

SUBMISSION TO FEDERAL PARLIAMENTARY INQUIRY INTO WORKPLACE BULLYING

September 2012

Background

1. The Employment Law Centre of WA (Inc) (**ELC**) welcomes the opportunity to make a submission to the Inquiry into Workplace Bullying (**Inquiry**) being conducted by the House of Representatives Standing Committee on Education and Employment.
2. 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 5,000 vulnerable non-unionised employees in Western Australia.
3. This submission addresses the following terms of reference:
 - the prevalence of workplace bullying in Australia and the experience of victims of workplace bullying;
 - 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; and
 - whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying.

Summary

4. ELC considers that workplace bullying is a significant occupational safety and health risk. Bullying adversely affects a large number of employees each year and the number of employees who are experiencing bullying seems to be on the increase, based on ELC's statistics.
5. Further, bullying can have a devastating effect on employees, resulting in high stress levels, anxiety, depression, loss of self-esteem, a loss of the ability to perform work, ill health, and in extreme cases, suicidal tendencies. In ELC's experience, the long-term effects of bullying are among the most severe of those associated with workplace issues.
6. 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. ELC proposes legislative reform to ensure that there is appropriate recourse for those who suffer from bullying in the workplace.

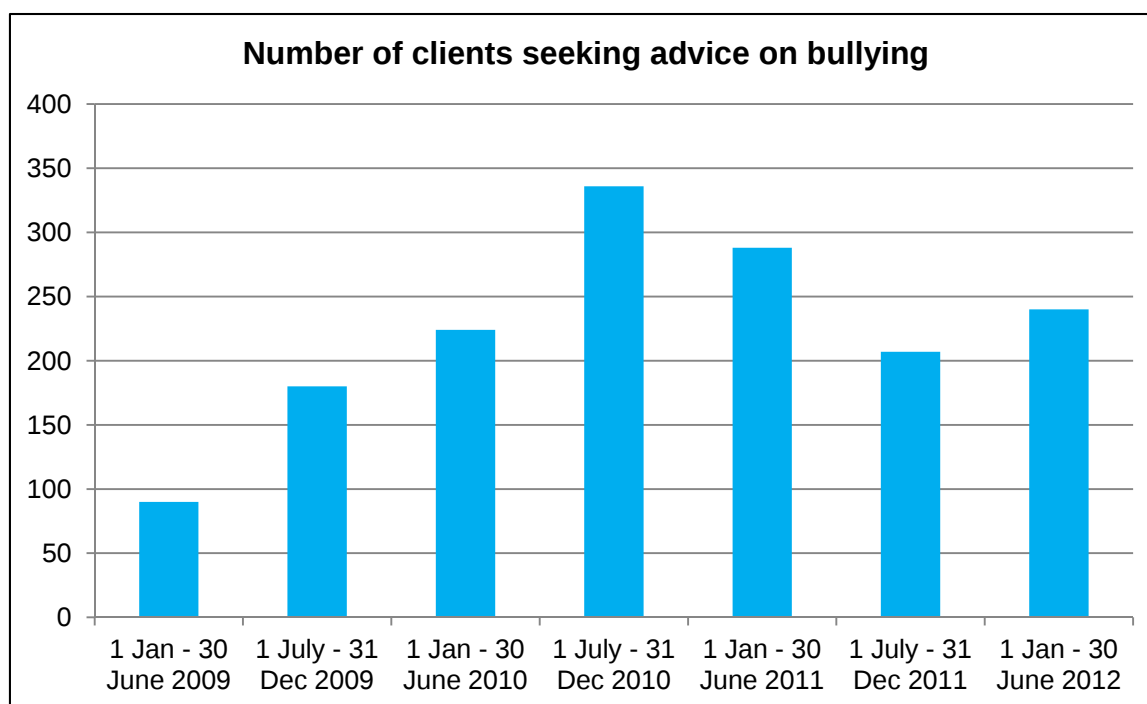
The prevalence of workplace bullying in Australia

7. 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.

8. 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.

ELC's client statistics

9. The number of clients who have contacted ELC with bullying issues has increased in recent years, as shown in the chart below:



The experience of victims of workplace bullying

10. ELC submits that its clients who suffer from workplace bullying are generally more adversely affected than clients who experience other issues. Clients suffering from bullying have reported various effects including high levels of stress, anxiety, depression, loss of self-esteem, a loss of the ability to perform work, ill health, and in extreme cases, suicidal tendencies. The long-term effects on employees who suffer from bullying also seem to be among the most severe of those associated with workplace issues. This is illustrated through ELC's case study below.

Client case study

11. 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.
12. 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 [had] been destroyed".

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.

13. C's case demonstrates the long-term effects 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 looked into his options for commencing legal action against company Z. The fact that he is now on medication for depression, which he believes was brought about by the bullying, demonstrates the impact it has had on his long-term mental health.

Regulatory and administrative gaps and whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying

Western Australia's legislative scheme

14. 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.
15. 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.
16. 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.
17. 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.
18. As noted above, WorkSafe WA's statistics indicate that each year in Western Australia an average of 600 workers' compensation claims are lodged for time off arising from workplace violence and bullying.
19. ELC understands that WorkSafe WA has not successfully prosecuted any employers on the basis of workplace bullying. In contrast, there have been several successful prosecutions for bullying in Victoria and New South Wales.
20. 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.
21. 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.

Harmonisation of occupational health and safety laws

22. The Commonwealth, State and Territory governments are currently in the process of harmonising, to a large extent at least, the occupational safety and health laws across the country. However, in ELC's view, the national model Work Health and Safety Act, Regulations and Codes of Practice proposed by Safe Work Australia do not provide adequate remedies for employees who are bullied in the workplace.
23. Several of the States, including Western Australia and South Australia, have not yet adopted the model Work Health and Safety Act, Regulations and Codes of Practice. A review is currently underway in Western Australia to examine the benefits and costs of the model Work Health and Safety regulations and codes.²

Recommended legislative reform

24. ELC considers that the existing South Australian legislation dealing with occupational health and safety issues, the *Occupational Health, Safety and Welfare Act 1986* (SA), provides a better model for dealing with workplace bullying than either the Western Australian legislation or the existing model Work Health and Safety Act and associated Regulations and Codes of Practice.
25. For instance, s 55A of the *Occupational Health, Safety and Welfare Act 1986* (SA) sets out a definition of workplace bullying, a list of exclusions from that definition and provides potential avenues an employee or employer may pursue to remedy workplace bullying.
26. 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".³ Section 55A is annexed to this submission.
27. In ELC's view, the national model Work Health and Safety Act and Regulations should be amended to provide more effective protection against workplace bullying, as set out below.

Statutory remedies for employees subject to workplace bullying

28. ELC considers that the national WHS Act should include provisions outlining remedies available to employees who suffer from workplace bullying.
29. 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

30. 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.
31. As noted above, 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,

² See http://www.marsdenjacob.com.au/cms/index.php?option=com_content&task=view&id=182, accessed 3 September 2012.

³ Section 55A(6).

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)

32. In ELC's view, 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.
33. 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.
34. 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.

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.