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PSA Feedback

Ombudsman NSW Bullying Harassment and Discrimination policy

Thank you for drafting the *Workplace Bullying, Harassment and Discrimination Policy and Procedures* and for the opportunity to provide feedback. The Public Service Association of NSW (PSA), delegates, and members are committed to supporting the organisation in every way possible to ensure a safe workplace and culture that is free from all forms of bullying, harassment, and discrimination.

As you know from our discussions at the last Joint Consultative Committee (JCC), the PSA sought comment from delegates and members concerning the documents. We have now concluded that process and please find that feedback below.

As part of our review, we did some research into best practice reports including the Sex Discrimination Commissioner Kate Jenkins' *Respect@Work* report and *Bullying and harassment: a case of success* by the University of Glasgow, UK.

The *Respect@Work* report by Kate Jenkins although focuses on sexual harassment, has some valuable principles and ideas that we should be considered including:

- The need to shift from the current reactive, complaints-based policy approach to a proactive policy framework that aims to create a safe environment that prevents bullying and harassment. As we know from the PMES, bullying and harassment have been a long-term issue with our office despite having the current bullying, harassment and grievance policies in place.
- As we know, everyone has a responsibility to prevent bullying and harassment however, Kate Jenkins' talks about shifting that responsibility from the employee to the employer with a focus on creating a safe culture with a greater focus on prevention. Having clear complaints processes is important however, history shows that staff rarely make formal complaints. Leadership and modelling therefore plays a critical role as well as having clearly articulated and measurable proactive and preventative strategies. Some suggestions have been discussed in the recent PMES workshops and in discussions with Breda Diamond including building confidence in staff to have 'difficult' conversations including up as well as leaders modelling the highest standards of behaviour and communication and creating opportunities for genuine feedback.

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- Kate Jenkins talks about how engagement with all staff in developing a path forward and having ownership into a culture that prevents bullying is critical. We have already seen some great work being done in this space and witnessed some improvements in the culture in recent times however, given the importance of this policy, we recommend consideration be given to a broader consultation strategy that includes all staff to participate in the development of this policy framework and hopefully become more invested in contributing to a safe working culture.

Feedback specifically related to the draft policy and procedures includes:

1. Draft Bullying, Harassment and Discrimination Policy

1. Sexual Harassment is referred to in the preface of the policy but not referred to in the title. Nor is it referred to in point 1 referring to the title of the document. Is there a reason for this? It is recommended that this be included to ensure a stronger statement that this type of conduct is unacceptable.
2. In the second paragraph of the policy statement listing areas of discrimination colour, ethnicity and religion are omitted. It is valuable to include these areas as its omission in itself can create offence.
3. In page 1 last sentence begins with *That is why*. It argues we are opposed to bullying, harassment and discrimination because it hurts people and is illegal. Consideration should be given to stating because it is inherently wrong.
4. In the second paragraph on page 2 the word *sexual* is used. Consider adding the word *inappropriately* sexual.
5. 2.3 refers to how people should take feedback. Much work required to ensure this occurs as intended such as training and guidance about challenging conversations.
6. 2.4 urges people to call out behaviour. The PSA is not opposed to this but it could also lead to complaints about the person who called the behaviour out and cause conflict. There needs to be discussion about how this can be achieved in practice. The PSA would be happy to work with the Ombudsman on this as an example of it working could be used elsewhere in the public service.

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7. Also, at 2.4 it is suggested the phrase lead with *staff who are subjected to, or witness, bullying, harassment, sexual harassment and discrimination are expected to take action (if safe to do so)*
8. Regards to managers general obligations there should be some reference to their obligations if they are perceived as a bully. Clearly HR or higher management would need to be involved but the earlier references to upfront conversations appears to work on the basis of the potential for a person being called on behaviour then changing that behaviour. Managers should have the responsibility to listen, to seek advice and to learn from behaviours called out. Such a responsibility being defined may prevent a blinkered, overly defensive approach.
9. Under roles and responsibilities, the word *complainant* can be confusing as it is a term in the CIB for a person making a complaint to our office about a public authority. Consider *staff or contractor raising complaint*.
10. Under roles and responsibility complainant omit the phrases *vexatiously and maliciously* and replace with *not made in good faith*. The Ombudsman has advocated for some time to remove these types of phrases from complaints policies as the vexatious and malicious relate to the motivations of the individual and are not really assessable or a basis to make a decision. Not made in good faith relates to a determination based on the content of the complaint and not the motivations of the person who made it.
11. Under support person there should be a reference to the union
12. The policy should also address and clarify investigations. Are they based on allegations put to a person or is it a fact finding? The process needs to be defined and clear. The alleged behaviour needs to be clear and provided in advance to ensure procedural fairness.
13. The policy should also refer to matters where violence and assault occur and appropriate actions.

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2. Draft Bullying, Harassment and Discrimination Procedure

We received feedback about some aspects of the procedures concerning risk to staff making or witnessing behaviour as well as general comments about the structure of the document.

1. The first few pages of the procedural document are essentially the policy document. This is not necessary as this has already been defined in the policy and could lead to confusion for staff and for those responsible for responding to allegations.
2. Care should be taken when listing areas and groups where discrimination occurs to ensure none are omitted as this can lead to offence in itself.
3. Confidentiality is extremely important for the person subject to the allegation and the person making the complaint as they both can feel isolated. This does need to be addressed in the procedures.
4. There needs to be a reference to when a person can complain outside of the organisation as well as when matters are potentially criminal.
5. Where a matter is being dealt with through workers compensation if it is determined to proceed the manager needs to get clear advice on the matter.
6. The procedure advises that it is not always necessary to have an investigation. There should be examples provided in the procedure. It should also be defined as to who can make such a decision and when.
7. The document needs to be clear when a matter is to be investigated under the GSE Act. Therefore, it needs to be determined and made clear when it is just a preliminary inquiry to determine if a formal investigation is warranted and it needs to be determined that the matter is such that it can be dealt with in a remedial way. Further, what the complaint seeks may impact on who the matter proceeds.
8. The retention of documentation must ensure confidentiality and security and should be accessible by only relevant senior officers (HR). There should be clarity about how, when and why it may be accessed.

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9. EAP services should be offered to both the person subject of the complaint and to the person making the complaint.
10. Under 2.1 – even if the effected employee requests that no action be taken the manager or person responsible must still conduct a risk assessment. The document does not refer to a template or tool to assist in how to do this and should do.
11. We understand the procedure specifies that anonymous complaints will not be encouraged. The PSA would like to understand the reason/s for this position. The PSA believes any complaint should be assessed against its content and the merits of the information to determine if action by the organisation is warranted, rather than on how the complaint is received. Active discouragement of such complaints could be counterproductive to the aims of revealing incidents of bullying, harassment, and discrimination, even if these complaints have to be managed in another way by the organisation. There are examples under the PID act that allow for anonymous complaints to afford protection to individuals.
12. Decide on appropriate action refers to *attachment 1*. Attachment 1 was not included in the documents we received.
13. Under 1.2 Consider inserting avenue to escalate to Ombudsman or Deputy Ombudsman
14. The executive is mentioned in the procedures, but their responsibility is not defined in the policy.
15. 7.3 does not define who in the office is responsible for responses to workplace bullying, harassment and discrimination. Presumably this is P&C but not defined.
16. 7.3 should include provide training.
17. Document may benefit from examples of bullying behaviour though equally this may be something best addressed in training.

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18. In the statement under *Reasonable Management action* it is recommended that it be included that directions by management must be lawful and reasonable. Potentially, a direction from management could be unlawful and unreasonable or in part of one or the other. Giving a direction that is unlawful or unreasonable could potentially be evidence of bullying and Harassment.
19. Under the heading *Reasonable behaviour* states that workplace conflicts are not regarded as unreasonable behaviour. Conflict by itself is not behaviour. Consider revising to workplace conflict that give rise to difference of opinion and disagreements.
20. Under 5.0 it refers to action to implement the preferred option but is unclear how a manager assesses what the preferred option should be.
21. Under 6.1 it *states assess the potential seriousness of the matter* but does not state how this is assessed?
22. 7.0 should or elsewhere set out what formal advice should be provided to the complainant and respondent.

We also note that some of the comments received from members relate to the structure and grammar of the documents. We did not go into the specifics of this feedback here though a review of the language, grammar and typographic content of the documents is recommended prior to release.

Please feel free to contact us if you would like to discuss our feedback or seek any clarification. We look forward to continuing to work together on this important piece of work.