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Dear Committee Secretary

The Northern Territory Government notes that the Senate Education, Employment and Workplace Relations Committees are conducting an inquiry into the Fair Work Act Amendment Bill ('the bill').

The Northern Territory Government wishes to make the attached submission in relation to the anti-bullying measures set out in the bill.

Yours sincerely

JOHN ELFERINK

1601
15/4/13

Northern Territory Government Submission to the Senate Education, Employment and Workplace Relations Committees' Inquiry into the Fair Work Amendment Bill 2013

Introduction

This is a submission made on behalf of the Northern Territory Government to the inquiry by the Senate Education, Employment and Workplace Relations Committees ('the committees') into the Fair Work Amendment Bill 2013 ('the bill'). It will deal exclusively with Schedule 3 of the bill. This schedule deals with the anti-bullying measure that seeks to give effect to the Australian Government's response to the House of Representatives Standing Committee on Education and Employment report *Workplace bullying —We just want it to stop.*

At the outset, the Northern Territory Government supports appropriate measures being introduced that address the issue of bullying in the workplace. However, it submits that where there are appropriate, legally enforceable mechanisms available to workers to seek remedies to bullying, that these should be used before resort to the anti-bullying measure contained in Schedule 3 of the bill.

Specifically, this submission argues for the exclusion from the anti-bullying measure for:

- the Northern Territory Public Sector; and
- employers and employees whose enterprise agreements contain provisions for the management of bullying.

Proposed amendments

Schedule 3 of the bill provides an option for a worker who reasonably believes that he or she has been bullied at work to apply to the Fair Work Commission for an order to prevent the worker from being bullied at work. It is the claimed intention of the amendment to provide workers with quick and inexpensive remedies to bullying at work.

Clause 789FD(3)(b) in Item 6 of Schedule 3 extends coverage of the anti-bullying measure to a business or undertaking that is conducted principally in a Territory or Commonwealth place. This brings the Northern Territory Public Sector within its scope. This has implications for the Northern Territory which will be set out below.

Implications for the Northern Territory

There are two principal implications for the Northern Territory as a consequence of clause 789FD(3)(b). The first is that it imposes a limit on Northern Territory sovereignty and, related to this, it in effect duplicates legally enforceable anti-bullying measures that are available to employees in the Northern Territory Public Sector.

Northern Territory sovereignty

Section 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) (the Self Government Act) empowers the Legislative Assembly of the Northern Territory to make laws for the peace, order and good government of the Territory.

Section 53(6) of the Self Government Act empowers the Legislative Assembly of the Northern Territory to confer power on the Public Service Commissioner of the Territory to make determinations by way of fixing the terms and conditions of employment of persons employed in the public service of the Territory. The proposed anti-bullying measure limits this power in a way that is not extended to the public services of the states due to the limits of the constitutional power of the Commonwealth Parliament.

While it is within the power of the Commonwealth Parliament to limit the sovereignty of the Northern Territory, it is argued that it is not in the public interest that the sovereignty of the Northern Territory be limited in the regulation and management of its public service, and that such restraint is inconsistent with the rights and obligations given to the Northern Territory legislature under the Self Government Act.

The Northern Territory Public Sector has a number of anti-bullying provisions both in its principal and its subordinate legislation. These are set out in more detail below.

Duplication of existing Northern Territory Public Sector anti-bullying measures

The principal anti-bullying measure for Northern Territory Public Sector employees is enshrined in the *Public Sector Employment and Management Act* ('the PSEM Act').

In essence, there are three levels of dealing with bullying and 'bullies' under the PSEMA.

Firstly there is established a process and structure for dealing with issues of bullying as close as possible to the source of the issue, that is at the workface (Employment Instruction No. 13).

Employee behaviour is underpinned by the Performance and Conduct Principle (section 5F) and the Code of Conduct (Employment Instruction No. 12). All processes are underpinned by natural justice (Employment Instruction 3).

Employment Instruction Number 13: Appropriate workplace behaviours deals specifically with bullying. It can be found at Attachment 1 to this submission. Amongst other things it employs a definition of 'workplace bullying' that is similar to that used in the bill:

4.1 Workplace bullying is repeated, inappropriate, unreasonable behaviour directed towards an employee or employees that creates a risk to health and safety in the workplace.

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

4.2 'Inappropriate' or 'unreasonable' behaviour is behaviour that a reasonable person having regard to the circumstances, would find unacceptable, humiliating, threatening, victimising or undermining to an employee's mental well-being and right to respect and dignity in the workplace.

4.3 The term 'workplace' as used in this Employment Instruction also includes work-related activities (e.g. office social functions, work-related travel etc.) or actions which may occur outside the usual place of work, but are connected to an employee's work (e.g. social media comments about other employees).

Amongst other things, Employment Instruction 13 requires Chief Executive Officers of Northern Territory Public Sector agencies to develop and implement an appropriate workplace behaviour policy and procedure which must, at a minimum:

- set out the requirement for appropriate workplace behaviour;
- take a proactive approach in developing the interpersonal skills of persons selected to supervisory or management positions (both in terms of their ability to relate appropriately to staff who report to them, and to their ability to help resolve interpersonal conflicts in the workplace); and
- have effective mechanisms for dealing with internal complaints promptly and effectively and in accordance with the principle of natural justice.

Secondly, if this is not successful the employee can elevate their concerns to a formal complaint to the Commissioner for Public Employment to review the matter. The Commissioner has broad powers to deal with the matter (section 59).

Section 59 of the PSEM Act (see Attachment 2) provides the Commissioner for Public Employment with extensive powers in relation to employee grievances, including:

- referral of the grievance back to the relevant agency;
- the ability to confirm the agency's actions or decisions or direct the chief executive officer to take or refrain from taking, as the case requires, a specified action; or
- the ability to decline to review the grievance on certain grounds such as determining that it is frivolous, vexatious or not made in good faith; or alternative proceedings for the same matter are on foot.

Thirdly and not mutually exclusively, the perpetrator of any instance of bullying could be subject to sanctions for a breach of discipline (section 49).

Part 1A of the PSEM Act obliges all persons employed under it to adhere to its performance and conduct principle[1]. Amongst other things public sector employees are required to treat other public sector officers, other persons in the workplace and members of the public fairly, equitably and with proper courtesy and consideration. This obligation extends not only to fellow employees, but to other persons in the workplace and to members of the public. Breaches of the performance and conduct principle could result in an employee being subject to disciplinary action[2] and, if proven, the employee could be subject to sanctions that range from a formal caution to termination of employment[3]. As with clause 789FG of Item 6 of Schedule 3 of the bill, the PSEM Act imposes sanctions against an employee who disregards or disobeys a lawful order or direction given by a person having authority to give such an order or direction, such as a direction to desist from behaviours that could be considered as bullying.[4]

These disciplinary provisions are supported through subordinate legislation in the form of Employment Instructions that are rules issued by the Commissioner for Public Employment that, amongst other things, relate to the good management of the public sector.[5] Employment Instructions cover matters such as:

- natural justice[6];
- discipline[7];
- a code of conduct[8]; and
- appropriate workplace behaviours[9].

For visitors to Northern Territory Public Sector workplaces the appropriate mechanism for dealing with behaviour that contravenes the performance and conduct principle would be a complaint to the relevant public sector agency. The complaints would be investigated and, if substantiated, then disciplinary action could ensure.

In addition to the legislative measures, Northern Territory Public Sector enterprise agreements also deal with bullying. These will be outlined below.

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[1] Section 5F, PSEM Act
[2] Section 49(a), PSEM Act
[3] Section 49C, PSEM Act
[4] Section 49(c), PSEM Act
[5] Section 16, PSEM Act
[6] Employment Instruction Number 3
[7] Employment Instruction Number 7
[8] Employment Instruction 12
[9] Employment Instruction 13

Anti-Bullying Measures in Northern Territory Public Sector Enterprise Agreements

Clause 24 of the *Northern Territory Public Sector 2010–2013 Enterprise Agreement* sets out the:

- commitment of the parties to maintain safe and healthy workplaces that are free from harassment and bullying behaviour;
- requirement for chief executive officers to take all reasonably practicable steps to prevent harassment and bullying in workplaces;
- obligation of employees to behave in a professional manner and treat colleagues, supervisors and others in their workplaces with courtesy, dignity and respect at all times; and
- option of employees who are aggrieved by their treatment in employment to seek a review under the PSEM Act.

Similar anti-bullying provisions are found in all but one Northern Territory Public Sector enterprise agreements.[10] This leads to a general submission in relation to enterprise agreements that contain anti-bullying measures.

In the Northern Territory Public Sector anti-bullying provisions in agreements have been in place for a number of years. They are robust and provide recourse to effective remedies for employees. The unions that represent Northern Territory Public Sector employees have supported the current measures.

Enterprise Agreements with anti-bullying provisions

As with the brief discussion of the anti-bullying measures that exist in most Northern Territory Public Sector enterprise agreements above, a brief survey of enterprise agreements on the Fair Work Commission web-site indicates that other enterprise agreements deal with the question of bullying in the workplace. It is not intended to imply that this survey is exhaustive; rather it is intended to suggest that some employers and employees have dealt with the question. A query of the term 'bullying' produced 7616 hits in 2782 documents.

It would be a better application of public policy and consistent with the object of the *Fair Work Act 2009* to support the will of those bargaining parties who have reached

[10] See clause 15.2(c) *Darwin Port Corporation (Northern Territory Public Sector) 2011–2014 Enterprise Agreement;* clause 9.3 *2010–2013 Power and Water Enterprise Agreement*; clause 52 *Northern Territory Public Sector Teacher and Educator Enterprise Agreement*; clause 14 *Northern Territory Public Sector Dental Officers' 2011–2014 Enterprise Agreement*; clause 19 *Northern Territory Public Sector Nurses and Midwives 2011–2014 Enterprise Agreement*; clause 59 *Northern Territory Public Sector Fire and Rescue Service 2011–2013 Enterprise Agreement;* clause 67.3(a) *Medical Officers Northern Territory Public Sector 2011–2013 Enterprise Agreement*; and clause 62 *Prison Officer (Northern Territory Public Sector) 2011–2014 Enterprise Agreement*. The exception is the *Darwin Port Corporation Marine Pilots' 2011–2014 Enterprise Agreement*; however there is nothing in that agreement that would prevent an employee who was covered by it from lodging a bullying-related grievance under section 59 of the PSEM Act.

an agreed approach to the management of bullying in their enterprises. However, it is recognised that not all employment relationships are regulated by enterprise agreements and that not all enterprise agreements would provide anti-bullying measures. For this reason the Northern Territory Government has no objection to the inclusion of Part 6-4B as set out in Schedule 3 of the bill into the *Fair Work Act 2009*, as an appropriate safety net for those employees who are not protected from bullying through an enterprise agreement.

Discussion and Conclusion

As can be seen from this submission for employees such as Northern Territory Public Sector employees or others whose enterprise agreements contain appropriate provisions, there are already a number of mechanisms that provide for quick and in-expensive resolution of complaints of workplace bullying. As can also be seen from the submission, these measures can actually be more extensive than the proposed powers available to the Fair Work Commission in Schedule 3 of the bill. It is argued that these anti-bullying measures can be more effective than actions available to workers under the relevant work health and safety legislation.

Enactment of Schedule 3 of the bill in its present form is liable to sow confusion rather than effective resolution of complaints of bullying in the workplace and provide for multiple legally enforceable avenues to deal with their issues. Whist it is important to provide this opportunity for remedies for those workers who are bullied at work; it is equally important that once a matter is heard in one jurisdiction that the matter be considered resolved so that the parties can get on with their business. It is submitted that

- the measures that are available to Northern Territory Public Sector employees are effective, anti-bullying measures;
- allowing the PSEM Act to prevail over the proposed anti-bullying measure in Schedule 3 of the bill is not inconsistent with the mischief the amendment proposes to address: access and protection for employees who have been bullied at work through timely and low-cost remedies; and
- allowing the PSEM Act to prevail over the proposed anti-bullying measure in Schedule 3 of the bill would mean Northern Territory public servants would have the same standing and treatment as the other states in respect to their public sector employees.

It would be better that the proposed anti-bullying measure be the minimum standard that would apply for those workers who do not have access to

- other effective means of legislative redress; or
- effective anti-bullying measures in an applicable enterprise agreement.

Recommendation

It is recommended that Schedule 3 of the bill be amended to:

- exclude the Northern Territory Public Sector; and
- exclude those employers and employees who have effective anti-bullying measures in their enterprise agreements.

APPROPRIATE WORKPLACE BEHAVIOUR
Employment Instruction Number 13

1. Scope

1.1 This Employment Instruction:

a) sets out the requirement for all employees to behave appropriately in the workplace;

b) sets out the requirement for Chief Executive Officers to foster a culture which supports appropriate behaviour and is free from bullying;

c) sets out the Northern Territory Public Sector (NTPS) definition of workplace bullying and inappropriate behaviour;

d) is issued in accordance with section 16 of the *Public Sector Employment and Management Act* (the Act); and

e) is to be read in conjunction with section 5F (Performance and Conduct Principle) of the Act; Employment Instruction Number 3 (Natural Justice); and Employment Instruction Number 12 (Code of Conduct).

2. Appropriate Workplace Behaviour

2.1. Employees must treat other employees and members of the public in a respectful, professional, fair, equitable and courteous manner, and act in a manner consistent with the Performance and Conduct Principle and the NTPS Code of Conduct.

2.2. Managers have a responsibility to foster a culture of respect in the workplace, and to ensure employees are treated appropriately and not subjected to bullying.

2.3. The NTPS will not accept inappropriate workplace behaviour or bullying and will deal with it in a fair and timely manner in accordance with the provisions of the Act and supporting legislation.

3. Agency Policy and Procedure

3.1. A Chief Executive Officer must develop and implement an agency policy and procedure to foster appropriate workplace behaviour and a culture of respect, and to deal effectively with inappropriate workplace behaviour and bullying as defined in this Employment Instruction. The policy and procedure are to be consistent with the Act, its subordinate legislation and any relevant award or enterprise agreement.

3.2. The agency policy and procedure regarding appropriate workplace behaviour must, at a minimum:

a) set out the requirement for appropriate workplace behaviour;

b) require employee orientation to include adequate information about appropriate workplace behaviour;

c) take a proactive approach in developing the interpersonal skills of persons selected to supervisory/management positions (both in terms of their ability to relate appropriately to staff who report to them, and to their ability to help resolve interpersonal conflict in the workplace);

d) ensure access to and participation in relevant education and training for supervisors and managers;

e) provide for access to suitable training for staff; and

f) have effective mechanisms for dealing with internal complaints promptly and effectively and in accordance with the principle of natural justice.

4. *Definition of Workplace Bullying and Inappropriate Behaviour*

4.1. Workplace bullying is repeated, inappropriate, unreasonable behaviour directed towards an employee or employees that creates a risk to health and safety in the workplace.

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

4.2. 'Inappropriate' or 'unreasonable' behaviour is behaviour that a reasonable person, having regard to the circumstances, would find unacceptable, humiliating, threatening, victimising or undermining to an employee's mental well-being and right to respect and dignity in the workplace.

4.3. The term 'workplace' as used in this Employment Instruction also includes work-related activities (e.g. office social functions, work-related travel, etc.) or actions which may occur outside of the usual place of work but are connected to an employee's work (e.g. social media comments about other employees).

GRAHAM SYMONS
Commissioner for Public Employment

29 June 2012

Part 9 Review of grievances and appeals

Division 1 Grievances

59 Review of grievances

(1) An employee may:

(a) where he or she is aggrieved by the intention of the employee's Chief Executive Officer to terminate the employee's employment on probation – within 14 days; or

(aa) if aggrieved by a decision of the employee's Chief Executive Officer:

(i) under section 44 to take remedial action of a kind mentioned in section 46(1)(b)(i); or

(ii) under section 49A to take disciplinary action of a kind mentioned in section 49C(1)(b)(i) to (iv);

within 14 days after notice of the decision is given to the employee; or

(b) in any other case where the employee is aggrieved by his or her treatment in employment in the Public Sector – within 3 months after the action or decision by which he or she is aggrieved;

request the Commissioner to review the action, intended action or decision complained of.

(2) Subject to subsections (3) and (5A), the Commissioner must:

(a) in a case referred to in subsection (1)(a) or (aa) – within 14 days; and

(b) in any other case – within 3 months;

after a request under subsection (1) is received, or such longer period as, in the Commissioner's opinion, the circumstances require, review the matter.

(3) Where the Commissioner believes that an employee making a request under subsection (1) has not taken adequate steps to seek redress of the grievance within the relevant Agency, the Commissioner may refer the matter to the Chief Executive Officer of the Agency for consideration within the time specified by the Commissioner and the Commissioner need not review the matter under this section until that time has expired.

(4) Subject to this Act, the Commissioner has the powers necessary and convenient to deal with a request under this section, including the same powers and obligations in relation to a review as an appeal board has under section 59F in relation to an appeal.

(5) After reviewing a matter under this section the Commissioner may:

(a) confirm the action, intended action or decision; or

(b) direct the Chief Executive Officer of the Agency concerned to take or refrain from taking, as the case requires, a specified action.

(5A) The Commissioner may decline to review an action, intended action or decision if satisfied:

(a) the request for review is frivolous, vexatious or not made in good faith; or

(b) alternative proceedings:

(i) have been commenced by, or on behalf of, the employee; and

(ii) have neither:

(A) been withdrawn; nor

(B) failed for want of jurisdiction.

(6) In this section, for the purpose of allowing a review under this section of treatment resulting in the termination of the employment in, or resignation from, the Public Sector of a former employee, ***employee*** includes a former employee.

(7) In this section:

alternative proceedings means proceedings under another Act or a law of the Commonwealth or of a State or another Territory, for a review of the action, intended action or decision.