



THE LAW SOCIETY
OF NEW SOUTH WALES

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9 August 2012

The Committee Secretariat
House of Representatives Standing Committee on
Education and Employment
PO Box 6021
Parliament House
CANBERRA ACT 2600

Email: workplacebullying.reps@aph.gov.au

Dear Secretariat,

**House of Representatives Standing Committee on Education and Employment:
Inquiry into workplace bullying**

I refer to the submission dated 6 July 2012 from the Law Society's Employment Law Committee (Committee) to this Inquiry and the evidence given by Ms Petrine Costigan and Mr Giri Sivaraman on behalf of the Committee at the Sydney public hearing on 10 July 2012.

The Committee was asked to provide further comments to the Inquiry in respect of two matters, the international regulation of bullying and the Draft Code of Practice "Preventing and Responding to Workplace Bullying" issued by Safe Work Australia. The Committee's supplementary comments are set out below.

International Legal Regulation of Workplace Bullying

In Sweden and France, legislation that directly addresses bullying in the workplace has been enacted. In 1993, Sweden enacted legislation against moral harassment in the form of the Ordinance on Victimization at Work¹. The 1993 Ordinance was underpinned by the 1977 Swedish *Work Environment Act*. The legislation has had varied success and there has been some criticism targeted at its ability to provide redress for victims of bullying².

In January 2002, France through the *Social Modernization Act* established a legal regime aimed at combating moral harassment at work³. This legislation has been the basis upon which case law has developed on moral harassment. The French Labor Code was modified

¹ S. M. I. Guerrero, (2004). The development of Moral Harassment (or Mobbing) Law in Sweden and France as a step towards EU legislation. *Boston College International & Comparative Law Review*, 27(2), page 478

² David Beale and Helge Hoel (2010), "Workplace Bullying, industrial relations and the challenge for management in Britain and Sweden" *European Journal of Industrial Relations* 16, page 107

³ Loic Lerouge, "Moral Harassment in the Workplace: French Law and European Perspectives", *Comparative Labor Law & Policy Journal*, Volume. 32 (2010) page 111.

to clarify the definition of moral harassment, specific penal provisions were instituted to address moral harassment and some modifications were made to employer's obligations in relation to 'physical and mental health'⁴.

Belgium has laws against moral harassment⁵.

In the United States, there is no single specific legislation that deals with workplace bullying directly⁶. Instead protection for victims of bullying can be found in various legal forums such as through civil rights protection and occupational health and safety legislation.

In the United Kingdom, a draft Dignity at Work Bill was tabled in 2001. However this bill was never passed into legislation and no direct attempt has been made at legislating in relation to workplace bullying since.

The Labour Inspectorate of Spain has released a Code of Practice which addresses bullying and the Labour Inspectorate frames bullying as an OHS hazard⁷.

In Norway, a Tripartite Agreement on a More Inclusive Workplace was agreed in 2001 to address the high sickness absence and disability benefit inflow rates. The Agreement was extended in 2006 with a Letter of Intent until 31 December 2013; however it does little in terms of imposing direct obligations in relation to bullying and instead aims to increase collaboration between employer and employees to promote a better and more inclusive work environment⁸.

The Netherlands has a *Working Conditions Act* which appears to place on employers an obligation to protect their employees from psychological aggression in the workplace⁹.

Draft Code of Practice "Preventing and Responding to Workplace Bullying" issued by Safe Work Australia

Thank you for the opportunity to comment in relation to the Safe Work Australia Draft Code of Practice, "Preventing and Responding to Workplace Bullying" (Draft Code of Practice).

The Committee noted in its earlier submission to you dated 6 July 2012 that it broadly agreed with the definition of workplace bullying in the Draft Code of Practice, but in the Committee's view the definition should be extended to include a single instance of "unreasonable behaviour" if sufficiently aggravated.

The Committee has now reviewed the Draft Code of Practice and comments in relation to the general nature of the Draft Code, its appropriateness, applicability and form. The Committee also has several specific concerns regarding particular statements made within the Draft Code of Practice.

⁴ Ibid, pages 113-114

⁵ Loic Lerouge, above footnote 3, page 137

⁶ Helen LaVan and Wm. Marty Martin (2008), "Bullying in the U.S. Workplace: Normative and Process-Oriented Ethical Approaches" *Journal of Business Ethics* 83(2), page 150

⁷ Manuel Veldzquez (2010), "The Spanish Code of Practice on Work-Related Bullying: Reflections on European Law and its Impact on a National Strategy For Labor Inspectors", 32 *Comparative Labour Law and Policy Journal* page 210

⁸ Bjørn Tore Langeland (2011), "Impact of the more inclusive working life agreement" *European Working Conditions Observatory*, National Institute of Occupational Health, <http://www.eurofound.europa.eu/ewco/2011/06/NO11060191.htm>

⁹ European Agency for Safety and Health at Work, "The Dutch Working Conditions Legislation" (2012), <http://osha.europa.eu/fop/netherlands/en/legislation/index.html>

Code of Practice

It is the Committee's view that creating a Code for the management of human behaviour and relationships is undesirable. The Draft Code of Practice is prescriptive and process-driven, and not suitable to many workplaces in Australia, particularly small to medium sized businesses, and businesses whose employees have poor English literacy skills. It is not possible to have a Code of Practice that is suitable to all Australian workplaces given the many variables including size, location, and industry.

The Committee suggests that the finalised document be implemented as a guideline and educational tool for employers rather than as a Code of Practice.

Present form of the Draft Code of Practice

It is the Committee's view that the present form of the Draft Code of Practice is unsuitable: it is prescriptive, long, process-driven and directed at large employer organisations and not suitable to small to medium sized businesses. The Committee supports the broad principles of identifying risks and assessing risks, consultation and control measures but these matters should be tailored to individual workplaces. The Draft Code of Practice is process-driven and is not conducive to an early resolution of complaints of bullying in the workplace, and could lead to a greater level of conflict rather than working towards a resolution of the conflict. The Draft Code of Practice appears to be directed to large workplaces, and many aspects of the Draft Code of Practice, including the processes it envisages, would be unworkable in small business.

The Committee also believes that the Draft Code of Practice does not effectively distinguish between serious and less serious complaints, and is not nuanced to the subtleties of workplace relationships. It is important that a balance be found to assess the seriousness of the complaint and for different measures to be put in place to reflect the levels of seriousness.

Specific matters in the Draft Code of Practice of concern to the Committee are as follows:

At page 16, in clause 4.4 Formal resolution, the Draft Code of Practice states:

"The formal process involves the target of the bullying making a formal complaint in writing which is then formally investigated."

In the Committee's view it is undesirable that there be a requirement that all formal complaints be in writing, as for example, it disadvantages employees with poor literacy skills, especially migrant workers where English is a second language.

In the last paragraph of clause 4.4, the Draft Code of Practice states that the formal process should include:

"possible appeals process, if necessary".

In the Committee's view an appeals process is impracticable for many small to medium sized businesses.

At page 18, under the heading Step 4 – Investigation outcomes, the third paragraph states:

“If the complaint is found to be vexatious or malicious, counselling should be provided for the target. This action should be considered very seriously and should only be undertaken in the rarest of circumstances”.

It is the Committee’s view that if a complaint is “vexatious or malicious” the victim, who is the person who has been accused of bullying in the first place, should be immediately provided with support as they themselves may be a target of workplace bullying. It is also appropriate in the Committee’s view that if a person makes a “vexatious or malicious” complaint then that person should be disciplined, and that may include the termination of their employment.

At page 19, the second paragraph, the Draft Code of Practice states:

“Note that mediation is not an appropriate intervention if an allegation of bullying has been substantiated. Expecting a person who has been targeted by bullying behaviour to enter into agreements with their abuser may constitute a form of punishment for the target”.

The Committee disagrees with this view. Often mediation is appropriate, depending on the seriousness of the allegations and the impact of the behaviour on the victim.

The Committee supports appropriate and commonsense measures which will empower employees and promote the early resolution of these matters in the workplace.

Thank you for the opportunity to further participate in this Inquiry. Should you wish to discuss any of the matters raised in this letter or the Committee’s earlier submission, please contact Gabrielle Lea, Policy Lawyer for the Employment Law Committee by email to gabrielle.lea@lawsociety.com.au or on 9926 0375.

Yours faithfully,


Justin Dowd
President