



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:gl:Employment: 755737

15 July 2013

Safe Work Australia
Attn: Codes Public Comment
GPO Box 641
Canberra ACT 2601

Email: codes@swa.gov.au

Dear Sir/Madam

Preventing and Responding to Workplace Bullying – Draft Code of Practice

I am writing to you at the request of the Law Society's Employment Law Committee ("the Committee") which is comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for various stakeholders in all areas of employment law in New South Wales.

The Committee is pleased to have the opportunity to review the *Preventing and Responding to Workplace Bullying – Draft Code of Practice* ("the Draft Code") and the accompanying Worker's Guide ("the Worker's Guide").

The Committee reviewed the prior version of the Draft Code and is pleased to note a number of important changes have been made to the Draft Code, such as greater recognition of the need to treat an alleged bully as innocent until proven otherwise.

1. Code of Practice or Guide?

As a preliminary issue, comments have been requested as to whether or not the Draft Code should be a Code of Practice or a Guide. The Committee strongly recommends that the Draft Code should be a Guide and not a Code of Practice. In the Committee's view, the purpose of the Draft Code should be to assist employers, rather than to create a further compliance task, particularly for small business. It should be a constructive tool for employers, assisting with the creation and promotion of a safer, tolerant and respectful workplace, rather than used as a "weapon" against employers who do not strictly comply with its terms.

It is the Committee's view that creating a Code of Practice for the management of human behaviour and relationships is undesirable and fraught with difficulty. The Committee supports the broad principles of identifying and assessing risks, leading to the implementation of elimination or control measures, but in the case of workplace bullying these matters should necessarily be tailored to individual workplaces. The ability to prescribe a "one size fits all" Code of Practice is made even more difficult given the range of behaviours which may constitute bullying. It is the Committee's strong view that the discretion afforded by a Guide is far more appropriate.

The Committee notes the new regulatory framework under the *Fair Work Act 2009* to deal

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with workplace bullying, which will commence on 1 January 2014. If an application is made to the Fair Work Commission under that framework but prior to the suggestions in the Draft Code being carried out by a particular workplace, this may be problematic. In the Committee's view, the new regulatory framework to be provided under the *Fair Work Act 2009* would be best supported and complemented by the Draft Code becoming a Guide rather than a Code of Practice.

2. Draft Code

Part 1: Introduction

Generally the Committee is satisfied with the manner in which workplace bullying is defined in the Draft Code but makes some minor suggestions for consideration.

In respect of Part 1.1, the Committee has scrutinised the examples of behaviour listed in the dot points of the fourth paragraph and suggests that since the preamble in that paragraph mentions the *repeated* nature of the behaviour, references to "continuously" or "constantly" in the dot points are otiose. Additionally, the preamble in the paragraph also states that the behaviour may be intentional or unintentional. It is then confusing to make reference to certain *deliberate* behaviour in the third and ninth bullet points.

In respect of Part 1.2, the Committee notes that some of the examples of reasonable management action are unduly restrictive and are unlikely to be appropriate to a small business which may not have extensive written processes in place. For example, the reference to a documented process or policies or performance management guidelines in dot points 4 and 5 should be deleted because they presume a level of formality and written process inappropriate for many small businesses.

Part 2: Preventing Workplace Bullying

In the Committee's view, the Draft Code does not adequately take into account non-traditional workplaces such as teleworking arrangements and work conducted out of office either remotely via smartphones or remote access. Additionally, working out of hours or social work functions can be other "grey" areas outside the traditional employment sphere. These non-traditional spheres similarly require vigilance in identifying the potential for workplace bullying and controlling the associated risks. A specific reference to these non-traditional "workplaces" should be considered for inclusion in the Draft Code.

Although mentioned elsewhere in the Draft Code, references (or at least cross references) should be made in Part 2 to contact officers and whistleblower systems and protection. The value of contact officers in identifying hazards in Part 2.1 could be added, highlighting that workers can report issues and hazards to those people who regularly report to management in this area.

The Committee suggests that clear reporting lines and communication channels could be added on page 11 to the list in Part 2.2 of general workplace management control measures to ensure safe systems at work. Clear and visible communication channels support effective communication with workers and appropriate oversight which function as a general control measure.

Page 12 of the Draft Code helpfully discusses appropriate features of a workplace bullying policy and Appendix A contains an example of a workplace bullying policy ("the Example Policy"). The Example Policy includes a helpful reference to protection against victimisation which in the Committee's view should also be included in the list of appropriate features of a policy on page 12.

In respect of training, for many organisations face to face training is cost prohibitive or logistically difficult so it may be useful to refer to interactive web based training as a viable alternative. Additionally, for communication within the organisation it may be useful to incorporate use of the internet or podcasts for the dissemination of information, particularly where workers may be working remotely or across a number of sites.

The recommendation for a review of control measures is appropriate. The only suggestion the Committee makes is that a review of control measures outside the scheduled review date should only be made upon the *reasonable* request of the health and safety representative or committee.

Part 3: Responding To Workplace Bullying

The Committee makes two suggestions for further consideration in this part. A specific reference could be added to Part 3.5 to refer to the ability of some employees to notify a dispute about bullying to the Fair Work Commission under the new regulatory framework of the *Fair Work Act 2009* commencing 1 January 2014. In the Committee's view there are many places in the Draft Code where a reference or cross reference to the new jurisdiction of the Fair Work Commission in workplace bullying may be useful. The Committee notes that at the time Safe Work Australia drafted this version of the Draft Code, the operation of this new jurisdiction was uncertain. However, now that the legislation has received assent and is due to commence 1 January 2014, consideration could be given to inserting a brief section on the regulatory framework for workplace bullying under the *Fair Work Act 2009*.

In the Committee's view the Draft Code could give further guidance around the needs of the alleged bully, although the Committee notes that this revised Draft Code has made some improvements in that regard. Part 3.2 lists important principles when handling reports of bullying, such as confidentiality and procedural fairness, including treatment as innocent until proven true. The Committee notes that it can be very damaging to the integrity of the process and the individuals involved if the focus and attention on ridding workplaces of "bullying" turns into a "witch hunt" in workplaces.

Part 4: Investigations

The reference to other relevant workplace laws in the "Note" at the beginning of Part 4 could also include a specific reference to the ability of some employees to notify a dispute about bullying to the Fair Work Commission under the new regulatory framework of the *Fair Work Act 2009* commencing 1 January 2014.

The second paragraph of Part 4 infers that investigations are only appropriate where there is a "serious risk to health and safety". Investigations may be appropriate even if there are not serious risks to health and safety, as the conduct alleged may be indicative of some dysfunction in the workplace that could be investigated and addressed before it becomes a bigger issue.

The Draft Code refers to the investigator submitting a report with "findings", but it is also often useful for an investigator to make recommendations for the decision maker to consider. The reason for this is that the investigator has had the opportunity to interview employees and may be in a position to comment on the dynamics in the workplace and make recommendations on how bullying behaviour could be prevented. An example may be that the investigator may form the view that the employees are uninformed about appropriate behaviour and what behaviour constitutes bullying and consequently may recommend increased education and training to raise awareness of appropriate workplace conduct.

In Part 4.3, "Outcomes of an investigation", the Draft Code states the following:

An investigation may find that a report of bullying is not substantiated and no further action can be taken. If the allegation cannot be substantiated, this does not mean the bullying did not occur.....

In the Committee's view this statement is confusing. If allegations of bullying are not substantiated, then the finding is that the bullying did not occur. The investigation may raise workplace issues that should be addressed by way of mediation, counselling, or changing workplace arrangements. However, it is unfair for a person to still be accused of bullying if in fact the actual claims cannot be substantiated.

Appendix A – Example of a Workplace Bullying Policy

The Example Policy is helpful and an excellent tool for small businesses which will be greatly assisted by its inclusion. The Draft Code usefully lists a range of matters to be included in a Workplace Bullying policy but not all of the listed matters appear to have been included in the Example Policy. In the Committee's view, particularly if the Draft Code does become a Code of Practice, the Example Policy should be amended to include prompts for the following additional information (as described on page 12 of the Draft Code) to be inserted:

- the process for reporting workplace bullying (in addition to the existing prompt for details of the contact person);
- the process for responding to reports of workplace bullying;
- accountability and responsibilities of various staff; that is, who makes the decisions; and
- the process for managing vexatious reports.

3. Worker's Guide

In the Committee's view, the Worker's Guide is a useful tool for workers who find themselves targeted by a bully or the subject of an allegation of being a bully.

The Worker's Guide must be wholly consistent with the Draft Code. Currently the language used in the Worker's Guide is very similar to that used in the Draft Code but there are instances where a slight variation of language is made for no particular reason apparent to the Committee. For example, the omission of a statement in the Worker's Guide that the bullying behaviour may be intentional or unintentional. Similarly any changes made to the Draft Code in this current review should be checked for consistency with the Worker's Guide and if appropriate, changes made should be carried over.

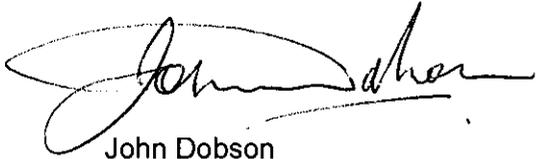
A specific reference could be added to the Worker's Guide referring to the ability of some workers to notify a dispute about bullying to the Fair Work Commission under the new regulatory framework commencing 1 January 2014.

In the Committee's view, it should be specified in the Worker's Guide that the investigator may make *recommendations* as to the appropriate course of action but it is the organisation that decides what actions if any should be taken.

In describing the role of an inspector appointed by the work health and safety regulator on pages 6 and 8 of the Worker's Guide, the Committee prefers the description given in the Draft Code in the last sentence on page 17 which focuses on the inspector providing advice and investigating contraventions.

The Committee appreciates the opportunity to comment on the Draft Code and Draft Worker's Guide. If you have any questions regarding this letter, please contact Gabrielle Lea, Policy Lawyer for the Committee on (02) 9926 0375 or by email: gabrielle.lea@lawsociety.com.au.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John Dobson', with a large, sweeping flourish at the end.

John Dobson
President