

House of Representatives Committees – Inquiries into Workplace Bullying

JE.

Thank you for allowing me the opportunity to provide this submission. The submission is made on behalf of a relative who I have supported during his recent experience with workplace bullying and interaction with NSW WorkCover, the regulatory authority.

I have prepared the submission in summary format in order to reduce its volume and will address the terms of reference under the following headings:

1. Workplace bullying victims experience
2. Role of workplace culture
3. Adequacy of existing education & support services
4. Regulators response, and
5. Workplace bullying deterrents

No names have been mentioned in this submission.

The facts relating to the bullying incident are well documented and these documents are available for your consideration although they are not provided.

One could allege a degree of bias or loss of objectivity when reporting a matter like this. The documents, from many sources including medical practitioners and psychologists, negate that allegation and on their own disclose the depth of failures across the workplace and regulatory systems.

Regards

16 June 2012

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1. Workplace bullying victims experience:

Having worked for a multinational processing company for 20 years Manager A (victim) came into contact with Manager B (aggressor) in 2008. A number of conflict events occurred between the two (not reported to employer). In late 2008 Manager B was promoted and began to criticise the work practices of Manager A. Manager B changed Manager A's job description and resource allocation (increased work load, removed laptop and reduced staff numbers reporting to Manager A). These criticisms were not reflected in the annual workplace appraisals of Manager A.

Throughout 2009, on site production was increased and safety stock storage areas were reduced to allow for more production area. In late 2009 a strike at the workplace saw the Management team working long hours over a three week period. Manager's, including Manager A received correspondence from Manager B thanking them for their efforts.

In December 2009 Manager A began to display symptoms of a previously undiagnosed medical condition. Manager B was aware that Manager A was unwell (Signed statement dated 4 November 2009 from Manager B). At this time Manager B began to '*performance manage*' Manager A. This involved micro managing Manager A who was required to record time and function information and report this information verbally to Manager B who made no recorded of the reported information.

On 5th January 2010 Manager A was diagnosed with an aortic valve issue that may need to be replaced within a five year period. Manager B was advised of the diagnosis and continued to '*performance manage*' Manager A.

Over the next six weeks Manager A had a number of periods of absence from the workplace and underwent open heart surgery in late March 2010. Manager A returned to the workplace in June 2010.

In August Manager B resumed the '*performance management*' of Manager A although Manager B agreed (document signed by Manager B) that Manager A had improved one area subject of the '*performance management*'. Arguably the second area was outside Manager's A's control and could never be improved to the level required by Manager B.

In September Manager A had a breakdown, was admitted to hospital and went on sick leave. On returning to work, Manager B continued to '*performance manage*' Manager A who had a more severe breakdown in October 2010.

In December 2010 the Company contracted a return to work provider to oversee the return to work process of Manager A. In pre return to work meetings, Manager A made a formal complaint regarding Manager B. Manager A also requested controls be put in place to ensure his safety, health and well being from further bullying by Manager B. These controls were rejected. A number of worker's compensation

medical certificates and the worker's compensation application form had been submitted since 31st October 2010; but these documents were not considered relevant by the Company.

June 2011 Manager A returned to work. At this time Manager A discovered that no action had been taken regarding the matters subject of the *'performance management'* and that a senior employee had not accurately transcribed the NSW WorkCover Medical Certificate return to work arrangements onto company documents. The senior employee reported to Manager B - as did all on site managers including human resources and health and safety. Manager A suffered another break down. The matter was reported to NSW WorkCover.

In August 2011 as a result of the written complaint the Company conducted a review of Manager A's allegation of bullying by Manager B. The Company stopped interviewing Manager A before Manager A could complete his evidence, which included producing documents. The Company found that there was no evidence (including documents, emails and medical certificates) to support Manager A's allegation.

Manager A appealed against the findings and submitted the documents including medical certificates indicating that the medical issue *'adjustment disorder'* occurred due to *'harassment in the workplace'*. Manager A's appeal was dismissed by the Company. No investigation report was provided to Manager A.

Manager A's employment was subsequently terminated by the Company on 31st January 2012 using the previously irrelevant medical certificates to support the termination. The matter is currently before the NSW Worker's Compensation Commission.

2. Role of workplace culture:

described organisational culture as *"the way we do things around here; the way we make decisions around here."* Hopkins also quoted Edward Schein as saying *"Leaders create culture by what they pay attention too, comment on, measure, control and reward"*.

These descriptors are very important as they highlight a number of existing workplace dichotomies. Workplaces are based on the closed system machine paradigm. Plant, equipment, premises and finances can be measured, quantified and to a degree controlled. Workplaces are focused on inputs, processes and outputs. People are qualitative by nature and are not easily measured or controlled. This is the basic Man v Machine paradigm.

Another workplace contradiction is that health and safety legislation is the only legislation enacted that directs an organisation and employees to protect an asset class; people.

In fact one can argue that the current health and safety legislation identifies people as the primary workplace asset. Yet every workplace ledger records people in the expenditure column and not the capital column. Employees are, after all, profit generators and should be viewed as assets. Governments direct employers to treat people well yet basic management systems (government and non-government) do not reflect that attitude. Processes and profits are viewed as more important than people.

¹ Safety Institute of Australia (2012) *'Body of Knowledge'*; Chapter 10 *'The Organisation'* (p.13)

Finally, human error; we all make mistakes, we are all less situationally aware at times than other times. Human error shouldn't be a surprise. Error is built into our workplaces by the people that design, construct, manufacture plant and operate machinery, administrate, manage and populate workplace systems. Yet employers are always surprised and ready to blame employees for workplace errors - another very human quality.

Comment:

- A. Move people to the capital (asset) side of the business ledger.
- B. Change management culture by redesigning management learning programs to reflect the importance of people as an asset including health, safety and wellbeing subjects.
- C. Accept human error as being endemic and the hunt for human error as being systemic (Reasons 'Swiss Cheese' model), iterative and blameless.

3. Adequacy of existing education & support services:

If you know where to look there is sufficient educational material on bullying; however if you are suffering from the effects of bullying you may not be able to adequately source that material. There are no support services except those that exist as part of medical treatments. By that time the victim is usually severely impacted by an event.

One issue that anecdotally appears to be a common issue is that many victims of bullying did not expect the bullying event to have the impact on them that it subsequently did. The 'It can't happen to me' syndrome.'

I note there are some 'bullying' styled victims websites operated by individuals who could attract victims of workplace bullying (<http://www.know-bull.com/kbcorporate.html>) I am unaware if these sites are sponsored by Government agencies, the quality of the information they provide or the sources for that information.

In fact workplace violence is like a statistical black hole. The descriptors in the worker's compensation statistics do not adequately capture any level of workplace violence including bullying.

Comment:

- A. Provide Government support for a National 'bullying' web based and telephone service similar to that of 'Black Dog'. It should be noted that while 'Black Dog' is well advertised; the bullying victim in this matter had difficulty accepting that they had suffered a psychological injury and therefore did not adequately grasp the connection between depression and the workplace incident.
- B. If outsourced the service should have standards that are audited by a Regulator.
- C. The site can act as an interface between victims and regulators as well as an anonymous survey data collection site.
- D. Change the worker's compensation statistics to include descriptors relating to various levels of workplace violence including bullying.

4. Regulators response:

Under the NSW Occupational Health & Safety Act 2001 this matter was a 'serious incident' as it involved a workplace event that led to open heart surgery and a further two hospitalisations. The NSW WorkCover Regulator did not respond to this complaint by conducting an active, timely and thorough investigation. The Regulator adopted a 'check list' approach to bullying allowing the Company to investigate and report on itself; without validating those results. The victim was not interviewed by the Regulator and it is only in June 2012 that the Regulator, after some prompting, is apparently moving towards an investigative response. The depth, consistency and timeliness of the Regulators response is questionable.

In this matter '*performance management*' has been used by the employer as a euphemism for bullying. This is because the Regulator does not appear to actively investigate bullying complaints where the subject relates to 'reasonable management' action in the form of performance management.

It should never be considered 'reasonable management' action to knowingly subject a person suffering from a diagnosed heart condition that required open heart surgery to bullying under the guise of performance management. Especially as the very issue(s) subject of the performance management may have resulted from the medical condition. Given the medical condition was undiagnosed even though Manager A had exhibited signs of ill health; one would think that a reasonable person would stop the '*performance management*' after the diagnosis in an effort to avoid additional stressors.

It stands as a testament to the current system, that the '*performance management*' was allowed to continue by the employer and was not actioned appropriately by the Regulator when first reported. In fact the employer and Regulator have tacitly sanctioned Manager B's actions by their lack of response. The available evidence indicates that while Manager A was on sick report from October 2010 to his dismissal in January 2012, no one else in the factory addressed the issues subject of the '*performance management*' - a period of 15 months.

One explanation for lack of Regulatory response may be found in the resources available to WorkCover Investigators. In NSW there are 15,000 Police addressing a population of about 6 Million. About 3 Million people in NSW work and their needs are met by about 450 WorkCover Investigators.

Governments and their Regulators should lead from the top and by their example show others that bullying will not be tolerated. Given the complaints within the Commonwealth Public Service, about Politicians and within Regulatory agencies by their employees this is not happening.

Comment:

- A. Review the bullying complaint handling processes of NSW WorkCover to avoid repeat incidents.
- B. Provide adequate resources for investigators.
- C. Provide support for victims.
- D. Begin a bullying education program for politicians and public service senior management to promote a bullying reduction program – '*Let's Walk the Talk*'.

5. Workplace bullying deterrents:

There are sufficient criminal sanctions currently in the Statutes to act effectively as a deterrent. These deterrents are not effective as they are not being applied. I am unaware of any corporate executive that has been convicted and sentenced to a term of imprisonment.

Earlier I described workplace contradictions that while problematic send mixed messages to Senior Executives. Another is what I call the 'Sgt Schultz' defence. Civil litigation is based on 'knowledge' - without knowledge, one cannot foresee. Being unable to foresee leaves one unable to take reasonable action to prevent. Senior Executives build a shield of managers, consultants and contractors to protect them from 'knowing'. The current Work Health & Safety Act 2011 is due diligence based and therefore it would seem that by 'not knowing' Senior Executives are admitting a lack of 'due diligence'. This view has not been tested judicially.

In NSW, hearings relating to offences under this legislation are now heard in criminal courts, with a civil onus of proof. NSW WorkCover prosecutors and investigators seem ill equipped to effectively manage this change of venue and onus of proof. In fact it can be argued that health and safety offences under the harmonisation process effectively establish a new class of white collar criminal offences.

Law enforcement agencies are well equipped to investigate and prosecute criminal offences whose outcomes may extend into civil jurisdictions or be subject of Government inquiry. Fraud offences are a real example of white collar crimes which are prosecuted 'beyond reasonable doubt' by Police to a much higher standard than one set by the civil onus.

Given the current financial situation, costs associated with WorkCover Investigations could be levied against an employer, whether or not a conviction is recorded. This may be another way to drive health safety and wellbeing programs at the coalface without resorting to litigation. Research has shown that safe systems of work are cost effective, reduce insurance costs and increase productivity. Therefore the target of this service, the employer, will ultimately benefit from any investigative corrective action.

Naturally it would only be fair that people making complaints that were without substance or malicious in nature should have to pay investigative costs.

Comment:

- A. Institute a new criminal category for white collar crime called 'Work Health & Safety' crimes.
- B. Transfer the NSW WorkCover Inspectorate personnel and their duties and budget to the NSW Police.
- C. Augment NSW WorkCover Inspectors experience within the new white collar criminal investigation unit that targets workplace fatalities and serious injuries resulting from workplace health safety and wellbeing failures.
- D. Adequately resource the unit by providing additional training to those NSW Police involved as well funding. The unit should have strong connections to NSW WorkCover but remain under the direction of the NSW Police.

- E. Prosecution could be aligned to current criminal prosecution pathways established with the NSW Police and the Director of Public Prosecutions.
- F. NSW WorkCover should establish a mediation unit based on the NSW Department of Fair Trading's - Consumer Trader and Tenancy Tribunal that can review other health and safety complaints that do not result in fatality or serious injury. Such a review may result in the issue of a fine or improvement notice to employers.
- G. Establish an employer user pay system to defer Government costs associated with WorkCover Investigations.

6. Conclusion:

My experience is that health safety and wellbeing issues arise primarily due to a breakdown in communication. That is, human communication; policies, procedures, training, supervision and non-human communication; the workplace environment and the operation of plant and equipment in that environment.

As bullying involves human communication failures one must consider the failings in the workplace administrative system as part of a larger systemic problem. Naturally, outside the workplace those procedural communication failings can be amplified by the Regulator and/or the will of Politicians.