



Equal Opportunity Commission

**EQUAL OPPORTUNITY COMMISSION
OF WESTERN AUSTRALIA**

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

8 AUGUST 2012

HOUSE STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT
INQUIRY INTO WORKPLACE BULLYING

The Western Australian Commissioner for Equal Opportunity is empowered under the *Equal Opportunity Act 1984* (the Act) to investigate complaints of unlawful discrimination and, where possible, attempt to conciliate them. If a complaint cannot be conciliated, or is dismissed by the Commissioner as misconceived or lacking in substance, it can be referred to the State Administrative Tribunal for determination. Many discrimination complaints contain allegations of what might commonly be described as workplace bullying, where the bullying is causally connected with one or more of grounds of discrimination recognised under the Act, for example, sex, race, or impairment. That is, if a person alleges that he or she is being bullied on the ground of ethnicity, for example, then the Commissioner can commence an investigation. Absent that critical nexus, the Commissioner has no jurisdiction under the Act to accept a bullying complaint.

In 2006, the Commissioner commenced a review of the Act, the first such review since its enactment in 1985. Included in the terms of reference was the question as to whether the Act should incorporate new grounds of discrimination, as well as a remedy for workplace bullying. The reason for including bullying in the terms of reference was because the Commissioner had for many years been receiving a substantial number of enquiries from people complaining about workplace bullying. As these complaints could not be investigated by the Commission, the enquirers were referred to other agencies, usually WorkSafe WA, which regulates occupational health and safety in the workplace.

The frequency of such enquiries was noted, as was the lack of any legal avenue of redress for individuals seeking a civil remedy for bullying. The review took submissions, and a report was released in May 2007.¹ It was noted that there was broad support for bullying as a ground under the Act, particularly from unions and organisations representing employees of CALD and Aboriginal backgrounds. It was submitted that the inclusion of such a ground would provide employees with access to the Commission's

¹ *Review of the Equal Opportunity Act 1984*, May 2007 – eoc.wa.gov.au/publications/reviewsandreports

investigation and conciliation functions, and a remedy for proven acts of bullying and victimization.² The report recommended that bullying be included as a ground. This has yet to occur.

The Inquiry's terms of reference are addressed below.

- **The prevalence of workplace bullying in Australia and the experience of victims of workplace bullying.**

Although the Act does not include bullying as one of its grounds of unlawful discrimination, the Commission receives and records bullying enquiries from the public and the number of these enquiries is significant.

In 2011-12 the Commission received 111 bullying enquiries. Ninety two of these were about bullying in the workplace and most were from people who felt they had been discriminated against and were calling as potential complainants. A further 1173 enquiries involved alleged discrimination or harassment on the grounds of sex, race and impairment and invariably contained elements of workplace bullying.

Bullying is the fourth most commonly enquired about workplace issue behind impairment discrimination, race discrimination and sexual harassment. These statistics are the tip of the iceberg when it comes to the prevalence of workplace bullying in Western Australia.

The Commission's enquiry officers continue to hear concerning reports from those who call our enquiries line looking for assistance or some form of remedy to a bullying situation. The following is a report of bullying enquiry taken by a Commission officer:

A man working in an organisation in the Kimberley described a bullying culture which was exacerbated by the manager. Many members of staff have taken time off on stress leave and this man is one of them. The man's workload and responsibility was increased, however when he asked for a pay increase to compensate for this, it wasn't paid. The fact that he confronted his manager to ask for the pay increase as well as his increased workload and responsibility made the working environment highly stressful

² Ibid, at 14-15

and he had to take extended leave from work. He no longer has money to pay his rent and now has to shift his family to another location.

- **The role of workplace cultures in preventing and responding to bullying and the capacity for workplace-based policies and procedures to influence the incidence and seriousness of workplace bullying.**
- **The adequacy of existing education and support services to prevent and respond to workplace bullying and whether there are further opportunities to raise awareness of workplace bullying such as community forums.**

In response to the increasing level of concern about workplace bullying, most of the Commission's education and training courses include a component of approximately 10 per cent which addresses the issue of bullying.

In the financial year 2011-2012, 97 training sessions involving courses with a bullying component were held, with 98.4% of participants responding in evaluation feedback that they will be able to apply what they have learned from the course at work and in their daily life.

Ninety eight per cent of participants also said the support materials provided in training sessions i.e. brochures, guidelines, manuals would be useful in their work.

These figures indicate that training and support services are an effective way to respond to discrimination, harassment and bullying in the workplace. However, without the inclusion of bullying as a ground under the Act it is difficult for the Commission's Training and Education section to develop a specialized workplace bullying course or to address bullying issues in its community outreach activities.

Anecdotally, Commission trainers have reported that in these training sessions the majority of participants thought bullying was part of the Act and were surprised to learn that it was not.

Trainers have also reported that many organizations enquiring about training request that a bullying or workplace culture component be included in the course.

As a way of addressing bullying as part of a workplace culture, the Community Education and Training section has recently developed a new course *Developing and Maintaining a Positive Workplace Culture*, which aims to teach participants to identify elements of toxic workplaces and provides examples of the impacts of a negative workplace culture on organizations and individuals. The course also helps participants identify strategies to deal with a toxic workplace.

As a course focused on workplace culture, it has strong links to workplace bullying. The EOC held the first session for this course in May 2012, which was well attended by 16 people who gave positive feedback. As requested, it will run two more courses in September 2012 during the Community Education regional visit to Carnarvon and Geraldton.

This course has attracted unprecedented attention from employers such that 10 courses will be run for individual organizations during August 2012. This indicates a significant level of concern about negative workplace culture.

- ***Whether there are regulatory, administrative or cross-jurisdictional and international legal and policy gaps that should be addressed in the interests of enhancing protection against and providing an early response to workplace bullying, including through appropriate complaint mechanisms***
- ***Whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying***

There is no uniform regulatory or policy approach to bullying in the workplace in Australia. Each state and territory, as well as the Commonwealth, has passed laws addressing workplace health and safety, workers compensation, and discrimination, all of which are broad enough to encompass claims of bullying within their respective jurisdictions. At the Commonwealth level, the *Fair Work Act 2009* (FWA) allows an employee to lodge an adverse action or unfair dismissal application against an employer in connection with the exercise of a workplace right, for example, the right to

be protected from bullying under a State occupational health and safety law.³ The emphasis of the FWA, however, is on the employer's adverse response to asserting the workplace right, not on the bullying itself.

In Western Australia, the workplace safety regulator, WorkSafe WA, promotes policies and procedures that enable employers and employees to identify, prevent, and report workplace hazards, including bullying. WorkSafe defines bullying as "*repeated, unreasonable or inappropriate behaviour directed towards a worker, or a group of workers, that creates a risk to health and safety.*"⁴ WorkSafe can investigate reported allegations of bullying and, if necessary, issue an improvement notice to an employer under the *Occupational Safety and Health Act 1984* (OSH Act). The notice may require the employer to improve systems for preventing bullying in the workplace, or improve reporting and investigation procedures, however, WorkSafe inspectors cannot mediate disputes or inquire into the specifics of the allegations other than to ensure that the employer is complying with its statutory obligations. Although the OSH Act does provide for criminal penalties and other sanctions for breaches of occupational safety and health obligations, neither the Act nor its regulations⁵ actually refer to bullying, despite WorkSafe's recognition of it as a workplace issue. It appears that bullying is not a concept that easily fits within the current Australian occupational safety and health regulatory regimes, which continue to be directed towards regulating physical hazards.

In September 2011, amendments to the Victorian *Crimes Act 1958* that expand the definition of the offence of 'stalking' to include conduct that would otherwise constitute bullying, commenced operation.⁶ The offence now includes making threats to the victim, using abusive or offensive words to or in the presence of the victim, and performing abusive or offensive acts in the presence of the victim. The amendments were in response to the case of Brodie Panlock, a teenage girl who was driven to suicide as a consequence of persistent bullying and mistreatment by her employers. The offence applies to those doing the stalking, not to employers. Criminal penalties of up to 10

³ *Fair Work Act 2009*, Parts 3-1 General Protections and 3-2 Unfair Dismissal

⁴ commerce.wa.gov.au/content/safety_topics/bullying

⁵ *Occupational Safety and Health Regulations 1996*

⁶ *Crimes Amendment (Bullying) Act 2011, amending section 21A of the Crimes Act 1958*

years imprisonment apply to convicted offenders. A victim of stalking may also apply under the *Stalking Intervention Orders Act 2008* for an intervention order before any charge or conviction is rendered.

The amendments to the Victorian *Crimes Act* were an understandable response to a tragic set of circumstances. However, a victim of stalking in the workplace is still required to lodge a complaint with the police or to go to court to seek an intervention order, and the prosecution must prove its case beyond reasonable doubt in order to get a conviction. As such, although making bullying behaviour a criminal offence may provide a further avenue of redress for victims of bullying, its effectiveness remains to be seen. The higher standard of proof required in the criminal justice system, requiring the intervention of the courts or the police, may not translate well to the workplace environment. In the Commission's view, criminal sanctions alone are unlikely to be an adequate deterrent against workplace bullying.

Ideally, each Australian jurisdiction should have a dual mechanism for dealing with complaints of bullying, in much the same way that complaints of discrimination are handled now. In addition to the existing regulatory framework, with its emphasis on education and prevention, there should also be a process by which aggrieved individuals can seek a civil remedy for loss and damage brought about by bullying, both against individuals and employers. In other words, the prevention measures need to be complimented by deterrent and liability measures.

Under the discrimination model, a complaint is lodged with the investigating body, which, in addition to carrying out coercive investigating functions, attempts to bring the parties together and achieve a settlement through conciliation. Those complaints that cannot be conciliated may be referred to the specialist tribunal in the particular jurisdiction or, in the case of the Commonwealth, to the Federal Magistrates Court. Both at the conciliation and the tribunal stage, outcomes can include compensation, an apology, and an agreement to make good the damage done by the discrimination. The emphasis of the discrimination model has been on relative informality, low cost, and confidentiality. Whilst there is always room for improvement, the model has been an

effective and enduring method of resolving discrimination complaints in Australia for over 30 years.

The downside of the discrimination model is that it is not uniform across all the Australian jurisdictions, in respect to grounds of discrimination, areas of life, remedies, and the complaint process. Ideally, discrimination laws and procedures should be uniform across the country, with the States, Territories, and the Commonwealth agreeing on the preferred model. However, in relation to bullying, the opportunity is there for the Commonwealth to take on a major role by proposing that all the Australian jurisdictions develop a uniform legislative model for redressing harm done by workplace bullying, which could also include uniform investigation and conciliation procedures, to be inserted into existing statutes, for example, the *Equal Opportunity Act 1984* or the *Fair Work Act 2009*, or contained in stand-alone legislation. Either way, given that there is now widespread acceptance of the prevalence of workplace bullying, and the damage done by it, the States, Territories, and the Commonwealth need to deliver a bold and innovative legislative response.

- **The most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another**

Without the inclusion of bullying as a ground under the Act people cannot seek the remedies available within the Commission for workplace bullying incidents.

Where complaints of discrimination and harassment are within jurisdiction, the Commission has found the complaint handling process to be an effective means of resolving these issues with cases being finalized within an average time of four and a half months.

The Commission has also found education and training to be an effective way of helping people understand discrimination and harassment to hopefully prevent an incident or complaint from occurring.