s, the employer and potentially the alleged perpetrator/s attend a compulsory conference at Fair Work Australia where the matter

may be settled by agreement between the parties.¹⁰ The contents of any settlement would be up to the parties but could include such things as training, relocation, disciplinary action, monetary compensation, counseling and medical costs and/or other forms of compensation.

If the matter was not settled, the aggrieved party or parties can then make an application to the Federal Court or the Federal Magistrates Court seeking remedial orders including injunctions to prevent the bullying from continuing.

It is further envisaged that a general protections workplace bullying complaint would be open to an employee who is still in employment and to former employees.

Time limit – 12 months

The time limit for filing a workplace bullying complaint should be 12 months from the date of the bullying conduct complained of occurring. In JobWatch's opinion, a time frame of 12 months would be long enough to capture the repeated nature of bullying and short enough to compel aggrieved individuals to make their complaint in a timely manner so as to minimise the effects of the bullying and to avoid any prejudice to the employer and/or the alleged perpetrator/s.

Definition

In Canada, a comparable common law jurisdiction to Australia, three provinces (i.e. states) have enacted specific anti-bullying legislation.¹¹ Having considered these definitions and the description contained in WorkSafe Victoria's guidance note, JobWatch proposes the following amendments to the *Fair Work Act 2009* (Cth):

1. Workplace Bullying be defined in section 12 (the Dictionary) as:

“any repeated unwanted conduct, comment, display, action or gesture by a person that adversely affects an employee’s psychological or physical well-being and that the person knows or ought reasonably to know would cause the employee to feel intimidated or threatened or that otherwise causes a risk to the health or safety of the employee.”

2. Section 342 (Meaning of adverse action), item 1, Column 2 be amended to include a new sub-section (e) stating *“subjects the employee to workplace bullying or fails to take reasonable action to prevent the employee being*

¹⁰ It should be noted that presently under the general protections, where an employee is still in employment, any conference at Fair Work Australia may only take place by agreement between the parties. Conferences are compulsory where there has been a dismissal.

¹¹ Workplace Bullying as an Occupational Safety and Health Matter: A Comparative Analysis, Susan Harthill, *Hastings Int'l & Comp L. Rev.*, Vol 34:2 2011, p 273.

subjected to workplace bullying.”

This entire section would then read as follows:

“Adverse action is taken by an employer against an employee if the employer subjects the employee to workplace bullying or fails to take reasonable action to prevent the employee being subjected to workplace bullying”.

It is envisaged that “reasonable action” by an employer to prevent workplace bullying might include preventative training, anti-bullying policies, SafeWork Australia code compliance and/or other similar action.

3. A new sub-section (5) be added to section 342 stating:

“Adverse action does not include any lawful and reasonable managerial action that is taken by an employer in relation to the performance or conduct of the employee or in relation to the direction of the employer’s enterprise.”

This section would provide employers with a defence to potentially unmeritorious claims.

In conclusion, workplace bullying is a serious problem that current laws fail to adequately address. In fact, current laws may even exacerbate the effects of workplace bullying. Therefore, the law needs to be reformed so as to give those affected by workplace bullying a meaningful avenue of redress as described above.

Please contact Ian Scott on (_____) if you have any queries.

Job Watch Inc



Per:
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