ADLS
Connecting New Zealand Lawyers

Chancery Chambers
2 Chancery Street
Auckland 1010

PO Box 58
Shortland Street
Auckland 1140

DX CP24001

T 09 303 5270
F 09 309 3726
adls.org.nz

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ADLS EMPLOYMENT LAW COMMITTEE

SUBMISSIONS ON THE MINISTRY OF BUSINESS, EMPLOYMENT AND INNOVATION ISSUES PAPER ON BULLYING AND HARASSMENT AT WORK

INTRODUCTION

The ADLS Employment Law Committee ("Committee") is comprised of lawyers in the Auckland region who practice employment law. Committee members collectively have significant experience of representing clients who have been bullied or harassed in mediations run by MBIE and private mediators, as well as in proceedings in the Employment Relations Authority and the Employment Court.

The Committee is encouraged that the Ministry of Business, Employment and Innovation is reviewing the employment relations pathway for bullying and harassment claims and welcomes the opportunity to provide feedback on the Ministry's Issues Paper.

The Committee has reviewed the Issues Paper and has provided feedback in response to questions 32 – 61 from the Submissions Template which are relevant to lawyers and their clients. The Committee would also like highlight the following themes that emerged from the Committee's feedback. These are as follows:

- Some members felt that the 90-day timeframe for raising a personal grievance is too short as it often takes a considerable amount of time for people to come forward and report bullying and harassment. This timeframe was implemented when there was far less awareness of and discussion about these issues, along with research which demonstrates the average time it takes for people to come forward. Other members were concerned that if the timeframe were increased for bullying and harassment claims this could be used as a tactic by employees in disciplinary processes.

- There are delays for all mediations through MBIE Mediation Services, not just those involving bullying and harassment. It is generally much quicker to engage a private mediator.

- There are also delays in the Employment Relations Authority and the Human Rights Review Tribunal for all claims, not just those involving sexual and racial harassment.

- Given the vulnerability of clients who have been bullied or harassed, delays can have a significant impact on client's decision to proceed and their general trust and confidence in the system.

- The employment jurisdiction should draw on the increasing body of research and evidence in the criminal jurisdiction on how to appropriately assist vulnerable people who have been sexually harassed to report in the first place and then participate effectively in employment law processes.

- The Employment Relations Act needs to be amended to provide a discrete bullying personal grievance with a specific definition of what constitutes bullying. Clearly defining bullying in the Act will greatly assist in mediations and proceedings in the Employment Relations Authority and Employment Court.

- Increased diversity is needed in terms of the minority groups of mediators employed by MBIE (as well as others on the employment relations pathway). Training in basic Te Reo should also be offered so that this can be incorporated into mediations. MBIE should also engage with individual iwi to seek feedback.

- Employment advocates need to be regulated by a professional body to ensure consistency with lawyers who are regulated by the NZ Law Society and advocates in other jurisdictions, for example advocates in the immigration jurisdiction.

The Committee's specific feedback in response to questions 32 – 61 is provided below.

Question 32: What is the quality of the investigations conducted by the independent investigation market?

General feedback from committee members is that the quality of investigations varies significantly; some are excellent but some are well below standard. The fee charged by investigators, which can be high, is not always a reflection of the quality. Unlike in-house investigators, independents now must be either a licenced PI or a practicing lawyer. This should theoretically improve the quality of independent investigations. Membership of the local association of investigators (Australasian Association of Workplace Investigators – a subsidiary of AWI) should be encouraged as this will include training, mentorship and expectations of adherence to ethical guidelines.

Question 33: To what degree does the current online application requirement for mediation create a barrier?

General feedback from committee members is that the barriers are minimal where parties have legal representation. However, concerns were raised about the requirement on unrepresented parties to have a RealMe Login which could be quite burdensome for those who aren't technologically literate and/or do not have easy access to a computer. The suggestion was also made that parties without legal representation should also be able to apply by phone.

Question 34: Are there variations by ethnicity, gender, or other factors, in parties' ability or willingness to access mediation services?

Committee members do not have a general view but individual committee members have the following feedback:

- Persons with a low socio-economic status may find it difficult to apply, especially if they are wanting representation and are worried about the cost. Am not aware of ethnicity as a factor re willingness to participate.

- Unfortunately, our firm does not have exposure to wide diversity of ethnicity. We act predominantly for Pakeha North Shore clients. The system is designed by that group (Pakeha)

so the system, to a large degree, fits our clients. As for gender, I have not observed a difference in gender of the client being a factor in access to mediation.

Question 35: How quickly are mediation meetings occurring for issues involving bullying or harassment? Where there are delays, what are contributing to these?

The majority view of committee members is that there are delays for all mediations through MBIE Mediation Services, not just those involving bullying and harassment. This has become a significant issue in the past 18 months and it is generally much quicker to get a private mediator. It was also noted that despite delays for mediations for all types of disputes, the delay can have a much more significant psychological impact on clients who have been bullied or sexually harassed and reduce their trust and confidence in the system. The delay was raised as an access to justice issue in that some employers are using that delay to justify not paying/ delaying any settlement.

Some of the specific reasons for delays in arranging a mediation date include:

- Mediation Services only providing one date at a time.
- Mediation Services holding that date for four working days.
- The slow response rate from Mediation Services with an alternative date if the provided date doesn't suit.

Question 36: What are the benefits and/or risks with the involvement of legal and/or non-legal representatives in bullying and harassment cases?

Benefits of involvement by legal representatives identified by committee members include:

- Lawyers understand the legal process and application of the law to the situation and can be effective advocates for their party's position. This ensures people take matters seriously.
- If the lawyer is skilled this results in skilled representation / facilitation / skilled dispute resolution.
- Legal representation balances the power dynamic for employees.
- Employees are informed of their rights.

Risks identified by committee members:

- Questioning from lawyers may cause re-victimisation and other mental health issues unless dealt with in a particularly sensitive way. This may even stymie parties from talking directly to each other in such a way that resolution might have occurred without the need for legal representation.

- Depending on skill level of the lawyer, it can become about rights/positioning, rather than needs/interests.

- A focus on informing employees of their rights could interfere with the ability of the employee to agree a practical way forward in terms of reconciliation. However, often issues are long standing by time advice is sought so opportunity for early intervention already lost with positions entrenched.

- There are some egregious examples of the conduct of advocates at mediations, illustrating the necessity for a form of licensing of employment advocates including educational requirements, ethical rules, perhaps along the lines of immigration advisers.

The following comment was also made:

- The risks and benefits are variable and to some extent are dependent on the skills of the mediator and how they interact with the parties and their lawyers.

Question 37: How can parties feel supported and safe to attend mediation without legal or external representation?

Generally the committee members support the parties having legal representation at mediation because they have often made attempts to resolve prior to mediation without legal representation which have been unsuccessful. Individual committee members also provided the following suggestions:

- Greater engagement from Mediation Services will enable parties to feel supported. While the party is at mediation, Mediators may do a good job of supporting unrepresented parties. The period of time prior to the mediation may be the point at which they feel the least supported and greater efforts for Mediation Services to provide support around ensuring unrepresented parties feel comfortable attending would be worthwhile.

- Parties could be encouraged to bring their own support person, family or whanau member.

Question 38: How well is Employment Mediation Services currently supporting parties to reach an agreement without feeling unduly pressured?

Committee members have a general concern that the percentage of resolved mediations may be a KPI for mediators. This was discussed at the NZ Law Society Employment Law Conference last year but it is still unclear whether such a KPI does in fact exist. More specific feedback on this issue from individual committee members is as follows:

- KPI's create the perception, at least, that mediators are driven to settle regardless of the circumstances. Although that has not been how I have experienced mediator involvement. Sometimes the mediators appear disengaged / not interested / not invested. It appears they are over-worked and are now required to cram more mediations in each week. They seem

disengaged. A few years ago most mediations were scheduled to be 1 day. Now, that is the exception – most are ½ a day.

- There is a real focus on resolution which at times ignores the legal position, which people are entitled to stand on.

Question 39: What should a low-level dispute resolution process for cases involving bullying or harassment look like?

General suggestions provided by individual committee members include:

- Prompt resolution, all parties having the chance to be heard, lawyers who take a non-aggressive approach, a skilled mediator, and a well drafted agreement.

- A process that enables the employee and employer to talk freely with each other to see what solutions can be reached.

- I have heard anecdotally that the Fair Work pilot option is working well.

Question 40: Are there particular types of bullying or harassment cases where it would be appropriate and beneficial to attempt to resolve the issue by phone mediation?

Committee members have the general view that phone mediations are not appropriate for bullying/harassment but could be appropriate where a person feels unable to face the other party and is particularly vulnerable. A committee member provided the following specific example:

- The phone provides a level of detachment, which can be beneficial for someone suffering from trauma and from preventing re-traumatisation. I had a client who was suicidal from bullying experienced at work. The mental health crisis team had provided a letter setting out that he was not to meet the employer face to face through mediation. The employer would not negotiate. A phone mediation would have allowed him to attend the mediation remotely which may have helped to resolve the situation and have protected his mental health somewhat.

Question 41: Are there current issues with the way non-disclosure and/or non-defamation clauses are being used for cases involving bullying or harassment, particularly sexual harassment? What risks would arise if their use was restricted?

Committee members provided the following comments which demonstrate the complexity of this particular issue:

- It is always open to the parties to agree or disagree to such clauses. Usually these clauses are helpful because they allow people to move on. However they also limit other people knowing about the harassment and if it is serious harassment this could be an issue.

- There is a concern that particular clauses effectively silences a victim from speaking their truth about bullying / harassment and that, for example, a settlement effectively buys their silence. The risk in not having such clauses however, is that this reduces an incentive for an employer to make a decent offer of settlement that would make a meaningful difference to the employee's life.

- I'm not aware of issues with these legally although arguably they don't hold "perpetrators" to account.

- It is wrong to call these "non-defamation" clauses. They are much broader than the technical elements of defamation in NZ. One (perhaps unintended) consequence of restricting or banning non-disparagement and/or confidentiality requirements, would be a lowered preparedness to settle, resulting in more litigation. While this might have advantages in the creation of more caselaw as guidance and financially for lawyers and other representatives, I wonder whether discouraging settlements and encouraging litigation is counterintuitive. And how many complainants would be prepared to go to trial? While it is possible theoretically to settle without such clauses, how many lawyers acting for employers would advise a client to do so? This is a problematic area with no simple solutions.

Question 42: Are the grounds for raising a grievance for bullying, or for the employer's response to a bullying complaint, clear? Are these grounds appropriate for raising such a claim to the ERA?

The majority view of the majority of committee members is that the grounds are not clear in the ERA. Consideration should be given to a discrete bullying personal grievance with a specific definition of what constitutes bullying.

Question 43: Are the grounds for raising a sexual and racial harassment claim to the ERA appropriate?

Committee members have the general view that the definition of sexual harassment in the ERA is quite limiting, particularly given the 90-day constraint. The definition is wider in the Human Rights Act and clarity comes from case law and WorkSafe guidelines which don't apply to ERA.

Question 44: Is the requirement to raise a personal grievance within 90 days appropriate for bullying and harassment cases? If not, does this apply to all bullying or harassment cases or specific types/situations?

The majority view of committee members is that it often takes a considerable amount of time for people to come forward and report bullying but in particular harassment, so the 90-day timeframe is not appropriate. Specific comments from individual committee members are as follows:

- The 90-day period was set a long time ago before there was the same level of awareness of sexual harassment and bullying than there is today.

- There is a lot of research which shows many people don't come forward immediately i.e. within 90 days which justifies a different timeframe for other types of employment claims.

- This requirement is a real problem for such cases which develop slowly over time and may take years to come to the point where a grievance is raised. There should be an adjustment to the time limit to accommodate them.

- Often the most serious incident is not brought within the 90-day period but forms a pattern of behaviour and the final incident that is within the 90 day period is the straw that breaks the camel's back.

- 90 days to raise a personal grievance is a blunt instrument in bullying and harassment cases. Some of these issues aren't brought to the attention of the employer for considerable time as persons subjected to bullying and harassment may feel uncomfortable speaking out about their experiences. 90 days doesn't apply in exceptional circumstances, perhaps the exceptional circumstances can be broadened to allow bullying and harassment claims to be taken more easily.

- There are also issues with people on visas being extremely vulnerable to speaking up to an employer, for fear of their visa being affected and their right to stay in NZ being affected.

However, the view of some committee members is that if there an extension of the 90-day limit this could be used as a tactic by people making false complaints of bullying and harassment. There was also concern expressed by some members about a "two tier" limitation period and some felt it should be the same limitation period for all grievances.

Question 45: Is cross-examination of witnesses during bullying or harassment, particularly sexual harassment, cases appropriate? If so, what needs to be in place to prevent re-victimisation? If not, how should facts be established?

The majority view of committee members is that cross examination is necessary to test the evidence, however controls could be put in place to mitigate re-victimisation. Individual committee members have the following suggestions:

- The employment jurisdiction should learn from the criminal jurisdiction where I understand significant research has been put into developing how victims of sexual harassment should be treated including research-based understanding as to why it takes a long time for people to speak up? We should be drawing on that evidence-based research and initiatives and implementing the same immediately in the employment jurisdiction. I understand Elizabeth MacDonald (Senior Lecturer Victoria) did significant research on this area of law.

- The employment jurisdictions should learn from the successful specialist sexual violence courts in terms of how to deal with cross-examination of witnesses during bullying or harassment.

- Approach used in the Human Rights Review Tribunal should be encouraged.

- ERA members should receive training on ensuring that questioning is appropriate and doesn't re-victimise employees who are taking a claim (both for their own questions and questions from legal representatives).

- There could also be a more intensive pre-Investigation Meeting case management process where the issues involve bullying or harassment.

- In some cases a security guard may be needed to give the victim reassurance in terms of their safety.

- Exclusion orders for witnesses should eb considered where there might be re-victimization.

- Participants should be made aware of the possible checks and balances so they can feel safe.

Question 46: How should representatives be governed?

Committee members interpreted this question as how should employment advocates (as opposed to employment lawyers) be governed and the majority view of committee members is they should be regulated by a professional body. This would result in consistency with lawyers who are regulated by the NZ Law Society and with other types of advocates, for example immigration advocates.

Question 47: Is there adequate support for employees who do not have representation during ERA cases involving bullying and harassment?

The general view of the committee is that it would be a challenging situation to bring a case for bullying and representation in the ERA without legal representation.

Question 48: Are the remedies for grievances involving bullying or harassment appropriate?

The general view of the committee is that the monetary remedies are too low, particularly when you take into account the cost of representation and the mental exhaustion in taking a case.

Question 49: Are there any issues with the way bullying and harassment personal grievances are dealt with by the Employment Court?

The general view of the committee is that the Court process is much more formal and expensive so it is harder to bring a case there, however on the flip side it would be good to have more cases in the Court to develop more precedents.

Question 50: Do employees who have experienced sexual or racial harassment at work feel able to escalate a grievance to the ERA or Employment Court?

The general view of the committee is that often employees don't have the financial resources to get legal advice/representation to assist them with escalating grievances. Where people do have the financial resources, often the emotional toll of proceeding is too much for people and this is the main factor for them in deciding not to proceed.

Question 51: Are there situations where the ERA or Employment Court should inform WorkSafe of bullying and harassment cases for consideration where there may be an ongoing safety risk?

The general view of the committee is there are situations where WorkSafe should be informed where there is an ongoing safety risk. However, until there is a WorkSafe prosecution the majority of employers are potentially unlikely to take the health and safety aspects of these cases seriously.

Question 52: Overall, how well does the existing employment relations pathway work for people who have experienced bullying and harassment, including sexual harassment?

The general view of the committee is that there are a number of challenges and the existing pathway may be traumatic for bullying and harassment victims. Innovative solutions are therefore needed. A committee member also made the following suggestion:

- In general, it is worth considering an overhaul of the way the Employment Relations Authority works. The ERA has similar requirements in terms of filing documents as the Employment Court which creates a barrier for access to justice. It may be time for a re-think regarding how the ERA operates. As a lower-level tribunal type body exhaustive requirements around witness statements and legal submissions etc. can create significant costs that could be reduced by taking some lessons from the way the Disputes Tribunal (for example) operates.

Question 53: How well is the existing employment relations pathway working for Māori?

The majority view of the committee is that increased diversity is needed in terms of the representation of minority groups for mediators employed by MBIE as well as others on the employment relations pathway. Training in basic Te Reo should also be offered so that this can be incorporated into mediations, ERA proceedings and court proceedings. This is important given Te Reo is an official language of New Zealand and parties have the right to speak it in legal settings. The suggestion was also made that MBIE engage with individual iwi to seek feedback on this particular question as it's not possible nor appropriate to suggest a general approach for Maori without consultation with individual iwi.

Question 54: How well is the existing employment relations pathway working for other minority and vulnerable populations (eg, people with disabilities, migrant workers, and trans and non-binary New Zealanders)?

The committee does not have a general view but individual committee members have the following feedback:

- I have not seen any particular hurdles for these groups of people, other than the general hurdles referred to above.

- The biggest issue is that there are significant barriers for minority groups in accessing the existing systems and for pursuing potential grievances through various escalation steps. Minority groups may often be unrepresented or poorly represented by advocates because of the lack of finances to afford strong legal representation. Community Law Centres do a good job of assisting but more support is needed. The existing delays in the Authority are exacerbating issues as this makes people more inclined to walk away or to take inadequate settlement offers.

- One of the best mediators I have ever used is totally blind and uses a guide dog to get around. His disability does not hinder him.

Question 55: What is working well in the existing employment relations pathway?

The general view of the committee is that mediation, especially with a skilled mediator (usually private) works well.

Question 56: What is the biggest issue with the way a bullying and harassment issue is currently dealt with within the employment relations pathway?

As discussed above, the majority of committee members are of the view that there needs to be a defined personal grievance in the ERA for bullying. At the moment there are only defined personal grievances for sexual harassment and racial harassment. The risk of re-victimisation of and lack of support for those bringing PGs / concerns etc is also a concern.

Another issue identified by an individual committee members is as follows:

- Unlike the human rights jurisdiction, where a harassment claim can be brought directly against the alleged harasser, the jurisdiction of the employment institutions depends on there being an employment relationship as defined in the Employment Relations Act.

- The list of employment relationships in the Act does not include the relationship between two employees of the same employer. This means that an employee who feels they have been treated in a bullying or abusive can bring a claim against their employer for failing to deal with the problem but can't bring a grievance against the alleged bully/abuser themselves.

- Accordingly the person the employee sees as the real culprit may have only a marginal involvement, in responding to any claim – a highly unsatisfactory situation if the employee's key concern is that the person who wronged them should be held to account.

- The legislative fix for this would be a relatively simple one - adding "two or more employees of the same employer" to the list of employment relationships in s 4(2) of the Act, and enabling a claim to be brought by one employee against another where the other's conduct gives rise to a personal grievance.

Question 57: What improvements or changes would have the biggest impact?

The majority view of the committee is that the Employment Relations Act needs to be amended, as above, to provide a specific personal grievance for bullying.

Question 58: Should changes be made to WorkSafe's criteria, threshold or approach for triaging and handling bullying and harassment incidents at work?

The committee is of the general view that more engagement from WorkSafe in bullying and harassment cases would be a positive step, for example proactive steps such as informal interventions or prosecutions.

Question 59: How can WorkSafe most effectively use its range of intervention options to reduce the risk of harm from bullying and harassment at work?

See above.

Question 60: What role should WorkSafe have in engaging with, and encouraging change in, sectors or organisations where risks have been identified?

Committee members suggested coaching for employers and ongoing work surveillance.

Question 61: How well does the human rights system work for someone who has experienced bullying or harassment at work that has a discriminatory basis?

Committee members are of the general view that this system works well but the main downside is that there are significant delays in the Human Rights Review Tribunal. This can dis-incentivise people from bringing claims.

CONCLUSION

The Committee hopes the above feedback is of assistance to MBIE and looks forward to learning the outcome of the review. In the interim, if clarification is needed in respect of any of the committee's feedback or if MBIE has further questions for the committee, MBIE representatives would be welcome to meet with the committee in person in Auckland or remotely via Zoom.

Yours sincerely,

CATHERINE STEWART

Convenor, ADLS Employment Law Committee