

WORKPLACE HARASSMENT – AN UPDATE

It is now over 12 months since I delivered a paper titled *Bullying/ Harassment in the Workplace* and had a lively and informative debate about bullying in the workplace. What has happened in the intervening period? For one, enquiries at our practice have not stopped concerning bullying in the workplace. However and most importantly the expected Taskforce Report has been released in March 2002. Unfortunately that report is now nearly 12 months old and what has occurred in the meantime? I will deal mainly with the report and observations of it. I will not deal with it in its entirety as that would be too time consuming. I do however commend its reading as it is a most comprehensive document and makes telling and intelligent comment on this workplace scourge. In brief the recommendations are being dealt with and the Department reports that an Implementation Group has been formed consisting of the Queensland Public Sector Commissioner, the Deputy Director-General and various representatives from Treasury and the Department of Industrial Relations. It is expected (or rather hoped) to have information available to the public by the middle of this year.

My concern with the report is the co-ordinated approach recommended by the Taskforce involves:-

1. Which could be an administrative tightrope among competing interests – for that co-ordination. History tells us that drawing together what are usually independent bodies with their own agendas and views is a very difficult, if not impossible, task;
2. I expect a cost component that would have to be additions to budgets of a number of government funded or dependent bodies.

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3. History also shows us that the public sector is very concerned at budgetary constrictions and there is the standard government, of whatever political persuasion, mantra of there is no extra money/ this demand will send us into the red/no new taxes. The public sector is crying out for funds that government says are not available. If the money is forthcoming, where will the cuts be to find that money – either not the co-ordinated approach we need, or there will be cuts in other essential areas. But enough of my gloom – let us move onto to the positives of the Taskforce report and some comments on them:-

(a) A definition of *workplace harassment*:

Workplace harassment is repeated behaviour, other than behaviour that is sexual harassment, that:

- (i) is directed at an individual worker or group of workers; and*
- (ii) is offensive, intimidating, humiliating or threatening; and*
- (iii) is unwelcome and unsolicited; and*
- (iv) a reasonable person would consider to be offensive, intimidating, humiliating or threatening for the individual worker or group of workers.*

I applaud the definition – particularly the repetitive aspect. I do think there has to be repetition – but if a workplace has a proper system for dealing with workplace harassment then if an employee has a concern over some conduct, it should be raised with an appropriate person so that the employer can review it and either judge its seriousness or have it noted in the event of a repetition.

(b) Legitimate Management Action. This section, although

brief, does make some pertinent points on this topic. Most complaints are against superiors – those closest to the employer or the employer itself. Inevitably the question of legitimate management action raises its head as an excuse or the reason for conduct the employee believes is workplace harassment. Let's face facts though:-

- (i) Invariably there is a communication breakdown – and if there is it is the fault of the superior and/or the employer. If there is a communication breakdown and it is not remedied, then the employer places itself at risk to allegations of workplace harassment – see the proposed definition again.
- (ii) A superior, particularly in restructures of departments or businesses (and particularly highlighted by the public sector) is looking after No 1. Without a proper change process again the superior/employer places itself at risk to allegations of workplace harassment.

I agree that there will be definition litigation of legitimate management action in the context of the definition of Workplace Harassment. But any employer should be careful to follow the recommendations or advice on systems in dealing with workplace harassment to bolster any defence they may wish to avail themselves of --but more importantly, to avoid workplace harassment in the first place.

- (c) The Advisory Standard. As a result of the Taskforce recommendations, this is a key to the co-ordinated approach. The recommendation is:

A WHS Advisory Standard for workplace harassment should contain the following elements:

Definition: The WHS Advisory Standard should include a clear definition of workplace harassment to assist employees, employers and regulators to identify workplace harassment when it occurs and to prevent and manage incidence of workplace harassment.

Legal Obligations and Rights: The WHS Advisory Standard should outline the legal obligations of employers and employees in relation to workplace harassment. The WHS Advisory Standard should also clarify the responsibilities of employers and employees in preventing and minimising the risk of workplace harassment occurring. The WHS Advisory Standard should also outline legal avenues of redress available to victims of workplace harassment, including information about where to gain further advice.

Best Practice Guidance: The guidance given in the WHS Advisory Standard should be based on international "best practice" models. The guidance given should be focused on preventing and minimising the risk of exposure to workplace harassment. The WHS Advisory Standard should also include guidance on managing the incidence of workplace harassment when they occur, including how to investigate and resolve incidence of workplace harassment. The WHS Advisory Standard should also recommend the use of alternative dispute resolution processes such as mediation.

Claims Management: The WHS Advisory Standard should provide information about claiming workers' compensation and the claims management process.

Flexibility: The WHS Advisory Standard should be able to cater for a variety of organisations from small

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businesses to large corporations.

Importantly it would be relevant to all workplaces. It would be an umbrella of information – pointing to processes, practices and further steps in the event of workplace harassment. This is something obviously DWHS is working on diligently, and it must be a standard simple in its understanding, adoptive to all workplaces and clear in its terms of guiding employers and employees and lastly and most importantly, where we go from here. This is an important step in the co-ordinated approach recommended. I particularly refer you to pages 57-59 of the Taskforce Report.

- (d) QIRC. I see the logic in the co-ordinated approach recommended by the Taskforce and the eventual “power” and “remedy” within the QIRC. It will, however, take careful drafting and perhaps even the power of the President of the Commission to issue Court-style “Practice Directions” as to how the jurisdiction works in practice. It will mean a re-education and review process for Commissioners as they will be dealing with and looking at an area never previously dealt with – particularly the personalities and hurt involved. This is where I maintain my view that the ADCQ is the most adoptive forum for dealing with workplace harassment – given it already deals exclusively in this jurisdiction. I agree it would mean revision of legislation and processes and powers (read money) to make it work. Experience in this area is a key. Major changes would be needed and I agree the QIRC is an excellent forum for early intervention and timely resolution.

My further concern, as a lawyer, is the restricted nature of the QIRC for legal representation and also cost. Something needs to be done in this respect. Often a lawyer is involved because

of the legal remedies available – from WorkCover Queensland to other legal remedies. This co-ordinated and regulated proposal will be an area an employee will need legal guidance and advice on. Costs should be available as of right to aggrieved parties. In the majority of cases I deal with, companies immediately engage lawyers to defeat/defend/mitigate claims. Cost appears to be no object. Employees should not have to face the anguish of workplace harassment and endure the cost out of pocket to seek a remedy. I will not go on too much about this – it will lead to another pet hate of mine – our individual society and the so-called level/fair playing field that allegedly exists for employers and employees – it does not exist.

Therefore I still view the ADCQ as the best forum but if it is done and funded correctly, then the QIRC will work.

I refer you to section 5.4.6 of the Report at pages 59 – 66 for discussion and recommended changes for the QIRC and the *Industrial Relations Act*. These are highlighted by the improving dispute resolution and listing workplace harassment as an industrial matter.

(e) WorkCover Queensland. The recommendation is that WorkCover Queensland compensation arrangements and Claims Management be reviewed in terms of:

- Timeliness;
- Rehabilitation;
- Meaning of “ Reasonable Management Action” ;
- Evidentiary and process requirements.

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Again it is probably a matter of resources but the quicker a claim is processed, the less the additional stress is to a claimant. In a workplace harassment context, appeal rights and periods also need to be reviewed. Should an appeal to go an Industrial Magistrate or straight to a tribunal?

Certainly a process undertaken by WorkCover in a recent claim by a client of mine highlights what can be done if an investigation can be done quickly. Although not quite an ideal example of a stress claim – the result of what would fall under the definition of workplace harassment – it was processed quite quickly and with care. An independent investigator was used to interview and report to the Claims Officer. The claim process took eight weeks – still a long time from medical certificate to acceptance and the employer then appealed. I hope there is an effective process implemented – but I expect it is entirely resource-based so that funding again is the major issue.

- (f) Prevention and Management Framework. This section of the report (page 71 onwards) highlights the co-ordinated approach necessary to deal with workplace harassment. If I could just highlight two such sections dealing with an *advisory service* and *complaints handling process*. To quote from the report:-

The Taskforce considers that a prevention and management framework should involve the following components as they have been discussed in the preceding sections of this report:

1. Workplace Health and Safety Advisory Standard.
2. Listing workplace harassment as an industrial

3. Improving dispute resolution under the *Industrial Relations Act*.
4. Improving the grievance process in the Queensland public sector.
5. Amending Directive 32/99 by the Public Service Commissioner under the *Public Service Act*.
6. Advisory Service.
7. Complaints Handling Process.
8. Anti-Discrimination Commission of Queensland.
9. Workers' Compensation.
10. Partnering Arrangements.

This is an excellent suggestion and part of the awareness that needs to be generated. However, whether it is a government agency or community-based, it will be resource intensive. Again *where will the money come from*. The complaints handling process would start with resolution in the workplace and then move on to the QIRC dispute resolution process. The report envisages the possibility of a five-stage process – see pages 73 and 74 of the Report.

It is to be hoped that Queensland achieves what would be a best practice approach to workplace harassment. What must be also remembered is that workplace *bullies* were probably *school bullies*. We need to reach into our communities and homes and ensure that programs and education address bullying of every description from the earliest times. For schools again this is a resource matter as well as a commitment concern.

I commend the Taskforce and its report and also commend it to you for reading. I certainly hope that matters move a lot more quickly given the nearly 12 months that has elapsed since the report was released.

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