

Independent Investigator for Allegations of Workplace Bullying and Other Unreasonable Behaviour

Terms of Reference (Amended 17 May 2013)

Introduction

1. On 5 February 2013 Dr Megan Clark, the Chief Executive of CSIRO, announced the decision to establish an independent mechanism to investigate claims of workplace bullying and unreasonable behaviour by CSIRO staff members and affiliates.
2. Emeritus Professor Dennis Pearce AO has been appointed by Dr Clark as the independent investigator (**investigator**). Professor Pearce will be assisted by a team from HWL Ebsworth Lawyers led by Ms Melanie McKean.
3. For the purposes of the investigation, the investigator will:
 - (a) adopt the definition of 'workplace bullying' recommended by the Parliamentary inquiry into workplace bullying in 2012¹ which is 'workplace bullying is repeated, unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety';
 - (b) define 'unreasonable behaviour' as behaviour (other than workplace bullying) that is:
 - (i) directed towards a worker or group of workers; and
 - (ii) unreasonable having regard to the standards of conduct described in the CSIRO Code of Conduct as it applied at the relevant time.
4. CSIRO 'staff members' are people appointed under section 32 of the *Science and Industry Research Act 1949* (Cth). CSIRO 'affiliates' are people associated with CSIRO namely: visiting scientists, secondees, students and trainees, contractors and consultants, and honorary, post retirement or volunteer fellows.
- 4A These Terms of Reference apply to the conduct of the Chief Executive of CSIRO and to the conduct of Board members of CSIRO (in their role as CSIRO Board members) in the same manner as they apply to staff members. References throughout these Terms of Reference to 'staff members' include reference to the Chief Executive and to CSIRO Board members.
5. The investigator is also required to report on general findings (including lessons to be learnt and recommendations for improvements to CSIRO policies, processes and practices). The Chief Executive of CSIRO will publish the reports on general findings.
6. The investigation will be conducted in two phases.

¹ Conducted by the Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Education and Employment, report titled 'Workplace Bullying: We just want it to stop', October 2012.

Conduct of Phase 1

7. During Phase 1 the investigator will:
- (a) receive and consider submissions;
 - (b) obtain and consider relevant documents and information from CSIRO (if the person making the submission has consented to their personal information being disclosed to CSIRO for this purpose – see below);
 - (c) provide a summary report to the Chief Executive of CSIRO on each submission which contains an allegation of workplace bullying or unreasonable behaviour that is alleged to have occurred wholly or substantially on or after 1 January 2006. [*Personal information will be removed from reports to the Chief Executive where the person who has made a submission has done so on a confidential basis.*];
 - (d) consider whether to provide a summary report to the Chief Executive of CSIRO on each submission which contains an allegation of workplace bullying or unreasonable behaviour that is alleged to have occurred wholly or substantially prior to 1 January 2006. [*Personal information will be removed from reports to the Chief Executive where the person who has made a submission has done so on a confidential basis.*];
 - (e) inform each person who made a submission of the outcome of the investigator's consideration of the submission;
 - (f) provide a report to the Chief Executive of CSIRO and to the Board of CSIRO on general findings (including lessons to be learnt and recommendations for improvements to CSIRO policies, processes and practices).
- 7A Notwithstanding paragraphs 7(c) and 7(d), if any part of the reports referred to in those paragraphs relates to:
- (a) the conduct of the Chief Executive - then the investigator must not provide that part to the Chief Executive and must instead provide that part to the Board of CSIRO² and to CSIRO's responsible Minister;
 - (b) the conduct of one or more members of the Board of CSIRO – then the investigator must not provide that part to the Chief Executive, nor to the Board of CSIRO, and must instead provide that part to CSIRO's responsible Minister.
- 7B Following receipt at the end of Phase 1 of a report in relation to a submission that will not be further investigated during Phase 2:
- (a) Where the report has been made to the Chief Executive in accordance with paragraphs 7(c) or 7(d) - the Chief Executive will determine what, if any, action is to be taken.
 - (b) Where the report has been made to:
 - (i) the Board of CSIRO in accordance with paragraph 7A(a) -then the Board of CSIRO will determine what, if any, action is to be taken;
 - (ii) CSIRO's responsible Minister in accordance with paragraph 7A(b) - then CSIRO's responsible Minister will determine what, if any, action is to be taken.

² The Chief Executive will not be involved in the Board's deliberations about or decisions in relation to such part of the reports because section 15A(a) of the legislation governing CSIRO (the *Science and Industry Research Act 1949 (Cth)*) provides that the Chief Executive must not take part in any deliberation or decision of the Board about the Chief Executive.

Submissions covered by Phase 1 of the investigation

8. During Phase 1, submissions can be made about workplace bullying or unreasonable behaviour that is alleged to have occurred at any time. *[But see paragraphs 17(a) and 18 for the limitation that submissions which contain an allegation of workplace bullying or unreasonable behaviour wholly or substantially prior to 1 January 2006 will generally not be investigated during Phase 2.]*
9. During Phase 1, submissions may be made by current or former CSIRO staff members and affiliates who allege they have experienced (directly or as witnesses) workplace bullying or unreasonable behaviour. *[But see paragraph 17(b) for the limitation that submissions from current CSIRO staff members and affiliates will not be investigated during Phase 2.]*
10. During Phase 1, submissions may be made about the conduct of current or former CSIRO staff members and affiliates. *[But see paragraph 17(c) for the limitation that submissions about the conduct of former CSIRO staff members and affiliates will not be investigated during Phase 2.]*
11. Allegations of workplace bullying or unreasonable behaviour that are being or that have already been formally investigated (whether internally or externally to CSIRO) may be raised with the investigator. The investigator will initially only consider the integrity and probity of the ~~earlier~~ investigative process(es); that is, the substantive conduct in the submission will not be immediately re-investigated. If the investigator is satisfied that the current or prior investigation is being or was undertaken in a fair manner and that there is no evidence of procedural defects, the substantive conduct in the submission will not be considered further. If the investigator is not so satisfied, the investigator will investigate the substantive conduct in the submission further.
12. Submissions relating to the following matters can be made during Phase 1, but can only be considered by the investigator for his report on general findings:
 - (a) matters where the substantive conduct that is alleged to amount to workplace bullying or unreasonable behaviour has been the subject of a negotiated settlement between CSIRO and a former or current CSIRO staff member or affiliate; or
 - (b) matters in which a Court, Tribunal or other administrative review body or judicial review body is currently considering, has previously considered, or during the period of the investigation begins considering, whether the conduct alleged was in fact workplace bullying or unreasonable behaviour.

Note: This exception does not prevent a person from raising allegations that have also been raised:

- (i) *in a Comcare claim - if the claim has not been reviewed by an administrative review body or judicial review body (such as the Administrative Appeals Tribunal or the Federal Court of Australia); or although the claim has been considered by an administrative review body or judicial review body, that body did not determine, or is not determining, whether the conduct alleged was in fact workplace bullying or unreasonable behaviour. (For example, if Comcare determined that an injury was significantly contributed to by a person's employment, but did not determine whether the events amounted to bullying, that matter can be considered by the investigator).*

- (ii) *in a civil proceeding (such as a claim for negligence) or a statutory proceeding (such as a claim under the Fair Work Act 2009 (Cth)) - if that proceeding is not currently considering, has not previously considered, or during the period of the investigation does not begin considering, whether the conduct alleged was in fact workplace bullying or unreasonable behaviour.*

Conduct of Phase 2

13. During Phase 2 the investigator will:
- (a) further investigate certain submissions (see below) regarding workplace bullying or unreasonable behaviour that were raised during Phase 1 and that the investigator considers require a more thorough investigation;
 - (b) provide a report to the Chief Executive of CSIRO on each workplace bullying or unreasonable behaviour submission investigated during Phase 2;
 - (c) inform each person who made a submission that was investigated during Phase 2 of the outcome of the investigation (subject to privacy, natural justice and legal considerations);
 - (d) provide a further report to the Chief Executive of CSIRO and to the Board of CSIRO on general findings (including lessons to be learnt and recommendations for improvements to CSIRO policies, processes and practices).
- 13A Notwithstanding paragraph 13(b), if any part of the report referred to in that paragraph relates to:
- (a) the conduct of the Chief Executive - then the investigator must not provide that part to the Chief Executive and must instead provide that part to the Board of CSIRO³ and to CSIRO's responsible Minister;
 - (b) the conduct of one or more members of the Board of CSIRO – then the investigator must not provide that part to the Chief Executive, nor to the Board of CSIRO, and must instead provide that part to CSIRO's responsible Minister.
14. During Phase 2 procedural fairness will be afforded to all people who have raised or been referred to in submissions about workplace bullying or unreasonable behaviour. The investigator may seek information from whomever he thinks appropriate.
15. The investigator's findings and recommendations following the investigation of workplace bullying and unreasonable behaviour submissions during Phase 2 will be used by CSIRO to determine whether there is evidence of misconduct by any current CSIRO staff members or affiliates and, if so, the appropriate processes to be taken.

³ The Chief Executive will not be involved in the Board's deliberations about or decisions in relation to such part of the reports because section 15A(a) of the legislation governing CSIRO (the *Science and Industry Research Act 1949 (Cth)*) provides that the Chief Executive must not take part in any deliberation or decision of the Board about the Chief Executive.

- 15A Notwithstanding paragraph 15, in circumstances where a report has been made to:
- (a) the Board of CSIRO in accordance with paragraph 13A(a) - then the Board of CSIRO will determine the appropriate action to be taken;
 - (b) CSIRO's responsible Minister in accordance with paragraph 13A(b) - then CSIRO's responsible Minister will determine the appropriate action to be taken.

Submissions covered and not covered by Phase 2 of the Investigation

16. During Phase 2 the investigator can only investigate submissions that were made during Phase 1 and that:
- (a) contain allegations of workplace bullying or unreasonable behaviour that occurred wholly or substantially on or after 1 January 2006 [but see paragraph 18];
 - (b) are made by a former CSIRO staff member or affiliate; and
 - (c) relate to the conduct of a current CSIRO staff member or affiliate.
17. Phase 2 will not investigate submissions that:
- (a) relate to conduct that occurred wholly or substantially before 1 January 2006 [but see paragraph 18];
 - (b) are made by current CSIRO staff members and affiliates. [*Current staff members and affiliates should progress allegations of workplace bullying and unreasonable behaviour through CSIRO's existing feedback and independent review mechanisms (such as the Grievance Procedure, the Misconduct Procedure and the Whistleblower Scheme).*];
 - (c) allege workplace bullying or unreasonable behaviour by someone who is no longer a CSIRO staff member or affiliate; or
 - (d) are of the type excluded due to paragraph 12 above.
18. Notwithstanding paragraphs 16(a) and 17(a), the investigator may, in his discretion, investigate during Phase 2 a submission that relates to conduct that occurred during 2005, if the investigator considers that the nature of the conduct warrants investigation.

Submissions not covered by Phase 1 or by Phase 2 of the Investigation

19. The Investigator will not consider during Phase 1 or Phase 2 conduct that is potentially criminal in nature. The investigator will - if the person raising the matter consents or if the investigator is otherwise obliged to do so - refer any potentially criminal aspect of a submission directly to the Police for consideration. The investigator will consider the balance of the submission if he is reasonably able to do so without prejudicing the police investigation.
20. Anonymous submissions will not be considered by the investigator and will not be reported on by the investigator.

Other matters relevant to Phase 1 and to Phase 2

21. The investigator will determine whether submissions come within the scope of these Terms of Reference or not, what action will be taking during Phase 1 and Phase 2 in respect of each submission and the extent of consideration, investigation and reporting to be made in respect of each submission. The investigator's determination will be final.
22. The investigation is not intended to establish a scheme under which current or former CSIRO staff members or affiliates may apply for financial compensation or other remedies that would typically be able to be awarded by a Court, Tribunal or other administrative body.
23. During Phase 1 and Phase 2 CSIRO:
 - (a) will not take submissions from current or former CSIRO staff members and affiliates (all submissions must be made directly to the team assisting the investigator);
 - (b) will refer all attempts to make a submission to CSIRO to the team assisting the investigator;
 - (c) will assist the investigator by responding promptly and fully to the investigator's requests for documents, information and assistance (such as facilitating interviews with current CSIRO staff members during Phase 2);
 - (d) will receive the investigator's reports and give prompt and fair consideration to the content of those reports;
 - (e) handle all personal information sensitively and in accordance with the *Privacy Act 1988* (Cth).

Confidentiality and use of information

24. People who make submissions to the investigator will be able to do so on a confidential basis if they wish. This means that their personal information (and other information from which their identity could be deduced) will not be provided by the investigator to CSIRO or to CSIRO's responsible Minister.
25. The investigator will ask people for their permission to disclose their personal information to CSIRO, so that the investigator can obtain documents and information from CSIRO (during Phase 1) and conduct investigations (during Phase 2).
- 25A Before a report in relation to a submission is made by the investigator to CSIRO's responsible Minister (pursuant to paragraphs 7A or 13A or both), the investigator will seek consent from the person making the submission to disclose their personal information to the Minister.
26. People who make submissions will have the option to consent to disclosure of their personal information during Phase 1 only and to decide later whether they consent to disclosure of their personal information during Phase 2.
27. The investigator's ability to consider a submission where a person has not given permission to disclose their personal information to CSIRO will be limited. It is unlikely submissions can be investigated during Phase 2 on a confidential basis.

28. All submissions and information (including personal information) will be treated by the investigator sensitively and in accordance with the *Privacy Act 1988* (Cth)). Where consent to disclosure of personal information has been provided, the investigator will not disclose personal information to CSIRO any more broadly than is necessary to carry out the investigation.

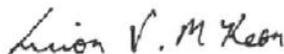
Period for submissions and time for reports

29. Submissions may be made to the investigator between 27 February 2013 and 7 June ~~27 May~~ 2013.
30. The investigator will provide his Phase 1 reports on submissions and on general findings by 31 July 2013.
31. Phase 2 investigations may commence before the delivery of the Phase 1 reports.
32. It is intended that Phase 2 will be completed by February 2014.

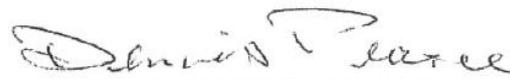
26 February 2013, Amended 17 May 2013



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Mr Simon McKeon
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