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Submission to House Standing Committee on Education and Employment - Workplace Bullying Inquiry

APS Dignity

31 August 2012

Background

APS Dignity is a network of individuals who support targets of workplace bullying, harassment, victimisation and discrimination in the Australian Public Service and support dissatisfied consumers of Australian Public Service scrutineer agencies, such as the Australian Public Service Commission, the Australian Human Rights Commission, the Fair Work Ombudsman, the Commonwealth Ombudsman, Comcare, and the Australian Information Commission.

We note that , , put forward information to the Committee on 10 June 2012 and requested that it be treated as a submission on 15 June 2012. was only told on 29 August 2012 that the Committee had decided not to publish the submission.

holds a Bachelor of Laws with Honours and a Master of Public Policy with Merit. She has studied public sector whistleblowing and bullying in-depth at the postgraduate level. Her contributions would be highly valuable and we believe that the Committee should recognise this.

As a result, APS Dignity now requests that the Committee publish this submission. Whilst the Committee may understandably be very reluctant to publicise the dark underbelly of the Australian Public Service, in the interest of openness, transparency and accountability, the right thing would be to allow the public to know about the extent of workplace mistreatment in the Australian Public Service, rather than hide it.

Specifically, the terms of reference that this submission covers, in respect of the Australian Public Service, are:

- the prevalence of bullying and experiences of victims;
- the role of workplace cultures
- scope for coordination in improvements and other solutions.

1. Prevalence

The Australian Public Service Commission's official statistics report that around 17% of Australian Public Service (APS) employees are bullied or harassed in their workplaces each year. Yet, other studies and anecdotal evidence indicate that the incidence of workplace bullying, harassment, victimisation and discrimination in the APS can be much higher, reaching well over 30% in some APS agencies. With around 165,000 people employed in the APS, this makes for a huge number of sufferers.

The APS presents a picture to the public that it is adequately dealing with the issue, but the opposite seems to be true. Moreover, it appears to be the trend in the APS that employees who complain about bullying, harassment, victimisation or discrimination can be further victimised for standing up for their workplace and human rights. The worst form of victimisation is compulsory referrals of complainants to psychiatric examinations under the *Public Service Regulations 1999* in an attempt to undermine complainants' mental stability and cause further distress.

With the APS being the largest employer in the country, it should be leading the way in understanding, preventing and effectively addressing bullying, harassment, victimisation and discrimination in its workplaces. Unfortunately, however, it is generally failing dismally. Not only is this a blight against the basic human right to dignity, it is also a grave failing in respect of democratic notions. With the incomes of APS employees being funded by tax payers, the public wants to be sure that their tax dollars are not going to waste. Since studies have shown that workplace bullying, harassment, victimisation and discrimination negatively affects employee productivity, the upshot is that tax payers are cheated of the efficient use of their tax dollars, and the production of high-quality public policy and service delivery. Furthermore, as a matter of ethics, the great majority of tax payers would feel very uneasy with the idea of their tax dollars being used to fund the wages of wrongdoers. Thus, there is a clear obligation on the APS to effectively address workplace bullying, harassment, victimisation and discrimination in the interest of accountability to the Australian public.

2. Cultures

The ordinary person would, understandably, believe that if he or she was a target of bullying, harassment, victimisation or discrimination in his or her APS agency, then his or her APS agency would want to know about it and immediately put an end to the mistreatment in order to protect the well-being and productivity of the target, and to maintain a healthy and functional workplace culture. Indeed, the APS Values, the APS Code of Conduct, and APS policies would support this view. But the sad truth is that the reality frequently does not match the APS's official public position on this issue. Countless targets have made the mistake of complaining about mistreatment with the expectation that their APS agency will protect them, only to find themselves being cruelly attacked or dismissed. Even more astounding is when the perpetrators are praised or promoted soon after.

There are four main reasons why APS agencies react in this unjust manner. Firstly, unlike the private sector, APS agencies are generally more focused on maintaining conformity and obedience rather than on productivity and innovation. This breeds a culture of resentment of difference and suspicion of questioning the status quo. One of the flow-on effects of this culture can be the formulation of the view that anyone who challenges the way they are treated in the workplace must not be a team-player and is therefore an organisational threat.

Secondly, APS agencies are determined to 'contain' complaints in order to reduce legal liability risks and reputational damage. Where perpetrators (particularly perpetrators who are more assertive and are seen as more valuable to the APS agency than the targets) deny their behaviour, it is easier and more expedient for the APS agency's 'containment' strategy to focus on blaming, discounting and controlling the target rather than addressing the perpetrator's behaviour, and the APS agency's culture and system inadequacies.

Thirdly, APS employees and APS agencies are divorced from the financial consequences of engagement in misconduct, thereby reducing the incentive for engagement in accountable and ethical behaviour at the individual level and organisational level. APS perpetrators can access tax-payer funded legal representation under the *Legal Services Directions 2005* in legal actions taken by targets, but targets do not have access to the same privilege (thereby creating an uneven playing field). Compensation payouts and legal fees do not come out of APS agencies' operating budgets, but rather they are covered by ComCover or Comcare (the APS insurance providers).

Fourthly, a considerable number of APS employees higher up in the APS hierarchy are, or have been, themselves, perpetrators of workplace mistreatment, which manifests into a culture of 'perpetrators protecting perpetrators'.

The upshot of all of this is that the APS Values, APS Codes of Conduct, and APS policies can be merely tokenistic and can lure naive targets into a dead-end or harmful complaints process.

On the flip side, however, APS agencies will eagerly enforce the APS Values, APS Code of Conduct, and APS policies against APS employees who are viewed as threats, are not liked by influential APS perpetrators or their APS agency, or are seen as superfluous to their APS agency's needs and therefore seek to get rid of those targeted employees. Influential APS perpetrators or APS agencies can exaggerate the seriousness of frivolous complaints, solicit/incite allegations or fabricate/embellish allegations against the targeted employee - providing limited to no real procedural fairness to that targeted employee. In the APS, it is generally easier to bully, harass, victimise or discriminate against a person out of his or her job than to face the potential legal consequences of sacking him or her for the real reasons. This is the dark side of job security in the APS.

One of the biggest mistakes targets can make is to speak out about their mistreatment before educating themselves on the range of consequences they may suffer for speaking out, as the detriment can be quite severe, as discussed below.

3. Detriment that Targets Face

A. The Bystander Effect

The APS is probably one of the worst contexts that a person can be a target of workplace bullying, harassment, victimisation or discrimination. This is because of the pervasive existence of the bystander effect, which results in observers having two common reactions to seeing their colleagues being mistreated:

- stand idly by and not assist the targets;
- turn on targets by avoiding and isolating them, not sharing critical information with them, spreading gossip about them (often presented as 'concern'), blaming them, denying previous supportive statements made to them, denying what they have witnessed, and aligning with perpetrators.

The main cause of the first reaction is the 'diffusion of responsibility' phenomenon, that is, the more observers there are, the less likely observers are willing to assist the target because of the expectation that someone else will help or that it is someone else's responsibility to help. The main causes of the second reaction is a fear that job security/career advancement can be jeopardised or there is risk of being victimised by being associated with, or supportive of, an employee who has fallen out of favour (and this fear is often inflated in the APS).

The more uncomfortable bystanders feel about their unfair treatment towards the targets, the more likely they will act even more adversely towards the targets to try to justify that their behaviours are necessary and righteous. Once collective targeting ensues, the targets are unfortunately viewed as the source of conflict rather than being the unjust target of it.

All of this betrayal has a profound effect on targets whom often experience feelings of confusion, anguish, anger and depression. These reasonable reactions are often used by perpetrators and APS agencies against the targets to unfairly paint them as the wrongdoers, overly sensitive, lacking in resilience, unproductive or mentally unstable. Thus, targets of workplace bullying, harassment, victimisation and discrimination in the APS are often in a lose-lose situation.

B. Outrage Management Tactics

Whenever targets confront their perpetrator or make a complaint about workplace bullying, harassment, victimisation or discrimination, there is a risk that the

perpetrator and their apologists may engage in a victimisation tactic known in the literature as 'outrage management'. This is when perpetrators (and their protective employer), who behave in ways that others might perceive as unjust, use one or more of the following tactics to dampen outrage in response to their behaviour in an attempt to protect their reputation and reduce the risk of responsibility and liability:

- cover up and deny the action (maintaining the veil of secrecy);
- devalue the target (when the target is portrayed as inferior or spiteful, the mistreatment does not seem as bad);
- reinterpret the behaviour by lying, minimising, reframing or blaming (giving a different explanation for the mistreatment that makes it seem more acceptable);
- use official channels to give an appearance of justice (official channels are often presented as a genuine means of achieving justice when the reality is that many times there is limited substance and they can sometimes be more harmful);
- intimidate or bribe people involved (targets or witnesses are verbally or physically intimidated, or given incentives to be complicit or silent).

C. Compulsory Medical Referrals (The Soviet-Style of Victimisation)

One of the most controversial provisions under the Public Service Regulations is reg. 3.2 which gives APS agencies the power to direct APS employees to: (a) undergo a medical examination by a medical practitioner of the APS agency's choice for an assessment of the employee's fitness for duty; and (b) give the APS agency head a medical report of the examination.

This power has been used by APS agencies for the sadistic purpose of referring complainants to psychiatric assessments in an attempt to undermine and discredit complainants' mental state, and to cause complainants greater distress. Depending on the circumstances, this type of abuse of reg. 3.2 of the Public Service Regulations could arguably be a form of victimisation and discrimination in breach of section 16 of the Public Service Act, the APS Code of Conduct, section 15 of the Disability Discrimination Act 1992, section 340 of the Fair Work Act 2009, section 5 of the Administrative Decisions (Judicial Review) Act 1977, defamation law and may also be in breach of other laws and APS policies. It is also notable that clause 6 of the Institute of Australasian Psychiatrists' Code of Ethics states that 'it is unethical for a psychiatrist chosen by an employer to examine an employee who has been forced to attend'.

There are a number of important issues to note with this form of abuse. Firstly, psychiatry is a 'soft' science - it is based on open subjective opinion rather than hard evidence, such as x-rays and tissue examination. Thus, psychiatry arguably does not

hold the same status and credibility levels that other 'hard' science fields hold. Professors Thomas Szasz, Michel Foucault and David Rosenhan are often cited as leading scholars who are critical of psychiatry. Secondly, whilst 'hired guns' appear in most professions, they appear to be more prevalent and more vicious in psychiatry. Hired gun psychiatrists are rogue psychiatrists that APS agencies may try to use, knowing that they will get the 'diagnoses' that they seek (usually based on an unwritten and implied understanding between the APS agencies and the hired gun psychiatrists) in order to discredit, demote or dismiss employees who are viewed by the APS agencies as 'troublemakers'.

The process starts with employees being compulsorily referred to psychiatrists of the APS agency's choice for a medical assessment. If employees refuse to take part in an assessment, they can be unfairly accused of having 'something to hide' and they face the threat of termination of employment, discipline or financial penalty. An APS agency may direct employees to stay away from work (at the employees' own expense) until they attend the psychiatric assessment, despite the fact that there is a growing acceptance in common law of the right of an employee to perform work (see, for example, the case of Quinn v Overland (2010) FCA 799).

At the same time, the APS agency may try to compel the employees to grant the APS agency access to the whole of the employees' medical histories, not telling the employees of their right of refusal to grant access. The employees may not even be told that they are being referred to a psychiatrist and the employees simply assume that they are having a physical medical assessment until they realise what is happening when they are in the psychiatrist's office.

Then there are usually secret briefings by the APS agency to the psychiatrist (which are frequently inaccurate and sometimes wildly misleading) and employees, who are unaware of the existence or content of the briefings, have little chance to refute the APS agency's allegations. Furthermore, the psychiatrist's assessment report may also be provided to the APS agency in secret, without employees being aware of the 'diagnoses' (or lack thereof) in the report. Of course, such information can be accessed under the Freedom of Information Act 1982 , but APS agencies notoriously engage in blockage and delay tactics to try to prevent employees accessing their personal information, particularly assessment reports that are favourable towards employees. Where reports are, in fact, favourable towards employees, the APS agency may subsequently send the employees to different psychiatrists in an attempt to shop around for the 'diagnoses' that it seeks. The highest number of compulsory psychiatric referrals for one APS employee has reportedly been four separate referrals. Alternatively, the APS agency may complain to the psychiatrist and demand that they redo their assessment report in a way that serves the APS agency's agenda.

The 'diagnoses' that hired gun psychiatrists invariably come up with are forms of personality disorders which can sometimes be stretched out to serious mental illnesses, such as paranoid schizophrenia. Such 'diagnoses' are usually arrived at after only one forty-minute session with employees, and are based on manipulated evidence, questionable evidence or no evidence at all. Where employees have suffered a psychological/psychiatric injury as a result of bullying, harassment, victimisation or discrimination, the hired gun psychiatrists will try to claim that the injury is a 'pre-existing' condition, rather than work-related.

Other common tactics employed by hired gun psychiatrists are:

- antagonistic and provocative behaviour towards employees;
- creating distractions (such as making unnecessary noises) to disrupt employees' train of thought;
- 'verballing' employees (such as saying to employees in a sympathetic joking manner 'couldn't you just kill those bullies for what they have done' and when the employees agree to this statement, naively believing it is just a harmless figure of speech, the hired gun psychiatrist later records in the reports that the employees expressed desires and fantasies to commit murder);
- refusing to allow support persons to be present for interviews;
- encouraging 'self-diagnoses' (such as asking 'what do you think you are suffering from?');
- engaging in bizarre assessment techniques (such asking employees to make comments on pictures of different animals);
- asking intrusive and inappropriate questions (such as asking whether employees had ever been sexually abused as children);
- using a standard report already in existence on a word processor and the hired gun psychiatrist simply fills in the gaps.

Disturbingly, it is notable that there are some striking parallels in the intent behind APS agencies' abuse of reg. 3.2 of the Public Service Regulations and the notorious false psychiatric diagnoses and institutionalisation of dissidents through the use of punitive psychiatry in the Soviet Union.

D. Mediation

The value of mediation in the workplace is highly questionable when dealing with personal grievances such as workplace bullying, harassment, victimisation and discrimination. You should definitely never allow anyone to pressure you into partaking in a mediation session when your claims have been found to be substantiated, as expecting targets to enter into agreements with their perpetrators

constitutes a form of punishment to the targets. For the same reason, you should also not allow anyone to pressure you into partaking in a mediation session even when your claims have not yet been formally substantiated or have formally been found to be unsubstantiated (since an unsubstantiated finding does not mean that your claims are untrue, it just technically means there is not enough evidence available at the time to support your claims).

Given that targets usually face a detrimental power imbalance, they are often not in an equal bargaining position and may feel pressured to compromise on matters that should not be negotiable. For mediation to occur, parties to a dispute need to be accurately assessed as being the right candidates for mediation because they are genuine equals and approach mediation in good faith. It is essential that a presiding mediator be viewed by all participants as suitably qualified, fair, independent, impartial, non-judgmental, and has a genuine record of professionalism and integrity. It is also important to allow all parties to have a support person/advocate with them.

When these prerequisites are met, this is the only time mediation can truly be considered as appropriate and legitimate. Otherwise, taking part in a mediation session that is run by amateurs or where candidates have not been properly assessed for suitability means that the odds are stacked against the target from the start and the target will nearly always suffer some form of detriment.

E. Beware Human Resources

Many targets make the mistake of trusting Human Resources personnel with their concerns about workplace mistreatment, only to find that Human Resources was less than helpful or even made matters worse. This is because Human Resources personnel's loyalties will nearly always lie with senior management of an APS agency, not individual targets.

In APS agencies where there is a secretive, insular and insecure culture, Human Resources is likely to engage in unscrupulous actions in order to cover for, and protect, senior management from hassles, scrutiny and accountability. Disturbingly, Human Resources personnel will describe their unscrupulous actions as 'professional', no matter how unreasonable and absurd such spin is.

Some examples of shady conduct carried out by Human Resources against complainants of mistreatment in APS agencies include:

- claiming complainants cannot remain at their workplace (sometimes based on dubious grounds) and degradingly parading complainants out of the workplace under guard, or noticeable supervision, like a criminal;

- cutting pass access of complainants without telling them so that the complainants are put in a publicly humiliating circumstance when they discover for the first time, in front of their colleagues, that their pass has been disabled;
- misusing confidential information in complainants' personal files against complainants, such as medical records;
- hiring private investigators to 'investigate' complainants without the complainants' knowledge (which is more akin to spying);
- secretly briefing complainants' perpetrators and their perpetrators' supporters, and divulging personal information about the complainants;
- secretly briefing complainants' medical practitioners to try to influence the medical practitioners' diagnoses and prognoses in favour of the APS agency's agenda;
- manipulating or pressuring complainants to allow Human Resources personnel to attend the complainants' private consultations with their medical practitioners under the guise of 'care' and 'support', when really it is about Human Resources trying to fish for personal information about the complainants;
- compulsorily referring complainants to psychiatric examinations against the complainants' free will and providing the APS hired psychiatrists with inaccurate or wildly misleading information about the complainants;
- making threats against complainants, coercing complainants or misleading complainants (such as in relation to trying to have complainants sign documents which are not in the complainants' interests);
- failing to engage in impartial fact-finding processes;
- disingenuously characterising workplace mistreatment as a 'miscommunication', 'misunderstanding' or a 'mere personality clash' instead of calling it what it is;
- soliciting personal information from complainants;
- engaging in fraudulent cover-up.

F. APS Preliminary Inquiries/Investigations (Creating the Appearance of 'Official Concern')

APS agencies usually use 'preliminary inquiries' and 'investigations' to address 'formal complaints' of breaches of the APS Code of Conduct. Despite the different labels given by APS agencies to these processes, in practice, many 'preliminary inquiries' and 'investigations' are the same in substance. Essentially, preliminary inquiries are supposed to be used to determine whether allegations are sufficiently substantial to warrant investigation and investigations are supposed to be used to determine whether the evidence establishes that a breach of the APS Code of Conduct has occurred.

Many APS agencies' procedures either lack necessary detail or their preliminary inquiry/investigation processes have shortfalls which bring into question the legitimacy of their processes. Whilst APS agencies may claim that the main reason why procedure documents need to be this way is so that investigators can operate within a flexible framework to the benefit of all parties, it can really be more of a deliberate strategic design to simply protect the APS agency's interests. Firstly, the more rules that are documented in preliminary inquiry/investigation procedures (that is, procedural certainty and transparency), the higher the risk of non-compliance by investigators and the Secretary's delegate, and therefore the higher the risk of legal liability for the APS agency. Secondly, investigators can introduce new rules (which serve to benefit the APS agency) just before, or during, an interview with the complainant, thereby limiting the benefit to the complainant of being adequately pre-informed about all rules.

Targets are likely to face many disadvantages in utilising this channel. The first disadvantage is that preliminary inquiries/investigations can often be designed to merely create the appearance of 'official concern' and serve the APS agency's interests, rather than being a genuine fact-finding process. Investigators' loyalties will always lie with their APS agency, not individual employees. With the aim of all APS agencies being to reduce the prospect of legal liability and protect their public image, investigators have a perverse incentive to 'contain' complaints and find that complaints are unsubstantiated or unfounded, or that the target invited the mistreatment. This is particularly the case when the perpetrator is higher up in the APS hierarchy than the complainant.

Some 'containment' strategies employed by some investigators (and other senior APS officers) include:

- ordering targets to not speak to anyone about their complaint under the cover of 'avoiding potential compromise of the integrity of the preliminary inquiry/investigation';
- falsely telling targets that they are prevented from discussing their experiences with anyone under the *Privacy Act 1988*;
- avoidance of, or discouraging targets from, reporting serious workplace mistreatment that may amount to criminal action to the police, suggesting that the 'APS Code of Conduct Police' are a substitute for the real police.

These strategies can be so successful in achieving self-censorship (which is what APS agencies are counting on) that some APS officers/investigators will pressure/force targets into a preliminary inquiry/investigation so that:

- 'containment' strategies can be used 'legitimately';

- the APS agency has an opportunity to hold a monopoly over all information (thereby disempowering the target); and
- a pre-set unfavourable finding for the target can be reached so that the matter can be said to be 'finalised and closed'.

In trying to avoid legal liability, investigators may also try to take advantage of complainants during times of emotional vulnerability, and may victimise complainants or manipulate complainants into making statements that are not in their best interests. Examples of inappropriate conduct by some investigators include:

- pressuring complainants into being interviewed when they have a medical certificate to be away from work;
- trying to solicit the legal action intentions of complainants or privileged legal advice that complainants have received;
- relying on separate confidential information belonging to interviewees that is not relevant to the complaint;
- understating complainants' legal, policy and administrative rights whilst simultaneously overstating other interviewees' legal, policy and administrative rights;
- concealing interviewees' legal, policy and administrative rights;
- being belligerent towards complainants and threatening complainants (usually during conversations that are not audio recorded);
- physically intimidating/distracting complainants during face-to-face interviews whilst modulating their voices so that they sound friendly/professional on the audio recording, thereby making it more difficult for complaints of physical intimidation/distraction to be believed;
- engaging in amateur psychology/psychiatry;
- trying to solicit the private medical histories of interviewees;
- unfairly painting complainants as wrongdoers or troublemakers (particularly where complainants have tried to stand up for themselves against their perpetrators);
- denying procedural fairness to complainants (some investigators even refuse to provide records of meetings/interviews that complainants participated in, falsely claiming that the *Privacy Act 1988* prevents them from doing this);
- denying interviewees their right to an independent support person/advocate/legal representative;
- secretly instructing complainants' support persons that they cannot say anything during interviews with the complainants (leaving complainants ignorant and vulnerable to a lack of intervention when required);
- asking inappropriate leading questions and verballing interviewees;
- inciting witnesses to make negative comments about complainants;

- not absolving themselves from investigations when they hold a conflict of interest or are biased towards or against an interviewee;
- exaggerating/misrepresenting complainants' complaints in reports so that a recommendation can be made for the complaints to be found to be unsubstantiated or unfounded or, conversely, investigators downplaying complainants' complaints in reports so that they can be interpreted as frivolous and even vexatious;
- refusing to disclose professional backgrounds, claiming that the *Privacy Act 1988* allows for non-disclosure;
- refusing to investigate serious mistreatment altogether.

If investigators are engaging in these types of behaviours without being reprimanded/disciplined by their APS agencies, then it is fairly sure that the investigators have an unofficial mandate from their APS agencies to engage in these types of behaviours.

The second disadvantage of utilising preliminary inquiries/investigations is that preliminary inquiries/investigations provide little open justice and fairness to complainants. Specifically:

- since preliminary inquiries/investigations are usually conducted by internal APS employees, it is arguable that preliminary inquiries/investigations can never be truly 'independent';
- even when investigators are external contractors (that is, they are paid by the APS agency), their 'independence' is still questionable, as there is a perverse incentive to satisfy the APS agency in order to increase the chances of future contract work;
- although the principle of procedural fairness is to be applied in all preliminary inquiries/investigations, there is no way for complainants to confidently know they have been provided with procedural fairness, as some investigators will stretch out the provisions of the *Privacy Act 1988* to try to justify non-disclosure of the identity of witnesses interviewed or the testimony given by witnesses and perpetrators (and insecure/spiteful witnesses and perpetrators have been known to make petty and outrageous statements about targets under the protection of the preliminary inquiry/investigation process);
- there is usually a significant lack of rules of evidence, so evidence of questionable quality may be accepted by an investigator/Secretary's delegate which would not normally be accepted in a court or tribunal;
- with investigators holding a monopoly on the information they have obtained in their preliminary inquiry/investigation processes, complainants have no real way of knowing how much evidence needs to be provided and what issues

need to be addressed in order to persuade the investigators to find that their claims are substantial;

- when complainants' complaints are found to be unsubstantiated or unfounded, they are not subsequently provided with the reasons for such decisions under the claim that the *Privacy Act 1988* prevents disclosure of the reasons;
- an APS agency's disciplinary decisions cannot be disclosed to complainants under the *Privacy Act 1988*, which can leave complainants with the impression that their complaints were not taken seriously;
- preliminary inquiries/investigations are designed to leave complainants in the position of having to emerge either as a 'winner' or a 'loser', rather than being left with the possibility of a more neutral outcome, which puts complainants at risk of further victimisation if they emerge as a 'loser' (thus, complainants need substantial vindication).

The third disadvantage of utilising preliminary inquiries/investigations is that complainants will usually have to deal with investigators who are under-qualified. APS agencies often view prior informal training, such as police detective work or basic certificates in government/fraud investigation (which can take anywhere between 2 and 32 weeks to complete, depending on the education provider) as adequate prerequisites to being an investigator for workplace bullying, harassment, victimisation and discrimination issues. Some investigators simply receive 'learn as you go' training. These substandard types of training are not sufficient to understand and competently deal with the sensitivities and complexities that go with workplace bullying, harassment, victimisation and discrimination. They are also not sufficient enough to enable investigators to have a truly thorough understanding of relevant complex workplace, human rights and administrative laws. (Some investigators believe that if they can recite the law or copy and paste the law, then this must mean that they adequately understand the law.)

G. The Truth about Internal Reviews (Two Words: 'Frivolous' and 'Vexatious)

Many complainants would understandably presume that if an injustice cannot be dealt with adequately at the lower level of an APS agency, then someone higher up in the APS agency should be able to fix the problem. After all, surely this is what internal review procedures were set up to do? Unfortunately, the usual experience is just the opposite. Rarely will a review decision deviate from an original decision about a complaint. After all, with evidence and reasons behind original decisions about complaints often being cloaked in secrecy and weasel words, how can complainants formulate successful arguments? What is worse is that many APS agencies can turn on complainants, accusing them of seeking reviews that are 'frivolous' and 'vexatious' and, thereby, dismiss their requests for legitimate review. Complainants who are

faced with these unfair and grossly inaccurate labels can be devastated, as the labels strike at the heart of complainants' true motives, that is, to seek vindication, protection and justice.

The Macquarie Dictionary defines the word 'frivolous' as meaning 'of little or no weight, worth or importance and lacking seriousness or sense'. Various statues and case law define the word 'vexatious'. It usually is interpreted to mean:

- having the intention to annoy, embarrass, harass or other wrongful purpose (see, for example, the case of *Attorney-General v Wentworth* (1988) 14 NSWLR 481);
- seeking to achieve a collateral purpose (see, for example, the case of *Re Cameron* (1996) QCA 37);
- pursuing untenable or manifestly groundless claims as to be utterly hopeless (which really should fall into the 'frivolous' category) (see, for example, the case of *Walton v Gardiner* (1993) 177 CLR 378).

The first two interpretations of the word 'vexatious' focus on the complainant's intentions. Thus, theoretically, APS agencies should be producing persuasive evidence to prove actual intention of complainants to be vexatious. However, rarely do APS agencies provide persuasive evidence or even logical reasons for determining the intent of complainants to be vexatious in internal review decisions. The third interpretation of 'vexatious' would also arguably require APS agencies to meet a high threshold, but often persuasive reasons are not provided on this ground either.

In fact, the courts have made it clear that the use of frivolous and vexatious defences are not to be invoked lightly. For example, in the case of *Re Davison* (1997) ALR 259, it was said that it was only in 'very clear cases' that such decisions can be made. It was said that 'if, on the face of the "process", there is a possibility that it is not frivolous, vexatious or an abuse of the process ..., the matter will be left to be dealt with in accordance with the ordinary curial processes'.

Given the tendencies of APS agencies to label complaints as 'frivolous' and 'vexatious', it would appear that the APS sometimes presumes that the actual exercising of a legal right is a frivolous and vexatious act. Yet, the fact is that review mechanisms are meant to be used, not to just merely be in tokenistic existence.

There are various reasons why internal reviews do not provide a satisfactory process and outcome for complainants. Firstly, organisational micro-politics and the organisational belief in protecting the portrayed legitimacy of preliminary inquiries/investigations mean that the original decision is likely to be upheld. Secondly, since rarely internal review decision-makers are sufficiently educated and trained in the complexities and sensitivities of workplace bullying, harassment,

victimisation and discrimination, they are dismissive of subtle/covert mistreatment that can only be properly understood by those who have actually been in the targets' positions. Thirdly, in cases where the targets are lower in the APS hierarchy than the APS perpetrators, the more senior APS perpetrators are viewed as needing protection in order to maintain the lines of authority. Finally, some scholars believe that internal review mechanisms are purely set up for symbolic purposes only.

H. Commonwealth External Investigation/Review Agencies (Targets Should Try to Avoid Them)

The following Commonwealth agencies can be classed as investigation/external review agencies, which you may direct enquiries and complaints to about workplace bullying, harassment, victimisation or discrimination:

- Australian Human Rights Commission (for human rights matters);
- Fair Work Ombudsman (for workplace rights matters);
- Safe Work Australia (for work health and safety matters);
- Office of the Australian Information Commissioner (for privacy and FOI matters);
- Australian Public Service Commission (for APS review matters);
- Comcare (for workplace injury matters);
- Commonwealth Ombudsman (for administrative action matters).

Many of investigation/review agencies generally have limited jurisdiction and are under-resourced. Therefore complainants may not receive the full assistance that they require and the processing of their complaints may take a considerable length of time. Unfortunately, many complaints can be drawn out for months, even years, which can add to complainants' frustrations and suffering.

Also a considerable number of bureaucrats employed in investigation/review agencies tend to be more concerned with crossing off cases on their workload lists (since reduced workloads are viewed as a mark of a good employee in APS performance reviews) and they therefore usually look for, or sometimes make up, narrow technical arguments as to why they cannot assist you. Such bureaucrats also tend to be easily swayed by submissions made by respondent APS agencies, as these bureaucrats hold the prejudiced view that APS agencies have greater legitimacy than individual complainants (and APS agencies know that they have this advantage). Sometimes complainants may just have the misfortune of dealing with bureaucrats who are plainly ignorant of relevant laws, policies, procedures and facts. Other times, complainants may come across bureaucrats who are just so unprofessional and downright rude, that they will unjustifiably ignore correspondence and phone calls, or treat complainants with disdain. Coming up against this type of obstructive mindset,

incompetence and ingrained procedural delays can be very frustrating and sometimes painful for complainants.

I. The APS Modus Operandi in Legal Action

One of the best contexts to be a perpetrator of bullying, harassment, victimisation and discrimination is the APS. This is because the perpetrator usually benefits from the APS agency's marshalling of its resources and commitment to protect the perpetrator in order to protect the APS agency from legal liability, ethical liability and reputational damage. In fact, where an APS perpetrator is personally sued by the target, the perpetrator can obtain Commonwealth funded legal representation under the *Legal Services Directions 2005*, usually from the Australian Government Solicitor (AGS) or a top tier law firm. Targets who assert their legal rights, on the other hand, usually attract retaliation from their APS agency instead of protection, and they have to fund their own legal expenses. The costs of legal action for targets can be hugely significant, including:

- time and effort involved in preparation;
- financial expenses running into the tens of thousands of dollars;
- prolonged/exacerbated trauma;
- gagging clauses that prohibit targets from ever speaking about their experience or ever saying anything disparaging about their employer.

J. Freedom of Information Applications (Classic APS Frustration Tactics)

The *Freedom of Information Act 1982* provides a legally assertable right to data held by the Commonwealth Government (with various exemptions). Targets would normally want to utilise freedom of information laws when they want to collect information from their APS agency relating to them and their complaint of workplace mistreatment if they are concerned about:

- the processes undertaken;
- outcomes incorrectly reached; or
- inaccurate information held about you and your complaint which you want to correct

Unfortunately, APS agencies are known to sometimes use frustration tactics when dealing with requests under the *Freedom of Information Act 1982*. Be aware of the following tactics:

- <u>Delays</u> - APS agencies may try to respond to requests as close to the end of the statutory timeframes as possible or, where there are no statutory timeframes, APS agencies may try to deal with requests as slowly as possible.

- Obstruction - APS agencies may over-use exemptions to justify not releasing information or grossly exaggerate hours of work/costs involved in processing a request. Initial refusal of access or imposition of excessive charges may be decided by APS agencies in the hope that the appeals processes will not be pursued.
- Not applicant-blind - individuals who make requests who are also taking legal action against APS agencies may be treated differently to other applicants. An innovation worth considering by the Commonwealth would be to make requests genuinely applicant-blind so that only the APS employee who fields the request should know about the applicant's identity.
- Over-use of redaction - APS agencies can unjustifiably redact documents so severely that they become effectively useless to the reader.
- Lack of transparency - APS agencies may not provide clear and thorough reasons for refusal of access or imposition of charges.
- Deny existence or destroy documents - on rare occasions, APS agencies may deny the existence of documents or destroy them.

4. Solutions

A. Repealing the Compulsory Medical Referral Provision under the Public Service Regulations

The compulsory medical referral provision should be repealed. The fact is that there is no need for the existence of this provision when an APS employee can simply be redeployed or dismissed for non-performance or unsatisfactory performance of duties (see clause 2.12(1)(e) of the *Public Service Commissioner's Directions 1999* and section 29(3)(c) of the *Public Service Act 1999*), provided that there is no breach of any workplace or human rights laws. It is the actual performance of an APS employee that should be assessed, not the reasons behind the APS employee's performance, as it should not be the APS's role to enter into a paternalistic relationship with its employees. Repealing the provision is the best way to overcome the exploitative nature of compulsory medical referral provisions.

If there is any place for psychiatric assessments in the workplace context, a more ethical mechanism should include employees deciding of their own will (without pressure) to see psychiatrists of their own choice, referred from their general practitioners. Assessment reports should be provided to employees' general practitioners in the normal way whom, in turn, only provide medical certificates for the APS agency if employees wish for this to happen. In fact, this should be applicable to all kinds of medical issues.

B. Policies to Address the Bystander Effect

There needs to be policies and practices in the APS to encourage observers to openly support targets and safely confront perpetrators, and to have disciplinary measures in place for when observers join in the mistreatment of targets or are found to lie in their witness testimony during APS preliminary inquiries/investigations.

In particular, APS employees need to be made aware that colleagues are one of the most unreliable class of witnesses (due to their fears around workplace/professional survival) so that complainants are not unfairly accused of embellishment/fabrication when a colleague that they put forward as a witness later denies what they have previously stated/witnessed.

Perpetrators thrive in environments of secrecy, fear and silent/deceitful witnesses. Workplace bullying, harassment, victimisation and discrimination is guaranteed to continue in the APS unless the APS addresses the bystander phenomenon.

C. Introducing Legislative Sanctions for Defences that are Trivial, Frivolous, Vexatious, Misconceived or Lacking in Substance

Under various pieces of legislation, applications to seek the assertion of legal rights can be dismissed if a complainant/complaint is declared to be trivial, frivolous, vexatious, misconceived or lacking in substance. The public policy intent behind such provisions is to protect respondents from annoyance/harassment and unnecessary cost in defending a claim without merit, and to prevent waste of scarce public resources. Thus, the existence of such legislative provisions is completely justifiable. However, all too often these labels are misused and abused by the APS in defending against legitimate claims. This leaves genuine complainants devastated at the hurt and damage caused to their reputation and claims, and increased costs for complainants who have to refute such unfair allegations.

Even more problematic for complainants is that the APS also too often engages in behaviours and defences that are trivial, frivolous, vexatious, misconceived or lacking in substance. This also leaves genuine complainants' feeling hurt and frustrated, and their costs increase when addressing such defects with defences. Yet, generally legislation does not contain equivalent provisions of penalties/recourse where respondents/defences are trivial, frivolous, vexatious, misconceived or lacking in substance. Thus, in addition to legislation that puts the onus on the complainants to prove all of the factual and legal matters of their complaint, complainants face a real power imbalance when seeking justice because of the inadequacies in legislation.

If the Commonwealth Government was genuine about trying to curb workplace bullying, harassment, victimisation, discrimination and any other legal rights breaches, it would amend its legislation to provide penalties/recourse for grossly inaccurate/malicious misuse of the labelling of complainants/complaints as trivial, frivolous, vexatious, misconceived or lacking in substance. The Commonwealth Government should also provide legislative sanctions/recourse where respondents engage in defences that are trivial, frivolous, vexatious, misconceived or lacking in substance. Such amendments would address the current power imbalances and act as a powerful deterrent on the APS against engaging in reckless/unethical behaviour and defences in legal matters.

D. Addressing Flaws in APS Preliminary Inquiries/Investigations into Workplace Mistreatment

Proper investigation frameworks are a cornerstone of the practical implementation of the APS Code of Conduct, resulting in matters being dealt with appropriately and the full facts of a situation discovered. The confidence of APS employees in internal and contracted investigators' thoroughness, fairness, expertise and professionalism is pivotal to whether targets would report their concerns internally. The complex matter of conducting investigations into workplace bullying, harassment, victimisation and discrimination cannot be taken lightly, nor can the skills required for such investigation work be taken for granted. Unfortunately, the APS does not appear to genuinely recognise this.

APS agencies constantly put the burden on targets to complain when they experience workplace mistreatment and APS agencies also invest heavily in preliminary inquiries/investigations by internal or contracted investigators to address complaints.

A proactive approach is one that invests more in awareness raising, education, training and monitoring, and is proven to be more effective and less costly than the reactive approach in the long-term. The proactive approach does not appear to be the preferred approach in the APS. Thus, there is a grave misplacement of focus and resources which needs to be urgently addressed.

There are also grave flaws with preliminary inquiries/investigations into workplace mistreatment in APS agencies. Firstly, some APS agencies fail to recognise that internal and contracted investigators need to have a specific professional skillset to effectively inquire into workplace bullying, harassment, victimisation and discrimination. It appears that many investigators have substandard education and training backgrounds, such as former police detective work or certificates in government or fraud investigation (which can take anywhere between 2 and 32 weeks to complete

depending on the education institution). Some investigators do not even have any related education or training backgrounds and merely 'learn on the job'. Anecdotal evidence indicates that investigators with these substandard backgrounds tend to cause greater harm and can hold false prejudiced views that the complainants are 'the problem'.

Secondly, APS agencies fail to recognise that preliminary inquiries/investigations into workplace mistreatment requires the adoption of context-specific methodologies. Instead, all APS agencies must comply with is its procedures document under section 15(3) of the *Public Service Act 1999* and the Australian Government Investigation Standards 2011 (AGIS). The AGIS wrongly applies homogenised criminal investigative methodologies to all types of investigations of misconduct, including complaints that do not encompass criminal allegations. One particular AGIS methodology of electronically recording complainants' interviews is actually in direct contravention to criminal justice law, which does not allow police officers to electronically record victims of crime when interviewing them. Instead, they can only take down a written statement, which the victim is allowed to review, amend and sign. Police officers cannot interview and electronically record criminal offenders unless they are under arrest and informed about their legal rights. Thus, in some areas, the ludicrous consequence of the implementation of the AGIS is that APS agencies are going beyond what the criminal justice system prescribes.

Thirdly, complainants have to deal with the reality that APS agencies have a perverse incentive to find that their complaints of workplace mistreatment are unsubstantiated or unfounded in order to protect the APS agencies from potential legal liability and reputational damage. This perverse incentive manifests into other various obstacles that complainants can come up against, including:

- preliminary inquiries/investigations being designed to create the appearance of 'official concern' and serve the APS agency's interests rather than being a genuine fact-finding process;
- investigations being disguised as preliminary inquiries;
- complainants being taken advantage of during times of emotional vulnerability by manipulating them into making statements that are not in their best interests and victimising them;
- complainants' legal and policy rights being misrepresented;
- complainants being provided with little open justice and procedural fairness.

To address the above flaws, the Commonwealth Government should be looking at professionalising investigator positions. A separate accreditation body should be formed which has the following functions:

- setting appropriate qualifications and competencies for different types of investigators;
- setting appropriate conduct and ethics standards;
- prescribing appropriate processes to be followed in different types of investigations;
- prescribing ongoing training requirements;
- monitoring performance;
- conducting investigations into complaints about investigators/investigations;
- disciplinary procedures for investigators who breach the rules.

In terms of qualifications and competencies, investigators should hold professional tertiary qualifications that involve holistic training, such as social work, and should have undertaken courses directly related to their field of investigation work. Whilst there also needs to be training in technical investigation skills, these are not as important as the holistic training.

In terms of conduct and ethics standards, it is unacceptable for criminal investigation standards to be used by non-law enforcement agencies in investigations of workplace mistreatment, due to the significant risk of re-victimisation of targets. In the rare cases where workplace mistreatment is serious enough to amount to criminal conduct, then such cases should be referred to the police.

Other specific issues that should be covered in any manual dealing with preliminary inquiries/investigations so that best practice is achieved, include:

- ensuring that a complaint was actually intended to be made before invoking the complaint-handling procedures;
- clearly and appropriately delineating the differences between preliminary inquiries and investigations;
- ensuring that parties are not pressured to take part in preliminary inquiries/investigations if they have a medical certificate;
- providing parties with the option of making submissions in writing, rather than oral submissions, during preliminary inquiries/investigations and allowing parties to refuse electronic recordings of interviews;
- if interviews are audio recorded, the Queensland Public Service approach to recording interviews should be adopted, that is, an interviewee is entitled to a transcript of the interview and, because the interview is recognised as forming part of an administrative inquiry, not a criminal inquiry, the interviewee can add or delete anything that he or she wishes in his or her statement;
- allowing interviewees to obtain the professional background of investigators, like in the Queensland Public Service;

- encouraging potential complainants to seek support from colleagues and collect documentary evidence to support their claims (such as signed written witness testimonies) before making a complaint (this particularly needs to be addressed since many APS senior officers and investigators often mistakenly or falsely claim that the *Privacy Act 1988* prevents targeted employees from discussing their bullying experience with colleagues, thereby limiting targeted employees' opportunities to obtain support and witness evidence, which naturally aids the agency in achieving its goal to 'contain' complaints so that the risk of legal liability is reduced);
- requiring that all parties, prior to participating in interviews, are to be informed of the scope of questioning (this will help reduce the risk of investigators asking unnecessary and intrusive questions which may infringe upon interviewees' privacy) and how interviews will be recorded;
- stipulating rules of evidence to ensure that evidence of questionable quality is not relied upon by investigators;
- recognising that <u>all</u> parties have a right to procedural fairness;
- recognising that whilst confidentiality needs to be maintained, the importance of open justice should also be a strong consideration (this is a significant problem in preliminary inquiries/investigations, as numerous investigators often misrepresent the coverage of the *Privacy Act 1988* to support their claim that they cannot provide complainants with witness evidence or even records of meetings that the complainants participated in, leaving complainants with no sure way of knowing whether they have been provided with procedural fairness or knowing how much evidence they need to provide in order to persuade the investigators to find that their claims are substantial);
- ensuring that all parties are entitled to have a support person/advocate present during interviews, particularly given the fact that workplace mistreatment grievances involve emotionally charged matters and, consequently, parties may not be fully articulate, calm or have the ability to protect their interests;
- ensuring that parties are provided with the reasons of a preliminary inquiry/investigation outcome, not just the outcome itself, for the purposes of openness and transparency and to reduce the concern that complaints were not properly investigated (this is a problem in the APS, as some investigators mistakenly or falsely claim that providing the reasons for an outcome of a preliminary inquiry/investigation would be a breach of the *Privacy Act 1988*);
- ensuring that investigators, decision-making officers and review officers understand the case law around the meaning of 'vexatious' complaints (this is a problem in the APS, as some investigators, decision-making officers and review officers give the word 'vexatious' an overly wide meaning and therefore misuse

this label, not realising that they often require evidence of the complainant's intentions to find that a complaint is actually vexatious);
- informing employees that they have a right to make complaints to external investigation/review agencies, if appropriate, particularly where employees do not have confidence in the independence, impartiality, fairness, transparency or competency of their APS agency's complaint-handling processes or complaint-handling officers;
- requiring organisations to be supportive of parties' choices to seek external assistance from specialist organisations or professionals that deal with workplace bullying, harassment, victimisation and discrimination matters.

E. Reigning in APS Censorship

The APS is notoriously hypersensitive about bad publicity and can go to desperate lengths to try to silence and frustrate someone engaging in a damaging exposure of the APS, particularly when it comes to APS employees. The APS is particularly worried about the networking power of social media. Two standout methods that the APS has concocted in silencing criticism and dissent is the 'Australian Public Service Commission's (APSC) Circular 2012/1: Revisions to the Commission's Guidance on Making Public Comment and Participating Online' and gagging clauses in deeds of release (that is, the written terms of a settlement coming out of legal action). These are both discussed below.

APSC's Circular 2012/1

The APSC's Circular 2012/1 was introduced in January 2012 in reaction to the increased usage of social media by APS employees to critique the APS/Commonwealth Government and its decisions. The Circular instructs that it is not appropriate for APS employees to make comment that is, or could be perceived to be:

- so harsh or extreme in its criticism of the Commonwealth Government, a member of parliament from another political party, or their respective policies, that it raises questions about the APS employee's capacity to work professionally, efficiently or impartially;
- so strong in its criticism of an APS agency's administration that it could seriously disrupt the workplace - APS employees are encouraged instead to resolve concerns by informal discussion with a manager or by using internal dispute resolution mechanisms, including the APS whistleblowing scheme if appropriate;
- compromising public confidence in an APS agency or the APS (including lowering or undermining the reputation of an APS agency or the APS as a whole).

These instructions even apply to comments made in a personal and unofficial capacity outside of office hours and unrelated to the APS employee's area of work. The Circular does not refer to defences of truth, fair comment or public interest. Indeed, on the face of it, the APSC has arguably taken rather extreme measures in curbing criticism and dissent by APS employees.

It is yet to be seen how broadly the APS will interpret the instructions in the Circular and how consistently it will be applied. There have already been suggestions that the Circular is undemocratic and unconstitutional. The Circular also flies in the face of traditional and contemporary philosophical justifications of freedom of expression, that is: (1) to enable the quest for the 'truth'; (2) individual self-fulfilment and autonomy; (3) to facilitate self-governance; (4) to promote tolerance; and (5) to maintain a safety-valve for the release of destructive emotion. However, the main point is that the Circular is going to have a massive chilling effect on APS employee's freedom of expression long before a test case appears before the courts, thereby supporting the APS's goal to protect itself from public criticism by its own, no matter how justifiable the criticism is. Thus, targets of workplace bullying, harassment, victimisation and discrimination in the APS will no doubt be reluctant now to make public comment on their experiences.

The APSC needs to rewrite the Circular so that any censorship instructions are in line with the implied freedom of political communication under the Australian Constitution and in line with the philosophical justifications of freedom of expression.

Gagging Clauses in Deeds of Release

The use of confidentiality clauses and non-disparagement clauses in settlement agreements between an APS agency and a litigant are common practice in the APS. Non-disparagement clauses can be so wide as to prevent a litigant from making any kind of disparaging remark (which means to express a low opinion, regardless of how truthful or fair the remark is) about the whole of the Commonwealth and its past and current employees. The absurdity of such a wide clause means that litigants cannot even technically sign a petition against a Commonwealth Government policy. To impose such conditions on litigants, whom, at the time of agreeing to such conditions have usually reached a state of desperation in terms of dwindling financial resources and emotional reserves, is clearly exploitative. Where the litigants' legal action was about workplace bullying, harassment, victimisation or discrimination, the litigants' silence is bought forever, thereby destroying the disincentive for perpetrators and retaliatory/neglectful APS agencies to not engage in repeat misconduct, and also destroying the chances of future targets to obtain a behavioural history of their perpetrators and retaliatory/neglectful APS agencies.

Confidentiality clauses and non-disparagement clauses have been imposed by APS agencies regardless of the fact that:

- part 1, paras 4.5 of the *Legal Services Directions 2005* states that an APS agency can only impose or agree to a confidentiality term of a settlement where it is necessary to protect the Commonwealth's interests;
- there is no reference in the *Legal Services Directions 2005* to non-disparagement clauses; and
- the APS Values assert openness.

Like the implications of the APSC Circular 2012/1 discussed above, there are clear arguments that such imposed confidentiality and non-disparagement conditions are undemocratic, unconstitutional and contrary to the philosophical justifications of freedom of expression. The Commonwealth Government needs to curb the APS's powers to impose such conditions on vulnerable litigants.

F. One Consolidated Law - Unreasonable Behaviour

There is currently a patchwork of laws that deal with various types of unreasonable behaviour. There are civil remedies available under human rights legislation for employees who belong to a recognised protected category, and there are laws to protect employees from reprisals for exercising workplace rights. However, there is no real coherent system of legal rights under any legislation for targets of workplace bullying, which actually makes up the majority of unreasonable behaviour in the workplace.

Current debates are focusing on the introduction of anti-bullying laws to complement the existing laws that already deal with harassment, victimisation and discrimination. However, to add an extra layer to an already complex system of protecting employee's rights is unnecessary when the fine lines that separate bullying, harassment, victimisation and discrimination can simply be consolidated into one piece of legislation, along with administrative arrangements, so that the focus is not on the reasons or causes of the misconduct, but rather the unreasonable behaviour itself. The differences in understanding nuances between bullying, harassment, victimisation and discrimination can still be maintained at an educative level. Basing the consolidated legislation on the existing Fair Work System is a good place to start. A supplementary program set up to fund legal costs of targets who have merit in their case should also be considered so that targets do not have to dip into their own savings to protect their livelihoods and reputations, and there is an increase in equality of arms between a relatively unlimited resourced respondent and a resource-limited target.

Any consolidation and introduction of laws around unreasonable behaviour in the workplace will need to take into account the realities that complainants come up against when utilising existing protection measures, such as the APS Code of Conduct, namely:

- current codes, policies and laws are often used by employees higher up in the workplace hierarchy as both a sword and a shield against targeted employees lower in the workplace hierarchy;
- current codes, policies and laws can often be merely for public consumption rather than actual compliance, and formal complaint-handling processes are often designed to create the appearance of 'official concern' rather than be a genuine fact-finding and disciplinary process;
- regardless of codes, policies and laws being in place, in many cases, organisations' investigators have a perverse incentive to find that targeted employees are not being mistreated (or sometimes even unjustly paint targeted employees as the wrongdoers) in order to help the organisation avoid legal liability for detriment suffered by targeted employees;
- since targeted employees will often need to rely upon evidence from colleagues in order to substantiate their claims of being mistreated, targeted employees are at a huge disadvantage, as colleagues are notorious for being an unreliable class of witnesses, often refusing to provide evidence and denying/changing what they have claimed to have witnessed/stated out of fear that their job security or career advancement opportunities could be jeopardised;
- current codes, policies and laws offer little practical protection for those who suffer subtle mistreatment behaviours that can only be understood by those who have actually been in the targeted employee's position;
- inquiries/investigations are designed to leave targeted employees in the position of having to emerge either as a 'winner' or a 'loser', rather than being left with the possibility of a more neutral outcome, putting targeted employees at risk of victimisation if they emerge as a 'loser';
- internal review officers rarely deviate from inquiry/investigation decisions due to organisational micro-politics and the belief in protecting the portrayed legitimacy of inquiries/investigations;
- turning to external investigation/review agencies can often provide little remedy/satisfaction to targeted employees, due to these agencies' regulation constraints and under-resourcing, and sometimes bureaucratic incompetency or even corruption (thus, transforming external channels into mere symbolic channels).

G. Targeting APS Culture

There are some general high level cultural view changes that need to be addressed in the APS in order for workplace bullying, harassment, victimisation and discrimination to be effectively addressed. These are discussed below.

Firstly, there needs to be recognition of the need to invest more into training and education (the proactive approach) rather than inquiries/investigations (the reactive approach), as inquiries/investigations are not as effective, are more expensive in the long-run, and can have a punitive impact on complainants. In APS inquiry/investigation processes, the rights and the career of the (usually more senior) perpetrator seems to receive more attention than the rights and needs of the (usually more junior) complainant. This needs to change so that there is an equal balance of attention paid to the rights of the complainant and perpetrator.

Secondly, there is a false assumption in the APS that because there are policies and procedures in places then they must be effective, when they often are not. There seems to be a view that when a complainant agitates and uses other official channels open to them, then they must be the problem and are accused of 'shopping around' for assistance. This erroneous view needs to come to an end. Complainants actually have little choice in how their complaint is dealt with when the Commonwealth has set up a silos system of dealing with mistreatment issues, rather than a consolidated one. Targets are simply motivated to protect their well-being, career and reputation, which they should be entitled to do.

Thirdly, the APS needs to know that targets want their complaints heard, validated and proportionately acted upon. Perpetrators need to be punished - it is the strongest disincentive against repeated behaviour. When perpetrators are left unpunished, they are viewed as untouchable, thereby discouraging other targets from lodging complaints.

Fourthly, if employees who are targets of workplace mistreatment choose to resolve their concerns by themselves, their managers or supervisors should be responsible for ensuring they are protected from any reprisals for doing so. This protection needs to be officially afforded to targets because too often targets, who decide to confront their perpetrators, are punished by superior officers for this, thereby providing the perpetrators with an implied mandate to continue/escalate their unreasonable behaviour with impunity. Such an approach is negligible when research is revealing that a hostile-assertive confrontation by the targeted employee can be the best way to nip problem-behaviours in the bud.

Fifthly, the value of mediation in dealing with workplace mistreatment needs to be brought into serious question. This is because expecting targets to enter into agreements with their perpetrators constitutes a form of punishment to the targets. Given that targets usually face a detrimental power imbalance, they are often not in an equal bargaining position and may feel pressured to compromise on matters that should not be negotiable. For mediation to occur, parties to a dispute need to be accurately assessed as being the right candidates for mediation because they are genuine equals and approach mediation in good faith. It is essential that a presiding mediator be viewed by all participants as suitably qualified, fair, independent, impartial, non-judgmental, and has a genuine record of professionalism and integrity. It is also important to allow all parties to have a support person/advocate with them. When these prerequisites are met, this is the only time mediation can truly be considered as appropriate and legitimate. Otherwise, taking part in a mediation session that is run by amateurs or where candidates have not been properly assessed for suitability means that the odds are stacked against the target from the start and the target will nearly always suffer some form of detriment.

Sixthly, the fact that the current legal framework seems to be failing complainants needs to be officially acknowledged. This is because to use the official channels in the conventional manner is to play the opponent's game largely by the opponent's rules. Targets who are dis-empowered by using official channels should not be punished, but encouraged, when they subsequently decide to turn to social media to expose their plight, since use of social media currently seems to be one of the best tools targets have in trying to create an incentive for the APS to live up to its mantra that it does not tolerate workplace mistreatment, rather than relying on the current flawed legal framework.

Finally, policy analysts should pay greater attention to the issue of workplace bullying, harassment, victimisation and discrimination in the public services, as there is arguably a link between workplace mistreatment in the APS and lesser quality public policy creation and service delivery.

5. Summary

Whilst some of the information provided is unique to the APS culture and structure, a lot of the themes can be extrapolated to the wider context of workplace bullying. We trust that the Committee will find this thorough analysis highly useful.

Yours sincerely

APS Dignity