



Fair Work Commission

By email: futuredirections@fwc.gov.au

23rd December 2013

To whom it may concern

Re: Submission to the Fair Work Commission on the Draft Anti-bullying Benchbook

National Working Women's Centres (NWWC) are pleased to have the opportunity to submit this response.

The NWWC in South Australia, the Northern Territory and Queensland are community-based not-for-profit organisations that support women employees whatever their age, ethnicity or work status by providing a free and confidential service on work related issues. All three Centres are small agencies that rely on funding from the Commonwealth Fair Work Ombudsman, State (SA and Qld) and Territory governments (NT).

The Working Women's Centres opened in 1979 in South Australia and in 1994 in the Northern Territory and Queensland. Since their beginnings, the Centres have worked primarily with women who are not represented by a union, their own lawyer or other advocate. We provide advice, information and support in lodging complaints and claims. As we are not legal services and can not provide legal advice, we refer women with legal needs to appropriate legal services. Many women who contact our Centres are economically disadvantaged and work in very precarious areas of employment.

NWWC also conduct research and project work on a range of issues that women experience in relation to work. These have included access to child care, Repetitive Strain Injury, outwork, family

friendly practices, WHS, workplace bullying, the needs of Aboriginal and Torres Strait Island women, pregnancy and parental status discrimination, Community Development Employment Project (CDEP), work/life balance, pay equity and the impact of domestic violence on women workers and their workplaces. Although some of the issues have changed for women since the Centres began operation, the work that we do remains consistent with the philosophy that all women are entitled to respect, to information about their rights and equal opportunity in the workplace.

The NWWCs have been working in the field of workplace bullying since our Centres opened. Unfortunately, workplace bullying has always been and continues to be one of the most prevalent issues that our clients complain of. It is certainly the issue that requires the greatest time, skill and expertise from our staff. Our assistance to clients in this area includes providing advice, information, supported referrals to counsellors and medical professionals, assistance with preparing internal and external complaints to various authorities and representation for these complaints. In addition, the Centres have provided extensive community education in relation to identifying, preventing and responding to workplace bullying, aimed at both employers and employees. The Centres have also produced resources on this topic.

We are happy to be contacted about this submission.

Yours sincerely

Rachael Uebergang & Anna Davis

Co-Coordinators

Northern Territory
GPO Box 403
Darwin NT 0801
mob: 0422 896 551
p: (08) 8981 0655
f: (08) 8981 0433
admin@ntwwc.com.au

Alicia Philbey

Acting Director

Queensland
PO Box 10554
Adelaide Street
Brisbane QLD 4000
mob: 0423 435 285
p: (07) 3211 1440
f: (07) 3211 1449
e: qwws@qwws.org.au

Sandra Dann

Director

South Australia
PO Box 8066
Station Arcade
Adelaide SA 5000
mob: 0409 693 286
p: (08) 8410 6499e:
f: (08) 8410 6770
e: wwc@wwc.org.au

Introduction

NWWC are very pleased that the Anti-bullying Benchbook has been released prior to the 1st January 2014. The Anti-bullying Benchbook is practical and useful for our staff and clients and we commend the FWC on its release.

This submission groups issues broadly under main headings. Where possible sub-headings and page numbers of the Anti-bullying Benchbook are referred to for ease of the reader.

Safety

Commission to deal with applications promptly (p. 40)

NWWC acknowledge that the FWC must start to deal with an application for an order to stop bullying within 14 days after the application is made and the FWC must prioritise applications where circumstances indicate a significant risk to parties.¹ We have concern for the safety of women who make an application to the FWC, particularly in the period immediately after the respondent learns that a complaint to the FWC has been lodged. NWWC experience tells us that where workplace bullying is well entrenched, the bullying behaviours of the perpetrator can escalate if the target attempts to assert themselves or challenge the bullying behaviour.

We anticipate that many of our clients will seek to take paid leave at the time of lodging an application for the bullying to stop with the FWC so that they can be away from perpetrator of bullying and therefore protect, as much as is possible, their own safety. Some of the most vulnerable workers such as casual workers may not be in a position to take leave at the point of lodging an application. They may be left vulnerable, scared and at risk of harming their health and safety by continuing to present to work in order to ensure they continue to be paid.

Furthermore, our experience in this area tells us that a high level of importance must be placed on complainant's knowing the status and progress of their complaint at all times, especially where they have fears for their safety. In addition, appropriate referrals to other services such as doctors who understand the dynamics of workplace bullying are crucial. We acknowledge that the FWC will be receiving training in these areas.

¹ Anti-bullying jurisdiction – Summary of the case management model, 20 November 2013, Fair Work Commission, p. 8)

Conducting a conference

(p. 40)

NWWC appreciates that participation in mediation must be voluntary² but that under section 592(1) of the Act parties may be directed to attend conferences and that this might also include a conciliation conference. Whilst compelling parties to attend conciliation conferences may be necessary and fair, NWWC are of the view that no applicant should be compelled to meet face to face in a conciliation conference setting with the person who is allegedly bullying them if they say that they do not feel safe to do so. In these instances NWWC recommend shuttle conciliation or separate meetings to protect the safety of the applicant. NWWC also recommend that p. 40 of the Benchbook clarifies whether attendance at conciliation can be compelled and that mediation is voluntary. NWWC also ask what the process would be for an applicant who does not agree to attend mediation for the reasons specified above.

The interplay between FWC and WHS regulators

Powers of the Commission

(p.40)

It is clear in the Benchbook that the FWC may refer a matter to a work health and safety (WHS) regulator where it considers this necessary and appropriate. Clarification is needed in this section to inform the reader what becomes of the status of the application to the FWC when a referral is made. When a matter is referred to a WHS regular will the FWC put a hold on the application until there is an outcome of the referral, adjourn proceedings, terminate the application or continue with the application?

Outcomes arising from investigations by another person or body

(p. 46)

NWWC are pleased that applicants have the right to make an application to the FWC for the bullying to stop and also seek intervention by WHS regulator. NWWC acknowledge that section 789FF(2)(a) requires that the FWC must take into account the outcomes of an investigation of a body such as a WHS regulator but that voluntary provision of information to the Commission by WHS regulators could potentially be constrained by confidentiality requirements under WHS laws.³ We are concerned that this constraint may limit the information available to the Commission's ability to assess the details of the investigation and its outcome. We are aware that processes differ between the various WHS regulators in each State and Territory and wonder what impact this might have

² Anti-bullying jurisdiction – Summary of the case management model, 20 November 2013, Fair Work Commission, p. 10)

³ Anti-bullying jurisdiction – Summary of the case management model, 20 November 2013, Fair Work Commission, p. 5)

upon the outcomes of investigations provided to the Commission, and hence on the Commission's approach to a particular case. For example, some WHS regulators have investigators who are trained in the area of workplace bullying while others do not. If possible, we would see value in a consistent approach being adopted so that there is a common understanding and approach to complaints, and a confidence in the breadth, depth and quality of the investigation process across the different jurisdictions.

The NWWC are particularly interested in what arrangements have been put in place (such as memoranda of understanding and training) between the Commission and the WHS regulators to ensure that the Commission has a clear understanding of the processes the WHS regulator has undertaken, and also to ensure that there is a level of national consistency to the WHS regulators investigation processes..

Internal complaints

Procedures available to the worker to resolve grievances or disputes (p.46)

The 'availability of alternative procedures does not necessarily mean that an application for order to stop bullying cannot proceed'. However this indicates that bullying orders may not proceed if there are available alternative procedures.

In the experience of the NWWCs, internal complaint processes vary widely between organisations, depending a lot upon their size, level of HR, understanding of workplace bullying and leadership take-up of the issue. Many organisations still do not have internal policies and procedures that address workplace bullying. Many clients report that the experience of filing and pursuing a complaint through the internal procedures available to them simply compounded the distress and damage caused by the bullying itself. Some examples include:

- Forced mediation;
- 'mediation' carried out by an involved, internal party who does not have mediation skills;
- Investigations carried out by a biased party;
- A lack of an independent avenue for complaint, for example, when the alleged bully and the person to whom the victim must complain are one and the same, or where there is a family relationship between the alleged bully and the person to whom the victim must complain;
- A lack of natural justice and procedural fairness in the manner in which complaints were addressed.

NWWC assert that an applicant ought to have the right to choose whether they wish their application to proceed with the FWC and not to be compelled at any stage to pursue an internal complaint mechanism whilst their FWC application is adjourned, stalled or interrupted.

The application process

Making an application

(p. 38)

NWWC assert that it is extremely important, where ever possible, that applicants are provided with a copy of the respondent's response prior to mediation and conciliation. We believe that applicants are likely to be feeling scared and worried about their application for the bullying to stop and for reasons of procedural fairness, the respondent's response ought to be provided. This section provides no information on such matters.

Legal advice

(p. 39)

The link to [Community Legal Centres](#) contains information about Working Women's Centres. This is misleading as Working Women's Centres in QLD, SA and the NT are not legal services and cannot provide legal advice. The referral to Working Women's Centres is appropriate and appreciated but we recommend the wording on page 30 be changed to [Community Legal Centres and Other Advisory Services](#).

Contact details for the NT Working Women's Centre in this section are also incorrect. Below are correct details:

NT Working Women's Centre
www.ntwwc.com.au
(08) 8981 0655
1800 817 055

Onus of proof

Unlike in the general protections laws, we understand that there is no reverse onus of proof provision in the new anti-bullying provisions. This means that the onus is on the complainant to prove that bullying, according to the definition under the Act, has occurred. The NWWCs seek clarification on whether our understanding is correct.

Representation

Hearings and conferences

(p. 40)

This section does not provide any information on representation of lawyers, paid agents or other representatives. NWWC seek to ensure that their staff will be able to represent clients in the same manner as is possible in unfair dismissal and general protections proceedings.

NWWC recommend that information similar to that contained in the Unfair Dismissals Benchbook under chapter heading *Representation by lawyers and paid agents* is provided.

NWWC also seek clarification on whether representatives may attend mediation and any directions as to their role during mediation.

General observations

NWWC would like to make the following comments that pertain more specifically to the Anti-bullying jurisdiction – Summary of the case management model document than the Benchbook though are relevant to both.

Responding to suicide risk

NWWC note that Members of the FWC who deal with anti bullying applications will be provided with comprehensive training. We believe that comprehensive training is essential for all staff who will deal with bullying matters, not only Members. It is particularly important for front line staff to be able to appropriately deal with highly distressed and anxious members of the public.

NWWC accept that the FWC is not a mental health service and does not provide mental health support. However, we believe that front line staff ought to undertake suicide intervention training (such as the Applied Suicide Intervention Skills Training (ASIST) workshop) so that they are equipped to identify and respond to members of the public who display suicidal thoughts. All staff of the NT Working Women's Centre (including the Administrative Officer and Managers) are required to complete ASIST training. All staff of WWC SA have undertaken Mental Health First Aid training and frontline staff receive specific training on dealing with difficult clients, including those who may speak about suicide or harming others. This is due to the extremely high numbers of women who call Working Women's Centres and have suicidal thoughts due to workplace bullying. It is a regular occurrence that Working Women's Centre staff does a suicide intervention with a woman who is bullied at work. We anticipate the same issues will present to FWC staff but may not be identified, appropriately responded to and referred if staff have not completed the appropriate ASIST training.

NWWC are very keen to work together with the FWC, peak employer and union bodies, relevant WHS regulators, FWO and other relevant interest groups to develop material that promotes good work place practices to prevent workplace bullying and mange related issues.

Questions in relation to Safe Work Australia's Guide to Preventing and Responding to Workplace Bullying

The NWWCs were very disappointed to learn that, following over 24 months of consultation on the Code of Practice on Workplace Bullying, during which the NWWCS provided two submissions, SafeWork Australia made the decision in November 2013 to downgrade the Code to a Guide. We understand that this will have an impact upon the admissibility of the material in the Guide in the legal sphere.

The NWWCs are seeking clarification from the FWC as to the use of the Guide's contents in the Anti-Bullying processes. For example, will a complainant be able to use the Guide as a benchmark against which to assert that their employer has not adequately pursued their complaint internally, or has not appropriately investigated?

Capacity and resourcing

As mentioned above, the NWWCs already respond to a large number of enquiries in this field and these cases generally take up a greater proportion of time and resources than other workplace matters. At this stage the NWWCs are preparing to monitor the expected impact on their capacity of even more referrals flowing from the new Anti-bullying jurisdiction. We would like to report to FWC on any changes to our workloads, and the need for increased upskilling of and training to staff. We seek support from FWC to explore avenues of funding to enable us to respond adequately.