

*The recent introduction of Brodie's Law in Victoria has put the spotlight on workplace bullying in Australia. Craig Donaldson speaks with a number of experts about the law, what can be done to address workplace bullying as well as implications for OHS professionals*

# Stamping out workplace bullying

**W**orkplace bullying has been called the cancer of the workplace. Figures published in 2010 by the Productivity Commission indicate that bullying costs the Australian economy up to \$36 billion annually. Nearly all workers will have to deal with bullying behaviour directed towards them at some time in their working lives.

Workplace bullying has emerged as a serious issue for Australian employers, with greater media attention on incidents of workplace bullying as more victims start to come forward, according to Maurice Baroni, partner, and Millen Lo, senior associate, in the national Clayton Utz Workplace Relations and Safety practice. The introduction of Brodie's Law in Victoria, for example, following a tragic case of workplace bullying involving a teenage girl, underlines the heightened focus on bullying as a serious workplace issue. In Victoria, for example, they note that reports of workplace bullying are on the rise. "Last year, WorkSafe reported receiving around 30 phone calls a day relating to workplace bullying," according to Baroni and Lo.

Michelle Tuckey, senior lecturer in the school of psychology, social work and social policy at the University of South Australia, notes that up to 10 per cent of workers at any one time report being that target of severe levels of bullying – daily or weekly for more than six months.

"Our recent work at the University of South Australia reveals that organisational climate is the leading indicator of bullying levels in organisations and can affect how much of an impact bullying has on workers when it does occur," she says. "When workers feel that their mental and emotional wellbeing is a priority for the organisation – and not just production goals or core business – then bullying levels in the organisation are much lower and the negative effects, such as traumatic stress symptoms, emotional distress and emotional exhaustion, are less severe."

## The impact of Brodie's Law

This amendment to the criminal offence of stalking in Victoria has attracted public attention to inappropriate conduct in the workplace – which is a good outcome, according to Siobhan

Flores-Walsh, special counsel in the occupational health, safety and security group at Norton Rose.

However, she notes that Brodie's Law has also added a further level of complication to dealing with bullying in a workplace environment. "Brodie's Law is a mainstream criminal law, which means that the police will need to lay charges for the offence in the first place. Convicting a person for this offence requires the criminal standard of proof to be met," she says.

"Accordingly, Brodie's Law may not be the most effective way to tackle inappropriate workplace behaviour, particularly when the behaviour would need to be quite extreme to come within the ambit of this law. It may be that pursuing a civil remedy, requiring a lower standard of proof and not entailing a criminal penalty against the alleged perpetrator, would offer a more satisfactory result."

Josh Bornstein, principal at Maurice Blackburn, believes that the legislation is well intentioned, but flawed. "Whilst I agree that criminalising bullying sends a strong signal to the community, criminal laws will only be invoked in the most extreme cases. There simply aren't enough police resources to deal with most cases of workplace bullying," he observes.

Secondly, a criminal prosecution will invariably occur well after the damage has been done. "This is not good enough. Employees should be given quick and ready access to a tribunal or court that can pre-empt or stop workplace bullying before it causes damage to a person's health," says Bornstein, who affirms that victims of bullying need access to a user-friendly court process that allows them to stop bullying before real damage is done.

## Tackling bullying in the workplace

Initially, Brodie's Law may have some deterrent effect, although Flores-Walsh says it is questionable whether the legislation will actually deter workplace bullying. "It might be that the publicity associated with the legislation will make some people pause; however, the legislation simply extends the definition of stalking and has been drafted to capture fairly extreme conduct, not the more common types of bullying," she says.

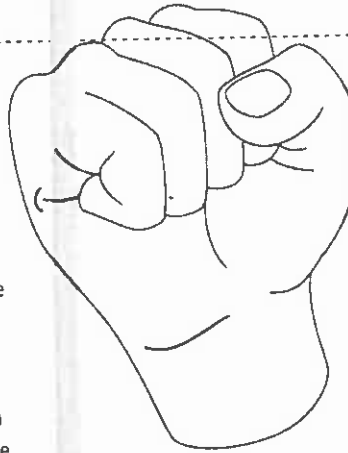
"It's doubtful that these types of laws making bullying and

harassment a serious offence will have a long-term deterrent effect if they are not enforced consistently. We may see a cultural adjustment within the wider community in terms of the type of behaviour that is deemed to be unacceptable."

The University of South Australia's Tuckey believes that addressing bullying at work needs to start by building a culture that values mental and emotional health at work and then implementing policies, procedures and especially workplace practices/behaviours that reflect this value.

"Brodie's Law may serve as an impetus for supporting such culture change in organisations," she says. "For example, more organisations may take bullying more seriously as a result of this legislation, and send a clear message that bullying is not tolerated – in organisational policy but especially in terms of the action taken by the organisation to deal with bullying and, more broadly, to value mental and emotional wellbeing and build a culture of respectful behaviour."

While the new laws allow victims of bullying in serious cases to seek intervention orders, Bornstein observes that it is likely that there will be a number of practical difficulties posed if such intervention orders are granted "For a start, such an order can't be made against an employer. Indeed the employer may be unaware of the process until one employee turns up to work brandishing an intervention order against a co-worker," he says.



*"Brodie's Law may not be the most effective way to tackle inappropriate workplace behaviour"*

**Siobhan Flores-Walsh, special counsel in the OHSS group at Norton Rose**

Bornstein believes that employees would benefit more if bullying was tackled at the national level by including it in the *Fair Work Act*. "If you are an employee who is misled about workplace bargaining, if you are subjected to racial vilification or sexual harassment, or if you make a complaint to your employer about an issue in the workplace and are punished or sacked for doing so, you can immediately have your matter heard in a tribunal or court," he says.

"A similar approach should apply for victims suffering from workplace bullying."

### Implications for OHS professionals

Brodie's Law raises a number of potential issues for employers. It is important that all employers review their existing OHS policies to reflect legal developments in this area, according to Clayton Utz's Baroni and Lo.

"Workplace policies need to reflect the fact that workplace bullying may take many forms, and the relevant policy must be equipped to deal with this. The rights and responsibilities of employers and employees alike must be made clear and there must be a transparent process for dealing with employee complaints," they say.

Similarly, employees who are responsible for administering the company's OHS policies must be properly trained in the

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new laws and how to respond to any allegations of bullying.

Bornstein says OHS professionals should ensure that there are strict HR policies regarding bullying or harassment and offer employees the opportunity to raise any concerns in a safe and confidential process to eradicate any bullying behaviour.

"While there is a major personal cost to the victim of bullying, employers may be faced with significant legal action and other costs of retraining or recruiting new staff in the event that a worker leaves their employment," he says.

The real power of Brodie's Law lies in its value in making bullying and other types of harassment a bottom line issue for employers – that is, an issue that has serious financial and reputational consequences for a brand and business, according to Flores-Walsh. "In order to address that risk, employers must implement comprehensive policies and complaint and investigation procedures," says Flores-Walsh, who adds that these processes shape the workplace culture and provide mechanisms to process complaints.

## POLICIES AND PRACTICES FOR ADDRESSING WORKPLACE BULLYING

OHS professionals should ensure that workplace policies cover the full range of bullying, harassing and discriminatory behaviour. For the purpose of education and training, these types of conduct should be defined and illustrated with examples, so that businesses, employees and others have a good understanding of what behaviour is not acceptable, and also what behaviour employers, managers and supervisors should be looking out for.

Internal complaint and investigation procedures are fundamental to ensuring that workplace policy is enforced, and that employees feel they are able to come forward with complaints, which will be taken seriously and handled competently.

Workplace behaviour policy will not be effective unless it is modeled from the top of the business down – role modeling is everything in ensuring that harmful discriminatory or inappropriate conduct is not culturally acceptable in any workplace. Employers should make the following clear to management and workers (however engaged, including employees, contractors and consultants): a description of prohibited behaviours; and guidance about how an employee can obtain confidential assistance to deal with possible harassment/discrimination including referral to external providers and external grievance officers as well as a clear description of the informal and formal complaint processes.

Employers should also ensure that their procedures provide for: appropriate contact people; grievance officers; and mechanisms and processes to deal with difficult preliminary issues such as: when to refer a complaint to the police; how to determine the boundary between on-duty and off-duty conduct (and therefore when there is an obligation to intervene); the employer's duty to investigate a "risk" even when the complainant will not consent to being identified; the need to take care about referring a complaint to alternate dispute processes; and how to deal with confidentiality and protecting against retaliation and victimisation.

Source: Slobhan Flores-Walsh, special counsel in the occupational health, safety and security group at Norton Rose