



**Government of
South Australia**

Submission to the House of Representatives Standing
Committee on Education and Employment

Review into Bullying in the Workplace

7 August 2012

INTRODUCTION

The Government of South Australia welcomes this opportunity to make a submission to the inquiry into workplace bullying currently being undertaken by the House of Representatives Standing Committee on Education and Employment (the Committee).

The Government of South Australia is committed to ensuring that every worker enjoys a safe, fair and productive working life, and is able to return home at the end of each day safe from injury – both physical and psychological. The South Australian Government recognises that workplace bullying represents a significant risk to workers' health, safety and welfare, with major consequences for the individual, the workplace and the community at large. With significant impacts on the psychological wellbeing of the victims of bullying and their families and communities, as well as a reduction in workplace productivity and an increase in workers compensation claims and associated costs, the South Australian Government recognises the importance of confronting this complex and sensitive issue at both a state and national level.

SafeWork SA is the South Australian government agency with responsibility for occupational health, safety and welfare education, prevention, enforcement and complaint resolution activities. SafeWork SA lodged an agency submission with the Committee on 29 June 2012. The submission lodged by SafeWork SA focuses on the experience of the regulator in dealing with workplace bullying matters in the context of the current South Australian legislative framework (*Occupational Health, Safety and Welfare Act 1986* (SA) (OHSW Act)). In particular that submission discussed the limitations of Section 55A of the OHSW Act, which expressly deals with 'inappropriate behaviour' (a copy of that submission is attached).

Within this context and based on the South Australian experience, this submission focuses on some potential new policy directions that might be considered by the Committee.

SUMMARY OF RECOMMENDATIONS

The Government of South Australia makes the following recommendations to the Committee:

Recommendation 1

The Government of South Australia considers that workplace bullying should be primarily dealt with within the framework of work health and safety legislation.

Recommendation 2

The Government of South Australia recommends that Safe Work Australia undertakes further work in developing a nationally consistent approach to managing 'psychosocial hazards' and 'bullying' within the work health and safety legislative framework.

Recommendation 3

The Government of South Australia recommends consideration of a low cost, easily accessible dispute resolution/judicial process (either within the WHS framework or within the industrial relations framework) to allow an individual to lodge a bullying complaint and seek some form of redress.

Recommendation 4

The Government of South Australia recommends that anti bullying provisions recognising the particular vulnerability of young workers should be reinforced within the framework of each state's child employment legislation.

Recommendation 5

The Government of South Australia recommends that the Commonwealth Government explore avenues for providing resources to encourage partnership programs between agencies such as the state regulators and state based community legal/workplace service providers to enable the delivery of preventative education campaigns on workplace bullying.

Recommendation 6

The Government of South Australia recommends that the Commonwealth Government continues to explore opportunities to conduct further research into the area of workplace bullying. There should also be close links between research organisations (e.g. Universities) and SafeWork Australia and other jurisdictions to ensure research findings are disseminated to policy makers and industry to inform and improve policy, workplace practices and procedures in the area of workplace bullying (for both prevention and the management of bullying complaints).

DISCUSSION

Workplace bullying constitutes a significant threat to the health, safety and welfare of people in the workplace and potentially has wider implications for businesses, including reduced productivity and profitability, low morale, increased absenteeism and high staff turnover. The South Australian Government notes recent developments in the Victorian criminal jurisdiction (specifically Brodie's law), which deal with bullying, but submits that workplace bullying should continue to be primarily dealt with through the work health and safety (WHS) legislative framework. In South Australia, this legislative framework currently comprises of the OHSW Act and associated Regulations. Of particular significance in the context of bullying are sections 19, 21(a) and 55A of the OHSW Act.

In due course (once the *Work Health and Safety Bill 2011* (SA) is passed by the South Australian Parliament), nationally harmonised work health and safety legislation will replace the South Australian OHSW Act and Regulations. The principal duty of care provisions in the *Work Health and Safety Bill 2011* (the WHS Bill) will capture the incidents of workplace bullying in a manner similar to the existing provisions. However, the WHS Bill is anticipated to do so in a more effective and robust manner by expanding the definition of 'health' to include 'physical and psychological health'.

The South Australian Government considers that workplace bullying should continue to be dealt with through the WHS framework as the elimination of bullying behaviour is central to the dynamics of a safe and healthy workplace, and bullying is a hazard that can have a significant long term effect on a worker's psychological health, safety and welfare.

The South Australian Government recommends that workplace bullying should be treated like any other health and safety hazard within workplaces. As part of standard workplace risk management procedures, bullying incidents, practices or the potential for bullying should be identified, assessed for risk, and steps taken to eliminate or minimise the risk. Follow-on procedures and process evaluations should also be established to ensure bullying does not occur or continue to occur. This includes clear and workplace-appropriate anti-bullying policies, a suitable process for reporting bullying incidents, and a procedure for dealing with the bullying reports in a fair, effective and efficient manner.

While recent developments, such as Brodie's law, provide an avenue in criminal law to deal with bullying once it has occurred, the South Australian Government considers that prevention of workplace bullying is as important if not more so and should be a dominant feature of the legislative framework that regulates bullying. The WHS legislative framework with its risk identification and elimination/minimisation approach is arguably the most suitable framework to ensure that prevention of bullying is given the strongest legislative foundation to ensure optimum effectiveness.

Within the work health and safety legislative framework, the South Australian Government also notes the potential to use enforceable undertakings as an alternative to a prosecution when dealing with bullying matters (see Part 11 of the WHS Bill 2011 (SA)). Enforceable undertakings may become a valuable tool in securing successful outcomes for the victims of workplace bullying and the workplace within which the bullying has taken place.

In an enforceable undertaking, once the regulator lays charges against the alleged offender, the new provisions will allow an alleged offender to enter into an agreement with the regulator to undertake certain actions as an alternative to litigation and exposure to penalties. All opinions will be taken into account when the regulator is considering entering into an enforceable undertaking, including those of the injured worker. There will be consistent application of undertakings across Australia so that it will be clear what criteria are being used to accept or reject an undertaking.

Enforceable undertakings will provide an opportunity for businesses to avoid costly litigation when faced with a workplace bullying prosecution. This approach will also ensure that better outcomes can be achieved for the victim of bullying and other affected workers at the workplace. The alleged offenders will be able to undertake to do a wide range of actions. Some of the actions could include developing anti-bullying policies and reporting procedures; providing appropriate bullying management training to workers and management; arranging a counselling service for affected workers; or publishing a case study of the bullying incident and the outcomes of the investigation.

Recommendation 1

The Government of South Australia considers that workplace bullying should be primarily dealt with within the framework of work health and safety legislation.

In its submission to the House of Representatives Standing Committee on Education and Employment inquiry into workplace bullying, SafeWork SA has discussed the current legislative framework surrounding the management of workplace bullying complaints in South Australia, and in particular Section 55A of the OHSW Act. In its submission, SafeWork SA made comments that the current legislative framework provides a useful model for dealing with workplace bullying; however there are certain limitations that do exist within that framework.

One of the limitations within Section 55A of the OHSW Act is the definition of 'inappropriate behaviour'. Although intended to clarify the scope of the provisions, it has a somewhat limiting effect by excluding certain behaviours that may otherwise be considered as 'bullying'. (Please refer to the SafeWork SA submission for a further discussion of this issue).

The South Australian Government notes that the definition in the WHS legislation of 'health' to include 'psychological health' provides opportunities to further develop stronger approaches for dealing with bullying within this legislative framework.

Within this context, there is scope to develop specific regulations around psychosocial issues, scope to develop a national enforcement and compliance manual to deal specifically with bullying matters, and scope to develop a national approach to the investigation of bullying complaints and a national training programme to equip WHS inspectors with the skills required to deal with bullying issues, including the provision of mediation and conciliation services.

All of these approaches could potentially assist the dispute resolution process and act as a support for preventative measures to be established in workplaces, as well as providing a heightened awareness among employers and employees of the consequences of

workplace bullying. A common set of regulatory principles and approaches to workplace bullying would also create consistency for the national inspectorates in the investigation and management of workplace bullying complaints.

The work health and safety inspectorates remain the central resource for the provision of education, prevention and resolution of workplace bullying. It is fundamentally important that inspectors are well trained and skilled in order to gain community respect in dealing with this very challenging issue. WHS inspectors must be able to go out into the community and possess the right set of skills, knowledge and understanding to raise awareness of the psychosocial hazards associated with workplace bullying. They need to assist businesses with the necessary resources and information dealing with prevention, management and control of bullying hazards. Inspectors must also have the right set of skills and experience to be able to respond to bullying complaints and conduct their investigations in a timely, efficient and sensitive manner.

It is important to note that bullying complaints are some of the most complex, sensitive and difficult complaints for inspectors to handle. They are also more likely to involve a high level of emotion and distress on the part of complainants and respondents alike.

The skills, knowledge and experience necessary to handle workplace bullying complaints are required from the initial contact with the complainant, then throughout the investigation and up until the prosecution stage. As well as experience, knowledge and skills in incident investigation, inspectors handling bullying complaints need to possess other important skills, in particular the skills in negotiation and mediation.

Providing preventative education campaigns and educating and assisting businesses to comply with the WHS legislation is an integral function that the WHS inspectorate performs on a daily basis. The Government of South Australia recognises that education and prevention, rather than response and investigation of complaints, should be at the forefront of managing workplace bullying.

In order to overcome the difficulties in assessing psychosocial risks, it is important for inspectors handling bullying complaints to have a good working knowledge of the factors that lead to, and increase the likelihood of such hazards arising in the workplace.

It is within this context that the South Australian Government recommends that consideration be given to the development of a national enforcement and compliance policy on bullying by Safe Work Australia, with clear guidelines about how bullying investigations are to be conducted. Development of a national policy will ensure that all regulators across Australia are dealing with the investigation of workplace bullying in a consistent and uniform manner.

The South Australian Government notes the current work being undertaken by Safe Work Australia in the development of a national *Code of Practice on Responding to Workplace Bullying*, which will clarify the scope of the provisions in the WHS Bill as they relate to workplace bullying. It also notes that any definitions either in the Code or Regulations should be constantly reviewed and updated to ensure that they remain relevant to ever changing workplaces where the context for bullying (including, for example, cyber bullying) are changing by the day.

Recommendation 2

The Government of South Australia recommends that Safe Work Australia undertakes further work in developing a nationally consistent approach to managing 'psychosocial hazards' and 'bullying' within the work health and safety legislative framework.

This could include developing specific regulations to deal with psychosocial hazards; a national enforcement and compliance manual to deal specifically with bullying matters; the development of a national approach to the investigation of bullying complaints; and a national training programme to equip WHS inspectors with the skills required to deal with bullying issues, including the provision of mediation and conciliation services

Although the Government of South Australia considers the WHS legislative framework to be the most appropriate for dealing with workplace bullying, there are certain 'gaps' that exist in the WHS legislation that could be addressed by other processes or legislative provisions. One of these legislative 'gaps' is the limitation placed on the way in which a

bullying investigation can be conducted by a workplace authority once the worker has left the place of employment where he or she has been subjected to workplace bullying.

There are many instances where workers feel that they cannot remain working in an environment where they are subjected to bullying. Many elect to resign from their place of employment first, and then lodge a workplace bullying complaint with SafeWork SA. However, under the provisions of the WHS legislation once the employment relationship ceases to exist, the focus of the bullying investigation turns to the existence of anti-bullying policies, procedures and training in the workplace, rather than the actions of the alleged bully. The aim of the investigation is then to 'remove' the hazard of bullying from the workplace, rather than to investigate the individual circumstances of the worker who made the complaint.

In addition, under the current legislative framework of Section 55A of the OHSW Act, an inspector cannot refer a bullying dispute to the Industrial Relations Commission of South Australia for mediation or conciliation if the complainant is no longer employed at the workplace where the bullying occurred.

Because of these limitations, in many cases the complainants are left with the perception that they have not received 'justice', and that the alleged bully has been 'allowed to get away with it'.

Another limitation of the current WHS framework in relation to dealing with bullying complaints is the high burden of proof (beyond reasonable doubt) for a successful prosecution of a breach under the WHS legislation.

While the WHS legislation provides a legislative framework that deals with bullying as with any other WHS issue, it must be acknowledged that bullying is somewhat different. There are important differences that arise from WHS breaches that involve human interaction as opposed to mechanical, technological or procedural failures. The bullying investigation process has to assess both covert and overt instances which often appear trivial, but do cause a risk to health and safety when viewed as repeated behaviours that build over time. Because of the nature of bullying behaviour, it is often exceptionally difficult to prove 'beyond reasonable doubt' that bullying occurred, as even overt behaviours are rarely

witnessed either individually or electronically. This is one of the key reasons why bullying is so difficult to prosecute as a WHS breach under the WHS legislation.

The South Australian Government suggests that consideration could be given to the development of an additional dispute resolution process that can be accessed by individuals in order to pursue workplace bullying complaints. This could be included in either a WHS or an industrial relations legislative framework.

A process could be developed whereby an individual complainant could lodge a complaint with a tribunal which could facilitate conciliation between the disputing parties, with the option to proceed to a decision maker who could arbitrate an outcome if necessary. This would provide the complainants with an option to advocate their own claim, rather than relying on the workplace authority to commence proceedings for the breach of WHS legislation. Secondly, this approach would address the identified gaps in the WHS legislative framework.

This approach would address the limitations identified in the South Australian experience of section 55A, by expanding on the current provisions offered by Section 55A. The ultimate decision maker in the process could be given the power to make an order in the matter, to impose a penalty or to compel parties to enter into an enforceable undertaking.

This model of an individual approach to dealing with complaints would assist those complainants who wish to have more involvement in the advocating of their own claim, as well as those complainants who have left the workplace and are unable to achieve what they perceive as 'justice' by way of a prosecution under the WHS legislative framework. Arguably, it could also be a more effective way than using the criminal law approach of Brodie's law to deal with serious cases of bullying.

The South Australian Government acknowledges that the sensitive nature of the issue of workplace bullying needs to be taken into account in the development of any process for handling individual complaints. This process will also need to reflect the understanding that the sooner these complaints are resolved, the more likelihood there will be for a worker to maintain their participation in the workforce and the less likely will be the risk of long term negative psychological health impacts.

Recommendation 3

The Government of South Australia recommends consideration of a low cost, easily accessible dispute resolution/judicial process (either within the WHS framework or within the industrial relations framework) to allow an individual to lodge a bullying complaint and seek some form of redress.

Another legislative 'gap' identified by the Government of South Australia currently exists within the context of affording protection to the classes of workers who are most vulnerable to becoming victims of workplace bullying. In particular, further protection needs to be afforded to the young workers who are the most susceptible to experiencing bullying at their workplaces.

Young workers are particularly at risk of experiencing workplace bullying for a number of reasons. Their lack of knowledge about appropriate working conditions and entitlements, together with limited life experience and self-confidence can make them vulnerable to exploitative practices and workplace bullying. Also, they can be vulnerable because they are either in casual or part-time work. Further, their often limited self-confidence can make it difficult for them to speak up about experiencing bullying or to do anything to address the situation for the fear of jeopardising their employment and any future opportunities.

The South Australian Government is planning to introduce a Child Employment Bill into the South Australian Parliament later in the year. Within the context of this legislative framework, the Government will consider the inclusion of specific provisions to reinforce the protections against bullying for young workers.

Recommendation 4

The Government of South Australia recommends that specific anti bullying provisions recognising the particular vulnerability of young workers should be reinforced within the framework of each state's child employment legislation.

The South Australian Government also notes the 2011 amendments to the Victorian *Crimes Act 1958*, informally dubbed 'Brodie's law', in recognition of 19 year old Brodie Panlock, who took her own life after being subjected to persistent and vicious bullying at her place of employment. While acknowledging that these provisions draw attention to the often extremely serious and tragic consequences of bullying, it is also important that legislators do as much as they can to reinforce and strengthen the law around prevention.

Within this context, it is clear that prevention and education programmes are extremely important when it comes to preventing workplace bullying.

The increasing rates of workplace bullying files that are being managed by SafeWork SA inspectors indicate that workplace bullying is an escalating problem. The Government of South Australia considers that the most effective way of tackling the escalation of this problem is by expanding the preventative education work being undertaken by a variety of government and community service providers in relation to workplace bullying.

In South Australia, some of the community legal services that provide education and assistance to the most vulnerable groups of workers and to businesses dealing with workplace bullying include Young Workers' Legal Service (YWLS) and the Working Women's Centre of South Australia (WWC).

YWLS provides free legal advice to young workers in relation to a range of employment issues, including workplace bullying. The service provides in person and over the phone advice, as well as representation and support at mediation and conciliation sessions. It also runs weekly education and awareness talks at schools and delivers educational segments over community radio.

WWC supports a range of different clients who are women, including a high number of clients dealing with workplace bullying. The WWC also delivers awareness raising and training sessions on workplace bullying to a range of organisations in the government, private and community sectors. WWC has made some significant contributions to the development of the resources and approaches for the prevention and addressing of workplace bullying across Australia.

The Government of South Australia recommends consideration of a Commonwealth funded program which assists in developing working partnerships between the states' and territories' regulating authorities and community legal services, such as the YWLS and WWC in South Australia. Partnering with community service providers will allow for a more effective delivery of the necessary preventative education campaigns to a much wider audience, and will help better educate individuals and businesses across Australia about the prevention and management of workplace bullying.

In addition to building working partnerships with community legal/workplace service providers, other types of collaborative working relationships could also be developed to enhance prevention and education programs in the community and the workplaces. For example, building partnership programmes with agencies such as the Equal Opportunity Commission of South Australia would create a reciprocal relationship for the provision of education in the areas of discrimination, harassment, bullying and victimisation. There may also be opportunities for developing partnership programs with the workers compensation authorities in the interests of reducing the number of claims associated with psychological injuries and their associated costs.

Recommendation 5

The Government of South Australia recommends that the Commonwealth Government explore avenues for providing resources to encourage partnership programs between agencies such as the state regulators and state based community legal/workplace service providers to enable the delivery of preventative education campaigns on workplace bullying.

The Government of South Australia also considers that further research opportunities should be explored in order to inform and improve policy, workplace practices and procedures in the area of workplace bullying. Further research can assist in the development of a range of preventative strategies, such as practical risk assessment tools, to assist the industry and workplaces to identify the risk factors associated with bullying

behaviours and implement appropriate controls before these behaviours escalate and cause psychological injury to a worker.

Recommendation 6

The Government of South Australia recommends that the Commonwealth Government continues to explore opportunities to conduct further research into the area of workplace bullying. There should also be close links between research organisations (e.g. Universities) and SafeWork Australia and other jurisdictions to ensure research findings are disseminated to policy makers and industry to inform and improve policy, workplace practices and procedures in the area of workplace bullying (for both prevention and the management of bullying complaints).

