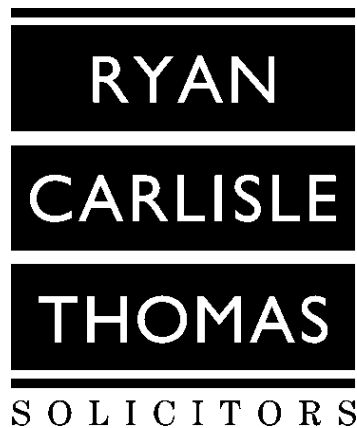


House Standing Committee on Education and Employment

SUBMISSION TO THE INQUIRY INTO WORKPLACE BULLYING

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RYAN CARLISLE THOMAS – SUBMISSION TO THE INQUIRY INTO WORKPLACE BULLYING

PRELIMINARY

1. Ryan Carlisle Thomas welcomes the opportunity to provide some brief comments to the Inquiry into Workplace Bullying.
2. Much has been written about the phenomenon of bullying from an academic perspective. A key focus of this submission, however, is to share with the Committee our experiences, at the level of practitioners, as service providers.
3. We provide this information because we consider it may not emerge via conventional sources such as surveys, which glean information from those who are willing to talk about their experiences and/or those cases where the complainant has been willing to speak to the media. We have observed that many of our clients would be reluctant to participate in such exercises, because they find it painful to talk about their experiences and tend not to wish to re-live their trauma more than is absolutely necessary.
4. Further, in cases where a settlement is negotiated, our clients are normally constrained by confidentiality obligations which would preclude discussion about their case with third parties without the consent of the respondent. For that reason, learning which might otherwise be derived from many of the most egregious cases will never become publicly known.
5. We would be happy to expand upon the content of this submission. Any queries may be referred to Philip Gardner (Partner) or Carol Andrades (Consultant).

THE EXPECTATION vs REALITY GAP AND ‘BULLYING’

6. On a daily basis, we are approached by workers¹ who complain of ‘bullying’ (we use the term in this submission for convenience, but stress that, as noted elsewhere in this submission, there are important issues to address on the definition of the term and its operation). We consider that this is probably attributable, at least in part, to Government sponsored awareness-raising publicity campaigns about ‘bullying’. The campaigns have been very effective, and this is to be commended.

¹ This is a neutral term, designed to capture a wide range of working relationships rather than the classic employment contract.

7. However, the publicity has also generated a high level of expectation that the law will deliver clear and robust remedies for the individuals concerned (over and above any workers compensation or similar benefits). Almost without exception, workers expect to be able to take action against perpetrators and/or employers. When informed that there may not be such a right, most workers understandably become upset. Typically, those who consult us have been receiving medical treatment for stress, anxiety and depression. Often, it is their doctors who have advised them to see a lawyer. For such clients, it is not only difficult for them to understand why there may be no avenue for them to obtain individualised relief, but this knowledge contributes to and exacerbates their feelings of anxiety and stress.

DEFINITIONS

8. The chart below sets out definitions² of ‘bullying’ or similar behaviour used in Australia.

Cth	Repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety. [Note: this definition was under review at the time of writing this submission]
ACT	Bullying is repeated unreasonable behaviour directed towards a worker or a group of workers that creates a risk to the health and safety of those workers.
QLD	A person is subjected to ‘workplace harassment’ if the person is subjected to repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person’s employer or a co-worker or group of co-workers of the person that: (a) is unwelcome and unsolicited; or (b) the person considers to be offensive, intimidating, humiliating or threatening; or (c) a reasonable person would consider to be offensive, humiliating, intimidating or threatening.
NSW	Bullying is repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.
NT	Bullying at work can be defined as repeated, unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety.
SA	Workplace bullying <i>means</i> any behaviour that is repeated, systematic and directed towards an employee or group of employees that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten <i>and</i> which creates a risk to health and safety – s 55A OHSWA (SA).
TAS	Bullying is repeated, unreasonable behaviour directed towards a worker or group of workers. It creates a risk to personal and workplace health and safety.
VIC	Bullying is repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety. Bullying can occur wherever people work together. Under certain conditions, most people are capable of bullying. Whether it is intended or not, bullying is an OHS hazard.
WA	Bullying at work can be defined as repeated unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety.

² Except for South Australia, which defines ‘bullying’ under s 55 A of the *Occupational Health Safety and Welfare Act 1986* (SA), the definitions are contained in publications issued by regulator.

Absence of a Statutory Definition

9. As noted in the chart above, only South Australia has defined 'bullying' in a statute. The absence of a statutory definition of 'bullying' in most jurisdictions sits uneasily with regulators' initiatives designed to increase community awareness that bullying is unlawful. Although the publications make it clear that 'bullying' is a breach of (among other things) occupational health and safety laws, there are a number of problems which arise because of the lack of a definition.
10. One such problem may be observed when a court or tribunal is called upon to hear allegations where the cause of action includes references to, and may even be couched in terms of, 'bullying'. While, in some cases, the local regulator's definition is adopted by such bodies³, it is unsatisfactory that resort has to be had to a non-statutory source for such a serious matter.
11. In other cases, the decision turns on the crucial question of whether there has been 'bullying' conduct, but is made in the absence of any definition of that term⁴.
12. The problem is not simply one of semantics. If varying standards of behaviour are accepted (or not accepted) as sufficient to constitute 'bullying', with employees, employers, lawyers, human resources practitioners, courts, tribunals and others expressing disparate views, it will be impossible to develop coherent jurisprudence. The resulting lack of certainty diminishes the potential for workers to understand their rights and employers to understand their obligations.
13. Inconsistencies in definition between jurisdictions also make the collection and analysis of data problematic⁵. This in turn militates against the capacity of stakeholders to respond effectively and accurately to the problem.
14. Equally importantly, there is a perception that bullying may not be a serious matter, if its definition has not been enshrined in a statute as a discrete species of unlawful behaviour.

³ In *Brown v Maurice Blackburn Cashman* [2012] VCC 647 at par 33, the Court accepted WorkSafe Victoria's definition as a 'reasonable working definition of workplace bullying'.

⁴ For example, *Frank Graf v Hyne & Son Pty Ltd* [2006] AIRC 810; *Aksentijevic v Victoria Racing Club Limited* [2011] VSC 538.

⁵ See Productivity Commission, Parliament of Australia, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* (2010) at 282.

Requirement of ‘Repeated’ Behaviour

15. The requirement, in the definitions, for ‘repeated’ untoward behaviour is problematic. It has the inadvertent effect of devaluing the seriousness of a single incident of abusive behaviour and generating confusion about whether a single incident triggers any laws.

“While prevention should, by its very nature, take place before there exists evidence of bullying, it has been suggested that a strict definition of bullying that includes repeated exposures and high frequency of exposures may be used as a pretext to justify doing nothing before evidence of these conditions is in place”⁶. (emphasis added)

16. To take an analogous phenomenon, sexual harassment does not require there to have been repeated instances of offensive behaviour before action may be taken⁷. Nor do racial or religious vilification laws require repetition of behaviour⁸.
17. Further, the reference to ‘repeated’ behaviour does not assist in circumstances where the targets of ‘bullying’ behaviour have a natural tendency to self-silence and it is probable that ‘bullying’ is under-reported⁹. In our experience, it is a common accusation levelled at complainants, by respondents to a bullying complaint and/or employers, that, because no complaint had been made at early stages of the alleged conduct, the problem cannot have been serious. The corollary is that, if the problem had been serious, the complainant would have spoken up earlier. However, this discounts the strong impulse, which we have observed in most clients, not to want to ‘rock the boat’ at work. Employees are dependent upon employers for their livelihood and do not lightly take action which might result in their being labelled as troublemakers and/or adversely affecting their prospects. In many cases, a complainant is simply not well enough to think clearly and to seek help. There is therefore a tendency not to report a problem until it has escalated to a point where it is unbearable.
18. In that context, requiring a person to wait until the conduct has become ‘repeated’ before it is classified as ‘bullying’ is counter productive, especially if the goal of health and safety laws is to encourage prevention of risk. This is especially so where most employer policies

⁶ Katherine Lippel, ‘The Law of Workplace Bullying: An International Overview’ (2010) 32(1) *Comparative Labor Law & Policy Journal* at 3; citing Laura Crawshaw, ‘Workplace Bullying? Mobbing? Harassment? Distraction by a Thousand Definitions’ (2009) 61(3) *Consulting Psychology Journal: Practice and Research* at 263-267.

⁷ See *Sex Discrimination Act 1984* (Cth) s 28A; *Equal Opportunity Act 2010* (Vic) s 92

⁸ See *Racial Discrimination Act 1975* (Cth) s 18C; *Racial and Religious Tolerance Act 2001* (Vic).

⁹ See Dr Gregory Lyon SC & Garry Livermore, ‘Regulation of Workplace Bullying’ (Report, July 2007) at par 36.

emphasise the making of complaints about 'bullying', rather than emphasising that single incidents may be serious enough to warrant attention. Some have suggested that the solution lies in early intervention, so as to prevent repetition of the offending behaviour¹⁰, but this presumes that the target will speak up – which overlooks the 'self-silencing' tendency noted above.

Broadening the Definition

19. It may be that the better approach is to focus on the concept of the right to a safe workplace, such as that recognised in similar contexts. For example, it has been noted, in the context of sexual harassment, that:

*"It is an act of discrimination to deny to an employee a benefit connected with employment. A benefit of employment is in fact quiet employment, that is, the freedom from physical intrusion, the freedom from being harassed, the freedom from being physically molested or approached in an unwelcome manner and if that type of behaviour or conduct is permitted by an employer he is providing a detriment to one group of employees who suffer such unwelcome intrusion."*¹¹ (emphasis added)

20. Consideration could also be given to listing factors or circumstances to take into consideration in determining whether conduct is 'bullying' or not. Similar guiding provisions are found in anti-discrimination law¹².

Intersectional 'Bullying'

21. We note that the definition used in Queensland specifically excludes sexual harassment. It has also been suggested that sexual harassment, occupational violence and discrimination may best be dealt with by police or other regulators¹³. We would not support exclusion of sexual harassment or any other behaviour covered under anti-discrimination or other laws, from a definition of 'bullying', because that would ignore intersectional offending behaviour. To take a common example, if workers are 'bullied' and also sexually harassed because of their sexual orientation, it is difficult and artificial to separate the sexual harassment from the 'bullying'. If someone is taunted at work because of racial or religious attributes, one cannot separate the causal conjunction of activating factors. If the

¹⁰ Dr Gregory Lyon SC & Garry Livermore, 'Regulation of Workplace Bullying' (Report, July 2007) at [74].

¹¹ *R v Equal Opportunity Board and another; ex parte Burns and another* (1984) EOC 92-112 at 76,111 per Nathan J.

¹² For example s 28A(1A) of the *Sex Discrimination Act 1984* (Cth)

¹³ Dr Gregory Lyon SC & Garry Livermore, 'Regulation of Workplace Bullying' (Report, July 2007) at par 86(b).

legislature is serious about addressing the problem of ‘bullying’ obstacles to invoking a cause of action should be removed, rather than erected.

22. Where there is a civil cause of action under more than one law, the usual principles concerning choice of jurisdiction would apply¹⁴.

LOCATING ‘BULLYING’ WITHIN THE LAW

23. One of the most difficult tasks we have is to explain to a worker, who has been ‘bullied’, the complex and random ways in which the law deals with apparently similar sets of circumstances. Depending on the behaviour involved, workers may have rights under a number of laws, but not necessarily the option to sue an employer or perpetrator. A typical first contact ‘triage’ conference with a worker who complains of ‘bullying’ in Victoria may be represented as follows:

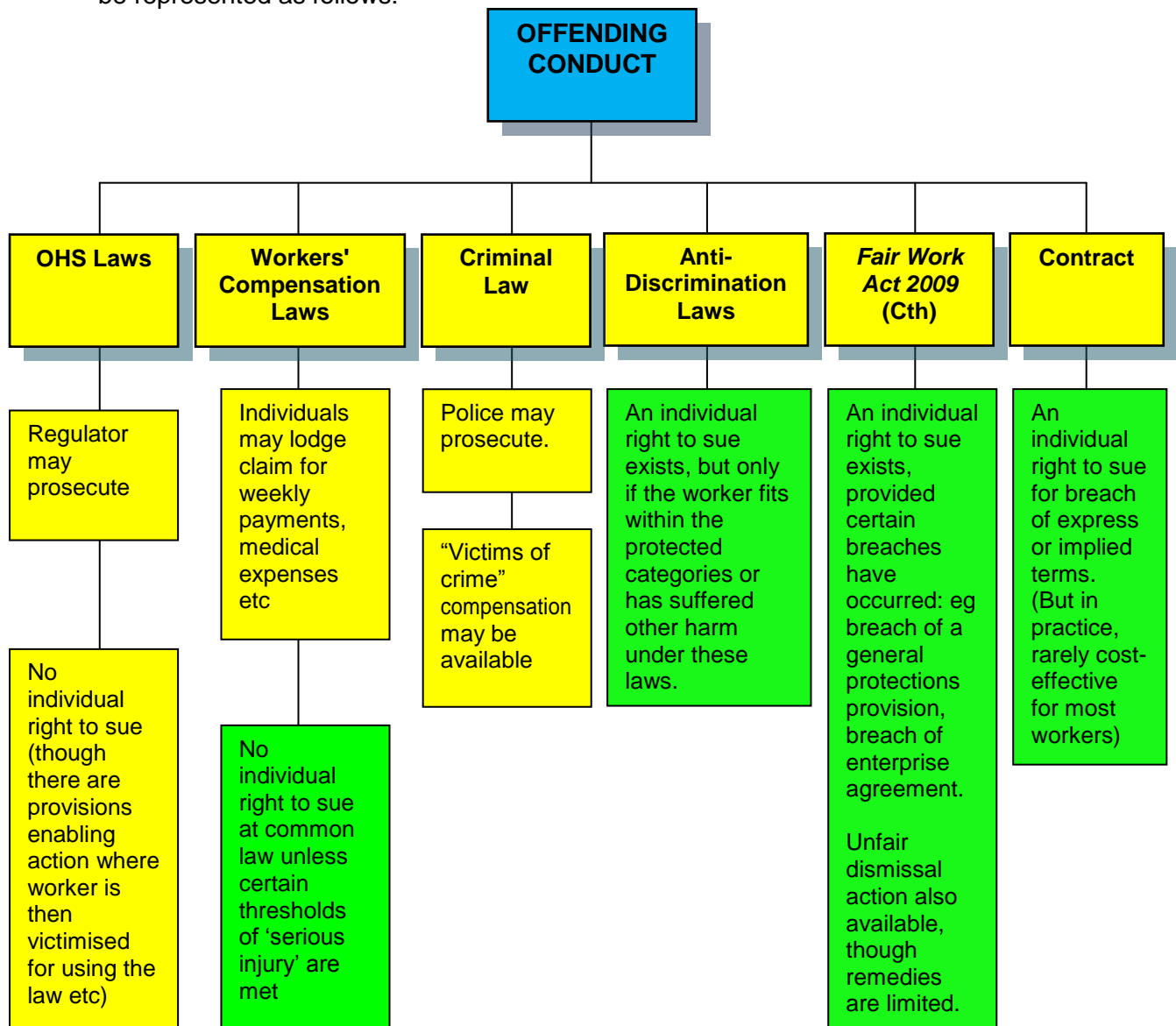


Fig 1 – ‘Triage’ Chart for a Typical ‘Bullying’ Claim in Victoria

¹⁴ See for example Ch 6 Div 2 of the *Fair Work Act 2009* (Cth).

PROBLEMS

Random Conferral of Rights

24. It is unsatisfactory that there is no clear avenue for making a claim of 'bullying' in its own right, as a discrete cause of action. As may be observed from the green-shaded areas in the Triage Chart, the range of options available to an individual who wishes to sue for 'bullying' behaviour is confusing, inconsistent and arbitrary.
25. If workers cannot understand their rights, they are less likely to exercise them.
26. If employers are faced with a fragmented and inconsistent set of obligations, they are less likely to be able to run their businesses in an efficient way.
27. We have observed a degree of confusion on the part of lawyers, employers, human resources practitioners, courts and tribunals about the definition of 'bullying' and the laws which may or may not apply. This makes negotiation for resolution of problems even more difficult.
28. A by-product of this unsatisfactory state of affairs is that workers begin to doubt the commitment of the legislature, and the legal system, to addressing the problem of 'bullying'.

Occupational Health and Safety Law

29. Much of the publicity concerning 'bullying' behaviour has been conducted under the auspices of health and safety regulators, who perform an important awareness-raising function, as noted above. However, the number of prosecutions for 'bullying' behaviour remains low and there is room for improvement in terms of regulators' responses to 'bullying' complaints. For example, it has been reported that in Victoria, in 2010, of 6000 bullying complaints to WorkSafe Victoria only 60 resulted in an inspector visiting a workplace¹⁵.
30. There is provision, under the *Occupational Health and Safety Act 2004* (Vic), for civil action where there has been, in effect, victimising conduct against a person who has or has asserted rights under the Act.¹⁶ While such conduct may overlap with 'bullying' behaviour, it has relatively narrow application.

¹⁵ Rachel Wells, 'Most workplace bullying claims fall short', *The Age* (Melbourne), 24 July 2011.

¹⁶ *Occupational Health and Safety Act 2004* (Vic) s 78D.

Anti-Discrimination Laws

31. It is a popular misconception, on the part of workers, that ‘bullying’ behaviour is caught by anti-discrimination laws. Many workers who present with a ‘bullying’ complaint in fact complain of ‘discrimination’ or ‘harassment’ . However, as noted above, anti-discrimination laws capture only certain types of discriminatory and harassing behaviour, namely, those which involve characteristics listed in the relevant laws¹⁷ or associated unlawful behaviour.
32. In the case of *Clifford v SBS*¹⁸, for example, it was common knowledge in the workplace that the individual respondent perpetrator was aggressive and abusive at work. However, the complainant failed in her claim of sexual harassment even though the perpetrator’s offensive behaviour towards her was:

“drunken behaviour of the same character that governed his relationship with all his colleagues in the newsroom, male and female alike” [which] “rendered him rude, smelly, aggressive, intrusive and generally offensive”.

His conduct did not, according to the tribunal, fall within the concept of ‘sexual harassment’ within the definition of the *Sex Discrimination Act 1984* (Cth) and left the complainant without a remedy.

33. One would expect that the law would provide such a complainant with an alternative comparable remedy for having had to work under these conditions. However, this is not the case (see the Triage Chart). If a worker does not fall within the categories protected by anti-discrimination laws, they cannot be used. This is unsatisfactory in circumstances where the intersection between anti-discrimination law and basic principles of occupational health and safety has long been recognised. For example, the Supreme Court of Victoria has noted that:

“It is an act of discrimination to deny to an employee a benefit connected with employment. A benefit of employment is in fact quiet employment, that is, the freedom from physical intrusion, the freedom from being harassed, the freedom from being physically molested or approached in an unwelcome manner and if that type of behaviour or conduct is permitted by an employer he is providing a

¹⁷ Broadly, under the Commonwealth anti-discrimination laws, race, sex, age and disability are covered – see the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* and *Age Discrimination Act 2004* (Cth). Under State and Territory laws, the field of protected characteristics is much broader. For example, the *Equal Opportunity Act 2010* (Vic) contains 18 such attributes, including those covered by the Commonwealth laws, as well as others, such as gender identity, physical features, sexual orientation and so on.

¹⁸ [1998] HREOCA 25.

detriment to one group of employees who suffer such unwelcome intrusion."¹⁹
(emphasis added)

34. The other danger is that, as some perpetrators of 'bullying' behaviour become aware that only some forms of offensive behaviour supply a cause of action for a worker to sue, they simply avoid overt behaviour which generates such a cause of action (sexism, racism, homophobia and so on) and concentrate on non-attribute based offensive behaviour. While, in some cases, a court or tribunal will be persuaded to draw an inference that the latter is still a manifestation of unlawful discrimination based on a protected attribute, there are significant problems of proof associated with 'inference-based' argument²⁰.
35. As to the concept of 'harassment', which is often used interchangeably with 'bullying' (for example, Queensland uses the term 'workplace harassment') it should be noted for completeness that, even though discrimination on a protected ground would logically encompass 'harassment' on that ground, anti-discrimination laws also single out certain types of harassment for particular attention. Sexual harassment, disability harassment and racial or religious vilification are some examples²¹. The existence of unlawful 'harassment' provisions in some anti-discrimination laws, coupled with the use of that term in conjunction with 'bullying' behaviour, adds to the general confusion.

The Fair Work Act 2009 (Cth)

36. It has been noted above that anti-discrimination laws may be used to address 'bullying' behaviour only if the aggrieved worker comes within one or more of the categories or species of behaviour protected by such laws. Similarly, the *Fair Work Act 2009 (Cth)* provides relief only if the behaviour is captured by one or more of the mechanisms supplied by the Act. The General Protections provisions of Part 3-1 of the *Fair Work Act 2009 (Cth)* will not provide an avenue for relief in all cases of 'bullying'. The conduct must fit within one of the categories of behaviour set out below.
37. In brief, the General Protections:
- provide for protection from adverse action and various other inappropriate behaviour related to workplace rights²²

¹⁹ *R v Equal Opportunity Board; ex parte Burns* (1984) EOC 92-112 at 76,111 per Nathan J.

²⁰ See for example *Ruscuklic v Cantire Investments Pty Ltd trading as Chris' Greek Dips* [2009] VCAT 832.

²¹ See *Equal Opportunity Act 2010 (Vic)* ss 92–94 ; *Sex Discrimination Act 1984 (Cth)* s 28A; *Racial Discrimination Act 1975 (Cth)* ss 18C & 18D; *Disability Discrimination Act 1992 (Cth)* ss 35 & 36.

²² *Fair Work Act 2009 (Cth)* ss 340–345.

- provide for protection from adverse action and various other inappropriate behaviour related to industrial activities²³
- provide protection from adverse action because of fourteen listed characteristics²⁴ (commonly referred to as the ‘Discrimination’ section)
- provide protection from dismissal for temporary absence from work for a prescribed illness or injury²⁵
- prohibit the demanding of a bargaining services fee²⁶
- provide protection from discrimination against an employer in connection with coverage or lack of coverage of the employer’s employees by the National Employment Standards or a particular workplace instrument or enterprise agreement²⁷
- prohibit coercion to employ/not employ, engage/not engage or allocate/not allocate particular duties to a particular person²⁸
- provide that objectionable terms¹¹ in various industrial instruments have no effect²⁹
- prohibit sham arrangements and similar conduct in relation to independent contractors³⁰

38. Use of s 351 (the ‘Discrimination’ section) depends on satisfying criteria similar to those discussed above in connection with anti-discrimination laws. In other words, the applicant must come within one of the 14 categories listed in s 351 in order to invoke it. Not all ‘bullying’ behaviour will satisfy this test.

39. There have also been attempts to use the ‘workplace rights’ provisions of the general protections regime to address ‘bullying’ behaviour, but the route is not a simple one. Because of the structure of the workplace rights provisions, the cause of action does not depend simply on whether ‘bullying’ has occurred, but requires that adverse action has been taken because a complaint of ‘bullying’ was made (or was anticipated or because there was a right to make such a complaint). In *Stevenson v Airservices Australia*³¹, for example, the applicant failed in an argument that his employment had been terminated because he exercised a workplace rights, namely, complaining about ‘bullying’ and harassment. The employer successfully countered that the termination of employment was not because of the exercise of a workplace right, but a result of the applicant’s inability to

²³ *Fair Work Act 2009* (Cth) ss 346–350.

²⁴ *Fair Work Act 2009* (Cth) s 351.

²⁵ *Fair Work Act 2009* (Cth) s 352.

²⁶ *Fair Work Act 2009* (Cth) s 353.

²⁷ *Fair Work Act 2009* (Cth) s 354.

²⁸ *Fair Work Act 2009* (Cth) s 355.

²⁹ *Fair Work Act 2009* (Cth) s 356.

³⁰ *Fair Work Act 2009* (Cth) ss 357–359.

³¹ [2012] FMCA 55.

establish effective working relationships (including, ironically, with one of the persons alleged to have harassed him).

40. In some cases, the unfair dismissal provisions of the *Fair Work Act 2009* (Cth) may be used to challenge a dismissal which was the culmination of 'bullying' behaviour³². However, apart from the fact that this remedy is available to a limited range of workers³³ and addresses the problem only after the damage has been done, the remedies available are restricted to reinstatement (which is rarely ordered, especially if the relationship has broken down) and capped compensation for economic loss³⁴.
41. Other avenues under the *Fair Work Act 2009* (Cth) include an action for breach of a term in an enterprise agreement which deals with health and safety in terms which may encompass 'bullying' behaviour³⁵. However, the utility of such terms will depend on their wording. Though supplying a useful mechanism for engendering appropriate workplace behaviour, they will not always support an action for compensation in the event of breach.

Workers' Compensation Laws

42. A claim may be made under workers' compensation laws, such as the *Accident Compensation Act 1985* (Vic) for compensation for physical or mental injury arising out of or in the course of employment³⁶. This would include injury arising from workplace misbehaviour, such as 'bullying'. Where stress is the manifestation of the injury, there are limitations.
43. Stress arising out of management action taken on reasonable grounds and in a reasonable manner is excluded from compensation.³⁷ The complication is that the line between bullying and legitimate discipline, or other specified action, is a fine one indeed and the hurdle of proving that action was taken unreasonably will often deter the aggrieved worker from pursuing the matter.
44. There is also provision, under the *Accident Compensation Act 1985* (Vic), for civil action where there has been, in effect, victimising conduct against a person who has or has asserted rights under the Act³⁸. While such conduct may overlap with 'bullying' behaviour, it has relatively narrow application.

³² See for example *Harley v Aristocrat Technologies Australia Pty Ltd* [2010] FWA 62.

³³ *Fair Work Act 2009* (Cth) ss 382, 384, 386(2).

³⁴ *Fair Work Act 2009* (Cth) s 392.

³⁵ See for example cl 57 of the Monash University Enterprise Agreement (Academic and Professional Staff) 2009.

³⁶ *Accident Compensation Act 1985* (Vic) ss 5 (definition of injury) & 82.

³⁷ *Accident Compensation Act 1985* (Vic) s 82(2A).

³⁸ *Accident Compensation Act 1985* (Vic) s 242AD.

Common Law (Tort) rights

45. At common law, employers may be held to be vicariously liable for the criminal and other 'bullying' conduct of employees but only where it can be shown that the employer knew or should have known that the conduct was occurring; that it was likely to cause harm to the victim; or that there was a failure on the part of the employer to take reasonable care. In these circumstances, an employer would be liable to pay damages for the injury sustained by the employee. These common law rights are, however, subject to significant limitations in various jurisdictions by operation of workers compensation laws. In Victoria for example, even if it can be shown that the risk of injury was foreseeable, an employer can be sued for damages only if the worker has suffered a serious injury, which is, for most purposes, deemed to be either a 30% impairment or more³⁹. This means that even if a worker can show that an employer has negligently allowed the injury to occur, unless the conduct has resulted in a "serious injury" there is generally no right to claim damages.
46. While there have been occasional successful actions at common law for 'bullying' behaviour⁴⁰ in some jurisdictions, they are few and far between.

Contractual Rights

47. There are various terms, in employment contracts, which are relevant to potential claims involving 'bullying' behaviour. In some cases, workplace behaviour policies are incorporated into the contract and provide a platform for action⁴¹. In other cases, courts or tribunals have accepted the existence of relevant implied terms, such as the provision of a safe workplace, or to act in good faith⁴², or not to act in a manner calculated or likely to destroy mutual trust and confidence in the employment relationship⁴³. There remains some debate about the parameters, and perhaps the existence, of a term of mutual obligation of trust and confidence⁴⁴. Thus, while there have been cases in which employees have successfully sued for breach of contract constituted by 'bullying' behaviour, in practice, few workers can afford the legal cost involved in bringing an action based purely on breach of contract.

³⁹ *Accident Compensation Act 1985* (Vic) s 134AB(15) & (16)

⁴⁰ For example, *Nationwide News Pty Ltd v Naidu*; *ISS Security v Naidu* [2007] NSWCA 377

⁴¹ For example, *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120

⁴² For example, *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104

⁴³ For example, *Gillies v Downer EDI Ltd* [2011] NSWSC 1055

⁴⁴ For example, *South Australia v McDonald* [2009]SASC 219; *Dye v Commonwealth Securities Limited* [2012] FCA 242.

Criminal law

48. On 31 May 2011, the Victorian Government passed legislation known informally as 'Brodie's Law' which made 'bullying' conduct a criminal offence in some circumstances. Emphasising the serious dimensions of such behaviour, Brodie's Law meant that certain types of offensive conduct associated with 'bullying' were recognised as a crime in certain limited circumstances.
49. The relevant provisions are now located in the definition of 'stalking' in the Crimes Act and in the *Personal Safety Intervention Orders Act 2010* (Vic). The offence of stalking is set out in s 21A of the *Crimes Act* (Vic) and is punishable by a maximum 10 years imprisonment. The *Personal Safety Intervention Orders Act 2010* (Vic) contains mechanisms whereby certain orders may be obtained to protect those who are subjected to behaviour often associated with 'bullying', such as stalking, among other things. Under the changes, the offence of stalking has been extended to include common aspects of 'bullying' behaviour, such as making threats to the victim, using abusive or offensive words to, or in the presence of, the victim, performing abusive or offensive acts in the presence of the victim, or directing abusive or offensive acts towards the victim.
50. For the behaviour to constitute a criminal offence, the conduct must be done "with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any person". The definition of harm has been extended to include psychological harm and suicidal thoughts including "self-harm".
51. Victims of a crime are entitled to claim compensation under the *Victims of Crime Assistance Act 1996* (Vic). However, crimes compensation awards will take into account other damages or compensation which may have been recovered⁴⁵.
52. In our view, most workers who are 'bullied' at work will have difficulty showing that the perpetrator has committed a crime. The threshold for the requisite conduct is high.

⁴⁵ *Victims of Crime Assistance Act 1996* (Vic) s 16.

RECOMMENDATIONS

53. The range of conduct caught by the laws listed above will not always capture ‘bullying’ behaviour or, even if it is captured, may not furnish an individual with a right to sue and/or seek individualised redress. There should be a discrete, stand-alone mechanism enabling a worker to take action. It should not exclude conduct which might intersect with rights under other laws.
54. A national uniform statutory definition of ‘bullying’, which does not require that conduct be ‘repeated’, should be established. Key elements, in the context of work, should be:
- unreasonable behaviour directed towards a worker or workers; and
 - the creation (or potential creation) of a risk to their health and safety.
55. Consideration should also be given to the introduction of a duty to eliminate ‘bullying’. A precedent may be found in the *Equal Opportunity Act 2010* (Vic), which establishes a duty to eliminate discrimination, harassment and victimisation⁴⁶. Those who have a duty under Part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation, must take ‘*reasonable and proportionate measures*’ to eliminate discrimination, sexual harassment and victimisation as far as possible⁴⁷. There is a list of factors which must be considered in determining whether a measure is reasonable and proportionate (for example, size and nature of the business or operations, the person’s resources and so on)⁴⁸. A contravention of the duty cannot be the basis for a dispute before the Commission or an application to VCAT⁴⁹, but may be the subject of an investigation by the Equal Opportunity and Human Rights Commission⁵⁰.

CONCLUSION

56. In circumstances where other laws already encourage the establishment of precautions to prevent workplace discrimination, sexual harassment, disability harassment, racial and religious vilification and the like, the addition of anti-‘bullying’ measures would be a negligible additional administrative burden. Many employers already have anti-‘bullying’ policies and have a commitment to prevention and elimination of the problem .

⁴⁶ *Equal Opportunity Act 2010* (Vic) s 15.

⁴⁷ *Equal Opportunity Act 2010* (Vic) s 15.

⁴⁸ *Equal Opportunity Act 2010* (Vic) s 15(6).

⁴⁹ *Equal Opportunity Act 2010* (Vic) s 15(3).

⁵⁰ *Equal Opportunity Act 2010* (Vic) s 15(4).

57. The economic and social benefits of preventing and addressing ‘bullying’ behaviour in a more streamlined and effective way would be significant, in terms of workplace health and safety and savings on direct and indirect costs, such as those associated with productivity, insurance, workers’ compensation and sick leave⁵¹. Conversely, the costs of leaving the problem unaddressed are high.

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⁵¹ See Productivity Commission, Research Report March 2010 “*Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety*” at 286–288.