

Strategy Eyes: Workplace Perspectives

ISSUE 9 | APRIL 2013

The Bullying Edition

PCS' inaugural roundtable

An insight from HR leaders on the proposed reforms to Bullying laws



On 5th and 6th March 2013, PCS conducted its first roundtable event attended by senior HR leaders.

This unique event gauged the response of HR leaders to the Government's proposed workplace bullying reforms and provided numerous insights, both from the organisations represented, as well as PCS' extensive experience with other clients, concerning the identification of potential bullying acts and the management of workplace bullying complaints.

The resounding conclusion was that workplace bullying continues to be a significant issue for most organisations, with the introduction of the bullying reforms elevating this concern.

In attendance was Greg Harrison, a former long-standing Commissioner of the Fair Work Commission ("FWC") who commenced working with PCS as a consultant in January 2013. Greg provided a valuable dimension and contribution to the debate by discussing the likely role of the

FWC in responding to workplace bullying complaints.

Shifting the mindset

One of the topics that the HR leaders debated was the confusion amongst employees in recognising what is, and is not, workplace bullying. While the prevalent media attention on workplace bullying over recent years may be responsible for the increased number of workplace bullying claims being made, it was felt by the attendees that employees often prematurely or inaccurately labelled behaviour as workplace bullying and in part this may also be attributable, in particular, to younger generations of workers who felt more empowered to object to certain behaviours which older generations may have otherwise tolerated (and therefore proliferated).

PCS emphasised that with the introduction of the workplace bullying reforms, organisations would need to take a holistic view in addressing workplace bullying, if

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A message from our Managing Principal



With 2013 now in full swing it is opportune to take a moment

to anticipate what will be a significant year in workplace relations law.

The election that has now been called for 14 September 2013 will be very different to the last election. Workplace relations reform will be a significant issue and we, like many of you, are eagerly awaiting details of the Coalition's policy which we understand will be released within a few weeks of us going to print on this edition of Strateg-Eyes. Indeed, I recently had the pleasure of spending time with Senator the Hon Eric Abetz who is the Shadow Minister for Workplace Relations as part of which I tabled many of the sentiments expressed to me by our clients in recent times. PCS is uniquely positioned to shed

light on the realities of workplace relations legislation in practice whether in the context of adverse action claims, good faith bargaining, unfair dismissals or otherwise.

With that in mind, clearly the most topical issue in workplace relations at present is that of workplace bullying and that is why we have dedicated an entire edition of Strateg-Eyes to this topic. In fact, much of our firm's current thought leadership revolves around analysis of the subject of bullying particularly as against performance management.

This will be the subject of my address at the various HR Summits being held around the country in upcoming months at which PCS is proud to once again be the Exclusive Legal Sponsor.

I encourage you all to consider the breadth of offerings PCS has to help you and your leaders manage your risks when it comes to complaints of bullying. Leaving aside the assistance we can provide through advice and representation we are

increasingly being asked to conduct investigations and act as leadership coaches to those individuals within our client organisations who might find themselves the subject of bullying and harassment allegations.

Finally my thanks to all who attended our inaugural Roundtable events, the photos of which are shared in this publication.

Joydeep Hor, Managing Principal •

MISSED A PCS WEBINAR?

If you missed our last webinar on **People issues in introducing and managing change** and would like a copy of the recording please email Corinne Ozols at corinne.ozols@peopleculture.com.au there is a small cost for non-PCS clients.

We also invite you to join our next webinar on **Managing Independent Contractors** on Wednesday, 15 May at 12pm. •

Legal basics for emerging HR professionals and entry-level managers

After the success of this Education + Training program in 2012, PCS will again be hosting its four-part training program "Legal Basics for Emerging HR Professionals". Given the breadth of issues HR professionals face, it is critical for those in their formative years of HR to understand HR legal issues in a modern commercial context.

The program provides those starting out in HR with an understanding of important HR legal issues. However, it is equally suitable for those with greater levels of experience wishing to develop their HR expertise, or for seasoned HR professionals seeking a refresher.

Consistent with PCS' commitment to innovation and partnering with its clients, these sessions will not be in the form of lectures but will rather be delivered in an interactive way based on our firm's significant expertise, with high levels of participation encouraged, and anticipated from attendees.

Attendees will receive a tool-kit of documents and will develop or deepen their understanding of a range of fundamental HR legal issues, including the law from hiring to firing, the hierarchy of instruments and documents, the meaning behind certain clauses in a contract, protecting organisations and individuals from liability and what happens if it all goes wrong.

TOPICS AND AGENDA

The program will be structured as follows:

- **Thursday, 4 April 2013:** Introduction to HR and the Australian workplace relations system
- **Thursday, 18 April 2013:** Employment documentation and management
- **Thursday, 2 May 2013:** EEO, harassment, discrimination and Work Health & Safety
- **Thursday, 16 May 2013:** Termination and litigation

For more detailed information on each of the topics and to register for any of the sessions please contact our Administration Manager, Corinne Ozols, on 02 8094 3100 or via email: corinne.ozols@peopleculture.com.au. A discount applies for all PCS clients. •

PCS' inaugural roundtable (continued)

An insight from HR leaders on the Proposed Reforms to Bullying Laws

they were not already doing so. Such an approach consisted of organisations implementing education and training programs for all managers and employees and taking steps to shift the mindset of their managers and employees in relation to workplace bullying. Currently, the term “workplace bullying” is inappropriately used to describe a broad range of behaviours that do not constitute workplace bullying. Instead, employers should focus on behaviours the subject of any complaint and investigating those before determining whether those behaviours amount to workplace bullying. It was observed that if the behaviours were dealt with in this manner they might be more easily resolved at workplace level.

When asked whether they would do anything differently in light of the proposed reforms, the HR leaders agreed that the prioritisation of training and education was key to minimising risks of complaints and litigation.

The role of the FWC

In accordance with the workplace bullying reforms, the FWC will be tasked with receiving and handling workplace bullying claims. While few details have been released in relation to the role of the FWC, Greg Harrison, stated:

“What I see happening, and the devil is in the detail, to the Fair Work Commission’s role, will be an extension of what they are doing in relation to adverse action and general protections.”

One of the key concerns discussed at the roundtable event was the impact of the FWC’s role and the potential inability for organisations to resolve workplace bullying complaints at the workplace level. In addition, concern was expressed over the adversarial nature of the FWC process and the impact that this is likely to have on the ongoing employment relationship.

The time limits that the reforms are proposing also raised concern for the HR leaders, who believe that the limits are unreasonable and would not assist

genuine complainants who often have complex issues to resolve.

Experiences across different industries

The HR leaders who participated in our roundtable event came from a range of different industries (including construction, advertising, health and hospitality) allowing us a myriad of insights into the multi-faceted nature of workplace bullying. While some industries experience high levels of workplace bullying complaints, others record fewer instances.

It is important that organisations recognise that no two workplaces or industries are the same, and that within an organisation there are a number of symptoms of bullying which employers should be alert to, including, an increase in personal/carer’s leave being used or workers’ compensation claims, high staff turnover, lack of staff commitment and behavioural changes. With an employer’s alertness can come swift and effective action, no matter the workplace or the industry.

The importance of leadership

All HR leaders agreed that an organisation’s risk depended on how workplace bullying was tolerated at the top of an organisation, with “leading by example” being a key factor in preventing and addressing workplace bullying. As one attendee described it *“the senior team sets the agenda.... They need to model behaviour and act on issues where there are genuine issues.”*

HR leaders expressed opposing views on the role of senior managers and whether they are frequently “gun shy” with respect to the performance management of an employee. HR leaders quoted numerous examples of genuine performance management issues where rather than addressing those issues, managers had short-cut the process, resulting in a bullying complaint. Some HR managers argued



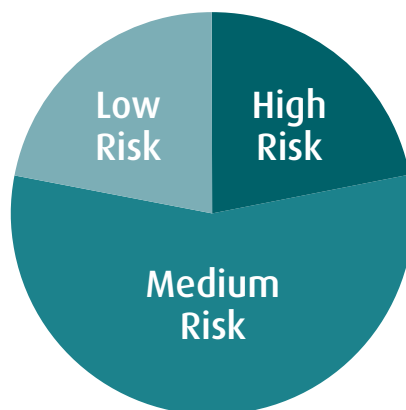
that these short-cuts arose from the fear of a bullying complaint while others countenanced that that could be remedied by increasing the managers’ capability to handle performance management and a bullying complaint.

What is the “risk”?

As part of the roundtable event, we asked the HR leaders whether workplace bullying was viewed as a high risk, medium risk or low risk within their organisation. The majority of participants responded that workplace bullying was viewed as a medium risk, but that there was certainly a shift towards workplace bullying being seen as a “high risk” given the recent attention and workplace bullying reforms. ●

KIRRYN JAMES AND ERIN LYNCH

HR Leaders rating the risk of workplace bullying



Workplace bullying – the Government’s response

What can the Government do to lower the incidence of bullying and alleviate its damaging effects?

There is no doubt that bullying claims and prosecutions have increased dramatically since “bullying” became a recognised (if somewhat inconsistently defined) threat to workers’ health and safety more than a decade ago.

Has workplace culture deteriorated as commercial imperatives drive everyone to work harder? More probably, an increased awareness of what is and what is not acceptable and lawful conduct in the workplace has led to a higher rate of reporting of incidents that may amount to bullying. Either way, “bullying” is on the political radar and the Federal Government’s workplace relations reform agenda.

On 12 February 2013, Employment and Workplace Relations Minister Bill Shorten announced the Government’s proposal to create an avenue of complaint to the Fair Work Commission (“FWC”) for employees who are bullied at work. The proposal is in

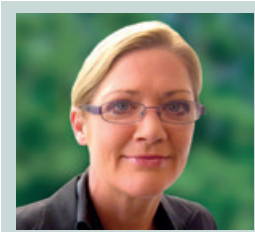
response to a recommendation from the Standing Committee on Education and Employment of the House of Representatives in its report “*Workplace Bullying: We Just Want it to Stop*” released in October last year, that the Government allow bullied employees to seek individual recourse through an adjudicative process.

Responses to the proposal have ranged from the overwhelmingly positive to the underwhelmed and skeptical. The issues that divide opinion are necessity and effectiveness. Is another legal remedy to address bullying necessary or likely to be effective in the form proposed?

The proposal

Recommendation 1 of the report adopts a popular definition of “bullying” as “repeated, unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety”.

Under the Government’s proposal, employees alleging workplace bullying will have their applications to FWC expedited for consideration



CARA SEYMOUR,
SENIOR ASSOCIATE

within 14 days. If the FWC is satisfied that a person has been subjected to workplace bullying it could make orders to remedy the conduct or prevent the conduct recurring including directing an employer’s action in a particular manner. The FWC may also recommend that a matter be investigated and determined by a Work Health and Safety regulator under Work Health and Safety legislation, presumably where the conduct poses a more serious risk to health and safety or results in injury and where the employer does not appear to have taken all reasonably practicable steps to prevent that risk. Penalties of up to \$51,000 for corporations may apply for failing to follow a FWC order.

As far as the actual implementation of the proposed new cause of action, little is known. Whether the jurisdiction of the FWC to make binding determinations will be expanded and more resources added to the FWC’s already overburdened dispute handling function remains to be seen. How the FWC will reach a determination in 14 days also remains a mystery, but these are not the issues that most concern the doubters.

Remedial overkill?

There already exists a variety of individual complaint-based mechanisms for workers who have been bullied. These are discussed in detail in this edition.

The current understanding of “bullying” as an actionable wrong developed most rapidly in the work, health and safety and worker’s compensation jurisdictions. The discrimination jurisdiction also carries a large volume of bullying complaints. Importantly, in both these jurisdictions, complaints are circumscribed by the need to establish



particular criteria, a workplace injury or serious risk of one or conduct based on a particular attribute such as sex, age, race or disability. Regulators in these jurisdictions have developed significant expertise in this area over the last decade.

More recently, the adverse action provisions of the *Fair Work Act 2009* have made it easier for employees alleging workplace bullying to seek redress, at least as far as the conciliation stage. Where termination or resignation results from the conduct, unfair dismissal actions also remain available. When current remedial options are assessed, the new proposed ground of complaint does not appear to add anything and on further inspection, may even be detrimental.

The problem that has emerged when bullying is dealt with as a “workplace dispute” is that, increasingly, bullying complaints are being used by employees to challenge, impede or prevent legitimate management directions, performance management,

disciplinary action and allocations of work by employers. There is a very real risk if the proposal goes ahead, that the FWC will be backlogged with unmeritorious claims of bullying and employees will misuse this avenue in order to bring more systemic workplace disputes before the FWC at short notice.

When an employee lodges a claim against an employer with an external agency, it is rarely likely to enhance trust and confidence in the relationship. Employers with responsive internal infrastructures to manage grievances fairly, consistently, confidentially and expeditiously are far more likely to effectively manage bullying in their workplaces and retain employees.

However, individual-complaint based mechanisms are never enough to engender cultural change. When it comes to workplace bullying, changing workplace culture is crucial. This is best achieved by a range of strategies including training and awareness raising programs, implementing policies on workplace

behaviour, mentoring and positive leadership, the careful monitoring of workplace behaviour and internal communications.

Conclusion

At its core, bullying is about an abuse of power that causes harm to an individual. It is a human rights issue and it is a health and safety issue first and foremost. Work, health and safety regulators and anti-discrimination tribunals are already well equipped to deal with complaints in this area where internal grievance procedures have failed. Further, in both these jurisdictions, preventative strategies are built into the regulatory framework.

Perhaps it is time for the Government to focus more on incentivating the preventative measures proposed by the Standing Committee rather than an additional avenue for individual complaint. ●



How to catch a bully across jurisdictions



DIMI BARAMILI,
ASSOCIATE

There is no express prohibition against workplace bullying under Australian law, however, a broad variety of legal remedies exist to allow an individual or regulatory authority to indirectly bring a claim. In recent times discrimination and Work Health and Safety (“WHS”) laws have been the forum where bullying claims have been pursued.

The ability to prosecute under this law has contributed to the growth of this type of complaint, placing organisations on notice, and giving them incentive to address the

issue. State and territory worker’s compensation schemes, the common law duty of care, criminal law and the *Fair Work Act 2009 (Cth)* (the “**FW Act**”), also enable causes of action related to bullying providing scope for employers and regulators to target it.

FW Act

Under the FW Act individuals are able to initiate a direct complaint against their employer, including allegations of bullying, in a number of ways. Most commonly this is through the unfair dismissal regime (if no longer employed), or if they remain employed through breach of an enterprise agreement or the general protections provisions.

To establish a breach of an enterprise agreement it must be shown that the bullying conduct in some way violates its terms and conditions. Additionally the dispute resolution mechanism, a mandatory aspect of enterprise agreements, may be triggered by a workplace bullying complaint and workplace bullying claims can and have more readily formed the basis of a general protections claim where it is sustained (as an adverse action) in

response to the employee’s exercise of a workplace right.

The Federal Court¹ recently upheld the dismissal of an employee after he engaged in misconduct through initiating a physical altercation with a colleague. It did not matter that the employee was previously subject to repeated bullying from the victim, as the employer had the right to address the misconduct. This case is just one which considers the relevance of bullying to the “extenuating circumstances” of unfair dismissal claims, with its relevance often depending on the member hearing the case.

Discrimination

Complaints of bullying can be made to the relevant discrimination body via discrimination laws if the bullying is causally connected to a protected ground. The relevant discrimination body will then try to resolve the dispute, before the matter can be litigated.

However, the various jurisdictions are inconsistent in the grounds protected. New South Wales provides the least coverage, whereas Tasmania and Victoria are more comprehensive covering less common grounds like lawful sexual activity, and political conviction. Overlaying state and territory laws are the Federal discrimination laws.

The Federal Court identified sex discrimination when a female employee suffered victimisation and bullying in the context of repeated sexual harassment from a male colleague.² More recently, an IBM employee is claiming up to \$1.1 million for sex discrimination after she suffered sexual harassment and bullying for up to two years from her manager.³



¹ *Lambley v DP World Sydney Limited* [2013] FCA 4

² *Lee v Smith* [2007] FMCA 59

³ *Spiteri v IBM Australia Ltd* [2011] FCA 1318



Worker's Compensation

Individuals can recover under their state or territory worker's compensation regime if the injury arises out of, or in the course of their employment. However, this is harder to satisfy than a WHS claim as the bullying must be linked to a recognised psychological illness or medical condition.

WHS

WHS is another avenue commonly used to capture bullying claims, where a complaint is made to the relevant regulator who will then prosecute the employer provided there is sufficient evidence of a breach of the WHS laws. WHS implicitly captures bullying conduct in the positive requirement of employers to provide a safe working environment, ensuring the mental and physical health and safety of employees. This responsibility also extends to individual officers and workers who both face liability under the new harmonised WHS laws, thus deterring individuals as well as organisations. Further, the harmonised laws also require officers to take proactive steps to ensure the employer complies with their WHS duties. Currently, all Australian jurisdictions except for Victoria and

Western Australia have adopted the model laws which arose out of the harmonisation process.

Criminal Law

State and territory police are able to prosecute bullying related criminal offences such as stalking, assault and nuisance. However, Victoria is the only state to prescribe workplace bullying as part of a criminal offence.

In 2011, three individuals involved in the prolonged workplace bullying of their teenage colleague Brodie Panlock which led to her suicide, as well as her employer were each convicted and fined under WHS laws. The Crimes Act 1958 (Vic) was altered in response, specifically to capture bullying as a criminal offence.

Common Law

An individual can claim that bullying amounts to a common law breach of contract, specifically a breach of an employer's express or implied duties. Such claims are rarely used, due to issues of proof, and the time and cost involved. However, it has long been recognised that employers owe their employees a duty of care, a part of which involves the provision of a safe place to work.

Conclusion

One would expect that the prospect of a successful WHS prosecution would likely be enough of a deterrent to organisations, officers and workers given the significant penalties involved and the fact that a breach of these laws amounts to a criminal offence. However, given that bullying claims can also arise from less serious incidents such as performance management and have been pursued in other jurisdictions, many organisations perceive the risk as real and are responding appropriately to workplace bullying by introducing and re-enforcing bullying policies and tailored training. Employers' initiatives in this regard have, however, been viewed as ineffectual in reducing the incidence of workplace bullying which has led to the proposed reforms which of themselves it can only be hoped redress the issues rather than, as is feared, result in an influx of vexatious claims. ●

Walking the fine line between reasonable performance management and bullying



MARGARET CHAN,
ASSOCIATE



Q: Which of the following would be considered bullying?

- (a) Criticising an employee for poor performance and firmly instructing them to rectify errors in their work;
- (b) Postponing an employee's project, relocating tasks performed by them and offering them alternative duties;
- (c) Having a firm word with an employee about their absenteeism and lack of punctuality.

Depending on the circumstances and facts of each situation, all of the above could constitute bullying, but equally could be seen as "reasonable action" taken by an employer in respect of performance management and discipline – which is what makes the line between performance management and bullying such a fine one.

At present, claims of "bullying" in the context of performance management generally appear before the courts and tribunals as a result of a dispute about an entitlement to worker's compensation or in the hearing of an unfair dismissal application.

The question is – will the Government's proposal to allow individual employees who are bullied at work to complain directly to the Fair Work Commission ("FWC") clear up some of the mystery around when performance management becomes bullying, or will it only muddy the waters even further?

Recently, the FWC found that even where performance management is stressful for an employee, this may not necessarily equate to bullying or harassment (although this would come as no surprise to most of us). In *Choi v Country Fire Authority*⁴, Ms Choi was told by several managers that her work was unsatisfactory and needed to be changed. Believing that she was doing a good job, Ms Choi refused to comply with these instructions, which led to the commencement of a formal performance management program. Following this, Ms Choi made an informal complaint that the "raising of ongoing performance issues by her managers" was bullying. After an incident involving an outburst directed at a colleague, Ms Choi was dismissed. She subsequently lodged an unfair dismissal claim and argued that the performance management process was "part of a bullying process by her managers".

In dismissing her application, the FWC

found that the stressful performance management process was not inappropriate nor unfair and that there was no reason to dispute the outcome of the employer's investigation (which found that the behaviours engaged in by her managers were not bullying). It should be noted that the FWC did not definitively decide that bullying and harassment had not occurred – it merely accepted the investigation outcomes. It remains to be seen whether a case with similar factual circumstances would be decided differently under the Government's proposed anti-bullying regime.

In a similar vein, the recent Administrative Appeals Tribunal ("AAT") decision of *Fox v Comcare*⁵ also raises the same questions about when a Court and Tribunal will definitively find an employee has actually been bullied.

In this case (which was not about performance management, but whether the employer had undertaken "reasonable administrative action" for the purposes of determining the application of an exception under worker's compensation legislation) the AAT did not feel that it was required

⁴ [2013] FWC 469

⁵ [2012] AATA 204



to make a finding on the question of whether bullying had occurred. Rather, it accepted that the employee perceived that her manager was “bullying, obstructing and harassing her” when changes were being made to her job duties and work environment, subsequently causing her to sustain a psychological injury.

Employers should also be cautious, as not all actions to discipline or counsel employees will necessarily be characterised as performance management. As such, any exception for reasonable management action under worker’s compensation legislation – such as section 11A of the *Workers Compensation Act 1987* (NSW), may not apply.

In *South Eastern Sydney & Illawarra Area Health Service v Nikolis*⁶, it was found that a number of meetings between a manager and an employee about her absenteeism and lack of punctuality could not truly be characterised as performance management. It was held that even if the meetings were to be treated as being performance management

meetings, the “firm” tone of the manager and an incident where the manager had ended a meeting “with a bit of frustration” were sufficient to uphold a finding that Ms Nikolis would perceive it to be “bullying and intimidating”, and therefore she should be entitled to worker’s compensation.

Given the subjectivity of what employees may perceive to be bullying, the increasing frequency with which

the term is used in complaints and the reluctance by the courts and tribunals to clarify what is or is not bullying, it is anticipated that the FWC will see an increase in the number of bullying complaints should the legislation be passed.

⁶ [2009] NSWCCPD 74

Some things your organisation can do to protect itself from bullying claims arising from performance management are to:

- maintain objectivity and focus on the performance issues, not the person, during performance management meetings;
- ensure that the emphasis of any performance management meetings are on the future – that is short, medium and long term goals – even though discussion of performance issues will necessarily involve discussing the employee’s past performance;
- document all performance management discussions and meetings (as you may already be doing); and
- pay attention to your oral and written communications and consider the impact of these on the employee. ●

Workplace bullying: an EAP perspective

Michele Grow, Chief Executive Officer, Davidson Trahaire Corpsych



MICHELE GROW
CHIEF EXECUTIVE OFFICER
DAVIDSON TRAHAIRE CORPSYCH

About Michele Grow

Michele is the CEO of Davidson Trahaire Corpsych (DTC), a national corporate psychology firm providing EAP, critical incident management, and employee wellbeing services.

Michele has particular expertise in the areas of employee wellbeing and workplace risk management including employee wellbeing, mental health, fatigue management, stress, and bullying.

Michele is a regular presenter on workplace issues and has conducted benchmarking research on the impact of work-related issues on individuals.

She is a Fellow of the Australian Human Resource Institute and the Australian Institute of Management and a member of Chief Executive Women and the Australian Institute of Company Directors. She holds tertiary qualifications in HRM, Corporate Management and Business.

An Employee Assistance Program (EAP) provides support for individuals and their family members for a broad range of issues. This includes personal issues such as anxiety, stress management, self esteem, grief and loss, relationship and family issues and navigating your way through major life events.

Work-related concerns that are commonly supported through the EAP include interpersonal issues with others, dealing with change, perceived bullying or harassment and managing job demands and pressure, to name a few.

The two most commonly presenting work-related issues are interpersonal issues with managers and perceived bullying or harassment. At DTC we see almost 9,000 employees every year who are seeking support to manage one or both of these issues. Despite significant focus on building respectful workplaces in recent years, the number of employees presenting with bullying concerns has increased by over 17% in the past two years. Likewise there has been considerable attention given to improving leadership and management capability, however the number of employees presenting

with issues with their manager has increased by over 20% in the past two years.

Through the EAP, employees share many examples of concerning workplace behaviours. The five behaviours most commonly reported by employees accessing the EAP are:

- verbal abuse (shouting, swearing, malicious sarcasm or threats to safety);
- mistreatment (isolation, intimidation, humiliation, cruel conduct);
- abuse of authority (undeserved evaluations, taking credit for others' work, tarnished reputation);
- interference with work performance (sabotage, ensuring failure, undermining); and
- destroying workplace relationships.





While many employees report a concern with one person in the workplace, in some cases it is a number of people or entire teams. This is not always seen as bullying behaviour, but examples such as everyone rolling their eyes when one person speaks is a form of individual targeting that can have a measurable impact on an employee.

One of the reasons for the high use of the EAP service for workplace bullying or manager concerns is that many employees don't feel they can talk with anyone in their workplace about the issues. While many organisations have policies in place for dealing with bullying, few employees are prepared to raise the issues internally. The primary reasons for not reporting the issues include concern over personal reputation, concern over ongoing career prospects, and fear of the situation becoming worse.

For those employees who do report the behaviours, in approximately two out of five cases either nothing is done or nothing changes. In around one out of five cases the situation does in fact become worse.

The extent to which bullying actually occurs in the workplace is difficult to measure given the low level of reporting. Our own experience and the findings of most studies estimate that up to 40% of employees are either experiencing bullying now or have experienced it at some time in the past.

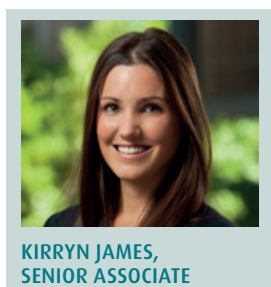
Regrettably this leaves a large number of employees trying to manage inappropriate workplace behaviour on their own. At best there is a negative impact on their engagement and productivity, and at worst there is a direct psychological and physical impact on the employee with a ripple

effect across their team and family. Many employees in this situation will make the decision to move to another organisation – again without any advice to their employer of the reason.

Employees who are being bullied have one common goal – they just want the behaviour to stop. Dealing with bullying and poor workplace behaviour is challenging, but the single most effective strategy to address workplace bullying is to have the courage to act. This may be seeking support outside of the workplace or may be addressing within the workplace – but leaving the issue to continue is exceptionally harmful for everyone involved. ●

“Workplace bullying: We Just Want it to Stop”

Examining the report of the Standing Committee on Education and Employment



At the end of 2012, the Standing Committee on Education and Employment (the “Committee”) released its much anticipated report into workplace bullying titled “Workplace Bullying: We Just Want It To Stop” (the “Report”). The Report was the result of a comprehensive inquiry which received over 300 submissions and conducted 11 days of public hearings.

The Federal Government’s focus on workplace bullying is reflective of the growing awareness of workplace bullying as a serious behaviour and culture issue. This growing awareness is the result of a number of high profile cases which have attracted significant media attention, the introduction of legislation to criminalise workplace bullying and the recent work health & safety harmonisation process which reinforced psychological health as a priority.

The Process

On 1 June 2012, the Committee called for submissions to be made on all forms of bullying in the workplace to hear a range of perspectives and experiences.

The Committee was interested in hearing from all parties and submissions were received from a range of stakeholders including, affected individuals and their families, legal practitioners (of which PCS was one firm), employer groups, employee counselling service providers and unions.



The Committee was then tasked with preparing a report to examine the nature, causes and extent of workplace bullying and considering proposals to address workplace bullying.

The Report

The Committee released the Report at the end of 2012 detailing the inquiry process and making 23 key recommendations. These recommendations depict a clear focus on up-skilling all workplace participants in relation to workplace bullying and adopting a preventative approach to address workplace bullying at the organisational level.

Having said this, the Report also made a number of recommendations suggesting legislative changes to address workplace bullying. Of significance, was the recommendation that an adjudicative process be established to provide employees with an avenue for redress. In circumstances where there are already numerous avenues available to an employee to pursue a complaint of bullying (including through worker’s compensation, anti-discrimination, industrial law and tort law), this has caused concern for many employers and has taken the focus away from adopting a preventative approach to workplace bullying.



Of the 23 recommendations made by the Committee, employers should particularly be aware of the following key recommendations:

- **Definition:** throughout the inquiry there was general support for the adoption of a single nationally consistent definition of workplace bullying. The definition of workplace bullying recommended by the Committee was:
"repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety".

Importantly, the Committee noted in their Report that balanced against this definition is also the need for managers to be able to manage their staff and that the definition of workplace bullying must include scope for reasonable performance management, disciplinary action and management action.

- **Advisory services:** the Committee made a number of recommendations about the establishment of various services to assist employers and workers to prevent workplace bullying and appropriately address instances of workplace bullying. Specifically, the Committee recommended the establishment of advisory services, through new and existing channels, to provide resources and toolkits for employers and workers.
- **Code of Practice:** Managing the Risk of Workplace Bullying: as part of the work health & safety harmonisation process, Safe Work Australia prepared a number of codes of practice, with one of these codes of practice addressing workplace bullying. Due to the significant consultation with various stakeholders this code of practice has not been finalised. The Committee recommended that this code of practice be urgently progressed by Safe Work Australia and it is expected that an updated code of practice will be released in March/April 2013 as on 14 March Safe Work Australia members agreed by majority to release the much-anticipated revised draft Code of Practice on the prevention of workplace bullying.
- **Training:** in addition to training at an organisational level, it was suggested that a new accredited training program be designed for managers and health & safety representatives to equip them to deal with workplace bullying matters.
- **Legislation:** the Committee also recommended that the Commonwealth Government implement arrangements that would allow an individual to make a claim of workplace bullying and seek remedies through an adjudicative process.

Of the 23 recommendations made, 19 were adopted by the Federal Government, including all of the recommendations set out above. ●

Personal liability for other people's bullying: will individual managers be accountable?



NICHOLA CONSTANT,
DIRECTOR

The Government's response to a parliamentary inquiry into workplace bullying supports amendments to the *Fair Work Act 2009 (cth)* (the "FW Act") that will ensure that employees who are bullied at work will be able to get help quickly with a focus on early intervention through the Fair Work Commission (the "FWC"). Other amendments to the Fair Work Act will include enabling the FWC to make orders to deal with the complaint and/or to refer to the relevant state Work Health & Safety ("WHS") regulator.

While it is not clear at this stage, PCS assumes that the relevant state or territory WHS regulator would then be required to consider prosecuting the "bully", the employer and any person who may have breached their obligations under existing WHS laws.

We have warned employers, officers and workers in the past about the risk of a WHS prosecution arising from a bullying incident. With the increased scrutiny of matters referred by the FWC, prosecutions by the relevant WHS regulators for bullying are likely to be more common.

Individual obligations under WHS

Under the harmonised WHS laws, managers must exercise due diligence to protect against bullying and co-workers must take reasonable steps for the health and safety of others at the workplace as well as comply with any reasonable instruction and co-operate with any reasonable policy or procedure (generally this will be of the employer).

How to avoid personal liability under WHS

It is important that line managers and human resources managers are aware of this increased risk of prosecution and audit their own behaviours and practices in relation to bullying.

Managers are responsible for ensuring that all employees understand that bullying is not tolerated in the workplace and for taking early





corrective action to deal with behaviour which may be offensive or intimidating.

If a manager feels that a reported incident might constitute bullying and the manager/supervisor feels that the nature of the complaint is outside their expertise, he or she will refer the matter to the Manager, Human Resources.

Should the FW Act be amended then there will be further imperative on the prevention of bullying given that the FW Act as it currently stands holds individuals “involved” in a contravention of certain parts of the FW Act to have themselves contravened the FW Act rendering them subject to a penalty.

Avoiding actions for defamation

Managers must remember that an accusation of bullying can be potentially defamatory, especially if confidentiality is not observed and a person’s reputation is unfairly damaged. In order to avoid a civil action for defamation, managers should ensure discussions, information and records related to complaints should remain factual and confidential. All documentation and details of bullying enquiries and grievances should be kept securely by managers or Human Resources. ●

The prevention of all inappropriate behaviours including bullying requires managers to:

- be aware of, identify and prevent bullying in the workplace;
- eliminate inappropriate behaviour regardless of whether a complaint is received about that behaviour;
- encourage all staff to behave in accordance with the principles of equal opportunity and anti-discrimination;
- provide leadership and role modelling in relation to appropriate and professional behaviour in the workplace;
- respond promptly, sensitively and confidentially to all situations where inappropriate behaviour is exhibited or alleged to have occurred; and
- ensure there is no victimisation of complainants and witnesses.

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