



**House of Representatives Standing
Committee Inquiry into Workplace
Bullying:
Submission of the Office of the Anti-
Discrimination Commissioner**

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Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

Level 1, 54 Victoria Street, Hobart • GPO Box 197, Hobart, Tasmania, Australia, 7001

Telephone: [03] 6233 4841 • Statewide: 1300 305 062 • Facsimile: [03] 6233 5333

E-mail: antidiscrimination@justice.tas.gov.au • Website: www.antidiscrimination.tas.gov.au

Introduction

The Tasmanian Anti-Discrimination Commissioner is an independent statutory officer with responsibilities under the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) in respect of discrimination and related specified conduct including investigation and conciliation of complaints of discrimination and prohibited behaviour, promotion of awareness, education and training, and research and development of guidance.

The role and functions of the Commissioner are set out in the Act. The Office of the Anti-Discrimination Commissioner (OADC) supports the Commissioner to fulfil these roles and functions.

The Tasmanian Act gives effect at a State level to commitments made by the Australian Government in relation to international treaties and related instruments aimed at protecting, promoting and enhancing the human rights of all citizens, including the right to a fair and safe workplace.

The OADC considers that the framework for addressing discrimination and prohibited conduct contained within the Tasmanian Act has the capacity to provide a platform for addressing bullying and associated behaviours in the workplace.

In particular, under the provision headed 'prohibited conduct' the Tasmanian Act provides the basis for a definition that has the capacity to capture much of the behaviour that may be considered bullying in an employment context.

The OADC welcomes this opportunity to make a submission to the House of Representatives Standing Committee Inquiry into Workplace Bullying. This submission of the Office of the Anti-Discrimination Commissioner responds to the inquiry's terms of reference:

Freedom from harassment and bullying reflect human rights

Terms of Reference: 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

Bullying is behaviour that is abusive, offensive, intimidating, ridiculing, isolating, violent, unreasonably demanding, pressuring and which may cause feelings of humiliation. It may involve physical acts (including of violence), but does not always. It occurs through verbal or written communication, behaviour or physical contact. It often, but not always, involves a person or persons inappropriately exercising power or authority over another in a way which involves harassment and intimidation.

Bullying risks emotional and/or physical harm and can lead to a loss of self-esteem and anxiety.

The Australian Human Rights Commission provides the following examples of what bullying in the workplace may look like:¹

¹ Australian Human Rights Commission, *Workplace Bullying Factsheet* (2011) <http://www.humanrights.gov.au/bullying/factsheets/workplace_bullying.html> at 10 July 2012.

- repeated hurtful remarks or attacks, or making fun of a person or their work
- sexual harassment, particularly behaviour such as unwelcome touching and sexually explicit comments
- excluding or stopping a person from working with people or taking part in activities that relates to their work
- playing mind games, ‘ganging up’, or other types of psychological harassment
- intimidation (making a person feel less important and undervalued)
- giving a person pointless tasks that have nothing to do with their job
- giving a worker impossible jobs that can't be done in the given time or with the resources provided
- deliberately changing a person’s work hours or schedule to make it difficult for them
- deliberately holding back information needed to get work done properly
- pushing, shoving, tripping, grabbing in the workplace
- attacking or threatening with equipment, knives, guns, clubs or any other type of object that can be turned into a weapon
- initiation or hazing - where a worker is made to do humiliating or inappropriate things in order to be accepted as part of the team

Not all actions in the workplace constitute bullying. Fair and reasonable management actions done in a respectful way is not bullying.

Every worker has the right to feel safe and be treated respectfully in employment. Human rights violated by bullying may include:²

- The right to be free from cruel, inhuman or degrading treatment or punishment (Article 7 of the *International Covenant on Civil and Political Rights*)
- The right to the highest attainable standard of physical and mental health (Article 12 of the *International Covenant on Economic, Social and Cultural Rights*)
- The right to work and have a fair and safe workplace (Articles 6 & 7 of the *International Covenant on Economic, Social and Cultural Rights*)
- The right to equal protection against discrimination and any incitement to discrimination (Article 2, 14 and 20 of the *International Covenant on Civil and Political Rights*)
- The right to freedom of opinion and expression (Article 18 and 19 of the *International Covenant on Civil and Political Rights*)
- The right to privacy and the protection against attacks upon honour or reputation (Article 17 of the *International Covenant on Civil and Political Rights*)

All of these are rights that are recognised by the Australian Government through the adoption of human rights instruments, including the ratification of international treaties.

Addressing bullying through anti-discrimination legislation

Terms of Reference: Whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying

The OADC regularly gets enquiries from people who believe they have been bullied and is able to provide information about whether or not the conduct complained about may constitute a breach of the Tasmanian Act. These enquiries come both through the OADC enquiries system and through its education and training work across the State. The

² Ibid.

OADC's training program expressly includes material on bullying and its potential to be unlawful under the Tasmanian Act.

As the experiences of those who believe they have been subjected to bullying behaviour can vary widely in the way it is described, one of the first tasks in examining a complaint is to understand the circumstances of the event in a way that enables an assessment of the likelihood of a breach under the Tasmanian Act.

As outlined above, bullying behaviour may include, for example, using insulting or offensive language; behaving in ways that frighten or intimidate; humiliating others through sarcasm; belittling someone's opinion; unjustified criticism delivered by yelling and/or screaming; teasing or making others the brunt of practical jokes; excluding isolating or marginalising a person; and/or deliberately spreading misinformation.

As such, the OADC's assessment and investigation processes involve seeking clarification from the complainant about the specific conduct alleged so that a determination can be made under the Tasmanian Act.

Section 14(3) of the Tasmanian Act provides that for discrimination to take place it is not necessary that the prescribed attribute is the sole or dominant ground for the unfavourable treatment; nor that the person who discriminates regards the treatment as unfavourable or has any particular motive in discriminating. It is the impact of the discrimination that determines whether it is unlawful, not the intent.

The Tasmanian Act provides an objective test of behaviour that may be considered 'bullying'.

This is described in more detail in following sections.

The focus of anti-discrimination complaints

The primary mechanism available under the Tasmanian Act to challenge conduct that may be in breach of the Act is a complaint.

Complaints are 'prosecuted' by the person or people affected, or by others—such as unions or advocates—on their behalf. While the complaint process under the Act includes investigation undertaken by the OADC, the OADC is not resourced to conduct investigations such as those available undertaken by police or workplace safety bodies.

As with anti-discrimination laws across Australia, the complaint process under the Tasmanian Act is largely focused on resolving the complaint to the satisfaction of the complainant through alternative dispute resolution processes. The Tasmanian Act provides that, where a complaint discloses possible breaches of the Act and cannot be resolved through these processes it is to be the subject of an inquiry conducted by the Anti-Discrimination Tribunal, a body established under the Tasmanian Act and separate to the OADC. Where the Tribunal determines that there has been a breach of the Tasmanian Act, it can make a range of orders. The major focus of orders made by the Tribunal has been on remedying the effect of the breach on the complainant. The Tribunal does have power to fine a person or organisation found to have breached the Act, but has not exercised this power.

The scope of protection under the Tasmanian Act

Anti-discrimination legislation in Tasmania offers a broad range of protection against bullying and related behaviours. Subject to specified exceptions, the Tasmanian Act applies to discrimination and prohibited conduct by or against a person engaged in, or undertaking any action in connection with a range of specified areas of activity including employment, and education and training.³

Employment includes:⁴

- Paid or voluntary work
- Membership or partnerships, professional or trade associations
- Registration or recognition by professional and trade organisations, qualifying bodies
- Engagement of commission agents under a contract for service
- Registration, enrolment or placement by employment agencies or vocational training bodies.

Education and training⁵ includes:

- Schools, colleges, universities or other educational or training institutions or bodies.

Discrimination on the grounds of attribute

The Tasmanian Act prohibits direct and indirect discrimination against a person or group of people on the basis of the following attributes:⁶

- (a) Race
- (b) Age;
- (c) Sexual orientation;
- (d) Lawful sexual activity;
- (e) Gender;
- (f) Marital status;
- (fa) Relationship status;
- (g) Pregnancy;
- (h) Breastfeeding;
- (i) Parental status;
- (j) Family responsibilities;
- (k) Disability;
- (l) Industrial activity;
- (m) Political belief or affiliation;
- (n) Political activity;
- (o) Religious belief or affiliation;
- (p) Religious activity;
- (q) Irrelevant criminal record;
- (r) Irrelevant medical record; or
- (s) Association with a person who has, or is believed to have, any of these attributes.

Discrimination occurs where a person treats another person on the basis of one or more of these attributes (or imputed prescribed attributed or characteristic thereof) less

³ *Anti-Discrimination Act 1998* (Tas) s 22, and 22(1)(a) and (b) in particular.

⁴ *Anti-Discrimination Act 1998* (Tas) s 3.

⁵ *Ibid.*

⁶ *Anti-Discrimination Act 1998* (Tas) s 16.

favourably than someone who does not have these characteristics or exposes them to disadvantage because of one or more characteristics. The behaviour may be unlawful regardless of the intent of the behaviour or whether the person who is engaging in discriminatory behaviour has a particular motive in discriminating.

If bullying occurs in employment or in education and training and is related to any of these protected attributes it is likely to be unlawful and subject to the complaint and other provisions of the Tasmanian Act.

Prohibited Conduct

Section 17(1) of the Tasmanian Act also provides that ‘a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person’ on the basis of selected attributes in the area of employment, education and training or other areas of public activity.

The attributes currently protected under this provision are: gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities.

It should be noted, however, that work is underway on amendments to the Tasmanian Act that would extend this provision to all the attributes set out in section 16 of the Act.

Once enacted, such an amendment would make it expressly unlawful to engage in conduct that is offensive, humiliating, intimidating, insulting or ridiculing on the basis of one or more protected attribute or a combination of those attributes, identified in section 16(a) – (s) (listed above).

There are two requirements—a subjective element and an objective element—to prove prohibited conduct under section 17(1) of the Tasmanian Act:

1. That a person offends, humiliates, intimidates, insults or ridicules another person because of one or more of the protected attributes; and
2. That a reasonable person would anticipate that the other person would feel offended, humiliated, intimidated, insulted or ridiculed in the circumstances.

Attribute-based harassment

Section 19 of the Tasmanian Act makes it unlawful for a person to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief, religious affiliation or religious activity.

In addition, section 17(2) of the Tasmanian Act prohibits a person sexually harassing another person.

Whilst the Tasmanian Act explicitly prohibits sexual harassment, harassment of a person on the basis of other protected attribute is—as with other discrimination laws—potentially unlawful in circumstances where the harassment is discriminatory (for example, based on race or sexual orientation). That is, if the conduct is less favourable treatment than that afforded to others without the protected attribute, or has the effect of disadvantaging a person because of a protected attribute. In this context the OADC has sought amendment to legislation at both Commonwealth and State level to explicitly deem harassment to be a form of discrimination. Such an amendment would remove uncertainty about the general protection against harassment in relation to all protected

attributes.⁷ In addition, the OADC has expressed the view that the definition of harassment should include conduct that is offensive, humiliating, intimidating, insulting or ridiculing.

Aiding or promoting contravention of the Act

Section 20 of the Tasmanian Act prohibits a person publishing or displaying or causing or permitting to be published or displayed any notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct and section 21 provides that all persons who cause, induce or aid another person to contravene the Act are jointly and severally liable.

Vicarious Liability

Under the Tasmanian Act, an organisation is to take reasonable steps to ensure that no member, officer, employee or agent engages in discrimination or prohibited conduct.⁸ Where the organisation does not comply with these requirements, it is liable for any contravention of the Act committed by any of its members, officers, employees or agents.

In addition, an organisation must ensure that:

- Its members, officers, employees and agents are made aware of the discrimination and prohibited conduct to which the Act relates;
- The terms of any order made under the Act relating to that organisation are brought to the notice of its members, officers, employees and agents whose duties are such that they may engage in conduct of the kind to which the order relates; and
- No member, officer, employee or agent of the organisation engages in, repeats or continues such conduct.

This provision encourages employers to develop policies that clearly indicate the types of behaviour that are unacceptable, to pro-actively train everyone involved with the organisation and to actively respond to instances of potential and actual discrimination and harassment in order to avoid liability.

Application of anti-discrimination law to workplace bullying

Terms of Reference: 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

Anti-discrimination law provides important safeguards against workplace bullying where it is less favourable treatment of or effect on a person because of their protected personal characteristics.

⁷ In September 2011, the Commonwealth Attorney-General released a discussion paper regarding the proposed consolidation of Commonwealth anti-discrimination laws. As part of this process the Attorney-General's Department sought comment on whether prohibition against harassment should cover all protected attributes and, if so, how this would be most clearly expressed. See Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (Canberra, 2011) 18-19. A copy of the OADC submission is available at <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx>

⁸ *Anti-Discrimination Act 1998* (Tas) s 104.

The Tasmanian Act enables complaints of bullying involving discrimination or prohibited conduct to be investigated and resolved.

Those who can lodge a complaint under the Act include an individual or group of individuals against whom the discrimination or prohibited conduct was directed; a trade union that represents a member or class of member; or an organisation against which the alleged discrimination or prohibited conduct was directed.⁹

Resolution of a complaint may involve financial compensation or other outcomes, including:

- A requirement to undertake training and education, including staff and employers
- Changes to policies and procedures
- An apology and acknowledgement of grievance

Employment was identified as the area of activity in 52.2% of all alleged complaints made to the OADC in 2010–11. Employment is consistently among the highest area of complaint under the Tasmanian Act.

Education and support services

Terms of Reference: 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

Anti-discrimination legislation provides an important legal protection against workplace bullying and increased awareness and promotion of anti-discrimination legislation in the workplace will act to raise awareness about workplace bullying and other discriminatory conduct.

Promoting recognition and approval of attitudes, acts and practices relating to discrimination and prohibited conduct form a core component of the work of the OADC. This includes providing fee-for-service training and education in both public and private workplaces. This includes courses directly addressing harassment and bullying in the workplace.

Training and education are critical to promoting an understanding of discrimination and prohibited conduct and actions that can be taken to ensure that organisations and their employees are compliant with their obligations under the Act.

Co-ordination of effort

Terms of Reference: Whether the scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent workplace bullying

The protections provided for by the Tasmanian Act provide an important mechanism for addressing a significant number of actions that may be considered workplace bullying. We believe there may be benefits in improved coordination of effort across relevant

⁹ *Anti-Discrimination Act 1998* (Tas) s 60.

agencies that have a similar interest in addressing bullying behaviours. In particular, there would appear to be benefits in promoting an awareness of what constitutes harassment and bullying under respective legal frameworks and how actions that contravene these laws may be addressed.

The OADC considers that the definition of prohibited conduct under the Tasmanian Act provides a sound basis on which to base an understanding of bullying and would support the inclusion of a similar definition in relevant workplace legislation to provide an objective test of unlawful behaviour.