

**Submission
No 49**

**INQUIRY INTO ALLEGATIONS OF BULLYING IN
WORKCOVER NSW**

Organisation: Maurice Blackburn Pty Limited

Date received: 23/08/2013



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23 August 2013

Rev. The Hon. Fred Nile MLC
Committee Chair
General Purpose Standing Committee No. 1
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Dear Sir,

Enquiry into Allegations of Bullying in WorkCover NSW

I refer to your letter of 8 July 2013 inviting Maurice Blackburn Lawyers to make a submission to the Committee on this matter. Thank you for the opportunity to make the submission.

Executive Summary of Submission

1. There are significant gaps in protections against bullying for employees in New South Wales that need to be addressed by legislative reform. Those gaps impact on victims of bullying within WorkCover New South Wales. Furthermore, they are exacerbated if there is a culture of bullying within WorkCover New South Wales.

Current Protections Against Workplace Bullying

Legal avenues

2. There is no statutory scheme within New South Wales that specifically proscribes protections against bullying. New South Wales does not have specific laws that deal with workplace bullying or address it directly. However this does not mean that there are no legal remedies currently available for victims of workplace bullying. Instead of a specific statutory scheme, there are different systems of protections, some Commonwealth and some State that together form a piecemeal or adhoc approach for protection against bullying for employees in New South Wales.

Anti-bullying laws in the Fair Work Act 2009 (Cth)

3. The Commonwealth Government has recently passed legislation amending the Fair Work Act to provide an early intervention mechanism for victims of alleged bullying to seek orders to stop the bullying. The new anti-bullying provisions will commence operation on 1 January 2014. The provisions allow a victim of alleged bullying to make an Application to the Fair Work Commission ("FWC") seeking orders that the bullying stops. The definition of bullying is modelled on the definition in Safe Work

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Australia's draft bullying code and it is defined as repeated unreasonable behaviour towards a worker or a group of workers of which the worker is a member that creates a risk to health and safety. However, these particular provisions of the Fair Work Act only apply to employees of constitutional corporations and Commonwealth and Territory entities. Hence in New South Wales they will not apply to employees of partnerships, unincorporated associations, non-constitutional corporations (for example including some local councils and universities) and employees of the State Government. Hence the protections are not available to employees of WorkCover NSW.

Occupational Health and Safety legislation

4. The *NSW Work Health and Safety Act 2011* imposes a general duty to protect health and safety at work so far as is reasonably practicable. Victims of alleged workplace bullying could argue that the employer has breached the Act by failing to maintain the health and safety of the worker and such breach is generally treated as a criminal offence. However individual victims have no capacity to commence action or seek any individual remedies and must refer the matter to WorkCover NSW to investigate. In certain very limited circumstances, a Trade Union that represents the interest of a person or persons who are the victims of the alleged bullying can also seek to prosecute any such offence.
5. If WorkCover chooses not to prosecute a complaint of bullying or to take no action in relation to the bullying, there is no recourse for the individual. This is particularly problematic if WorkCover itself has a culture of bullying hence leading to a greater reluctance to commence any prosecutions for bullying.

Anti-discrimination Law

6. Employees in New South Wales have the benefit of protections from Federal anti-discrimination legislation and the New South Wales Anti-discrimination Act.
7. If workplace bullying is found to be motivated because of an attribute protected by the legislation which includes race, ethnic origin, gender, marital status, family responsibilities, physical or intellectual disability or age, then a complaint can be lodged with the Australian Human Rights Commission or Anti-discrimination Board. Hence if an employee alleges that he or she was the victim of bullying motivated by one of these attributes, they can make a complaint. However if they cannot show the bullying was motivated by possession of a protected attribute then they cannot make a complaint. The complaints must proceed through Conciliation either at the Commission or Board and if unsuccessful at Conciliation can then be referred to the Federal Court or Federal Circuit Court, (for a complaint that proceeded to the Australian Human Rights Commission) or to the NSW Administrative Decisions Tribunal (for a complaint that proceeded through the Anti-discrimination Board).
8. If a complaint proceeds to a Court or Tribunal, the complainant can seek remedies including injunctions, orders for compensation and declarations about the discrimination. The process to proceed through Conciliation and to a Court can take anywhere from 6-18 months to be resolved. There are currently significant delays at both state and federal level in dealing with these complaints.

Industrial Relations Legislation

9. There can be remedies for victims of bullying under either the Fair Work Act general protections scheme or the NSW Industrial Relations Act 1996 if the bullying is motivated by an unlawful reason.
10. The Fair Work Act prevents someone from being subject to adverse action for exercising a workplace right or engaging in lawful industrial activity. There are also specific discrimination related provisions in the Fair Work Act. Bullying could in some cases contravene the adverse action provisions in the Fair Work Act. The NSW IR Act prevents victimisation of someone who engages in industrial activity as defined in the Act.
11. These remedies under the Fair Work Act and the NSW IR Act are only accessible for employees who can prove that the bullying was motivated because of a protected attribute they possess. They are not available for bullying generally.

Other Legal Remedies

12. If an employee sustained an injury, including a psychological injury, as a result of workplace bullying, s/he can make a Workers' Compensation claim under NSW or Commonwealth Workers' Compensation legislation. However a claim cannot be made unless the employee has suffered an injury and requires treatment or time off work.
13. A Common Law negligence claim can be brought if the victim can prove a breach of duty of care by the employer and has exceeded the required permanent impairment threshold which is 15%.

Gaps in legal protections for workplace bullying

14. Aside from the anti-bullying protections that have recently been created within the Fair Work Act, all other remedies can only be pursued once harm is caused. Hence the avenues have been criticised as being too reactive, with a need to wait for an injury before the employer had taken any action. There are no early intervention and response mechanisms. Furthermore, many of the protections are attribute specific and hence cannot be pursued by an employee who can't prove that the bullying has been motivated by a prohibited reason.
15. Some positive obligations arise from employers to implement early response mechanisms as implied from their obligations under OH&S legislation to have a safe and healthy workplace environment and ensure best practice. However, these early response mechanisms are not mandatory under the legislation.
16. The difficulty with having numerous employees within New South Wales not afforded the protection of the new anti-bullying laws under the Fair Work Act is that these employees may have no early response mechanism for bullying. This in turn this will prolong their exposure to workplace bullying and result in more serious traumatisation, injury and absence from the workplace.

Recommendation

17. It is our recommendation that the NSW Government enact legislation similar to that of the Federal Government providing an early response mechanism for employees

to obtain orders to stop bullying in the workplace and that this be extended to all employees in NSW and hence including those that do not have the coverage of the new Commonwealth anti-bullying laws.

18. Thank you again for the opportunity to make this submission. We would be more than happy to speak to the submission and address any questions from the Committee.

Yours faithfully

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