



Inquiry into Workplace Bullying
Written Submission Addressing Terms of Reference
from Sally Jetson & Associates 12/8/2012

SJ

Sally Jetson & Associates thanks the Committee for their invitation to appear at the Public Hearing into the Inquiry into Workplace Bullying in Perth, Western Australia on Wednesday 8 August 2012. Subsequent to our appearance we have taken the opportunity to provide further detail to the questions raised by the Members. Our response is a joint effort of Sally Jetson, Gail Broady and Tim Law and is presented to the Inquiry for consideration. We hope that the following evidence from the SJA team will be of assistance to the Inquiry.

A. What can and should Federal government/policy makers do?

1. **Initiate & Fund Research** into workplace bullying (prevalence, impacts, risk factors, effective preventive & management practices etc) in Australia so that decisions can be made on the basis of evidence rather than emotion and mythology.
2. **Regulate** workplace behaviour and practice
 - Draft Legislation/Develop & Implement Policy & Code of Practice
 - Assist states in clarifying and communicating a consistent definition and expectations of employers/employees
 - Coordinate states to ensure consistent and resolute approach to productive workplaces that are physically & psychologically safe
 - Monitor
 - Enforce
3. **Role modelling** – elected members and senators need to:
 - Refrain from bullying
 - Model non-abusive debate & conflict
 - Promote parliamentary culture of respectful, non-abusive, non-denigrating disagreement & debate
 - Take a stand against bullying by naming & challenging bullying behaviour to show that it is not accepted (as a number of parliamentarians did in regard to the way in which Craig Thompson was talked to and about, around the time that allegations were made against him)
4. **Promote Awareness and Educate** in regard to
 - Definition, differentiation, prevention and management
 - The unacceptability of work related bullying
 - The risks and costs to business - especially re productivity & competitiveness, legal costs, sanctions and lost time costs



- The responsibilities of all in regard to ensuring workplaces are psychologically safe
- Reasonable and effective management practice; Best practice management/leadership
- Assisting organisations to identify, reduce and manage risks

5. **Facilitate Access to support** for those who believe they have been bullied

- Advice/resources
- Assistance to investigate
- Advocacy
- Alternative Dispute Resolution

B. Questions Relating to Legislation

1. *Where should legislation sit?*

- Under OSH - it is more likely to gain support in workplaces if it is understood as being about *psychological safety* rather than *political correctness*

2. *Should legislation include vicarious liability?*

- Yes – our experience is that it is often the realisation that senior management may be held liable for injury caused in the workplace that prompts action to prevent or address hazardous behaviour

3. *Should legislation require organisations to have a policy on bullying?*

- Yes in light of Australian research on the positive effect that an explicit policy has in reducing the reported incidence of workplace bullying

4. *Should legislation require organisations to undertake and act on risk assessments?*

- Yes - there should be support for organisations to reduce and manage risks
 - Advice
 - Education/training
 - Awards/Recognition

5. *Can you manage behaviour/eliminate bullying by making and enforcing rules?*

- Yes and no.
 - If this is all you do, **No**.
 - If you also change / develop workplace culture, **Yes**
There is a lot of evidence that workplaces can be, and have been, made physically safer by simultaneously making & enforcing reasonable rules AND developing a safety culture – together these result in sustained changes in behaviour, processes and practices; it's possible and practical to do the same in regard to *psychological safety*.
- Legislation can assist in changing workplace culture by requiring that ALL organisations take *reasonable steps* to ensure the workplace is both physically and psychologically safe
 - Government, Educators and Regulators can assist with identifying reasonable steps to employers - these might include, for example:
 - Develop, communicate and implement Policy and Code of Conduct
 - Assess risks and act to manage these



- Raise and maintain awareness through:
 - *Induction and training in EEO, Bullying, Code of Conduct and acceptable workplace behaviour*
 - *Visual reminders in the workplace*
 - *Regular refresher training*
 - *All soft – skills training includes content differentiating acceptable practice/behaviour from bullying*
- Provide supervisors and managers with training in *performance problem solving behavioural coaching and conflict resolution*
- Provide multiple contact & support options for complainants
- Develop accessible and fair-resolution processes for complainants
- Monitor and analyse contacts etc.

C. Questions relating to Definition and Differentiation

1. *Should there be a uniform definition across state and federal jurisdictions?*

- Yes – evidence from research, and our own experience as investigators, advisors and educators, is that there are probably as many personal definitions of bullying as there are people, and that, in regard to what is or isn't bullying
 - employees and employers differ
 - people of different national cultures differ
 - people from different industries differ
 - Baby Boomers, Gen X and Gen Y differ
 - people from different socio-economic background differ
 - employee advocates and employer advocates differ

A clear and uniform definition across jurisdictions would assist everyone to identify prevent/avoid and manage workplace bullying.

2. *Should the definition include Repeated Behaviour?*

- No - it should address the
 - Nature of the behaviour
 - Context in which the behaviour occurs
 - Impact of the behaviour

3. *Should definition include intent or reference to intent, being systematic*

- No – those who bully often use 'good intent,' and/or the absence of malice, to rationalise and justify their behaviour; it is very difficult to prove; intent is not necessarily correlated to not proportional to the injury or harm caused
- Legislation should clearly identify and address bullying as behaviour that *is hazardous to psychological health and/or causes psychological injury*.
- It could differentiate acts of reckless endangerment or gross negligence as being subject to more severe penalty (as does some existing OSH legislation)

4. *Should the definition specify behaviours that constitute bullying (such as, for example swearing, yelling)?*



- No - it should address the
 - Nature of the behaviour
 - Context in which the behaviour occurs
 - Impact of the behaviour

5. *Should the definition of bullying include a Reasonable Person Test?*

- Yes – this is essential given that
 - there is an almost infinite number of combinations of nature, context and impact
 - those who bully often subvert social mores, organisational practices and processes to their personal ends
 - the intent of legislation should be to *require reasonable behaviour that does not create a hazard or harm to people in the course of work.*

D. Questions relating to complainant concerns about process & outcomes of investigation

What can be done about complainant concerns that external, so-called 'independent' investigators/mediators will be biased in favour of the organisation that pays them?

1. This is a legitimate and understandable concern, and our experience is that complainants and respondents are equally likely to be concerned that we will be biased against them, and both require reassurance and demonstration as to our integrity, expertise and impartiality.
2. Ideally perhaps, an independently appointed and funded investigator, vetted and agreed to by the parties to the complaint/allegation(s) might be the ideal. *(Even then though, it is possible that complainants, respondents and/or organisations might question the impartiality, thoroughness and expertise of the investigator when they don't get the findings they hope for... and let's face it, rarely do all three parties get that!)*
3. Given that SJA is called in because independently (ie government) appointed and funded investigators are not available, there are a number of factors to consider in responding to this concern:

- ***Time & Stress***

When there is a complaint, grievance policies and/or legislation often require that an investigation commence within a short period of time. As well, complaints/allegations of bullying are distressing and scary for all involved, and take a number of employees 'off-line' – out of the workplace or away from their usual work as employees may be stood down; granted stress, medical or compassionate leave; assigned to case manage the investigation etc. So consideration for all parties (*complainants, respondents, witnesses, managers and work colleagues; their families, and the organisation itself*) creates pressure to appoint an investigator and get the investigation underway as quickly as possible. Consultative processes to recruit and select investigators that involve , complainants, respondents, and/or their advocates, and representatives of the organisation will be lengthier, will likely add to the stress of all involved. They will almost certainly be fraught and may end in stalemate.



- **Money**

Someone has to select and pay an investigator. *And investigation is expensive.* This is especially so if there are: multiple complainants; numerous behaviours and/or incidents to be investigated; allegations covering a significant span of time; injured complainants; multiple witnesses for either or both the complainant and respondent; little or a lot of documentation; counter-allegations; travel outside the metro area; likelihood that the matter will end up in a court of law requiring the attendance of the investigator, etc. As well, more experienced investigators are likely to be more expensive than novice investigators (who will in any case require supervision that someone will have to pay for). So who is to pay? Whilst we are open to being paid by co-contribution, proportional or otherwise, from all parties and/or their advocates (eg unions), this has never been proposed to us, nor taken up when we have suggested it as a possible means of addressing concerns about bias towards the party that pays.

- **Independent/Arms-Length review and/or Test of Investigative Process & Findings**

Complainants or respondents who believe that the investigator demonstrated bias in investigating or reporting, or that the investigation process or findings are flawed, do have avenues of appeal, even though these are not ideal. Investigations and reports may be, and have been tested in court (eg Fair Work Australia), and this provides some pressure to keep investigators honest.

- **Accreditation & Licensing**

Nationally recognised qualifications and/or licensing of investigators may also provide parties with some reassurance in regard to investigator/mediator impartiality and quality.

- Currently there are no specific qualifications required for internal or external workplace investigators, and many develop their skills from their experience working in Human Resources, EEO, OSH, Security or the Police service. It is our experience that those who come from OSH, Police or Security backgrounds have great difficulty identifying bullying from evidence relating to the *patterns of behaviour* that constitute bullying, and in teasing out the evidence from often conflicting and confusing statements from witnesses resulting from the dynamics that develop around bullying.
- Investigators trained and experienced in dealing with behaviour leading to physical injury or tangible harm, have often not (in our experience) developed the necessary skills or confidence to make findings in regard to the causes of psychological injury and/or 'on the balance of probability' – the level of proof applicable in these matters. They tend to make findings of bullying only when the evidence supports findings 'beyond reasonable doubt' in regard to specific incidents, rather than on 'the balance of probabilities' applied to both incidents and patterns of behaviour. When there are no direct witnesses, or where the person who bullies is found to have engaged in a string of similar or diverse behaviours (rather than repeated identical behaviours), they report that bullying is *not found*, even when the injury to the complainant/s is patent.



- The result is further trauma, a heightened sense of injustice and isolation (even betrayal), for the target, and confirmation of the fears and beliefs of past and future targets and witnesses, that the organisation will 'do nothing anyway.'
 - If organisations are to be encouraged and supported to take decisive, industrially sustainable, disciplinary action, they must be supported by investigators trained to make findings on the balance of probability. This means that the nationally recognised Certificate III in Investigations should focus equally on the gathering and handling of evidence AND the analysis and presentation of argument in support of findings to be made on the balance of probability. The certificate should also include a module on workplace bullying that develops investigator competency in identifying patterns and dynamics of bullying behaviour and in handling the evidence of stigmatised targets and witnesses.
4. While it is unlikely that federal legislators can do much to address individual concerns without creating an independent Inspectorate and/or selecting and funding independent investigators (*possible funding sources being: general revenue; a levy on industry; fines imposed on breaching organisations*), investigators and mediators can help reassure them by:
- a. Building a diverse and deep client base and a portfolio of service so that they are not dependent on a particular client, and so can take the risk of investigating and reporting without fear or favour even if it means being 'fired' because it will not be fatal to their practice/business.
 - b. Benchmarking their practices, processes and analyses through continual professional development and supervision/peer review.
 - c. Giving those concerned about bias access to information demonstrating their independence, qualifications, expertise, experience, reputation, operating values and of the proposed or appointed or investigators.
 - d. Being open to and encouraging parties to voice their concerns and ask questions, then responding openly and honestly to those concerns, and problem solving or negotiating issues of concern where that is possible.
 - e. Clarifying upfront the processes, roles, responsibilities, rights and limitations and then supporting and sticking to these and checking that these are understood – helping build an understanding of the investigator's commitment *to helping each party tell their story in order to build a factual, full and accurate an understanding of events and their impact, so that the organisation can make and act on informed, fair and timely decision..*
 - f. Encouraging those interviewed to bring a support person with them and to record interviews (as does the investigator).
 - g. In more formal investigations, providing participants with drafts of statements and giving them time, support and opportunity to correct errors, misunderstandings, and to add relevant information/detail they may have forgotten/overlooked during interview to ensure their evidence is entered into the record as they wish it to be told.



- h. Keeping *everyone* informed about the process of the investigation, its progress, any delays or difficulties and how these are being managed, while scrupulously maintaining confidentiality and providing support, care, respect and consideration to all parties at all stages.

5. The foregoing comments also apply (at least in part) to mediators

Do investigations and/or mediations produce good outcomes where it is found that a person has been bullied? Where investigations result in findings, do satisfactory outcomes follow for those who've been bullied?

1. In the case of investigations,

- Where it is found that a person has engaged in bullying, and the organisation takes decisive action commensurate with the seriousness of the behaviour and its impact or that person chooses to resign from the organisation, there is often a huge relief to complainants and witnesses (who are often also significantly stressed and may have themselves been traumatised by what they have witnessed). They may feel also elated and vindicated; grateful for the courage and support of witnesses and managers; disappointed with those they feel supported the bully or failed to speak up despite being witness or having material evidence. They may also feel resentful that it took so long and was so difficult and costly to achieve this outcome and/or that the organisation did nothing until they were hurt. They are also likely to be glad that what happened to them will not happen to others in the workplace. Despite this likely mixture of feelings, the process of recovery and rebuilding working relationships and workgroups can begin....and must be actively monitored and supported *because they have been injured, often traumatised*, and they are not immediately, miraculously injury free.
- Where it is found that a person has engaged in bullying, and the organisation does not take decisive disciplinary action commensurate with the seriousness of the behaviour and its impact because of an absence of will, or because of legal or industrial constraints, complainants and witnesses are likely to feel betrayed, devastated, angry and extremely vulnerable; and to become cynical and hopeless about the chance of receiving adequate protection from bullying. We don't blame them.
- Where bullying has, in fact, occurred but allegations cannot be found (perhaps because of insufficient evidence, lack of cooperation from witnesses, the organisation's failure to take reasonable steps or document etc) complainants may feel devastated, angry and extremely vulnerable. Recovery and restoration of workplace relations is unlikely and they are at significant risk.

-End of Submission -