

SUBMISSION TO SAFEWORK AUSTRALIA ON THE NATIONAL MODEL WORK HEALTH AND SAFETY ACT, REGULATIONS AND CODES OF PRACTICE

Background

1. This submission has been prepared by the Employment Law Centre of WA (Inc) (**ELC**). ELC is a not-for-profit community legal centre which specialises in employment law. It is the only free service in Western Australia offering legal advice, representation, advocacy and assistance in relation to employment law. Each year ELC provides advice and assistance to approximately 5000 vulnerable non-unionised employees in Western Australia.
2. SafeWork Australia has asked for public comment on the national model Work Health and Safety Regulations and Codes of Practice as proposed by the Commonwealth Government. These regulations and codes cover a wide range of workplace health and safety issues but notably do not provide any remedy for employees who are bullied in the workplace.
3. In Richard Hooker's 2006 review of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**), bullying and related stress were identified as an area of concern by many of the submissions to that review. It also noted that there were limited means to minimise those hazards and ensure that employers are accountable for the health and safety of their employees.

Summary

4. ELC considers that the issue of workplace bullying is a significant occupational safety and health risk. Bullying adversely affects a huge number of employees each year.
5. In its March 2010 report entitled *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*¹, the Productivity Commission stated that the cost to the economy as a result of work-related stress was close to \$15 billion each year.
6. ELC proposes legislative reform to ensure that there is appropriate recourse for those who suffer from bullying in the workplace.

Existing legislative schemes

Western Australia's legislative scheme

7. Currently, there is limited employee protection against workplace bullying in the Western Australian occupational safety and health (**OSH**) legislative scheme. In 2006, following the Laing review in 2002, a '*Violence, Aggression and Bullying at Work*' Code of Practice (**Code**) was introduced by the then Department of Consumer and Employment Protection. The Code outlined methods that employers could use to minimise or resolve bullying in the workplace. The only external method of resolution proposed in the Code was to request that WorkSafe WA conduct an investigation.

¹ Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*, 6 April 2010, accessed at <http://www.pc.gov.au/projects/study/regulationbenchmarking/ohs/report> on 22 March 2011.

Legislative issues with this scheme

8. The Code outlines that the role of an inspector is to determine whether all parties have met their obligations under the OSH Act. The inspector may not mediate between parties, nor may he or she become involved in the specific details of the alleged bullying activity.
9. Remedies that can be offered as part of an investigation are limited to:
 - verbal advice by the inspector; and/or
 - improvement or prohibition notices being issued.
10. These remedies do not offer any compensation to the employee who has been the subject of workplace bullying, nor do they penalise the responsible employer. Further, there is no avenue for mediation or conciliation. It has been ELC's experience that bullying issues are rarely resolved through investigation and will in some cases worsen as a result of the investigation occurring.
11. According to WorkSafe WA's website, each year in Western Australia an average of 600 workers' compensation claims are lodged for time off arising from workplace violence and bullying.
12. ELC understands that WorkSafe WA has not successfully prosecuted any employers on the basis of workplace bullying.

Practical issues with this scheme

13. In some circumstances, employees who suffer from workplace bullying may be able to access a remedy. An employee who is bullied on account of a protected characteristic under the *Equal Opportunity Act 1984* (WA) may bring a claim with the Equal Opportunity Commission. An employee who suffers from workplace bullying on the basis of having or exercising a workplace right may bring a claim with either Fair Work Australia or, in the case of employees in the state employment system, where termination of employment results, with the Western Australian Industrial Relations Commission. An employee who suffers from physical or sexual assault in the course of workplace bullying may report the matter to the police and consider pressing criminal charges.
14. However, many employees who suffer from workplace bullying do not fall into any of these categories. These employees are unable to bring any statutory claim against their employer or the employee who has perpetrated the bullying. They are effectively left with no means of redress.

Interstate comparisons

South Australia

15. The *Occupational Health, Safety and Welfare Act 1986* (SA) provides a definition in s 55A of workplace bullying, a list of exclusions from that definition and also the potential avenues an employee or employer may pursue to remedy workplace bullying.
16. This section includes the right to conciliation or mediation between parties, and also provides the Industrial Commission with the right to attempt to resolve the matter "as [it] sees fit".²
17. Section 55A is annexed to this submission.

² Section 55A(6).

18. ELC submits that a similar section should be included in the model work health and safety legislation.

Victoria

19. Section 21 of the *Occupational Health and Safety Act 2004* (Vic) states that “an employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health”.
20. In February 2010, WorkSafe Victoria successfully prosecuted MAP Foundation Pty Ltd (**MAP**), a director and three employees in relation to the severe bullying of an employee which resulted in her committing suicide. MAP was fined \$335,000.
21. In 2004, WorkSafe Victoria successfully prosecuted an employee for bullying, and his employer, Radio Ballarat Pty Ltd. Radio Ballarat Pty Ltd was fined \$50,000 and made an undertaking to broadcast 240 radio advertisements promoting occupational health and safety issues.
22. Several employees have been prosecuted for bullying and harassment by WorkSafe Victoria under s25 of the Victorian legislation. There have also been several successful prosecutions of employers for bullying and harassment prior to the most recent occupational health and safety legislation coming into effect in 2004.
23. There is no provision for conciliation or mediation in the Victorian legislation.

New South Wales

24. In May 2004, a case in the Industrial Magistrates Court of NSW saw the WorkCover Authority successfully prosecute an employer for failing to take all practical steps to prevent bullying conduct. This case provided an important precedent for instances of workplace bullying involving a lack of training for, and supervision of, employees, resulting in bullying.

Queensland

25. The Queensland legislative scheme is constructed in similar terms to the WA and NSW legislative schemes – however, like WA, there has not been the common law development that there has been in NSW whereby large penalties can be awarded against an employer who allows bullying conduct.

The experience of ELC’s clients

26. ELC submits that its clients who suffer from workplace bullying are generally more adversely affected when contacting ELC than clients who experience other issues. The long-term effects on employees who suffer from bullying seem to be more severe than employees whose workplace issues do not include bullying.

Client case study

27. ELC was approached in January 2011 by a client, C, who had been bullied at work. C had been employed by company Z in February 2007 as a part time sales assistant. Two of the managers employed by Z began to gang up on C, calling him “Betty the Tranny” and forcing him to wear a name badge labelled with ‘Betty’ rather than his real name. They also started to make offensive remarks about his weight, and frequently implied that he was homosexual and made derogatory remarks about his perceived sexuality. A manager exposed himself to C on more than one occasion.
28. C contacted ELC seeking advice on his situation. At the time that he contacted ELC, C was suffering from depression and told ELC that his “life has been destroyed”.

29. C's case demonstrates the long-term effect that continuous bullying in the workplace can have on an employee. C has removed himself from social networking mediums (such as Facebook) to try and limit his interaction with the perpetrators of the bullying and is currently pursuing legal action against company Z. However, the fact that he is now medicated for depression which he believes was instigated by the bullying demonstrates the impact it has had on his long-term mental health.

ELC client statistics

30. The number of clients who contact ELC with bullying issues has increased exponentially over the past two years:
- between 1 January and 30 June 2009, 90 callers contacted ELC with workplace bullying issues;
 - between 1 July and 31 December 2009, 180 callers contacted ELC with workplace bullying issues;
 - between 1 January and 30 June 2010, 224 callers contacted ELC with workplace bullying issues; and
 - between 1 July and 31 December 2010, 336 callers contacted ELC with workplace bullying issues.

Recommended legislative reform

31. It is ELC's view that the national harmonisation of occupational safety and health legislation should include reforms relating to workplace bullying. ELC considers that the following reforms should be contemplated by Safe Work Australia when drafting the final national Work Health and Safety (**WHS**) Act, Regulations and Codes of Practice.

Statutory remedies for employees subject to workplace bullying

32. ELC considers that the national WHS Act should include provisions outlining remedies available to employees who suffer from workplace bullying.
33. ELC submits that these provisions should allow for remedies including but not limited to:
- compensation for employees who are subject to workplace bullying;
 - penalty provisions for employers and those responsible for workplace bullying; and
 - provisions allowing an employee to apply to the regulating authority for a pecuniary penalty to be paid to the employee or other organisation as the employee sees fit.

Legislative entrenchment of "workplace bullying" definition

34. ELC notes that the current model legislation defines health to include physical and psychological health. In ELC's view, this offers insufficient protection for employees.
35. Section 55A of the *Occupational Health, Safety and Welfare Act 1986* (SA) provides a comprehensive definition of workplace bullying as well as a legislative right to refer the matter to the Industrial Commission. This definition encompasses most, if not all, instances of workplace bullying and ELC recommends that such a definition be included in the national WHS Act or the accompanying Regulations.

Expanded powers of the Occupational Safety and Health Tribunal (OSH Tribunal)

36. The powers of the OSH Tribunal should be expanded to adequately assist an employee subjected to workplace bullying. Conciliation should be an option made available at the outset.
37. A conciliating function by an external party would be valuable to an aggrieved employee. ELC is often contacted by employees who feel they are being bullied by superiors who “have the ear” of management (or who constitute the management itself) and as such feel that an internal mediation process will not assist. To address this issue, the OSH Tribunal should have extended powers to conciliate and resolve alleged bullying.
38. Aside from its powers to enforce the obligations of parties under the WHS Act, the OSH Tribunal should also have the power to make specific orders for incidents of bullying including:
 - ordering a person to do, or refrain from doing something;
 - ordering specified arrangements to deal with bullying;
 - ordering a person to complete a course relevant to bullying (at the person’s expense); and
 - making a declaration that the person has engaged in bullying.

Conclusion

39. ELC submits that the existing occupational safety and health legislative schemes, both within Western Australia and at a national level, offer inadequate protection in relation to workplace bullying. The national harmonisation of occupational safety and health laws provides the federal government the opportunity to rectify this significant issue which impacts so adversely on Australian employees and workplaces.

Annexure: Section 55A of the Occupational Health, Safety and Welfare Act 1986 (SA)

55A—Inappropriate behaviour towards an employee

(1) For the purposes of this section, bullying is behaviour—

(a) that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and

(b) that creates a risk to health or safety.

(2) However, bullying does not include—

(a) reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee; or

(b) a decision by an employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with an employee's employment; or

(c) reasonable administrative action taken in a reasonable manner by an employer in connection with an employee's employment; or

(d) reasonable action taken in a reasonable manner under an Act affecting an employee.

(3) If—

(a) an inspector receives a complaint from an employee that he or she is being bullied or abused at work; and

(b) the inspector, after an investigation of the matter, has reason to believe that the matter is capable of resolution under this section,

the inspector may—

(c) take reasonable steps to resolve the matter between the parties himself or herself; and

(d) if the matter remains unresolved after taking the steps required under paragraph (c), after consultation with the parties, refer the matter to the Industrial Commission for conciliation or mediation.

(4) A reference under subsection (3) will be made by written instrument that complies with any prescribed requirements.

(5) The inspector must ensure that the parties are furnished with a copy of any reference under subsection (3).

(6) If a matter is referred to the Industrial Commission under subsection (3), the Industrial Commission must attempt to resolve the matter by—

(a) conciliation; or

(b) mediation,

as the Industrial Commission thinks fit.

(7) For the purposes of this section—

(a) conciliation is a process where the parties meet with the conciliator with a view to the conciliator identifying the issues and resolving the matter by making recommendations if the matter is not settled by agreement; and

(b) mediation is a process where the mediator seeks to resolve the matter by facilitating an amicable agreement between the parties.

(8) The Industrial Commission must seek to commence any conciliation or mediation within 5 business days after the matter is referred to the Industrial Commission under this section.

(9) For the purposes of any conciliation or mediation, the Industrial Commission may (subject to subsection (10))—

(a) interview the parties separately or together; and

(b) inform itself in any other way as it thinks fit.

(10) The person undertaking a conciliation or mediation must—

(a) at the request of a party, attend at a workplace (on at least 1 occasion) for the purposes of the conciliation or mediation;

(b) deal with the matter with a minimum of formality.

(11) For the purposes of any conciliation, the conciliator may call a compulsory conference of the parties.

(12) The Industrial Commission may at any time bring any conciliation or mediation to an end if the Industrial Commission considers that the conciliation or mediation will not result in the resolution of the matter.

(13) Subject to subsection (14), nothing said or done in any conciliation or mediation under this section may subsequently be given in evidence without the consent of the parties to the conciliation or mediation.

(14) The terms of any agreement between the parties to any conciliation or mediation may be given in evidence in subsequent proceedings (without the restriction imposed by subsection (13)).

(15) The Industrial Commission must inform the Department when any conciliation or mediation under this section is concluded or brought to an end.

(16) The Industrial Commission and the Department may consult from time to time about the processes and arrangements that should apply under this section, and prepare and publish information and guidelines to assist persons who may become involved in conciliation or mediation under this section.

(17) The President of the Industrial Commission may make rules relating to—

(a) representation before the Industrial Commission in connection with the operation of this section; or

(b) the conduct of the parties to a conciliation or mediation under this section; or

(c) any other matter that, in the opinion of the President, is necessary or convenient for the purposes of any conciliation or mediation under this section.