Inquiry into the Fair Work Amendment Bill 2013

Submission to the Senate Education, Employment and Workplace Relations Legislation Committee

Australian Nursing Federation (Victorian Branch)

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2. Introduction

ANF (Vic Branch) is Victoria's peak nursing and midwifery industrial and professional body, representing over 66,000 members in the full spectrum of health and aged care services in Victoria, in relation to matters including industrial, professional, occupational health and safety, and workers compensation.

ANF (Vic Branch) on behalf of its members lobbies governments and other key stakeholders to ensure that nurses and midwives are provided with a healthy and safe workplace, and thus ensures that the community continues to receive professional standards of nursing and midwifery care by maintaining a workforce which is appreciated and supported.

It is in this role that it is increasingly common that matters arise which cross the industrial, occupational, occupational health and safety, workers compensation and equal opportunity jurisdictions, none more so than workplace bullying.

Subsequent to making a submission to the House Of Representatives Standing Committee on Education & Employment, Inquiry into Workplace Bullying, ANF (Vic Branch) has followed with interest the *Workplace Bullying "We just want it to stop"* report, the Australian Government response to the report dated February 2013 and the Fair Work Amendment Bill 2013.

ANF (Vic Branch) welcomes this opportunity to provide a submission in consideration of the proposed amendments to the Fair Work Act 2009 that address workplace bullying

3. Executive Summary

The Fair Work Amendment Bill 2013 (the Bill) has been developed to give effect to a number of recommendations resulting from the Fair Work Act Review and also to give effect to the Government's response to the House of Representatives Standing Committee on Education and Employment's report *Workplace Bullying "We just want it to stop."*

This submission of the ANF (Vic Branch) provides comments specific to the anti-bullying measures outlined in the Bill. The ANF (Vic Branch) otherwise adopts the submission of the Australian Nursing Federation.

ANF (Vic Branch) strongly supports and is encouraged by the introduction of the anti-bullying measures outlined in the Bill. In order to strengthen the implementation and effectiveness of the proposed amendments, however, the ANF (Vic Branch) makes the following recommendations.

1) That the legislation include a note to s789D 'When is a worker bullied at work?" that provides some description as to some of the types of behaviours that may fall within the definition outlined in s789FD(1) and (2).

2) Development of guidance material to assist a worker who believes they have been bullied to appropriately complete an application to the FWC.

3) That further consideration be given to the circumstances in which the FWC may deem it necessary and appropriate to refer the matter to a WHS regulator, particularly in reference to jurisdictions that have not adopted the model WHS laws.

4) That the Bill provide further clarity about the types of orders that the FWC can and cannot make if satisfied that a worker has been bullied at work and there is a risk that the worker will continued to be bullied.

5) That consideration be made to the availability of the FWC to order compensation/severance package when the bullying is so severe that the working relationship cannot continue.

6) That clarity be provided as to whether or not a worker is required to attempt to use internal grievance procedures prior to making an application to the FWC under Part 6-4B

4. Individual right of recourse for persons who are bullied at work

ANF (Vic Branch) strongly supports the introduction of an individual right of recourse for persons who are bullied at work. This amendment is, in the most part, consistent with the ANF (Vic Branch) recommendation to the Inquiry into Workplace Bullying that there be legal reform to provide an alternative mechanism for the handling of workplace bullying complaints that gives an individual the ability to seek a remedy that is fast, efficient and specific.

While the proposed sections 789FD(1) and (2) provide a definition of 'when is a worker bullied at work?' it is recommended that a note be included in the legislation that describes some of the types of behaviours that may fall within this framework. Terminology such as 'bullying' is often used in everyday language in a different context to what is contemplated in the proposed definition. ANF (Vic Branch) regularly assists members who have a belief that they are being bullied and at times their perception of bullying has been influenced by an inaccurate or different understanding of what bullying is.

The insertion of a note describing some of the types of behaviours that may properly constitute workplace bullying would provide greater clarity to an individual who is considering making an application to the Fair Work Commission under the proposed Part 6-4B of the Fair Work Act. Similarly a note describing behaviours that constitute reasonable management action would also be of benefit. An example of such a note could read as follows:

> Behaviours that may constitute workplace bullying include verbal abuse, putting someone down, spreading rumours or innuendo about someone, interfering with personal property or work equipment, unjustified criticism or complaints, deliberately excluding someone from workplace activities, deliberately denying access to information or other resources, withholding information that is vital for effective work performance, setting tasks that are unreasonably above or below a worker's ability, deliberately changing work arrangements to inconvenience a worker, setting unrealistic timelines, excessive scrutiny at work.
>
> Reasonable management action may include the following if carried out in a reasonable manner: Setting performance goals standards and deadlines, allocating work, rostering and allocating working hours, transferring a worker, deciding not to select a worker for promotion, informing a worker about

unsatisfactory work performance, informing a worker about inappropriate behaviour, performance management processes, constructive feedback, downsizing/ restructuring.

It is well documented that workplace bullying can have a significant impact upon an individual even to the extent of psychological illness and in the most extreme cases, suicide. Given this impact and also the fact that the very definition of when a worker is bullied at work contemplates 'risk to health and safety' a person who has experienced workplace bullying is likely to be distressed which can make it difficult for the individual to describe the subject matter that may constitute workplace bullying in an objective and factual manner. ANF (Vic Branch) regularly assists members to formulate workplace bullying complaints. This usually requires considerable advice regarding whether or not the alleged conduct is likely to constitute workplace bullying and also assistance to prepare the written submission in an appropriate manner. Quite often the information is initially presented in an emotional manner often failing to adequately describe the actual incidents that may be workplace bullying.

ANF (Vic Branch) recommends that guidance material be developed and made available on the Fair Work Commission website that can provide assistance to an individual to appropriately describe instances of workplace bullying in order to make an application under Part 6-4B of the Fair Work Act.

Recommendation One

That the legislation include a note to s789D 'When is a worker bullied at work?" that provides some description as to some of the types of behaviours that may fall within the definition outlined in s789FD(1) and (2).

Recommendation Two

Development of guidance material to assist a worker who believes they have been bullied to appropriately complete an application under Part 6-4B of the Fair Work Act.

5. Determination that worker has been bullied at work and the role of WHS Regulators

Pursuant to the proposed s789FF, the Fair Work Commission may make an order to stop bullying if satisfied that the worker has been bullied at work and there is a risk that the worker will continue to be bullied at work.

Section 789FE provides that the FWC must start to deal with an application within 14 days of the application being made and the corresponding note states that the FWC may inform itself of the matter under s590. Section 590 provides flexibility to the FWC to inform itself in such manner as it considers appropriate and allows for actions such as contacting the employer or other parties, requiring provisions of documents or records, a conference and a formal hearing. The Fair Work Amendment Bill 2013 Explanatory Memorandum also provides that FWC may refer a matter to a WHS regulator or another regulatory body.

Presumably, it is through actions such as those under s590 that the FWC will be in a position to be satisfied of the elements required to make an order under the new s789FF.
The ability of the FWC to refer the matter to a WHS regulator is concerning for a number of reasons. It is unclear as to whether such a referral would require the regulator to provide feedback to the FWC as part of s590 which would then enable the FWC to decide if satisfied that the worker has been bullied at work, or whether alternatively, the FWC could refer the matter to a regulator to deal with the issue as a whole. Either of these courses is concerning.

The very fact that the Workplace Bullying 'We just want it to stop' report recommends a new individual right of recourse to seek remedies is an indication that the current WHS regime has some failings. This is also evidenced by the very few low prosecution rates across Australia relating to workplace bullying. The prevalence of workplace bullying is widespread yet WHS enforcement measures are rarely utilised. Furthermore, the WHS does not give a worker an avenue to personally seek resolution to a workplace bullying issue, other than to make a complaint to the regulator.

The potential role of WHS regulators in relation to the new FWA amendments is further complicated in jurisdictions that have not adopted the model WHS laws. These associated complications include an

inconsistent approach to the handling of bullying complaints and an almost certain failure to adopt the Preventing and Responding to Workplace Bullying Code of Practice which is currently in draft form. WorkSafe Victoria, for example, in October 2012 released new guidance material concerning workplace bullying entitled "Workplace Bullying – Prevention and Response.' In this guidance material WorkSafe Victoria has adopted a different definition of workplace bullying to that recommended by the Workplace Bullying – 'We just want it to stop' report and subsequently inserted into the Bill. The new Victorian definition is "workplace bullying is characterised by persistent and repeated negative behaviour directed at an employee that creates a risk to health and safety.' The distinction between the terms 'unreasonable behaviour' and 'negative behaviour' is significant. Unreasonable behaviour, for example, allocation of easier duties below skill level, may not necessarily be considered as negative. Therefore a particular behaviour may constitute bullying for the purposes of the Fair Work Act but not that of the Victorian regulator.

If the FWC routinely refers matters to WHS regulators as part of 'informing itself' pursuant to s590 it is difficult to foresee how such matters could be dealt with consistently, particularly in those jurisdictions whereby the model WHS laws have not been adopted. This is further emphasised in Victoria where the regulator has endorsed a different definition of workplace bullying.

Differences also exist between the ability of the different State and Territory WHS regulators to adequately deal with complaints of workplace bullying.

In its submission to the Inquiry into Workplace Bullying, Worksafe WA even commented that while an inspector will look at whether adequate systems and processes are in place to deal with allegations of workplace bullying and whether the employer has responded to a complaint within a reasonable time, 'it is not the WorkSafe inspector's role to facilitate, mediate and/or carry out an investigation into the specific allegations[1].

Furthermore, some jurisdictions have inspectors who are specifically trained to respond effectively to complaints of workplace bullying, and others do not. The Workplace Bullying 'We just want it to stop' report recognised that specific training to inspectors on best practice in relation to workplace bullying is necessary through Recommendation 20 – the development of a national accredited training program

[1] WorkSafe WA, *Submission 206*, p. 8.

for all work health and safety inspectors to identify and address instances of workplace bullying. The need for a consistent approach amongst jurisdictions was recognised through recommendation 21 – the development and endorsement of a uniform national approach to compliance and enforcement policy for preventing and responding to workplace bullying matters.

ANF (Vic Branch) notes in the Australian Government response to the report dated February 2013 that both of these recommendations are supported by the Government and that Comcare has been asked to lead the implementation of these recommendations in liaison with the State and Territory WHS regulators.

If the proposed anti-bullying measures outlined in the Bill contemplate referral to WHS regulators, it is essential that recommendations 20 and 21 above are promptly implemented to enable an appropriate and consistent approach throughout all jurisdictions in Australia. The reality of this occurring for jurisdictions that have not adopted the model WHS laws, however, is questionable. Consequently, if FWC refers matters to such jurisdictions as part of 'informing itself' under s590 the outcome is likely to be inconsistent and arguably ineffective.

Recommendation Three

That further consideration be given to the circumstances in which the FWC may deem it necessary and appropriate to refer the matter to a WHS regulator, particularly in reference to jurisdictions that have not adopted the model WHS laws.

6. Orders open to the FWC

Section 789FF(1) provides that the FWC may make any order it considers appropriate to prevent the worker from being bullied at work. This section specifically excludes the payment of a pecuniary amount, and the explanatory memorandum provides some further clarification as to the types of order the FWC may make. The power of the FWC to grant an order is limited to preventing the worker from being bullied at work, and the focus is on resolving the matter and enabling normal working relationships to resume. The FWC cannot order reinstatement or the payment of compensation.

It is unclear as to what orders may be appropriate in circumstances where the bullying and subsequent psychological injury is so severe that the working relationship cannot continue. In such a circumstance,

it might be appropriate for consideration to be given to some kind of severance package. In such a circumstance, would it be open to the FWC to order that a perpetrator of bullying be relocated to another workplace?

Section 789FF(2) outlines factors that the FWC must take into account in considering the terms of an order. Specifically, subsection (b) refers to any procedure available to the worker to resolve grievances or disputes. Given that the FWC must consider this fact, is it to be implied that a worker should access and attempt to utilise internal grievance procedures prior to making an application pursuant to Part 6-4B of the Fair Work Act? If this is the case, then it is the view of the ANF (Vic Branch) that any such requirement to utilise internal processes first be made very clear.

Recommendation Four

That further clarity be provided about the types of orders that the FWC can and cannot make if satisfied that a worker has been bullied at work and there is a risk that the worker will continued to be bullied.

Recommendation Five

That consideration be made to the availability of the FWC to order compensation/severance package when the bullying is so severe that the working relationship cannot continue.

Recommendation Six

That clarity be provided as to whether or not a worker is required to attempt to use internal grievance procedures prior to making an application to the FWC under Part 6-4B.

7. Conclusion

ANF (Vic Branch) strongly supports and is encouraged by the introduction of the anti-bullying measures outlined in the Bill. ANF (Vic Branch) however, submits that the proposed amendments can be strengthened through the recommendations as outlined above. Furthermore, it is submitted that careful consideration is had regarding the ability of the FWC to refer matters to WHS regulators and the consequences of this given the effectiveness of the current system and the fact that not all jurisdictions have adopted the model WHS laws.