

***Submission to the inquiry of the Standing Committee on Education
and Employment into Workplace Bullying***

14/07/2012

Dear Committee Secretary,

I wanted to take the time to share my thoughts on this matter with the Committee, as I have had a number of recent and painful experiences of workplace bullying in my own workplace. This conduct, which has occurred over a period of more than two and a half years, has affected- and continues to affect- the health of a number of individuals employed in that workplace.

My experience

For more than two and a half years I worked for a large state public sector entity. The business unit in which I was situated had a number of law enforcement and regulatory functions which necessitated ongoing contact with business owners and professional bodies. Unfortunately, this unit was very poorly managed from its earliest days in operation. Staff members were not given adequate training in the functions they were expected to perform, no written operational guidelines or policies were put in place to guide staff in the exercise of their duties and there were not enough support staff employed to properly manage the administrative and record-keeping functions of the unit.

Within a few months of the establishment of this business unit a workplace culture had developed which can only be described as toxic. A small number of individuals in supervisory positions became involved in systematic bullying of staff members who, in most cases, were reluctant to report the behaviour due to fear of reprisals or damage to their careers. During my time in this business unit I became aware of a range of disturbing occurrences including the following:

- A team leader manufacturing false underperformance allegations against a staff member which were used to justify the commencement of a formal underperformance process;
- A staff member being encouraged by a team leader to falsify a written record and commit perjury in order to justify the initiation of enforcement action against a business (that staff member refused to do so and was later subjected to ongoing malicious bullying);
- A staff member being verbally abused or screamed at for more than half an hour by a manager in the latter's office (an independent investigation was undertaken following this incident and the manager was found to have breached the applicable Code of Conduct in a number of respects);
- A staff member being threatened with violence by a manager;

- A male acting team leader making inappropriate comments in front of his whole team about a female colleague he had been assigned to work with (specifically, comments along the lines of “that’s going to lead to an unwanted pregnancy, that is”);
- A number of Work Cover claims being made by staff members in relation to workplace bullying;
- A significant number of staff seeking help from mental health services.

Health consequences and economic cost of workplace bullying

To those who have not personally experienced bullying or victimisation in the workplace the health consequences can sometimes be difficult to appreciate. The reality is that for almost all of us our work is the primary source of our income and, consequently, the lynchpin sustaining most of our aspirations as well as the things we enjoy in our everyday lives. When we are personally denigrated in the workplace on a systematic basis and our key source of income is threatened the consequences can be devastating. Like a cancer, the experience can seep into every facet of one’s life and cause ongoing problems including anxiety, frustration, depressed mood and difficulty relating to other people in a normal way. The primary cause of the problem is the power imbalance between the bully and the victim, with the latter typically feeling powerless to do anything about the behaviour due to reliance on the income from his or her job or, perhaps, a desire for a favourable reference.

A much quoted report by the Productivity Commission found that workplace bullying costs the Australian economy between \$6 billion and \$36 billion annually.¹ Even if we accept the figure at the lower end of this range the cost is still staggering. This amount would be enough to pay for the proposed Footscray to Domain rail tunnel, construct several new hospitals or purchase an iPad for every public school student in Australia.

In 2006-07 alone there were 1,395 workers compensation claims in Australia arising from “work-related harassment or bullying”.² It may be supposed that the challenging economic climate has placed even greater pressure on a large number of workplaces and in this environment victims of bullying can feel particularly powerless, as there are limited alternative jobs on offer for those who wish to leave their places of work.

In extreme cases bullying or victimisation in the workplace can lead to suicide. A number of cases of suicide arising from long term workplace bullying have been reported in the media in recent times. The Brodie Panlock case, in which a young waitress took her own life after systematic and ongoing bullying at the Hawthorn café in which she worked, is perhaps one of the most well known. Yet there may be many other cases that have not been reported in the media.

¹ <http://www.pc.gov.au/__data/assets/pdf_file/0003/96177/13-chapter11.pdf> p. 279.

² p. 286.

Inadequacy of the current law

There are no national, or uniform, laws in Australia specifically defining and outlawing workplace bullying. A patchwork of common law rules and statutory provisions currently applies.

Occupational health and safety legislation in the various jurisdictions imposes duties upon employers to provide healthy and safe working conditions for employees. In Victoria, for example, section 21 of the *Occupational Health and Safety Act 2004* provides 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.”

In reality, these provisions will only be helpful to bullying victims in a very small proportion of cases, as breaches of the legislation can be difficult to prove and government bodies empowered to investigate breaches will simply not have sufficient resources to deal properly with all reported cases. Further, enforcement agencies may not have the expertise to deal with bullying cases, or their own managers may be involved in a bullying culture.³

Workers’ compensation legislation in the various jurisdictions enables employees to receive regular payments in the event that they are injured at work and no longer able to perform their normal duties.⁴ However, claims under workers’ compensation legislation can only be made when significant psychological damage has already been done to employees such that they are no longer fit to perform their normal duties. In addition, it should be emphasised that making a claim under workers’ compensation legislation does nothing to expose the bullying behaviour to external scrutiny or to hold the perpetrator to account.

The law of negligence and the law of contract may provide some redress for bullying victims in a limited number of cases. The latter was successfully invoked by a bullying victim employed by Goldman Sachs in the case of *Goldman Sachs JBWere Services Pty Ltd v Nikolich*.⁵ In that case an employee who had been subjected to severe, malicious bullying over an extended period of time and had developed a major psychiatric illness as a result was able to recover substantial damages for breach of contract. This outcome was possible because a Goldman Sachs policy document entitled “Working With Us”, which the employee had been given at the time he received his written offer of employment, was held to form part of his contract of employment. The employee had been given a number of “Sign-off forms” at that time which reproduced parts of the “Working With Us” document and had been asked to sign these and return them to the employer. Of crucial significance was that the “Working With Us” policy document contained a number of provisions concerning the safety and welfare of staff, including a

³ Saffron Howden and Georgina Robinson, “Probe Ordered into WorkCover Bullying Claim”, *SMH*, 21/09/2010 <<http://www.smh.com.au/nsw/probe-ordered-into-workcover-bullying-claim-20100921-15kb5.html>>

⁴ See for example the *Accident Compensation Act 1985* (Vic).

⁵ (2007) FCAFC 120.

provision stating that “JBWere will take every practicable step to provide and maintain a safe and healthy work environment for all people”.

It should be noted, however, that the *Nikolich* precedent will only be of assistance to a small number of workplace bullying victims. A large number of employers have already sought the assistance of lawyers to rewrite policy and other documents so that *Nikolich* will not apply. In addition, it should also be evident that the plaintiff in the *Nikolich* case was only able to bring an action and obtain a remedy *after* the psychological damage had already been done. What is needed is a national law prohibiting workplace bullying and victimisation that will allow those impacted by such behaviours to take legal action *before* their health has been irreparably damaged.

Different types of bullying and possible approaches to the problem

Keryl Egan, a clinical psychologist and specialist in workplace bullying, has attempted to construct a typology of workplace bullies. Egan identifies three workplace bully profiles: the accidental bully, the narcissistic bully, and the serial bully:

Egan describes the accidental bully as emotionally blunt, aggressive and demanding. "This person is task orientated and just wants to get things done, tends to panic when things are not getting done, and goes into a rage about it. This person is basically decent, they don't really think about the impact of what's happened or what they have done. They are responding to stress a lot of the time." Importantly, Egan believes this type of bully can be trained or coached out of the bullying behaviour.

The second profile formulated by Egan is the narcissistic bully, who is grandiose and has fantasies of breath-taking achievement. "This type of bully feels they deserve power and position. They can fly into rages whenever reality confronts them. This person is very destructive and manipulative, they don't set out in a callous way to annihilate any other person - it's purely an expression of their superiority."

Finally, Egan's third profile is that of the serial bully "who has a more sociopathic or psychopathic personality. This type of bully is intentional, systematic, and organised and the bullying is often relentless. They usually get things done in terms of self interest, not in the interest of the company." Egan's serial bully employs subtle techniques that are difficult to detect or prove and training or coaching is always unsuccessful ... ⁶

This classification system does, in my view, have some merits. Bullying of the first type listed above (ie. the “accidental” type) can often result from poor organisational

⁶ See Steven Gregor, “Fighting Back: Workplace Bullying in Australia”, Australian Psychological Society web site <https://www.psychology.org.au/publications/inpsych/workplace_bullying/>

structures, heavy workloads or inadequate training. Indeed, my own experience in the public sector suggests that many people in supervisory positions would benefit from better training in people management principles. In many cases managers or supervisors who are highly stressed, poorly trained in people management principles or confused about the nature of the duties their staff are supposed to be performing can unintentionally behave in ways that have a detrimental effect on the emotional wellbeing of staff. Sometimes staff underperformance issues that could easily be resolved through better feedback, clearer guidelines or remedial training can instead lead to bullying behaviour simply because managers or supervisors do not know how to properly deal with them or how to manage such problems constructively.

In the case of the “serial” or “psychopathic” bully, however, it is highly unlikely that people management training, mediation or other such solutions will work. I have personally had the misfortune of working with such people. What is needed is specific legislation that enables victims of workplace bullying to access a court or tribunal directly and seek an appropriate remedy. Nothing frightens bullies and those who shelter them more than exposure- as Josh Bornstein, employment law principal at Maurice Blackburn, rightly says:

Bullying behaviour thrives in a culture of darkness. It can persist for years in workplaces that are not exposed to external scrutiny. The key to addressing bullying is for policymakers to legislate a practical means for employees to expose their work environment to external scrutiny in a court or tribunal.

Once the spotlight is activated on bullying behaviour, it tends to wither and die.⁷

What should be done

I strongly recommend that Parliament consider doing the following (insofar as Commonwealth legislative power permits):

- Specifically outlaw workplace bullying and victimisation and allow victims to seek remedies directly through a court or tribunal;
- Legislate to make serious workplace bullying or victimisation (ie. cases involving violence, threats of violence or placing people in physical danger) a criminal offence;
- Give serious consideration to a public awareness or education campaign addressing the issues of workplace bullying and victimisation;
- Establish an independent statutory authority to investigate bullying within the public sector and provide recommendations for action. In my own experience internal investigations bodies in the public sector are generally not independent and are ineffective in tackling bullying and victimisation issues.

⁷ Josh Bornstein, “Time to Outlaw Toxic Bullies”, Australian Financial Review, 30/08/2011
<http://afr.com/p/national/work_space/time_to_outlaw_toxic_bullies_Xfa9LfQaUIVv3KjHHzGTrI>

The states and territories should be encouraged to take similar action in relation to bullying behaviour within their departments and administrative bodies.

In conclusion, I am pleased that the Committee is giving serious consideration to this problem, and I am grateful for the opportunity to share my views on the matter. I certainly hope that effective measures will result from the Committee's inquiry.

Yours sincerely

NAME SUPPLIED TO COMMITTEE