

**Submission
No 76**

INQUIRY INTO EMERGENCY SERVICES AGENCIES

Organisation: Maurice Blackburn Lawyers

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The Hon Robert Borsak MLC
Committee Chair
NSW Legislative Council Portfolio Committee No. 4 – Legal Affairs
Parliament House, Macquarie Street
SYDNEY NSW 2000

By Email: portfoliocommittee4@parliament.nsw.gov.au

Dear Sir,

We refer to your email, dated 23 May 2017, inviting Maurice Blackburn Lawyers to make a submission to the Committee's Inquiry into emergency services agencies.

Thank you 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

Alex Grayson
Principal
MAURICE BLACKBURN

About Maurice Blackburn

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in employment and industrial law, personal injuries, medical negligence, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Executive Summary

There are significant gaps in protections against bullying for all employees in New South Wales that need to be addressed by legislative reform. Those gaps impact on victims of bullying, harassment, and discrimination within the public service including in emergency services agencies in New South Wales. If there is indeed a culture of bullying within New South Wales emergency services agencies, then these gaps undoubtedly exacerbate this culture.

Current Protections Against Workplace Bullying

Legal avenues

There is no statutory scheme within New South Wales that specifically makes bullying unlawful or 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 Commonwealth and State protections that together form a piecemeal or ad-hoc approach to protection against bullying for employees in New South Wales. We submit that there are significant gaps in these protections as they currently stand.

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

In 2014, the Commonwealth Government enacted legislation amending the *Fair Work Act 2009 (Cth)* ("*Fair Work Act*") to provide an early intervention mechanism for victims of alleged bullying to seek orders to stop the bullying. 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 was modelled on the definition in Safe Work 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. In New South Wales they do not apply to hundreds of thousands of employees of the State Government. Hence the protections are not available to employees of NSW emergency services.

Occupational Health and Safety legislation

The *Work Health and Safety Act 2011* (NSW) ("The Act"), 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. Such a 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 SafeWork NSW to investigate. In certain very limited circumstances, a trade union that represents the interests of a person or persons who are the victims of the alleged bullying can also seek to prosecute any such offence. If SafeWork NSW chooses not to prosecute a complaint of bullying or to take no action in relation to the bullying, there is little or no recourse for the individual.

Anti-discrimination Law

Employees in New South Wales have the benefit of protections from Federal anti-discrimination legislation and the New South Wales *Anti-Discrimination Act 1977*.

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 ("AHRC") or the Anti-Discrimination Board of NSW ("Board").

So 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 on the grounds of a protected attribute then they cannot make a complaint. The complaints must proceed through conciliation either at the AHRC 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 AHRC), or to the NSW Civil and Administrative Tribunal (for a complaint that proceeded through the Board).

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 to 18 months to be resolved. There are currently significant delays at both State and Commonwealth level in dealing with these complaints.

Industrial Relations Legislation in New South Wales

There can be remedies for victims of bullying under the *NSW Industrial Relations Act 1996*, in limited circumstances, if the bullying behaviour constituted a detriment and is motivated by an unlawful reason. These provisions are not available for bullying generally.

Other Legal Remedies

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.

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

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 or detriment is caused. These avenues may be criticised as being too reactive because an injury is required before action is taken. There are no early intervention and response mechanisms. Furthermore, many of the protections are in relation to specific attributes and cannot be pursued by an employee who is unable to prove that the bullying has been motivated because of a protected attribute.

Some positive obligations come from employers implementing early response mechanisms because of their implied 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.

The difficulty with having hundreds of thousands of employees within New South Wales not being 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 will prolong their exposure to workplace bullying and result in more serious traumatisation, injury, and absence from the workplace.

Recommendation

It is our recommendation that the NSW Government enact legislation similar to that of the Federal Government by providing an early response mechanism for employees to obtain orders to stop bullying in the workplace and that this beneficial legislation should be extended to all employees in NSW who are not currently covered by the Commonwealth anti-bullying laws. This will provide crucial protection for emergency services workers in NSW who are not currently covered by the Commonwealth anti-bullying laws.

The content of anti-bullying legislation in New South Wales

Legislation enacted by the Parliament of New South Wales ought to be similar to the anti-bullying provisions in the *Fair Work Act*, and we recommend that any such legislation contain a definition of 'bullying' and 'worker' that is similar to that in the *Fair Work Act*.

Remedies and access

It is necessary for the legislation that the Parliament of New South Wales enacts to include preventative and reactive remedies.

The anti-bullying provisions in the *Fair Work Act* do not allow the making of an order requiring payment of compensation; rather, the only available remedy is an order that the bullying stops.

Workplace bullying often has the effect of causing severe damage to a worker's health and well-being, and to the functioning of an employment relationship. In such circumstances, preventative measures can be an inadequate mechanism to remedy the damage caused by workplace bullying.

In addition, by limiting the available remedies to preventative remedies, the *Fair Work Act* anti-bullying provisions preclude workers who have suffered from workplace bullying, but are no longer employed by the employer, from accessing the jurisdiction.

It is our recommendation that the:

- (a) legislation permits the making of orders that the bullying stops and allows the awarding of compensation as a remedy in appropriate circumstances;
- (b) amount of compensation be unlimited, and include an ability to recover compensation for economic loss, and pain and suffering; and
- (c) legislation apply to workers who have ceased to be employed.

Considerations when making anti-bullying orders

Often it is difficult for victims of bullying to access internal complaint mechanisms. This is particularly so where the bully is the victim's manager or a senior manager, or where there is an entrenched culture of bullying.

The anti-bullying provisions in the *Fair Work Act* enable the FWC to consider whether a bullying complaint has been made internally when making orders.

Given the practical difficulties that victims of bullying can face in raising an internal bullying complaint, it is our recommendation that such considerations not feature in any anti-bullying legislation that the Parliament of New South Wales seeks to enact.