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

Dear Sir/Madam,

Thank for you the opportunity to comment on the Parliamentary Inquiry into workplace bullying. The South Australian Equal Opportunity Commission (the Commission) receives a significant number of complaints and enquiries concerning bullying in the workplace. In the last financial year the Commission has received 158 complaints and enquiries related to bullying.

Unless the bullying experienced by the complainant is due to a personal attribute covered by the *Equal Opportunity Act 1984* (SA), such as race, age or gender, the Commission cannot take up a complaint of bullying. We refer those enquiries that cannot be dealt with by the Commission to SafeWork SA who administer the *Occupational Health, Safety and Welfare Act 1986* (SA) (the OSHW Act) which includes provision regarding workplace bullying.

Definition of bullying

The legislative definition of bullying, as prescribed by section 55A (1) of the OSHW Act, imposes several elements that must be satisfied before a complaint of bullying can be accepted. The Commission believes that the legislative definition of bullying creates difficulty for those experiencing such behaviour from accessing recourse under the OSHW Act.

Some of the most serious cases of bullying have been due to one-off instances and the defining bullying as 'repeated' behaviour precludes a person who experienced such an incident from making a complaint.

The other elements of bullying, those being 'systematic' and a 'risk to health and safety', also raise the evidential standard required to be satisfied before a complaint will be investigated and conciliated. The difficulty in establishing the presence of bullying in the workplace means that serious issues may fail to be addressed.

The Commission encourages the Parliamentary Inquiry to examine the definition and consider the inclusion of one-off incidences of bullying.

Recourse under the *Occupational Health, Safety and Welfare Act 1986* (SA)

Under the OSHW Act, before a complaint can be resolved representatives from SafeWork SA are required to undertake an investigation into the alleged bullying. This requirement to conduct an investigation extends timeframes. In addition, access to the resolution process being determined by a third party's assessment of the events has the effect of further disempowering a victim of bullying. The power balance rests with the employer rather than the employee and being subject to an investigation is a difficult and stressful process and would act as a deterrent to any potential complainant.

At the Commission, whether an investigation is conducted is a discretionary power held by the Commissioner for Equal Opportunity. Investigations are in fact very rarely conducted as the Commission believes complaint resolution is more usefully focused on what would resolve the issue for the parties, rather than an investigation into the alleged events. This facilitates early resolution of a complaint and avoids escalation.

Anecdotally, we hear that SafeWork SA does not take up many of the complaints they receive. A prescriptive definition of bullying coupled with a time and resource intensive investigation process act as barriers to a timely conciliation of the complaint.

It is recommended that the Parliamentary Inquiry examine the use and efficacy of the investigation component applied to complaints of bullying. To make this step of the process discretionary would enable the complaint to reach the stage of resolution much earlier.

Case study:

Caller who works on permanent part-time basis as a nurse. She alleges that she is being bullied by another nurse who tells her to shut up, not to bring that "___ in here" and generally has been ignored and isolated at work by this nurse and others. She reported the behaviour to her Manager and they are looking into it but she can't get any answers as to who is doing so and what is happening with her complaint from them or Human Resources.

Victimisation protection'

Section 56(1)(c) of the OHSW Act provides some protection against discrimination on account of having made a complaint concerning health and safety matters. However, the OHSW Act states that an employer must not dismiss, injure, threaten, intimidate or coerce an employee by virtue of the fact that they made a complaint of bullying. This protection is not as broad as the victimisation provision included in section 86(2) of the *Equal Opportunity Act 1984* (SA) which states that 'a person commits an act of victimisation against another person if he or she treats the victim unfavourably...'. This ensures that a person subject to victimisation is protected regardless of the specific nature of the acts against them.

Furthermore, although the burden of proof is on the defendant to show that the reason for the discriminatory action prescribed by section 56 of the OHSW Act was due to making a complaint, there is no provision that indicates the discrimination needs to be only a 'substantial reason' behind the behaviour.

The *Equal Opportunity Act 1984* (SA) prescribes that discrimination, as covered by the legislation, need only be a 'substantial reason' for the unfavourable treatment experienced by the complainant. This ensures that if the respondent raises other issues, this does not automatically eclipse the discriminatory behaviour. To ensure that victimisation provisions are actionable, this is a necessary inclusion into any legislation that deals with bullying.

Case study:

Caller made a complaint to his HR department about an incident in which a member of senior management, belittled him and yelled at him in front of other staff members. The HR Dept did

not resolve the complaint, however, a senior member of management was informed of the complaint. This member of management withheld promotion opportunities for the caller to this incident. Although other complaints have been made to HR, no action had ever been taken. Because of the conduct of the member of management people fear for their jobs and the caller terminated his employment within the company because of this incident.

Manager's ability to resolve conflict

Many of the complaints received by the Commission regarding bullying need not have escalated if the organisation had dealt with the situation effectively themselves. Although changes to the legislation will increase the protection afforded victims of bullying and facilitate access to the resolution process, in our view more needs to be done to arm managers with the skills to resolve issues early.

Case study:

Caller alleges he is being bullied by a co-worker since he started work in their quality assurance area. He alleges she has been undermining him, has been verbally abusive to him, withheld information that he needed to complete his work, over ridden his instructions to other team members and generally ignored him. He spoke to his Manager who clarified each of their roles and responsibilities at team meetings with no change in her behaviour. He has gone back to him and his Manager has basically said "that's just the way she is" and "she does so much around here we can't do anything about it". He has recently spoken to HR after two incidents of verbal abuse from her. He is fed up and stressed out because he can't do his work effectively. HR referred back to Manager to formalise his complaint. He is not sure what to do next.

The above case study illustrates the failure of the internal process experienced by many of the people that contact us concerning incidents of bullying. The Commission suggests that the Parliamentary Inquiry examine the training and support managers receive regarding dealing with incidents of bullying.

Conclusion

Thank you for the opportunity to provide a submission to the Parliamentary Inquiry into Workplace Bullying. This is an important issue that has a far reaching impact affecting individuals, businesses and ultimately, the Australian economy.

Both the internal and external processes need to enable a person suffering from bullying to have effective access to a resolution, one which facilitates retention of employees and permits a person to continue to work in an environment free from bullying behaviour. Any changes to legislation or workplace policies that provide for better protection and increased access to the conciliation process will be supported by the Commission.

If you would like any further information regarding the above submission, please do not hesitate to contact my office.

Yours sincerely,

ANNE BURGESS
ACTING COMMISSIONER FOR EQUAL OPPORTUNITY