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The Committee Secretariat
House of Representatives Standing Committee on
Education and Employment
PO Box 6021
Parliament House
CANBERRA ACT 2600

Email: workplacebullying.reps@aph.gov.au

Dear Secretariat,

**House of Representatives Standing Committee on Education and Employment:
Inquiry into workplace bullying**

I am writing to you at the request of the Law Society's Employment Law Committee (Committee).

The Committee is pleased to have the opportunity to participate in the Inquiry into workplace bullying being conducted by the House of Representatives Standing Committee on Education and Employment (Inquiry).

The Committee has considered the Terms of Reference for the Inquiry and has chosen to confine its response to the following three terms of reference, being matters it regards as within its members' areas of expertise:

- "the prevalence of workplace bullying in Australia and the experience of victims of workplace bullying;
- whether there are regulatory, administrative or cross-jurisdictional and international legal and policy gaps that should be addressed in the interests of enhancing protection against and providing an early response to workplace bullying, including through appropriate complaint mechanisms; and
- whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying".

The Committee also comments on an appropriate definition of workplace bullying.

The need for a definition of workplace bullying

Any consideration of issues involving workplace bullying needs, in the Committee's submission, to commence with an appropriate definition of that term.

Many definitions which have been proposed in other contexts have been imprecise and broad.

The Committee supports the definition recently contained in the draft code of practice titled "Preventing and Responding to Workplace Bullying" issued by Safe Work Australia. That definition was in the following terms:-

"1.2 What is workplace bullying?"

'Workplace bullying' is repeated, unreasonable behaviour directed towards a worker or a group of workers, that creates a risk to health and safety.

'Repeated behaviour' refers to the persistent nature of the behaviour and can refer to a range of behaviours over time.

'Unreasonable behaviour' means behaviour that a reasonable person, having regard for the circumstances, would see as victimising, humiliating, undermining or threatening."

The Committee is of the view that a single instance of "unreasonable behaviour" can constitute workplace bullying if sufficiently aggravated.

The Committee also agrees generally with the comments in that draft code which deal with direct or indirect bullying and intentional or unintentional bullying, namely:-

"Direct or indirect bullying

Bullying can occur face-to-face, over the phone, via email, instant messaging or using mobile phone technologies including text messaging. Bullying can involve many different forms of unreasonable behaviour, which can be obvious (direct) or subtle (indirect).

Examples of direct bullying include:

- abusive, insulting or offensive language
- spreading misinformation or malicious rumours
- behaviour or language that frightens, humiliates, belittles or degrades, including criticism that is delivered with yelling or screaming
- displaying offensive material
- inappropriate comments about a person's appearance, lifestyle, or their family
- teasing or regularly making someone the brunt of pranks or practical jokes
- interfering with a person's personal property or work equipment, or
- harmful or offensive initiation practices.

Examples of indirect bullying include:

- unreasonably overloading a person with work or not providing enough work
- setting timelines that are difficult to achieve or constantly changing deadlines
- setting tasks that are unreasonably below or beyond a person's skill level
- deliberately excluding, isolating or marginalising a person from normal work activities

- withholding information that is vital for effective work performance
- deliberately denying access to information, consultation or resources
- deliberately changing work arrangements, such as rosters and leave, to inconvenience a particular worker or workers, or
- unfair treatment in relation to accessing workplace entitlements such as leave or training.

Intentional or unintentional bullying

Bullying can be intentional, where the actions are intended to humiliate, offend, intimidate or distress, whether or not the behaviour did have that effect.

Bullying can also be unintentional, where actions which, although not intended to humiliate, offend, intimidate or distress, cause and should reasonably have been expected to cause that effect.

Sometimes people do not realise that their behaviour can be harmful to others. In some situations, behaviours may unintentionally cause distress and be perceived as bullying.

Bullying can be directed at a single worker or a group of workers and be carried out by one or more workers. Bullying can be:

- Downwards from managers to workers – for example, a manager or supervisor in a position of power may have a management style that seems to be strict or disciplinary when in fact it is bullying.
- Sideways between workers or co-workers – for example, a co-worker seeking to enhance their position or sense of power in the workplace.
- Upwards from workers to supervisors or managers – for example, workers may bully their manager or supervisor to try and drive them from the workplace."

The Committee adopts these concepts of bullying for the purpose of its comments below.

The prevalence of workplace bullying in Australia and the experience of victims of workplace bullying

While it is difficult for the Committee, which is comprised of New South Wales practitioners who specialise in employment law, to make any comments about the prevalence of workplace bullying in Australia but Committee members have noticed the increasing incidence of complaints relying on various allegations of bullying. It is important that some definition or consistency can be achieved regarding workplace bullying because of the huge variety of conduct that potentially comes under this heading.

Some allegations of workplace bullying may arise out of the context of a performance review, the directive to an employee to perform a lawful and reasonable task or circumstances where there is a difference in opinion between an employee and their manager or supervisor. On their own, these matters do not necessarily fall within the ambit of workplace bullying.

On the other hand, disinhibited conduct by managers including yelling, screaming, "space invading", finger waving and adopting conduct that is aggressive and intimidating or covert behaviour including deletion of work files and setting disingenuous deadlines may be associated with the commonly accepted definition of workplace bullying.

The Committee recognises the need for independent investigation of allegations of workplace bullying and principles of procedural fairness and natural justice. This includes the

need to ensure an alleged perpetrator of workplace bullying is protected from frivolous and vexatious complaints.

In terms of any national approach it is important to identify the issue of victimisation as well as how the process might encourage people to behave like victims when other non-legal or non-litigious approaches may be far more beneficial (for example, adopting codes of conduct and encouraging civil behaviour between employees as fundamental to that code).

Whether there are regulatory, administrative or cross-jurisdictional and international legal and policy gaps that should be addressed in the interests of enhancing protection against and providing an early response to workplace bullying, including through appropriate complaint mechanisms

In examining the issues raised by this Term of Reference, the Committee firstly considers current legislative protections against workplace bullying and the utility of each remedy. The Committee then comments on the gaps in legal and policy approaches to workplace bullying and concludes this section with some comments regarding the international regulation of workplace bullying

Current Protection against Workplace Bullying - Legal Avenues

There is no statutory scheme in Australia that specifically proscribes or addresses workplace bullying, with the exception of Occupational Health and Safety (OHS) legislation in South Australia. However this does not mean that there are no legal remedies currently available for victims of workplace bullying. Instead of a specific statutory scheme, certain, albeit piecemeal, systems of protection against workplace bullying may be found under several different areas of the law, applying at State and Commonwealth level.

Occupational, Health and Safety Legislation

OHS is largely legislated in Australia at the State and Territory level.¹ South Australia is the only State to directly address the issue of workplace bullying through OHS legislation. Workplace bullying behaviour is defined in section 55A(1) and (2) of the *Occupational Health, Safety and Welfare Act 1986* (SA) and encapsulates concepts including repeated and systematic conduct, which a reasonable person would expect to "victimise, undermine or threaten" an employee or employees, and which creates a risk to health and safety.

In other States, workplace bullying falls more generally under an employer's obligation to ensure the health and safety of employees and others at the place of work². Serious workplace bullying that amounts to a failure by an employer to safeguard the health and safety of a worker in the workplace may be a breach of the Act, which will generally be treated as a criminal offence.

In addition, as part of the harmonisation of State and Territory OHS laws, Safe Work Australia is proposing to issue a Model Code of Practice which aims to provide a practical guide to achieving the standards of health, safety and welfare required under the OHS legislation. Safe Work Australia's draft Code of Practice "Preventing and Responding to Workplace Bullying" was referred to earlier in this submission regarding an appropriate definition for workplace bullying. For jurisdictions participating in the harmonisation of OHS laws, following transition, this Code of Practice will be able to be used as evidence in legal

¹ The *Work Health and Safety Act 2011* (Cth) only applies to promote the occupational health and safety of persons employed by the Commonwealth, Commonwealth authorities and certain licensed corporations.

² For example, in NSW, section 19 of the *Work Health and Safety Act 2011* imposes a general duty to protect health and safety at work so far as is reasonably practicable.

proceedings to provide information on how a bullying hazard or risk can be controlled or managed and assist in determining what was reasonably practicable in the circumstances.

However, insofar as OHS remedies may apply to workplace bullying, individual victims have no capacity to commence action or seek any individual remedies.

Anti-Discrimination Law

There are Commonwealth and State legislative schemes in Australia which proscribe discrimination on the basis of certain characteristics. Workplace bullying will infringe anti-discrimination law where it is motivated by an actual or perceived attribute of the victim. At the Commonwealth level, there are four main general statutes³ which prohibit discrimination on the basis of certain attributes, which include race, ethnic origin, gender, marital status, family responsibilities, physical or intellectual disability or age. In NSW, the *Anti-Discrimination Act 1977* makes discrimination on the basis of certain attributes unlawful.

If workplace bullying is found to be motivated because of a protected attribute then a complaint can be lodged with the Australian Human Rights Commission or Anti-Discrimination Board for conciliation. If the matter is not resolved through conciliation, the complainant is able to institute proceedings in either the Federal Court or the Federal Magistrates' Court or the NSW Administrative Decisions Tribunal.

Victims of workplace bullying that are successful complainants in the Court or Tribunal have various remedies available to them including a declaration that the respondent has committed unlawful discrimination, an injunction against the respondent preventing continuing discrimination and/or requiring the respondent to pay compensation for any loss or damage suffered because of their conduct.

However, unless the workplace bullying can be attributed to a protected characteristic, anti-discrimination legislation is of no assistance in remedying the situation.

Industrial Relations Legislation

Additional remedies for victims of workplace bullying may be available under the current industrial relations legislation regime.

Where workplace bullying can be characterised as:

- (a) "adverse action"⁴ (for example, where it can be established that the bullying was motivated all or in part by a victim having, exercising, having exercised or proposing to exercise a victim's workplace right), or
- (b) engaging in lawful industrial activity⁵; or
- (c) employment-related discrimination⁶; or
- (d) unfair dismissal⁷; or

³ *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Age Discrimination Act 2004* (Cth)

⁴ See section 340(1) and section 342 of the *Fair Work Act 2009* (Cth).

⁵ A workplace right and lawful industrial activity are defined at sections 341 and 347 of the FW Act respectively.

⁶ On the basis of the attributes provided in section 351 of the *Fair Work Act 2009* (Cth).

⁷ The doctrine of constructive dismissal found under section 386(1) of the *Fair Work Act 2009* (Cth) may also assist a victim of workplace bullying as it covers a person who has resigned but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer - see Wilson, John. Employment Law

(e) unlawful termination⁸;

remedies may be pursued under the *Fair Work Act 2009* (Cth) (FW Act), and may include compensation, damages and civil penalty provisions.

These remedies under the current industrial relations legislation regime suffer from a number of limitations including that they are generally only able to be pursued against employers, rather than individual perpetrators. It is noted, however, that section 362 of the FW Act allows an individual to be named as a party to the litigation where the individual has advised, encouraged, enticed or coerced the adverse action on the basis of another's workplace right or lawful industrial action.

Additionally, these remedies require the satisfaction of a number of elements, meaning that a claim may fail even where the bullying conduct itself is admitted. Arguably the remedies referred to above as (a), (b) and (c) under the FW Act are easier to pursue than OHS and discrimination-based legal remedies given a reversal of the onus of proof.

Other Legal Remedies

Recent legislative change in Victoria was introduced following an incident in which an employee committed suicide after being subjected to serious bullying in the workplace. The definition of 'course of conduct' under the offence of stalking in section 21A of the *Crimes Act 1958* (Vic) has been broadened to include behaviour such as making threats to the victim and acting in ways that could reasonably be expected to cause the victim to engage in self-harm, enabling these provisions to be used in the context of workplace bullying. To be convicted of stalking, the offender must have intended to cause physical or mental harm to the victim, where mental harm has been defined to include psychological harm and suicidal thoughts.

In addition, changes were made to the *Stalking Intervention Orders Act 2008* (Vic) and the *Personal Safety Intervention Orders Act 2010* (Vic), to allow victims to apply for intervention orders to protect themselves in situations of serious bullying.

However, Victoria is the only State to make bullying a criminal offence, with similar changes yet to be introduced in other States and Territories in Australia.

In addition, an employee who sustains an injury, including psychological injury, as a result of workplace bullying can make a workers' compensation claim under NSW or Commonwealth workers' compensation legislation⁹. However, recent changes to NSW legislation have reduced benefits available to employees.

A common law tortious claim could be brought by a victim of workplace bullying alleging a breach of the duty of care an employer owes an employee. However, such a claim requires the employee to show that he or she has exceeded the required permanent impairment threshold level.

Gaps in legal and policy approaches to workplace bullying

Matters. Ethos Official Publication of the Law Society of the Australian Capital Territory, No. 212, June 2009, page 8.

⁸ The prohibited grounds of termination under the *Fair Work Act 2009* (Cth) in section 772 includes under subsection (1)(f) attributes which overlap anti-discrimination law.

⁹ Squelch, Joan, and Guthrie, Robert "The Australian Legal framework for workplace bullying." *Comparative Labor Law & Policy Journal* 32 (2010) page 26.

The current regulatory frameworks in Australia applicable to workplace bullying are piecemeal, and apply only within specific frames of reference (for example OHS, discrimination, or the exercise of a workplace right), rather than directed specifically to addressing workplace bullying.

In the main, the current legal remedies that are described above are reactive, and can only be pursued by a victim of bullying once some harm or injury is caused. It is difficult to find a suitable legal remedy unless there is a compensable injury to the victim of bullying. While there is the possibility of seeking conciliation following complaints in the context of discrimination or the FW Act, being derived remedies, there is otherwise a significant lack of other complaint and early response mechanisms available to victims of workplace bullying.

Some positive obligations that arise for employers to implement early response mechanisms may be implied from the obligation under OHS legislation to have a safe and healthy workplace environment and ensure best practice. These include having appropriate policies and procedures and training staff to ensure that there are appropriate internal complaint handling procedures in place. However these are not required under legislation.

For those employed in the Commonwealth public service, section 13(3) of the *Public Service Act 1999* (Cth) as part of the legislated code of conduct requires that "an APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment". This arguably would encompass prohibiting workplace bullying. However a complaint about a breach of this section can only be instigated by an Agency head.

In this context, protection is not afforded to victims of workplace bullying in terms of providing an early response. This may have significant impacts for the victims in terms of prolonging their exposure to workplace bullying and resulting in more serious traumatisation and injury.

The other significant gap that exists in legal and policy approaches to workplace bullying in Australia relates to instances in which the bullying cannot be said to be motivated by a protected attribute of the victim. In these circumstances there is no option for individuals to take action except in very limited common law claims. This leaves many victims of bullying without a remedy.

International Legal Regulation of Workplace Bullying

Some countries have enacted legislation that directly addresses bullying in the workplace, whether categorised as such or as 'mobbing' or victimisation. Such laws are in force in Sweden, Norway, Finland, France, Germany, Italy, Spain, Netherlands, Belgium, Great Britain and the United States of America¹⁰. Of particular note is the Swedish Environment Act under which responsibility is placed on managers to prevent bullying.¹¹

The international legal community has not adopted any obligatory or recommended legal acts in relation to the issue of workplace bullying. However there has been some discussion of responses to the issue at international level. The rights of workers at an international legal level can be found in the *International Covenant on Economic, Social and Cultural Rights* as adopted by the United Nations. Article 7 recognises the right of everyone to the enjoyment of

¹⁰ Guerrero, S. M. I. (2004). The development of Moral Harassment (or Mobbing) Law in Sweden and France as a step towards EU legislation. *Boston College International & Comparative Law Review*, 27(2), pages 477-500.

¹¹ Sheehan, M., Barker, M., & Rayner, C. (1999). Applying strategies for dealing with workplace bullying. *International Journal of Manpower*, 20(1/2), page 50

just and favourable conditions of work which ensure, in particular, that working conditions conform with requirements of safety and hygiene.

The International Labour Organisation (ILO) has adopted a large number of conventions and recommendations focused on occupational health and safety. The *International Occupational Safety and Health Code* consists of Convention (No. 155) concerning Occupational Safety and Health and the Working Environment and the accompanying Occupational Safety and Health Recommendation (No. 164) and Convention (No. 187) on Occupational Safety and Health.

Article 3(e) of the ILO Convention No. 155 defines the concept of "occupational health" and includes mental components of health. Members are required to formulate and implement a coherent national policy on occupational health and safety to minimise risk. ILO Convention No. 155 was expanded by ILO Recommendation No. 164 slightly to include references to mental stress due to conditions at work¹².

There also exists a Promotional Framework for Occupational Safety and Health Convention No. 187 (2006), which does not have any specific requirements relating to workplace bullying but provides a very broad definition of 'national preventative safety and health culture' covering all elements of working conditions.¹³ Thus the ILO has developed a framework to address the maintenance of a healthy and safe workplace but in doing so does not explicitly refer to workplace bullying and any obligations in relation to this.

It is useful to note that the conversation around implementing codes of practice in relation to the prevention of workplace bullying continues with the ILO's *Code of practice on workplace violence in services sectors and measures to combat this phenomenon*¹⁴ and a *Training Manual on Framework guidelines for addressing workplace violence in the health sector*¹⁵.

Whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying

As discussed earlier, there is no specific regulatory framework that is designed to deal with workplace bullying. A right may exist in circumstances where there is workplace bullying for the complainant to:

- Use the bullying behaviour as part of a discrimination claim if the behaviour is based on a protected characteristic. There is a choice of jurisdictions where this type of complaint may be made;
- Use the bullying behaviour in a workers compensation claim where the bullying behaviour causes damages to a complainant's health, and ability to attend work;
- Activate a complaint through the employer's grievance and dispute resolution procedure, although often that does not relate to contractual rights that may be enforced;
- Make an application under the general protections provisions of the FW Act, or a dispute notification under the relevant award or agreement, to Fair Work Australia where the employee has exercised a workplace right and the bullying is adverse action against them because of the employee exercising that right.

¹² Petrylaitė, Daiva. "International Legal Standards of Regulation of Mobbing at Work" May 2011 3 (1) *Issues of Business and Law*, page 124

¹³ *Ibid*, page 125

¹⁴ http://www.ilo.org/safework/info/standards-and-instruments/codes/WCMS_107705/lang--n/index.htm

¹⁵ http://www.ilo.org/safework/info/instr/WCMS_108542/lang--en/index.htm

Without a specific regulatory framework that is designed to deal with workplace bullying, there is often no deterrent for bullying in the workplace, and persons who make a complaint often feel exposed because of the lack of a framework to deal with the conduct.

Thank you for the opportunity to participate in this Inquiry. Should you wish to discuss any of the matters raised in this letter please contact Gabrielle Lea, Policy Lawyer for the Employment Law Committee by email to [REDACTED] or on [REDACTED]

Yours faithfully,

[REDACTED]

Justin Dowd
President