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A review of workplace bullying protections conducted by the House of Representatives Standing Committee on Education and Employment

Introduction

Justitia is a law firm based in Melbourne that works in the area of workplace relations. We provide advice to employers in relation to industrial relations, employment, workplace safety and discrimination legal matters. Due to the reputation of the firm for having experienced and reliable investigators, the firm is frequently retained to advise about, or conduct investigations into, bullying and misconduct.

Justitia is therefore in a unique position to be able to comment on the issues being considered in this review, the increase of bullying complaints in Australian workplaces and the way these are commonly dealt with by organisations.

Preliminary observations

It is worth making a number of preliminary observations before we make more specific comments.

1. Our firm has seen the number of complaints of bullying in the workplace increase significantly over the last few years. We have also accordingly experienced a large increase in our

investigation, in the last three years in particular. The majority of allegations we are asked to investigate involve bullying.

2. There was recent media coverage of Victoria's Worksafe statistics which said that the number of bullying claims made to Worksafe in the previous year rose from 3000 to 6000. We note that these are just the complaints brought to Worksafe. Many more are raised within organisations and dealt with by them.
3. Worksafe have publicly stated for the past financial year that more than 2/3 of those complaints made to them were investigated and found not to be substantiated. Fewer than 1% were serious enough to warrant possible prosecution.
4. The Productivity Commission has estimated the annual toll on business, of productivity losses caused by bullying, to be between 6 - 36 billion dollars. Investigation costs and management time would be a part of this equation.
5. The new adverse action provisions which are part of the general protections sections of the *Fair Work Act 2009* have made organisations much more cautious about how they deal with a complaint of bullying. Often the employer will not be able to take disciplinary action until it has dealt with a complaint of bullying. To do otherwise risks an employee claim for compensation against the employer and the possibility of a penalty being imposed. Even if a complaint is vexatious, the employer will be prudent to investigate, however may expend considerable resources in doing so.

6. The written material produced by State health and safety authorities, for example in Victoria this is Worksafe, is often very user friendly and helpful for employers.
7. Most medium to large sized organisations have policies that provide guidelines about expected behaviour from employees, the meaning of bullying, how to make a complaint and how it will be dealt with by the organisation.

Further, the majority of complaint handling procedures have a multi-stage process which escalates depending on the seriousness of the complaint:

- a) seek to resolve the complaint yourself;
- b) raise it with your supervisor/manager to assist with resolution;
- c) seek mediation/conciliation;
- d) request an investigation; and
- e) there may be disciplinary consequences.

In our experience, employers are vigilant about having comprehensive policies and responsive procedures for dealing with complaints. They regularly conduct either face-to-face or electronic training on these issues. They are usually swift in dealing with complaints. Ignoring a complaint of bullying exposes employers to claims and penalties, and in our experience they know this.

8. Investigations of bullying can be conducted "in house", or outsourced to a law firm or consultant. They can be an expensive way to resolve workplace conflict and misconduct.

Specific Observations

In Victoria, most guidance in relation to the management of bullying is provided by written guides developed by Worksafe. These guides have also developed a definition of bullying. This definition broadly is based on an objective test. Were this review to consider moving to a more subjective test, for example, that the definition require an assessment of whether in all the circumstances it was reasonable for the employee to feel bullied, we would advocate against this. We believe it is better to retain an objective test, because the definition of bullying is already wide in scope, and often grey in terms of whether conduct can be interpreted as bullying. Were the definition broadened, there would be more complaints, and little certainty about what is and is not bullying.

We believe bullying should continue to be dealt with under occupational health and safety legislation, rather than in another forum, such as anti-discrimination. This is because the number of complaints currently being made to Worksafe are already prolific, and they will become more so if similar or further complaint based legislation is created. Based on our experience, employers are already dealing with many complaints of bullying, not all of them justified. To provide further avenues for lodging a complaint would in our submission be a further operational burden on employers, not to mention government agencies seeking to handle and resolve these complaints. In Victoria, Worksafe is equipped to investigate complaints, and anecdotally appears to be dealing with the serious complaints expeditiously and comprehensively.

Government guidelines concerning bullying should continue to clarify, and educate the community about what is and is not bullying. Furthermore, they must strongly advocate for alternative means of resolving a dispute where it falls short of the definition of

bullying. Employers should feel confident to deal with complaints via a variety of means, such as through mediation/conciliation or going directly into a disciplinary process. Fair Work Australia may be able to provide more guidance to employers about how to handle complaints of workplace bullying proactively. The suggestion of public forums would be of interest to employees and employers alike.

A recent article by Richard Guillet in *The Australian Magazine* on bullying quoted the National secretary of the CPSU Nadine Flood. She said that although awareness campaigns have raised the profile of bullying, they have also led many workers to erroneously believe that launching a grievance claim will somehow make their office a happier place. "*In my view, encouraging people down the legal path when there are simpler, quicker solutions doesn't do them any favours*". We agree that a more practical view needs to be taken of the issues around bullying and how they may be resolved. Employers should be able to put more emphasis on dispute resolution within their policies, and move complainants in that direction where appropriate, as the alternatives will not necessarily provide any satisfaction to any of the parties involved.

Serious bullying can often be a criminal offence, but this is not always known to the parties involved. Victoria is the first State to have legislation (through amendments to the *Crimes Act*) that specifically makes certain serious bullying acts a criminal offence. Whilst Victoria Police will inevitably be swamped with complaints, we expect they will only investigate serious complaints. It is useful to have these criminal sanctions in place, as an aide to training and policies to assist with the education of employees and employers.

Summary

In summary, we make the following suggestions:

1. definitions of bullying retain the objective test;
2. bullying continue to be dealt with within an occupation health safety framework;
3. there continue to be strong and clear guidelines about what is not bullying, and the options for dealing with bullying, including taking direct disciplinary action;
4. Fair Work Australia provide more guidance to employers about how to handle complaints of workplace bullying proactively from a disciplinary perspective;
5. employers will need to be able to place more emphasis on dispute resolution within their policies, and encourage employees with bullying complaints in that direction, where appropriate; and
6. bullying should be clearly made a criminal offence in every State.

Yours faithfully

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