

AFEI Response to Safe Work Australia's Draft Code of Practice for Workplace Bullying – December 2011

There should not be a Code of Practice on workplace bullying. Work health safety material produced on the issue of bullying should be confined to guidance status. The content of the draft code is unacceptably prescriptive over a broad range of managerial and human resource areas, and will be used as a means of prescribing hours, work content, manning levels and operational procedures. These are the focus of the code, despite its all encompassing approach: *"Identifying hazards involves finding all of the things and situations that could potentially contribute to bullying in the workplace and cause harm to people."*

If the intention is to provide practical guidance on what bullying is and how to prevent it, then guidance material would be adequate. The fact that a code and not guidance material is proposed reveals its actual purpose. A code makes it easier for regulators to prosecute. Failure to apply the code is evidence of failure. The inspector is relieved of the responsibility to prove that risk of injury actually existed or that bullying behaviour has actually occurred. All that needs to be demonstrated is that the PCBU has not applied the code and that officers have not exercised due diligence.

The code as drafted will provide additional opportunities to make claims, providing workers with a further platform to claim injury as a consequence of their perceptions of the risks involved with workload, work organisation, management style, organisation culture, inadequate consultation and so on. The definition of workplace bullying in the code makes it clear that actual injury does not need to be sustained, merely *" a risk"* to health and safety.

Irrespective of the actual nature of their work environment, it remains open to employees to perceive work as the cause of ill health with a compensatory outcome. There will undoubtedly be increased numbers of bullying claims as a direct consequence of this code, and consequently, increased costs to business.

While regulators may view unproven or unsubstantiated claims as the outcome of a positive process which is working well, employers (and alleged perpetrators) have to bear the costs of the accusation, the investigation, the appeals process, the subsequent remedial action and so forth. These processes are costly. They are time consuming, resource intensive and disruptive. They are also often inconclusive.

Despite this, the code imposes an obligation to provide assistance to "*remedy the conflict*" even where the allegation cannot be substantiated. The remedy includes "*mediation, counselling, changed working arrangements or addressing other organisational issues that may have contributed to the circumstances of the complaint*". This is an unreasonable and costly burden. There is no certainty that these are effective measures – even if a precise reason for the complaint is identified.

The subjective application of the term "bullying" will not be reduced by the code's wide definition of bullying. It remains open to inspectors and workers compensation investigators to interpret and make value judgements about human perception and behaviour as well as their views on how to best manage a business.

This situation will be exacerbated by the code's reference to "*unintentional*" bullying. Bullying must require an intention to cause hurt. Otherwise, any behaviour or action to which a worker objects has the potential to be viewed as bullying. It places all reliance on the views of the alleged target.

The code's identification of bullying risk factors as including systems of work is unacceptable. In effect the code is saying every aspect of the job and work organisation can be a bullying risk. Predictably, job insecurity and change make their usual inevitable appearance along with workload and excessive work demands. Whether these are fairly managed or are instances of repeated unreasonable behaviour is to be subject to the terms of the code, regulator judgement and possible prosecution.

The code requires the application of risk assessment to work systems with the presumption that these "risks" can be rated in the usual way. This risk rating requires reliance on assessment of individual perceptions and reactions and is unworkable. It is a departure from the accepted use of hazard identification and risk assessment.

The code places PCBU's in the position of having to ensure workers have their desired level of control over how and when they do their jobs or it may constitute a bullying risk factor. If the worker considers their job is too hard/unpleasant/ demanding/boring/out of their control/etc, this perception is the vehicle for a bullying claim. Not only is managing this impossible to deliver in practice, attempting to do so can only come with unsustainable economic costs and job loss.

The requirements demanded by the code are beyond the capacity of most Australian businesses which are small and simply do not have the relevant resources. ¹ The code has a distinctly public sector character with its detailed prescription of investigation and complaints procedures. It is unacceptable to promulgate a code which prescribes a formal complaints procedure and then states that this will differ depending on the size of the business: "*some businesses may not need to use all of the steps in the formal process*". How can it differ? In what respects? What will determine the acceptability of alternative solutions? This is not made clear in the draft code, or any other for that matter.

Regulation which set compliance standards that duty holders cannot meet is poor regulation. Most businesses will not be capable of complying with this code, particularly with statements such as "*Although there may be no obvious signs of workplace bullying this does not mean such behaviour does not exist*". They are then required to examine the identified risk factors prescribed in the code to uncover bullying. If bullying as defined in the code means behaviour that a **reasonable person** would see as victimising, humiliating, undermining or threatening the existence of bullying would be readily apparent.

¹ Most employing businesses, 731,055 (89.1%) employ less than 20 employees. This comprised 497,098 (68.0%) businesses with 1-4 employees and 233,957 (32.0%) businesses with 5-19 employees. ABS 8165.0 - Counts of Australian Businesses, including Entries and Exits, Jun 2007 to Jun 2009