



Australian Government

Department of Education, Employment and Workplace Relations

JE

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

Dear Mr Worthington

I refer to your letter of 6 June 2012 to the Secretary of the Department of Education, Employment and Workplace Relations (DEEWR), Ms Lisa Paul AO PSM, inviting DEEWR to make a submission to the inquiry into workplace bullying.

DEEWR welcomes the opportunity to make a submission to the inquiry into workplace bullying. Please find attached the Department's submission for the Committee's consideration.

Yours sincerely

Jeff Willing
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2 July 2012

**The Department of Education, Employment and
Workplace Relations**

**Submission to the House Standing Committee on
Education and Employment
Inquiry into workplace bullying**

Table of Contents

Section 1 – Introduction and Summary	4
Section 2 – Possible improvements to the national evidence base on workplace bullying.....	7
Section 3 – The role of workplace cultures in preventing and responding to bullying and the capacity for workplace-based policies and procedures to address workplace bullying.....	9
Section 4 – Legislative provisions under the <i>Fair Work Act 2009</i> and the <i>Commonwealth Work Health and Safety Act 2011</i>	11
Section 5 – Anti-discrimination Law	15
Section 6 – Summary of current legislative and regulatory options outside of the <i>Fair Work Act</i> and <i>Commonwealth Work Health and Safety Act</i>.....	18
Section 7 – Impact of workplace bullying on vulnerable and disadvantaged Australians	20
Section 8 – Conclusion	21

Committee Terms of Reference

Workplace bullying can have a profound effect on all aspects of a person's health as well as their work and family life. It also has significant flow-on effects for the community and the economy, with the Productivity Commission estimating the total cost of workplace bullying in Australia at between \$6 billion and \$36 billion annually.

The terms of reference for the inquiry will focus on:

- the prevalence of workplace bullying in Australia and the experience of victims of workplace bullying;
- 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;
- 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;
- whether the scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent 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;
- whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying;
- the most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another; and
- possible improvements to the national evidence base on workplace bullying.

Section 1 – Introduction and Summary

1.1 The Department of Education, Employment and Workplace Relations (DEEWR) welcomes the opportunity to make a written submission to the House of Representatives Standing Committee on Education and Employment inquiry into bullying in the workplace.

1.2 Under DEEWR's 2011-2014 Strategic Plan, the Department's vision is a **productive and inclusive Australia**. This involves the promotion of safe, fair, productive and successful workplaces, as well as the promotion of a participative and inclusive society. Workplace bullying is a clear impediment to the attainment of this vision.

1.3 DEEWR considers that agreement on a definition for workplace bullying is particularly important to effective data collection to inform the national evidence base on workplace bullying.

1.4 A further issue is the effect of bullying in the workplace on vulnerable and disadvantaged Australians, as members of these groups may be less inclined to report bullying. Strategies that are tailored and targeted to address bullying for the different cohorts may be required to be effective.

1.5 DEEWR considers that the legal and regulatory framework to address workplace bullying must be complemented and supported by initiatives at the individual workplace level, ensuring that managers and workers have the capability and the right tools to prevent and deal with bullying effectively.

1.6 As referenced by the Terms of Reference for the Inquiry, the Productivity Commission estimated in 2010 the total cost of workplace bullying in Australia to be between \$6 billion and \$36 billion annually. While there is limited data on the prevalence and incidence of bullying across workplaces in Australia, there is considerable anecdotal evidence of the negative impact of workplace bullying on a person's health, as well as their work and family life and the greater community.

1.7 While the Terms of Reference for the inquiry is focused on workplace bullying, the Australian Government recognises that addressing bullying behaviours and attitudes needs to commence well before people enter the workplace, and that bullying can take many forms. In recognition that bullying is not an issue particular to workplaces, but that this behaviour begins much earlier, the Commonwealth is working with states and territories to implement the National Safe Schools Framework.

1.8 The Government believes student resilience and wellbeing are essential for academic and social development and that all students should be able to learn and develop in safe, supportive and respectful environments.

1.9 The Government plays a leadership role in national school education priorities, including providing national frameworks, policies, programs and initiatives that support school authorities. As part of a national approach to supporting schools to build safe school communities, the Government has collaborated with state and territory education authorities to review and revise the National Safe Schools Framework. The Framework has been endorsed by all Ministers for Education.

1.10 The Framework provides Australian schools with a vision and a set of guiding principles that will assist whole school communities to develop positive and practical student safety and wellbeing policies. The Framework and an online supporting resource manual are available to all Australian schools. Further information about the National Safe Schools Framework is available at: www.safeschools.deewr.gov.au.

1.11 Within the Attorney-General's portfolio the Australian Human Rights Commission (AHRC) and the Australian Federal Police (AFP) undertake work on combating bullying, particularly cyber-bullying. On 19 June 2012 the AHRC launched its BackMeUp campaign to encourage young people to support those targeted by cyber bullying. Information on the campaign can be found at http://www.humanrights.gov.au/about/media/news/2012/55_12.html. The AFP's work in this area focuses on a program known as ThinkUKnow – see <http://www.thinkuknow.org.au>. The program aims to raise awareness among parents, carers and teachers of the issues that young people face online. The AFP through its High Tech Crime Prevention Team also works with schools in the Australian Capital Territory (ACT) in delivering cyber-safety presentations, which address cyber-bully. Information on the AFP's work on bullying can be found at: <http://www.afp.gov.au/policing/cybercrime/crime-prevention.aspx>.

1.12 Bullying has also been considered by the Australian Institute of Criminology (AIC). The AIC publication, 'Preventing Violence *within* Organisations: A Practical Handbook' (2000), while particularly relevant, is one of a number of AIC publications on bullying more generally¹.

1.13 Issues covered in this submission relate primarily to the portfolio responsibilities of DEEWR and while Section 6 provides an outline of current legislative and regulatory options outside the *Fair Work Act 2009*, *Work Health and Safety Act 2011*, and Commonwealth anti-discrimination legislation, it should be noted that neither DEEWR or the Attorney-General's Department (AGD) are able to comment on the effectiveness of legislation specific to other jurisdictions.

1.14 DEEWR notes the amendments to the Victorian *Crimes Act 1958* (known as 'Brodie's Law'). These amendments provide for the prosecution of extreme cases of bullying under the criminal law with a penalty of up to 10 years imprisonment. DEEWR is not aware of any prosecutions under 'Brodie's Law' since the amendments came into effect.

¹ AIC publications are available on-line from: www.aic.gov.au

1.15 The key topics covered in the submission are:

- Issues relating to the definition of workplace bullying that flow through difficulties with data collection to determine the extent and prevalence of workplace bullying in Australia;
- A brief outline of current data available that may assist the inquiry with developing an understanding of the incidence and prevalence of workplace bullying in Australia noting that the Safe Work Australia submission provides more detail on this;
- An analysis of provisions in legislation DEEWR has responsibility for that may assist victims of workplace bullying, the Fair Work Act 2009 and the Commonwealth Work Health and Safety Act 2011;
- An analysis of provisions in the Commonwealth anti-discrimination legislation that may assist victims of certain types of workplace bullying including attribute-based harassment, sexual harassment, racial vilification, and complaints under federal anti-discrimination laws;
- The impact of workplace bullying on vulnerable and disadvantaged people in workplaces and why their needs should be a particular consideration by the inquiry; and
- The role of workplace cultures in preventing and responding to bullying, and the capacity for workplace-based policies and procedures to address this issue.

Section 2 – Possible improvements to the national evidence base on workplace bullying

2.1 One of the issues identified in the course of responding to the Terms of Reference for the inquiry is the lack of nationwide data to inform the inquiry. This submission will provide some guidance on research studies that may assist the Committee assess the extent and prevalence of workplace bullying in Australia.

2.2 A further issue is the variations in bullying definitions used by regulators across jurisdictions. Inconsistency in defining workplace bullying reflects in the data collected, making it difficult to compare data from different jurisdictions, and to develop an accurate national picture on the prevalence of workplace bullying in Australia.

2.3 DEEWR notes that as part of the harmonisation of work health and safety laws in Australia, Safe Work Australia through its Strategic Issues Group on Work Health and Safety is developing a model Code of Practice on bullying in the workplace. This will include the development of an agreed consistent definition for bullying for work health and safety purposes.

2.4 As the Committee is aware, the Australian Productivity Commission's *Performance Benchmarking of Australian business regulation: Occupational Health and Safety* estimated that the annual cost of workplace bullying to employers and the economy in Australia ranged from \$6 billion to \$36 billion in 2000. The Productivity Commission defines bullying as a type of psychosocial hazard of the workplace which contributes to work-related stress. However, DEEWR considers a more detailed definition is required, refer to 2.3 above.

2.5 At the time of the Productivity Commission's report, no surveys had been conducted of Australian workplaces on the incidence of bullying in the workplace, therefore the research in their report used survey findings from the United States of America and Sweden to estimate the number of people subjected to bullying.

2.6 Since the Productivity Commission's report, more recent research has been undertaken into bullying in the workplace, although to date there has been no Australia-wide research study on the prevalence of bullying in workplaces.

2.7 Two recent surveys which include data on workplace bullying, both partly funded by Safe Work Australia, are:

- the Australian Workplace Barometer (AWB) Survey, and
- the Personality And Total Health (PATH) through Life Project.

2.8 Detailed information on these surveys can be found in the Safe Work Australia submission.

2.9 As part of the AWB project, data was collected from 2009-11 from employed workers over the age of 18. Respondents were randomly selected from six Australian states and territories: New South Wales (NSW), Western Australia (WA), South Australia (SA), Tasmania, the ACT and the Northern Territory. This resulted in a total of 3483 participants from a wide range of occupations and industries. While data was not captured in Victoria and Queensland, DEEWR considers this study to be the most comprehensive in terms of the information captured on workplace bullying in Australia.

2.10 The PATH through Life project is a random sample of people in Canberra and Queanbeyan who are in the 30-35 age group and have been respondents for this survey for the last 12 years.

2.11 The Committee may also wish to refer to worker's compensation data collected by Safe Work Australia. However, it is important to note that Safe Work Australia consider that this data significantly under-represents the incidence of work related harassment and bullying as it only represents accepted workers' compensation claims for mental stress.

Section 3 – The role of workplace cultures in preventing and responding to bullying and the capacity for workplace-based policies and procedures to address workplace bullying

3.1 The Commonwealth's Work Health and Safety (WHS) regulator, Comcare, has an important role to play in working with organisations to develop these systems. While the emphasis of WHS legislation is on the prevention of harm, offences and penalties under the *Work Health and Safety Act 2011* and *Work Health and Safety Regulations 2011* serve as a disincentive for non-compliance. Additional legislation that supports the goal of a bullying-free workplace cultures throughout Australia are discussed in sections 5 and 6.

3.2 There is a variety of evidence that the best workplaces have good relationships between managers and employees. Firms that engage their employees effectively and listen to them tend to be more productive and more profitable than firms that do these things badly.² An engaged employee is one who knows what he or she need to do to further their organisation's interests and is committed to doing that. They also tend to be satisfied with their work, have good relationships with their colleagues and feel that their work fully utilises their skills and talents.

3.3 Bullying is one example of behaviours that prevent effective employee engagement. Employees who are bullied, either by a manager or colleagues, will not feel satisfied and will not enjoy their work, even if the actual work they perform is personally fulfilling to them. This is obviously a problem for the employees involved and it is also a problem for managers and the owners of firms, even if they don't immediately see it. Bullying fractures the relationship between the employees involved and undermines mutual trust and respect. By undermining these factors, the presence of bullying in a workplace ultimately undermines productivity. Both workers and bosses identify the link between management performance and productivity, with people management being the most significant factor³.

3.4 The good treatment of employees in the workplace is ultimately a matter for management and is something that can be changed by improving the capability of managers and their effectiveness in engaging and empowering employees. Managers can address these things both proactively and reactively and both approaches require the manager to be appropriately skilled in leading people and setting workplace culture. Proactively, managers can create a workplace culture where bullying is not tolerated and thus prevents bullying occurring in the first place. Where bullying does occur, managers can deal with it promptly and appropriately to ensure that it stops. In this circumstance, managers need the appropriate skills to be able to deal

² For example, Roy Green (2009) *Management Matters*; Boedker et al (2011) *Leadership, Culture and Management Practices of High Performing Workplaces in Australia: The High Performing Workplaces Index*

³ Ernst and Young Australian Productivity Pulse 2011

with the conflict that has occurred, to repair workplace relations and to re-engage any employees who have become disengaged as a result of the bullying.

Section 4 – Legislative provisions under the *Fair Work Act 2009* and the Commonwealth *Work Health and Safety Act 2011*

4.1 DEEWR has specific portfolio responsibility for the *Fair Work Act 2009* (FW Act) and the Commonwealth *Work Health and Safety Act 2011* (WHS Act). This section contains an analysis of the provisions for both Acts, and the ways that they address bullying behaviour, or may be used to deal with bullying in the workplace.

Fair Work Act 2009

General Protections

4.2 The emphasis of the General Protections in Part 3-1 of the FW Act is on protecting the freedom to exercise and enforce certain workplace entitlements. However, in some circumstances, the General Protections provisions may provide protection to individuals who are bullied at work.

Workplace rights

4.3 The General Protections protect an employee against ‘adverse action’ by the employer if the employee is bullied because they exercise a workplace right or for a discriminatory reason.

- Adverse action includes refusal to employ, dismissal or injuring the employee in their employment.

4.4 Subsection 341(1)(c)(ii) of the FW Act protects an employee’s right to make a complaint or inquiry in relation to their employment. This means that an employer is prohibited from taking adverse action against an employee because they make a complaint or inquiry in relation to workplace bullying. However, it is important to note that the protection only applies to adverse action that is taken against the employee **because** they make the complaint – it does not provide protection against the substantive bullying allegations.

Discrimination

4.5 The General Protections also prohibit an employer from taking adverse action against an employee for a discriminatory reason (for example, race, age, sexual preference or disability). If an allegation of workplace bullying is because of a discriminatory reason, then the protection may apply.

Remedies

4.6 The General Protections are civil remedy provisions enforceable in the Federal Court or the Federal Magistrates Court. The court may make any order the court considers appropriate if the court is satisfied that a person has contravened the General Protections, including the imposition of a monetary penalty (\$6,600 for an individual and \$33,000 for a corporation). However, for any application alleging a breach of the General Protections involving a dismissal, an application must first be made to Fair Work Australia (FWA)

which may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. FWA must then issue a certificate before an application to a court may be made.

4.7 It is not uncommon for employees to utilise the general protections provisions in relation to complaints about bullying. Whilst the majority of applications involving allegations of bullying to date have not ultimately been the subject of a final determination by the Court (for a range of reasons including being made outside the allowable timeframe etc), the Court considered the matter of both *Stevenson v Airservices Australia* [2012] FMCA 55 (1 February 2012) the *McCulloch v Preshil, The Margaret Lyttle Memorial School* [2011] FCA 1218 (25 October 2011) .

4.8 In *Stevenson v Airservices Australia* [2012] FMCA 55, the applicant alleged that his employment was terminated because he exercised a workplace right in making complaints about harassment and bullying. The respondent, however, satisfied the court that it did not terminate the applicant because of the complaints and the application was dismissed. In *McCulloch v Preshil, The Margaret Lyttle Memorial School* [2011] FCA 1218 (25 October 2011) the applicant alleged that her employment was terminated because she exercised a workplace right in making complaints about alleged bullying .The application for interlocutory relief was not granted and the matter was discontinued prior to a final hearing.

Commonwealth Work Health and Safety Act 2011

4.9 The Commonwealth WHS Act and the *Work Health and Safety Regulations 2011* (WHS Regulations) implement the model WHS legislation developed by Safe Work Australia as part of the national Occupational Health and Safety (OHS) harmonisation process. As a member of both Safe Work Australia and the Strategic Issues Group – OHS, DEEWR actively contributed to the development of the model legislation. This section will focus on the Commonwealth's WHS Act and WHS Regulations, with further information on the model WHS legislation provided in Safe Work Australia's submission to this Inquiry.

4.10 The WHS Act is limited in scope, covering employees of the Commonwealth, public authorities and (for a transitional period) non-Commonwealth licensees. The WHS legislative framework addresses workplace bullying through general duties of care under the WHS Act, issue resolution procedures established by the WHS Act and the WHS Regulations and a Code of Practice (currently being drafted) which will provide guidance about preventing and responding to workplace bullying.

4.11 As noted at 3.1, Comcare is the Commonwealth WHS regulator and is responsible for working with employers to ensure the workplace health, safety and welfare of employees through education, assurance and guidance.

Health and Safety Duties

4.12 Under section 19 of the WHS Act, a person conducting a business or undertaking (PCBU) has the primary duty to ensure, so far as is reasonably practicable, the health and safety of workers who are:

- engaged, or caused to be engaged by the PCBU; or are influenced or directed by the PCBU; and
- at work in the business or undertaking.

4.13 Health is defined under section 4 of the WHS Act to mean both physical and psychological health. The Explanatory Memorandum provides that this definition 'means that the Act covers psychosocial risks to health like stress, fatigue and bullying.'

4.14 Officers, workers and other persons at the workplace all have responsibilities under the WHS Act with respect to the psychological health of people at the workplace. Section 27 of the WHS Act requires officers to exercise due diligence to ensure the business or undertaking complies with the WHS Act and the WHS Regulations. The officer duty recognises that particular individuals within organisations are able to influence the culture of the business or undertaking, including by ensuring that appropriate resources and processes to eliminate or minimise risks associated with bullying are adopted.

4.15 Sections 28 and 29 of the WHS Act require workers and other persons at the workplace to take reasonable care for their own health and safety while at work and also to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons.

Issue Resolution

4.16 Where issues such as workplace bullying arise in a workplace, Division 5 of Part 5 of the WHS Act establishes a mandatory process for resolving work health and safety issues. It applies after a work health and safety matter is raised but not resolved to the satisfaction of any party after discussing the matter. Section 81 of the Act requires each party to an issue to make reasonable efforts to achieve a timely, final and effective resolution of the issue using the agreed issue resolution procedure or, if there is no agreed procedure, the default procedure prescribed by the regulations. The intention is that issues should be resolved as soon as can reasonably be achieved to avoid further dispute or a recurrence of the issue or a similar issue.

4.17 Section 82 of the WHS Act gives parties to a work health and safety issue the right to ask for an inspector's assistance in resolving the issue if it remains unresolved after reasonable efforts have been made. It applies where at least one of the parties has made reasonable efforts to have the work health and safety issue resolved.

Offences and Penalties

4.18 Division 5 of Part 2 of the WHS Act sets out the offences and penalties in relation to breaches of health and safety duties under the WHS Act. Contraventions of the WHS Act and the WHS Regulations are generally criminal offences, although a civil penalty regime applies in relation to right of entry under Part 7. This generally reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable to a criminal sanction for placing another person's health and safety at risk. Such an approach is also in line with international practice.

4.19 The WHS Act provides for three categories of offences against health and safety duties. Category 1 offences are for breach of health and safety duties that involve reckless conduct and carry the highest maximum penalty under the WHS Act. The maximum penalties are:

- \$300,000 or 5 years imprisonment or both for an offence committed by an individual;
- \$600,000 or 5 years imprisonment or both for an offence committed by a PCBU or officer; and
- \$3,000,000 for an offence committed by a body corporate.

Code of Practice

4.20 The draft Code of Practice titled '*Preventing and Responding to Workplace Bullying*' provides practical guidance on what bullying is, how to prevent bullying becoming a health and safety risk in the workplace and what to do if it does occur. Safe Work Australia will provide more detail on this code as part of its submission to the inquiry.

4.21 An approved code of practice will not form part of the WHS Act or Regulations, but may be admissible in proceedings as evidence of whether or not a duty or obligation under the WHS Act has been complied with. For example, a court may use a code of practice as evidence of what is known about hazards and risk control. A code may also be used to determine what is reasonably practicable in the circumstances to which the code relates. Importantly, a duty holder may also comply with their duty by using another method which provides an equivalent or higher standard of health and safety.

Section 5 – Anti-discrimination Law

5.1 The Attorney-General's Department has provided the following information on the four anti-discrimination acts that may provide redress for victims of workplace bullying.

Protection against bullying in anti-discrimination law

5.2 Anti-discrimination legislation is one of a number of legal remedies that have been applied to behaviour regarded as bullying.

5.3 At the Commonwealth level there are four anti-discrimination acts: *the Racial Discrimination Act 1975* (RD Act), the *Sex Discrimination Act 1984* (SD Act), the *Age Discrimination Act 2004* (AD Act), and the *Disability Discrimination Act 1992* (DD Act).

5.4 Harassment based on a person's attribute can be a form of unlawful discrimination if it results from a less favourable treatment of the person on the basis of their attribute. The DD Act also explicitly prohibits harassment on the basis of a person's disability, the SD Act prohibits sexual harassment and the RD Act prohibits vilification (described as racial hatred).

5.5 Under the anti-discrimination laws, complaints may be made directly against the person or persons concerned or, in the context of employment, an employer may be the subject of a complaint as being vicariously liable for an employee.

5.6 However, the scope and coverage of anti-discrimination law is limited. The prohibition of discrimination under Commonwealth anti-discrimination laws is restricted to certain protected attributes:

- race (including attributes such as colour, descent and national or ethnic origin)
- that a person is or has been an immigrant
- sex
- marital status
- pregnancy or potential pregnancy
- breastfeeding
- family responsibilities
- disability (including carers and associates), and
- age.

5.7 The Government committed during the 2010 election to add sexual orientation and gender identity as new protected attributes, as part of the project to consolidate anti-discrimination laws into a single Act.

Attribute-based harassment

5.8 Harassment in relation to any protected attribute is unlawful discrimination in all areas of public life in which discrimination is unlawful, because it will usually result in less favourable treatment of the person based

on a protected attribute.⁴ For example, a pattern of abusive language directed at a particular employee because of their sex or race would be discriminatory because it would subject the employee to detriment not suffered by other employees.

5.9 The DD Act explicitly prohibits disability harassment in employment, (and also in education and the provision of goods and services).⁵ The DD Act does not define 'harassment' but makes it unlawful to harass a person, or an associate of the person, 'in relation to' their disability.

5.10 In *McCormack v Commonwealth*,⁶ the court referred to the dictionary definition of harassment as 'troubled by repeated attacks, incursions, etc, as in war or facilities; harry; raid; to disturb persistently; torment as with troubles, carers, etc'.

Sexual Harassment

5.11 Sexual harassment has a particular focus on unwelcome sexual conduct rather than non-sexual, but sex-based, harassment. Sexual harassment is defined as making an unwanted sexual advance or an unwelcome request for sexual favours to the person harassed, or engaging in unwelcome conduct of a sexual nature in relation to the person harassed that a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated having regard to all the circumstances. Unwelcome conduct of a sexual nature includes making a statement of a sexual nature, orally or in writing, to a person or in the presence of the person.⁷

5.12 Sexual harassment is unlawful in a range of circumstances extending beyond employment and embracing conduct in regard to the grant of occupational qualification, in relation to registered organisations, employment agencies, educational institutions the provision of goods and services and facilities, in relation to accommodation, in connection with dealings in land, conduct by a management committee member concerning membership of a club, and conduct when performing functions under, or carrying out any other responsibility for the administration of, Commonwealth laws and programs.

Racial Vilification

5.13 Section 18C of the RD Act prohibits behaviour which is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people because of race, colour or national or ethnic origin. It applies to acts done 'otherwise than in private'. There are a range of exceptions to enable a comment in the public interest.

5.14 Places of employment have been held by the Australian Human Rights Commission as within the scope of s 18C (*Korczak v Commonwealth*

⁴ See, for example, *Cooke v Plauen Holdings*, per Driver FM; *Shaw v Perpetual Trustees* per Crennan QC (as she then was); *Qantas Airways v Gama*

⁵ Sections 35-37.

⁶ [2007] FMCA 1245

⁷ Sex Discrimination Act s.28A

(Department of Defence).⁸ This is consistent with the overall object of the RD Act which is to prohibit discrimination in all areas of public life, including employment.

5.15 Vilification is of some relevance to the general context of workplace behaviour which may amount to bullying insofar as it concerns behaviour that is judged as reasonably likely to offend, humiliate or intimidate another person or group of persons because of the race, colour or national or ethnic origin of the other person or group.

5.16 Humiliation and intimidation supplies a common element with common definitions of bullying. However, vilification provisions seek to regulate public behaviour, not necessarily behaviour directed only at the complainant, and the nature and structure of the provision suggests an essentially different kind of inquiry.

Complaints under the federal anti-discrimination Acts

5.17 The first stage in making an unlawful discrimination complaint is to lodge it with the Commission, which must investigate the complaint and try to resolve it where possible through conciliation. It is only if conciliation fails to resolve the matter that the complainant may commence proceedings in the Federal Court or Federal Magistrates Court. If a complaint is upheld, the court may order any remedy it sees fit including, for example, ordering remedial action, an apology and monetary compensation or a combination of remedies.

5.18 Under the tests for direct discrimination in all Commonwealth, State and Territory anti-discrimination laws, the burden of proving that the respondent treated the complainant less favourably because of their protected attribute falls entirely on the complainant. In contrast, for indirect discrimination, once a complainant has established the discriminatory impact of a condition, requirement or practice, a number of Australian anti-discrimination laws shift the burden of proving that the discriminatory condition was reasonable, to the respondent.

Consolidation of anti-discrimination laws

5.19 The Government is at an advanced stage of preparing a consolidation of these four anti-discrimination acts into a single consolidated Act. On 22 September 2011, the Attorney-General and Minister for Finance and Deregulation launched a public discussion paper to seek community views on the consolidation. Draft legislation will be released for further consultation in 2012.

5.20 Although there is minimal consideration of the application of anti-discrimination law to bullying in this project, the discussion paper canvassed views on how attribute-based harassment should be covered.⁹

⁸ Unreported, Human Rights and Equal Opportunity Commission, Commissioner Innes, 16 December 1999.

⁹ Attorney-General's Department, *Consolidation of Anti-Discrimination Laws: Discussion Paper* (2011), p18-19, at <www.ag.gov.au/antidiscrimination>

Section 6 – Summary of current legislative and regulatory options outside of the Fair Work Act and the Commonwealth Work Health and Safety Act

6.1 While neither DEEWR or AGD has responsibility or expertise on the following legislative and regulatory options to address workplace bullying, it considers these mechanisms may play a useful role in providing options for victims of workplace bullying.

6.2 All jurisdictions currently address bullying in the workplace in either a code of practice or guidance material. The Australian Government is working with state and territory governments, as well as employer and employee representatives to harmonise work health and safety laws across Australia. The new work health and safety legislation recognises that psycho-social hazards such as bullying can create health and safety risks in the workplace. The new laws have been enacted in five jurisdictions to date and a sixth jurisdiction will implement the laws by 1 January 2013.

General criminal law

6.3 There is no specific criminal offence of ‘bullying’ in any Australian jurisdiction. However, existing offences in Commonwealth, State and Territory criminal laws (such as assault, battery, making threats, damage to property or stalking) may apply to bullying behaviour. Serious cases of cyber-bullying may be covered by a Commonwealth offence of using a carriage service, such as the internet or telephone, to menace, harass or cause offence, which carries a maximum penalty of three years’ imprisonment.

6.4 In 2011, the Victorian Government amended the existing offence of ‘stalking’ in its *Crimes Act 1958* to expressly include making threats, using abusive or threatening words, performing abusive or offensive acts, or acting in a way that could reasonably be expected to cause the victim harm or self-harm. These amendments have been informally dubbed ‘Brodie’s law’ in recognition of 19 year old Brodie Panlock, who took her own life in September 2006, after being subjected to persistent and vicious bullying at the café where she worked as a waitress. Stalking carries a maximum penalty of 10 years’ imprisonment under the *Crimes Act 1958*.

6.5 On 18 November 2011 the Standing Council on Law and Justice considered anti-bullying legislation, and noted:

- The introduction of Brodie’s Law in Victoria; and
- The importance of finding effective means of dealing with all forms of bullying whether in the workplace, school yard, sporting club, cyberspace or elsewhere.¹⁰

¹⁰ 18 November 2011, Communique Standing Council on Law and Justice

6.6 Note: jurisdictions that have adopted the model WHS legislation also have criminal penalties for breaches of a range of duties contained in the WHS Act and Regulations.

6.7 DEEWR notes there are a range of Commonwealth, state and territory government organisations that can assist victims of workplace bullying including the work, health and safety regulators in the relevant jurisdictions, Fair Work Australia, the Fair Work Ombudsman, and in cases of discrimination the Australian Human Rights Commission or anti-discrimination boards in states and territories.

6.8 However, DEEWR acknowledges that for some people it may not be clear which government organisation is best placed to assist them. This is more likely to be the case for people from vulnerable or disadvantaged groups who may not have a good understanding of their rights in the workplace or the assistance available to them.

Anti-discrimination, equal opportunity and sexual harassment laws

6.9 There are a range of anti-discrimination and sexual harassment laws in the Commonwealth, states and territories that may apply to discrimination in the workplace and other environments which incorporate elements of human rights. More detail on the Commonwealth anti-discrimination laws can be found in Section 5 of this submission.

6.10 These laws are enforced by Commonwealth, state and territory tribunals, and have the capacity to provide redress to victims of bullying, including through damages for pain and suffering. Victims of bullying may use discrimination law to address bullying, but typically this is addressed through a mediation process first, followed by tribunal or court action.

6.11 Courts and tribunals have also acknowledged that an organisation's response to bullying, in particular a failure to respond, may be subject to anti-discrimination law.

6.12 However, both anti-discrimination and sexual harassment laws are limited in that they can only provide a remedy for bullying behaviour which relates to discrimination based on disability race, sex or sexual harassment.

Section 7 – Impact of workplace bullying on vulnerable and disadvantaged Australians

7.1 The Government is committed to increasing workforce participation for all Australians, particularly people belonging to disadvantaged and vulnerable groups, working Australians with a disability or mental illness, workers from culturally and diverse backgrounds, youth and women (particularly low skilled), Aboriginal and Torres Strait Islander people, jobless families, the long-term unemployed and older Australians.

7.2 DEEWR is responsible for a range of measures aimed at increasing workplace participation outcomes for disadvantaged and vulnerable Australians. In the 2012–13 Federal Budget the Government committed \$7.1 million over four years to ensure five Community Based Employment Advice Services (CBEAS) can continue to assist thousands of Australia's most vulnerable workers. These not-for-profit organisations provide advice, assistance and information to Australians who experience difficulties in asserting and exercising their rights at work.

7.3 Research indicates high levels of stigma associated with disability and sickness, along with relatively low workforce participation levels of some disadvantaged groups¹¹. It may be inferred from this that some groups may be more vulnerable to bullying and harassment. Preliminary findings from the Australian Workplace Barometer Survey provided by Safe Work Australia into incidence rates for participants show the following:

- females reported significantly higher levels of bullying and stated they experienced bullying for significantly longer periods of time
- 9.7 per cent of participants advised that they have experienced unfair treatment due to gender
- 6.3 per cent had experienced negative comments regarding ethnic or racial background.¹²

7.4 DEEWR considers the impact of workplace bullying on vulnerable and disadvantaged Australians warrants special consideration by the inquiry when looking into initiatives and remedies to address workplace bullying.

¹¹ OECD (2010), *Sickness, Disability and Work: Breaking the Barriers: A synthesis of findings across OECD countries*. OECD Publishing, Paris.

¹² Australian Workplace Barometer

Section 8 – Conclusion

8.1 DEEWR has responsibility for possible legislative remedies to address workplace bullying under the FW Act and the Commonwealth WHS Act. Penalties under the new Commonwealth WHS Act provide more substantial penalties for breaches of work health and safety duties than under the previous *Occupational Health and Safety Act 1991*.

8.2 DEEWR considers a holistic approach to addressing workplace bullying across jurisdictions is required. This would take into account prevention, education, early intervention and legislative and regulatory remedies underpinned by a single definition will assist workplaces, regulators and governments tackle this issue more effectively.