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Inquiry into Workplace Bullying  
Secretary,  
House of Representatives,  
PO Box 6021,  
Parliament House, Canberra ACT 2600

26 June 2012

Dear Secretary

### **Summary of Submission**

Worklogic Pty Ltd provides the following observations and suggestions to the Inquiry into Workplace Bullying.

These are based on its considerable experience, including the conducting of approximately 150 separate workplace fact-finding investigations, roll out of a number of workplace reviews and conducting a range of workplace training to minimise and prevent bullying.

Many of these investigations have included inappropriate behaviour. These have been identified as bullying, either through the participants in the investigation, or the workplace advisor or law firm engaging Worklogic Pty Ltd.

From this practical experience, Worklogic Pty Ltd makes the following suggestions (which are also detailed below, under the section, "Terms of Reference Addressed in this submission"):

- Worklogic Pty Ltd considers it useful for there to be explicit legal obligations which require employers to respond through a series of reasonable steps where there is a "reluctant complainant" whom the employer is aware may have been subjected to bullying, but is not able to initiate or proceed with a complaint. This may also involve a specific obligation for the employer to commence an investigation where it is aware of allegations of bullying.
- Worklogic Pty Ltd considers that workplaces need to set out explicit expectations and examples of what is appropriate behaviour in that workplace, ensure induction and ongoing workplace training includes relevant and engaging training about how to avoid bullying behaviour, and has independent "reporting lines" where any employee can report any concerns about inappropriate behaviour that is witnessed in the workplace.



- Worklogic Pty Ltd is of the view that there is scope to improve the definition of bullying to establish more clearly what in fact constitutes “unlawful, unreasonable behaviour creating a risk to health and safety, and to acknowledge a possible time frame in this definition, as occurs internationally.
- Worklogic Pty Ltd considers that the inclusion of a bullying definition in OHS/WHS legislation (similar to legislation such as the Equal Opportunity Act 2012 which defines, for example, sexual harassment and discrimination) would highlight that bullying is a significant health and safety issue. The specific inclusion of bullying in such OHS/WHS legislation would also ensure that bullying is managed in the same way as all other health and safety issues, by using a comprehensive risk management approach that sets out proactive compliance strategies.
- Worklogic Pty Ltd believes that peak bodies have an important and visible role in educating its employer membership base about how to prevent, maintain and improve workplace behavioural standards, including the eradication of workplace bullying.
- Worklogic Pty Ltd considers that the establishment of a consistent definition of workplace bullying, and a consistent methodological approach to the investigation of workplace bullying, would enable all workplaces, depending on their available resources, to identify any bullying in their workplace.
- Worklogic Pty Ltd believes that it may be useful to consider the creation and promotion of standards that require annual reporting of any investigation/s in that workplace, in circumstances where allegations of workplace bullying have been substantiated, on the balance of probabilities, based on the evidence gathered.
- Worklogic Pty Ltd considers that the implementation of standard, consistent and mandatory approaches to responding to bullying allegations would mean that, over time, the effect of proactive compliance strategies to eradicate bullying through an OHS/WHS approach can be reliably measured and noted.

### **Terms of Reference Addressed in this submission**

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

From Worklogic Pty Ltd’s experience, many of the investigations it has conducted for a wide range of workplaces by sector and/or industry across Australia have involved allegations of bullying.

Some investigations have found that the allegations of bullying are, in effect, substantiated. Other investigations have found that such allegations are not substantiated.

Worklogic Pty Ltd considers that, from its experience and anecdotally, only a minority of those employees who consider that they may have been bullied do make a complaint of such behaviour to their employer whilst in the workplace. Anecdotally, during the course of a workplace review or



investigation conducted by Worklogic Pty Ltd, participants may indicate that they consider themselves to have been subjected to bullying behaviour that had not been reported to the employer. Again, if there was a consistent definition of workplace bullying which was incorporated into the employer's policies and training, this could potentially give employees a clearer understanding of what behaviour amounts to bullying and generate greater levels of commitment in reporting alleged bullying to the employer. This may also encourage third parties in the workplace to act rather than ignore any behaviour that may amount to bullying behaviour.

In relation to employers ensuring that employees are able to bring complaints of bullying to its attention for investigation, the majority of the employers for whom Worklogic Pty Ltd provides services do indeed have in place relevant policies. These policies state that bullying behaviour is unlawful, with a concomitant internal grievance procedure for the investigation of complaints of allegations of bullying behaviour.

It is Worklogic Pty Ltd's observation, however, that victims of bullying may not always be the most resourced or able persons to raise a complaint, if they themselves have been subject to bullying behaviour by a direct supervisor, and/or are severely incapacitated by such behaviour, and/or fear victimisation.

Worklogic Pty Ltd considers it useful for there to be explicit legal obligations which require employers to respond through a series of reasonable steps where there is a "reluctant complainant" whom the employer is aware may have been subjected to bullying, but is not able to initiate a complaint.

Worklogic Pty Ltd considers that the standing of employers to step into the shoes of complainant, given the vicarious liability for any risk to health and safety that they bear, should be expressly stated so that employers must have standing to commence an investigation. Without being exhaustive, for example, such circumstances may be where the victim of alleged bullying is reluctant or medically unfit to bring a complaint, and/or involve a specific obligation in any event for the employer to commence an investigation.

the role of workplace cultures in preventing and responding to bullying and the capacity for workplace-based policies and procedures to influence the incidence and seriousness of workplace bullying;

Worklogic Pty Ltd has seen a wide range of different employee behaviour policies, and workplace cultures.

From its exposure to a range of workplaces, Worklogic Pty Ltd is of the strong view that employers must take all necessary steps to ensure bullying is not occurring in the workplace, via policies and training and a commitment that bullying will not be tolerated in the workplace.

Specifically, Worklogic Pty Ltd considers that workplaces need to set out explicit expectations and examples of what is appropriate behaviour in that workplace, ensure induction and ongoing workplace training includes relevant and engaging training about how to avoid bullying behaviour,



and have independent “reporting lines” where any employee can report any concerns about inappropriate behaviour that is witnessed in the workplace.

The adequacy of existing education and support services to prevent and respond to workplace bullying and whether there are further opportunities to raise awareness of workplace bullying such as community forums;

Worklogic Pty Ltd is aware of a draft Code of Practice that will be released by Safe Work Australia at the end of 2012<sup>1</sup>. It is hoped that this will assist in setting out a consistent and published definition and comprehensive response to workplace bullying concerns by an employer are fundamental to responding to bullying.

whether the scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent workplace bullying;

Worklogic Pty Ltd considers that there is scope to improve the definition of bullying to establish more clearly what in fact constitutes “unlawful, unreasonable behaviour creating a risk to health and safety”.

The current definition of bullying in Victoria and New South Wales is set out in a Guidance Note. The definition is the same in the 2003 and 2009 versions, but the explanations for the terms used in that definition are not necessarily helpful because whilst there is a definition of “repeated” and “unreasonable” in the 2003 version, these definitions are absent in the 2009 edition. In this regard, the recent case of *Brown v Maurice Blackburn Cashman* 2012 VCC 647 (18 May 2012) used the 2003 definition of “unreasonable”.

Accordingly, it is suggested that the current 2009 definition could benefit from some review for the following reasons:

- It does not define “unreasonableness”;
- It does not define what is repeated (and is silent as to whether there is any “pattern” of behaviour needed). This means that it is unclear if inappropriate behaviour fits within the definition of bullying because it occurs twice and is hence “repeated” or whether it also needs to be part of a systematic set of behaviours. It is suggested that for behaviours to be considered bullying there must be some systematic pattern of behaviour discernable over a period of time.
- It does not address how long behaviour that amounts to bullying must occur before it is considered to be bullying. It would also be useful to include in any definition of bullying what is the meaning of that “period of time” over which the pattern of behaviour occurs and how long the

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<sup>1</sup> The *Preventing and Managing Fatigue in the Workplace* and *Preventing and Responding to Workplace Bullying* draft model Code of Practice are currently being revised based on public comment feedback with finalization expected by the end of 2012.



behaviours can occur before they are considered to establish a systematic pattern of behaviour that fits within the definition of bullying.

The definition in the 2009 Guide introduced the concepts of direct and indirect bullying behaviours, a concept found in discrimination laws, but which is not necessarily helpful in relation to bullying. Some of the behaviours listed as indirect bullying appear to be direct. It is not clear to Worklogic Pty Ltd why this distinction has been introduced and what its significance is. It is suggested, therefore, that this can have the effect of introducing some unnecessary confusion between discrimination laws and bullying laws.

The definitions in the 2009 and 2003 Guide include a comment about management prerogative not being bullying. The definitions are largely similar in both versions, however, noticeably absent from the current 2009 Guidelines is the statement that poor management is not bullying, and it is unclear if this is intentional or not. The 2003 Guidance Note states, "The Guidance note is not intended to cover poor or bad management practices on their own, because they are not considered bullying." The definition leaves open the question as to whether there is any significance to this change and whether poor or bad management practices on their own amount to bullying or not.

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;

The Victorian and NSW definition of bullying is very different to that definition widely quoted in research, which includes a time frame (*Einarsen 2011*)<sup>2</sup>.

*Einarsen* states that bullying at work means:

"Harassing, offending, socially excluding or negatively affecting someone's work tasks. In order for the label bullying to be applied to a particular activity, interaction or process it has to occur repeatedly and regularly (e.g. weekly) and over a period of time (e.g. about six months). Bullying is an escalating process in the course of which the person confronted ends up in an inferior position and becomes the target of systematic negative social acts. A conflict cannot be called bullying if the incident is an isolated event or if two parties of approximately equal "strength" are in conflict".

Worklogic Pty Ltd suggests that this definition of bullying has a number of aspects that provide greater clarity of what is bullying for employers and employees than the definitions currently available in NSW and Victoria. In particular the identification of time periods and the requirement that the behaviour amount to "systematic" negative social acts is considered to be very helpful. It is

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<sup>2</sup> Einarsen S, Hoel H, Zapf D, Cooper CL. The concept of bullying and harassment at work, In: Einarsen S, Hoel H, Zapf D, Cooper CL editor(s). *Bullying and Harassment in the Workplace: Developments in Theory, Research and Practice*. Boca Raton, Florida: CRC Press, Taylor & Francis Group, 2011:3-40.



suggested that incorporating these aspects of the above definition into a legal definition of bullying would provide greater clarity for those experiencing or managing such behaviours.

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

Worklogic Pty Ltd notes the lack of any definition of bullying in OHS/WHS legislation, with the exception of South Australia, which includes a definition of “inappropriate behaviour” in section 55A of the *Occupational Health, Safety and Welfare Act 1986*.

Worklogic Pty Ltd considers that the inclusion of a definition of bullying may have a positive impact in highlighting that bullying is a significant health and safety issue.

The specific inclusion of bullying in such OHS/WHS legislation would ensure that bullying is managed in the same way as all other health and safety issues, by using a comprehensive risk management approach that sets out proactive compliance strategies.

Worklogic Pty Ltd notes from its own anecdotal observations, from relevant published case law concerning workplace cultures, and a range of research that it appears that some objectively dysfunctional organisational work cultures still do exist in Australia which either ignore, or are wilfully blind to bullying, or even encourage bullying behaviour. In such organisations, bullying may be tolerated as an effective area of “controlling” the workforce and achieving targets, at the expense of individual wellbeing in the short term, and broader and more sustainable productivity in the long term.

the most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another;

Worklogic Pty Ltd considers that peak bodies have an important and visible role in educating its employer membership base about how to prevent, maintain and improve workplace behavioural standards, including the eradication of workplace bullying.

Possible improvements to the national evidence base on workplace bullying.

Worklogic Pty Ltd considers that the establishment of a consistent definition of workplace bullying, and a consistent methodological approach to the investigation of workplace bullying, would enable all workplaces, even depending on their available resources, to identify any bullying in their workplace.

Worklogic Pty Ltd considers that it may be useful to consider the creation and promotion of standards that require annual reporting of any investigation/s in that workplace that substantiate/s allegations of workplace bullying.

The implementation of standard, consistent and mandatory approaches to responding to bullying allegations would mean that, over time, the effect of proactive compliance strategies to eradicate bullying through an OHS/WHS approach can be reliably measured, noted and universally published.



Thank you for the opportunity to provide public consultation in this vital issue of ensuring healthy and productive workplaces.

Yours sincerely

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