The Parliament of the Commonwealth of Australia

Workplace Bullying

We just want it to stop

House of Representatives
Standing Committee on Education and Employment

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DISSENTING REPORT

Foreword

In workplaces across the country, tragically there are too many Australians being bullied at work. This problem is not exclusive to one jurisdiction, one industry, or one 'type' of worker.

Described as a form of psychological violence, workplace bullying can result in significant damage to an individual's health and wellbeing, and in extreme cases, can lead targets of bullying to suicide. Such behaviour can also undercut the productivity of an entire organisation, which incurs financial costs to employers and the national economy. Beyond the enormous personal and organisational costs, the Productivity Commission estimates that workplace bullying costs the Australian economy between $6 billion and $36 billion annually.

The Committee's inquiry was announced against the backdrop of an ongoing, nation-wide harmonisation process of work health and safety legislation, the primary area of regulation of the risks of bullying at work. Since the Committee adopted this report in late October 2012, the South Australian Parliament passed model work health and safety legislation on 1 November 2012. Harmonised work health and safety laws have now been adopted in all jurisdictions, with the exceptions of Victoria and Western Australia.

In addition to harmonisation efforts, governments, unions and industry groups are collaborating to develop a nationally consistent Code of Practice on workplace bullying. The purpose of the Code is to provide practical guidance to workers and employers to tackle immediate concerns, as well as to assist them to achieve the goal of positive, functional and productive workplaces.

The Committee trusts that this report complements the ongoing efforts of the state and territory governments to harmonise work health and safety laws as well as the finalisation of the Code.

All too frequently the Committee heard about the regulatory 'minefield' that both individual workers and employers face when confronted with bullying at work. These challenges add layers of complexity to already difficult experiences.

Diverse and contrasting regulation complicates broad public understanding of these laws as well as the system which enforces their application. This is the reason why the Committee is calling for a new single national advisory service, to help workers and employers to identify what is and what is not bullying behaviour; to clarify the extent to which workplace bullying is dealt with by workplace health and safety legislation versus antidiscrimination law, industrial relations' instruments, workers' compensation schemes and, in some cases, criminal law; and to provide a range of options for resolving the problem.

Although the Committee heard that Australia's approach to addressing workplace bullying, through a risk management rubric, is an example of international best practice, the Committee believes that there is real momentum in the Australian community to do more to prevent and manage bullying, as well as better support those workers who have been bullied.

On behalf of my colleagues, I wish to thank all those who contributed to this inquiry. We are especially grateful to the hundreds of individual participants who courageously shared their personal experiences of workplace bullying. Whether a written submission was made, or an oral statement provided in a closed session, these personal accounts were deeply moving and an important component of the evidence gathering process in every state and territory.

The title of this report stems from the repeated calls from these statements and submissions where the first and foremost call of individuals was a wish for the behaviour to just stop.

A key objective of the Committee's inquiry was to enable individual Australians to come forward, tell their stories, and give some insight into the prevalence of workplace bullying. Excerpts of these powerful stories are included throughout the Committee's report and pinpoint the acute need in the community for Australians to do more to eradicate bullying from the workplace.

Amanda Rishworth MP
Chair

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Terms of reference

Workplace bullying can have a profound effect on all aspects of a person's health as well as their work and family life. It also has significant flow-on effects for the community and the economy, with the Productivity Commission estimating the total cost of workplace bullying in Australia at between $6 billion and $36 billion annually.

The terms of reference for the inquiry will focus on:

- the prevalence of workplace bullying in Australia and the experience of victims of workplace bullying;
- the role of workplace cultures in preventing and responding to bullying and the capacity for workplace-based policies and procedures to influence the incidence and seriousness of workplace bullying;
- the adequacy of existing education and support services to prevent and respond to workplace bullying and whether there are further opportunities to raise awareness of workplace bullying such as community forums;
- whether there is scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent workplace bullying;
- whether there are regulatory, administrative or cross-jurisdictional and international legal and policy gaps that should be addressed in the interests of enhancing protection against and providing an early response to workplace bullying, including through appropriate complaint mechanisms;
- whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying;
- the most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another; and

- possible improvements to the national evidence base on workplace bullying.

List of abbreviations

ACCI	Australian Chamber of Commerce and Industry
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
AFEI	Australian Federation of Employers and Industries
AIER	Australian Institute of Employment Rights
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
AiG	Australian Industry Group
AMF	The Alannah and Madeline Foundation
APS	Australian Public Service
APSC	Australian Public Service Commission
ASU	Australian Services Union
AWB	Australian Workplace Barometer
CCIQ	Chamber of Commerce and Industry Queensland
CCIWA	Chamber of Commerce and Industry Western Australia
CCNT	Chamber of Commerce Northern Territory

CFMEU-MENDB	Construction, Forestry, Mining and Energy Union, Mining and Energy, Northern District Branch
COAG	Council of Australian Governments
CPSU	Community and Public Sector Union
CPSU-SPSFG	Community and Public Sector Union, State Public Services Federation Group
DCA	Diversity Council of Australia
DEEWR	Department of Education, Employment and Workplace Relations
DTC	Davidson Trahaire Corpsych
EASA	Employee Assistance Service Australia
ELC	Employment Law Centre of Western Australia
EOCWA	Equal Opportunity Commission of Western Australia
HR	Human resources
IEUA	Independent Education Union of Australia
ILO	International Labour Organisation
KPI	Key performance indicator
MBA	Master Builders Association
MEA	Master Electricians Australia
NNWWC	National Network of Working Women Centres
NTIBN	Northern Territory Indigenous Business Network
NTWWC	Northern Territory Working Women's Centre
PC	Productivity Commission
PCBU	Person conducting a business or undertaking
RCT Solicitors	Ryan Carlisle Thomas Solicitors

SJ&A	Sally Jetson and Associates
SME	Small and medium-sized enterprises
UMFA	United Mineworkers' Federation of Australia
VACC	Victorian Automobile Chamber of Commerce
VTHC	Victorian Trades Hall Council
WCR	Workplace Conflict Resolution
WHS	Work health and safety

List of recommendations

1 Workplace bullying: we just want it to stop

Recommendation 1

The Committee recommends that the Commonwealth Government promote national adoption of the following definition: workplace bullying is repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety.

Recommendation 2

The Committee recommends that the Commonwealth Government develop a national advisory service that provides practical and operational advice on what does and does not constitute workplace bullying, and offers self-assessment and guidance materials to workers and employers to determine whether behaviour meets the workplace bullying definition established in Recommendation 1.

2 Legislative and regulatory frameworks

Recommendation 3

The Committee recommends that the Commonwealth Government, through Safe Work Australia urgently progress the draft *Code of Practice: Managing the Risk of Workplace Bullying* to a final version and that members of Safe Work Australia adopt the Code in all jurisdictions.

Recommendation 4

The Committee recommends that Safe Work Australia work with all jurisdictions to actively promote and implement the Code of Practice and ensure it is embedded in workplaces.

Recommendation 5

The Committee recommends that the Commonwealth Government seek agreement through Safe Work Australia for the development and implementation of model Work Health and Safety Regulations that capture the minimum requirements for managing the risks of workplace bullying, applicable to all workplaces, as currently established in the draft *Code of Practice: Managing the Risk of Workplace Bullying*.

3 From legislation to implementation

Recommendation 6

The Committee recommends that Safe Work Australia develop advice materials for employers that provide guidance on how to maintain the confidentiality of parties when responding to reports of workplace bullying, whilst also enabling the response to be transparent, similar to the risk management responses of other work health and safety hazards.

Recommendation 7

The Committee recommends that the Minister for Employment and Workplace Relations commence a feasibility study of the Commonwealth Government providing an independent investigation referral service, and include consultation of the relevant stakeholders when conducting that study.

Recommendation 8

The Committee recommends that the Commonwealth Government:

- review how the fit for duty test under the Public Service Regulations 1999 is used to respond to bullying across the Australian Public Service and what safeguards are in place for its appropriate use;
- publish a report setting out the findings of that review for transparency and to ensure it is available to all public servants;
- make any necessary amendments to the legislation or public service policies to ensure that there are adequate safeguards in place for the appropriate use of the fit for duty test and there are easily accessible avenues for review should an allegation of misuse be made;
- require the Australian Public Service Commission to collect data about the particular grounds on which fit for duty review applications are made to the Merit Protection Commissioner to ensure accountability for the use of that power; and
- encourage its state and territory counterparts to similarly ensure there are safeguards in place in regards to the comparable provision in their public service legislation.

Recommendation 9

The Committee recommends that the Commonwealth Government, through Safe Work Australia, develop advice materials for employers that detail appropriate responses to and outcomes for reports of workplace bullying.

4 Workplace cultures

Recommendation 10

The Committee recommends that the Commonwealth Government, through the Centre of Workplace Leadership and in conjunction with industry and employer groups, work to promote the economic benefits of positive working environments that are free from workplace bullying.

5 Enhancing tools for the prevention and resolution of workplace bullying

Recommendation 11

The Committee recommends that the Commonwealth Government, in consultation with stakeholders, establish a new national service to provide advice, assistance and resolution services to employers and workers. Its activities should include:

- a hotline service to provide advice to employers and workers alike on a variety of topics including:
  - ⇒ practical, preventative and proactive steps that employers can take to reduce the risk of workplace bullying;
  - ⇒ empowering workers to respond early to the problem behaviour they encounter;
  - ⇒ provide advice to workers who have been accused of bullying others in their workplace;
- providing downloadable training packages for employers to tailor to their industry and size;
- a proactive, onsite and ongoing education service targeting specific industries where bullying is known to be particularly problematic;
- resolution assistance services including information about how and when to engage mediation sessions between the workers concerned; and
- collating information when providing the above services, and contributing to improving the national evidence base in Australia on workplace bullying.

Recommendation 12

The Committee recommends that the Commonwealth Government, through Safe Work Australia, develop an accredited training program for managers and health and safety representatives to equip them to deal with workplace bullying matters.

Recommendation 13

The Committee recommends that the Minister for Employment and Workplace Relations develop a trial mediation service for resolution of conflicts where there is a risk of bullying arising out of poor workplace behaviour, prioritising small and medium enterprises, and where employers and workers jointly request the use of the service in an effort to resolve the matter.

Recommendation 14

The Committee recommends the Commonwealth Government work with its state and territory counterparts to develop better cross-agency protocols in respect of workplace bullying, to allow for better information-sharing, cross-jurisdictional advice and complaint referrals across the following areas of regulation:

- work health and safety laws;
- industrial relations laws;
- antidiscrimination laws
- workers compensation laws; and
- relevant criminal laws.

Recommendation 15

The Committee recommends that the Minister for Employment and Workplace Relations consider implementing, in conjunction with stakeholders, a voluntary national accreditation system to recognise and award employers who achieve best practice and meet defined standards of psychosocial health and safety.

Recommendation 16

The Committee recommends that the Minister for Employment and Workplace Relations work with state and territory counterparts to specifically recognise good practice in workplace psychosocial health and safety through instituting annual employer awards in all jurisdictions throughout Australia.

Recommendation 17

The Committee recommends that the Minister for Employment and Workplace Relations commission research into the prevalence and long-

term trends of workplace bullying in Australia using the definition provided in Recommendation 1.

Recommendation 18

The Committee recommends that Safe Work Australia issues an annual national statement which updates any emerging trends of its collated data from each of the state and territory regulators, and the Commonwealth, with respect to psychosocial health and safety generally and workplace bullying specifically.

Recommendation 19

The Committee recommends that the Minister for Youth and the Minister for Employment and Workplace Relations work with their state and territory counterparts to develop targeted initiatives for young Australians undertaking the transition from school to work, about their rights and responsibilities at work.

6 Enforcement and remedies

Recommendation 20

The Committee recommends that the Commonwealth Government, through Safe Work Australia, develop a national accredited training program for all work health and safety inspectors that equips inspectors to identify and address instances of workplace bullying.

Recommendation 21

The Committee recommends that the Commonwealth Government seek agreement from the work health and safety regulators of each jurisdiction through the Safe Work Australia process, for the development and endorsement of a uniform national approach to compliance and enforcement policy for preventing and responding to workplace bullying matters.

Recommendation 22

The Committee recommends that, through the Standing Council on Law and Justice, the Commonwealth Government:

- encourage all state and territory governments to coordinate and collaborate to ensure that their criminal laws are as extensive as Brodie's Law; and
- encourage state and territory governments to consider greater enforcement of their criminal laws in cases of serious workplace bullying, regardless of whether work health and safety laws are being enforced.

Recommendation 23

The Committee recommends that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process.

1

Workplace bullying: we just want it to stop

Bullying undermines the victim's deepest sense of self, of who they are. As adults we think we have figured out who we are, and so to have that completely undermined and stripped away is utterly crippling and that is why it is so destructive.[1]

Bullying is the key workplace health and safety issue of our time. It can affect anyone in any job, regardless of what task they perform, what kind of people they work with, or of what industry they are part. These issues are not easy and they need to be tackled head on, rather than ignored until they become so unbearable for people that they cannot face going to work.[2]

Introduction

The significance of workplace bullying

1.1 To most Australians, work provides a sense of dignity and is central to our individual and collective sense of identity. The value of work is not simply that a very large part of life is spent working, nor that work is the primary means to gaining a livelihood, and therefore ensuring material survival. Rather, work has a more complex meaning interwoven in the creation of a sense of self.

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1 SF, *Committee Hansard*, Closed Session.

2 Carlo Caponecchia and Anne Wyatt, *Preventing Workplace Bullying: An evidence-based guide for managers and employees*, Allen & Unwin, Crows Nest, NSW, 2011, p. 139.

1.2 The significance of work is also larger than its meaning to the individual. Work plays a critical role in the constitution of a society as the interdependence of citizens through their work, is one of the most important structural bonds of any community. [3]

1.3 Workplace bullying can therefore disturb both the individual and social conceptions of self and value. Workplace bullying is a dynamic and complex phenomenon and its causes are often multifaceted and its impact individual and varied. It can have a profound effect on all aspects of a person's health as well as their work and family life, undermining self-esteem, productivity and morale. For some it can result in a permanent departure from the labour market and in extreme cases, suicide.

1.4 Bullying behaviours might range from subtle actions that seek to exclude, isolate or marginalise, to extreme acts of physical violence resulting in death or serious injury. Yet it is common for many targets of this behaviour to struggle to identify these encounters as bullying. Frequently, it is only when they seek the guidance or support of others that they identify that their experience is causing damage to, or creates a great risk to, their health and wellbeing.

1.5 Unfortunately, there are illusory distinctions between physical and psychological workplace hazards or injuries. Psychological injuries in particular, are often seen as 'soft issues', as the sole responsibility of the individual, or stigmatised as 'craziness'. Such hazards can be seen as too 'variable' to manage the risk created. [4]

1.6 Workplace bullying experts, Dr Carlo Caponecchia and Dr Anne Wyatt commented:

> There is also the fear that taking action to prevent and control psychological hazards will unleash a flood of similar complaints, and ultimately end in litigation, finger pointing and threatened careers. These perceptions are baseless, inadequate [and] irresponsible. [5]

1.7 Indeed, like other triggers of stress, physical and emotional responses to workplace bullying are diverse. The Australian community should not dismiss workplace bullying as a 'grey area' or relegate it to the too-hard

3 Rosemary Owens, 'Decent Work for the Contingent Workforce in the New Economy', *Australian Journal of Labour Law*, vol. 15, 2002, p. 209.

4 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, pp. 139-140.

5 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 140.

basket. Preventing and managing bullying is a challenge, but it is a challenge that if met, will reap benefits for all workers and organisations. [6]

1.8 This inquiry arose out of increasing national attention on the prevalence of bullying in Australian workplaces. The Committee has sought to understand the experience, prevalence and cost of workplace bullying.

The experience of workplace bullying

1.9 The Australian Institute of Employment Rights observed that for an increasing number of Australians, their experience of work and treatment within the workplace is a negative one.[7] The International Labour Organisation (ILO) describes workplace bullying as a form of psychological violence. The ILO argues:

> Workplace bullying constitutes offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees. Such persistently negative attacks on their personal and professional performance are typically unpredictable, irrational and unfair.[8]

1.10 According to Davidson Trahaire Corpsych (DTC), a leading organisational psychology consulting firm, the most common form of workplace bullying is verbal abuse: shouting, swearing, malicious sarcasm, intimidating behaviours and undeserved evaluations.[9]

1.11 Examples of bullying include:

- abusive, insulting or offensive language or comments;
- undue criticism;
- excluding, isolating or marginalising a person form normal work activities;
- withholding information that is vital for effective work performance;
- unreasonably overloading a person with work or not providing enough work;

6 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 140.

7 Australian Institute of Employment Rights, *Submission 109*, p. 4.

8 International Labour Organisation, *Violence at Work: A major workplace problem*, 1 January 2009, referenced in Australian Industry Group (AiG), *Submission 59*, p. 7.

9 Ms Michele Grow, Chief Executive Director, Davidson Trahaire Corpsych (DTC), *Committee Hansard*, Canberra, 13 September 2012, p. 1.

- setting unreasonable timelines or constantly changing deadlines;
- setting tasks that are unreasonably below or beyond a person's skill level;
- denying access to information, supervision, consultation or resources such that it has a detriment to the worker;
- spreading misinformation or malicious rumours;
- changing work arrangements, such as rosters and leave, to the detriment of a worker or workers; and
- unreasonable treatment in relation to accessing workplace entitlements such as leave or training.[10]

1.12 Bullying can also manifest in more predatory activities. In a case that gained national attention in 2006, Brodie Panlock, a 19 year old waitress, tragically took her own life after enduring persistent and vicious bullying at work. Evidence raised in the resulting court case revealed that Brodie had been the subject of continual physical and emotional abuse. In one of the more horrific incidents, Brodie was physically restrained whilst her manager, and cafe owner, poured oil over her. Mrs Rae Panlock, Brodie's mother commented on her daughter's experience:

> She was a very strong person. I think I have said it a few times, but she used to soldier on and get over whatever was going on. But the impact was just too much. It was not just one person; it was four men: the owner and three individuals. They just kept on pursuing her. This is the other thing. The people who worked there other than these men did try but did not try enough. A lot of them said in the court case they wished they had done more.[11]

1.13 Recent advances in technology and greater social engagement in the online world are also extending the work environment into the private sphere of workers. Mirroring the phenomenon occurring in schools, workplace bullying is beginning to occur through online technologies, [12] casting doubt on the ability and responsibility of employers to respond to all these behaviours.

1.14 Further, bullying may manifest in different ways according to the nature of certain industries. For example, 'initiation ceremonies' are more likely to occur in certain sectors or amongst workers of a certain age. A recent

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10 Safe Work Australia, *Draft Code of Practice: Managing the Risk of Workplace Bullying* (*Draft Code of Practice*), July 2012, p. 4.

11 Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 53.

12 Ms Sandra Craig, Manager, National Centre Against Bullying, Alannah and Madeline Foundation, *Committee Hansard*, Melbourne, 11 July 2012, pp. 41- 42.

case in New South Wales was successfully prosecuted after five workers wrapped a 16-year-old asthmatic apprentice-labourer in cling wrap. These workers then forced sawdust into his mouth as part of an 'induction' into the workplace.[13]

1.15 Although the Committee heard numerous personal accounts of psychological bullying in the workplace, there are no Australian examples of these cases pursued in the courts. The cases pursued in the courts are physical, rather than psychological bullying.

1.16 For example, the Committee heard of psychologically abusive group behaviour, known as 'mobbing'.[14] The intent of 'mobbing' is usually to try to drive a worker from the workplace. Evidence received by the Committee indicates that this phenomenon is particularly present in the teaching and nursing professions. The following individual impact statement was given by a teacher at one of the Committee's closed sessions:

> Imagine that your favourite teacher at school, the one who impacted you the most and shaped who you are today, was found dead one morning, a suicide note the only indication that their death was the direct result of behaviours they had tolerated at the hands of bullies in their staffroom.
>
> Workplace mobbing is described in the international literature in ways such as these: workplace mobbing is an emotional assault; one individual gathers others to participate in continuous, malevolent actions to harm, control or force another person out of the workplace. The victim feels increasingly helpless when the organisation does not put a stop to the behaviour and may plan or even condone it. …Workplace mobbing targets people who are high achievers, are enthusiastic and volunteer at work, love what they do, have integrity and ethical standards, and promote human rights, dignity and respect. These are the people that are targeted by this brand of bullying.[15]

1.17 Irrespective of form, mode, or context, bullying is characterised by an abuse of power, where vulnerable targets are 'pushed into positions from which they have no avenue of escape'.[16] As such, bullying is part of a

13 Unions NSW, *Submission 61*, p. 26.

14 Safe Work Australia, *Submission 74,* p.

15 GM, *Committee Hansard*, Closed Session.

16 Dr Donna Louise McGrath, *Submission 87*, p. 3.

'continuum of severity of the misuse of authority or actual power'.[17] Importantly, the concept of a power imbalance is not limited to traditional worker-manager hierarchies.

1.18 Bullying can be downwards (from superiors to subordinates), upwards (from subordinates to superiors) or horizontal (amongst co-workers). Notions of power need to be viewed in a broad manner, rather than simple hierarchies.[18] Speaking specifically about upwards and horizontal bullying, Dr Sara Branch, a research fellow at Griffith University, observed:

> The recognition of upwards and horizontal bullying emphasises that processes beyond formal power are at play and that bullying is not just conducted by managers. Power derived by a person's access to informal sources such as expertise and information can be used along with formal sources to gain sufficient power to bully others in the workplace.[19]

1.19 Bullying in workplaces can quickly escalate into a 'drama spiral'. Namely, what begins as bullying between two primary workers is unlikely to be contained to those people alone. Caponecchia and Wyatt discuss the 'escalating drama spiral' that can result when inappropriate behaviour is not addressed early:

> What generally happens, over time, is an escalating drama spiral with a number of players, or stakeholders, in varying roles playing out the 'story'. The roles may include 'bully', 'target', 'bystander', people responsible for intervening, family and friends of the various stakeholders, other people who work in the organisation and possibly to organisation's consumers. ... The 'drama' attracts more players as time goes by and the situation will reach out and affect other stakeholders. Over time the original issue may well be lost sight of and the truth radically distorted.[20]

1.20 Experiencing bullying at work can lead to a feeling of being trapped. In some cases, the targets of bullying behaviours are caught in a 'trifecta': a toxic working environment, difficult financial circumstances and not having options for alternative employment. When trapped in that

17 Ms Moira Rayner, Deputy Chair, Workplace Relations Section, Law Institute of Victoria, *Committee Hansard*, Melbourne, 11 July 2012, p. 14.

18 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, pp. 8-9.

19 Dr Sara Branch, Research Fellow, Key Centre for Ethics, Law, Justice and Governance, Griffith University, *Committee Hansard*, Brisbane, 18 July 2012, p. 10.

20 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, pp. 61-62.

situation, individuals can feel disempowered and unable to regain control of their surrounds.[21]

1.21 The impacts of bullying can be extreme with its effects extending into all areas of day-to-day activities, family life and broader social engagement. The following comments were made by individual participants in the inquiry who have experienced workplace bullying first-hand.

> As a result of my combined two experiences I have given up my career as a research scientist. I am too afraid to go back and put myself in those situations again. It was a career that I loved, and I feel a great sense of loss at the situation I now find myself in. I never expected to become a target of bullying. I used to think of myself as a strong and resilient person, but the stress that was caused by my situation—the fear of losing my job and my career—had an extreme impact on me. My doctor told me that the symptoms I felt were similar to the symptoms that someone has in a life or death situation, and that the situation was prolonged by several months, in fact more than a year, because the processes were not put in place properly to deal with my complaint.[22]
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> I have been in the same organisation [as my husband] since 1986. I had a variety of roles. The most current one is as work health and safety adviser, which I find a great deal of conflict with because the organisation has failed my husband; he was suicidal. It has failed so many other people. You have people in tears in the workplace, and the workplace does nothing. We have the legislation. I was the one that provided the training. I wrote the presentation packages for the whole of this organisation. I know what it is supposed to do.[23]
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> Things became worse over the years. I attempted addressing my concerns with the 'bullying'. She denied that her intentions were harmful and said she would never bully anyone as she had been bullied at school. When I did speak to her about specific incidences she said she was joking. I reported the matter to my immediate supervisor who said I'd be fine because I was a strong and stable person whereas the 'bully' was insecure and had problems relating to her childhood. The behaviours were

21 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 3.

22 JE, *Committee Hansard*, Closed Session.

23 LW, *Committee Hansard*, Closed Session.

> constant and unrelenting. She attempted to engage all new staff in the fiasco. Most of the permanent staff knew better than to believe the lies yet all of us were powerless. Others reported the issue to our supervisor. Still, nothing was done. I began to withdraw and not function as well at work as I used to which only gave her more ammunition.[24]
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> **
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> To those who have not personally experienced bullying or victimisation in the workplace the health consequences can sometimes be difficult to appreciate. The reality is that for almost all of us our work is the primary source of our income and, consequently, the lynchpin sustaining most of our aspirations as well as the things we enjoy in our everyday lives. When we are personally denigrated in the workplace on a systematic basis and our key source of income is threatened the consequences can be devastating. Like a cancer, the experience can seep into every facet of one's life and cause ongoing problems including anxiety, frustration, depressed mood and difficulty relating to other people in a normal way. The primary cause of the problem is the power imbalance between the bully and the victim, with the latter typically feeling powerless to do anything about the behaviour due to reliance on the income from his or her job or, perhaps, a desire for a favourable reference.[25]

Prevalence and national evidence base

1.22 Bullying, particularly in the workplace, has been described as a 'hidden problem'.[26] The prevalence of workplace bullying in Australia cannot be determined with any precision due to the absence of a national evidence base from which such indicators might be drawn. Consequently, various studies report widely different estimates of the prevalence of bullying in Australian workplaces.[27]

1.23 A commonly accepted estimate of the prevalence of workplace bullying in Australia comes from the Australian Workplace Barometer (AWB) project (2009-11). The AWB project found that 6.8 per cent of Australian workers

24 WM, *Submission 152*, p. 2.

25 CP, *Submission 145*, p. 2.

26 Workplace Investigation Services Pty Ltd, *Submission 98*, p. 7.

27 Safe Work Australia, *Submission 74*, p. 14.

had been bullied at work in the six months prior to being surveyed, with 3.5 per cent experiencing bullying for longer than a six month period.[28]

1.24 This figure is supported by the Personality and Total Health through Life project, a longitudinal study on mental and physical health managed by the Australian National University. This study also found that 6.8 per cent of workers had been bullied at work in the six months prior to being surveyed. The survey data was collected in 2011.[29]

1.25 However, the prevalence of workplace bullying could be far greater than this statistic. The Assistant Commissioner of the Productivity Commission (the PC) stated that 'it is probably higher than that ... it could be over 15 per cent'.[30] Professor Maryam Omari commented further:

> we are not capturing in whatever studies are done the actual rates of workplace bullying, which would be far higher than the 22 to 33 per cent that I have found.[31]

1.26 Similarly, DTC commented that every year they respond to 10,000 cases that relate to some form of workplace bullying. The Chief Executive Director, Ms Michele Grow, stated that the number who present or report their bullying is significantly higher than statistical analysis has found. Ms Grow commented that the figure is possibly closer to 'one in three' workers experience bullying at work.[32]

1.27 The Australian Public Service Commission (the APSC) found that 17 per cent of staff had experienced harassment or bullying at work. Only 0.13 per cent of these cases are investigated. The APSC believes that this higher rate of reported bullying could involve unfounded accusations. [33]

1.28 The discrepancy of estimates indicates an urgent need to improve Australia's evidence base. Yet, collating solid evidence faces many statistical challenges including:

- lack of common definition;
- self-reporting – may affect both under reporting and over reporting as workers and employer's struggle with defining behaviour as bullying;

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28 Referenced in Safe Work Australia, *Submission 74*, p. 14.

29 Referenced in Safe Work Australia, *Submission 74*, p. 14. Mr Rex Hoy, Chief Executive Officer, Safe Work Australia, *Committee Hansard*, Canberra, 17 August 2012, p. 12.

30 Ms Sue Elaine Holmes, Assistant Commissioner, Productivity Commission (PC), *Committee Hansard*, Canberra, 17 August 2012, p. 17.

31 Professor Maryam Omari, *Committee Hansard*, Perth, 8 August 2012, p. 2.

32 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 1.

33 Australian Public Service Commission, *Submission 122*, p. 2.

- lack of consistency in the research or data across Australian jurisdictions; or
- duplication – reports to state-based regulators may relate to the same instance as reported to federally-based industrial relations regulator or anti-discrimination commissions.[34]

1.29 Without a national evidence base, regulators and governments struggle to develop new initiatives or carve out the purpose and goals of new programs.

The cost of workplace bullying

1.30 The costs of workplace bullying are significant. The costs are myriad and involve individual workers, employers, industry, government and the community as a whole.

1.31 The PC estimates that workplace bullying costs the Australian economy between $6 billion and $36 billion every year.[35] Again, the absence of reliable, concentrated data on workplace bullying is reflected in this broad-ranging estimate.[36]

1.32 Other costs to the economy include public sector costs such as the health and medical services, and income support and other government benefits provided to individuals who prematurely depart the workforce based on their bullying experience and injuries suffered.[37]

The cost to employers

1.33 Workplace bullying costs employers an average of $17,000 to $24,000 per case.[38] These costs can be directly or indirectly borne by the employer.

1.34 The Australian Industry Group (the AiG) submitted:

> Bullying complaints not only reduce workplace morale, but can prove to be a costly and time-consuming exercise for employers. Employers may be faced with the potential costs of defending

34 Safe Work Australia, *Submission 74*, p. 14.

35 Productivity Commission, *Benchmarking Business Regulation: Occupational Health and Safety*, March 2010.

36 Ms Holmes, PC, *Committee Hansard*, Canberra, 17 August 2012, p. 17.

37 Diversity Council of Australia (DCA), *Submission 185*, p. 8.

38 Ms Holmes, PC, *Committee Hansard*, Canberra, 17 August 2012, p. 17.

> bullying allegations under work health and safety laws, legal representation, settling a complaint, and the negative publicity that may arise as a result of the complaint. Even if a complaint is resolved internally, there are costs associated with conducting an investigation.[39]

1.35 Harmers Workplace Lawyers commented that, in their experience, workplace bullying results in:

- staff turnover, and thus additional recruitment costs;
- management down-time – due to the significant time involved in responding to, and investigation of, allegations of workplace bullying;
- loss of productivity – due to sick leave and/or workers compensation claims;
- diminishment of workplace culture – worker morale can be negatively impacted due to workplace bullying; and
- impact on company reputation.[40]

1.36 The cost of lost productivity to employers was discussed by many other participants in the inquiry. For example, the Chief Executive Officer, Mr Rex Hoy, of the Commonwealth tripartite agency, Safe Work Australia said:

> I find it frustrating that a lot of businesses do not think that good performance in work health and safety can lead to improved productivity. We have been battling for a fair bit with companies to identify and report on performance in this area in terms of their bottom line. They just aggregate all of this in terms of their normal [human resource] performance, and you cannot get them to think about and focus on how good work in health will lead to good and improved productivity.
>
> ...some well-performing companies that have focused on this... claim that it actually leads to improved performance. It must lead to improved performance, because you reduce absenteeism and improve morale. It just goes without saying, but it is pretty hard to convince people.[41]

1.37 Safe Work Australia also contrasted the higher costs of workplace bullying compensation claims to those of 'traditional' (physical) injuries:

39 AiG, *Submission 59*, p. 10.

40 Harmers Workplace Lawyers, *Submission 88*, p. 4.

41 Mr Hoy, Safe Work Australia, *Committee Hansard*, Canberra, 17 August 2012, p. 19.

> For the financial year 2007-08 the average cost of a compensation claims due to workplace bullying/harassment was $41 700 and the average time lost from work was 25 weeks compared to the average cost of all claims of $13 300 and the average time lost from work of 7 weeks.[42]

1.38 These costs fail to account for the human costs including reduced quality of life for victims, colleagues, children, spouses and costs to the greater community.[43]

Personal costs

1.39 Individuals who experience workplace bullying suffer significant personal costs. The extent of these costs is influenced by the nature of the bullying behaviours, their duration, and the efficacy of responses. These costs are also influenced by factors intrinsic to the 'target' – their coping styles, perceptions and reactions as well as the personal support systems provided by family and friends.[44]

1.40 Bullying results in significant negative consequences for an individual's health and wellbeing. People who have been exposed to bullying at work have been found to experience the following:

- post-traumatic stress disorders;
- depression;
- anxiety;
- sleep disturbances;
- lowered self-esteem;
- anger;
- chronic fatigue;
- suicidal thoughts;
- irritability;
- feelings of nervousness, insecurity and victimisation;
- burnout;

42 Safe Work Australia, *Submission 74*, p. 13.

43 Australian Council of Trade Unions, *Submission 63*, p. 5.

44 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 41.

- musculoskeletal complaints and muscular tension;
- headaches;
- nausea;
- stomach upset; and
- social withdrawal. [45]

1.41 DTC reported that one in two people who experience bullying also suffer an 'extreme version of stress-related complications including stomach ulcers, tachycardia, hair loss, dermatitis, panic attacks, [and] irritable bowel syndrome'.[46]

1.42 Financial stress can be caused by the target needing time off work to treat the many physical and psychological consequences listed above. These additional costs can quickly escalate should the target pursue legal action against individuals, employers or submit workers compensation claims, all of which can be expensive and protracted experiences for already traumatised people.

1.43 Broader costs include social isolation, withdrawal from family or friends, and dismissal or loss of job promotion opportunities.[47] These can have significant flow-on effects to bystanders, co-workers, family and friends. In extreme cases, targets commit suicide with all the associated consequences for friends and family.

1.44 Mr Panlock discussed the effect that his daughter's suicide has had on his family:

> It impacted on our family. It was not just Brodie. She did the ultimate task, if you want to call it that. It has affected our family and it is nearly six years. It affected the whole family. It is not just us but our other children, their grandparents, cousins and so on.[48]

45 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 41.

46 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 2.

47 DCA, *Submission 185,* p. 7.

48 Mr Damian Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 52.

Definitions

Defining workplace bullying

1.45 Providing a definition of workplace bullying was a key issue throughout the inquiry. However, some participants cautioned that the debate about a definition might distract from the broader issue. The Northern Territory Working Women's Centre warned:

> It is an interesting debate. We actually shy away from talking too much about the definition, because it leads to so much discussion that it can detract from the actual issue. So we do not have a standard definition. As long as we are talking about repeated events—we are not talking about a one-off incident; we are talking about repeated events over a period of time that leave a person feeling powerless, and that they are harmed physically or psychologically. That, as far as we are concerned, is workplace bullying.[49]

1.46 Similarly, Dr Caponecchia stated:

> I think [defining workplace bullying] is sometimes a distractor and that the idea that we do not have a definition of workplace bullying in Australia is a little misleading. ... I think that sometimes saying that there is no definition or that it is still controversial is almost a barrier to doing something about this. I do not think we should be seduced by that at all.[50]

1.47 However, workers, their legal and industrial representatives, employer organisations, academics and employment assistance providers all supported adopting a nationally consistent definition of workplace bullying.[51]

1.48 Providing this guidance and assurance through a definition, it was argued, would give clarity and confidence for workers and employers alike.[52] The AiG referred to the colloquial, loose definitions of 'bullying' as

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49 Ms Rachael Uebergang, Co-coordinator, Northern Territory Working Women's Centre, *Committee Hansard*, Darwin, 17 July 2012, p. 4.

50 Dr Carlo Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 1.

51 Ms Katherine Eames, Industrial Services Officer, Queensland and Northern Territory Branch, Independent Education Union of Australia, *Committee Hansard*, Brisbane, 18 July 2012, p. 25; Mr Jason James O'Dwyer, Workplace Relations Manager, Master Electricians Australia (MEA), *Committee Hansard*, Brisbane, 18 July 2012, p. 31;

52 Dr Carlo Caponecchia, *Submission 81*, pp. 9-10.

'unacceptable or anti-social behaviour or behaviour that a person is unhappy with'.[53] Such behaviour is unlikely to amount to 'bullying' as provided under legislation.

1.49 All jurisdictions in Australia have definitions of workplace bullying in their respective guidance materials or regulations. However, there is neither a nationally consistent definition, nor an awareness of what behaviour amounts to workplace bullying. It may be that there is no wide-spread appreciation of these definitions, indicating that greater education is needed to increase awareness of the regulation of these behaviours.

1.50 Emerging from definitions adopted by the state, territory and federal jurisdictions, three criteria appear to dominate: the behaviours have to be repeated, unreasonable and cause a risk to health and safety. Dr Caponecchia commented:

> These criteria are relatively consistent across jurisdictions, and are fundamentally quite conservative in nature when they are properly applied. They are not always properly nor consistently applied when discussing or reporting bullying, which can lead to some mislabelled claims, and misdirected views.[54]

1.51 A cross-range of witnesses recommended the following definition:

> *Workplace bullying is repeated, unreasonable behaviour directed towards a worker, or group of workers, that creates a risk to health and safety*.[55]

1.52 'Repeated behaviour' is further defined as the persistent nature of the behaviour and can refer to a range of behaviours over time. 'Unreasonable behaviour' was also defined as behaviour that a reasonable person, having regard for the circumstances, would see as victimising, humiliating, undermining or threatening.[56]

1.53 Balanced against this definition is the need for managers to be able to manage their staff. It was argued by multiple participants in the inquiry that in order to ensure that employers are entitled to properly manage and monitor the conduct of their workers, the definition of workplace bullying must include exemptions for:

- reasonable performance management by an employer;

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53 AiG, *Submission 59*, p. 3.

54 Dr Caponecchia, *Submission 81*, p. 9.

55 Safe Work Australia, *Submission 74*, p. 10; Australian Chamber of Commerce and Industry (ACCI), *Submission 62*, p. 8.

56 Safe Work Australia, *Submission 74*, p. 10.

- reasonable disciplinary action by an employer; and
- reasonable management action.[57]

1.54 Performance management processes 'should not be a barrier to taking action on workplace bullying'.[58] Many witnesses indicated that clear and consistent identification of what bullying is, and what it is not, would help ameliorate concerns over false claims, or fears of being accused of bullying when counselling staff about their performance.[59]

Intentional versus unintentional bullying

1.55 The evidence received by the Committee indicates that under the definition of workplace bullying stipulated above, the intent of the perpetrator is not required to be established. Dr Sheryl Ramsay and Dr Jane Murray, researchers in the area of workplace bullying, observed that in their research, many workers are not aware of the effect of their behaviour in the workplace and consequently, bullying can be seen as 'accidental' or unintended.[60]

1.56 However, in a joint submission, Dr Moira Jenkins and Mr Karl Luke argued:

> Most definitions of bullying do not include intent as a requirement. Instead, a core component of bullying is said to be the subjective perception of the victim that repeated acts are hostile, humiliating and intimidating, and the unreasonable nature of the actions themselves. This is very similar to some definitions of sexual harassment, where the perpetrator may not have intended to cause humiliation or embarrassment, but their sexually suggestive actions have contributed to a target feeling intimidated and harassed.[61]

1.57 Similarly, Safe Work Australia also advises stakeholders of the differences between intentional and unintentional bullying. It submitted:

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57 Harmers Workplace Lawyers, *Submission 88*, p. 5; ACCI, *Submission 62*, p. 8; Mr O'Dwyer, MEA, *Committee Hansard*, Brisbane, 18 July 2012, pp. 31-32.

58 Dr Caponecchia, *Submission 81*, p. 9.

59 Dr Caponecchia, *Submission 81*, p. 9; Dr Jane Murray, Assistant Professor, Bond University, *Committee Hansard*, Brisbane, 18 July 2012, p. 8.

60 Dr Sheryl Ramsay, Senior Lecturer, Griffith University, *Committee Hansard*, Brisbane, 18 July 2012, p. 8; and Dr Jane Murray, Assistant Professor, Bond University, *Committee Hansard*, Brisbane, 18 July 2012, p. 8.

61 Moira Jenkins and Karl Luke, *Submission 210*, p. 15.

> Bullying can be intentional, where the actions are intended to humiliate, offend, intimidate or distress, whether or not the behaviour did have that effect. Bullying can also be unintentional, where actions which, although not intended to humiliate, offend, intimidate or distress, cause and should reasonably have been expected to cause that effect. Sometimes people do not realise that their behaviour can be harmful to others.[62]

1.58 Multiple other stakeholders, including the Law Society of Western Australia, the APSC and the Australian Nursing Federation also advocated that workplace bullying includes intentional and unintentional conduct.[63]

An aggravated single incident

1.59 The Law Society of New South Wales called for a definition that includes an 'aggravated single incident'.[64] Similarly, Professor Maryam Omari commented that the effect of a single traumatic incident can be 're-lived', and that the one action can be repeated in itself.[65] Extending the definition this way was not supported by all participants.

1.60 A single incident may have the potential to escalate and should not be ignored by employers.[66] However, broadening the definition to include aggravated single incidents may extend the responsibility of employers beyond what is reasonable.

1.61 Aggravated single incidents may be captured by the physical assault provisions of the criminal laws of each state and territory. Workplace bullying as physical assault is discussed in chapter 2.

1.62 The Committee does not support extending the definition to include single incidents, but supports the national adoption of the definition of workplace bullying as repeated, unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.

1.63 A consistent definition amongst the different jurisdictions would provide clarity to workers, their employers, assistance providers as well as the national debate. The case for national consistency is included in chapters 3 and 4.

62 Safe Work Australia, *Submission 74*, p. 31.

63 Law Society of Western Australia, *Submission 130 Attachment A*, p. 16; Australian Public Service Commission, *Submission 122*, p. 2; Australian Nursing Federation, *Submission 85*, p. 9..

64 Law Society of New South Wales, *Submission 123.1*, p. 2.

65 Professor Omari, *Committee Hansard*, Perth, 8 August 2012, p. 2.

66 *Draft Code of Practice*, July 2012, p. 4.

Recommendation 1

1.64 **The Committee recommends that the Commonwealth Government promote national adoption of the following definition: workplace bullying is repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety.**

1.65 To clarify, the Committee believes that the word 'directed' in Recommendation 1 encapsulates both intentional bullying behaviours and unintentional bullying. Intentional and unintentional bullying was discussed above.

Unpacking the definition: what is, and what is not, workplace bullying

1.66 A key concern throughout the inquiry has been the lack of available information on what is, and what is not, workplace bullying. Regulators do provide some guidance to employers and workers alike about what constitutes workplace bullying. However, this guidance provides examples of specific types of behaviour rather than a list of criteria or indicators of bullying.

1.67 Stakeholders advocated for a national advice service that provides some guidance as to whether the behaviour received, observed or reported amounts to bullying. Providing this preliminary and general advice will allow workers and employers to calibrate their response accordingly. The Queensland Law Society noted:

> misconceptions ... concerning the various concepts involved in this area of law…. Just as concerted efforts should be made to eliminate workplace bullying, similar efforts should be made in education of the wider community about the conduct that falls within and falls outside of the definition of workplace bullying.[67]

1.68 The Law Institute of Victoria submitted:

> It is vitally important for employers and employees to understand what constitutes bullying, what does not constitute bullying, and who has duties in relation to bullying in the workplace.[68]

1.69 Dr Jane Murray from Bond University also discussed how clarity around the definition will assist national discussion and drive change:

67 Queensland Law Society, *Submission 73*, p. 1.

68 Law Institute of Victoria, *Submission 52*, p. 1.

> If we are educating people about what workplace bullying is, we also need to be educating them about what workplace bullying is not, so that everybody is coming from the same page. …We do not want to create panic; we want to say, 'This is what it is and this is what it is not, and now here are some ways in which we can upskill ourselves as a population in the workplace to make sure that it doesn't happen.'[69]

1.70 Dr Caponecchia discussed the development of a 'decision tool' to guide stakeholders through a self-assessment against established criteria. Dr Caponecchia stated:

> I think a lot of our problems would be solved if there were some tools to help people decide in a cool-headed manner: is what is happening to me likely to meet those criteria? …We are proposing a decision tool that helps people make that decision. I think there needs to be some work done on that.[70]

1.71 Providing this basic clarity to the two primary stakeholders, workers and employers, is a first step. Indentifying poor workplace behaviour that is bullying will not resolve the problem alone. But it does prompt the parties, and their support networks, to act to address the behaviour and work to improve the system and culture that permitted it to arise.

Recommendation 2

1.72 **The Committee recommends that the Commonwealth Government develop a national advisory service that provides practical and operational advice on what does and does not constitute workplace bullying, and offers self-assessment and guidance materials to workers and employers to determine whether behaviour meets the workplace bullying definition established in Recommendation 1.**

1.73 Throughout this report, the Committee will make several recommendations that call on the Commonwealth Government to establish a new service. Although these recommendations are dispersed, the Committee wishes to clarify that these new national services could be delivered by a single agency.

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69 Dr Murray, Bond University, *Committee Hansard*, Brisbane, 18 July 2012, p. 12.

70 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 2.

Defining the workplace

1.74 Current legislation and regulations of workplaces adopt the terms 'person conducting a business or undertaking' and 'worker' rather than the traditionally used 'employer' and 'employee'. These terms are used in Australia's harmonised work health and safety laws as adopted in New South Wales, Queensland, Tasmania, the Australian Capital Territory, South Australia, and the Northern Territory as well as at the Commonwealth level.[71]

1.75 The terms will be used interchangeably throughout this report.

Who is a 'person conducting a business or undertaking'?

1.76 A 'person conducting a business or undertaking' (PCBU) is defined as a person who conducts a business or undertaking alone or with others, whether or not it is conducted for profit or gain.[72] A person may be a company, unincorporated association or partnership or an individual who is conducting a business in their own right as a sole trader or self-employed person. [73]

Who is a 'worker'?

1.77 Worker is defined as a person who carries out work in any capacity for a PCBU. Workers therefore are not only employees but also contractors, subcontractors, labour hire workers, outworkers, apprentices, trainees, work experience students and volunteers.

Workplace bullying as a risk to work health and safety

1.78 Bullying at work is regulated by many areas of law at both the Commonwealth and state/territory levels. These areas of law will be discussed throughout the report. However, the primary regulation of workplace bullying occurs within the work health and safety framework.

71 It is also anticipated that the South Australian Parliament will pass the harmonised Work Health and Safety Bill 2011 (SA) by the end of 2012, which shall also adopt these definitions and terminology.

72 Section 5 of the model Work Health and Safety Acts.

73 A more detailed explanation can be found on the Safe Work Australian website, in the interpretive guideline: 'The meaning of a person conducting a business or undertaking'.

1.79 Workplace bullying is well recognised as a work health and safety (WHS) matter: a psychological hazard. Risks to psychological injury, like physical hazards, must be mitigated. [74]

1.80 In the context of WHS, a risk management framework includes identification, assessment, control and monitoring of hazards that pose a risk to the health and safety of workers.

1.81 After attending the eighth International Conference on Workplace Bullying and Harassment in Copenhagen in June 2012, Dr Caponecchia argued that approaching bullying through a risk-management rubric is an example of international best-practice, and that Australia is considered a leader in this regard. [75] While the Committee is pleased to hear this feedback, Australia could do more to prevent and respond to workplace bullying.

1.82 The WHS framework also establishes rights and obligations for workers and employers. The responsibility to prevent workplace bullying is covered in WHS legislation by the duty of care held by employers to provide a healthy and safe working environment for their workers. Workers also have the duty to ensure their actions do not constitute a risk to the health and safety of themselves or other people at the workplace.[76] These rights and obligations are discussed in more detail in chapter 2.

1.83 The protection afforded to workers varies between state/territory and federal jurisdictions. Concurrent with this inquiry, all jurisdictions are working toward harmonising these protections.

Harmonisation of work health and safety laws

1.84 In July 2008, the Council of Australian Governments (COAG) signed the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety. This commitment included the development and implementation of a complete and fully integrated package including a model Act, supported by model Regulations, model Codes of Practice and a National Compliance, Enforcement Policy and guidance material. These instruments were, and continue to be developed by Safe Work Australia. [77]

74 Safe Work Australia, *Submission 74*, p. 3.

75 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 4.

76 Safe Work Australia, *Submission 74*, p. 3.

77 Safe Work Australia's members include representatives from each state and territory, the Commonwealth, the Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry and the Australian Industry Group.

1.85 The model WHS laws commenced in New South Wales, Queensland, the Australian Capital Territory, and the Northern Territory on 1 January 2012. In its limited jurisdiction, the Commonwealth also adopted the WHS laws on this date. The model WHS laws are due to commence in Tasmania and South Australia on 1 January 2013. South Australia and Western Australia remain committed to implementing the model WHS laws. At the time of writing, the South Australian WHS is currently before Parliament, and is anticipated to be passed by the Parliament in its final sitting session of 2012. Victoria is the only jurisdiction to announce that it will not be adopting the model WHS laws in their current form.[78]

1.86 On the topic of workplace bullying, the harmonisation effort is directed towards the adoption of a new Code of Practice as developed through Safe Work Australia. An initial draft was released for public comment in 2011.[79]

1.87 The Committee understands that a decision has been made by the members of Safe Work Australia to postpone the approval of the revised draft Code to await the conclusion of the Committee's inquiry in order that consideration be given to issues raised in this report.[80] The Committee hopes that its report complements the upcoming public consultation phase and that the finalisation process continues with haste.

Scope of inquiry and parameters

1.88 The scope of the inquiry is limited to bullying at work. Some participants commented that workplace bullying must be seen in a broader context, as a community-wide issue. For example, the Australian Chamber of Commerce and Industry submitted:

> It is generally accepted that bullying is not confined to any particular parts of the community, and is not isolated to the workplace. It is a community wide issue which requires a community wide policy response.[81]

78 Safe Work Australia, *Submission 74*, p. 7.
All references in this Report to the obligations under the model WHS law and their provision numbers are consistent throughout the jurisdictions which have enacted the legislation.

79 Safe Work Australia, *Submission 74*, p. 11.

80 Mr Hoy, Safe Work Australia, *Committee Hansard*, Canberra, 17 August 2012, pp. 23-24.

81 ACCI, *Submission, 62*, p. 10.

1.89 The Committee's terms of reference were to focus on bullying in the workplace, and there are specific legal obligations that arise with respect to bullying in a workplace to focus on.

1.90 The following areas of law seek to regulate the behaviours associated with workplace bullying:

- work health and safety;
- industrial relations;
- criminal law;
- anti-discrimination law; and
- workers' compensation schemes.

1.91 The intersecting responsibilities of federal and state or territory regulation add layers of complexity. Navigating through the matrix of regulations can be overwhelmingly complex for workers and employers alike.

1.92 Despite these varied and complex state and federal regulations, Harmers Workplace Lawyers observed:

> it is not uncommon for a client to have experienced significant workplace bullying (and subsequently suffer psychological injury with devastating impacts on ongoing employment prospects), yet have little redress under any of the above legal avenues (apart from some limited workers compensation payments that they may be available).[82]

1.93 The 'gap' identified here is the absence of specific (and uniform) regulation of workplace bullying that does not 'hinge off' the areas of law identified above. Indeed, workplace bullying manifests in vastly different ways; it is the diversity of circumstances that, despite the variety of regulation, appear to lead many bullying incidents to fall between the areas of regulation.

Constitutional limitations

1.94 Though the Commonwealth's power to legislate on matters of industrial relations has extended in recent years, WHS is a matter remaining within the residual powers of the states.

1.95 The Committee can only make recommendations to the Commonwealth agencies. Consequently, the Committee's report predominantly seeks to

82 Harmers Workplace Lawyers, *Submission 88*, p. 5.

make recommendations for improved regulation and policy at the Commonwealth level and in the areas where it has greater legislative responsibility. The report discusses the harmonisation of WHS law throughout the jurisdictions and recent efforts to adopt a harmonised Code of Practice for bullying.

1.96 The Committee makes its recommendations in the context of this current reform agenda. These recommendations should not be seen as detracting from the WHS regulation of the states and territories, but rather complementing these efforts. Further, this report is about providing people with different options; to encourage targets of bullying to pursue genuine complaints whilst acknowledging that different circumstances may favour one mechanism of redress over another.

Conduct of the inquiry

Referral of inquiry

1.97 The Prime Minister, the Hon Julia Gillard MP and the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP jointly announced the inquiry on 26 May 2012.

1.98 The Minister for Employment and Workplace Relations referred terms of reference for the inquiry on 29 May 2012. The terms of reference are set out in the front pages of the report.

Inquiry process

1.99 The Committee announced the inquiry on 1 June 2012 and called for submissions from interested individuals and organisations. The Committee also invited submissions directly from a wide range of stakeholders including state and territory governments, peak advocacy bodies, employer organisations, business chambers, unions, and employment assistance providers.

1.100 A total of 319 submissions were received of which over 200 were authored by individuals who had experienced first-hand or witnessed workplace bullying. The remainder was received from a broad cross-section of stakeholders with an interest in the subject matter. The submissions are listed in Appendix A.

1.101 The Committee also received a large volume of confidential submissions and supporting documents that were accepted as confidential exhibits. While documents taken on a confidential basis have not been cited in the report, they have been made available to Committee members and informed deliberations. A list of exhibits is included in Appendix B.

1.102 The Committee conducted 11 public hearings in all state and territory capitals. Details of hearings and witnesses are included at Appendix C.

Individual submissions and impact statements

1.103 A key objective for the inquiry was to hear from individuals who had personally experienced workplace bullying or had supported a co-worker or family member through its effects. In addition to written submissions, time was set aside for individual impact statement sessions at the end of public hearings in each capital city. Both avenues carried equal weight and were given equal consideration by the Committee in preparing this report.

1.104 The Committee received a great number of individual submissions many of which provided extensive documentation of their experience. The Committee does not have decision-making or referral functions. Rather, these submissions helped to shape the Committee's report and its recommendations.

1.105 Prior to publishing these submissions, the Committee resolved to redact identifying information to ensure the privacy of all concerned. Further, authors' initials were used rather than full names. These redacted submissions were subsequently published on the Committee's webpage in accordance with parliamentary practice. Submissions were considered in their original form by the Committee.

1.106 Individual impact statement sessions were an opportunity for members of the public to recount their experiences and provide details of the effects of bullying. To encourage maximum participation by individuals who may have been reluctant to be publicly identified, these sessions were not permitted to be reported by the media. Though forming part of its evidence record and used privately by the Committee in consideration of this report, complete statements provided were not published. Excerpts from these sessions have been incorporated into the report with the prior approval of witnesses.

1.107 To ensure equal opportunity for all members of the public wishing to make individual statements, the Committee allocated a total amount of time to these statement sessions, and divided that time equally amongst those individuals.

1.108 Individual impact statement sessions were important not only for the Committee in its evidence-gathering, but also important for those individuals who had experienced or witnessed workplace bullying to be provided with an opportunity to simply be heard. These sessions did not follow the typical opening statement and question structure as this was not the purpose. Committee members did not question participants about their experience, rather, they listened to stories recounted by individuals.

1.109 The Committee observed the support amongst participants both during the sessions and at their conclusion. Many expressed a sense of relief resulting from the simple act of being listened to.

Public / private balance

1.110 A challenge for the Committee was to achieve a public/private balance in the evidence it received from affected individuals.

1.111 Many individuals stated off the record that they would not participate without ensuring their privacy and anonymity. Many of the bullying incidents described by individual participants in the inquiry resulted in deeply personal and traumatic experiences. The Committee received evidence of extreme emotional upheaval, anger, frustration, anxiety, depression and suicide.

1.112 Yet an open and public discussion of workplace bullying may assist to remove the stigma and shame that many affected individuals feel. Reflecting this, some individuals submitting to, and appearing before, the Committee wanted to provide their name and the name of their employer to frankly and openly discuss what they had experienced.

1.113 An open discussion of workplace bullying also works towards establishing a broader culture within the Australian community that demonstrates the public's values for respect and integrity, as well as establishing standards of appropriate behaviour in the workplace. Similar opportunities and challenges are faced when tackling gender discrimination.

1.114 Approaching its official evidence gathering in a way that respected the competing desires for privacy and open discussion, was integral to the outcomes of a parliamentary inquiry into workplace bullying. Not only did the inquiry contribute to the public discussion on the issue, but it also encouraged it to be elevated onto a national platform.

Structure of report

1.115 Following this introductory chapter, the report is structured in two Parts.

1.116 Part One discusses the current landscape in which employers and workers are located. Within this part, chapter 2 presents the legislative and regulatory frameworks for workplace bullying at the federal, state and territory levels. The chapter addresses work health and safety law, criminal law, anti-discrimination law, industrial relations systems and workers compensation schemes.

1.117 Chapter 3 extends this discussion into the workplace context. The chapter will look at the capacity for workplace policies to prevent and respond to bullying. It will then examine the role of internal dispute-resolution mechanisms.

1.118 Chapter 4 will briefly examine how workplace cultures can 'set-the-tone' for appropriate workplace behaviour and give effect to zero-tolerance policies through role-modelling by organisation leaders.

1.119 Part Two explores effective policies for governments to adopt in responding to the complexities and challenges of workplace bullying in Australia. As acknowledged above, the predominant area of law that regulates workplace bullying is work health and safety law – an area that falls within the residual powers of the states and territories under the Constitution.

1.120 Chapter 5 examines how the tools for prevention and resolution of workplace bullying can be enhanced. Workplace bullying falls within a complex system of regulation and support services that are notably dispersed. A new national advice, assistance and resolution service will be discussed, as well as the possibility of establishing a single entry point to regulators.

1.121 Chapter 6 discusses how enforcement and individual remedies can be bolstered. It examines whether the enforcement measures currently available are sufficient to respond to all instances of workplace bullying and whether they are effectively applied. The chapter also presents the numerous calls for improving access to individual remedies for those adversely affected by bullying at work.

2

Legislative and regulatory frameworks

Workplace bullying is an issue that is poorly understood in the community and the variety of approaches and definitions in different jurisdictions make it difficult for both employers and individual workers to understand their rights and responsibilities. Further, the overlap and distinction between workplace bullying, employment law (via the Fair Work Act 2009*) and unlawful discrimination (in all jurisdictions) adds to complexity.*[1]

I must say when I first heard about this inquiry I felt quite a lot of relief as workplace bullying has been such a difficult issue for working women's centres for so many years. I often refer to it amongst my colleagues as a big black hole. It is the issue that we struggle with the most of all the industrial issues and workplace matters to find a remedy and to be able to find something that we can offer the client that comes to us.[2]

Introduction

2.1 The above quotes indicate the frustration and confusion many people feel when trying to find a legislative or regulatory response to workplace bullying. This is because there is no express prohibition on workplace bullying in any Australian laws, nor any one law that can be used to both hold bullies accountable and provide resolution and remedies for the targets of bullying.

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1 Diversity Council Australia (DCA), *Submission 185*, p. 10.

2 Ms Rachael Uebergang, Co-coordinator, Northern Territory Working Women's Centre (NTWWC), *Committee Hansard*, Darwin, 17 July 2012, p. 5.

2.2 Throughout the inquiry people who have experienced workplace bullying expressed frustration at the lack of appropriate and satisfactory avenues for resolution within the existing legislative and regulatory frameworks.

2.3 This chapter outlines the legislative and regulatory frameworks that are relevant to addressing workplace bullying issues. These frameworks fit broadly into the following categories: work health and safety law, criminal law, anti-discrimination law, industrial relations laws and workers' compensation law. Each category of law will be considered in terms of the resolution and remedial measures available to individuals and why many people do not have a right to take action against the perpetrators of workplace bullying or be informed of what course of action has been taken by government authorities.[3]

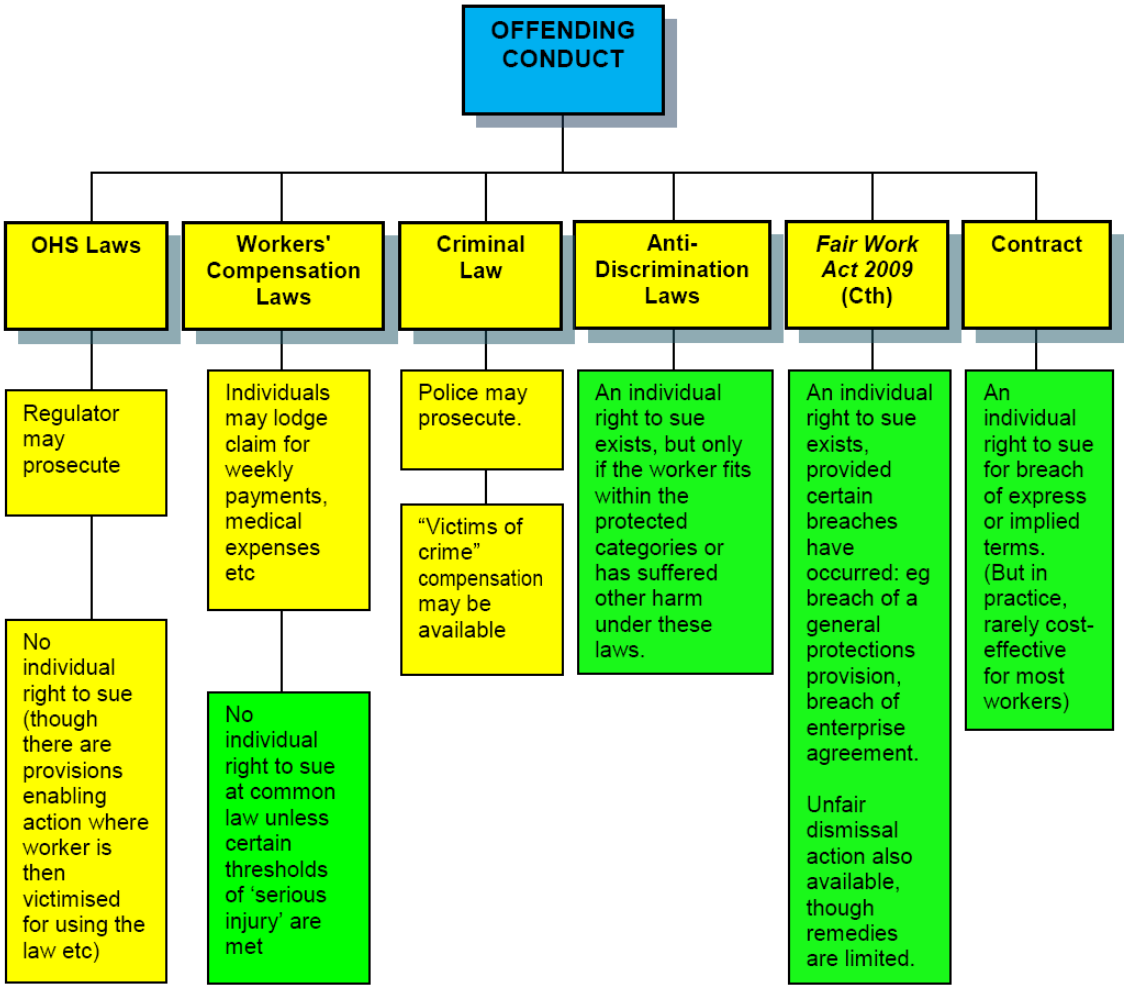
2.4 Some targets of workplace bullying may have a right to sue their employer for breach of employment contract. However, the little evidence that was presented suggested that this course of action is dependent on the terms of a workers' employment contract. For that reason, it will not be considered in this report.

Workplace bullying triage

2.5 Figure 2.0 charts the triage of legislative and regulatory frameworks which currently exist in Victoria, including the legal courses of action and individual rights that arise under each. Although it is specific to Victoria, the chart is indicative of the broader legislative and regulatory frameworks that exist across Australian jurisdictions.

3 The following are just some of the submissions received from individuals who feel there are inadequate options for legal recourse following workplace bullying: DA, *Submission 138*; MS, *Submission 140*; DH, *Submission 147*; KL, *Submission 157*; JR, *Submission 160*; MM, *Submission 263*.

Figure 2.0 'Triage' chart for a typical 'bullying' claim in Victoria



Source Ryan Carlisle Thomas Solicitors, *Submission 106*, p. 8.

2.6 The balance of Commonwealth, state and territory government responsibilities varies across each of these categories. States and territories have primary responsibility for work health and safety law, criminal law and workers' compensation. The Commonwealth has primary responsibility for industrial relations and anti-discrimination laws. However, there is also some overlap in responsibilities – states and territories have anti-discrimination laws, some states and territories legislate on industrial relations for limited workers, and the Commonwealth has some criminal powers.

2.7 The respective roles of the Commonwealth, state and territory governments in relation to each of these areas of law are outlined with particular focus on their roles in enforcing the laws to protect people from, or hold people accountable for, workplace bullying.

2.8 Many stakeholders complained about the failure of the legislative and regulatory frameworks to meet expectations and provide transparent or effective resolution or remedial measures in response to workplace bullying.[4]

Work health and safety law

2.9 Workplace bullying is primarily a work health and safety (WHS) issue because it poses risks to the health and safety of those workers who are targeted.[5] The Australian Council of Trade Unions (ACTU) contended:

> ...as workplace bullying occurs in a work setting, which can affect the health and safety and welfare of workers, it is appropriate that work health and safety legislation should be applied when addressing bullying behaviours.[6]

2.10 WHS was traditionally associated with the physical health of workers; that physical hazards, such as a missing guard on a machine, should be managed to protect the physical body of workers. However, an increased awareness of the psychological risks of different systems of work has promoted greater discussion on the mental health of workers. Bullying as a psychological risk was discussed in chapter 1.

2.11 Workplace bullying is predominantly considered to affect the mental health of people, but can also have adverse affects on physical health. headspace, the national youth mental health foundation, submitted:

> Workplace bullying has a major negative effect on mental health through depression, anxiety, stress and suicide. It also affects physical health through tobacco, alcohol and other drug abuse, and heart disease.[7]

4 See for example Ryan Carlisle Thomas Solicitors (RCT Solicitors), *Submission 106*, p. 4.

5 A number of submissions from individuals spoke about the adverse health effects they had suffered because of workplace bullying, see for example: A.M, *Submission 14*, pp. 1-3; E.R, *Submission 166*, pp. 3-4, 6-7; C.W, *Submission 192*, pp. 3 and 8.

6 Australian Council of Trade Unions (ACTU), *Submission 63*, p. 7.

7 headspace, *Submission 56*, p. 5.

2.12 Safe Work Australia,[8] the independent statutory agency with primary responsibility to improve WHS and workers' compensation arrangements across Australia, explained that:

> All work health and safety laws in Australia recognise workplace bullying as a work health and safety issue with the responsibility to prevent workplace bullying covered by the primary duty of care held by employers.[9]

2.13 Thus, although there is no express prohibition on workplace bullying in WHS laws there is an implied duty on employers to protect workers from workplace bullying.

2.14 WHS law is administered by each of the states, territories and the Commonwealth for workers within their jurisdiction.[10] However, on 1 January 2012 the Commonwealth, Queensland, New South Wales, the Australian Capital Territory and the Northern Territory enacted uniform WHS legislation.[11] The model Work Health and Safety Act (the model WHS Act) and model Work Health and Safety Regulations were adopted in those jurisdictions as part of an ongoing process to harmonise WHS laws in Australia. At the time of writing, it is widely anticipated that the South Australian Parliament will also pass the model WHS Act by the end of its final sitting session of 2012.

2.15 As part of that harmonisation process Safe Work Australia explained that they are also developing model Work Health and Safety codes of practice.[12] Currently there is a draft model code of practice, *Managing the Risk of Workplace Bullying,* in development.[13] During the period of this inquiry the draft code of practice was being revised in response to

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8 'Safe Work Australia is... a tripartite body representing the interests of the Commonwealth, states and territories as well as workers and employers in Australia': Safe Work Australia, *Submission 74*, p. 3.

9 Safe Work Australia, *Submission 74*, p. 7.

10 For example, the Commonwealth work health and safety legislation only applies in relation to workers in the Australian Public Service and of national corporations that self-insure under the Commonwealth scheme: see Comcare, *Submission 120*, p. 4.

11 Safe Work Australia, *Submission 74*, p. 7. The uniform legislation, known as the model Work Health and Safety Act and the model Work Health and Safety Regulations, has also commenced in each of the jurisdictions that enacted it but for Tasmania, where they will commence on 1 January 2013. They model laws may be enacted in Western Australia and South Australia in the future. The Victorian Government has said that they will not enact the model Work Health and Safety laws in their current form. This was also discussed in chapter 1.

12 Safe Work Australia, *Submission 74*, pp. 5-6.

13 For example, see ACTU, *Submission 63*, p. 20; Australian Chamber of Commerce and Industry (ACCI), *Submission 62*, p. 7.

submissions received during a three month public consultation period in 2011.[14] The implications of the draft Code of Practice will be discussed in further detail below. However, it is necessary first to understand how the laws operate across Australia.

2.16 In all jurisdictions, including those where the model WHS laws have not been adopted, the fundamental principles of WHS laws are the same.[15] It is important to note that they do not give workers who are injured at work, including those who are bullied, any avenue to personally seek resolution outside of the workplace, other than to make a complaint to their WHS regulator.

Current obligations

2.17 Current WHS regimes impose obligations on employers and officers to ensure the health and safety of workers while they are at work. There are also obligations on workers to take reasonable care that their acts or omissions do not adversely affect other workers and to comply with health and safety requirements at the workplace.

2.18 Safe Work Australia explained that under the model WHS Act all parties to a workplace bullying issue must make efforts to resolve it at the workplace:

> The model WHS Act also requires that where an issue like workplace bullying arises in a workplace, reasonable efforts to achieve a timely, final and effective resolution of the issue are made using any agreed issue resolution procedures or if there is not one the default procedure prescribed by the WHS Regulations.[16]

2.19 At the time of writing, issue resolution requirements are also provided for in existing Western Australian, South Australian and Victorian WHS legislation.[17] It should be noted that although there is some consistency

14 Safe Work Australia, *Submission 74*, p. 10.

15 This report will refer to the model Work Health and Safety Act when describing the laws of ACT, Cth, NSW, Qld, NT and Tasmania. The laws of South Australia, Western Australia and Victoria will be referenced individually.

16 Safe Work Australia, *Submission 74*, p. 8.

17 *Occupational Safety and Health Act 1984* (WA), s. 24; *Occupational Health, Safety and Welfare Act 1986* (SA), s. 36; *Occupational Health and Safety Act 2004* (Vic), s. 73.

The issue resolution provisions of the South Australian Act are likely to be superseded if, and when, the Parliament of South Australia passes the current Work Health and Safety Bill 2011 (SA).

between the approaches to issue resolution between the jurisdictions, the specifics of how an issue should be resolved may differ.

Obligations of employers to prevent workplace bullying

2.20 In all Australian WHS laws there is a primary duty of care on employers to protect, so far as is reasonably practicable, the health and safety of workers[18] while they are at work.[19]

2.21 Although there is no explicit duty on an employer to prevent workplace bullying in any of Australia's WHS laws,[20] the Diversity Council of Australia, Safe Work Australia and SafeWork SA were some of the stakeholders who asserted that it is implicit in the primary duty of care that an employer has responsibility for detecting and managing the risks of workplace bullying because it poses risks to the psychological health of those in the workplace.[21] That is, the duty to protect the health and safety of workers is not limited to the physical health of workers, but also extends to their mental health.

2.22 SafeWork SA submitted that the inclusion of psychological health in the definition of 'health' in the model WHS Act and the Victorian *Occupational Health and Safety Act 2004* removes doubt that the primary duty of care extends to the protection of mental health.[22]

2.23 They said that the successful prosecution of Brodie Panlock's employer for breaching his primary duty of care under the Victorian *Occupational Health and Safety Act 2004* demonstrates that the duty on employers extends to

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18 The model Work Health and Safety Act adopts the term 'worker' which is broader than 'employee' because it includes for example, volunteers and contractors in addition to employees. Comparatively, the current work health and safety laws in Victoria, South Australia and Western Australia (the jurisdictions that have not yet enacted the model Work Health and Safety laws) refer to 'employees'. For ease, this report refers to 'workers' because that term is adopted in most jurisdictions.

19 Dr Moira Jenkins and Mr Karl Luke, *Submission 210*, p. 2; WorkSafe WA, *Submission* 206, p. 9; Safe Work Australia, *Submission* 74, p. 7; SafeWork SA, *Submission* 82, p. 5. See: Model Work Health and Safety Act, s. 19; *Occupational Health and Safety Act 2004* (Vic), s. 21; *Occupational Health, Safety and Welfare Act 1986* (SA), s. 19; *Occupational Safety and Health Act 1984* (WA), s. 19.

20 Community and Public Sector Union, State Public Services Federation Group (CPSU-SPSFG), *Submission 188*, p. 11.

21 DCA, *Submission 185*, p. 11; Safe Work Australia, *Submission* 74, p. 3; SafeWork SA, *Submission 82*, pp. 8-9.

22 SafeWork SA, *Submission 82*, pp. 8-9; see model Work Health and Safety Act, s. 4; *Occupational Health and Safety Act 2004* (Vic), s. 5.

protecting workers from the risks to their mental health associated with workplace bullying.[23]

2.24 Dr Moira Jenkins, a private consultant and clinical psychologist who works with organisations to help them prevent and manage workplace bullying, and Mr Karl Luke, Partner at Thomsons Lawyers explained in their joint submission that to satisfy their primary duty of care employers must eliminate all risks to health and safety at the workplace so far as is reasonably practicable. If risks cannot be eliminated, the employer must ensure that they are minimised so far as is reasonably practicable.[24]

2.25 Mr Bryan Russell, Executive Director of SafeWork SA noted that this is the same approach that should be taken to all workplace hazards:

> [workplace bullying] should be treated like any other workplace hazard with the aim of identifying the hazard, assessing the risks and implementing steps to eliminate or minimise any identified risks.[25]

2.26 Some stakeholders argued that the duty on employers to manage the risks of workplace bullying should be explicitly required in WHS regulations.[26]

2.27 Regulations are legally enforceable directions for how a duty holder must comply with their duty of care in relation to specific high risk hazards at work. Dr Jenkins and Mr Luke explained that regulations mandate standards of risks control and are generally introduced when the necessary controls to manage a risk are known.[27] Mr Luke elaborated:

> There is a work health and safety scheme in each state which is largely self-regulatory. Employers are required to put in place risk control measures to ensure that risks arising from known hazards are properly controlled and eliminated or, if they cannot be eliminated, minimised. Yet the issue here is whether bullying, as a known psychological hazard, is properly controlled and whether there should be regulation to assist in identifying a standard. In certain circumstances, it is up to the individual employer to determine how they control risks in the workplace. Then we have regulations that impose particular standards in relation to these

23 SafeWork SA, *Submission 82*, pp. 8-9.

24 Dr Jenkins and Mr Luke, *Submission 210*, p. 6.

25 Mr Bryan Russell, Executive Director, SafeWork SA, *Committee Hansard*, Adelaide, 7 August 2012, p. 6.

26 ACTU, *Submission 63*, pp. 22-34; Finance Sector Union, *Submission 165*, pp. 3, 8-9; Dr Jenkins and Mr Luke, *Submission 210*, p. 4; CPSU-SPSFG, *Submission 188*, p. 11.

27 Dr Jenkins and Mr Luke, *Submission 210*, p. 3.

> particular hazards or risks: [they] tell you what you need to do and what the standard is to ensure that risks are properly controlled. For example, for confined spaces or falling from heights or when you dig a trench past a certain depth you must do X, Y and Z. There is a prescription of what needs to be done to control risks. We think the same thing can be done with workplace bullying.[28]

2.28 The Australian Federation of Employers and Industries (AFEI) argued that specific regulations are not necessary because employers can currently be penalised for a breach of their primary duty of care if they do not prevent bullying.[29]

Duty on officers to ensure employer complies

2.29 Under all current WHS laws an officer of an employer faces liability if the employer fails to meet its duty of care.[30] An officer is a person who is at a substantial decision making level of the organisation, such as a board member or company director.[31]

2.30 At time of writing, Victorian, Western Australian and South Australian WHS laws do not include an express duty of care on officers. Rather, an officer can be held to be liable, in addition to the employer, where the employer's breach of duty is attributable to the officer's conduct.[32]

2.31 Comparatively, Safe Work Australia and AFEI explained that under the model WHS Act there is an express duty on officers to exercise due

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28 Mr Karl Luke, Partner, Thomsons Lawyers, *Committee Hansard*, Adelaide, 7 August 2012, pp. 26-27.

29 AFEI, *Submission 60*, p. 4.

30 Model Work Health and Safety Act, s. 27; *Occupational Health and Safety Act 2004* (Vic), s. 144; *Occupational Safety and Health Act 1984* (WA), s. 55; *Occupational Health, Safety and Welfare Act 1986* (SA), s. 59C.

31 Section 144 of the *Occupational Health and Safety Act 2004* (Vic) and s. 4 of the model Work Health and Safety Act define 'officer' with reference to the *Corporations Act 2001* (Cth), s. 9. See Safe Work Australia, *Submission 74*, p. 8.

32 See *Occupational Health and Safety Act 2004* (Vic), s. 144; *Occupational Safety and Health Act 1984* (WA), s. 55; *Occupational Health, Safety and Welfare Act 1986* (SA), s. 59C.

The officer's duties provisions of the South Australian Act are likely to be superseded if, and when, the Parliament of South Australia passes the current Work Health and Safety Bill 2011 (SA). Once harmonised, the obligations of officers under South Australian legislation will mirror that of officers in Queensland, New South Wales, Tasmania, the Australian Capital Territory, the Northern Territory and the limited jurisdiction of the Commonwealth. These obligations are provided at para 2.29.

diligence; that is, to take positive and proactive steps to ensure that the employer complies with its health and safety duties.[33]

2.32 In discussing the importance of this duty, the Department of Education, Employment and Workplace Relations (DEEWR) submitted:

> The officer duty recognises that particular individuals within organisations are able to influence the culture of the business or undertaking, including by ensuring that appropriate resources and processes to eliminate or minimise risks associated with bullying are adopted.[34]

2.33 Mr Neale Buchanan, Director of Operations at Workplace Standards Tasmania, the WHS regulator in that state, commented that the due diligence duty was a new responsibility in Tasmania. He described the new duty as a positive move:

> I think the most important change in Tasmania, is the requirement on officers of organisations—the decision makers at director level, CEOs, those who influence the operation across the entirety of the business—to have the duty of due diligence. They have to have reporting mechanisms in place, they have to do all those things that we would commonly understand as due diligence and that they would undertake as directors now in financial areas that they are well familiar with, and it is now extended to health and safety. I think there is a really strong potential here to focus not so much on the traditional physical health and safety issues but that due diligence framework should extend to these areas of mental health and wellbeing.[35]

Obligations of workers to not bully others

2.34 Under all Australian WHS laws there are also duties on workers to take reasonable care when at work to avoid adversely affecting the health and safety of other people.[36] At the time of writing, in South Australia and

33 Safe Work Australia, *Submission 74*, p. 8; Australian Federation of Employers and Industries (AFEI), *Submission 60*, p. 14; Model Work Health and Safety Act, s. 27.

34 Department of Education, Employment and Workplace Relations (DEEWR), *Submission 84*, p. 14.

35 Mr Neale James Buchanan, Director, Operations, Workplace Standards Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 15.

36 Model Work Health and Safety Act, s. 28; *Occupational Health, Safety and Welfare Act 1986* (SA), s. 21; *Occupational Safety and Health Act* 1984(WA), s. 20; *Occupational Health and Safety Act 2004* (Vic), s. 25. See also Safe Work Australia, *Submission 74*, pp. 18-23.

Victoria there are also duties on all persons, including workers, not to recklessly endanger other people at the workplace.[37]

2.35 This was highlighted in a recent case in Victoria. In 2006, Brodie Panlock, a 19 year old waitress, committed suicide in 2006 after enduring persistent and vicious bullying at work. Following Miss Panlock's death the co-workers who had bullied her at work were found to have breached their duty of care under the Victorian *Occupational Health and Safety Act 2004*. The three workers convicted for breaching their duties as employees in that case were fined between $10,000 and $45,000 each. Notably, the manager of workplace, who was the company director, was fined for the employer's breach of duty as being an officer to whom that breach is attributable.[38]

2.36 Analysis of penalties available under all WHS laws provided by Safe Work Australia indicates that workers across Australia are liable to penalties at this level and higher if they bully others at work.[39]

South Australia's Section 55A

2.37 As discussed earlier in this chapter, the South Australian Parliament is widely anticipated to pass the Work Health and Safety Bill 2011 (SA) which would bring it within the harmonised WHS jurisdictions. However, mindful of this pending legislative change, South Australia is the only jurisdiction that specifically refers to and defines workplace bullying in its current WHS laws.[40] Section 55A of the South Australian *Occupational Health, Safety and Welfare Act 1986* defines workplace bullying as behaviour:

- that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and
- that creates a risk to health or safety.[41]

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37 Safe Work Australia, *Submission 74*, pp. 19 & 21; *Occupational Health, Safety and Welfare Act 1986* (SA), s. 59; *Occupational Health and Safety Act 2004* (Vic), s. 32.

38 WorkSafe Victoria, 'Business, Director, Three Workers Convicted And Fined For Bullying', 9 February 2010, <http://www.worksafe.vic.gov.au/news/news/business,-director,-three-workers-convicted-and-fined-for-bullying> viewed 3 September 2012.

39 Safe Work Australia, *Submission 74*, pp. 18-23.

40 The definition provided in s 55A of the *Occupational Health, Safety and Welfare Act 1986* (SA) will be superseded if Parliament passes, and upon the commencement of, the Work Health and Safety Bill 2011 (SA).

41 *Occupational Health, Safety and Welfare Act 1986* (SA), s. 55A(1).

2.38 SafeWork SA explained that:

> Section 55A establishes a mechanism to facilitate bullying investigations and ultimately to give the inspectorate the capacity to refer a complaint to the [South Australian Industrial Relations] Commission for resolution.[42]

2.39 SafeWork SA also observed that the Industrial Relations Commission can assist the timely, resolution of a workplace bullying complaint through mediation or conciliation.[43]

2.40 However, SafeWork SA said that although section 55A provides 'a useful framework for dealing with workplace bullying'[44] there a number of limitations, including:

- workers who have been bullied cannot apply directly to the Commission for resolution of the matter;
- participation in mediation or conciliation is voluntary only;
- the Commission cannot make a determination of whether or not there has been workplace bullying, whether an employer or worker has breached their duty of care, or whether there must be a change at the workplace; and
- if mediation or conciliation fails there are no further avenues of resolution available to the parties—the only remaining option is prosecution by the regulator of the employer or an individual worker for breaching their work health and safety duties.[45]

2.41 Section 55A only provides a process for the resolution of workplace bullying complaints; it does not place any duty on employers or workers to prevent workplace bullying. As there is no duty that must be complied with under section 55A there is no penalty attached for a breach.[46]

Role of the regulator in enforcing the law

2.42 WorkSafe WA explained that when they receive a complaint about workplace bullying, an inspector may visit the workplace. To ensure that

42 SafeWork SA, *Submission 82*, p. 6.

43 SafeWork SA, *Submission 82*, p. 5.

44 SafeWork SA, *Submission 82*, p. 6. See also Government of South Australia, *Submission 216*, p. 7.

45 SafeWork SA, *Submission 82*, p. 8; Mr Russell, SafeWork SA, *Committee Hansard*, Adelaide, 7 August 2012, p. 8.

46 SafeWork SA, *Submission* 82, p. 5; Australian Services Union South Australia and Northern Territory Branch, *Submission* 69, p. 4; Dr Jenkins and Mr Luke, *Submission 210*, p. 7.

the employer and workers are meeting their WHS obligations, the inspector will look 'at whether adequate systems and processes are in place to deal with allegations of workplace bullying' and whether the employer has responded to the complaint (if it was reported to them by a worker) at the workplace within a reasonable time.[47] However, Worksafe WA clarified that 'it is not the WorkSafe inspector's role to facilitate, mediate and/or carry out an investigation into the specific allegations.'[48]

2.43 Under all WHS laws in Australia there are two types of enforcement measures available to the regulators: compliance notices in the form of improvement notices and prohibition notices; and prosecution.[49]

2.44 A duty holder can be issued with a notice or prosecuted for breaching their WHS duties regardless of whether there is anyone adversely affected. For example, Safe Work Australia explained that under the model WHS Act there are three levels of offences. The lowest level of offence is for non-compliance with a duty with penalties of up to $50,000 for a worker, $100,000 for an officer and $500,000 for a body corporate.[50]

Improvement and prohibition notices

2.45 Improvement and prohibition notices are issued by WHS inspectors when they consider that there is a risk at the workplace that is not being managed properly or that there has been conduct which is in breach of the law. Ms Yvonne Henderson, the Equal Opportunity Commissioner for Western Australia explained that when a workplace bullying complaint has been made an improvement notice may be issued to an employer, requiring them 'to improve the systems for preventing bullying in the workplace or to improve reporting and investigating procedures'.[51]

2.46 Prohibition notices on the other hand require the person to whom they are issued to cease prohibited conduct. If a notice is not complied with, further penalties apply in addition to the potential penalty for the initial breach of duty.[52]

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47 WorkSafe WA, *Submission 206*, pp. 7-8.

48 WorkSafe WA, *Submission 206*, p. 8.

49 See Mr Luke, Thomson's Lawyers, *Committee Hansard*, Adelaide, 7 August 2012, p. 30; Master Builders Australia (MBA), *Submission 105*, pp. 10-11.

50 Safe Work Australia, *Submission 74*, p. 18. See also model Work Health and Safety Act, s. 33.

51 Ms Yvonne Henderson, Commissioner for Equal Opportunity, Equal Opportunity Commission of Western Australia (EOCWA), *Committee Hansard*, Perth, 8 August 2012, p. 22.

52 Safe Work Australia, 'Role of inspectors in compliance and enforcement' , <http://www.safeworkaustralia.gov.au/sites/swa/legislation/guidance-material/pages/guidance-material.aspx> viewed 10 September 2012; WorkSafe Victoria,

2.47 An inspector is not compelled by WHS law to issue improvement or prohibition notices. However, they may choose to in instances where, for example, complaints of workplace bullying can be resolved at the workplace or they think it more appropriate to issue a notice than proceed to prosecution.

Penalties for non-compliance

2.48 Under all WHS laws the regulator is able to prosecute any party believed to be in breach of their WHS duty by failing to prevent workplace bullying or, in the case of a worker, bully another person in the workplace. A breach of a WHS duty is a criminal offence.

2.49 There are significant criminal penalties in WHS laws that a court may order in convicting an individual or an organisation of breaching their WHS duties.[53]

2.50 Safe Work Australia noted that the penalties available under the model WHS Act are higher than in non-harmonised jurisdictions.[54] A person who breaches their duty under the model WHS Act is liable for criminal fines of up to $3 million for a body corporate; $600,000 or five years imprisonment for an officer or an individual employer;[55] and, up to $300,000 or five years imprisonment for workers.[56] These levels of penalties apply in relation to offences 'of the most serious kind involving recklessness'.[57]

2.51 The AFEI submitted that high penalties also apply for the offence of recklessly endangering another person at a workplace under the Victorian *Occupational Health and Safety Act 2004*. That offence is 'punishable by a maximum penalty of over $215,000 and/or five years imprisonment for individuals and, in the case of corporate offenders, a maximum fine of over $1 million'.[58]

2.52 DEEWR submitted that the inclusion of such high criminal penalties in WHS legislation:

'What Actions Can Inspectors Take', <http://www.worksafe.vic.gov.au/safety-and-prevention/workplace-inspections/what-actions-can-inspectors-take> viewed 24 September 2012; SafeWork SA, *Submission 82*, p. 8.

53 See the comparison of penalty levels in work health and safety legislation in Safe Work Australia, *Submission 74*, pp. 18-23.

54 Safe Work Australia, *Submission 74*, pp. 18-23.

55 Safe Work Australia, *Submission 74*, p. 8.

56 Safe Work Australia, *Submission 74*, pp. 8 & 18.

57 Safe Work Australia, *Submission 74*, p. 8.

58 AFEI, *Submission 60*, p. 15.

> generally reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable to a criminal sanction for placing another person's health and safety at risk.[59]

2.53 The criminal nature of the penalties and prosecutions under WHS laws means that the regulator must produce evidence strong enough to prove 'beyond reasonable doubt' that there has been a breach of duty by an employer or worker. The Government of South Australia submitted that this high burden of proof is difficult to satisfy in workplace bullying complaints:

> While the WHS legislation provides a legislative framework that deals with bullying as with any other WHS issue, it must be acknowledged that bullying is somewhat different. There are important differences that arise from WHS breaches that involve human interaction as opposed to mechanical, technological or procedural failures. The bullying investigation process has to assess both covert and overt instances which often appear trivial, but do cause a risk to health and safety when viewed as repeated behaviours that build over time. Because of the nature of bullying behaviour, it is often exceptionally difficult to prove 'beyond reasonable doubt' that bullying occurred, as even overt behaviours are rarely witnessed either individually or electronically. This is one of the key reasons why bullying is so difficult to prosecute as a WHS breach under the WHS legislation.[60]

2.54 Issues relating to the effectiveness of how WHS laws are implemented and enforced will be considered in chapter 6.

Codes of practice and guidance material

2.55 Across Australia specific guidance on workplace bullying is provided by WHS regulators in codes of practice or guidance materials.[61] Unlike the previously discussed WHS laws which encapsulate workplace bullying in general duties of care, codes of practice and guidance material outline specific standards that duty holders should meet to ensure they satisfy their duties of care.

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59 DEEWR, *Submission 84*, p. 15.

60 Government of South Australia, *Submission 216*, pp. 10-11.

61 Safe Work Australia, *Submission 74*, p. 9.

2.56 In the Australian Capital Territory, Queensland and Western Australia workplace bullying is addressed in codes of practice.[62] They provide practical guidance on how employers and workers can comply with their WHS duties specifically in relation to workplace bullying. The directions in a Code of Practice are not mandatory, but they do set the minimum standards that must be met by duty holders.[63] Mr Mark McCabe, Work Safety Commission of the ACT explained that the current ACT Code of Practice sets the benchmark of what an employer must do to manage the risks of workplace bullying.[64]

2.57 As there is no requirement that duty holders must comply with the directions in a code of practice, a person cannot be prosecuted if they do not follow any directions set out in the code of practice. However, as they set the minimum standards that must be met, a duty holder must be able to show that the actions they took to meet their duties under the legislation in relation to workplace bullying provided the same or a higher standard of health and safety than would have been provided had they followed the directions in a code of practice.

2.58 And although there is no requirement that a code of practice must be complied with, a code of practice is automatically admissible in court proceedings as evidence of what an employer should have known about for managing the risks of workplace bullying. [65]

2.59 The ACT Government stated for that reason, duty holders should comply with a code of practice unless there is another solution for addressing workplace bullying which achieves the same or a better result.[66]

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62 Safe Work Australia, *Submission 74*, pp. 49-57.

63 Safe Work Australia, *Submission* 74, p. 11; See also: Government of Western Australia, Department of Commerce, 'Codes of practice', <http://www.commerce.wa.gov.au/WorkSafe/Content/About_Us/Legislation/Codes_of_practice.html> viewed 5 October 212; *Occupational Safety and Health Act 1984* (WA), s. 57; model Work Health and Safety Act, ss. 274 and 275.

64 Mr Mark McCabe, Work Safety Commissioner, WorkSafe ACT, *Committee Hansard*, Canberra, 16 August 2012, p. 3. See also ACT Government, *Submission 191*, p.4.

65 Safe Work Australia, *Submission 74*, p. 11; SafeWork SA, *Submission 82*, p. 9. See model Work Health and Safety Act, ss. 274 and 275 and *Occupational Safety and Health Act 1984* (WA), s. 57.

66 See ACT Government, *Submission 191*, pp. 3-4; see also Western Australian Government Department of Commerce, 'Codes of Practice', <http://www.worksafe.wa.gov.au/Content/About_Us/Legislation/Codes_of_practice.html> viewed 24 September 2012; Workplace Health and Safety Queensland, 'Codes of Practice', <http://www.deir.qld.gov.au/workplace/law/legislation/codes/index.htm> viewed 24 September 2012; Safe Work Australia, *Submission 74*, p. 6.

2.60 In all other jurisdictions, including South Australia, workplace bullying is addressed in guidance material.[67] Dr Jenkins and Mr Luke explained that these guides do provide practical guidance, in a similar way to codes of practice, to assist with the identification and management of risks of workplace bullying.[68] However, unlike codes of practice, guidance materials are not recognised in WHS legislation.

2.61 The ACT Government commented that their current Code of Practice is based on the guidance material that was developed by the Victorian regulators and subsequently adopted by the New South Wales regulator.[69] This indicates that there is some consistency across some jurisdictions.

Model *Code of Practice: Managing the Risk of Workplace Bullying*

2.62 Safe Work Australia explained that the new national model Code of Practice that is being drafted is largely based on the current codes of practice and guidance materials in operation across Australian jurisdictions. It includes a proposed definition of workplace bullying as well as practical advice about using a risk management approach to prevent workplace bullying and how to respond if bullying occurs.[70] SafeWork SA expanded on this, explaining that a Code of Practice under the model WHS laws is 'intended to provide practical guidance for duty holders to achieve standards of health, safety and welfare'[71].

Committee comment

2.63 The draft Code provides significant practical guidance to employers and workers about prevention and resolution strategies. The Committee supports the draft Code in its current form, and encourages the members of Safe Work Australia to progress the finalisation and adoption of the Code in each jurisdiction.

67 See Safe Work Australia, *Submission 74*, pp. 49-57 for a list of the workplace bullying Codes of Practice and guidance materials currently available in each Australian jurisdiction.

68 Dr Jenkins and Mr Luke, *Submission 210*, p. 1.

69 Mr McCabe, WorkSafe ACT, *Committee Hansard*, Canberra, 16 August 2012, p. 3.

70 Safe Work Australia, *Submission 74*, pp. 9-10.

71 SafeWork SA, *Submission 82*, p. 9.

Recommendation 3

2.64 **The Committee recommends that the Commonwealth Government, through Safe Work Australia urgently progress the draft *Code of Practice: Managing the Risk of Workplace Bullying* to a final version and that members of Safe Work Australia adopt the Code in all jurisdictions.**

Recommendation 4

2.65 **The Committee recommends that Safe Work Australia work with all jurisdictions to actively promote and implement the Code of Practice and ensure it is embedded in workplaces.**

Elevating employers' obligations and standards to nationally consistent regulation

2.66 Throughout the inquiry, many stakeholders advocated that the standards provided in the code should be elevated to establish clear obligations prescribed in regulations.[72] Reflecting this sentiment, Mr Kevin Harkins from Unions Tasmania said:

> In our view, while the code of practice will be helpful, it is just not strong enough. It will be similar to a policy, with lip service but no real implementation in the workplace.[73]

2.67 Safe Work Australia explained that under the model WHS Act, codes of practice 'play an important role in explaining the requirements of the WHS Act and Regulations'. While a duty holder is required to meet their duties under the legislation in a way that 'provides a standard of WHS that is equivalent to or higher than the standard required in the code'[74], they are not obligated to do so in the way recommended in the code. Safe Work Australia clarified:

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72 Dr Jenkins and Mr Luke, *Submission 210*, pp. 2-3, 6-7 and 24; ACTU, *Submission 62,* p. 22; IRIQ Pty Ltd, *Submission* 190, p. 5; Ms Uebergang, NTWWC, *Committee Hansard*, Darwin, 17 July 2012, p. 5; Ms Katrine Hildyard, Secretary, South Australia and Northern Territory Branch, Australian Services Union, *Committee Hansard*, Adelaide, 7 August 2012, p. 21.

73 Mr Kevin Harkins, Secretary, Unions Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 2.

74 Model Work Health and Safety Act, s. 275(4).

> Courts may regard a Code of Practice as evidence of what is known about a hazard, risk or control and may rely on it in determining what is reasonably practicable in the circumstances to which the Code of Practice relates. There is no requirement that Codes of Practice be complied with.[75]

2.68 Dr Jenkins and Mr Luke explained that regulations mandate standards of risks control and are generally introduced where the necessary controls to manage a risk are known.[76] They contended that placing an obligation in WHS regulations requiring employers to take action to control specific identified workplace bullying risk factors 'would provide clarity as to at least the minimum identified risk factors that need to be controlled.'[77]

2.69 They also submitted:

> Establishing (by way of regulation) standards for controlling some of the identifiable risks across jurisdictions would not only raise awareness of what the specific risks are, but also raise awareness of the need for appropriate behaviours and the potential for serious psychological health impacts of workplace bullying.[78]

2.70 In response to this point, Safe Work Australia stated:

> Although [elevating the Code into regulation] would have the benefits of raising awareness in the community, the concern is that specific regulations on workplace bullying would do no more than duplicate the primary duty in the model WHS Act.[79]

2.71 Some employer groups strongly refuted that there is a need for further regulation.[80] In explaining why there should not be specific WHS legislative provisions, or a code of practice, for workplace bullying, Mrs Carolyn Davis from the Australian Chamber of Commerce and Industry (the ACCI) said:

> We have been saying that the good occupational health and safety outcomes in the workplace at the coalface are from cultural change rather than from strict regulation. ... As a guide [the Code] can provide a lot more structure and help people deal with this as a

75 Safe Work Australia, *Submission 74*, p. 11.

76 Dr Jenkins and Mr Luke, *Submission 210*, p. 3.

77 Dr Jenkins and Mr Luke, *Submission 210*, p. 2.

78 Dr Jenkins and Mr Luke, *Submission 210*, p. 7.

79 Safe Work Australia, *Submission 74*, pp. 8-9.

80 See Victoria Automobile Chamber of Commerce (VACC), *Submission 80*, pp. 5-7; Australian Mines and Metals Association, *Submission 124*, p. 21.

> shared responsibility. It is important that everyone is involved in this, that it is not seen to be a regulation that falls on top of people.[81]

2.72 There are calls for nationally consistent obligations on employers, established in WHS regulations, from individuals who have personally experienced workplace bullying, or supported a family member through its effects. The parents of Brodie Panlock argued:

> I think you need one law for one country, not each state. That is what the problem is: each state is slightly different. It is like the railway lines: they do not match. They have to match. There has to be continuity across the whole board. We are not talking about politics or anything like that; it is people. The laws are all different, or slightly different, in each state. I have spoken to lawyers down here, and when they go to Queensland it is different again. Why can't there be one straight across the board? We are Australians, aren't we? [82]

> Bullying is no different in Victoria, Queensland or any other state in Australia. Bullying is the same here as it is everywhere else and that is why I would like to see it as a national law. So if you live in Victoria there is the chance for jail, but why should Queensland, Tasmania and every other state be left out?[83]

2.73 Similarly, at one of the Committee's individual impact statement sessions, an individual worker advocated:

> all workplaces and all bosses should be obligated by legislation to take complaints of bullying such as mine seriously without irrelevant and dismissive insult.[84]

Committee comment

2.74 The Committee believes that employers' obligations established under the draft Code should be elevated to establish clear obligations prescribed in regulation. The Committee believes regulations can be developed that address the concerns expressed by the business community. Regulations should set a minimum standard of action that must be taken to minimise the risk of bullying in the workplace through thoughtful risk control measures.

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81 Mrs Carolyn Davis, Manager Work Health, Safety and Compensation Policy, Australian Chamber of Commerce and Industry (ACCI), *Committee Hansard*, Melbourne, 11 July 2012, p. 5.

82 Mr Damian Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 51.

83 Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 54.

84 DD, *Committee Hansard*, Closed Session.

2.75 Regulations that set minimum standards, and which are strongly supported by a code of practice that provides practical advice on how to meet these standards, would not place any additional requirement on employers. They would merely impose specific obligations outlining what employers should already be doing to comply with their duty of care.

Recommendation 5

2.76 **The Committee recommends that the Commonwealth Government seek agreement through Safe Work Australia for the development and implementation of model Work Health and Safety Regulations that capture the minimum requirements for managing the risks of workplace bullying, applicable to all workplaces, as currently established in the draft *Code of Practice: Managing the Risk of Workplace Bullying*.**

Criminal law

2.77 Some cases of workplace bullying can also be prosecuted under criminal legislation. Although WHS laws impose criminal punishments, they are distinct from criminal legislation in that they are enforced by WHS regulators. Comparatively, it is up to the police to enforce criminal law or legislation.

2.78 Like WHS law, criminal legislation is the responsibility of governments in each jurisdiction. Behaviour that may be seen in serious cases of workplace bullying can be prosecuted under criminal legislation, and so under the criminal justice system, of each jurisdiction. The Victorian Government recently amended their criminal legislation to remove doubt that workplace bullying can be a criminal offence.

Victoria and Brodie's Law

2.79 When announcing this inquiry into workplace bullying, the Prime Minister, the Hon Julia Gillard MP, and the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, were accompanied by Mr Damian and Mrs Rae Panlock.[85]

85 Brodie Panlock's employer and colleagues were fined under the Victorian *Occupational Health and Safety Act 2004*. For more information about the offences and penalties, see WorkSafe Victoria, 'Business, Director, Three Workers Convicted And Fined For Bullying', 9 February

2.80 Brodie Panlock's case gained public attention when, in 2011, the Victorian Government made amendments to the *Crimes Act 1958* to remove doubt that serious instances of bullying, such as that experienced by Brodie, are criminal offences. The amendments, colloquially known as Brodie's Law, were introduced in response to community outrage at the apparent inadequacy of sanctions against the parties who bullied Brodie. Although the men who bullied Brodie were fined for breaching their health and safety duties by bullying her, they were not charged with serious criminal offences under criminal legislation. [86]

2.81 DEEWR explained that Brodie's Law amended the offence of 'stalking' in the Victorian *Crimes Act 1958* to 'expressly include making threats, using abusive or threatening words, performing abusive or offensive acts, or acting in a way that could reasonably be expected to cause the victim harm or self-harm'.[87]

2.82 Brodie's Law did not create an offence of workplace bullying. The behaviours referred to under the law are criminal offences regardless of whether they are engaged in at a workplace or elsewhere. However, the ACT Government noted that Brodie's Law removes doubt that stalking covers serious instances of workplace bullying and that perpetrators face up to 10 years imprisonment. [88]

2.83 Ryan Carlisle Thomas Solicitors (RCT Solicitors) noted that Brodie's Law also made amendments to the *Person Safety Intervention Orders Act 2010* (Vic) so that it '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.'[89]

2.84 The Western Australian Commissioner for Equal Opportunity, Ms Yvonne Henderson, commented:

> We note...a victim of stalking in the workplace is still required to lodge a complaint with the police and to go to court to seek an intervention order and that the prosecution must prove its case beyond reasonable doubt in order to get a conviction. While such a law making bullying a criminal offence may provide a further avenue of redress for victims, the effectiveness of that remains to

2010, <http://www.worksafe.vic.gov.au/news/news/business,-director,-three-workers-convicted-and-fined-for-bullying> viewed 3 September 2012.

86 Department of Justice Victoria, 'Brodie's Law', <http://www.justice.vic.gov.au/home/crime/brodies+law/> viewed 3 September 2012.

87 DEEWR, *Submission 84*, p. 19.

88 ACT Government, *Submission 191*, p. 9.

89 RCT Solicitors, *Submission 106*, p. 15.

> be seen. The higher standard of proof required in the criminal justice system, requiring the intervention of the courts and the police, may not translate well into the workplace environment. In our view criminal sanctions alone are unlikely to be an adequate deterrent to workplace bullying.[90]

2.85 Mrs Moira Rayner, the Deputy Chair of the Workplace Relations Section of the Law Institute of Victoria said that a law such as Brodie's Law can be ineffective because targets of bullying will not use it for fear of retribution from their bullies:

> A person who has actually been bullied has been disempowered and they cannot use, as in Victoria's Brodie's law case, the access that is offered to them through the courts for a restraining order or through the police, because they are too browbeaten, downtrodden and afraid to do so, knowing—and they do know—they will be victimised for raising a matter for which the possible consequences will be a prosecution, conviction and maybe a jail sentence.[91]

2.86 The ACTU noted that the Brodie's Law 'does not and cannot address the majority of bullying behaviours, nor the workplace risk factors which can lead to such behaviours'[92].

2.87 Mr Damian and Mrs Rae Panlock called for Brodie's Law to be made a national law.[93] Mrs Panlock argued that there should be one law for all of Australia because currently the laws are slightly differently in each jurisdiction.[94] Harmers Workplace Lawyers also supported a proposed nationalisation of Brodie's Law.[95]

2.88 A nationally consistent definition of workplace bullying across Australia that secures the rights of all Australian workers to be safe from bullying was almost universally supported in evidence to the inquiry.[96] However, the specific objective of a national Brodie's law cannot be met simply by the introduction of legislation by the Commonwealth.

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90 Ms Henderson, EOCWA, *Committee Hansard*, Perth, 8 August 2012, p. 22.

91 *Committee Hansard,* Melbourne, 11 July 2012, p. 13.

92 ACTU, *Submission 139*, p. 3.

93 Mr Damian Panlock and Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, pp. 51-57.

94 Mr Damian Panlock and Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 52.

95 Harmers Workplace Lawyers, *Submission 88*, p. 7.

96 For an example of an exception to support for a nationally consistent arrangement see Mr Eric Windholz, Associate, Centre for Regional Studies, Monash University, *Committee Hansard*, Melbourne, 11 July 2012, pp. 23-27.

2.89 The Alannah and Madeline Foundation noted constitutional limitations to the Commonwealth's power which prevent it from legislating on anti-social behaviour such as bullying other than behaviour which involves electronic means.[97] Thus, 'in approaching legal issues it is highly desirable to develop a co-ordinated approach with States and Territories'.[98]

The Commonwealth and cyber-bullying

2.90 Although constitutional limitations mean that the Commonwealth criminal law cannot address many instances of workplace bullying, Commonwealth does extend to prosecution of cases of cyber-bullying because it does deal with offences relating to the electronic transmission of material.[99]

2.91 The Association of Professional Engineers, Scientists and Managers Australia stated that of 3.8 per cent of its members who reported that they were bullied at work said that they had experienced cyber-bullying.[100] Similarly, Master Grocers Australia submitted that its members, who are employers, reported a significant increase in the complaints from employees about cyber-bullying.[101]

2.92 DEEWR explained how the Commonwealth *Crimes Act 1914* could be used to address cyber-bullying:

> Serious cases of cyber-bullying may be covered by a Commonwealth offence of using a carriage service, such as the internet or telephone, to menace, harass or cause offence, which carries a maximum penalty of three years' imprisonment.[102]

97 The Alannah and Madeline Foundation (AMF), *Submission 125*, p. 28.

98 AMF, *Submission 125*, p. 28.

99 DEEWR, *Submission 84*, p. 19; ACT Government, *Submission 191*, p. 7; AMF, *Submission 125*, p. 28.

100 Association of Professional Engineers, Scientists and Managers Australia, *Submission 96*, p. 3.

101 Master Grocers Australia, *Submission 115*, p. 2.

102 DEEWR, *Submission 84*, p. 19. The ACT Government noted that the offence of using a carriage service to menace, harass or cause offence, is found in s. 474.17 of the *Crimes Act 1914* (Cth): ACT Government, *Submission 191*, p. 7.

Other state and territory criminal laws

2.93 Beyond the highly publicised enactment of Brodie's Law in Victoria, criminal laws in other states and territories capture the behaviours and conduct typical of serious workplace bullying.[103]

2.94 WorkSafe WA confirmed that 'behaviours that constitute workplace bullying can be treated as a case of stalking under the *WA Criminal Code* [*Compilation Act 1913*]' in the same way that they can under Brodie's Law in Victoria.[104] The AFEI commented that the WA Criminal Code would also address assault or threats in the workplace.[105]

2.95 The ACT Government submitted that a number of offences under the ACT *Crimes Act 1900* 'may apply in circumstances where an employee is experiencing workplace bullying'.[106] Those offences include inflicting bodily harm, assault, stalking and aiding or abetting the suicide, or attempted suicide, of another.[107]

2.96 Evidence was not received from other state or territory governments about how their criminal laws might apply to bullying cases. However, the AFEI outlined the criminal laws in all other states and territories that could address behaviours that might be seen in serious cases of workplace bullying:

- the NSW *Crimes Act 1900* provides for the offences of assault, both that occasioning and not occasioning actual bodily harm, and threats or abuse directed at an employee that induces a reasonable fear of actual harm could also be an offence;
- the Queensland *Criminal Code 1899* provides the offences of physical assault causing injury or discomfort, torture which deals with the infliction of mental, psychological or emotional pain and stalking.
- the South Australian *Criminal Consolidation Act 1935* provides the offences of assault and the threat of assault, stalking and causing physical or mental harm and serious harm to persons;

103 See DEEWR, *Submission 84*, p. 19; AFEI, *Submission 60*, p. 3; ACT Government, *Submission 191*, pp. 6-7.

104 WorkSafe WA, *Submission 206*, p. 10. The full title of the WA Criminal Code is the *Criminal Code Compilation Act 1913*.

105 AFEI, *Submission 60*, p. 5.

106 ACT Government, *Submission 191*, pp. 6-7.

107 ACT Government, *Submission 191*, p. 7.

- Tasmania's *Criminal Code Act 1924* has offences of common nuisance, committing an unlawful act intended to cause physical harm and assaults.[108]
- the Northern Territory *Criminal Code Act* has offences for common assault, including the threat of physical harm, unlawful stalking and criminal defamation.[109]

2.97 Although the above laws are not uniform, they show that there are already criminal responses to workplace bullying available across Australia. However, Mr and Mrs Panlock commented, the criminal laws that are in place may not serve enough of a deterrent to bullying behaviour if they are not enforced.[110]

Anti-discrimination law

2.98 Ms Robin Banks, the Anti-Discrimination Commissioner for Tasmania, explained the objective of anti-discrimination law:

> The nature of discrimination law is that it is about people being treated in a particular way because they have an attribute that has traditionally been disadvantaged.[111]

2.99 Anti-discrimination laws may come to bear on instances of workplace bullying when the bullying arises as the result of the target possessing a designated protected attribute.

2.100 The requirement that bullying arises as the result of an attribute limits the scope of behaviour proscribed in the workplace. Harmers Workplace Lawyers suggested that, 'racial taunts would be an example of workplace bullying that could be pursued via discrimination laws.'[112]

Protected attributes

2.101 The grounds of discrimination, or 'protected attributes', are prescribed in anti-discrimination legislation in each jurisdiction.

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108 AFEI, *Submission 60*, p. 5.

109 AFEI, *Submission 60*, p. 5.

110 Mr Damian Panlock and Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 51.

111 Ms Robin Banks, Anti-Discrimination Commissioner, Office of the Anti-Discrimination Commissioner, Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 22.

112 Harmers Workplace Lawyers, *Submission 88*, p. 4.

2.102 DEEWR noted that the Commonwealth anti-discrimination laws, which provides protection to everyone in Australia, protect people from being bullied at work because of their:

- race (including attributes such as colour, descent and national or ethnic origin);
- that a person is or has been an immigrant;
- sex;
- marital status;
- pregnancy or potential pregnancy;
- breastfeeding;
- family responsibilities;
- disability (including carers and associates); and
- age.[113]

2.103 The range of protected attributes in state and territory anti-discrimination laws is much broader than under the Commonwealth laws. For example, it was noted that the Victorian law covers gender identity and sexual orientation in addition to those attributes covered by Commonwealth legislation.[114] And the ACT Government noted that its anti-discrimination laws also protect attributes including political conviction and industrial activity.[115] The Office of the Anti-Discrimination Commissioner (Tasmania) stated that that the Tasmanian *Anti-Discrimination Act 1988* 'prohibits direct and indirect discrimination against a person or group of people on the basis of' 20 different attributes, including religious activities or beliefs and irrelevant medical or criminal records.[116]

2.104 The Anti-Discrimination Commissioner for Tasmania commented that the there is a specific offence in the Tasmanian law which is akin to bullying more broadly than other discrimination offences:

> [there is an offence] which is titled 'prohibited conduct', [which] deals with a scope of conduct that 'offends, humiliates, intimidates, insults or ridicules'. At the moment it is only expressly unlawful...if the discrimination is on the basis of any of seven out of the 20 attributes: gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities. There is a proposal that came out of a review done

113 DEEWR, *Submission 84*, p. 16.

114 RCT Solicitors, *Submission 106*, p. 10.

115 ACT Government, *Submission 191*, p. 5.

116 Office of the Anti-Discrimination Commission of Tasmania, *Submission 186*, p. 6.

> several years ago to extend [that section] to protect all 20 attributes under the act.[117]

2.105 However, in no jurisdiction are the protected attributes broad enough to capture all types of workplace bullying, nor could protecting specified attributes capture all types of workplace bullying; quite often bullying is not engaged in because of a person's attribute.[118]

Individual right to seek remedies

2.106 Anti-discrimination laws enable a worker who has been bullied on discriminatory grounds to make a complaint to the Australian Human Rights Commission or state-based anti-discrimination commissioner. That complaint may be about the individual workers who carried out the bullying or their employer who can be held vicariously liable for discriminatory workplace bullying.[119]

2.107 DEEWR explained that if the workplace bullying complaint cannot be resolved through mediation or conciliation, the bullied worker may commence court proceedings to seek a resolution, and:

> [i]f a complaint is upheld, the court may order any remedy it sees fit including, for example, ordering remedial action, an apology and monetary compensation or a combination of remedies.[120]

Industrial relations law

2.108 Since 1 January 2010, the Commonwealth has had responsibility for the national workplace relations system which covers most Australian workers and workplaces. [121]

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117 Ms Banks, Office of the Anti-Discrimination Commissioner of Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 21.

118 Victorian Trades Hall Council (VTHC), *Submission 139*, p. 3; Mr Michael Harmer, Harmers Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 2; Australian Human Rights Commission, *Submission 121*, pp. 4-5;

119 DEEWR, *Submission 84*, p. 16.

Ms Moira Rayner, Deputy Chair, Workplace Relations Section, Law Institute of Victoria described the that vicarious liability of 'a person or body who did not actually do anything and who may not have known is deemed to be liable [for the unlawful conduct] because of their power in the workplace', see *Committee Hansard*, Melbourne, 11 July 2012, p. 16.

120 DEEWR, *Submission 84*, pp. 18-20.

121 Fair Work Australia, 'Transition to Fair Work Australia: Key Changes', <http://www.fwa.gov.au/index.cfm?pagename=transchanges> viewed 1 October 2012.

2.109 This means that the Commonwealth Government has responsibility for industrial relations, as legislated in the *Fair Work Act 2009* (the *Fair Work Act*), for:

- Nationally—all employment by constitutional corporations, and in:
- Victoria, ACT & NT—all other employment
- NSW, Qld & SA—all other private sector employment (from 1 January 2010)
- Tasmania—all other private sector and local government employment (from 1 January 2010).[122]

2.110 The only workers not covered by the national system are:

- those employed in the state public sector in Western Australia, New South Wales, Queensland, South Australia and Tasmania;
- those employed in local governments in Western Australia, New South Wales, Queensland and South Australia; and
- those employed by non-constitutional corporations in the private sector in Western Australia.[123]

2.111 The Fair Work Ombudsman website adds:

> sole traders, partnerships, other unincorporated entities and non-trading corporations and their employees continue to operate under the WA state system.[124]

2.112 The Fair Work Australia website describes the effect of a national workplace relations system:

> Employers and employees in the national system have the same workplace rights and obligations, regardless of the state they work in.[125]

2.113 The object of the *Fair Work Act* includes:

> enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association

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122 Fair Work Australia, 'Transition to Fair Work Australia: Key Changes', <http://www.fwa.gov.au/index.cfm?pagename=transchanges> viewed 1 October 2012.

123 Fair Work Australia, 'Transition to Fair Work Australia: Key Changes', <http://www.fwa.gov.au/index.cfm?pagename=transchanges> viewed 1 October 2012.

124 Fair Work Ombudsman, 'What is happening in my state?', <http://www.fairwork.gov.au/about-us/the-fair-work-system/what-is-happening-in-my-state/pages/default.aspx> viewed 1 October 2012.

125 Fair Work Australia, 'Transition to Fair Work Australia: Key Changes', <http://www.fwa.gov.au/index.cfm?pagename=transchanges> viewed 1 October 2012.

> and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.[126]

2.114 This objective appears, at least at first glance, to provide some remedy to targets of workplace bullying.

Fair Work Act 2009

2.115 Organisations and individuals referred to elements of the *Fair Work Act* that can be used to protect workers from some types of workplace bullying.[127] The general protections provisions are commonly utilised by workers to seek resolution and remedies in bullying cases, in both cases where they have left the workplace and are seeking unfair dismissal compensation or remain at the workplace and are seeking compensation for adverse action taken against them.[128]

Protection limited to prescribed workplace rights

2.116 The *Fair Work Act* protects workers from being bullied because they have exercised or enforced certain workplace entitlements. However, that protection is limited to workplace rights that are listed in the legislation.

2.117 Ms Yvonne Henderson, the Commissioner for Equal Opportunity in Western Australia, succinctly explained the operation of the general protections provisions and their limitations in protecting workers from bullying:

> At the Commonwealth level, the [*Fair Work Act*] allows an employee to lodge an adverse action or unfair dismissal application against an employer in connection with the exercisable workplace right—for example, the right to be protected from bullying under state occupational health and safety law. Unfortunately, this means that the emphasis of the fair work

126 *Fair Work Act 2009* (Cth), s. 3(e).

127 DEEWR, *Submission 84*, pp. 12-13; Mr Bill Loizides, Group Manager, Workplace Relations Policy, Education and Partner Development, Fair Work Ombudsman, *Committee Hansard*, Canberra, 17 August 2012, pp. 12-13; Mr Nick Behrens, General Manager, Advocacy, Chamber of Commerce and Industry Queensland (CCIQ), *Committee Hansard*, Brisbane, 18 July 2012, p. 15; Ms Clare East, Education and Training Policy Adviser, CCIQ, *Committee Hansard*, Brisbane, 18 July 2012, p. 15; Mr Harmer, Harmers Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 2.

128 See DEEWR, *Submission 84*, p. 12; RCT Solicitors, *Submission 106*, p. 11; and, VTHC, *Submission 139*, p. 8.

> section of the act is on the employer's adverse response to the employee asserting the right, rather than the existence of the bullying itself. If an employee does not assert the right, there is nothing necessarily under the *Fair Work Act* which would lead to action being taken.[129]

2.118 The onus of proving adverse action because of a workplace right is on the worker making the complaint.[130]

Individual resolution and remedies

2.119 Much of the support for utilising the *Fair Work Act* to respond to workplace bullying complaints focussed on the individual civil remedies that the Act provides.

2.120 If the bullying experienced by a worker is on grounds that constitute a breach of the *Fair Work Act*, they can apply to Fair Work Australia for assisted resolution of the matter. Fair Work Australia can deal with the dispute by conciliation or mediation, during which recommendation can be made on how the matter can be resolved.[131]

2.121 The Northern District Branch of the Construction, Forestry, Mining and Energy Union explained that if the issue is not resolved through the conciliation process because the parties cannot agree to an outcome or the employer refuses to participate, the worker is able to pursue the matter in court.[132]

2.122 DEEWR noted that the court can make any order that it sees fit, including monetary penalties of up to $6,600 for an individual.[133]

2.123 The exception is where the matter involves an unfair dismissal claim. RCT Solicitors noted that in such a case the available remedies are restricted to reinstatement and capped compensation for economic loss.[134] They suggested that the unfair dismissal remedies are not the best response to

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129 Ms Henderson, EOCWA, *Committee Hansard*, Perth, 8 August 2012, p. 21.

130 Ms Nicole Mary Wells, Senior Vice President, Unions Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 6.

131 For example, Construction, Forestry, Mining and Energy Union, Mining and Energy, Northern District Branch, (CFMEU-MENDB) *Submission 118*, pp. 6-7 and DEEWR, *Submission 84*, pp. 12-13.

132 CFMEU-MENDB, *Submission 118*, p. 7.

133 DEEWR, *Submission 84*, p. 12.

134 RCT Solicitors, *Submission 106*, p. 13.

workplace bullying because they issue only after the bullied worker has left the workplace.[135]

Workers' compensation law

2.124 Workers' compensation can be described as a system that complements WHS. Whereas WHS is about risk management to ensure people are safe from harm or injury at work, the purpose of workers compensation is to compensate people for any harm or injury that they sustain in the workplace.

2.125 Workers' compensation laws can give some workers injured or harmed by workplace bullying an entitlement to compensation. It is not available to all workers though. Safe Work Australia submitted:

> workers' compensation is only available to about 88 per cent of workers and is not available to the self-employed.[136]

2.126 The ACCI commented:

> [d]epending on the harm or injury suffered as a result of bullying, statutory compensation may be available through relevant "no-fault" workers' compensation schemes applying in each jurisdiction.[137]

2.127 The principle of 'no-fault' is explained by Safe Work Australia:

> ...to be eligible, workers only have to prove that their injuries were work related - they do not need to prove negligence on the part of an employer.[138]

2.128 Workers' compensation is regulated independently by state, territory and Commonwealth governments for workers within their jurisdiction. However, the schemes are broadly similar between jurisdictions.[139]

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135 RCT Solicitors, *Submission 106*, p. 13.

136 Safe Work Australia, *Submission 74*, p. 18.

137 ACCI, *Submission 62*, p. 13.

138 Safe Work Australia, 'Key Workers Compensation Information, Australia 2012', <http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/Key-WC-Information-2012.aspx> viewed 4 October 2012.

139 For a comparison of Australia's workers' compensation schemes see the Safe Work Australia publication, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, www.safeworkaustralia.gov.au.

Worker must be able to show that injury is work-related

2.129 In order to make a successful workers' compensation claim an injured worker must be able to show, on the balance of probabilities, that the harm or injury occurred in the course of their employment.[140]

2.130 Although this requirement seems reasonable because the objective of workers' compensation is to compensate only for work related injuries, it could create a barrier to compensation for many people harmed or injured by workplace bullying.

2.131 JobWatch suggested that because the injuries that typically arise from workplace bullying are psychological in nature, such as stress, depression and anxiety, it is difficult for a person to point to evidence that proves the injuries exist or prove that they are work related.[141] Similarly, headspace noted that this is in part because it is difficult to substantiate claims of bullying, particularly in those cases where the bullying is 'insidious or underhanded'.[142]

2.132 Similarly, the Government of South Australia commented:

> Because of the nature of bullying behaviour, it is often exceptionally difficult to prove 'beyond reasonable doubt' that bullying occurred, as even overt behaviours are rarely witnessed either individually or electronically. This is one of the key reasons why bullying is so difficult to prosecute as a WHS breach under the WHS legislation.[143]

2.133 By contrast, if a worker suffers a physical injury, it is much easier to identify and point to the physical cause of that injury at the workplace.

2.134 JobWatch added that because it is difficult to clearly shown that the harm or injury is work-related, workers' compensation claims for workplace bullying injuries are often denied by insurers in the first instance. They

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140 For an example of how Australia's workers' compensation schemes generally work, see Comcare, 'Key features of the Commonwealth workers' compensation scheme', <https://www.comcare.gov.au/Forms_and_Publications/published_information/our_services/claims/claims/info_for_gen_prac_fact_sh/key_features_of_the_commonwealth_workers_compensation_scheme> viewed 5 September 2012. Further details can be found in the Safe Work Australia publication, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, www.safeworkaustralia.gov.au.

141 JobWatch, *Submission 103*, p. 19.

142 headspace, *Submission 56*, p. 6.

143 Government of South Australia, *Submission 216*, pp. 10-11.

stated that this leaves the injured worker with the option to abandon their claim or take the matter to court which can entail prohibitive costs.[144]

Reasonable management action

2.135 A number of submissions drew attention to what could be a fine line between workplace bullying and reasonable management action where reasonable management action was perceived to be bullying[145] or where management action had crossed the line into bullying. [146] The Victorian Trades Hall Council (VTHC) explained that workers' compensation laws do not entitle workers to compensation for mental harm resulting from reasonable management action.[147]

2.136 RCT Solicitors suggested that the exclusion of injuries resulting from reasonable management is particularly problematic in relation to workplace bullying injuries:

> Stress arising out of management action taken on reasonable grounds and in a reasonable manner is excluded from compensation. 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.[148]

2.137 The VTHC argued that this exclusion heightens the proof threshold which claimants must meet and diminishes their chances of making a successful claim. [149]

2.138 Furthermore, the Community and Public Sector Union asserted that this exclusion unfairly restricts a worker's right to compensation:

> Whilst recognising that managers have certain rights to manage their employees, the manner in which those rights are executed can constitute bullying behaviour where an already stressful situation is compounded by the manner in which the actions are handled by a manager.[150]

144 JobWatch, *Submission 103*, p. 19.

145 Australian Industry Group (AiG), *Submission 59*, p. 6; VACC, *Submission 80*, p. 8.

146 For example, RCT Solicitors, *Submission 106*, p. 13; Community and Public Sector Union (CPSU), *Submission 188*, p. 11.

147 For example, VTHC, *Submission 139*, p. 7.

148 RCT Solicitors, *Submission 106*, p. 13.

149 VTHC, *Submission 139*, p. 7.

150 CPSU, *Submission 188*, p. 11.

2.139 The Victorian Automobile Chamber of Commerce (VACC) said that there are many cases where workers claim to be bullied when they have simply been disciplined:

> It is a common experience for VACC members that employees claim to have been bullied when they have actually been either disciplined or just asked to get on with their work. One VACC member reported an employee in tears because he had been asked to stop distracting other workers and return to his workstation. The worker complained to the Human Resources Manager that he had been bullied.
>
> This example highlights the importance of ensuring that managers are free to manage their workplaces appropriately. Overly prescriptive regulation can only lead to more workplace disputation and confusion.[151]

Common law rights

2.140 Solicitors and industry stakeholders commented that workers may be able to sue their employer under common law for a workplace bullying injury if the employer was reckless or negligent in not preventing the bullying.[152] However, workers' compensation laws expressly restrict, or in some jurisdictions prevent, injured workers from suing their employer for damages under the common law.[153]

2.141 Safe Work Australia stated that in South Australia and the Northern Territory workers' compensation legislation extinguishes any right of injured workers to bring a common law claim for damages.[154]

2.142 In other jurisdictions injured workers cannot bring a common law claim for damages against their employer unless the injury is of a level of seriousness prescribed in legislation.[155] For example, RCT Solicitors explained that in Victoria:

> ...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

151 VACC, *Submission 80*, p. 8. A similar argument was made by the AiG, *Submission 59*, p. 6.

152 RCT Solicitors, *Submission 106*, p. 14; MBA, *Submission 105*, p. 10; AFEI, *Submission 60*, pp. 15-16.

153 Mr Graham Harbord, Member, Australian Lawyers Alliance, *Committee Hansard*, Adelaide, 7 August 2012, p. 16; RCT Solicitors, *Submission 106*, p. 14; Ms Evelyn Margaret Field, Director, Evelyn M Field Pty Ltd, *Committee Hansard*, Melbourne, 11 July 2012, p. 35.

154 Safe Work Australia, *Submission 74*, p. 176.

155 Safe Work Australia, *Submission 74*, pp. 175-177.

a serious injury, which is, for most purposes, deemed to be either a 30% impairment or more.[156]

Disconnect between workers compensation and work health and safety laws

2.143 The ACTU stated that despite the complementary way in which the WHS laws and workers compensation appear to work, there is a disconnect between the regimes. They said this arises because a successful workers' compensation claim for a workplace bullying injury does not lead to an employer or individual 'bullies' being held responsible for the injury. Therefore, there is no accountability under WHS laws for employers who have breached their duty by not preventing the bullying or individual workers who actually engaged in the bullying. [157]

2.144 This disconnect suggests that workers' compensation laws provide little incentive for an employer to improve their risk management and meet their WHS duties. Indicative of this, the VTHC submitted that even where there is a successful workers compensation claim, 'the bullying behaviours which caused the injury are rarely addressed and prevented from [re]occurring'.[158]

2.145 The ACTU suggested that a better connection between workers compensation and the enforcement of WHS duties would provide better outcomes for injured workers.[159]

Concluding comments

2.146 Workers in all Australian jurisdictions are protected against workplace bullying by a variety of existing legislative and regulatory frameworks. These frameworks encompass WHS law, criminal law, anti-discrimination law and industrial law as well as rights under common law and workers' compensation when protections fail.

2.147 However, none of these frameworks provide an 'all in one' response to workplace bullying; that is, none provide both universal protection and recourse. Thus, workers are left to navigate the overlapping frameworks,

156 RCT Solicitors, *Submission 106*, p. 14.
157 ACTU, *Submission 63*, p. 23.
158 VTHC, *Submission 139*, p. 3.
159 ACTU, *Submission 63*, p. 23.

which can be frustrating and confusing for targets of workplace bullying. The variation across jurisdictions in each of these areas creates more confusion and frustration.

2.148 The ongoing harmonisation of Australia's WHS laws will improve clarity about the protections that all workers have from workplace bullying. However, these laws alone cannot meet all people's expectations of how the law should address workplace bullying. Not least because there is a lack of transparency to allow a complainant to know what action has been taken by a regulator. Also, the high burden of proof that must be satisfied in criminal prosecutions under WHS laws mean that convictions are unlikely, particularly where the bullying has not been overt.

2.149 Remedies for bullied workers available under anti-discrimination, industrial relations and workers' compensation laws are limited because of the specific objectives of those laws. Navigating their way through these processes with little prospect of obtaining the types of remedies sought places further strain on people.

2.150 Attempting to access workers compensation could be particularly traumatising for a bullied worker because of the difficulties they encounter in trying to prove that their injury is work related. This trauma is no doubt exacerbated for those people who have an unsuccessful claim and are not able to use the common law to sue their bully for damages.

2.151 The next chapter considers how legislation is translated into practice through workplace policies and procedures that seek to prevent and redress workplace bullying.

3

From legislation to implementation

[Workplace bullying] is a systemic problem. It is about individuals in work systems rather than just an interpersonal relationship. That is a big misconception in this area. [1]

Introduction

3.1 Workplace policies and procedures expound the legal rights and responsibilities of workers and employers alike. Chapter 2 presented the rights and obligations of workers and employers under law. This chapter will address the role and capacity of employers' workplace policies and procedures to deter and respond to workplace bullying. The effectiveness of these policies and procedures will largely determine the prevalence and resolution of bullying at work.

3.2 This chapter will first discuss best-practice policies that contribute to preventing bullying. The capacity of policies to prevent workplace bullying is discussed as well as the relevance of establishing policies for small businesses or contractors.

3.3 The chapter will then turn to the procedures that should be used to respond to bullying complaints, their role, content and the principles for handling complaints.

3.4 Although the tenet of this chapter is about good practices for preventing and responding to workplace bullying, many individual submitters expressed frustration over a perceived reticence or inaction from their

1 Dr Carlo Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 3.

employers to develop or implement policies and procedures. For example, the following sentiment was expressed in multiple submissions:

> Many complaints were made to [human resources] regarding this fellow's behaviour but all ignored with, the contact in HR saying words to the effect of "you will need to learn how to communicate better". ... The organisation has strong policies in place regarding bullying and harassment and a supposedly "zero" tolerance. However, it appears that this policy is not enforced, not worth the paper it is written on really. ... The organisation needs to be firm and enforce the so called "zero-tolerance" values. Until then nothing will change.[2]

3.5 Problematically, bullying is seen by many in the community as a 'conduct issue': a clash of personalities that is best resolved by intervention at the level of the individuals directly concerned.[3] Workplace bullying expert, Dr Carlo Caponecchia explained:

> Some people do not think [bullying] is a workplace issue, and others do not think it is an issue [at all]; they think it is someone's external psychological problem.
>
> ...psychological injury [can be viewed as] being about 'that person over there' and 'their stuff', as opposed to how they interact with what happens in our system.[4]

3.6 Bullying at work should be seen as a systemic issue. The system of work (or working environment) directly impacts on the prevalence of bullying, as it is these systems that create hazards to worker's mental health.[5]

3.7 A key theme raised in the inquiry was the nature and quality of the implementation and control strategies employed by the organisation to mitigate the hazard. Davidson Trahaire Corpsych (DTC), a corporate psychology firm,[6] noted that up to 44 per cent of workers who report instances of bullying perceived that the organisation did nothing in response to the report. Further, 18 per cent perceived that the bullying behaviours worsened after the report was made, and 40 per cent left the organisation with no bullying reports lodged and therefore no action

2 JR, *Submission 37*, pp. 1-2.

3 Carlo Caponecchia and Anne Wyatt, *Preventing Workplace Bullying: An evidence-based guide for managers and employees*, Allen & Unwin, 2011, p. 141.

4 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 5.

5 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 141.

6 DTC provides services to more than 2000 organisations across private, public and not-for-profit sectors. Its customers range in sizes from micro-businesses to large organisations of more than 100,000 employees located across several countries.

taken to address the residual behaviour.[7] Inaction in this regard may result in a breach of an employer's legal responsibilities to its workers.

Translating legal responsibilities into practice

3.8 As outlined in chapter 2, employers have legal responsibilities to manage the risk of workplace bullying. These responsibilities exist primarily under work health and safety (WHS) legislation. The risk-management framework established in the WHS Acts, is a useful approach for employers to prevent and respond to bullying within their organisations.

3.9 If, and when, adopted by the members of Safe Work Australia, the proposed *Code of Practice: Managing the Risk of Workplace Bullying* (the draft Code) will provide guidance to employers about how to translate these responsibilities into practice within their organisations.

3.10 The draft Code is used extensively throughout this chapter. In so doing, the Committee supports the draft Code and hopes that the members of Safe Work Australia quickly progress the draft to a final version for adoption within each of the state/territory and federal jurisdictions.

3.11 The current draft Code states that the risk of workplace bullying can be 'eliminated or minimised' by creating a work environment where 'everyone treats each other with dignity and respect':

> Bullying is best dealt with by taking steps to prevent it long before it becomes a risk to health and safety. This can be achieved by following a risk management process.[8]

3.12 The draft Code consequently recommends preventative strategies and systematic risk management processes. In doing so, employers are advised to:

- identify if bullying exists in the workplace or if there are work characteristics that may increase the risk of bullying
- if necessary, assess the likelihood of workplace bullying occurring and its impact
- implement control measures, and
- review and monitor the effectiveness of the control measures. [9]

7 Ms Michele Grow, Chief Executive Director, Davidson Trahaire Corpsych (DTC), *Committee Hansard*, Canberra, 13 September 2012, pp. 1-2.

8 Safe Work Australia, *Draft Code of Practice: Managing the Risk of Workplace Bullying* (*Draft Code of Practice*), July 2012, p. 3.

9 *Draft Code of Practice*, July 2012, pp 6-7.

3.13 Employers have a clear legal obligation: risks associated with workplace bullying must be eliminated so far as is reasonably practicable, or, if this is not reasonably practicable, must be minimised.[10] The draft Code recommends that employers satisfy these duties by implementing general workplace management strategies or specific workplace bullying strategies.[11]

3.14 The draft Code emphasises that the core objectives for organisations controlling the risks of workplace bullying should be:

- creating a workplace where everyone is treated with dignity and respect;
- design appropriate systems of work; and
- develop productive working relationships.[12]

3.15 These objectives should underscore an employer's policies to prevent bullying at work.

Policies to prevent bullying

3.16 Sound workplace policies can serve as a preventative tool to tackle bullying. Policies are clear statements of the standards of behaviour that is expected by the organisation. The draft Code advises employers to develop workplace bullying policies that articulate commitments to promoting a workplace that does not tolerate bullying. [13]

Do all workplaces need policies against bullying?

3.17 The draft Code advises that the management of psychosocial risks should suit the size and nature of the business as well as the type of work being carried out. The draft Code gives the following example:

> A small business may be able to manage the risk of workplace bullying without formal policies and procedures, however, a business with 300 workers may need a number of policies and procedures in place. Whatever the size and nature of the business, workers should be trained and supervised in what behaviours are

10 *Draft Code of Practice*, July 2012, p. 10.
11 *Draft Code of Practice*, July 2012, p. 10.
12 *Draft Code of Practice*, July 2012, pp. 10-11.
13 *Draft Code of Practice*, July 2012, p. 11.

> expected and actions they need to take to manage the risk of workplace bullying.[14]

3.18 The obligation of employers to their workers is to *reasonably* manage the risks associated with workplace bullying. What is reasonable for a large employer may differ from what is reasonable for a small employer. The draft Code reflects this in its guidance to employers:

> [Managing the risk] can be a stand-alone policy or incorporated into an existing human resource policy or handbook. For a very small business it can be a clear statement provided to workers that workplace bullying is not tolerated. [15]

3.19 To meet their legal obligations, the draft Code emphasises the requirement of employers to take *proactive* measures to address the risks associated with workplace bullying. Whatever form this takes, a policy should set out the standards of expected behaviour and include a statement that inappropriate behaviour will not be tolerated and offer a process to follow if breached. [16]

3.20 While large organisations have the capacity to hire expertise, state and territory WHS regulators play an important support role for small and medium enterprises (SMEs) in particular. Support to business, including SMEs, is also available via the various chambers of commerce or other industry groups.

3.21 The Indigenous Business Network (IBN) reflected on the specific challenges faced by SMEs:

> [Large employers] understand their legal obligations very clearly and have absolutely no problem in having their legal departments or what have you deal with the necessary issues around their policies and their HR. They have a HR system. [Smaller] organisations [often] do not have those systems and structures in place. So, if a sole trader took on subcontractors to take on work and that subcontractor was then harassed at a work site by another completely independent crew, how does that sole trader that has that contract deal with that issue? How does he navigate around that without hindering his capacity to then go back and get other work? [17]

14 *Draft Code of Practice*, July 2012, p. 10.

15 *Draft Code of Practice*, July 2012, p. 11.

16 *Draft Code of Practice*, July 2012, p. 11.

17 Ms Toni Ah-Sam, Chair, Northern Territory Indigenous Business Network, *Committee Hansard*, Darwin, 17 July 2012, p. 17.

3.22 The Committee acknowledges these challenges. Current regulation affords organisations with flexibility by requiring 'reasonable' management of the risk to health and safety created by bullying at work. Employers are required to take positive steps towards managing this risk, however the way in which they engage with this responsibility is not mandated, and can be informally or formally approached.

3.23 Examples of informal policies might include discussing the issue with workers at occasional meetings or making it clear to all workers that the manager has an open door policy to address issues of concern. The draft Code provides guidance to employers of all sizes as to what to include in a bullying prevention policy.

What should a bullying prevention policy include?

3.24 The Committee encourages employers of all sizes to consult, develop, and enact a policy. The draft Code provides some clear guidance for organisations and advises that workplace bullying policies (whether formal or informal) should include:

- a definition of workplace bullying with examples;
- the consequences for not complying with the policy;
- the process for reporting workplace bullying and encouraging workers to use the process;
- the process for managing vexatious reports;
- accountability and responsibilities of categories of staff, i.e. who makes the decisions;
- contact points within the organisation if a person has questions; and
- the investigation process (where necessary).[18]

3.25 It is important that these principles be embedded in an employer's policy documents and workers are informed of their rights and responsibilities at work. Dr Moira Jenkins submitted:

> A policy is an organisation's position or "stance" on a particular issue. It reflects the rules that employees must adhere to, and the way processes are carried out. A policy is enforceable (i.e. breaches of the policy may incur disciplinary action).[19]

18 *Draft Code of Practice*, July 2012, p. 11.

19 Dr Moira Jenkins, *Submission 183*, p. 18.

Consultation with workers

3.26 Consultation with workers is required under sections 47 and 48 of the model WHS laws as developed by Safe Work Australia, and currently in force in multiple jurisdictions around Australia.[20] Consultation involves sharing information, giving workers a reasonable opportunity to express views and taking those views into account before making decisions on health and safety matters.

3.27 In addition, consultation with workers can lead to greater ownership of policies which in turn leads to greater awareness of, and adherence to these policies. The Australian Council of Trade Unions (ACTU) argued:

> If workers are to accept their full share of responsibility, they must be able to participate fully in the making and monitoring of arrangements in their workplace. Effective and genuine worker consultation is essential in preventing and responding to workplace hazards including bullying. Genuine consultation with workers on safety issues recognises that:
>
> - Workers are well able to monitor and provide feedback on measures implemented to control risk;
> - Effective consultation promotes the development of skills in identifying, assessing risk, and appropriate control measures to control hazards. This can have a positive effect on workplace culture by improving morale and increased job satisfaction; and
> - Worker participation can and does result in improved safe systems of work.[21]

3.28 Similar comments were made by other unions.[22]

Giving effect to a bullying prevention policy

3.29 A recurrent theme of discussion throughout the inquiry was the importance of giving practical effect to policies. A mere policy document is not enough. Workplace bullying experts, Caponecchia and Wyatt argue that an employer's bullying prevention policy:

> will only be as good as the quality of its implementation. If a procedure exists but is not implemented, then effectively, it does not exist. It is simply a document.[23]

20 *Draft Code of Practice*, July 2012, p. 7.

21 Australian Council of Trade Unions, *Submission 63,* pp. 17-19.

22 Ms Melissa Payne, Assistant Director, Member Service Centre, Community and Public Sector Union, *Committee Hansard*, Canberra, 16 August, pp. 8-9; Finance Sector Union Australia, *Submission 165*, p. 2; Australian Nursing Federation (Victoria Branch), *Submission 117*, p. 21; Shop, Distributive and Allied Employees Association, *Submission 119*, p. 12.

3.30 Many stakeholders discussed ineffective implementation of prevention policies and management's failure to respond in accordance with the policies developed. An individual commented:

> Policies and procedures [are] simply not working. No-one wants to implement them because they look pretty just sitting on the shelf. Imagine having complete faith in all the checks and balances and having them all fail you one by one.[24]

3.31 In addition to implementing the policy in an organisation's daily-practice, incorporating positive communication and productive relationships into the ethos of an organisation will also underscore a preventative approach.

3.32 Developing a policy that is a clear statement of the expected standards of behaviour, is a first step towards eradicating bullying at work. Implementing these expected standards is a more difficult and long-term task. Implementation in this sense is not only about demonstrating positive communication and appropriate standards of behaviour, but should also be supported by appropriate procedures to respond to instances of bullying.

Responding to workplace bullying

3.33 Developing a 'road-map' to guide an organisation's response to bullying is an important component of risk management. Responding to bullying in a workplace may commence with informal resolution such as resolving the matter with the other party directly or referral to a supervisor or manager. Depending on the circumstances, a formal investigation may be required.[25]

3.34 The different stages of this system of 'triage' are discussed below.

Early intervention

3.35 An often overlooked preventative strategy is to better empower the targets of bullying behaviour to voice their concerns early. Early intervention focuses on a worker self-managing a bullying situation where they believe they have the capacity to respond. Early intervention may also be engaged

23 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 110.

24 LO, *Committee Hansard*, Closed Session.

25 Australian Industry Group (AiG), *Submission 59,* p. 10.

by a colleague or manager who witnesses, or is advised of, inappropriate behaviour and speaks up.

3.36 Although such conversations are difficult to conduct, directly and respectfully raising a concern with the worker engaging in inappropriate behaviour can be an effective tool for the aggrieved worker.

3.37 Frequently, the offending party will not be aware of the effect of the behaviour on others. The mere raising of the issue may be sufficient for the behaviour to be corrected. Equally, these discussions can be empowering for aggrieved workers. DTC commented on the training they provide to workers that enable these discussions:

> You can provide competency-based training so that you can check that the person who is a participant in a course is actually getting it—is actually understanding and starting to demonstrate that awareness and using different language, and using different approaches to reframe situations from an outburst of frustration to looking at what has given rise to these issues of concern, and how do you have a respectful conversation, even when things are really quite difficult or challenging. [26]

3.38 Providing a new vocabulary and improving the communication skills of the whole workplace can aid the early intervention capacities of workers. Further, improved communication skills and using different language within the workplace can lead to healthier workplace cultures. The importance of healthy workplace cultures is discussed in chapter 4.

3.39 Employee Assistance Service Australia (EASA) encourages workers to seek out advice early where employee assistance services are available:

> Sometimes, if we are seeing people during the early phase of the experience ... they are saying, 'I'm actually coming to explore what strategies are available to me.' ... We may talk to them about strategies for how to raise their concerns with the alleged bully directly and ask them to stop. We look at how they might assert themselves to do that, as scary as it may seem.[27]

3.40 These early intervention strategies may be insufficient to address poor workplace behaviour when the behaviour has progressed further along the spectrum. Often workers can be empowered to respond to poor workplace behaviour, but as that conduct descends into bullying, a

26 Ms Kate Price, Regional Manager ACT, Davidson Trahaire Corpsych (DTC), *Committee Hansard*, Canberra, 13 September 2012, p. 6.

27 Mrs Sarah Marie Davies, Psychological Services Manager, Employee Assistance Service Australia (EASA), *Committee Hansard*, Darwin, 17 July 2012, p. 20.

worker's ability to respond is likely to be impacted by low levels of confidence, fear of reprisal or worsening of the conduct.

3.41 The role of managers and the organisation's leaders is also important in early intervention. These officers have the responsibility, capacity and influence to clearly communicate what behaviour is not tolerated in the workplace. Workplace Conflict Resolution submitted:

> When a manager doesn't speak out about incidents of inappropriate behaviour that happen in or near their presence or when the manager doesn't take a bullying complaint seriously, this sends a very clear signal to all team members that inappropriate behaviour is condoned.[28]

3.42 Further, it is particularly important that the employer and/or manager respond in an appropriate way to the concerning behaviours. Employers do not have to become defensive nor should they overreact to inappropriate behaviour in their workplaces. An early intervention response by a manager or an employer should be calibrated according to the type, longevity and seriousness of the inappropriate behaviour.

3.43 When behaviours escalate, bringing into effect the employer's complaints procedures for bullying becomes particularly important.

Committee comment

3.44 A key focus of the inquiry was encouraging early intervention to mitigate bullying at the workplace. Participants had different views about when to, and who, should intervene early. Many participants believed early intervention should be engaged by the employer or manager – it is these officers who have legal responsibilities to recognise the hazard and manage the risk. This responsibility does carry a proactive duty that invites early mitigation of hazards.

3.45 However, this may be overlooking the early opportunities of targets of such behaviour to voice their concerns about inappropriate behaviour that may be directed at them. Empowering all workers in such a way is an acknowledgement of every worker's personal responsibility to others in the workplace.

3.46 This does not diminish the employer's or manager's duties to intervene. Rather, the empowerment of workers to be able to have respectful conversations at work forms part of a larger preventative framework and can lead to more respectful, healthy and productive working

28 Workplace Conflict Resolution, *Submission 100*, pp. 2-3.

environments. Building appropriate workplace cultures is discussed in the following chapter.

Complaints procedures and resolution

3.47 Any complaints procedure should provide a clear process for reporting and dealing with workplace bullying, including how complaints will be handled, investigated and resolved. Complaints procedures should provide workers with a system whereby they do not feel intimidating and are comfortable in coming forward with their concerns.

3.48 It can help to instil confidence in procedures if parties have more than one avenue to pursue.[29] The Law Institute of Victoria commented on the importance of individuals having different options at their disposal:

> A workplace complaints procedure should create a safe environment within which a complaint can be made. This may involve creating several contact points or avenues for a bullying complaint to be made, which is important, as different employees will need to approach the issue differently, particularly if they feel that an organisation has directly or indirectly contributed to the bullying.[30]

3.49 The draft Code specifies the following principles that should be applied when responding to workplace bullying hazards:

- treat all matters seriously;
- maintain confidentiality;
- act promptly;
- do not victimise;
- support all parties;
- be neutral;
- communicate process and outcomes; and
- keep records.[31]

3.50 These principles underscore the employer's WHS responsibility to take *proactive* steps to manage risk. Yet, the Committee heard that frequently employers are either reactive to bullying in their workplaces or fail to act

29 *Draft Code of Practice*, July 2012, p. 15.

30 Law Institute of Victoria, *Submission 52*, p. 2.

31 *Draft Code of Practice*, July 2012, pp. 14-15.

altogether. Dr Caponecchia argued that implementing workplace policies and procedures is the next challenge:

> A key theme that seems to be raised in almost all cases of workplace bullying that we deal with is the nature and quality of the implementation of control strategies. Many organisations have policies and procedures, and training in place. Merely having such strategies is not sufficient. ... it is not just about having the procedures; it is about having quality procedures. What underlies that is commitment—real, genuine commitment—and an awareness of the fact that these problems are real problems, they are workplace problems that organisations have a contribution to and a responsibility for. That recognition is not always there.[32]

3.51 To be effective, all workers must have confidence in the procedures established. Even for those organisations that have procedures in place, clear and plain language is essential. The DTC commented:

> Around one in five [workers] do not have faith in the complaint process—whatever that complaint process looks like. You can look at any organisation and they will have a very detailed grievance process. It is quite intimidating just to read through that and make the decision whether that is something that you want to go through.[33]

3.52 Similarly, Unions WA commented:

> It takes a lot of courage to try and use an internal grievance procedure to resolve an issue. [Workers] do not have confidence using those systems and, where they do use them, it does not lead to anything; it just leads to those people becoming more isolated in the workplace.[34]

3.53 Caponecchia and Wyatt argue that employers need to ensure that workers 'feel safe to report what they think are unacceptable behaviours at work'.[35]

Reporting

3.54 Encouraging workers to report early must be 'genuine and not part of rhetoric that masks the true nature of the situation.'[36] If workers do not

32 Dr Carlo Caponecchia, *Submission 81*, p. 5.

33 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 3.

34 Ms Meredith Hammat, President, UnionsWA, *Committee Hansard*, Perth, 8 August 2012, pp. 15-16.

35 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 111.

36 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 111.

feel comfortable to report, they are unlikely to do so. Consequently, problems can fester, bullying behaviours may extend to other workers and injuries sustained are likely to be greater.

3.55 There may be many reasons why workers do not report, do not report early, or leave their job without reporting the problem. These reasons may include embarrassment, fear of losing one's job, fear of reprisal, distrust of the hierarchy, or not wanting to be seen as a troublemaker. Other contributing factors might include lack of trust in the complaint handling procedure, low self-esteem, guilt about having possibly encouraged the behaviour, and the social conditioning linked to the workplace atmosphere and environment.

Early reporting

3.56 Early reporting can prevent worsening, or reoccurrence of the causative factors and enables early treatment to commence if a worker has suffered injury.

3.57 Often, an early report of bullying will entail less formal procedures being used, which can minimise the impact of the situation on all parties. The ACT Government commented:

> Early reporting often allows behaviour to be managed before the consequences for individuals have escalated.[37]

3.58 Fundamental to encouraging early reporting is acting on that information. EASA commented that while early reporting can significantly reduce the psychological injury that might be sustained, many of their clients say that they still have concerns about raising these issues:

> 'By me speaking out, I feel I am being treated even worse, so I've become even more of a target,' and it may have meant that they are feeling even more isolated. They may say, 'I've talked to the manager. They're not sure what to do, so now I feel they're ignoring me or just giving me no attention with regard to what I have spoken to them about.' Then they start to question themselves—'Have I imagined the whole thing? Am I going crazy?'[38]

3.59 Early reporting creates opportunities for constructive approaches to resolve issues. DTC discussed the 'no-blame' approach in the early stages of workplace bullying:

37 ACT Government, *Submission 191*, p. 12.

38 Mrs Davies, EASA, *Committee Hansard*, Darwin, 17 July 2012, p. 22.

> Most of the procedures and policies we have in place for bullying and harassment talk about a blame approach—they talk about victims and perpetrators; they talk about grievance procedures; they say someone is a complainant and an applicant. Those ways of approaching that kind of injury are actually not helpful, and perhaps there is scope to move towards a less blaming approach.[39]

3.60 There may be concerns that a no-blame approach will not achieve a resolution or an acknowledgement of wrong-doing. However, DTC stated when a process allows for a conversation that is empowering of both parties:

> There is far more likelihood of apology and regret and expressions of concern from the person who is the perpetrator than you would have in an adversarial process, in my experience. So, although you might begin with a perception of no blame, you are not saying there is no victim; you are accepting that there is an impact and that that impact is unhelpful, at the very least, if not quite horrific in some cases. But the way to effect change in a workplace or in an individual is not necessarily to label the perpetrator as unable to move from their position. A conversation around harm is absolutely appropriate. A conversation around what was unhelpful and the impacts of that are very empowering both for the victim and, actually, for the person who is accused of bullying because they get an opportunity to respond to that impact.[40]

3.61 Approaching reports of bullying with this framework may not be appropriate where behaviours are protracted or particularly severe. In such cases, a report of bullying should activate more formal procedures. Workplace consultants often use the term 'triage' to describe the appropriate responses that employers should engage depending on the severity of the bullying reported.

3.62 Employers should gauge the severity of the behaviour and react with a commensurate level of formality: a low-level situation may require a discussion around appropriate behaviour, whilst more severe incidents may require formal investigations and complaints procedures. Dr Caponecchia contended that employers should engage a form of 'triage' to respond to bullying in their workplaces:

> Particularly in sexual harassment [employers can be] very risk-averse ... as soon as someone claims sexual harassment it is like killing a fly with an atom bomb. It is a massive investigation. If

39 Ms Price, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 3.

40 Ms Price, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 4.

> they had done a little bit of triage and found out what are the effects are—how severe it was, what is thought on the face it, what is appropriate here—rather than a blanket intervention, they may well have had a better result. It is about saying, 'Okay, what is really going on in this case? What would be the most appropriate that would protect all of our people from increased risk?[41]

3.63 Indeed, calibrating these procedures in the appropriate way is intrinsic to a 'successful' outcome.

Mediation as a tool for resolution

3.64 In cases where the behaviour has not yet escalated into severe bullying, mediation may be an available option. Mediation is a voluntary process where an impartial third party (preferably a trained mediator) assists the parties put their respective cases before each other. The role of a mediator is to assist both parties understand the perspective of the other and to find an agreement the parties are willing to abide by. Mediation is an example of early intervention that may prevent bullying.[42]

3.65 Although mediation can be a useful tool in some circumstances, where there is an element of power imbalance in moderate to severe instances of bullying, mediation is an inappropriate mechanism and may cause further psychosocial injury. Mr Tim Law, a mediator with Sally Jetson and Associates (SJ&A) a workplace consultancy firm, outlined the circumstances in which mediation can work:

> Mediation is not necessarily a resolution for bullying. I am really cautious about—if I have somebody who is a serial bully I will not try and mediate that, that is not right. Mediation is a tool for resolving personal hurt and difference; it is not the solution to resolve issues where somebody has been really seriously bullied.[43]

3.66 Ms Rachael Uebergang from the Northern Territory Working Women's Centre, commented on the Centre's hesitation with using mediation:

> We are extremely cautious with mediation. In most instances when women come to us and have experienced bullying at work it is our assessment that the bullying relationship has proceeded to the extent that it is no longer safe for her to enter into mediation. The imbalance of power is so profound that she is just not able to

41 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 7.

42 *Draft Code of Practice*, July 2012, p. 13.

43 Mr Tim Law, Organisational Consultant, Sally Jetson and Associates (SJ&A), *Committee Hansard*, Perth, 8 August 2012, p. 28

> speak freely and openly and make requests of the other person to reach an agreement. Mediation relies on two parties participating equally and voluntarily, and that is very rarely the case in the sort of bullying we see. ... I think it would be unsafe and really inappropriate if it required the person who was being bullied to sit face to face with the person who was bullying her. I don't think that would be appropriate at all.[44]

3.67 Unions WA also stated that for targets of bullying, who may already lack confidence in their employer to handle the matter appropriately, an employer-appointed mediator may cause further distress:

> For a worker who has experienced bullying at work and has tried to use the internal mechanisms, and feels very vulnerable about that, [mediation] does not actually give them any confidence that their issues will be properly dealt with to then be told by their employer: 'Look, it's all right. We'll pay for and appoint a mediator to resolve your issue.'[45]

3.68 Outside of the bullying context, mediation is most frequently used as a dispute resolution forum when the relationship between parties has broken down.

3.69 Though mediation will not be suitable in all instances of workplace bullying, its ethos and modus operandi may allow the parties to resolve their issues if undertaken early, prior to turning to a formal investigation.

Investigation

3.70 Where a serious allegation has been made, a formal investigation may be the most appropriate way to manage the report. However, numerous individual participants in the inquiry stated that their employers failed to investigate reports of bullying.

3.71 The decision of how to respond to a report of bullying is challenging for employers and managers. The draft Code provides some guidance on how and when to investigate reports of bullying.

3.72 According to the draft Code, an investigation should be undertaken when the allegation:

- involves senior staff/management or business owners;
- covers a long period of time;

44 Ms Rachael Uebergang, Co-coordinator, Northern Territory Working Women's Centre, *Committee Hansard*, Darwin, 17 July 2012, pp. 2-3.

45 Ms Hammat, UnionsWA, *Committee Hansard*, Perth, 8 August 2012, p. 16.

- involves multiple workers;
- involves vulnerable workers; or
- where other issue resolution processes have not been able to resolve the issue.[46]

Transparency versus confidentiality

3.73 One of the key challenges discussed by all major stakeholders was the challenge of finding a balance between transparency and confidentiality when investigating complaints of bullying.

3.74 Transparency and confidentiality are core principles of natural justice. The draft Code advises that an employer's response to an allegation of bullying should follow the principles of natural justice which are designed to protect all parties. Reflecting this objective, 'confidentiality' is designed to guard against damage to a worker's reputation and other forms of detriment that may result from unsubstantiated claims of bullying.

3.75 Yet, it is likely that other employees will be aware of the inappropriate behaviour. Consequently, and as argued elsewhere in this report, it is important for the employer to be seen responding to inappropriate behaviour. Such a response requires a degree of transparency and a clear indication that bullying will not be tolerated.

3.76 An individual participant in the inquiry argued that having the employer investigate these matters was akin to 'asking [British Petroleum] to investigate leaks in their own oil wells'.[47] The same participant submitted:

> The process simply is not open and transparent; those who feel bullied have had no access or very limited access to those who are responsible for dealing with the issues that they raised, whereas the principal has unlimited access to them. We feel that they are simply not interested in our welfare or in what we have to say, that after we entered a legal process in good faith, we have been let down, have no rights and no support. [48]

3.77 The Victorian Automobile Chamber of Commerce advocated for a confidential process:

> A workplace bullying complaint should not involve consultation with other workers or the health and safety representative. A complaints process is a confidential investigation. Only those

46 *Draft Code of Practice*, July 2012, p. 17.

47 KC, *Submission 141*, p. 2.

48 KC, *Submission 141*, p. 2.

> people who need to be aware of the complaint should be informed.[49]

3.78 Yet there is a need for transparency so all participants can have faith in the process. The ACT Government stated:

> Experience of past bullying incidents illustrates that complaints must be handled quickly and transparently.[50]

3.79 Similarly, the Australian Industry Group (AiG) commented:

> There is a need for openness but also a need for confidentiality in certain aspects of [an investigation].[51]

3.80 Mr Mark McCabe, Commissioner of Worksafe ACT, commented on the challenge of balancing confidentiality or privacy and transparency:

> The privacy angle does become a problem for organisations. Even when they investigate a matter and take action against a bully, there is a belief out there, and there is some legal advice being provided to organisations, to suggest that they cannot tell the rest of the workforce what they did to the bully. Because they do not hear what happened, they assume nothing happened, and it actually undermines the success of the intervention. That is a real problem that we see. ... I find it a bit curious that we go so far to protect the privacy of the person who was found to have been a bully that we undermine successfully deterring other bullies. I am not suggesting they should be hung, drawn and quartered because of it, but I think people have a right to know the outcome of a complaint if it is validly upheld. [52]

3.81 The debate engaged throughout submissions and hearings around the competing needs for confidentiality and transparency indicates a need for greater clarity in the guidance offered to both employers and workers.

Independence and impartiality

3.82 Independence and impartiality towards the complainant and the alleged bully is 'critical' to a proper resolution of the matter. The person

49 Victorian Automotive Chamber of Commerce, *Submission 80*, p. 8.

50 ACT Government, *Submission 191*, p. 12.

51 Mr Stephen Smith, Director, National Industrial Relations, Australian Industry Group, *Committee Hansard*, Sydney, 10 July 2012, p. 8.

52 Mr Mark McCabe, Work Safety Commissioner, Worksafe ACT, *Committee Hansard*, Canberra, 16 August 2012, p. 3.

responding to the hazard report should not have been directly involved in the incident(s) and should avoid any personal or professional bias.[53]

3.83 Independence and impartiality is important to ensure a genuine process which is not only fair, but is seen to be fair. Impartiality in this way can engender confidence and reasonable morale amongst employees by the way that it is managed.[54] Furthermore, neutrality in an investigation can mean that the findings are more readily accepted by the parties concerned.

3.84 The Chamber of Commerce and Industry of Western Australia (CCIWA) advise their members that investigations into reports of bullying be conducted in an independent manner. CCIWA spoke of the correlation between independent investigations and the need for multiple contact points:

> What we promote in conducting investigations on these issues is that the person conducting the investigation must be independent from the relationship or the behaviours that have occurred or are alleged to have occurred. The way that we tend to do that with policies on harassment, discrimination or bullying is to have multiple contact points. The primary contact point may be the HR manager, but, either in their absence or if it relates to them, here is another person to go to. [55]

3.85 It is possible, particularly in larger organisations, for an investigation to be independently and impartially conducted internally. If being led internally, it is important that all parties have confidence in the neutrality of the investigator.

3.86 However, smaller organisations may not have the capacity for independent investigations. When an independent investigation of the report cannot be obtained, the CCIWA will recommend to their members that they hire an external investigator to investigate the matter:

> Where, in speaking to the employer, it is clear that there is no-one who has a level of independence within that, then we would recommend that they engage someone to conduct an independent investigation. In some circumstances, we will become involved in that. In other circumstances, we will recommend other external consultants to conduct that investigation.[56]

53 *Draft Code of Practice*, July 2012, p. 14.

54 Mr Michael Harmer, Harmers Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 5.

55 Mr Paul Moss, Manager , Employee Relations Consulting, Chamber of Commerce and Industry of Western Australia (CCIWA), *Committee Hansard*, Perth, 8 August 2012, p. 11.

56 Mr Moss, CCIWA, *Committee Hansard*, Perth, 8 August 2012, p. 11.

3.87 Mr Michael Harmer discussed how management's 'proximity to the alleged bully' will prompt employers to seek external investigators. Having said that, Mr Harmer cautioned that in cases of low severity, an external investigator may be inappropriate:

> [Employers] have a grid mechanism which calibrates severity of the issue. At certain levels it is best to handle it inside, because an external investigation can blow up beyond all proportion and even ruin the lives of both people, regardless of who is right or wrong.[57]

3.88 Although Unions WA were also supportive of the use of external investigators, they cautioned that as these contractors are employer appointed their loyalty still remains with the employer.[58]

3.89 SJ&A offers independent investigatory services to employers. Consulting director, Ms Sally Jetson explained the challenge of maintaining their independence:

> One of the things we have to do is ensure the parties concerned, and often their union rep who turns up with them and sits in on all of the interviews, that we are absolutely independent when it comes to this—that we work without fear or favour. ... We have a reputation to uphold in the public. We would certainly not do something because an employer wanted us to or write a report that showed an employer in a positive light when they were not. [If] we make an adverse report against a senior manager or against an organisation they might not employ us anymore. That is part and parcel of independence.[59]

A coordinated pool of independent investigators

3.90 Throughout the inquiry, participants discussed the possibility of the governments providing, or coordinating referrals to, independent investigatory services.

3.91 Independent investigations must be distinguished from the formal investigations of regulators prior to improvement notices, fines or court action is commenced. Independent investigations in this context refer to independent contractors conducting interviews and inquiries to establish the extent of the alleged bullying behaviour.

57 Mr Harmer, Harmers Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 5.

58 Ms Sophie Van Der Merwe, UnionLink Adviser, Community and Public Sector Union/Civil Service Association of WA, *Committee Hansard*, Perth, 8 August 2012, p. 16.

59 Ms Sally Jetson, Consulting Director, Sally Jetson and Associates (SJ&A), *Committee Hansard*, Perth, 8 August 2012, p. 29.

3.92 The provision or coordination of informal investigation services by the federal government was discussed by a diverse range of stakeholders. Ms Sophie Van der Merwe from the Community and Public Sector Union/Civil Service Association of Western Australia supported a referral service to independent investigators:

> It would be an advancement in that area for there to be a genuinely independent pool of investigators that were coordinated perhaps by the Public Sector Commission or something of that nature.[60]

3.93 Similarly, Dr Caponecchia advocated for a referral service to independent investigators:

> I think it would also be great if we had someone who was able to sit in the middle and assign organisations an independent investigator. ... Often organisations want to investigate whether allegations are substantiated—whether the behaviour has occurred. A big problem there is that they will often get an investigator who is not really independent. It is someone they have used before who they have a business relationship with, or they do it internally. ... If I had a shopping list for that independent body, it would be a great thing for them to be a referral point and say, 'Okay, you need an investigation. We've got this list of people. This month, this is who you are getting.'[61]

3.94 However, both the Chamber of Commerce Northern Territory and the IBN cautioned against the use of independent investigators who sole investigate bullying complaints. Ms Toni Ah-Sam, Chair of the IBN, advocated for a wider focus to be taken when resolving these issues:

> ...independent people coming in and focusing purely on one issue, because the reality is that there would not be one isolated incident. There would be other aspects attached to it which are manifestations of bullying in the workplace. There would have been behavioural issues going way back, because it is never a case of just the one incident taking place on a particular day. No-one wakes up and thinks, 'Gee, I'm going to bully the crap out of them today.' There would be systematic behaviour. There would be a

60 Ms Van der Merwe, Community and Public Sector Union/Civil Service Association of WA, *Committee Hansard*, Perth, 8 August 2012, p. 16.

61 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 6.

> trail of such behaviour in that workplace towards another individual. [62]

3.95 For all employers, and especially small businesses, approaching an 'investigation' with the requisite independence and impartiality may be particularly difficult. The Commissioner of WorkSafe ACT commented on the challenge of employers and their engagement with regulators:

> Quite frankly, all businesses would like us to investigate, which is something we resist because these are very tricky cases and they are only too happy to shift it over to the regulator and say, 'Please, you deal with it. We don't want to have to deal with it.' And we try to push it back to them to at least fulfil their initial obligation to investigate it. But I think that is a very good suggestion actually [for a small business to use independent investigators without triggering the formalities of a regulator's investigators]. How you would exactly do that and who would provide that service is an issue, and how it would be funded. But a small business does have the legal obligation to have gone through those steps, and surely there could be a model for that that suits a small business's costs—not the type of detailed investigation that a large business might be expected to go into, but nonetheless something that provides that for them. [63]

3.96 Dr Caponecchia was also cautious about the provision of investigation services by governments or regulators:

> There might be a temptation to think, 'We'll get another independent agency that can take the calls and refer people on' and suddenly the safety regulators do not have to do anything anymore. That is no good.[64]

3.97 Indeed, the provision of investigation services by governments or regulators could remove the current and proper emphasis on the obligation of employers to respond.

62 Ms Ah-Sam, Northern Territory Indigenous Business Network, *Committee Hansard*, Darwin, 17 July 2012, p. 18.

63 Mr McCabe, Worksafe ACT, *Committee Hansard*, Canberra, 16 August 2012, p. 2.

64 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 2.

Committee comment

Assisting employers to balance transparency and confidentiality of the parties

3.98 Employers acknowledged the challenge of maintaining the confidentiality or privacy of the parties concerned at the same time as needing to be seen to be transparent in their response to inappropriate conduct. Clearly and transparently communicating a response to a physical workplace hazard is standard risk management practice. It is important that this standard practice of transparency be equally applied to psychosocial hazards in the workplace. The ACT Government commented:

> Relevant Commonwealth laws must effectively balance the need for privacy and fairness with support for complainants and transparent outcomes that deter bullying.[65]

3.99 Further:

> It would be most helpful for the Commonwealth to review the role played by the *Fair Work Act 2009* and *Privacy Act 1988* to ensure employers are able to effectively and fairly address poor behaviour and to communicate their response to complaints consistently with the law. This may be a matter of renewed awareness, guidance and training rather than legislative reform and could form part of broader awareness-raising measures nationally. It is critical that further resources devoted to guidance and training have a practical, on-the-ground approach that is expressed briefly and in plain terms. Ideally, these would be citizen-focused and cover industrial, privacy, criminal and safety aspects of managing incidents.[66]

3.100 Although the Committee does not believe that a review of privacy legislation is needed, further advice should be provided to employers in this area. The expertise of Safe Work Australia and its tripartite membership affords an opportunity to develop this guidance.

Recommendation 6

3.101 **The Committee recommends that Safe Work Australia develop advice materials for employers that provide guidance on how to maintain the confidentiality of parties when responding to reports of workplace bullying, whilst also enabling the response to be transparent, similar to**

65 ACT Government, *Submission 191*, p. 2.

66 ACT Government, *Submission 191*, p. 13.

the risk management responses of other work health and safety hazards.

Independent investigation referral service

3.102 The Committee believes that a pool of investigators coordinated and certified by government is a concept worthy of further investigation. The Committee heeds the cautions presented above and does not believe that a referral service of this kind can be offered by regulators, as employers, particularly small and medium enterprises, are unlikely to call the regulator for fear of attracting penalties.[67]

3.103 Despite this caution however, it was repeatedly raised by stakeholders that too frequently, employers do not have the skills to be able to conduct these investigations. Further, the fear of not knowing how to investigate a report of bullying in their workplace appears to prevent many employers from responding to the hazard report at all.

3.104 An independent investigation referral service, where small and micro-businesses have priority access and investigators are certified as meeting established standards, would assist employers to proactively and swiftly respond to reports of bullying in their organisations.

Recommendation 7

3.105 **The Committee recommends that the Minister for Employment and Workplace Relations commence a feasibility study of the Commonwealth Government providing an independent investigation referral service, and include consultation of the relevant stakeholders when conducting that study.**

Outcomes and consequences

3.106 Where an organisation has developed a bullying policy, any behaviour which is found to be bullying, must be approached by the employer/manager as a breach of that policy. According to DTC, this "bullying equals breach" approach is often overlooked, and the outcomes and consequences of the breach are rarely articulated in an organisation's response to a finding.[68]

67 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 5.

68 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 4.

3.107 In most workplaces, there are very few consequences for inappropriate work behaviour and breaches of the organisation's anti-bullying policies unlike other, equally serious, behaviours. DTC argued:

> If you work in a workplace where there is drug and alcohol testing and you test positive, there is a consequence: you will be stood down, you will be case managed, there will have to be a demonstrated behaviour shift, you will have to retest and then you can come back to work. ... There is certainly an issue around consequences [for bullying]. In most cases there are very few consequences. In a large number of organisations, perceived perpetrators are allowed to continue on with the behaviour because they are great at sales or this or that, a technical expert, or have been there a long time—there are any number of reasons why someone is allowed to continue on when their behaviour is not appropriate, and that piece just stays unaddressed. [69]

3.108 EASA also commented on their experience offering counselling services to workers who have been bullied and feel that there is no likely resolution:

> In talking to our counsellors, we say that this is probably the most disheartening of cases that we see, given that the impact is so significant for the individual. There is also the sense that the bully is still going to continue to behave inappropriately, so that has not been dealt with. There is really little or no consequence for their behaviour.[70]

3.109 A conclusion, following an investigation, will not itself resolve the risk. Employers have responsibilities under WHS laws to manage that risk – and action is required after an investigation.

Actions after investigations

3.110 Appropriate management action after investigations will differ between unsubstantiated and substantiated claims. Both are addressed below.

Unsubstantiated claims

3.111 Where an investigation (be it conducted internally or externally) reveals that the bullying claim is unsubstantiated, managers and employers should be aware that problems may still require attention and action.

3.112 The draft Code advises that even at the conclusion of an investigation of a complaint where no bullying was found to have occurred, assistance

69 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 4.

70 Mrs Davies, EASA, *Committee Hansard*, Darwin, 17 July 2012, p. 22.

should still be provided to the parties. This may involve mediation, counselling, changing working arrangements or addressing other organisational issues that may have contributed to the behaviour occurring. [71]

3.113 Similarly, DTC contended:

> The answer to an investigation might be: no, there was not bullying. That does not say that there was not something unhelpful going on in the relationships in the workplace, and that there is not going to be a repeat of those concerns. If you have an investigation and that objective test model then you risk missing quite a lot of the richness of the concerns and the ability to impact on the broader culture by engaging in more of that no-blame, that more educative approach.[72]

3.114 The draft Code also advises that where the allegation is found to be vexatious or malicious in origin, counselling should not necessarily be provided for the person who submitted the hazard report. This action should be considered 'very seriously' by managers and should only be undertaken in the 'rarest of circumstances'.[73]

Substantiated claims

3.115 The actions or strategies employed by managers to respond to a substantiated claim of bullying will be different in each situation and will depend on the severity and frequency of the bullying as well as the size and structure of the business.

3.116 The draft Code advises that such actions following a substantiated finding of bullying may include:

- gaining a commitment that the behaviour will not be repeated;
- providing information to all workers to raise the awareness of bullying;
- providing training (i.e. leadership or communication training);
- providing coaching, counselling support and/or mentoring;
- reviewing the workplace bullying policy (if any);
- requiring an apology (if requested and an apology can be sincerely given);
- requiring a verbal or written warning;
- regular monitoring of behaviours;
- transferring a worker to another work area; and

71 *Draft Code of Practice*, July 2012, p. 18.

72 Ms Price, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 5.

73 *Draft Code of Practice*, July 2012, p. 18.

- demotion, dismissal or other actions subject to workplace relations laws.

In some cases, a combination of strategies may be appropriate.[74]

3.117 Similar courses of action were suggested by the AiG:

> Action taken to resolve a grievance will depend on the circumstances of the complaint, but may include an apology, an undertaking, counselling, disciplinary action (up to and including dismissal), training, [or] notifying the police.[75]

3.118 The draft Code also advises that following the investigation, there should be a 'follow-up review' to ensure the wellbeing of the parties involved and so that the actions taken to stop the bullying have been an effective response. [76]

3.119 Exposure to bullying may cause injury to a worker. Consequently, the worker may require ongoing support including:

- offering professional counselling;
- redressing any inequality resulting from the bullying behaviour;
- re-crediting leave taken as a result from the bullying behaviour;
- mentoring and support from a senior manager;
- providing training and relevant professional/skills development;
- ongoing formal/informal monitoring; and
- organising an opportunity to work in a new area (only where there is no risk of bullying in the new area).[77]

3.120 Corporate consultants such as SJ&A assist organisations responding to substantiated claims:

> Sometimes we do remedial work, and that is to use mediation once all the disciplinary action and everything is over and done with to try to restore those working relationships. From the complainant's point of view, it is very important that, if there is an outcome, the complainant is aware of the outcome and what action is being taken to keep them safe.[78]

74 *Draft Code of Practice*, July 2012, p. 18.

75 AiG, *Submission 59*, p. 12.

76 *Draft Code of Practice*, July 2012, p. 18.

77 *Draft Code of Practice*, July 2012, p. 18.

78 Ms Jetson, SJ&A, *Committee Hansard*, Perth, 8 August 2012, p. 31.

3.121 Despite existing guidance and the legitimate concern from workers that complaints need to be taken serious, employers are often hesitant to respond to instances of bullying.

Employers' concerns about investigating bullying complaints

3.122 The Australian Chamber of Commerce and Industry (ACCI) stated that employers can be anxious about progressing these complaints and taking action against workers where bullying was found to occur. The ACCI submitted:

> Employers remain concerned that allegations of workplace bullying raise contemporaneous legal requirements on the employer to ensure that they do not breach any legal rights of the alleged perpetrator or the alleged victim, which can be challenging to manage. Where there are allegations of misconduct between co-workers, employers often find themselves in an invidious situation when they attempt to investigate or enforce disciplinary action against the perpetrator (for example, issuing warnings or terminating their employment), only to find that they may be exposed to legal action (for example, in the form of an unfair dismissal or breach of contract claim).[79]

3.123 The ACCI further explained employers' concerns:

> There are particular legal difficulties for employers when an allegation of bullying is raised by an employee. For example, employees who are dismissed for breaching policies on bullying or harassment (or other instances of serious misconduct) are able to pursue the employer under a range of statutory and non-statutory causes of action where they believe their termination was unjustified or otherwise unlawful. An employer's ability to enforce relevant workplace policies is undermined when the alleged perpetrator of bullying or harassment is able to sue an employer and potentially win compensation or reinstatement.[80]

3.124 The ACCI referenced court cases where such circumstances arose.[81] Similar concerns were expressed by the Chamber of Commerce and Industry Queensland.[82]

79 Australian Chamber of Commerce and Industry (ACCI), *Submission 62*, p. 9.

80 ACCI, *Submission 62*, pp. 16-17.

81 See for example the following cases: *Wendy Bann v Sunshine Coast Newspaper Company Ltd Pty* [2003] AIRC 915 (30 July 2003); *Pecotic v AV Jennings Holdings Limited* [2007] NSWIRComm 1001 (6 June 2007); *Bilson v Mission Australia* [2010] FWA 6297 (31 August 2010); R *White v Caterpillar of Australia Ltd* [2001] AIRC 1193 (14 November 2001); *Breene v Jenny Craig*

3.125 The ACTU also commented on the difficulties of enforcing consequences and outcomes for breach of workplace policies and worker's duties under the WHS Acts:

> We would not want to allow employees to be dismissed on the basis of frivolous or false allegations about workplace bullying; but then, of course, we would not want to be defending people in situations where their bullying has been proven. So I suppose we have settle on a middle path, something that is appropriate. Just because someone is accused of workplace bullying does not necessarily mean that they have done it. ... We are not going to support people who have done the wrong thing.[83]

> ...we cannot defend people who break the law. If you have broken the law, you have broken the law. But we also cannot say that dismissing someone to get rid of the problem is how you deal with these things either. [84]

3.126 The concerns expressed by employer organisations are emblematic of a challenge that all stakeholders experience: engaging with the problem of workplace bullying is fraught with difficulty. Legal responsibility for managing the risk of workplace bullying is borne by employers and workers alike. Better response to instances of workplace bullying will not only ensure the health and wellbeing of all workers at an organisation, but can lead to greater productivity and growth.

Outcomes sought by targets of bullying

3.127 According to evidence to this inquiry, at least 90 per cent of targets of bullying make the comment: 'I just want it to stop. I don't necessarily want to go down a formal path. I don't necessarily want consequences. I just want the behaviour to stop.'[85]

3.128 Witnesses expressed the desire for an acknowledgement that this behaviour is/was bullying and that the perpetrator admitted their wrong-doing. Many acknowledged that their resulting psychosocial injuries had

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Weight Loss Centre Pty Ltd [2004] AIRC 187 (27 February 2004); *Ozzimo v Australian Postal Corporation T/A Australia Post* [2011] FWA 7831 (30 November 2011).

82 Chamber of Commerce and Industry Queensland, *Submission 67*, pp. 1-2.

83 Mr Michael Borowick, Assistant Secretary, Australian Council of Trade Unions (ACTU), *Committee Hansard*, Melbourne, 11 July 2012, pp. 19-20.

84 Mr Jarrod Michael Moran, Senior OHS and Workers Compensation Officer, ACTU, *Committee Hansard*, Melbourne, 11 July 2012, p. 20.

85 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 4.

possibly extended beyond the point where an apology would correct the wrongdoing they experienced. However, some people noted that an apology earlier in the course of the complaints process would have provided them with an important acknowledgement of what happened and its impacts.

3.129 Achieving these goals is not simple. They require skilled conflict resolution processes, prioritisation from organisational leaders, and where the bullying is systemic, a significant culture shift.

3.130 EASA and DTC submitted that employers often approach their organisations with the belief that their expertise alone will resolve the issue. EASA stated:

> I think there is a feeling sometimes from [counsellors that] the responsibility just shifted onto us to wave a magic wand to make that better.[86]

3.131 DTC concurred:

> We rarely see an investigation process achieving a positive outcome. It achieves an outcome but it is generally very difficult for everyone involved. It is very difficult for the person who has made the allegation. It can prove a result, so from that perspective it is good. ... If issues are identified early, it can be dealt with as a behavioural issue. When something is six months, 12 months or longer down the path and you have got systemic, repeated behaviour, it becomes very, very difficult. You can have an investigation and it can prove that is the issue—great. Then what do you do with it? You have still got an individual here and an individual here. You have been found to demonstrate bullying behaviours. What do you then do with that? The situation has not gone away by virtue of an investigation.[87]

3.132 Repairing the working relationship is sometimes beyond reach. Navigating these issues are challenging for workers, employers, external investigators and regulators alike. However, identifying the goals of issue resolution processes is integral for employers and their workers to reach an outcome where all parties can move on from the incident/s.

86 Mrs Davies, EASA, *Committee Hansard*, Darwin, 17 July 2012, p. 24.

87 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 5.

An anomaly: the fitness for duty test in the public service

3.133 Bullying in the public sector could involve a potential misuse of power with respect to a provision that allows employers to order their workers to attend a fitness for duty mental health assessment. Mr Graham Harbord, a member of the Australian Lawyers Alliance submitted this is a form of bullying that is being used against workers who are allegedly not performing their duties to the required standard.[88] Others said this provision was being used to intimidate or further bully workers who made complaints about workplace bullying or other working conditions.[89]

3.134 Under all public service legislation in Australia, public service employers are authorised to direct an employee to attend a mental health assessment if the employer has reason to believe the worker's health is affecting their work performance or the workplace. A worker must undergo any medical assessment they are ordered to attend, with the risk of suspension if they refuse to attend. [90]Workers who have been made to undergo mental health assessments after making complaints about bullying or other workplace issues described surprise and disbelief about being accused of having a mental incapacity.

3.135 According to the Australian Public Service Commission (APSC) the power, under the Commonwealth *Public Service Regulations 1999,* to order medical assessments exists to assist employers in meeting their WHS duties:

> The power to refer employees for a fitness for duty assessment is a significant one, and it exists for good reasons. It provides agencies with a flexible tool that allows them to manage genuine cases of illness, including mental illness, with compassion for both the individual employee and their colleagues. In some circumstances it may be difficult for agencies to meet their [statutory, work health and safety] duty of care to employees without recourse to

88 Mr Graham Harbord, Member, Australian Lawyers Alliance, *Committee Hansard*, Adelaide, 7 August 2012, p. 13.

89 For example, see DC, *Submission 268*; HL, *Submission 114*; SD, *Submission 178.*

90 See: Commonwealth: *Public Service Regulations 1999* (Cth), s. 3.2; Queensland: *Public Services Act 2008* (Qld), s. 175; New South Wales: *Public Sector Employment and Management Regulation 2009* (NSW), r. 13; Victoria: *Public Service Workplace Determination* (Vic), cl. 41.2; Tasmania: *State Service Act 2000* (Tas), s. 48(3) and *Commissioner's Directive No. 6: Procedures for the investigation and determination of whether an employee is able to efficiently and effectively perform his/her duties*, cl. 4.6; South Australia: *Public Sector Act 2009* (SA), s. 56; Western Australia: *Public Service Award 1992* (WA), cl. 26(4); Australian Capital Territory: *Public Sector Management Standards 2006* (ACT), s. 289; Northern Territory: *Public Sector Employment and Management Act* (NT), s. 45.

> such steps; in fact, they might become liable for damages if they did not.[91]

3.136 If a worker is assessed as not fit for work they could be retired on invalidity grounds.[92]

No mandatory decision making procedures

3.137 The APSC submitted that when deciding whether or not to refer an employee for a fitness for duty test, a manager must weigh up several concerns, including the duty of the worker to not affect the health and safety of other persons at the workplace.[93] They submitted:

> It is expected that the power to direct employees to attend a medical assessment will be exercised responsibly, in good faith, and in a way that is consistent with the APS Values and Code of Conduct.[94]

3.138 Ms Annwyn Godwin, the Merit Protection Commissioner at the APSC stated that there are no consistent guidelines across the Australian Public Service (APS) regarding who can make the decision to order a worker to have a medical assessment. Each agency is responsible for determining whether they have formal policies in place about the internal process for making a medical assessment decision and what the content of any policy is, including who signs off on a referral to medical assessment. There is no requirement that each health assessment referral be reviewed by a third party.[95]

3.139 Although there are no mandatory policies in relation to the health assessment decision that must be complied with, the APSC said there are safeguards within the *Public Service Regulations 1999*:

> Section 33 of the Public Service Act provides a check on this decision-making power by providing that APS employees have rights of review about matters affecting them in their employment, including in these circumstances.

91 Australian Public Service Commission (APSC), *Submission 122*, p. 2.

92 Ms Annwyn Godwin, Merit Protection Commissioner, Australian Public Service Commission, (APSC) *Committee Hansard*, Canberra, 17 August 2012, p. 9; see also the relevant provisions of jurisdictional legislation referenced above.

93 APSC, *Submission 122:2*, p. 3.

94 APSC, *Submission 122:2*, p. 2.

95 Ms Godwin, APSC, *Committee Hansard*, Canberra, 17 August 2012, pp. 8-9.

> Agencies are also likely to have policies in place that govern the use of this power, and such policies may include mechanisms for the protection of employees referred for medical assessment.[96]

Onus on worker to seek review of decision

3.140 Workers who are ordered to attend a medical assessment do have a right to apply for a review of their manager's decision. However, the onus is on the worker to seek a review.[97]

3.141 The worker may apply for a review by someone else within their agency or to the Merit Protection Commissioner within the APSC. The Merit Protection Commissioner, Ms Godwin said that usually they would ask the individual agency to review their own decision first.[98]

3.142 An individual submitter echoed this, commenting that despite ongoing bullying at work and internal processes to that point being of little assistance, when the individual contacted the Merit Protection Commissioner they were told to exhaust all avenues for review within the agency first.[99]

3.143 The APSC does not have records of how many review cases the Merit Protection Commissioner considered in the past five years included application for review of referrals of employees for mental health assessments. They submitted that this is because 'it is not practical to examine every case'. However, they contend that 'the number of cases, if any, is likely to be small'.[100]

Committee comment

3.144 The reported prevalence of workplace bullying within the public sector is particularly concerning. It is an industry governed by strict codes of conduct and procedures for breaching those codes. Yet, a number of state, territory and federal public servants raised their concerns with the Committee that the fitness for duty test may support, reward and enable a culture of workplace bullying. .

3.145 The Committee is concerned that there are no mandatory safeguards in the Commonwealth regulations requiring all decisions to refer a worker to a mental health assessment (or indeed any health assessment) be signed

96 APSC, *Submission 122:2*, p. 3.

97 Ms Godwin, APSC, *Committee Hansard*, Canberra, 17 August 2012, p. 8.

98 Ms Godwin, APSC, *Committee Hansard*, Canberra, 17 August 2012, p. 8.

99 DC, *Submission 268*, pp. 5-6.

100 APSC, *Submission 122*, p. 3.

off by a second and at least somewhat independent party. It is also worrying that there is no requirement that Commonwealth Government departments have formal procedures in place setting out how decisions about health assessments must be made.

3.146 The law instead relies on a worker who may be feeling psychologically harmed by the direction to undergo a medical assessment and by any bullying that may have been a precursor to the direction to be strong enough to advocate for themselves and seek a review. And there is no guarantee at that point that the decision will initially be reviewed by someone external to the agency that made the original decision.

3.147 As the APSC does not record how often this power is used or how many applications for review of referrals to mental health assessments are made there is no evidence to suggest what level of safeguards are necessary to prevent misuse.

3.148 It is acknowledged that recording such data could be onerous. However, the allegations of misuse of the mental health assessment referral power within the APS that the Committee heard about signify that there is a need to monitor how that power is used and how often there are reviews on the grounds of misuse.

Recommendation 8

3.149 **The Committee recommends that the Commonwealth Government:**

- **review how the fit for duty test under the Public Service Regulations 1999 is used to respond to bullying across the Australian Public Service and what safeguards are in place for its appropriate use;**
- **publish a report setting out the findings of that review for transparency and to ensure it is available to all public servants;**
- **make any necessary amendments to the legislation or public service policies to ensure that there are adequate safeguards in place for the appropriate use of the fit for duty test and there are easily accessible avenues for review should an allegation of misuse be made;**
- **require the Australian Public Service Commission to collect data about the particular grounds on which fit for duty review applications are made to the Merit Protection Commissioner to**

ensure accountability for the use of that power; and

- **encourage its state and territory counterparts to similarly ensure there are safeguards in place in regards to the comparable provision in their public service legislation.**

Moving on from bullying at work

Returning to work

3.150 Workers who are targets of workplace bullying often take a period of leave as a way of coping with the bullying behaviours. As explained in chapter 2, in some limited circumstances, injured workers may be approved for workers compensation. Workers' compensation schemes are designed to assist the worker to recover from the illness or injury and rehabilitate back into the workplace.[101]

3.151 The National Network of Working Women Centres (NNWWC) commented that whilst a period of leave can provide some initial relief, leave can turn into a period of waiting and worrying about a return to the workplace. The NNWWC stated:

> It is not uncommon for workplace bullying behaviours to escalate upon a return to work after absence, complaint or workers' compensation claim. Perpetrators of workplace bullying perceive such actions and threats against them.[102]

3.152 Similar experiences were recounted by individual workers:

> There is no return to work plan. Initial options sent to me showed me being isolated as a means of resolution. This is the second time I have been bullied and harassed by the same person. Last year I ended up in hospital.[103]

3.153 For return to work programs to be successful, the returning worker must be made aware that measures have been taken by the employer to address the behaviour of the offending worker, together with any necessary changes made to the work systems and environment.

3.154 The NNWWC emphasised the importance of educating and training all workers before the returning worker goes back to that workplace:

101 AiG, *Submission 59*, p. 14.

102 National Network of Working Women Centres (NNWWC), *Submission 86*, p. 11.

103 CH, *Submission 24*, p. 2.

> Return to work plans, whilst well intentioned, are often unable to affect the cause of the psychosocial injury because the perpetrator of workplace bullying remains in the same work site as the target, there is no education or training to accommodate the bullied workers and no support systems or people in place for the bullied worker to go to upon their return.[104]

3.155 If action is not taken, the return to work program is highly unlikely to be successful. As briefly introduced above, a mere conclusion that bullying either did or did not occur will not address the offending behaviour, nor the circumstances that allow such conduct to occur. Conducting a review of the work environment and responding with positive measures is required.

Reviewing the work environment

3.156 The draft Code advises that after addressing a specific bullying issue, employers or managers should also examine the 'work situation' to identify and address any underlying risk factors.[105]

3.157 The AiG also commented on the opportunity for an organisation to drive a cultural shift and improve the working environment:

> bullying complaints have lead to cultural shifts in the workplace. For example, a bullying complaint may result in an employer reviewing or developing bullying policies and procedures, and/or conducting training on bullying for both management and employees.[106]

3.158 The next chapter will consider the role and importance of good workplace culture.

Committee comment

Implementing and enforcing policies and procedures

3.159 It is concerning that even after bullying concerns are raised, some workplaces fail to respond to the psychological injury sustained, or at risk of being sustained, by their workers. In circumstances where workplaces already have the 'infrastructure' of policies and procedures to respond to

104 NNWWC, *Submission 86*, p. 11.

105 *Draft Code of Practice*, July 2012, p. 19.

106 AiG, *Submission 59*, p. 12.

bullying, there appears to be a lack of commitment, content awareness and implementation of those systems. When bullying is reported, it is perceived as a 'problem' that is 'often moved rather than resolved, which then infects the next workplace'.[107]

3.160 As bullying is a risk to the health and safety of workers, employers have clear responsibilities to proactively respond to bullying in their workplaces. Though the Committee believes that its inquiry has contributed to the beginning of a national discussion about bullying more generally, it is apparent that the responsibilities of employers must be more clearly articulated.

3.161 From the evidence submitted to the inquiry, it appears that employers feel restrained in acting on a finding of bullying and imposing consequences for that breach.[108] This hesitation can be mitigated through the provision of advice. Though the adoption of a code of practice will assist in clearly providing direction to employers about these responsibilities, the Committee is of the opinion that there could be more work done by Safe Work Australia and its members around the outcomes and consequences that employers can use in their response to bullying incidents.

Recommendation 9

3.162 **The Committee recommends that the Commonwealth Government, through Safe Work Australia, develop advice materials for employers that detail appropriate responses to and outcomes for reports of workplace bullying.**

Improving the skills and responses of management to workplace bullying

3.163 The reported hesitancy by managers and employers to implement and enforce their policies and procedures also indicates a need for greater skills development. It is particularly important for Australia to continue to develop more proactive and responsive cultures in workplaces. Chapter 4 will discuss workplace cultures and chapter 5 will discuss enhancing the tools for prevention and responding to workplace bullying as well as more general training for managers and employers.

107 Ms Grow, DTC, *Committee Hansard,* Canberra, 13 September 2012, p. 2.

108 ACCI, *Submission 62*, pp. 16-17.

4

Workplace cultures

A healthy and respectful culture is a critical part of the solution.[1]

Policies and procedures on their own do not prevent or address bullying. Appropriate leadership that demonstrates skills and confidence in addressing this issue are also required. High level commitment to making positive changes has a big influence on the culture of workplaces.[2]

Introduction

4.1 It became clear from early on in the inquiry that workplace culture was a key determinant of whether bullying would occur and for how long it would be sustained. Many individuals who came before the Committee spoke of 'toxic' working environments.

4.2 Workplaces characterised in this way typically have high staff turnover, low staff morale, high levels of informal grievance and complaint, inconsistent application of policies and rules, poor performance and victimisation of those who protest.[3] An abusive working environment or a toxic workplace is more likely to spring from the failure to address bullying and other negative behaviours systematically, quickly and consistently.

4.3 In contrast, respectful working environments invite greater trust amongst workers and with their employer. Supportive workplace cultures have been associated with a variety of benefits for both workers and employers,

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1 Ms Michele Grow, Chief Executive Director, Davidson Trahaire Corpsych (DTC), *Committee Hansard*, Canberra, 13 September 2012, p. 2.

2 National Network of Working Women's Centres, *Submission 86*, p. 6.

3 Alannah and Madeline Foundation, *Submission 125*, p. 6.

including productivity gains, higher levels of commitment to the organisation, greater staff retention, higher levels of job satisfaction, lower levels of stress and the experience of less conflict between work and family responsibilities.[4]

4.4 The policies and procedures organisations have for responding to bullying are of little use if there is an absent corresponding culture and role-modelling of their objectives. This chapter will discuss the capacity of a workplace culture to prevent bullying in the first instance, as well as the benefits of investing in workplace cultures and how this investment might drive improved cultures and increased productivity.

What is workplace culture and how does it affect bullying?

4.5 Workplace bullying experts Caponecchia and Wyatt define workplace culture as:

> the shared norms, values and assumptions that are held unconsciously but define how the organisation as a whole, views itself and its environment. [5]

4.6 The nature of the culture is identified by observable practices. Workplace characteristics, leadership styles and group dynamics all contribute to the culture of a workplace.

4.7 The demonstrated values of the organisation are fundamental in preventing and managing workplace bullying. Maintaining a culture where reports of unacceptable behaviour are taken seriously, dealt with confidentially, fairly and in a timely manner is intrinsic to eradicating workplace bullying and its negative consequences.

4.8 On the other hand, poor workplace culture can have a devastating impact on the health and wellbeing of workers. The Australian Institute of Employment Rights (AIER) argued:

> the subtle and destructive nature of adverse workplace culture ... can manifest itself in a "death by a thousand cuts". [6]

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4 Australian Institute of Employment Rights (AIER), *Submission 109*, p. 12.

5 Carlo Caponecchia and Anne Wyatt, *Preventing Workplace Bullying: An evidence-based guide for managers and employees*, Allen & Unwin, Crows Nest, NSW, 2011, p. 55.

6 AIER, *Submission 109*, p. 17.

4.9 Poor workplace cultures can lead to significant mental and physical health problems for workers across all sectors and all occupational levels. These adverse health outcomes have implications for the individual worker, their co-workers, the business, the national health system and the international competitiveness of the Australian economy overall. [7]

4.10 Importantly, negative workplace cultures can lead to higher rates of bullying. Caponecchia and Wyatt argue:

> Cultural values and practices may 'permit' or encourage acts of bullying, prevent a target from reporting the behaviour (because reporting is seen as weakness) or expect that they will endure it, or make it acceptable for management to ignore reports. [8]

4.11 Such cultures can emerge inadvertently where the organisation's leaders do not have an understanding of the magnitude or consequences of bullying in the workplace. WISE Workplace Investigations stated:

> The fostering of workplace cultures where bullying thrives, appears to have its roots in acquiescence, confusion about what constitutes bullying and an inability to conceptualise this conduct. [9]

4.12 Bullying cultures thrive in working environments where workers are fearful of speaking up about unreasonable behaviours because of fears of victimisation or because they may be the subject of bully behaviours themselves. Bullying cultures are often supported by a 'code of silence' which allows destructive behaviours of this kind to flourish. [10]

4.13 Healthy workplace cultures need to reinforce the message contained in policies and procedures that bullying is not tolerated. Employee Assistance Service Australia (EASA) commented:

> In talking to the client, they may work for an employer who has clear policy and procedure with regard to bullying and harassment—what it is and what should be done to stamp it out. However, the staff member who has been bullied is too afraid to speak out due to the work culture. It may be the most brilliant and well-written policy and procedure, but the culture does not seem to support it. [11]

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7 AIER, *Submission 109*, pp. 10-11.

8 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 55.

9 WISE Workplace Investigations, *Submission 98*, p. 4.

10 Australian Council of Trade Unions, *Submission 63*, p. 17.

11 Mrs Sarah Marie Davies, Psychological Services Manager, Employee Assistance Service Australia (EASA), *Committee Hansard*, Darwin, 17 July 2012, p. 22.

4.14 Proactive environments can also empower the parties to resolve issues early before they escalate and require management attention or formal inquiries. The Chamber of Commerce and Industry Queensland (CCIQ) submitted:

> CCIQ strongly believes that individual workplaces need to take responsibility and undertake proactive initiatives to reduce the potential for workplace bullying issues within their business [and employers] should be encouraged to focus on maintaining a workplace culture that embraces an atmosphere of trust and respect in which bullying is not tolerated and where disputes are resolved early.[12]

4.15 In their leadership capacities, managers have significant input into the culture of an organisation, and can therefore demonstrate to their workers what standard of behaviour is expected.

Role of leaders and managers

4.16 Leaders and managers contribute to the culture of a workplace, not just by what they say but also by what they do. Leaders need to model appropriate behaviours in how they conduct themselves and have the courage to call and to deal with inappropriate behaviour when they become aware of it.[13]

4.17 WISE Workplace Investigations commented:

> Whilst anti bullying policies are necessary they are not sufficient to eradicate this behaviour in the workplace. Positive role modelling is required to effect cultural change. Managers need to respond immediately when they witness inappropriate conduct. That is they need to be seen shutting down inappropriate conversations.[14]

4.18 Particularly in larger organisations, the role of middle-managers is equally important. In such organisations, it is this group of managers with whom workers have most contact and therefore the behaviours that they display also contribute to establishing professional standards.

4.19 On this point, the Australian Public Service Commission stated:

12 Chamber of Commerce and Industry of Queensland, *Submission 67*, p. 2.

13 Mr Stephen Sedgwick, Commissioner, Australian Public Service Commission, *Committee Hansard*, Canberra, 17 August 2012, p. 2.

14 WISE Workplace Investigations, *Submission 98*, p. 6.

> leadership [is important] in fostering a high performing culture and setting the standard for 'how things are done around here', which includes dealing promptly and firmly with unacceptable behaviour, such as workplace harassment and bullying.[15]

4.20 However, managers and an organisation's executive leadership are frequently promoted on the basis of technical skill or specific knowledge. Workplace Conflict Resolution (WCR), a consultancy firm offering mediation, investigation and training services, noted that managers:

> are not necessarily promoted because they have the interpersonal and leadership skills to be able to appropriately manage people. Most managers lack skills in active listening, appreciative inquiry and positive regard and so when listening to complaints managers can be quick to make assumptions and interpret incidents through their own reality, perspective and experiences. [16]

4.21 The responsibility of managers, argue Caponecchia and Wyatt, are twofold:

> Managers are paid to manage, and that doesn't mean just getting the job done. It involves demonstrating leadership: inspiring and motivating people while taking into account that they need to work together.[17]

4.22 Part of managers' duties is to manage the performance of staff. However, Ms Toni Mellington, Director of DC Workplace Consulting observed that key performance indicators (KPIs) can be used inappropriately, under the guise of performance management, as a bullying technique:

> In the modern workplace I do not believe you can exclude yourself from being required to meet KPIs. However, what has given me cause for concern is when performance management actions … are misreported or misrepresented and are presenting a worker as being somehow not measuring up to that which is required when in fact they are.[18]

4.23 Leadership is required from managers to address inappropriate behaviour when they first witness such conduct. If they do not address inappropriate behaviour that happens in, or near, their presence, a clear signal is sent to

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15 Australian Public Service Commission, *Submission 122*, p. 6.

16 Workplace Conflict Resolution (WCR), *Submission 100*, pp. 2-3.

17 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 139.

18 Ms Toni Mellington, Director, DC Workplace Consulting, *Committee Hansard*, Melbourne, 11 July 2012, p. 31.

their workers that such behaviour is condoned. Managers must foster and role-model the behaviour they expect and promote appropriate peer intervention to report incidents and support those they see being bullied.[19]

4.24 Enabling leaders and managers to address this conduct may require skills training specifically on such issues and real investment in a healthy workplace culture. It is vital that those officers who are required under the law, and within the organisation's own structures, have the skills and knowledge of how to respond to reported or observed bullying. This requires the 'soft-skills' including dispute management, conflict resolution, self-awareness and more general management abilities.

4.25 The lack of adequate skills of management to respond in appropriate ways to bullying incidents among their staff was repeatedly raised by stakeholders. Having specific training to develop these soft-skills was repeatedly raised throughout the inquiry.

Specific training for management

4.26 Many participants in the inquiry spoke of the need for managers and human resource sections to receive greater training in conflict management and bullying resolution strategies. WCR provides training, consulting, preventative measures, conflict coaching, mediation and grievance investigation services to Australian businesses. In their experience:

> The three single most important factors that prevent the reoccurrence and escalation of bullying behaviours in the workplace are:
>
> - The ability of each manager to be conscious of and notice incidents of subtle bullying;
> - The ability of each manager to speak up constructively in that moment; and
> - Managers that take complaints of bullying seriously.[20]

4.27 Yet according to WCR, most managers struggle with the challenges associated with delivery in each of these areas.[21] The draft C*ode of Practice: Managing the Risk of Workplace Bullying* (the draft Code) identifies this challenge:

19 ACT Government, *Submission 191*, p. 12.

20 WCR, *Submission 100*, p. 2.

21 WCR, *Submission 100*, p. 2.

> Bullying has been linked to situations of role conflict and ambiguity. Workers should understand their role and have the appropriate skills to do their job. This includes ensuring that workers who manage or supervise others have good communication and people management skills, or if necessary, providing training to acquire these skills before they start supervisory duties. [22]

4.28 Another key issue raised throughout the duration of the inquiry was the need for specific training or guidance material on how to respectfully and productively engage in discussions about workers' performance. Davidson Trahaire Corpsych, (DTC) commented:

> There is an absolute critical need to focus on managers. When I say 'managers', I mean everyone from the executive level down need to be focused on the issue.[23]

> …[Managers] are often not particularly skilled at giving feedback, and they are very rarely well skilled at receiving feedback. If you can just enhance that skill, you go along way forward in how you then deal with any of the issues and the openness to feedback and the acceptability. There are a number of core pieces in there of just building fundamental skills in good people management. [24]

4.29 The provision of training for those who provide guidance and support to individuals who are experiencing bullying was also raised. The draft Code recommends that workers who have a designated role in handling reports of bullying should undertake specific training to assist them to carry out their role effectively. [25] Frequently, this will include human resource sections, or bullying contact officers.

4.30 More broadly, improving the mindfulness and awareness of managers to notice concerning behaviours and actions amongst their team members or their interactions with other workers, would improve workplace cultures and also allow early resolution of conflict and prevent bullying escalating.[26]

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22 Safe Work Australia, *Draft Code of Practice: Managing the Risk of Workplace Bullying* (*Draft Code of Practice*), July 2012, p. 13.

23 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 2.

24 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 6.

25 *Draft Code of Practice*, July 2012, p. 13.

26 WCR, *Submission 100*, p. 5.

Investing in healthy workplace cultures

4.31 Businesses reap significant benefits from investing in workplace culture.[27] Furthermore, the far reaching consequences of poor workplace culture commands greater understanding and awareness of the impact of Australia's work environments on the wellbeing of workers.[28]

4.32 Investing in the culture of a workplace has a corresponding effect on the success of maintaining safe working environments. The AIER argues:

> The best workplaces are those that engender workplace cultures that focus on treating all employees with dignity and respect and ensuring that employees are encouraged to raise concerns if they arise.[29]

4.33 Equally, the Department of Education, Employment and Workplace Relations (DEEWR) referred to studies that found that the 'best' workplaces are those where there are good relationships between managers and workers. DEEWR stated:

> Firms that engage their employees effectively and listen to them tend to be more productive and more profitable than firms that do these things badly. An engaged employee is one who knows what he or she need to do to further their organisation's interests and is committed to doing that. They also tend to be satisfied with their work, have good relationships with their colleagues and feel that their work fully utilises their skills and talents. Bullying is one example of behaviours that prevent effective employee engagement.[30]

4.34 Developing the case for greater investment by employers in the culture of their organisation, the AIER stated:

> The first incentive for investment in workplace culture is "responsibility", in a manner analogous with corporate social responsibility. ... The second incentive is "the cost of inactivity" as a failure to invest in workplace culture will lead to greater costs associated with absenteeism, presenteeism and recruitment and training of new staff. The third incentive to improve workplace culture is the return on investment for improving quality of work

27 AIER, *Submission 109*, pp. 13-14.

28 AIER, *Submission 109*, pp. 10-11.

29 Diversity Council of Australia, *Submission 185*, p. 14.

30 Department of Education, Employment and Workplace Relations, *Submission 84*, p. 10.

> organisation, including corporate brand reputation and product innovation.[31]

4.35 The AIER also argued that the additional incentive for employers to invest in workplaces is that the quality of professional relationships is the single most important driver of excellence in workplaces. Therefore, investment in culture is a key strategy for employers to achieve quality working relationships and the elimination of negative outcomes such as bullying.[32]

4.36 Despite the incentives outlined by the AIER, some participants in the inquiry expressed concern that Australian workplaces are not investing in their cultures adequately and are therefore falling behind international benchmarks. Mr Michael Harmer summarised:

> In Australia we have a problem with our business culture. Australian business leadership fails in international surveys to reach important benchmark standards on the treatment of people and that, in turn, leads to workplace cultures that are conducive to bullying. That is an area that we need to help all Australian management with, and I am one of them. We certainly need, in my view, a system of accreditation of Australian business to genuine standards, because our management are highly educated—they know what to do, but they just do not achieve it. It is that gap between knowing and doing that needs to be bridged if we are going to have any real sort of turnaround of this problem in the country.[33]

4.37 The proposal for a 'system of accreditation' will be discussed in the second Part of this report.

4.38 The Committee acknowledges that in an inquiry of this kind few 'positive' or best practice examples would be discussed in the evidence received. If prevention strategies are working, stakeholders are unlikely to make submissions about them. However a significant number of submissions from individual workers referred to 'aggressive' working environments.[34] For example,

> Within a few months of the establishment of this business unit a workplace culture had developed which can only be described as toxic. A small number of individuals in supervisory positions

31 AIER, *Submission 109*, pp. 13-14.

32 AIER, *Submission 109*, p. 15.

33 Mr Michael Harmer, Harmers Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 1.

34 PP, *Submission 9*, p. 3.

> became involved in systematic bullying of staff members who, in most cases, were reluctant to report the behaviour due to fear of reprisals or damage to their careers. During my time in this business unit I became aware of a range of disturbing occurrences.[35]

Improving workplace culture

4.39 Organisational culture by nature is hard to shift. Change of this nature requires strong, visible leadership and role modelling by the employer and its management team. Without leadership from the employer, achieving a culture-shift will be 'next to impossible'. [36]

4.40 Caponecchia and Wyatt noted in their recent book on this topic that there is an improvement taking place in workplace cultures in Australia. They wrote:

> The good news is that we see some organisations shifting towards a new paradigm. This paradigm involves the promotion of workplace-related health and wellbeing while not compromising productivity. These organisations [are] investing in and valuing wise leaders and managers, not just clever ones or those who have been able to 'stick out' working for the organisation for a long time. In these organisations, there is more collaboration towards synergy, encouragement of formal and informal feedback (including negative), greater behavioural integrity modelled, agreed-upon organisational values. ... The managers in these organisations are encouraged and educated to facilitate, coach and support the process of people's ongoing development, rather than simply requiring goal achievement. [37]

4.41 Professor Maryam Omari and Mr David Blades argued the importance of educating and training workers:

> Public and private organisations should do more by way of training, workshops and information sharing to ensure that managers and employees follow the relevant codes of practice that relate to bullying, discrimination and harassment at all times. ... The provision of soft skills training, negotiation and conflict resolution skills will go some way in ensuring people are treated

35 CP, *Submission 145*, p. 1.

36 Maryam Omari, *Submission 28*, p. 2.

37 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 142.

> with dignity and respect at work, even if they need to be 'back on track' plans to improve work performance.[38]

4.42 DTC indicated that the average expenditure by organisations on their services equates to only $20-$30 per worker per annum. DTC's Chief Executive Director said:

> The cost of that per head of population is typically low. Lots of organisations talk about it, very few invest well, and then invest on an ongoing basis.[39]

Information and training for all workers

4.43 The risk-management focus of the work health and safety (WHS) legislation and the draft Code require employers to take proactive steps in managing bullying hazards. An effective management tool recommended by the draft Code is for information about the organisation's anti-bullying policies, and training on how to respond to bullying incidents to be given to all employees.

4.44 It is important that all workers receive information and training about how to respond to, be aware of, and meet their responsibilities relation to workplace bullying. Strategies and information about bullying at work will not only empower those individuals directly involved in the conduct, but also better enable bystanders to speak out.

4.45 The draft Code advises that information to raise awareness of bullying and its impacts in the workplace may be provided in various ways, for example:

- information sessions;
- team meetings or toolbox talks;
- newsletters, pamphlets;
- payslip attachments;
- posters;
- intranet announcements; or
- email messages.[40]

38 Professor Maryam Omari and Mr David Blades, *Submission 28*, p. 2.

39 Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 8.

40 *Draft Code of Practice*, July 2012, p. 13.

4.46 EASA commented on the effectiveness of training programs for promoting a discussion on what is, and what is not, appropriate in a workplace:

> People concluded that as much as the training is not the answer to completely eradicating bullying and harassment, it does make people think about what is appropriate and inappropriate. It also helps them understand what options they have available and it pinpoints the role of the bystander, which I think is really important, and there may even be bullies in attendance who realise their behaviour is unacceptable and the impact their behaviour is having on others, and hopefully it stops that as a consequence.[41]

4.47 Some workplace consultants are transitioning from training programs focussed on definitions to engaging workers in a discussion about healthy workplaces and respectful behaviours. For example, DTC described:

> What we now provide is some of the awareness that gives people the temperature gauge to say, 'Is my workplace healthy?' but also skills in appropriate assertiveness, in ways of raising those difficult concerns: if something happens to you in a workplace and it is not okay for you, how do you have the conversation, whether you are a manager or an employee? Our focus now is on building what are considered 'soft skills' and [respectful relationships].[42]

4.48 The basic building blocks of respectful communication and those skills are 'pretty universal'. Developing 'respectful behaviours' does not mean that everyone has to start being 'frightfully polite to one another and use long words'. Rather such discussions begin with a positive approach: a discussion of the responsibility of all workers to be more self-aware and cognisant of their responsibilities. [43]

Workplace culture – everyone's responsibility

4.49 All workers contribute to the culture of a workplace. As individuals, we can all contribute to improving workplace culture in several ways. Caponecchia and Wyatt argued:

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41 Ms Jade Hamilton, Training and Mediation Consultant, Employee Assistance Service Australia, (EASA) *Committee Hansard*, Darwin, 17 July 2012, p. 23.

42 Ms Kate Price, Regional Manager ACT, Davidson Trahaire Corpsych (DTC), *Committee Hansard*, Canberra, 13 September 2012, p. 6.

43 Ms Price, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 7.

> It may be as simple as reflecting on our own behaviour; carefully assessing any suspected unacceptable behaviour; and supporting our colleagues.[44]

4.50 Similarly, Mr Damian Panlock, father to Brodie Panlock, a 19 year old waitress who took her own life after enduring persistent and vicious bullying at work, commented:

> There should not be any complacency in the workplace. People have to be aware of what is going on around them and protect each other. I am not just talking about everyday things. When it gets to behaviour that is starting to impact on someone's life, putting them in the state that Brodie [Panlock] was in, it is serious.[45]

4.51 Establishing workplace cultures that cultivate respect and dignity will elevate the standards of behaviour expected and consequently place a high value on the health and wellbeing of all workers:

> It is about basic respect and a way of treating respect as the basic human right, rather than a transactional thing that is earned and lost. [46]

4.52 Such working environments are highly unlikely to lead to poor workplace behaviour, of which bullying is just one symptom. Caponecchia and Wyatt have argued:

> Moving values towards condemning these kinds of behaviours is what needs to happen in order for widespread, consistent and long-lasting prevention of bullying. [47]

4.53 Communicating the responsibility of all workers to contribute positively to the culture of a workplace is critical to improving the working environment. Such discussions can also frame the issue of expected standards of behaviour in a positive way.

4.54 A way to begin these discussions is around the collective responsibility of all workers for health and safety at work. More specifically in the bullying context, this may start with a discussion about the role of bystanders.

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44 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 142.

45 Mr Damian Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 52.

46 Ms Price, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 7.

47 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 143.

4.55 People who have been bullied at work, or who have witnessed the devastation that it can cause, have an important role to play in championing the issue to ensure bullying does not happen again.[48]

Bystanders

4.56 Under section 28 of the model WHS laws, all workers have a duty to take 'reasonable care' for the health and safety of their co-workers. This not only exists between the alleged bully and their target, but also between a bystander and those more directly involved in the bullying behaviour.

4.57 Despite the duty, bystanders may feel helpless and unsure how to respond. There may also be a fear of exposing themselves to bullying behaviour if they intervene.

4.58 The Australian Human Rights Commission has conducted various public campaigns on the role of bystanders on a range of issues including sexual harassment and cyber-bullying. In the area of workplace bullying, the Commission commented:

> Bystanders can be highly effective in raising awareness of bullying. They can also intervene to prevent harm and contribute to improving workplace practices and cultures that reduce the occurrence of bullying and harassment. [Bystanders] can play [an important role] in preventing and responding to bullying in the workplace and encourage strategies that create the confidence and safety for bystanders to take action.[49]

4.59 A workplace culture that empowers bystanders to 'take action' will significantly and positively contribute to employers 'armour' when preventing and responding to bullying.

Employers' response to the reports of bystanders

4.60 Where a bystander does report inappropriate behaviour to management, it is important that that the report is acted upon. As workplace bullying is a WHS issue, it should be responded to regardless of who raises the concern. It should not be treated as a general personal grievance that requires the targeted worker to come forward.

4.61 In the more traditional WHS areas of physical hazards, employers appear more willing to act proactively to address that issue despite whether the

48 Caponecchia and Wyatt, *Preventing Workplace Bullying*, 2011, p. 142.

49 Australian Human Rights Commission, *Submission 121*, p. 8.

hazard is reported by a worker who is directly exposed to the hazard, or other workers who have merely observed the risk. As workplace bullying is more widely understood as a risk to the health and safety of workers, it is foreseeable that managerial responses to bystander's reports of bullying will become more proactive.

Committee comment

Improving Australia's workplace leadership skills

4.62 As discussed throughout this report, a proactive, appropriate and comprehensive response to bullying in the workplace has a significant impact on the likelihood of a long-term resolution of problematic behaviour, hazardous systems of work and poor workplace cultures. Improving the skills and capabilities of managers to respond in such a way was repeated by a diverse cross-section of stakeholders.

4.63 Towards the end of the Committee's inquiry, the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, announced a new national Centre for Workplace Leadership. In a media release, Minister Shorten indicated that the Centre will:

- be the Australian expert on workplace management and leadership and improving the productivity of Australian workplaces through leadership;
- deliver quality training for leaders and managers on effective leadership, workplace culture and people management practices and connect leaders to training and development from other providers;
- promote and disseminate practical, relevant research, including surveys, on workplace change and improvement;
- lead the public debate on the importance of good leadership, workplace culture and people management and on the interdependencies between high performing and productive workplaces, effective management practices and quality jobs; and
- drive a broader movement to 'do things differently at work' by recognising that productivity 'happens' at work and that leadership is a crucial mechanism to improve productivity.[50]

50 The Hon Bill Shorten MP, Minister for Employment and Workplace Relations, 'Centre for Workplace Leadership', *Media Release*, 14 October 2012.

4.64 It is intended that the Centre will work across all industries, sectors and regions of Australia, with the goal to improving the leadership capability in workplaces of all sizes, including regional businesses, as well as a specific focus on assisting small and medium enterprises. Mirroring the tripartite membership of Safe Work Australia, the strategic direction and priorities of the Centre for Workplace Leadership will be initiated by the Advisory Group comprised of business leaders, peak union representatives, academic experts and government representatives.[51]

4.65 The Committee welcomes this recent announcement as there is a need to improve managerial skills among Australian employers, and will watch the Centre's progress with interest. The Committee believes that the Centre can play a role in improving workplace cultures and potentially reduce the rate of bullying in Australian workplaces.

Improving Australia's workplace culture

4.66 The Committee believes that there is a significant case to be made for greater investment in the relationships and cultures that are formed in workplaces. Focussing on promoting good behaviour, and investing in the skills of workers in this regard, rather than condemning negative behaviour is becoming the focus of corporate consultants.

4.67 The Committee believes that progressing the workplace discussion from what workers should not do, to promoting positive working relationships is an encouraging development. The preventative nature of this approach has the capacity to remarkably reduce the rate of bullying at work.

4.68 Progressing the national discussion to one which promotes positive workplace relationships may also create an opportunity to showcase the economic and productivity benefits to employers of featuring such relationships in their organisations. The Commonwealth Government, in conjunction with industry and employer groups, should work to promote the economic benefits of positive working environments that are free from workplace bullying.

4.69 The evidence received throughout this inquiry would indicate a clear need for improvement of workplace culture in Australia.

4.70 The Committee believes there is value in having KPIs for managers and supervisor that include targets for encouraging positive workplace behaviour.

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51 The Hon Bill Shorten MP, Minister for Employment and Workplace Relations, 'Centre for Workplace Leadership', *Media Release*, 14 October 2012.

4.71 The greatest investment Australia can make in with respect to eliminating workplace bullying is to improve workplace culture. Developing better cultures requires the contributors to that culture to act. The Committee hopes that its report will contribute to the ongoing national discussion about workplace culture and the detriment that can result from instances of workplace bullying.

Recommendation 10

4.72 **The Committee recommends that the Commonwealth Government, through the Centre of Workplace Leadership and in conjunction with industry and employer groups, work to promote the economic benefits of positive working environments that are free from workplace bullying.**

5

Enhancing tools for the prevention and resolution of workplace bullying

The only way I can see us overcoming [bullying at work] is really for employers to have more tools at their side.[1]

It is about empowering not only the workforce and the people on the job but also the organisational management and structure. [It is] about looking at preventative measures. Let's do the hard work upfront so workplace bullying will not be played out. [2]

Moving beyond workplace bullying ensures that work is not just balanced with life, but enriches and fulfils it.[3]

Introduction

5.1 All Australians should be able to go to work and return home without being harmed, physically or psychologically. The psychosocial health of working Australians has been the subject of significant national attention in the past year. A national discussion about workplace bullying has been

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1 Mr Michael Maloney, Manager, Workplace Relations, Chamber of Commerce Northern Territory (CCNT), *Committee Hansard*, Darwin, 17 July 2012, p. 17.

2 Ms Toni Ah-Sam, Chair, Northern Territory Indigenous Business Network (NTIBN), *Committee Hansard*, Darwin, 17 July 2012, pp. 14-18.

3 Carlo Caponecchia and Anne Wyatt, *Preventing Workplace Bullying: An evidence-based guide for managers and employees*, Allen & Unwin, 2011, p. 144.

fuelled by recent media coverage of horrific examples of bullying and violence at work.[4]

5.2 Australia should use this current momentum to improve the national 'skills-set' to respond to workplace bullying. Participants in the inquiry referred to the need for a 'change agenda' that will improve Australia's workplace culture.[5]

5.3 Bringing about cultural change is a protracted and highly complex task. The Alannah and Madeline Foundation (the AMF), a national advocacy group for preventing violence against children, commented there are five broad conditions to achieve social change which could be applied in bringing about cultural change in the workplace. These five conditions include:

- a common agenda for change where stakeholders have a shared understanding of this issue and a joint-approach for addressing the issue;
- a consistent measurement of the issue, to gauge the prevalence of the problem and to assess the impact of new initiatives;
- mutually reinforcing activities, where different activities are complementary, coordinated and focused on the shared vision for change;
- an ongoing and open dialogue between key stakeholders to build trust, affirm objectives and maintain focus; and
- resources are invested to coordinate activities across stakeholders (usually through a separate organization whose main focus is the change agenda).[6]

5.4 The Committee was encouraged throughout the inquiry to develop recommendations that would lead to a practical, multifaceted approach consisting of awareness-raising, education, support services and improved

4 H Ewart, 'Lawyers question workplace bullying protections', *7.30,* Australian Broadcasting Corporation, 10 September 2012; and H Ewart, 'Government fears extent of workplace bullying', *7.30*, Australian Broadcasting Corporation, 25 September 2012.

5 Dr Angela Martin, Senior Lecturer, Management, University of Tasmania, *Committee Hansard*, Melbourne, 11 July 2012, p. 47; Mr Michael Harmer, Harmers Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 1, Ms Kate Price, Regional Manager ACT, Davidson Trahaire Corpsych (DTC), *Committee Hansard*, Canberra, 13 September 2012, p. 6.

6 Alannah and Madeline Foundation (AMF), *Submission 125*, p. 15.

enforcement. The AMF acknowledged that these activities will need to be 'delivered by different stakeholders at many different levels'.[7]

5.5 This chapter considers prevention and resolution strategies and policies. Specifically:

- provision for a single government agency to provide a coordinated advice, assistance and resolution service to employers and workers alike;
- provision for a single entry point or 'gateway' to regulators in the various jurisdictions and across all areas of law;
- awareness raising of workplace bullying and how the final Code of Practice can be best promoted;
- strategies to encourage good workplace cultures through the establishment of a national accreditation system of employers who achieve standards of psychosocial health and safety;
- improving the national evidence base; and
- enhancing education and protections for young workers.

Complexity of regulation and dispersed support services

5.6 Throughout the inquiry, employers, workers, their legal representatives and consultants highlighted the regulatory complexity of workplace bullying. Chapter 2 outlined the different areas of law that may be brought into play by workplace bullying and the authority and powers of the regulators with respect to workplace bullying. These include:

- work health and safety laws of the Commonwealth and each state and territory with local regulators for each jurisdiction;
- industrial relations legislation at the Commonwealth level, covering the 96 per cent of employers in Australia, with:
  - ⇒ the tribunal (Fair Work Australia) hearing unfair dismissal cases and adverse action cases;
  - ⇒ the ombudsman (the Fair Work Ombudsman) investigating complaints and suspected contraventions of the entitlements

7 AMF, *Submission 125*, pp. 12-13.

provisions of the *Fair Work Act 2009*, and providing advice and education on the Act; and

- anti-discrimination legislation in federal, state and territory jurisdictions with commissions established to hear complaints about discrimination claims.

5.7 Each of these agencies has a defined role, with few overlapping responsibilities. However, community and industry expectations of the purpose and powers of these institutions with respect to workplace bullying, appear greater than the powers of any one area.[8]

5.8 Although all of the agencies listed above dedicate resources to education and advice services, there is still significant confusion about their role and responsibilities, as well as the overarching confusion as to how workplace bullying is or should be responded to.[9] These challenges are experienced by both employers and workers alike.

5.9 Employers, regardless of their size or industry, can struggle to navigate the complexities of developing systems, strategies and methods of work that reduce the risk of their workers being exposed to psychosocial risks. There is confusion amongst employers about how to tackle this issue, what responsibilities they carry, how they can meet these responsibilities, and to what extent they can act on a finding of bullying.[10]

5.10 Confusion, frustration and isolation are also felt by workers. Workers, and their industrial representatives, who participated in the inquiry reported confusion about what rights and remedies they have to pursue bullying complaints either internally with their employers or externally with the multitude of frameworks listed above.[11]

5.11 Frustration was expressed by individuals who attempt to resolve the issue internally within their workplace[12] and those who had attempted to engage agencies.[13] Many workers who had been targets of workplace

8 Robert Carlisle Thomas Solicitors (RCT Solicitors), *Submission 106*, pp. 3-4.

9 Dr Carlo Caponecchia, *Submission 81.1*, p. 1-2.

10 Australian Chamber of Commerce and Industry (ACCI), *Submission 62*, p. 9; Mr Nick Behrens, General Manager, Chamber of Commerce and Industry Queensland (CCIQ), *Committee Hansard*, Brisbane, 18 July 2012, p. 14

11 National Network of Working Women's Centres (NNWWC), *Submission 86*, p. 10; BK, *Submission 131*, pp. 3-5; DO, *Submission 51*, p. 2; KL, Submission 157, pp. 1-2.

12 Ms Meredith, Hammat President, UnionsWA, *Committee Hansard*, Perth, 8 August 2012, pp. 15-16; NNWWC, *Submission 86*, p. 10.

13 Mr Michael Borowick, Assistant Secretary, Australian Council of Trade Unions (ACTU), *Committee Hansard*, Melbourne, 11 July 2012, p. 17; Mr Behrens, CCIQ, *Committee Hansard,* Brisbane, 18 July 2012, p. 14.

bullying also questioned the willingness of work health and safety (WHS) regulators to enforce their powers.[14] Similar stories have been reported in mainstream media earlier this year.[15]

5.12 Confusion and frustration of employers and workers would indicate a need for more practical information to better understand the role and powers of all agencies involved in workplace bullying. The submission of the Chamber of Commerce and Industry Queensland (CCIQ) was typical of calls for the enhancement of educational and support services and the promotion of employers and community awareness and access to these services.[16] CCIQ advocated that governments should focus on preventative measures by enhancing:

> education and support services, and subsequently increase businesses' and the community's awareness and access to these services.[17]

5.13 Although all state, territory and Commonwealth regulators (particularly in WHS and anti-discrimination areas) provide support and advice services, there is currently a range of support activities that are not available because they fall through the gaps between the function of the regulators. Dr Carlo Caponecchia, a workplace bullying expert, identified the following areas:

- advising workers on when and how to make a report of bullying (and when not to);
- providing options to workers and monitoring and supporting them;
- advising people who have been accused of workplace bullying (an often forgotten group that needs support); and
- managing the allocation of independent investigators (who are appropriately trained and vetted) to organisations as necessary.[18]

5.14 The complexities of the problem of workplace bullying and the labyrinth of regulation of WHS, anti-discrimination, workers compensation and criminal law over nine Australian jurisdictions has led to heightened

14 DM, *Submission 91*, p. 2; Australian Council of Trade Unions (ACTU), *Submission 63*, p. 24; Victorian Trades Hall Council, *Submission 139,* p. 12; RCT Solicitors, *Submission 106*, p. 9; NNWWC, *Submission 86*, p. 7; Dr Caponecchia, *Submission 81*, p. 6.

15 H Ewart, 'Lawyers question workplace bullying protections', *7.30,* Australian Broadcasting Corporation, 10 September 2012; and H Ewart, 'Government fears extent of workplace bullying', *7.30*, Australian Broadcasting Corporation, 25 September 2012.

16 Chamber of Commerce and Industry Queensland (CCIQ), *Submission 67*, p. 3.

17 CCIQ, *Submission 67*, p. 3.

18 Dr Caponecchia, *Submission 81*, p. 7.

confusion and a 'haphazard' approach to community education and awareness of the risk of workplace bullying.[19]

5.15 Both employer and worker organisations called for improved coordination of agencies and information. Unions NSW suggested that there is currently 'an opportunity to coordinate all aspects of government in all jurisdictions'.[20]

5.16 CCIQ was strongly supportive of increasing the awareness and accessibility of current government and industry initiatives aimed at reducing workplace bullying:

> Work is required to reduce the high level of confusion that currently exists within the community about which government agencies are responsible for dealing with workplace bullying. There is a need for better coordination between agencies to reduce the risk of complaints being cross-referred and to provide better services and support to the victims and businesses.[21]

A national service: advice, assistance and resolution

5.17 Calls for better coordination focused on the need for a national service that would operate as a national depository of expert advice and practical supporting materials for both employers and workers.

5.18 Employer organisations argued that there is a need for better assistance and advice to be available for all parties when navigating these challenges.[22] For example, Master Grocers Australia stated:

> there is still much more that needs to be done to ensure that all workplaces are provided with the tools to ensure that bullying is not tolerated in any Australian workplaces.[23]

5.19 An individual commented:

> there have been nine different places that we have rung. There should be a one-stop shop. It is really hard when you are in there

19 Unions NSW, *Submission 61*, p. 17.
20 Unions NSW, *Submission 61*, p. 28.
21 Mr Behrens, CCIQ, *Committee Hansard*, Brisbane, 18 July 2012, p. 14.
22 Mr Behrens, CCIQ, *Committee Hansard*, Brisbane, 18 July 2012, p. 14.
23 Master Grocers Australia, *Submission 115*, p. 3.

> fighting, trying to find a solution and hearing, 'No, try this one', 'No, try this one', 'No, try this one'.[24]

5.20 Underscoring these comments appears to be a desire for a single 'one-stop shop' that provides not only practical advice that would be specific to a situation, but also advice on the different legal frameworks (WHS, anti-discrimination etc), along with the specific avenues that are peculiar to the relevant jurisdiction. Although harmonisation is removing the need for the latter, the rate at which harmonisation is progressing would indicate that there is still a residual need for specific advice for specific jurisdictions.

5.21 Unions NSW proposed a coordinated service, a 'one-stop shop' or central depository of materials providing advice, assistance and strategies to respond could be delivered through a telephone service[25] and the AMF advocated for online service delivery.[26]

5.22 Headspace contended that 'coordination' should extend beyond traditional state/territory and federal jurisdictions to include other stakeholders:

> Employers require ongoing guidance and support to assist employees who have experienced workplace bullying. Employers need to know where they can turn for advice and assistance in supporting an employee. Fostering links between workplaces and mental health and other community services will assist referrals and provide integrated, supportive care to workers.[27]

Provision of practical advice

Specific advice for employers

5.23 The need for practical assistance for employers was commented on by the South Australian Office of the Employee Ombudsman:

> ... there is still a profound failure to grasp practical interventions for dealing with [workplace bullying, and] education and support services should focus on capacity building on how to prevent and respond to workplace bullying.[28]

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24 KJ, *Committee Hansard,* Closed Session.

25 Unions NSW, *Submission 61*, p. 17.

26 AMF, *Submission 125*, p. 20.

27 headspace, *Submission 56*, p. 8.

28 Office of the Employee Ombudsman, *Submission 79*, p. 3.

5.24 Similarly, Dr Angela Martin, from the University of Tasmania stated:

> Many managers might be quite sympathetic to the idea of 'Workplace bullying is bad and I do not want to have that in my workplace' but they do not have the tools, training and support systems to help them to achieve that.[29]

5.25 The Chamber of Commerce Northern Territory and the Northern Territory Indigenous Business Network (NTIBN) called for a 'toolkit' for employers.[30] Ms Toni Ah-Sam, Chair of the NTIBN suggested:

> whether you are a small sole trader, in a partnership arrangement or if you are running an non-government organisation, you still need some basic toolkits. Giving them something in a toolkit that they would be able to access free through some sort of information package, I envisage that these businesses would be able to click on a link saying 'How to Deal With Bullying in the Workplace—these are some things that you as an employer would need to consider'.[31]

5.26 Dr Caponecchia also advocated for employers to be provided with additional, practical support through the development and evaluation of materials to complement the final *Code of Practice: Managing the Risk of Workplace Bullying*.[32] Dr Caponecchia contended that the following materials could complement the final Code:

- valid and reliable risk assessment tools;
- developing best practice strategies, and contextualised case studies, for dealing with bullying across a range of businesses and sectors; and
- providing advice for employers on 'early triage systems' and what is the best kind of intervention for an array of situations. [33]

5.27 To provide small and medium enterprises with greater assistance, the NTIBN supported the development of a 'checklist', developed specifically for smaller employers.[34] However, the Chamber of Commerce Northern Territory cautioned:

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29 Dr Angela Martin, Senior Lecturer, Management, University of Tasmania, *Committee Hansard*, Melbourne, 11 July 2012, p. 47.

30 Mr Maloney, CCNT, *Committee Hansard*, Darwin, 17 July 2012, p. 17; Ms Ah-Sam, NTIBN, *Committee Hansard*, Darwin, 17 July 2012, p. 17.

31 Ms Ah-Sam, NTIBN, *Committee Hansard*, Darwin, 17 July 2012, p. 17.

32 Dr Caponecchia, *Submission 81.1*, p. 1.

33 Dr Caponecchia, *Submission 81.1*, pp. 1-2.

34 Ms Ah-Sam, NTIBN, *Committee Hansard*, Darwin, 17 July 2012, p. 17.

> We have to be careful about someone developing a checklist that becomes the panacea all of a sudden, because it is not. It is only a bit of the tool kit. There has to be a lot more in there than just that. But at least, for those organisations that have no policies or procedures, it gives [them] a starting point.[35]

5.28 The provision of advice must not only assist employers through the response to workplace bullying once it is present in an organisation, but show how the employer can, and should, take proactive measures to respond to the risk of workplace bullying.

5.29 In this regard, the AMF argued that its successful eSmart program[36] can be applied successfully to workplaces:

> [eSmart] provides a method for creating a cultural change in the workplace through social and behavioural change campaigns and provides a mechanism to deliver interventions. Because an eSmart workplace is required to record and monitor its progress in implementing bullying policies and best practice strategies to reduce the incidence and harms caused by workplace bullying, eSmart offers a method for tracking and reporting the effects of interventions within the workplace.[37]

5.30 Using the eSmart program as a template, the Foundation advocated for the following advice and support services be developed for employers to implement in their workplaces:

- a framework to help workplaces navigate the myriad of information;
- a website where workplaces can access strategies for implementing good workplace policies, procedures and cultures, including sign-posted links to the best-available resources and tools;
- an online tool where workplaces can track and report on their progress;
- an ongoing 'help desk' service that is available to all workplaces; and

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35 Mr Maloney, CCNT, *Committee Hansard*, Darwin, 17 July 2012, p. 17.

36 "eSmart is a world-first, holistic approach to reducing bullying and cyberbullying within the Australian community and is informed by other successful behaviour change campaigns such as SunSmart and Quit which have an integrated, multi-layered, sustainable and systemic approach to social change. These interventions create the environments in which it is easy and normal for individuals to make smart/healthy/self-protective choices. ... eSmart is a web-based system. Each of the six 'pieces of the pie' or domains has within it a series of 'attributes' containing key questions and activities that a school must complete in order to achieve eSmart 'status', in the same way as SunSmart status is achieved and maintained". (AMF, *Submission 125*, p. 17)

37 AMF, *Submission 125*, p. 20.

- a training session (virtual or otherwise) for every workplace, supported by online forums and webinars.[38]

5.31 For Australia to tackle the problem of bullying in the workplace, employers must be fully aware of their responsibilities in health and safety risks and in psychosocial hazards. This requires equipping employers with the relevant knowledge to meet their workplace health and safety obligations and to be able to address issues arising from unacceptable behaviour.

Tailored information and advice for workers

5.32 Evidence received throughout the inquiry indicated that tailored information and advice should be developed for workers. The provision of such services, it was argued, must be tailored to support targets, those accused of bullying and the workforce as a whole.

Advice for targets

5.33 There is a 'chronic' need to provide support services to individual workers who experience workplace bullying. Dr Caponecchia detailed the current lack of support:

> Support services for people who feel they have been bullied are chronically unavailable. The issues include that:
>
> - They cannot always talk to someone in their organisation due to confidentiality issues;
> - their doctor may not have experience in the area;
> - their union may or may not be helpful, they may or may not be a member;
> - they cannot always afford a psychologist (and do not always need one, if they only need advice on options);
> - some agencies simply refer people to their health and safety regulators because bullying per se is not directly in their scope of activity; and
> - according to the reports of targets, safety regulators can appear to be dismissive.
>
> In short, there is often nowhere for people to go to get advice and support. This is likely to exacerbate any negative effects that they are already experiencing.[39]

38 AMF, *Submission 125*, p. 20.

39 Dr Caponecchia, *Submission 81*, p. 6.

5.34 Some of these issues may go beyond the services that an advice and assistance service could provide. However, coordinating the service-providers and developing a seamless referral process would be an avenue where aggrieved or injured workers may be better supported. The case for such a referral service was made by the AMF as quoted above.[40]

5.35 At the very least, workers should be able to access consistent and clear guidance on how, and to whom, they should report bullying within their workplaces.[41] Dr Caponecchia advocated that workers should be advised:

> about when and how to report workplace bullying, giving people strict criteria and guidelines to follow.[42]

5.36 Offering greater support to workers to report was also supported by Mr Mark McCabe, Commissioner of Worksafe ACT:

> We detect a fair bit of fear about what the consequences will be for their employment and their social interaction with others. [W]e need some kind of better support for people who feel they are victims to enable them to understand what protections there are and to encourage them to come forward.[43]

5.37 Mr Jarrod Michael Moran, Senior WHS and Workers Compensation Officer at the Australian Council of Trade Unions (ACTU) agreed:

> Giving someone an ability in a workplace to stand up and say, 'There is a health and safety issue here,' is paramount to the work that we do. Workers knowing what they are exposed to, workers knowing how to deal with what they are exposed to, is paramount. [If] someone is being victimised in the workplace they need some confidence to be able to speak up, for fear of further victimisation, of censure, of losing their position and those kinds of things. These are all real things that are happening in the modern workforce.[44]

5.38 Beyond the initial support of workers to report instances of bullying, it became apparent throughout the inquiry that the array of bullying situations in workplaces requires providing a spectrum of options. Unions

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40 headspace, *Submission 56*, p. 8.

41 Dr Caponecchia, *Submission 81.1*, p 1.

42 Dr Caponecchia, *Submission 81*, p 7.

43 Mr Mark McCabe, Work Safety Commissioner, Worksafe ACT, *Committee Hansard*, Canberra, 16 August 2012, p. 1.

44 Mr Jarrod Michael Moran, Senior WHS and Workers Compensation Officer, Australian Council of Trade Unions (ACTU), *Committee Hansard*, Melbourne, 11 July 2012, p. 17.

NSW contended that an advice service would 'provide consistent and clear guidance to workers on addressing the behaviour when it occurs'.[45]

5.39 Providing options that can be tailored to suit the needs of the parties will not only encourage more proactive resolution of these situations, but may lead to more agreeable outcomes. This may include using the early intervention strategies or mediation methods in the preliminary stages of inappropriate behaviour discussed in chapter 3.

5.40 Importantly, the spectrum of options and advice provided must extend to all courses of action, including empowering workers to leave the organisation should they be in a position to do so. Sally Jetson and Associates commented on the need for the advice to cover the complete spectrum including discussing the option of leaving the workplace:

> My key message is to the targets of bullying: give your employer one chance to act, to resolve and address your concerns and ensure your safety and wellbeing. If that fails, then get out. If your employer has not got the guts to stand up for you, do not stay and fight because you will not walk away without huge personal costs.[46]

5.41 In presenting this evidence, the Committee would not wish to convey a flippant message here. Poor workplace behaviour, and an employer's reticence to improve that culture and system of work, should not force a worker to leave their job. Rather, this discussion reflects the many individuals who appeared before the Committee or who submitted to the inquiry who, with the benefit of hindsight, wished they had left the organisation before they sustained significant psychological injuries.

5.42 However, leaving an organisation is not an option for many workers. Davidson Trahaire Corpsych acknowledged how many workers with whom they have worked feel 'trapped' in a workplace where they are bullied. Difficult personal financial circumstances, coupled with limited options for other employment often mean that leaving the organisation is not an option for workers.[47]

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45 Unions NSW, *Submission 61*, p. 5.

46 Ms Sally Jetson, Consulting Director, Sally Jetson and Associates, *Committee Hansard*, Perth, 8 August 2012, p. 28.

47 Ms Michele Grow, Chief Executive Director, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 3.

Providing advice to those accused of bullying

5.43 An often overlooked challenge in discussions about workplace bullying is the effect that an accusation of bullying can have on a worker who is the alleged perpetrator of that behaviour. Importantly, an unfounded claim of bullying can amount to bullying itself.

5.44 Dr Caponecchia recommended that better advice be available to those who have been accused of bullying.[48] Dr Caponecchia stated:

> It would be possible to have that [national] body do a whole bunch of important things—not just advising targets but also, for example, advising people who have been accused of using bullying behaviours, because they are a group that are often forgotten about. They can be really badly stigmatised. [49]

5.45 The Committee received minimal evidence on how and what advice should be provided to workers who have been accused of bullying. Importantly, the draft *Code of Practice: Managing the Risk of Workplace Bullying* (draft Code) does not provide guidance to workers who have been accused of bullying.

Information and advice for the whole workforce

5.46 A recurring theme of the inquiry was the responsibilities of all workers to each other. Beyond the legal responsibilities all workers carry to each other, all workers contribute to the culture of an organisation. As discussed in chapter 4, workplace culture has enormous potential to reduce the prevalence of bullying at work.

5.47 Acknowledging this dynamic, stakeholders discussed the role of bystanders in intervening and responding to instances of bullying in the workplace. The Australian Human Rights Commission (AHRC) advocated the important role that bystanders can play in preventing and responding to bullying in the workplace and encouraging strategies that create the confidence and safety for bystanders to take action.[50] The AHRC commented that bystanders' action:

> Include[s] taking proactive action by identifying and stopping a situation before it happens, intervening during an incident, and

48 Dr Caponecchia, *Submission 81.1*, p. 1.

49 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 6.

50 Australian Human Rights Commission (AHRC), *Submission 121*, p. 3.

> learning how to effectively and safely take action when confronted with behaviours that support violence, harassment and bullying.[51]

5.48 Dr Sara Branch from Griffith University also discussed how education of the whole workplace should be a focus and the benefits that will result:

> One of the areas where a lot of leverage could be had is with encouraging bystanders not to be silent and with skilling bystanders—and that means everybody—to feel empowered enough to step up and say, 'Hey, what you're doing there is not right.[52]

5.49 The personal accounts from individuals who experienced bullying at work indicated that bystanders, though wanting to speak up against the inappropriate behaviour, did not have the tools to do so. For example, the following statement was made by an individual worker, working as a teacher, who participated in the Committee's individual impact statement session:

> Staff members—people I considered friends—actually told me in private not to take it personally, but they could not sit with me in school, or be seen talking to me on their own, because they may be the next person she would choose to bully. ... I can still see a colleague standing behind the principal her eyes wide, mouthing, 'I'm sorry,' as she walked away. Once the principal had finished she watched as I headed to my classroom trying to hold it together. Staff members passed and whispered, 'Keep walking; she's watching.[53]

5.50 The dynamics reported in this individual impact statement are likely to reflect the day-to-day experiences of many workers in Australia. The capacity therefore of providing advice to the workforce as a whole is particularly evident.

Committee comment

5.51 The evidence received throughout this inquiry pinpoints the need to establish a single, national service to provide advice to employers and workers alike on how to prevent, and respond to workplace bullying. Support of this kind should also be available to those officers who have

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51 AHRC, *Submission 121*, p. 7.

52 Dr Sara Branch, Research Fellow, Key Centre for Ethics, Law, Justice and Governance, Griffith University, *Committee Hansard*, Brisbane, 18 July 2012, p. 12.

53 SH, *Committee Hansard*, Closed Session.

prescribed duties under the WHS Acts including health and safety representatives.

5.52 The Committee believes that the national service should draw upon the existing guidance and assistance materials developed by the regulators across the relevant areas of WHS law, anti-discrimination law, industrial relations law, workers compensation law and criminal laws. The collation of the vast, yet dispersed, information is integral for Australia to overcome workplace bullying.

5.53 Access to practical, implementable advice, assistance and resolution support must be available through online and telephone platforms. Online services should be quick and easy to access, with a collection of tailored information available for both workers and employers.

5.54 More specifically, employers should be able to access a variety of services which assist them to tackle workplace bullying, including:

- clear advice on their legal obligations with respect to workplace bullying;
- a toolkit that provides reliable risk assessment tools to assist employers in their initial risk management assessments of the risks of workplace bullying;
- assistance packages to develop policies and procedures, with the necessary flexibility to accommodate the specifics of the industry, size and characteristics of the employer;
- a sliding-scale diagnostic tool to assist employers calibrate their response to possible bullying behaviour in accordance with the 'triage' system discussed throughout this report;
- specialised best practice strategies and case studies for their specific industry and workforce size; and
- downloadable training packages that promote good workplace behaviours which can be tailored to specific industries.

5.55 In addition, advice should also be provided to employers who are seeking to reform their workplace culture. Further, assistance should be available to support employers who are seeking to assist workers who engaged in inappropriate behaviour. This might be in the form of specific strategies, or the development of training materials.

5.56 Support should also be made available to workers. This includes:

- early intervention strategies which they might be employed to respond to bullying behaviours directed at them;
- how and when to report bullying;
- tools which may be of assistance to workers personally, when dealing with the effects of bullying at work;
- clear advice about the objectives and content of areas of relevant regulation including WHS, industrial relations, workers compensation, anti-discrimination and criminal law;
- a coordinated referral service to ongoing support organisations; and
- specific advice to those workers who have been accused of bullying others in the workplace;
- information about the obligation of all workers to ensure their actions do not adversely affect the health and safety of their colleagues; and
- information for observers or bystanders of bullying about how to support the targeted worker, and how they might progress their concerns with the employer.

5.57 Further, with prescribed duties under the WHS Acts, health and safety representatives are often the first point of call for workers experiencing bullying by a colleague, manager or third party. Information should also be made available to health and safety representatives to assist them to support and advise workers who are experiencing bullying and to progress these issues with the employer.

5.58 The Committee did not receive evidence on where such a service should be located. It might be best situated within an existing government agency or department such as Safe Work Australia, the Fair Work Ombudsman or the Department of Education, Employment and Workplace Relations. It may also be considered appropriate for the service to be an independent body that is funded by the Commonwealth. Consequently, the Committee does not have a clear recommendation as to where the new national service may sit.

Recommendation 11

5.59 **The Committee recommends that the Commonwealth Government, in consultation with stakeholders, establish a new national service to provide advice, assistance and resolution services to employers and workers. Its activities should include:**

- **a hotline service to provide advice to employers and workers alike on a variety of topics including:**
  - ⇒ **practical, preventative and proactive steps that employers can take to reduce the risk of workplace bullying;**
  - ⇒ **empowering workers to respond early to the problem behaviour they encounter;**
  - ⇒ **provide advice to workers who have been accused of bullying others in their workplace;**
- **providing downloadable training packages for employers to tailor to their industry and size;**
- **a proactive, onsite and ongoing education service targeting specific industries where bullying is known to be particularly problematic;**
- **resolution assistance services including information about how and when to engage mediation sessions between the workers concerned; and**
- **collating information when providing the above services, and contributing to improving the national evidence base in Australia on workplace bullying.**

Recommendation 12

5.60 **The Committee recommends that the Commonwealth Government, through Safe Work Australia, develop an accredited training program for managers and health and safety representatives to equip them to deal with workplace bullying matters.**

Resolution assistance and mediation services

5.61 A key focus of the evidence has been on developing improved resolution options for parties. Broadly, the ACTU commented on the need for some form of independent resolution assistance service prior to the breakdown of employment relationships:

> Sometimes those [relationships] are going to break down. Sometimes they are not going to work.[W]e think there needs to be some step between a breakdown in the workplace and the more formal aspects of how you resolve that through a court system. ... There needs to be something in the middle. Conciliation is perhaps one model, some mediation or some recommendation by an inspector that something else can happen are other things that could be used in this space.[54]

5.62 Where workplace bullying arises from a workplace conflict, informal mediation and/or conciliation sessions may be a useful tool to employers and managers to respond to that behaviour.

5.63 Yet mediation is not without challenges. The challenges of mediation were discussed in chapter 3. In some circumstances mediation will be an appropriate option for the resolution of early bullying. However, the power imbalance that emerges through long-term bullying will reduce the capacity of traditional mediation to be an effective tool.

5.64 If used early in the process, and employers and/or managers are proactive in identifying and responding to poor workplace behaviour, mediation services may be useful. Yet to be successful, it was commented that mediators should be independent of the organisation.

5.65 For example, the Employment Law Centre of Western Australia (Inc) (ELC) submitted that internal processes may not be suitable in some cases:

> A conciliating function by an external party would be valuable to an aggrieved employee. ELC is often contacted by employees who feel they are being bullied by superiors who "have the ear" of management (or who constitute the management itself) and as such feel that an internal mediation process will not assist.[55]

54 Mr Moran, ACTU, *Committee Hansard*, Melbourne, 11 July 2012, p. 18.

55 Employment Law Centre of Western Australia (Inc) (ELC), *Submission 269*, p. 5.

5.66 The ELC argued that it would therefore be a positive move to empower a tribunal with the authority to conciliate and resolve cases of alleged workplace bullying.[56]

5.67 Similarly, Ms Meredith Hammat, President of UnionsWA contended:

> I think one of the processes that would help with resolution is having some form of truly independent mediator or third party that can assist in the resolution of issues. ... A truly independent mechanism that would allow some kind of more informal resolution options would go a long way. [57]

5.68 Dr Caponecchia also reflected on mediation. He noted that its use in regard to workplace bullying is not always appropriate or positive:

> I feel I should mention that in the international literature, the notion of mediation is highly controversial. ... Mediation is more focused on not whether it happened or not but, 'Let's get back to work', which may mean transferring someone. It may mean an agreement that sees them working together again, which might be a little bit risky. It might mean someone leaves. The outcomes are not always great. I think people go to mediation and organisations use mediation too soon, and almost as a bit of a default. That is partly because the mindset that we often have with this problem is more a human resources and an industrial-relations mindset than a risk-and-safety mindset. [58]

5.69 Ms Moira Rayner from the Law Institute of Victoria did not support the use of mediation:

> Someone who is a bully does not listen to mediation. They need to be pulled up in front of somebody who has the power to say that this is or is not bullying and to be told, 'This falls within the definition,' so they cannot shrug it off and say, 'That's just the way I am,' or, 'She's supersensitive,' or, 'They are hypersensitive and fragile and this is the way things go in our workplace.'[59]

5.70 However, Dr Moira Jenkins, a clinical psychologist and consultant who works with organisations to prevent and manage workplace bullying, supported the use of mediation as an early intervention tool:

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56 ELC, *Submission 269*, p. 5.

57 Ms Hammat, UnionsWA, *Committee Hansard*, Perth, 8 August 2012, p. 16.

58 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 6.

59 Ms Moira Rayner, Deputy Chair, Workplace Relations Sections, Law Institute of Victoria, *Committee Hansard*, Melbourne, 11 July 2012, p. 14.

> If we are looking at bullying from an occupational health and safety perspective, there are recommendations in relation to early intervention, which I think is very important, and to mediation being used as an early intervention. I do not think mediation is appropriate later on when you have very damaged people, but as an early intervention I think it is great. However, if mediation is being used, there needs to be a system where it is not kept confidential and just between the two parties; there needs to be a risk management perspective of identifying what organisational issues contributed to the problem occurring.[60]

5.71 Mediation presents an opportunity for longer-term resolution of issues, including providing feedback on workplace culture and systems of work both of which contribute to the creation of the initial risk of bullying at work. Mediation as an early intervention tool was supported by several individual submitters to the inquiry. For example, the following comment was made by an individual worker who had been bullied at their workplace:

> There should be mandatory mediation at the very outset of any complaints if this is not thought to be advisable then there should be mandatory counselling and mentoring for not just the bullied but the bully.[61]

5.72 Mediation cannot be the panacea to workplace bullying, rather, it is an effective early intervention tool and needs to be applied on a case-by-case basis. Although the evidence from stakeholders on the use of mediation was not particularly conclusive, the capacity of alternative dispute resolution methods as a tool for early intervention did appear to be supported by the majority of participants in the inquiry.

Committee comment

5.73 Throughout the inquiry, stakeholders raised the possibility of a new independent mediation service which could be voluntarily used in early to respond to instances of poor workplace behaviour. It is unlikely, and would be inappropriate, for mediation to be used in cases where bullying behaviours had occurred over a protracted period. However, mediation can form part of an early intervention model where poor workplace behaviour has been detected.

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60 Dr Moira Fay Jenkins, *Committee Hansard*, Adelaide, 7 August 2012, p. 28.

61 LP, *Submission 21*, p. 2.

5.74 Resolution achieved through mediation can also feed into the workplace culture. This can be achieved by ensuring that the employer is a party to the mediation and takes responsibility for their role in managing WHS.

5.75 The Committee is aware that the Victorian Government offered mediation services to employers and workers through its WHS regulator, WorkSafe Victoria. Though the program was not utilised during its six-month trial, the Committee believes that lessons can be learnt from the Victorian experience. Potentially, the success of the program could have been affected by the service being located in the office of the regulator itself.

5.76 The Committee recognises that more work is required to progress the idea into a practical service. However, the evidence received throughout the inquiry indicated that workers and employers alike wish to be better equipped to proactively overcome instances of conflict or poor behaviour before the behaviour descends into bullying.

Recommendation 13

5.77 **The Committee recommends that the Minister for Employment and Workplace Relations develop a trial mediation service for resolution of conflicts where there is a risk of bullying arising out of poor workplace behaviour, prioritising small and medium enterprises, and where employers and workers jointly request the use of the service in an effort to resolve the matter.**

A single entry point to regulators

5.78 It was discussed earlier in this chapter the confusion that results from the labyrinth of regulation that workers and employers face when engaging with government agencies about bullying experiences at work. For example, Mr Michael Borowick, the Assistant Secretary of the ACTU, contended that the three dominant areas of regulation, WHS, industrial relations and criminal law, need to be coordinated.[62]

5.79 The call for improved coordination was also made by industry groups. CCIQ also advocated for a single entry point where cross-agency protocols were developed to streamline the referral process:[63]

62 Mr Borowick, ACTU, *Committee Hansard*, Melbourne, 11 July 2012, p. 19.

63 CCIQ, *Submission 67,* p. 3.

> A single point of entry or cross-agency protocols are required to streamline the referral process and allow for the collection and disbursal of accurate and meaningful date in the area of workplace bullying.[64]

5.80 A single point of entry, or a 'gateway' to regulators, would allow complainants to access assistance through a single advice service by developing greater cross-agency protocols to improve referrals across state/federal government agencies.

5.81 The call for a single point of entry to relevant agencies was endorsed by some state WHS regulators. For example, the Acting Deputy Director of the Office of Fair and Safe Work Queensland, Dr Simon Blackwood contended:

> The plethora of agencies that look like they might deal with workplace bullying means that there are a lot of people ringing into various systems and being referred around the place, because: 'No, it may not be exactly a health and safety issue; it looks more like an antidiscrimination issue or something else.'[65]
>
> Bullying will get addressed by a number of agencies and laws, and therefore there is a need for better coordination between agencies. The fact is that some complainants will obviously be looking for redress through different tribunals and information sources, and they will at the same time get bounced around by the different agencies within government at a federal and state level. We believe that consideration should be given to allowing complainants to access assistance through a single entry point or at least developing greater cross-agency protocols to improve referrals across government. That is certainly been an issue that we have found comes up. And, as we said, there is a need to manage expectations about responses to bullying.[66]

5.82 WorkSafe ACT also endorsed the idea of a single point of entry, with the following caveat made by Mr McCabe:

> It is an excellent idea. Sometimes people do not just get bounced around—they will be pursuing it down different avenues at the same time. It is not something we can directly control; we have to

64 Mr Behrens, CCIQ, *Committee Hansard*, Brisbane, 18 July 2012, p. 14.

65 Dr Simon Blackwood, Acting Deputy Director, Office of Fair and Safe Work Queensland, *Committee Hansard,* Closed Session, Canberra, 18 September 2012, p. 12.

66 Dr Blackwood, Office of Fair and Safe Work Queensland, *Committee Hansard,* Closed Session, Canberra, 18 September 2012, p. 4.

> negotiate with those other bodies for some mechanism for a single entry point—but that does not mean it is not doable.
>
> One of the constraints would be the legislative obligations we are all under once the issue is raised with us, which they would face as well. But I still think it is an excellent idea.[67]

5.83 WorkSafe WA also supported the single point of entry:

> Our experience has shown that often, by the time people come here to WorkSafe, they have been to a number of other agencies and they have been bounced around. The Western Australian WorkSafe regulator also is a party to that bouncing process, so we do not have clean hands in that sense.[68]

Clarifying the public's expectation of regulators' powers and responsibilities

5.84 Developing a single point of entry would also be a vehicle to clarify the public's expectation of regulators' powers and responsibilities. The ACTU commented:

> Clarity is needed around the roles of [regulators]. That is a very necessary path in addressing those issues.[69]

5.85 Dr Caponecchia similarly recommended that efforts need to be made to clarify the roles of various agencies (WHS regulators, discrimination commissions, industrial relations tribunals and ombudsmen) with a goal of clarifying end-user's expectations of what these agencies have responsibility for, and what outcomes they are empowered to deliver.[70] Dr Caponecchia contended:

> There is a need to educate people on what exactly the role of the safety regulators is, because there seems to be a gap between what workers might expect and what the regulators can do and should do. Indeed it may be that the exact role of the regulators needs to be reframed and better communicated.[71]

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67 Mr McCabe, WorkSafe ACT, *Committee Hansard,* Closed Session, Canberra, 18 September 2012, p. 12.

68 Mr Ian Munns, Director, Policy and Education, WorkSafe WA Division, Department of Commerce *Committee Hansard,* Closed Session, Canberra, 18 September 2012, p. 12.

69 Mr Finian Scallan, WHS and Workers Compensation Project Officer, ACTU, *Committee Hansard*, Melbourne, 11 July 2012, p. 18.

70 Dr Caponecchia, *Submission 81.1*, p. 1.

71 Dr Caponecchia, *Submission 81*, p. 7.

> The expectations on the safety regulators, to be fair, are not always in line with what the regulators' role is.[72]

Committee comment

5.86 Repeatedly, the Committee heard of stakeholders' frustrations and confusion about the roles and responsibilities of the numerous regulators. This frustration was expressed by employer organisations and unions alike. Support for a single entry point or a 'gateway' to regulators was not only supported by employer organisations, workers and their industrial representatives but also a number of the regulators responsible for enforcing laws around workplace bullying.

5.87 Underscoring these calls for a single entry point appears to be a need for better cross-jurisdictional advice and coordination amongst regulators throughout the jurisdictions and between the different areas of regulation.

5.88 Further, the evidence received throughout the inquiry pointed to a disconnect between the expectations and experiences of stakeholders interaction with regulators. Many participants, including workers, unions, academics, and practicing lawyers, identified a 'gap' in current regulation. Whilst other participants called for current regulation to be 'streamlined' so that duplicated regulation could be minimised.

5.89 This situation highlights the need for clarity in the community about the purpose and objective of the different aspects of regulation. This report has attempted to provide some clarity of this kind in chapter 2.

5.90 When members of the business community are perceiving duplication, and workers and the industrial and legal representatives are observing gaps, it would appear that the purpose of these regulatory bodies is not fully appreciated. A lack of appreciation of what regulator does what, can lead some to have higher expectations than what these regulators are currently empowered to deliver.

5.91 The Committee therefore has identified an urgent need in the community for greater clarity on the roles of the respective regulators.

72 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 2.

Recommendation 14

5.92 **The Committee recommends the Commonwealth Government work with its state and territory counterparts to develop better cross-agency protocols in respect of workplace bullying, to allow for better information-sharing, cross-jurisdictional advice and complaint referrals across the following areas of regulation:**

- **work health and safety laws;**
- **industrial relations laws;**
- **antidiscrimination laws**
- **workers compensation laws; and**
- **relevant criminal laws.**

Raising awareness and promoting education of workplace bullying

5.93 A national conversation about workplace bullying has begun in Australia. The Committee's inquiry feeds into this discussion, and it is hoped that as the discussion progresses, more Australian will feel comfortable not only to identify inappropriate behaviour, but to speak up and report.

5.94 Importantly, there has been an increasing awareness of the hazard of workplace bullying and how organisations can be proactive in mitigating those risks. The Northern Territory Working Women's Centre noted:

> It is fair to say that there has been some awareness raising on this issue in the last few years, and it has been really good to see a number of organisations introduce their own workplace policies and their own community education type programs. Unfortunately that is not enough.[73]

5.95 The NTIBN commented that awareness and advocacy campaigns should be developed in collaboration with stakeholders such as employer and industry associations. Ms Ah-Sam elaborated:

> And, if people are made very much aware of it, they cannot plead ignorance. ... They cannot plead ignorance if we have promoted

73 Ms Rachael Uebergang, Co-coordinator, Northern Territory Working Women's Centre, *Committee Hansard*, Darwin, 17 July 2012, p. 2.

> awareness and have a campaign going [and] additional information [is available]. There are so many different stakeholders involved in this that you cannot develop such an educational or preventative campaign without factoring in all of those things. Why reinvent the wheel? [74]

5.96 However, the AMF cautioned that education campaigns are not necessarily a panacea:

> It is often the first response of organisations to create a campaign to disseminate views. [But] 'Campaigns' on their own have little long-term effect on behavioural change. They do play a role as part of a whole of community cultural change strategy. A multi-faceted approach consisting of awareness-raising, education, support services and interventions (amongst other things), which will need to be delivered by different stakeholders at many different levels to address the issue of bullying, including workplace bullying across our society.[75]

5.97 In isolation, support services and awareness campaigns cannot reduce workplace bullying in an ongoing and holistic way. Rather, these activities must be part of a broader approach to address the issue, involving the co-ordination of a range of different activities and interventions at different levels.[76]

Promoting the final *Code of Practice*

5.98 Once finalised, Safe Work Australia and the state/territory regulators will seek to promote the Code of Practice. These regulators have developed, adopted and promoted codes of practice on a variety of WHS topics including asbestos, hazardous manual tasks, working in confined spaces and construction work. Notably, most of these codes of practice are limited to certain industries – making them easier to promote and achieve greater awareness.

5.99 Yet a key challenge with promoting the final *Code of Practice: Managing the Risks of Workplace Bullying* will be the universality and complexity of the problem. It was clear throughout all evidence received by the Committee, that the problem of workplace bullying is not limited to certain industries or workers who attain senior position in an organisation.

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74 Ms Ah-Sam, NTIBN, *Committee Hansard*, Darwin, 17 July 2012, p. 18.

75 AMF, *Submission 125*, pp. 12-13.

76 AMF, *Submission 125*, p. 14.

5.100 Bullying at work is a complex phenomenon affecting all industries, workplaces of different sizes, and affects workers in different ways and to varying degrees.

5.101 Communicating the obligations and guidance that are established in the Code will be a challenge for the state/territory regulators and Safe Work Australia. Starting a conversation with an audience who is unaware of a risk can be a complicated task. In contrast, where an audience is aware of a problem and seeking guidance of how to manage or overcome that risk, is comparatively easier as they are more open to receiving, and will often seek the information out independently.

5.102 Consequently, the CCIQ advocated for public information sessions on the content of the Code, and by so doing, promoting the benefits of creating sound workplace cultures.[77]

Committee comment

5.103 One of the key strengths of the draft Code is its practical and implementable guidance specific to both employers and workers. The Code discusses bullying at the workplace level making it easier to comprehend such a challenging issue.

5.104 The Committee believes that this method of communication should be used by the new national service body when it engages in awareness and education initiatives. Its education initiatives must be proactive, and complement its reactive advice service. Analysing its advice-service statistics will allow the service to be proactive in its education strategies for the industries where the statistics reveal there are acute problems. The national service should also seek to work collaboratively with the multitude of regulators as well as state and territory governments so that awareness and education initiatives are consolidated, targeted and effective.

5.105 Throughout the inquiry, the Committee became aware of the workplace bullying awareness and education initiatives run by various state-based regulators. A notable example, is that conducted by the Victorian Department of Justice in collaboration with Mr Damian Panlock.

5.106 The Committee would like to formally recognise the efforts of Brodie Panlock's parents, Damian and Rae Panlock, and their ongoing endeavours to raise awareness about workplace bullying in Australia.

77 CCIQ, *Submission 67*, p. 3.

Recognising good culture: a national accreditation system

5.107 Culture can be improved through advice and awareness campaigns discussed elsewhere in this chapter. However, participants in the inquiry further advised that a system of 'accreditation' be developed to encourage and recognise employers who achieve best practice in promoting the psychosocial health of workers and maintain good workplace culture.

5.108 Employers' achievements in protecting and promoting the health and safety of their workers are recognised through the annual Safe Work Australia Awards. The state and territory regulators also present employers with awards in health and safety each year.

5.109 However, there is no ongoing recognition of employers who maintain good working cultures and exercise good practice with regards to psychosocial health. Workplace bullying expert, Dr Caponecchia recommended that a list of organisations be developed to recognise these good practices.[78] Dr Caponecchia expanded:

> That would be a great place for us to go, if we actually started rewarding people for doing this well. My colleagues and I talked about that several years ago as one of the places we need to take this area. Wouldn't it be great if one day there was an accreditation system or an awards system that said, 'This company, this company and this company have been evaluated as doing this really well.' It is almost like the idea that there are lists of companies that do corporate social responsibility well. There is an index every year, I think. ... That was the kind of pie-in-the-sky idea that we had. We do have [work health and] safety awards, but they are for all of safety.[79]

5.110 Similar recommendations were made by Harmers Workplace Lawyers and the Australian Institute for Employment Rights (AIER). Both called for a system of 'accreditation' to support and promote healthy workplace cultures.

5.111 Harmers Workplace Lawyers recommended the implementation of a system of accreditation for employers across Australia whereby employers

78 Dr Caponecchia, *Submission 81.1*, p. 2.

79 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 4.

become accredited for compliance with standards of psychosocial health and safety.[80]

5.112 The AIER called for a National System of Accreditation to encourage workplaces to improve their workplace cultures:

> It is clear that a systemic approach to managing workplace culture is required. ... Given the clear business and community case for investment in workplace culture, this requires a comprehensive national approach. The AIER believes that this is best administered at a federal level. In addition to initiatives such as the development of procurement guidelines, the Australian Government needs to lead the way by developing a National Accreditation System that would educate employers and other workplace participants, and encourage their alignment with the objectives and values of the system.[81]

5.113 The AIER advocates that an accreditation system should:

- be accessible to all employers and their workplaces: 'the costs and complexity of the system do not preclude small businesses or those with limited human resources expertise from engaging with it';
- be inclusive of employers, workers and their representatives, whereby the rights and legitimate expectations of workers and employers are balanced against the public interest; and
- aim to influence workplace culture by being an educative tool.[82]

5.114 The AIER contended:

> a National Accreditation System would address workplace culture over the long term. Such a comprehensive and systemic approach lends itself to focussing on the preventative ability and willingness of the business to minimise physical and mental illness arising from adverse culture in the present, as well as, in the future.[83]

Committee comment

5.115 The need to improve workplace culture in Australia was discussed throughout the inquiry. However, very few participants recommended how this might be achieved. A number of submissions called for a system

80 Harmers Workplace Lawyers, *Submission 88*, p. 7.

81 Australian Institute of Employment Rights (AIER), *Submission 109*, p. 16.

82 AIER, *Submission 109*, pp. 16-17.

83 AEIR, *Submission 109*, p. 18.

of national accreditation that recognises 'employers of choice'. The AIER, Harmers Workplace Lawyers and Dr Caponecchia called for a system of this kind.

5.116 On the recommendations of these participants, an employer would become 'accredited' or recognised for achieving defined standards of psychosocial health and safety. The Committee believes that this system could motivate employers to improve their workplace cultures and, more specifically, increase their awareness of the importance of workers' psychosocial health.

5.117 A challenge with establishing an accreditation system is developing the standards by which to measure workplaces. A recurrent theme throughout the inquiry is that there is no settled 'best practice' model that could be universally applied to all sectors. However, the Committee believes that its comments and recommendations to develop further guidance materials and specific sector best practice guides could assist in developing the standards which a national accreditation system could be evaluated against.

Recommendation 15

5.118 **The Committee recommends that the Minister for Employment and Workplace Relations consider implementing, in conjunction with stakeholders, a voluntary national accreditation system to recognise and award employers who achieve best practice and meet defined standards of psychosocial health and safety.**

Recommendation 16

5.119 **The Committee recommends that the Minister for Employment and Workplace Relations work with state and territory counterparts to specifically recognise good practice in workplace psychosocial health and safety through instituting annual employer awards in all jurisdictions throughout Australia.**

Improving the national evidence base

5.120 As commented in chapter 1, Australia does not have an evidence base on which to assess the trends of, or develop appropriate policy responses to, workplace bullying. The absence of a national evidence base was commented by a majority of stakeholders. For example, Unions NSW commented:

> there is a lack of knowledge of the depth of bullying in our workplace community and the extent to what it costs the community and who bears the costs.[84]

5.121 Similarly, Professor Maryam Omari and Mr David Blades argued:

> Clearly we need to know more about the environment of work. That is, what are Australian workplaces like? What are the main quality of work-life issues for employees and employers? How do experiences of employees differ within different professions and work settings? What is best practice?[85]

5.122 Dr Caponecchia argued that improving the national evidence base would assist in the development of best practice guides and more practical assistance to all parties. Dr Caponecchia stated:

> We really need to get best practice from evidence, not just practice from what we are already doing or from what is practical based on where we already are.[86]

5.123 Safe Work Australia commented on the other 'gaps' in Australia's knowledge of workplace bullying:

- a lack of longitudinal data on bullying / harassment;
- the lack of a complete national picture of the extent of workplace bullying across all jurisdictions in Australia; and
- the lack of information on how sources of bullying vary between industrial sectors in Australia.[87]

5.124 To improve the national evidence base, the Government of South Australia recommended:

> that the Commonwealth Government continues to explore opportunities to conduct further research into the area of

84 Unions NSW, *Submission 61*, p. 11.

85 Professor Maryam Omari and Mr David Blades, *Submission 28*, p. 4.

86 Dr Caponecchia, *Committee Hansard*, Canberra, 23 August 2012, p. 3.

87 Safe Work Australia, *Submission 74*, p. 14.

> workplace bullying. There should also be close links between research organisations (e.g. Universities) and SafeWork Australia and other jurisdictions to ensure research findings are disseminated to policy makers and industry to inform and improve policy, workplace practices and procedures in the area of workplace bullying (for both prevention and the management of bullying complaints).[88]

5.125 Unions NSW also recommended that the Federal Government fund research into the prevalence of workplace bullying across all industries, including measures to address bullying.[89]

5.126 Some participants called for Safe Work Australia to be adequately resourced to conduct a long-term study of workplace bullying in Australia. The ACTU contended:

> In terms of the collection and analysis of data, Safe Work Australia is reliant on the cooperation of the states and territories, which sometimes is not forthcoming. Ideally, we would like to see Safe Work Australia have an independent capacity to undertake research. However, in the current budgetary climate, I think Safe Work Australia is struggling with its funding, and perhaps this committee might see fit to make a recommendation about adequate funding for research in this area. [90]

Committee comment

5.127 The need to improve Australia's evidence base in workplace bullying was discussed throughout the inquiry. As highlighted in preceding sections, the Committee believes that the new national service could use its collated information to improve the evidence base.

5.128 A key challenge for the Committee, and consequently for state/territory and federal governments, is that responding to the problem of workplace bullying is challenging as currently there is very little evidence that would direct what is needed to assist stakeholders to combat the problem.

5.129 Though this inquiry has been a mechanism for the community to provide feedback to policy makers about what is needed and how it should be delivered, a long-term study of workplace bullying in Australia would

88 Government of South Australia, *Submission 216*, p. 4.

89 Unions NSW, *Submission 61*, p. 6.

90 Mr Borowick, ACTU, *Committee Hansard*, Melbourne, 11 July 2012, p. 22.

allow regulators and governments to assess the impact of their policies and better understand the prevalence of bullying at work.

Recommendation 17

5.130 **The Committee recommends that the Minister for Employment and Workplace Relations commission research into the prevalence and long-term trends of workplace bullying in Australia using the definition provided in Recommendation 1.**

Recommendation 18

5.131 **The Committee recommends that Safe Work Australia issues an annual national statement which updates any emerging trends of its collated data from each of the state and territory regulators, and the Commonwealth, with respect to psychosocial health and safety generally and workplace bullying specifically.**

Young workers

5.132 For young people, gaining employment symbolically represents an entry point into the world of adulthood with responsibilities, freedom and respect. However, according to headspace, the national youth mental health foundation, young workers are particularly vulnerable to the impact of bullying as a transition to work generally occurs at the same time when young people are most vulnerable to the onset of mental health difficulties.[91]

5.133 Indicating the prevalence of bullying experienced by young people at work, the Adelaide-based, Young Workers Legal Service reported that in the last year, they received 450 calls, 20 per cent of which related to workplace bullying.[92]

91 Ms Victoria Lee Ryall, eheadspace Manager, headspace National Youth Mental Health Foundation, *Committee Hansard*, Melbourne, 11 July 2012, p. 8.

92 Ms Anne Purdy, Coordinator, Young Workers Legal Service, *Committee Hansard*, Adelaide, 7 August 2012, p. 33.

5.134 Similarly, headspace reported findings from a survey of 797 apprentices which found that 23 per cent of new apprentices felt that they had been bullied at work which motivated them to leave the apprenticeship. headspace also stated that young people (aged 18 to 25) report more stress in the workplace and less positive experiences of work compared to other age groups.[93]

Vulnerability of young workers

5.135 Young workers can be more vulnerable than other employees to the hazards of workplace bullying. In a case that gained national attention in 2006, Brodie Panlock, a 19 year old waitress, tragically took her own life after enduring persistent and vicious workplace bullying. Mr Damian Panlock, Brodie's father, commented on the vulnerability of his young daughter:

> They pick them out. They pick out the weakest. Brodie was the weakest in that situation. She was the youngest and more vulnerable. They tried it on other people in the organisation and it did not work because they were older.[94]

5.136 The Government of South Australia argued that lack of knowledge about appropriate working conditions and entitlements, together with limited life experience and self-confidence can make younger workers vulnerable to 'exploitative practices and workplace bullying'.[95] The Government of South Australia also commented:

> their often limited self-confidence can make it difficult for them to speak up about experiencing bullying or to do anything to address the situation for the fear of jeopardising their employment and any future opportunities.[96]

5.137 The Tasmanian Anti-Discrimination Commission also commented on the likelihood of, and barriers faced by, young workers:

> young people will tend not to complain. When you are talking about workplace situations, the capacity to get and retain work and wanting to stay in a work environment probably are a further disincentive on top of the fact that young people do not tend to use formal complaints bodies across the board. I suspect there is a

93 headspace, *Submission 56*, p. 4.

94 Mr Damian Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 53.

95 Government of South Australia, *Submission 216*, p. 12.

96 Government of South Australia, *Submission 216*, p. 12.

> group who are probably highly vulnerable to bullying who are less likely to be represented in data anywhere there are complaints.[97]

5.138 Further, when young people transition from a school environment to a working environment, they face different structures and operational systems from those that they are accustomed. A school environment has clear, linear hierarchies. This is in contrast to the workplace environment where power structures can be dispersed and complex.

5.139 headspace commented on this transition:

> I think there is a lot of transitioning across or initiating that is not done that well at this time. Even in health care, parents often do not take their young ones to a GP to say, 'You now look after your own health'. We are strongly advocating for those things across the board for young people, including that we should let young people know their rights in workplaces et cetera. [98]

5.140 The Department of Education, Employment and Workplace Relations (DEEWR) also stated that the 'transition' from school to work presents an opportunity:

> the Australian Government recognises that addressing bullying behaviours and attitudes needs to commence well before people enter the workplace, and that bullying can take many forms. ... The Government believes student resilience and wellbeing are essential for academic and social development and that all students should be able to learn and develop in safe, supportive and respectful environments.[99]

5.141 The opportunity to impart good workplace behaviours, resilience and rights-awareness among young people as they transition from school into the workplace is discussed in the following section.

Educating on workplace rights and good workplace behaviour

5.142 Recurring themes in the evidence indicated priorities for educating young people of their workplace rights, the avenues available to seek assistance, as well as developing good workplace behaviours.

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97 Ms Robin Banks, Anti-Discrimination Commissioner, Office of the Anti-Discrimination Commissioner, Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 16.

98 Ms Ryall, headspace, *Committee Hansard*, Melbourne, 11 July 2012, p. 9.

99 Department of Education, Employment and Workplace Relation (DEEWR), *Submission 84*, p. 5.

5.143 headspace recommended a targeted campaign for young workers to inform them of their rights and services that can support them, and further contended:

> Many young people drop out work when they are experiencing problems. They are less likely to seek help. Coordinated care and links with mental health services and workplaces can assist in providing ongoing support. This could prevent young people from dropping out of work altogether. ... Young people need information about their rights in the workplace and where to turn for help.[100]

5.144 Educating young people of their workplace rights should also be balanced with information about their legal responsibilities as a worker. As discussed throughout this report, all workers carry responsibilities with respect to the health and safety of their co-workers. A better understanding of these responsibilities can lead to a deeper appreciation of good workplace behaviour.

5.145 Imparting an appreciation of good workplace behaviour is an extension of current campaigns around good citizenship and good digital citizenship. The Australian Chamber of Commerce and Industry stated:

> By the time young people join the workforce they have been exposed to many situations which cause them to define what is or is not acceptable behaviour.[101]

5.146 Similarly, the AMF argued:

> Young people progress into the wider workplace setting and take the cultural norms of bullying and cyberbullying [as] being unacceptable with them. However, targeting young people in workplace training and apprentice settings is only the first step... The goal is to have every work place become [an environment] where bullying and cyberbullying are reduced.[102]

5.147 School programs about good digital citizenship have coincided with discussions about bullying more broadly. DEEWR referred to initiatives commenced by the AHRC and the Australian Federal Police (AFP) that engage young people in discussions about bullying online.[103]

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100 headspace, *Submission 56*, p. 8.

101 ACCI, *Submission 62*, p. 12.

102 AMF, *Submission 125*, p. 17.

103 DEEWR, *Submission 84*, p. 6.

5.148 Despite the recent push for education in good citizenship and digital citizenship highlighted by the AHRC and AFP programs, there was concern among stakeholders that many young people are in workplaces across Australia with little protection from bullying and its effects.[104]

5.149 Work experience programs often occur at beginning of this transition, and represent students' first encounters with working environments. Work experience programs are currently managed by the states and territories with specific legislation regulating these programs.[105] Work experience placements aim to:

- provide students with an opportunity to relate school studies with workplace contexts;
- prepare students for the demands and expectations of the working world;
- help students make informed career decisions by assessing their aptitudes and interests, and exploring potential careers;
- give students insights into the nature of diversity of employees in the workplace; and
- improve students' maturity, confidence and self reliance.[106]

5.150 These programs also provide opportunities for students to become more informed about their responsibilities at work.

Protecting young people

5.151 In its submission, the Government of South Australia foreshadowed the introduction of legislation to reinforce the protections for young workers against bullying:

> The South Australian Government is planning to introduce a Child Employment Bill into the South Australian Parliament later in the year. Within the context of this legislative framework, the

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The AHRC recently launched its *BackMeUp* campaign to encourage young people to support those targeted by cyber bullying. The AFP's work in this area focuses on a program known as *ThinkUKnow* which aims to raise awareness among parents, carers and teachers of the issues that young people face online. The AFP through its High Tech Crime Prevention Team also works with schools in the ACT in delivering cyber-safety presentations, which address cyber-bully.

104 AMF, *Submission 125*, p. 3.

105 For example, *Vocational Education Training and Employment Act 2000* (Qld).

106 Queensland Government, Department of Education, Training and Employment, 'Work Experience Placements for School Students', <http://ppr.det.qld.gov.au/education/management/Pages/Work-Experience-Placements-for-School-Students.aspx> accessed 4 October 2012.

> Government will consider the inclusion of specific provisions to reinforce the protections against bullying for young workers.[107]

5.152 The Government of South Australia recommended such an approach be adopted in other jurisdictions.[108]

Committee comment

5.153 The Committee did not receive evidence in support of or against protecting young workers through specific legislation as the South Australian Government has foreshadowed. The Committee therefore does not believe it can make a specific recommendation on this matter.

5.154 However, once the bill is introduced into the South Australian parliament, it is foreseeable that public debate will occur specifically on this issue. In addition, it is foreseeable that discussions will also take place at Safe Work Australia meetings on this topic. The Committee will watch with interest the outcomes of these events.

5.155 Despite this, the Committee believes there is a unique opportunity for good workplace behaviours to be instilled in young workers as they make the transition from school to work. Enhancing the awareness of rights and responsibilities at work at an early age is one of the preventative measures that the Committee believes should form part of the national response to workplace bullying.

5.156 Developing the skills and self-awareness for respectful workplace behaviours among young workers will also contribute to the 'change agenda' and improvement in workplace culture that has been the undercurrent of this inquiry.

Recommendation 19

5.157 **The Committee recommends that the Minister for Youth and the Minister for Employment and Workplace Relations work with their state and territory counterparts to develop targeted initiatives for young Australians undertaking the transition from school to work, about their rights and responsibilities at work.**

107 Government of South Australia, *Submission 216*, p. 12.

108 Government of South Australia, *Submission 216*, p. 12.

6

Enforcement and remedies

> [National Network of Working Women's Centres] know that the current regulatory system is not working because of the sheer volume of women who seek our assistance with workplace bullying and because of the fact that so few of those women are able to seek an appropriate legal remedy.[1]
>
> I do not believe that only using the occupational health and safety legislation is enough. I believe we need to have laws that protect workers, just like they do with sexual harassment. Bullying and harassment needs to be brought from the darkness into the light and it needs to happen now.[2]
>
> Law can provide a powerful incentive for employers to provide bullying-free workplaces.[3]

Introduction

6.1 Despite efforts to prevent workplace bullying and resolve it through early intervention measures, some cases escalate to the point where the targeted worker is injured or has to remove themselves from the workplace to avoid injury.

6.2 Targets of bullying expressed a sense of injustice because bullies and employers who did not protect them from bullying were not held

1 National Network of Working Women's Centres (NNWWC), *Submission 86*, p. 9.

2 Ms Jan Shepphard, Senior Industrial Advocate, Australian Services Union (ASU), *Committee Hansard*, Brisbane, 18 July 2012, p. 24.

3 headspace, *Submission 56*, p. 7.

accountable for their inaction.[4] Work health and safety (WHS) regulators are criticised for not investigating complaints of bullying or prosecuting or issuing compliance notices to people for breaching their duties of care. The police can be called on to prosecute individuals who commit criminal acts, such as assault and stalking, when they bully others at work.[5]

6.3 Feelings of injustice and powerlessness are amplified for the many people who discover they have no right of individual recourse to seek remedies such as compensation or damages for the injury they suffered because of workplace bullying.

6.4 Chapter 2 identified the enforcement measures available under WHS law and criminal law to penalise those who engage in, or employers who do not adequately prevent, workplace bullying. It also identified the more limited individual remedies available under anti-discrimination law and industrial relations law, as well as workers' compensation arrangements available to some workers.

6.5 In addition to the limited remedies for individuals, many people spoke of being unable to return to work owing to injuries they had sustained because of workplace bullying, particularly mental health injuries. This indicates there may be a lack, or a perceived lack, of support for these workers to return to the workforce.

6.6 This chapter will consider the responses that are available, or should be available, to cases of workplace bullying that have not been resolved through early intervention. Specifically, it will consider:

- whether the enforcement measures currently available are sufficient to respond to all instances of workplace bullying and whether they are effectively applied;
- whether there is a need to improve access to individual remedies for those adversely affected by bullying at work; and
- what support services can be provided to assist workers injured by bullying to return to the workforce.

4 For example, see MS, *Submission 204*, p. 1; Name withheld, *Submission 66*, p. 2.

5 Mr Damian Panlock and Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 51; MR, *Submission 233*.

Enforcement

6.7 Under WHS or criminal legislation, criminal charges may be brought against an individual who bullies others in the workplace.

6.8 Employers can be charged for breaching their statutory WHS duties by not complying with their duty of care to protect workers from the risk of workplace bullying.[6]

6.9 Harmers Workplace Lawyers argued that in order to truly deter workplace bullying there is a need for a new law specifically prohibiting workplace bullying, with timely and effective enforcement measures.[7] There is no such prohibition in any current WHS or criminal laws across Australia.[8]

6.10 However, the value of such a law was challenged by claims that current laws adequately address workplace bullying.[9] People and Culture Strategies, a specialist workplace relations law firm that assists employees and employers in dealing with workplace bullying matters, argued that new legislation could have a detrimental impact:

> ...if further legislation is enacted to prohibit workplace bullying it is highly likely that this will lead to vexatious bullying claims which has the unfortunate impact of detracting attention from genuine claims.[10]

6.11 The Chamber of Commerce and Industry Queensland (CCIQ) also argued 'that there is already sufficient existing legislation through which workplace bullying can be addressed'.[11]

6.12 Mr Nick Behrens, General Manager at CCIQ referred to report findings of a ministerial working group, established by the previous Labor Government in Queensland, that the existing laws should be more strongly enforced:

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6 See chapter 2 for a discussion on how employers and workers can be held accountable for workplace bullying under current criminal laws and work health and safety laws.

7 Harmer's Workplace Lawyers, *Submission 88*, p. 6.

8 Harmer's Workplace Lawyers, *Submission 88*, pp. 4-5; Ryan Carlisle Thomas Solicitors (RCT Solicitors), *Submission 106*, pp. 8-9.

9 People and Culture Strategies, *Submission 108*, p. 3.

10 People and Culture Strategies, *Submission 108*, p. 3.

11 Chamber of Commerce and Industry Queensland (CCIQ), *Submission 67*, p. 1. See also Australian Industry Group (AiG), *Submission 59*, p. 16.

> It is interesting that … that reference group … concluded that no additional regulation was necessary but we needed to enforce what legislation was in place and we needed to significantly increase those activities associated with raising awareness and educating stakeholders in what their responsibilities were.[12]

Work health and safety laws

6.13 Where breaches of WHS laws are detected an inspector can enforce the law by issuing improvement or prohibition notices or escalating the action to formal procedures notices which are addressed through the courts for serious contravention of the legislation'.[13]

6.14 Mr Karl Luke, Partner at Thomsons Lawyers outlined the enforcement mechanisms available under Australia's WHS laws:

> The regulator could investigate and put in an infringement notice, an improvement notice saying, 'Your risk control measures are not adequate; these are the things you need to do to improve,' or a prohibition notice potentially. The regulator could prosecute the employer if it is a particularly bad case. I think the attractiveness of this model is that there is a whole suite of different enforcement mechanisms from education right through to prosecution that a regulator can use.[14]

6.15 A strategic approach is taken to determine what enforcement method should be used. Comcare explained how Commonwealth WHS inspectors determine the appropriate action:

> The type of intervention required will be determined based on an analysis of the allegation, the action taken (or not taken) by the employer and its previous compliance history.[15]

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12 Mr Nick Behrens, General Manager, Advocacy, CCIQ, *Committee Hansard*, Brisbane, 18 July 2012, p. 18. Mr Behrens commented that the report was prepared by a Ministerial working group under the previous Labor Government in Queensland. There was a change of government in Queensland in early 2012. The report has not yet been published.

13 Safe Work Australia, 'Comparative Performance Monitoring Report', 13th edn (October 2011), p. 17 < http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/609/Comparative_Performance_Monitoring_Report_13th_Edition.pdf> viewed 26 September 2012. See also Chapter 2 for further discussion of the enforcement mechanisms available under Australia's work health and safety laws.

14 Mr Karl Luke, Partner, Thomsons Lawyers, *Committee Hansard*, Adelaide, 7 August 2012, p. 30.

15 Comcare, *Submission 120*, p. 16.

Inadequate enforcement of work health and safety laws

6.16 Although it was acknowledged that there has been some enforcement of WHS laws by the regulators to hold employers accountable for breaching their duty of care, employee support organisations and lawyers criticised regulators for not enforcing the law often enough.[16]

6.17 Ryan Carlisle Thomas Solicitors (RCT Solicitors) contended:

> The number of prosecutions for 'bullying' behaviour remains low and there is room for improvement in terms of regulators' responses to 'bullying' complaints.[17]

6.18 The Australian Council of Trade Unions (ACTU) argued that enforcement of the law in response to non-physical workplace bullying is particularly poor.[18] On this point, Mr Michael Harmer from Harmers Workplace Lawyers said:

> I am aware of safety prosecutions relating to bullying, but they are rare and they normally relate to the more extreme cases, because it is difficult for the inspectors to detect and protect against that area.[19]

6.19 The Community and Public Sector Union said that the lack of prosecutions brought by work health and regulations 'fails to provide general and specific WHS deterrence'.[20]

6.20 The Australian Nursing Federation (Victorian Branch) commented that poor enforcement can also hinder public awareness of the law:

> ...there is a significant lack of knowledge at the community level in relation to this framework [for the prevention and management of workplace bullying] due to lack of community education and enforcement by the regulator.[21]

6.21 JobWatch stated that the burden on the regulators to prove beyond reasonable doubt that workplace bullying occurred was discouraging regulators from bringing about more prosecutions:

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16 Australian Council of Trade Unions (ACTU), *Submission 63*, p. 24; Victorian Trades Hall Council (VTHC), *Submission 139*, p. 12; RCT Solicitors, *Submission 106*, p. 9; NNWWC, *Submission 86*, p. 7.

17 RCT Solicitors, *Submission 106*, p. 9.

18 ACTU, *Submission 63*, p. 24.

19 Mr Michael Harmer, Harmer's Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 3.

20 Community and Public Sector Union (CPSU), *Submission 188*, p. 10.

21 Australian Nursing Federation (Victorian Branch), *Submission 117*, p. 32.

> Due to there being a criminal standard of proof...WorkSafe [Victoria] seems to prosecute only where there is an admission of bullying by the employer and/or its employees or where there is overwhelming evidence e.g. video evidence etc. ... The criminal standard of proof is therefore prohibitive to obtaining penalties against workplace bullies and to creating any real deterrent effect.[22]

6.22 The Community and Public Union suggested that improvement notices should require employers to improve their management of workplace bullying and therefore prevent it from happening rather than relying on prosecutions which 'are the end of the process.'[23]

Improvement and prohibition notices

6.23 Improvement notices are used by WHS regulators to require duty holders to improve standards to comply with their health and safety duties. Master Builders Australia explained that these notices 'outline the nature of the breach and can include directions as to the measures that the duty holder needs to take in order to rectify the breach'.[24]

6.24 Prohibition notices on the other hand require a duty holder to cease a prohibited action immediately.

6.25 Mr Paul O'Connor, Chief Executive Officer of Comcare explained that his agency uses improvement and prohibition notices to encourage employers to improve how bullying, harassment and inappropriate work relationships are being addressed.[25]

6.26 It appears that regulators use notices sparingly and that prohibition notices are less commonly used than improvement notices. The ACT Government stated that '[i]n 2010-11 four improvement notices and one prohibition notice were issued by WorkSafe ACT in response to specific matters involving allegations of bullying at work'.[26] The Comparative Performance Monitoring Report, published by Safe Work Australia each year, provides details on the number of notices issued by regulators each year.[27] At the time of reporting, the 2012 edition which would include the

22 JobWatch, *Submission 103*, p. 18.

23 CPSU, *Submission 188*, p. 18.

24 Master Builders Australia, *Submission 105*, p. 10.

25 Mr Paul O'Connor, Chief Executive Officer, Comcare, *Committee Hansard*, Canberra, 17 August 2012, p. 25.

26 ACT Government, *Submission 191*, p. 5.

27 The data does not include the mining sector. See Safe Work Australia, 'Comparative Performance Monitoring Report', 13th edn (October 2011), p. 17, <http://www.

data from 2010-11 had not been released. However, the previous edition in 2009-10 showed that the ACT issued 187 improvement notices in total and 103 prohibition notices in relation to all types of WHS breaches in the Territory.[28]

6.27 SafeWork SA said that since 2006 they had issued 174 improvement notices, but no prohibition notices.[29] By comparison earlier figures from mid-2006 to mid-2010 indicate that the South Australia regulator issued 9823 improvement notices and 2578 prohibition notices for breaches of WHS legislation.[30]

6.28 The Committee did not receive evidence on the number of notices issued by the regulators in the other jurisdictions but the Commonwealth and New South Wales regulators commented that they do issue notices in relation to workplace bullying cases.[31]

Prosecutions

6.29 The National Network of Working Women's Centres (NNWWC) said that being 'witness to the successful prosecution against perpetrators of workplace bullying by WHS or other regulators' is essential for educating the broader community about the consequences of allowing or engaging in bullying in the workplace.'[32]

6.30 Limited evidence was received in relation to the number of prosecutions pursued in relation to workplace bullying under WHS laws across Australia. SafeWork SA commented that no prosecutions for workplace bullying had been pursued in South Australia and that very few files reached the stage of being considered for prosecution.[33] The lack of

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safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/609/Comparative_Performance_Monitoring_Report_13th_Edition.pdf> viewed 26 September 2012.

28 Safe Work Australia, 'Comparative Performance Monitoring Report', 13th edn (October 2011), p. 21, < http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/609/Comparative_Performance_Monitoring_Report_13th_Edition.pdf> viewed 26 September 2012

29 SafeWork SA, *Submission 82*, p. 4.

30 Safe Work Australia, 'Comparative Performance Monitoring Report', 13th edn (October 2011), p. 21, < http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/609/Comparative_Performance_Monitoring_Report_13th_Edition.pdf> viewed 26 September 2012.

31 Mr O'Connor, Comcare, *Committee Hansard*, Canberra, 17 August 2012, p. 25; Mr Shay Deguara, Representative, Unions New South Wales and Public Service Association of New South Wales, *Committee Hansard*, Sydney, 10 July 2012, p. 22.

32 NNWWC, *Submission 86*, p. 7.

33 SafeWork SA, *Submission 82*, p. 4.

prosecutions may reflect the complexities of dealing with bullying matters:

> ... as it is often difficult to establish whether or not the alleged behaviours constituted workplace bullying or rather were reasonable actions taken by an employer.[34]

6.31 A 2010 Productivity Commission report indicated that 'Victoria and New South Wales had been the most active in pursuing incidents of bullying in the courts'.[35] However, WorkCover New South Wales submitted that although there had been some recent convictions for bullying involving physical injury, they did not know of any bullying prosecutions which related only to psychological injury.[36]

6.32 Mr Mark Crossin, Occupational Health and Safety Officer of Unions NT, said that between 2002 and 2008, when he was Director of NT WorkSafe, the regulator did not prosecute anyone in relation to psychological behaviours like workplace bullying.[37]

6.33 These low prosecution rates across Australia are criticised as indicative of regulators not adequately addressing workplace bullying. For example, Mr Crossin argued that the WHS regulators have not effectively responded to workplace bullying. He contended that their inaction was largely associated with a lack of relevant expertise in the area of workplace bullying but that it was also because the regulators were under -resourced.[38]

6.34 The ACTU suggested that low prosecution rates are indicative of regulators not pursuing workplace bullying cases that involve only covert and non-physical bullying behaviours.[39]

6.35 Others suggested that the low prosecution rates are largely due to the difficulties of gathering sufficient evidence to support a court case, particularly where the bullying is not overt. For instance, Mr Neale Buchanan, the Director of Operations at Workplace Standards Tasmania,

34 SafeWork SA, *Submission 82*, p. 4.

35 Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*, March 2010, p. 279.

36 Mrs Pamela Estreich, State Inspector, WorkCover Authority of New South Wales and Mr John Watson, General Manager, Work Health Safety Division, WorkCover Authority of New South Wales, *Committee Hansard*, Sydney, 10 July 2012 , pp. 2 and 5.

37 Mr Mark Crossin, Occupational Health and Safety Officer, Unions NT, *Committee Hansard*, Darwin, 17 July 2012, p. 10. Mr Crossin explained that he was Director of NT WorkSafe from 2002 to 2008.

38 Mr Crossin, Unions NT, *Committee Hansard*, Darwin, 17 July 2012, p. 11.

39 ACTU, *Submission 63*, p. 24.

said, 'it is very difficult to find a clear-cut, black-and-white proven beyond reasonable doubt prosecution case.'[40]

6.36 Similarly, the Government of South Australia submitted:

> Because of the nature of bullying behaviour, it is often exceptionally difficult to prove 'beyond reasonable doubt' that bullying occurred, as even overt behaviours are rarely witnessed either individually or electronically. This is one of the key reasons why bullying is so difficult to prosecute as a WHS breach under the WHS legislation.[41]

6.37 The Independent Education Union of Australia (IEUA) argued that these difficulties weaken the deterrent effect of the laws:

> Current regulatory frameworks place the burden of proof upon the prosecuting party and the standard of proof is beyond reasonable doubt. The outcome is often a long delay in progressing from initial complaint to a court hearing. Setting aside the impact of bullying upon effected members and their families, such challenges risk creating a culture in duty holders of being unlikely to be prosecuted. It is the opinion of the IEUA that existing regulatory frameworks do not provide a sufficient deterrent against workplace bullying.[42]

Training

6.38 Union groups argued that WHS laws are not enforced more often because WHS inspectors are not adequately resourced and skilled to investigate and respond to workplace bullying.[43]

6.39 Mr Rex Hoy, Chief Executive Office of Safe Work Australia, said:

> I think the jurisdictions will tell you that they really do not have the capacity to train up their people. Equally they have issues about training their inspectors to enforce the legislation.[44]

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40 Mr Neale James Buchanan, Director, Operations, Workplace Standards Tasmania, *Committee Hansard*, Hobart, 12 July 2012, pp. 19-20.

41 Government of South Australia, *Submission 216*, pp. 10-11.

42 Independent Education Union of Australia, *Submission 70*, p. 5.

43 For example, see Mr Kevin Harkins, Secretary, Unions Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 2; ACTU, *Submission 63*, p. 28. See also: Ms Caroline Dean, President, Challenge Bullying Inc, *Committee Hansard*, Hobart, 12 July 2012, p. 10.

44 Mr Rex Hoy, Chief Executive Officer, Safe Work Australia, *Committee Hansard*, Canberra, 17 August 2012, p. 18.

6.40 Ms Caroline Dean, the President of Challenge Bullying contended that inspectors:

> have very good training around occupational health and safety physically but they do not have it around bullying and harassment. In my experience, when inspectors are called in to examine a case that somebody believes is bullying, they often do not find in favour of that person; they find in favour of the organisation, because they do not understand the complexities and nor do they understand the operation of power [at the workplace].[45]

6.41 As workplace bullying and other psychological hazards at the workplace are so different to physical hazards, inspectors cannot rely on the same skills and knowledge to effectively investigate each. For that reason some organisations, including WHS regulators, submitted that inspectors need to be specially trained in how to investigate and respond to workplace bullying complaints to ensure that the law is enforced properly and effectively in this area.[46]

6.42 SafeWork SA explained the types of skills and knowledge that inspectors need:

> In order to overcome the difficulties in assessing psychosocial risks, it is important for inspectors handling bullying complaints to have a good working knowledge of the factors that lead to, and increase the likelihood of such hazards arising in the workplace.[47]

6.43 The South Australian Government discussed why it is so important that inspectors possess specialist skills when investigating workplace bullying:

> It is fundamentally important that inspectors are well trained and skilled in order to gain community respect in dealing with this very challenging issue. WHS inspectors must be able to go out into the community and possess the right set of skills, knowledge and understanding to raise awareness of the psychosocial hazards associated with workplace bullying. They need to assist businesses with the necessary resources and information dealing with prevention, management and control of bullying hazards.

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45 Ms Caroline Dean, President, Challenge Bullying Inc, *Committee Hansard*, Hobart, 12 July 2012, p. 10.

46 For example, Ms Dean, Challenge Bullying Inc, *Committee Hansard*, Hobart, 12 July 2012, p. 10; SafeWork SA, *Submission 82*, p. 11; Government of South Australia, *Submission 216*, pp. 7-8; Mr Buchanan, Workplace Standards Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 16.

47 SafeWork SA, *Submission 82*, p. 11.

> Inspectors must also have the right set of skills and experience to be able to respond to bullying complaints and conduct their investigations in a timely, efficient and sensitive manner.[48]

6.44 The NNWWC commented that the current skill levels of inspectors vary between jurisdictions:

> Some [W]HS regulators are staffed with specialist psychosocial complaints handlers who have specialist workplace bullying skills and knowledge. Some [W]HS complaints handlers do not.[49]

6.45 This was evident in comments received from the Tasmanian regulator. Mr Neale Buchanan, Director of Operations at Workplace Standards Tasmania who said that they currently have only two inspectors who are adequately skilled to address workplace bullying complaints.[50]

6.46 Indicative of similarly low levels of expertise in Northern Territory, Ms Rachael Uebergang, the Co-coordinator of the Northern Territory Working Women's Centre that WorkSafe NT may not be as equipped as other regulators to respond to take on complaints of workplace bullying and investigate them.[51]

6.47 This is in stark contrast to the approach taken in Queensland. Ms Jan Shepphard, Senior Industrial Advocate from the Australian Services Union (ASU) commented that the Queensland regulator has a specialist psychosocial unit with a staff of trained psychologists to address complaints such as workplace bullying.[52]

6.48 Similarly, Comcare referred to an 'established … specialist team to focus on workplace bullying – the Workplace Relationship Resolution Team'.[53]

6.49 SafeWork SA also noted specific training to be provided to inspectors in 2012, to be run by the Centre for Applied Psychological Research this year.[54]

6.50 However, personal impact statements at public hearings and submissions from individuals suggested wide-spread gaps in every Australian jurisdiction.

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48 Government of South Australia, *Submission 216*, p. 8.

49 NNWWC, *Submission 86*, p. 8.

50 Mr Buchanan, Workplace Standards Tasmania, *Committee Hansard,* Hobart, 12 July 2012, p. 16.

51 Ms Rachael Uebergang, Co-coordinator, Northern Territory Working Women's Centre, *Committee Hansard*, Darwin, 17 July 2012, p. 2

52 Ms Shepphard, ASU, *Committee Hansard*, Brisbane, 17 July 2012, p. 26.

53 Comcare, *Submission 120*, p. 16.

54 SafeWork SA, *Submission 82*, p. 11.

6.51 The Government of South Australia suggested that there is scope within the WHS harmonisation process for Safe Work Australia to develop 'a national training programme to equip WHS inspectors with the skills required to deal with bullying issues, including the provision of mediation and conciliation services'.[55]

Committee comment

6.52 WHS regulators in all jurisdictions have identified the need for inspectors to be trained to respond specifically to complaints of workplace bullying. However, it appears that resource constraints have limited the ability to provide such training.

6.53 The Committee supports the suggestion from the Government of South Australia that a national program for WHS inspectors be developed because a harmonised approach to training can allow a program that borrows from the experience and knowledge of each of the jurisdictions to be developed. It means that all jurisdictions can train their inspectorate in what is best practice in responding to workplace bullying. Coordinating resources to develop training could also assist those jurisdictions with fewer resources.

6.54 The suggestion of training inspectors in conciliation or mediation is also supported. However, the training program should aim primarily to assist inspectors in identifying when mediation or conciliation may or may not be appropriate. It should be noted that conciliation and mediation procedures should not be mandatory in all cases of workplace bullying because, as discussed in chapter 5, in some cases they can cause more damage than repair already fractured workplace relationships.

Recommendation 20

6.55 **The Committee recommends that the Commonwealth Government, through Safe Work Australia, develop a national accredited training program for all work health and safety inspectors that equips inspectors to identify and address instances of workplace bullying.**

55 Government of South Australia, *Submission 216*, p. 7.

Harmonising an approach to enforcement of work health and safety laws in workplace bullying cases

6.56 WHS regulators cannot investigate all complaints of workplace bullying.[56] Not only would so doing impose an unrealistic burden on resources, there is no doubt some complaints can be resolved by the provision of advice to the complainant on initial contact.

6.57 Evidence suggests that each of the WHS regulators utilise an assessment tool when determining which complaints should be further investigated. Following an investigation an inspector will make a determination of which, if any, enforcement measures should be used.[57]

6.58 However, the NNWWC explained, that in their experience, the responses of regulators to workplace bullying complaints vary between jurisdictions:

> The manner in which workplace bullying enquiries and complaints are handled by [W]HS authorities varies greatly between jurisdictions. ...Whilst some Working Women's Centres have success in enabling their clients to have complaints of workplace bullying investigated by their [W]HS regulator, some Working Women's Centres find that their [W]HS regulator will not accept or action an enquiry or complaint of workplace bullying. It is not uncommon for complainants in some jurisdictions to be informed by a staff member of an [W]HS regulator that they do not deal with workplace bullying and inappropriately refer the matter to an anti-discrimination commission or Fair Work Australia.[58]

Harmonised approach to compliance and enforcement

6.59 The Government of South Australia submitted that there is 'scope to develop a national enforcement and compliance manual to deal specifically with bullying matters and that doing so could improve people's experiences when dealing with the regulators.'[59] They explained

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56 Comcare, *Submission 120*, p. 16; NNWWC, *Submission 86*, p. 12.

57 Safe Work Australia, 'Role of inspectors in compliance and enforcement', <http://www.safeworkaustralia.gov.au/sites/swa/legislation/guidance-material/pages/guidance-material.aspx> viewed 10 September 2012; WorkSafe Victoria, 'What Actions Can Inspectors Take', <http://www.worksafe.vic.gov.au/safety-and-prevention/workplace-inspections/what-actions-can-inspectors-take> viewed 24 September 2012; SafeWork SA, *Submission 82*, p. 8.

58 NNWWC, *Submission 86*, p. 8.

59 Government of South Australia, *Submission 216*, p. 7.

that a harmonised approach to compliance and enforcement, in addition to consistent training for inspectors, could:

> ... potentially assist the dispute resolution process and act as a support for preventative measures to be established in workplaces, as well as providing a heightened awareness among employers and employees of the consequences of workplace bullying. A common set of regulatory principles and approaches to workplace bullying would also create consistency for the national inspectorates in the investigation and management of workplace bullying complaints.[60]

6.60 Harmonising regulators' approaches to compliance and enforcement is already underway, but not specifically in regards to workplace bullying. Safe Work Australia noted that as part of the harmonisation package a National Compliance and Enforcement Policy was developed.[61] The Policy was endorsed by all jurisdictions in November 2011.[62]

6.61 The Safe Work Australia website explains:

> The National Compliance and Enforcement Policy sets out the approach work health and safety regulators will take to compliance and enforcement under the model WHS Act and Regulations.[63]

Committee comment

6.62 It would be a positive step to harmonise the approach regulators take to encouraging compliance and determining when enforcement measures should be imposed on those who breach their duties. Such harmonisation might provide an opportunity to reassure the community that WHS regulators in all jurisdictions respond effectively to workplace bullying. There is also an opportunity for regulators to improve their approaches by sharing skills and expertise.

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60 Government of South Australia, *Submission 216*, pp. 7- 8.

61 Safe Work Australia, *Submission 74*, p. 6; Mr Rex Hoy, Chief Executive Officer, Safe Work Australia, *Committee Hansard*, Canberra, 17 August 2012, p. 12.

62 Safe Work Australia, 'National Compliance and Enforcement Policy', <http://www.safeworkaustralia.gov.au/sites/swa/legislation/ncp/pages/ncp.aspx> viewed 13 September 2012.

63 Safe Work Australia, 'National Compliance and Enforcement Policy', <http://www.safeworkaustralia.gov.au/sites/swa/legislation/ncp/pages/ncp.aspx> viewed 13 September 2012

6.63 It is unclear whether the National Compliance and Enforcement Policy developed by Safe Work Australia has been implemented by all of the jurisdictions, or just those that have enacted the model WHS laws.[64] However, the endorsement of the policy demonstrates a willingness of the regulators to harmonise their approach to encouraging compliance with WHS laws and using enforcement measures.

6.64 Any national compliance and enforcement policy specific to workplace bullying should have a similar approach to the broader, current National Compliance and Enforcement Policy insofar as it should encourage regulators to adopt a balance between compliance monitoring and enforcement to deter non-compliance with the use of positive motivators to encourage compliance.[65] This approach could assist in creating a more proactive approach to managing workplace bullying and in turn assist in lowering rates of workplace bullying.

6.65 Developing a national compliance and enforcement policy specific to workplace bullying could complement the ongoing work that Safe Work Australia is doing in developing the model *Code of Practice: Managing the Risk of Workplace Bullying*.

Recommendation 21

6.66 **The Committee recommends that the Commonwealth Government seek agreement from the work health and safety regulators of each jurisdiction through the Safe Work Australia process, for the development and endorsement of a uniform national approach to compliance and enforcement policy for preventing and responding to workplace bullying matters.**

Accountability where workers' compensation is awarded

6.67 Each jurisdiction provides workers' compensation under no-fault schemes.[66] This means that a successful workers compensation claim is based only on whether the injury or harm suffered related to work, not on

64 The model Work Health and Safety Act and Regulations have only been enacted in the Commonwealth, New South Wales, Queensland, Northern Territory, Australian Capital Territory and Tasmania to date.

65 Safe Work Australia, 'National Compliance and Enforcement Policy', published 26 September 2011, p. 2, <http://www.safeworkaustralia.gov.au/sites/swa/legislation/ncp/pages/ncp.aspx> viewed 13 September 2012.

66 Workers' compensation laws were also discussed in chapter 2.

whether someone at the workplace or the employer is at any fault for the injury or harm.

6.68 In many jurisdictions the WHS regulator is the same organisation responsible for the jurisdiction's workers' compensation scheme. WorkCover NSW supported both authorities being within the one organisation that allowed them to monitor files and investigate when there is a change that might indicate a WHS issue.[67]

6.69 Despite the complementary way in which WHS and workers' compensation laws appear to work, the ACTU argued that there is a significant disconnect between them. They said that there are many cases where a worker has made a successful workers compensation claim for an injury resulting from workplace bullying but the WHS regulator has not been able to substantiate the allegations of workplace bullying. Thus, no one is held responsible for the bullying and breaching their WHS duties.[68]

6.70 The Victorian Trades Hall Council (VTHC) submitted that because of this disconnect between successful workers' compensation claims and enforcement of WHS 'the bullying behaviours which caused the injury are rarely addressed and prevented from [re]occurring'.[69]

Committee comment

6.71 The importance of having no-fault workers' compensation schemes is to ensure that injured workers can be fairly compensated without prejudice for injury or harm which is attributable to their work. However, this principle should not prevent a party from being held responsible for breaching their WHS duties where the injury sustained was a result of that breach.

6.72 Indeed, a better connection between workers' compensation decisions and the enforcement of WHS laws could provide better outcomes for all workers. If employers are more often held responsible under the law for breaches of their health and safety duties that led to injuries for which workers have received workers' compensation there would be more incentive for them to improve their management of the risks of workplace bullying.

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67 Mr John Watson, General Manager, Work Health and Safety Division, WorkCover Authority of New South Wales, *Committee Hansard*, Sydney, 10 July 2012, p. 4.

68 ACTU, *Submission 63*, p. 23.

69 VTHC, *Submission 139*, p. 3.

6.73 The Committee understands that if a workers' compensation claim for a workplace injury, be it for a physical or psychosocial injury, is successful, Comcare currently does not investigate whether there has been a breach of WHS duties at the workplace.

6.74 The Committee would like to recommend that once awarding a compensation claim and where there is evidence of workplace bullying, Comcare should determine whether a breach of WHS duties has also occurred. However, that would entail a wider review of workers compensation which is beyond the scope of the inquiry's terms of reference. A site visit or investigation could potentially differentiate between the treatment of physical and psychosocial injuries. If workplace bullying was found to have caused a breach of WHS duties, that finding could help to highlight the problem and ensure that the employer takes steps toward remedying the breach.

6.75 The Committee is aware that some jurisdictions may reward employers through workers' compensation premiums for good risk management. Similar disincentives for those employers who do not comply with their WHS duties could perhaps encourage greater compliance and management of the risks of workplace bullying.

Criminal law

6.76 There were some calls for a national criminal law, based on Brodie's Law in Victoria, expressly prohibiting workplace bullying.[70] However, constitutional limitations mean that it is not possible for the Commonwealth to make a law criminalising any bullying or anti-social behaviour other than that which is typical of cyber bullying.[71] This is because the Commonwealth's powers in this regard are restricted to the use of a carriage service, such as the internet or telephones, to menace or harass another person.[72]

Need to clarify the effect of State and Territory criminal laws

6.77 Some state and territory criminal laws, such as the Australian Capital Territory's *Crimes Act 1900* and the Western Australian *Criminal Code*

70 Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p.51; Harmers Workplace Lawyers, *Submission 88*, p. 7; Harmers Workplace Lawyers, *Submission 88*, p. 7,

71 See chapter 2 and The Alannah and Madeline Foundation (AMF), *Submission 125*, p. 28.

72 ACT Government, *Submission 191*, p. 7; AMF, *Submission 125*, p. 28; *Crimes Act 1914* (Commonwealth), s. 474.17.

Compilation 1913, were purported to have the same effect as Brodie's Law in Victoria.[73]

6.78 However, there were also suggestions that some state and territory criminal laws are not as far reaching as Brodie's Law. For example, Mr Kevin Harkins, the Secretary of Unions Tasmania, commented that Tasmania does not have the same criminal offence of stalking that is fundamental to Brodie's Law in the Victorian *Crimes Act 1958*.[74]

6.79 Furthermore, Mr and Mrs Panlock, the parents of Brodie Panlock, suggested that in some cases the police are reluctant to enforce the criminal law in cases of workplace bullying. They commented that there were no criminal charges laid by the police in relation to the suicide of their daughter following ongoing and insidious workplace bullying.[75] Mr Panlock said:

> At the time the police did not want to pursue it any further. We did have one particular officer that went way beyond what she should have done or was supposed to do, and she is still trying, but to no avail. There is still assault, and there were certain other laws back then that could have been proceeded with, but the police did not go any further. We have spoken to high-ranking police as well, and they all sort of just go, 'Thwip!'[76]

6.80 In August 2012, the Victorian Attorney-General, the Hon. Robert Clark, launched the 'Take a stand against bullying' campaign, which is being supported by Mr and Mrs Panlock to:

> [urge] workplaces to take a stand against bullying and report such behaviour to authorities...[and] will see information about bullying and bullying laws distributed to more than 8,000 schools, workplaces and police stations across Victoria.[77]

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73 See ACT Government, *Submission 191*, pp. 6-7; WorkSafe WA, *Submission 206*, p. 10; Department of Education, Employment and Workplace Relations (DEEWR), *Submission 84*, p. 19. See discussion on current state and territory criminal laws in chapter 2.

74 Mr Kevin Harkins, Secretary, Unions Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 1.

75 Mr and Mrs Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 51.

76 Mr Damian Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 51.

77 Department of Justice, Victoria, Australia, 'Victorians Urged to Take a Stand Against Bullying', 8 August 2012, <http://www.justice.vic.gov.au/find/news/victorians+urged+to+take+a+stand+against+bullying, viewed> 9 October 2012.

Criminal sanctions should complement enforcement of WHS laws

6.81 It was strongly argued that criminal enforcement should not be a replacement or an alternative to enforcement of WHS laws.[78]

6.82 Workplace bullying expert, Dr Carlo Caponecchia asserted that criminal laws do not address workplace bullying as effectively as WHS laws can:

> The primary intended outcome of developing criminal laws is the punishment of individuals, with the flow on effect of deterrence. This approach seems to fall into the trap of viewing bullying as a one-on-one interpersonal exchange, based solely on interpersonal issues, where one individual should be held responsible for their effects on another (after those effects have occurred). This may be appropriate in some extreme cases, but in most cases...the role of the context and work environment is important in both preventing bullying from occurring in the first place, and/or from mitigating its effects.[79]

6.83 The ASU argued that enforcement of criminal laws alone is ineffective to address workplace bullying because:

> [the] emphasis [is]on holding individual bullies responsible when it is too late rather than [on] an employer's obligation to provide a safe workplace.[80]

6.84 Similarly, Associate Professor Maryam Omari, who has conducted extensive research on workplace bullying in Australia in the past decade, commented that criminal legislation to deal with workplace bullying may result in addressing the issue when it is too late, that is, when the target of the bullying has already been adversely affected.[81]

6.85 Mr Bryan Russell, Executive Director of SafeWork SA said that the South Australian Government supports workplace bullying continue to be dealt with in a WHS context rather than in a criminal law context:

> Elimination of bullying behaviour is central to the dynamics of safe and healthy workplaces, and bullying is a hazard that can have significant long-term effects on a worker's psychological

78 Dr Carlo Caponecchia, *Submission 81*, p. 8; Australian Services Union (ASU), *Submission 72*, p. 12; ACTU, *Submission 63*, p. 8; ACT Government, *Submission 191*, p. 13; Government of South Australia, *Submission 216*

79 Dr Caponecchia, *Submission 81*, p. 8.

80 ASU, *Submission 72*, p. 12.

81 Professor Maryam Omari, *Committee Hansard*, Perth, 8 August 2012, p. 5. See also Professor Maryam Omari and Mr David Blades, *Submission 28*.

> health, safety and welfare. Therefore, it should be treated like any other workplace hazard with the aim of identifying the hazard, assessing the risks and implementing steps to eliminate or minimise any identified risks.[82]

6.86 However, arguing for the consideration of workplace bullying primarily as a WHS issue does not preclude the availability of criminal sanctions in serious cases.[83] For instance, Safe Work Australia submitted:

> While WHS laws are an appropriate way to prevent and address workplace bullying and strong penalties are included in the model WHS Act for serious bullying, it is still appropriate that serious cases of bullying are capable of being addressed under the relevant criminal law system.[84]

6.87 The availability of criminal law in those cases reflects that, whether committed in a workplace or elsewhere, a person who commits a criminal offence should be penalised accordingly under criminal laws.

Criminal laws and deterrence

6.88 The mere existence of criminal laws and the potential to be held liable for bullying someone in the workplace can serve as a significant deterrent to workplace bullying.[85]

6.89 Dr Donna-Louise McGrath, a researcher who has written a number of articles about workplace bullying and workplace behaviours commented:

> The national introduction of 'Brodie's Law' could be a greater deterrent [than work health and same duties alone] to workplace bullying because perpetrators and their allies may have a greater fear of the personal consequences of their actions. At present, many perpetrators are able to bully without fear of punishment. In addition, individuals who are unlikely to bully alone may participate in bullying within the 'safety net' of a group; perhaps reasoning that any punishment will be apportioned between members of the group. An awareness of Brodie's Law could thus

82 Mr Bryan Russell, Executive Director, SafeWork SA, *Committee Hansard*, Adelaide, 7 August 2012, p. 6.

83 For example see Safe Work Australia, *Submission 74*, p. 3; Justitia Lawyers and Consultants, *Submission 104*, p. 5.

84 Safe Work Australia, *Submission 74*, p. 3.

85 See Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 52; Mr Harmer, Harmer's Workplace Lawyers, *Committee Hansard,* Brisbane, 18 July 2012, p. 5; Dr Donna-Louise McGrath, *Submission 87*, pp. 2 & 7.

> make every participant in bullying responsible for their behaviour.[86]

6.90 Mr Michael Harmer of Harmers Workplace Lawyers submitted that the response of employers to the introduction of Brodie's Law is illustrative of the deterrent effect criminal laws can have:

> There was, around the introduction of [Brodie's Law], a spate of education in corporations across Australia reinforcing the importance and the alignment of genuine systems of management to the achievement of the prevention of bullying.[87]

Committee comment

6.91 Workplace bullying should first and foremost be dealt with by enforcement of WHS laws. Only those laws can be used to hold employers (the legal entity, not necessarily the individual) accountable for their part in allowing workplace bullying to occur; for not effectively managing the risks of workplace bullying. And only WHS laws promote a risk management approach to workplace bullying; requiring employers to prevent, as far as reasonably possible, workplace bullying from occurring rather than responding to complaints of bullying when it is 'too late' for the targets of the bullying who have already been affected.

6.92 WHS laws can also be used to hold individual workers who participate in bullying accountable for any act of workplace bullying, regardless of the severity of the consequences. This is significant because it is not only bullying of a criminal nature that should be penalised. All perpetrators of workplace bullying should be held to account to ensure that this type of behaviour is eradicated across Australia, whether that accountability is made at the workplace level or through the WHS regulator. In some instances, being held accountable under workplace bullying policies by their employer may be sufficient to deter further bullying.

6.93 Criminal prosecution should not be seen as an alternative to enforcement of WHS law because the laws serve different objectives. This is especially significant where there are suggestions that the employer may have breached their duty of care to workers by negligently or recklessly failing to prevent workplace bullying because they cannot be penalised under criminal laws.

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86 Dr Donna-Louise McGrath, *Submission 87*, p. 7.

87 Mr Harmer, Harmer's Workplace Lawyers, *Committee Hansard,* Brisbane, 18 July 2012, p. 5.

6.94 The Committee was saddened to hear of a workplace bullying case in Victoria where it was reported that WorkSafe Victoria failed to take any action because the individual perpetrator had been charged under criminal legislation with assault.[88] It appeared that no action was taken against the employer despite reports they had knowingly failed to prevent the risks of bullying at the workplace. It is important that serious acts of workplace bullying that amount to criminal offences under criminal legislation should be punished as such.

6.95 There is some disagreement amongst stakeholders as to whether all current state and territory criminal laws can be used to penalise perpetrators of serious instances of workplace bullying in the same way that the Victorian *Crimes Act 1958* follows the amendments made by Brodie's Law. The Committee received evidence indicating uncertainty in the community of the powers of current criminal laws as well as the willingness of police to enforce those laws. Regardless of the location, a criminal offence should be treated as such and everyone should know that they are protected from criminal behaviour both inside and outside of the workplace.

6.96 An overriding message of the inquiry is that the laws to-date (in the way that they have been implemented) do not necessarily deter workplace bullying behaviour. The hundreds of submissions to the inquiry show this to be the case. The Committee received evidence indicating uncertainty in the community about the powers of current criminal laws as well as the willingness of police to enforce those laws. Regardless of whether this is due to a lack of prosecutions or need for greater education about their existing powers the Committee recommends that states and territories revisit their criminal laws in this area.

6.97 At the Standing Council on Law and Justice meeting in November 2011, members[89] noted the introduction of Brodie's Law in Victoria. They also noted:

> the importance of finding effective means of dealing with all forms of bullying whether in the workplace, school yard, sporting club, cyberspace or elsewhere.[90]

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88 Details of the case and allegations were reported on the ABC News, see 7.30 ABC, 'Lawyers question workplace bullying protections', Transcript, 10 September 2012, <http://www.abc.net.au/7.30/content/2012/s3587167.htm> viewed 11 September 2012.

89 'The Standing Council on Law and Justice comprises the Attorneys-General of the Commonwealth and states and territories, the Western Australia Minister for Corrective Services and the Minister of Justice of New Zealand', see Standing Committee of Attorneys-General, <www.scag.gov.au> viewed 14 September 2012.

6.98 Given the interest of the Standing Council in addressing workplace bullying, the Committee suggests that it may be the most appropriate forum for the Commonwealth Government to facilitate coordination and collaboration between state and territory counterparts on the effectiveness of criminal laws to deal with serious instances of workplace bullying and a willingness of authorities to enforce those laws when appropriate. It is important to convey a single and united message that workplace bullying is not tolerated in Australian workplaces; that such behaviour has consequences and can be prosecuted by criminal law.

Recommendation 22

6.99 **The Committee recommends that, through the Standing Council on Law and Justice, the Commonwealth Government:**

- **encourage all state and territory governments to coordinate and collaborate to ensure that their criminal laws are as extensive as Brodie's Law; and**
- **encourage state and territory governments to consider greater enforcement of their criminal laws in cases of serious workplace bullying, regardless of whether work health and safety laws are being enforced.**

Individual right to seek remedies

6.100 Many individuals spoke of the financial hardship as well as psychological and physical injuries that they have endured because of their workplace bullying experiences. In many instances, financial hardships result from being unable to work because of their injuries and the legal costs associated with trying to obtain some compensation or other remedy for the bullying they endured.[91]

6.101 The only remedy that may be available to bullied workers is workers compensation, which few people can make a successful claim for based on the nature of workplace bullying injuries, or compensation if they can

90 Standing Council on Law and Justice, 'Communique', 18 November 2011, < http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCLJ_Communique_18_November_2011_FINAL.pdf/$file/SCLJ_Communique_18_November_2011_FINAL.pdf> viewed 19 September 2012.

91 For example, see AH, *Submission 10*; KL, *Submission 157;* KB, *Submission 201*.

prove the bullying was unlawful under anti-discrimination law or the *Fair Work Act*.[92]

6.102 However, because these remedies were not created as specific responses to workplace bullying they are not available to all bullied workers.[93] For that reason, many people spoke of having to 'shop around' in an attempt to try to find a legislative or regulatory framework that provides them with the right to seek individual recourse. Some individuals submitted that the process of trying to seek justice for themselves, compensation for their loss and accountability of those who bullied them, can be just as or more damaging than the initial bullying.[94]

6.103 RCT Solicitors commented:

> 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 address the problem of 'bullying'.[95]

6.104 WHS is the only legislative regime that currently responds specifically to workplace bullying.[96] However, that legislation only gives the regulators[97] a right to enforce the law against those who have a statutory duty of care; it does not give individuals a right to seek remedies when they are adversely affected because their co-worker or employer has breached their duties of care. Harmers Workplace Lawyers explained:

> While an employee is entitled to make a complaint to an authority such as WorkCover NSW about incidents of workplace bulling, these laws provide no meaningful way for an employee to pursue a civil remedy to redress the impact of workplace bullying on their health and career.[98]

6.105 South Australia's WHS laws are the only ones in Australia that set out a process for resolving workplace bullying complaints outside of the workplace. Section 55A of the *Occupational Health, Safety and Welfare Act 1986* allows a dispute to be referred to the Industrial Relations Commission for conciliation or mediation. [99] However, SafeWork SA

92 See chapter 2.

93 See chapter 2 for further discussion on these legislative frameworks.

94 For example, see JK, *Submission* 55; MM, *Submission 236*

95 RCT Solicitors, *Submission 106*, p. 9.

96 See chapter 2 for further discussion on work health and safety law.

97 In NSW the legislation also gives unions limited rights to prosecute. See *Work Health and Safety Act 2011* (NSW), s. 230(1)(c).

98 Harmer's Workplace Lawyers, *Submission 88*, p. 4.

99 See *Occupational Health, Safety and Welfare Act 1986*, s. 55A. This provision was discussed in more detail in Chapter 2 of this report.

commented that it is limited in giving the target of bullying a resolution because the commission cannot make a determination of whether there has been bullying or impose a penalty.[100] It is also limited because the resolution process is not available if the worker has left the workplace.[101]

6.106 The Government of South Australia acknowledged that the focus of investigations on how the hazard of bullying is being managed by an employer, rather than on the individual circumstances of the person who complained for being bullied, can be perceived as unsatisfactory:

> In many cases the complainants are left with the perception that they have not received 'justice', and that the alleged bully has been 'allowed to get away with it'.[102]

6.107 Dr Caponecchia suggested that the lack of an individual right to seek remedies under WHS laws may not be a flaw within that legislative regime so much as a misconception within the community about the role of WHS regulators.[103] It was noted by the Anti-Discrimination Commissioner for Tasmania, Ms Robin Banks, that WHS regulators have 'a prosecutorial function which deals with [workplace bullying] as a wrong against the state.'[104] Ms Banks contrasted this with a 'process like discrimination law that deals with it as a wrong against the person and seeks to remedy that wrong for them.'[105]

6.108 In noting their support for an individual right to seek remedies following workplace bullying, SafeWork SA suggested that the criminal law system in which WHS laws sit may not be the most appropriate place to locate an individual right to seeking redress.[106] Mr Bryan Russell, Executive Director of SafeWork SA stated:

> The South Australian government considers that [there] should also be a mechanism for individuals to pursue their own workplace bullying complaints separate to the occupational health safety regulator but outside of the criminal law system. A low-cost, easily accessible judicial or dispute resolution process would allow an individual affected by workplace bullying to lodge a

100 SafeWork SA, *Submission 82*, p. 5.

101 Government of South Australia, *Submission 216*, p. 10.

102 Government of South Australia, *Submission 216*, p. 10.

103 Dr Caponecchia, *Submission 81*, p. 7.

104 Ms Robin Banks, Anti-Discrimination Commissioner, Office of the Anti-Discrimination Commissioner, Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 20.

105 Ms Banks, Office of the Anti-Discrimination Commissioner, Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 20.

106 Mr Russell, SafeWork SA, *Committee Hansard*, Sydney, 7 August 2012, p. 6.

> complaint and seek some form of redress in instances where a prosecution under the work health and safety laws has not been pursued by the regulator.[107]

6.109 Other submissions, including that from the Law Institute of Victoria, argued that there needs to be a 'quick, cost effective civil remedy through an appropriate tribunal for bullying in the workplace'.[108]

6.110 The VTHC contended that the process must be fast, efficient, specific to workplace bullying and under civil law where the complainant does not have to prove their complaint to the stricter and more difficult to satisfy standard that is required under criminal law.[109]

6.111 The Australian Institute of Employment Rights said that, given the lack of enforcement by WHS regulators, an individual recourse such as this could also provide an additional deterrent to workplace bullying: :

> While occupational health and safety legislation recognises the onus on employers to protect employees from physical and mental health risks resulting from poor workplace culture, it is extremely rare for an employer to be prosecuted in this area. Enforcement mechanisms exist for ordering penalties for a workplace injury or death arising from a physical hazard. However, for an employee who, having been subject to long term bullying and other negative behaviours at work, develops a serious mental illness or even dies, there is usually no effective mechanism to monitor this abuse and to enforce a penalty against the employer. Without such a mechanism there is little incentive for employers to improve workplace culture, and certainly very little to deter them from the existence of poor workplace culture in their business.[110]

Could the Fair Work Act be extended?

6.112 Many submissions supporting the introduction of a specific civil right of recourse for individuals suggested that it should be provided under industrial relations law, or more specifically the *Fair Work Act 2009*.[111]

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107 Mr Russell, SafeWork SA, *Committee Hansard*, Sydney, 7 August 2012, p. 6.

108 Law Institute of Victoria, *Submission 52*, p. 3; Australian Nursing Federation, *Submission 117*, p. 8; VTHC, *Submission 139*, p. 12; C.P, *Submission 145*, p. 5.

109 VTHC, *Submission 139*, pp. 7 and 12.

110 Australian Institute of Employment Rights (AIER), *Submission 109*, p. 17

111 For example, see Harmer's Workplace Lawyers, *Submission 88*, p. 6; Government of South Australia, *Submission 216*, pp. 3 and 11; Australian Nursing Federation, *Submission 117*, p. 8; VTHC, *Submission 139*, p. 12.

6.113 As well as applying to nearly all Australian workers, there was support for extending the *Fair Work Act* to address all types of workplace bullying because the legislation already provides effective and timely resolution processes.[112] Currently these processes can only be utilised in very limited workplace bullying matters that involve unfair dismissal or adverse action taken against a worker because they have or have exercised a workplace right, such as making a complaint to their WHS regulator.[113]

6.114 Harmers Workplace Lawyers suggested that providing a means of resolution through the *Fair Work Act* could be achieved by requiring claims of workplace bullying to be 'made initially to Fair Work Australia so as to allow an opportunity for a compulsory conciliation conference to occur'.[114] They argued that utilising this forum could result in early resolution of workplace bullying complaints because:

> the members of Fair Work Australia not only have extensive experience in dealing with a range of workplace issues and disputes, but are also very experienced in facilitating early intervention in claims with a view to achieving a resolution by way of conciliation.[115]

6.115 Harmers contended that only if complaints cannot be resolved through the conciliation process should the complainant have the right to pursue the matter and seek remedies through the court system.[116] This is because currently Fair Work Australia does not have the power to make orders about resolution, so the matter must proceed to court for such remedial orders to be made.[117]

6.116 The United Mineworkers' Federation of Australia (UMFA) submitted that if the *Fair Work Act* is expanded to capture all types of workplace bullying, Fair Work Australia should be empowered 'to arbitrate disputes that arise between an employee and their employer about behaviours that constitute bullying and by order be able to remedy it'. UMFA argued that this is

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112 Harmer's Workplace Lawyers, *Submission 88*, p. 6; Australian Nursing Federation, *Submission 117*, p. 8; VTHC, *Submission 139*, p. 12.

113 See chapter 2 of this report for further discussion of the *Fair Work Act 2009* and when it can be relied on in relation to workplace bullying. See also Ms Bernadette O'Neill, General Manager, Fair Work Australia, *Committee Hansard*, Canberra, 13 September 2012, pp. 1-2.

114 Harmer's Workplace Lawyers, *Submission 88*, p. 6.

115 Harmer's Workplace Lawyers, *Submission 88*, p. 6.

116 Harmer's Workplace Lawyers, *Submission 88*, p. 6.

117 United Mineworkers' Federation of Australia (UMFA), *Submission 118*, pp. 6-7.

necessary because the 'complicated, protracted and expensive' nature of the court process deters many workers from seeking remedies.[118]

6.117 It is, however, unclear whether the functions of Fair Work Australia could be expanded to enable them to make determinations about all cases of workplace bullying, regardless of whether they fall under the criteria of the current general protections or unfair dismissal provisions of the *Fair Work Act*. Ms Bernadette O'Neill, General Manager of Fair Work Australia commented that following the High Court's decision in regards to Work Choices it is very likely that the Commonwealth Government does have the constitutional legal capacity to deal with workplace bullying under industrial relations laws. However, she also acknowledged that it would be a monumental change and the legal and constitutional capacity is only one of many factors that would need to be taken into account.[119]

Committee comment

6.118 In recognition of the many calls from individuals who gave their personal accounts of bullying in the workplace, as well as a number of other stakeholders, the Committee supports the availability of a single right of individual recourse for all workers affected by workplace bullying.

6.119 The current legislative and regulatory frameworks have created perceptions of an unfair and unjust system whereby only a very limited group of workers who have been bullied can seek individual recourse and remedies under anti-discrimination law, the *Fair Work Act* and workers' compensation law.

6.120 Providing a new individual right of recourse would ensure an equal right for all workers to seek restitution if they are bullied at work. Regardless of whether a worker is bullied on discriminatory grounds such as race, gender or age, because they have exercised a workplace right protected under the *Fair Work Act* the consequences for that bullying behaviour could be treated the same.

6.121 Providing one right of recourse for all people who have been affected by workplace bullying could also address the distress and harm experienced by targets of workplace bullying at the moment who must navigate through a number of legislative and regulatory frameworks that may given them only some limited right of redress.

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118 UMFA, *Submission 118*, p. 7.

119 Ms O'Neill, Fair Work Australia, *Committee Hansard*, Canberra, 13 September 2012, p. 4.

6.122 It is unclear whether the *Fair Work Act* could be extended to provide a formal resolution process, with the potential for the complainant to seek remedies, for all workplace bullying disputes. This is because workplace bullying is not only a matter of industrial relations. The evidence has clearly indicated the desirability of viewing it as first and foremost a WHS issue because of the risks it poses to health and safety.

6.123 However, there was widespread support for a right of individual recourse that replicates that which is available to workers who are adversely affected because of their workplace rights under the *Fair Work Act*.

6.124 It is necessary that any arbitration process to address workplace bullying and provide remedies to affected workers rely on the expertise of those experienced in resolving such matters, such as Fair Work Australia, and those equipped with the knowledge and skills to address workplace bullying specifically, such as Safe Work Australia and the jurisdictional WHS regulators.

6.125 The Committee notes concerns that the court process can be arduous and often too difficult for individuals to navigate their way around. However, as this type of process is provided to workers seeking remedies in relation to other workplace disputes under the *Fair Work Act* and anti-discrimination laws, the Committee believes it may be appropriate to adopt a similar process in relation to workplace bullying.

6.126 Such a process should be not be costly nor a drawn out process. It should adhere to the same principles and practices of effective dispute resolution that Fair Work Australia already utilises and promotes for facilitating the resolution of a grievance or dispute between the parties by reaching an agreement through conciliation or mediation. However, if agreement cannot be reached an individual should have access to an adjudicative process that provides decisions on cases in a quick manner, with limited costs incurred by the parties, such as that which the Committee understands is provided by Fair Work Australia.

6.127 These processes should sit within a civil law jurisdiction because of the lower burden of proof that is required. In relation to the availability of criminal laws, there may be some temptation to rely on the application of civil penalties and this could in turn dilute the application of WHS and criminal penalties to workplace bullying. For that reason WHS regulators and police should not perceive individual remedies as a replacement for penalties enforceable under WHS and criminal legislation.

Recommendation 23

6.128 **The Committee recommends that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process.**

Support for getting workers back into the workforce

6.129 Many submissions highlighted that often workers who are injured at harmed by bullying need to take periods of leave to recuperate. There are also people who need to leave the workplace where they were bullied indefinitely because the circumstances there pose too much of a risk to their health and safety.[120] Evidence was also presented from people who are prevented by their injuries, such as severe anxiety and depression, from ever being fit to return to work.[121]

6.130 The Australian Industry Group explained that return-to-work assistance is available to these workers through workers' compensation:

> Employers are obliged to provide workers' compensation to workers who suffer an illness or injury resultant from bullying behaviour. This obligation includes a positive duty to facilitate the employee's return to work in a full or partial capacity.[122]

6.131 However, the limited availability of workers' compensation to workers who suffer injuries arising from workplace bullying means that this assistance will not be available to all workers who are out of the workforce because of workplace bullying.[123]

Workers' compensation return-to-work programs inefficient

6.132 The NNWWC explained that if a worker has made a successful workers' compensation claim for workplace bullying, they may be placed on a workers' compensation return to work plan.[124] However, a small

120 For example, NNWWC, *Submission 86*, p. 11.

121 For example, JN, *Submissions 175 & 175.1.*

122 AiG, *Submission 59*, p. 14.

123 The limited availability of workers' compensation was discussed in chapter 2 of this report.

124 NNWWC, *Submission 86*, p. 11.

proportion of people succeed in making a successful workers' compensation claim for workplace bullying.[125]

6.133 The risks of workplace bullying at a workplace cannot be viewed in the same way as physical risks and hazards can. Return to work programs that primarily cater to return workers who have suffered physical injuries at the workplace to work are not necessarily effective in return workers who are injured because of non-physical workplace bullying engaged in by people whose behaviour cannot be managed in the same way as physical hazards. The NNWWC elaborated:

> Return to work plans, whilst well intentioned, are often unable to affect the cause of the psychosocial injury because the perpetrator of workplace bullying remains in the same work site as the target, there is no education or training to accommodate the bullied workers and no support systems or people in place for the bullied worker to go to upon their return.[126]

6.134 The Community and Public Sector Union also discussed the failure of workers' compensation schemes to address the issue before a worker is returned to the workplace:

> Notably, the Workers Compensation System does not bring about any resolution of the issue, but merely seeks, where claims are accepted, to compensate the target for any loss incurred financially or in quality of life. Once declared fit for work, the target may then be returned to exactly the same workplace situation, or transferred to another workplace. Once again, it is the target who pays the price.[127]

Broader assistance is available through employment participation programs

6.135 The Department of Education, Employment and Workplace Relations (DEEWR) explained that they have responsibility 'for a range of measures aimed at increasing participation outcomes for disadvantaged and vulnerable Australians'.[128]

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125 See chapter 2 of this report and also NNWWC, *Submission 86*, p. 11.

126 NNWWC, *Submission 86*, p. 11.

127 Community and Public Sector Union – State Public Service Federation Group, *Submission 188*, pp. 10-11.

128 DEEWR, *Submission 84*, p. 21.

6.136 Unfortunately, evidence was not received about the specific measures available and whether they could assist people who are injured to any degree by workplace bullying return to the workforce. However, DEEWR noted :

> In the 2012–13 Federal Budget the Government committed $7.1 million over four years to ensure five Community Based employment Advice Services can continue to assist thousands of Australia's most vulnerable workers. These not-for-profit organisations provide advice, assistance and information to Australians who experience difficulties in asserting and exercising their rights at work.[129]

Committee comment

6.137 The Committee was struck by the number of individuals who courageously spoke about and submitted evidence of their struggles to return to work because of the injuries they sustained being bullied at work. The large majority, if not all, of the individual submissions presented by people who are currently outside of the workforce noted a desire to return to work; however, some people require support to overcome their injuries, regain their confidence and regain employment.

6.138 It is acknowledged that through workers' compensation schemes some workers adversely affected by bullying are provided with assistance in returning to work. However, there are many workers who cannot access workers' compensation for the injuries they sustained from bullying because of the difficulties in proving they arose from work, and therefore cannot access these return to work programs.

6.139 If this assistance is tied to returning the worker to the same workplace where they were bullied, the appropriateness of that is questioned. No one should feel they have to choose between returning to a workplace where they will be subjected to bullying or trying, without support, to gain other employment, especially when overcoming injuries sustained because of bullying.

6.140 The Committee recognises that these people may be entitled to assistance through the workplace participation programs that DEEWR has responsibility for. However, given the number of people who spoke of having no support to return to work though, it would be beneficial for there to be more public awareness of the assistance that can be provided to

129 DEEWR, *Submission 84*, p. 21.

people to re-enter the workforce, particularly those who feel they are unable to work because of psychological injuries arising from workplace bullying.

6.141 A worker who has suffered a workplace injury because of bullying but cannot obtain workers' compensation should not be left to suffer on their own with no support to regain employment.

Amanda Rishworth MP

Chair

A

Appendix A – Submissions

1	S.T.
2	D.O'B.
3	U.D.
4	P.F.
5	M.P.
6	J.M.
7	R.T.
8	K.H.
9	P.P.
10	A.H.
11	R.K .
12	National Tertiary Education Union, Branch
13	Dr Peter Bowden
14	A.M.
15	R.T.
16	Grantley Resources
17	T.F.
18	P.G.
19	R.T.
20	K.C.

20.1 K.C.

21 L.P.

21.1 L.P.

22 L.D.

23 Queensland Nurses Union

24 C.H.

25 M.A.

25.1 M.A.

25.2 M.A.

25.3 M.A.

26 Monash University – Centre for Regulatory Studies

27 K.D.

28 Professor Maryam Omari and Mr David Blades

29 S.T.

29.1 S.T.

30 CONFIDENTIAL

31 R.H.

32 I.C.

33 P.S.

33.1 P.S.

34 P.C.

35 David Lander and Co Solicitors

36 J.C.

37 J.R.

38 Master Electricians Australia

39 S.C.

40 CONFIDENTIAL

41 The Boss Whispering Institute

42 D.P.

43 R.G.

44 C.V.

45 G.B.

46 Worklogic Pty Ltd

47 H.S.

48 Dr Penny Webster

49 CONFIDENTIAL

50 CONFIDENTIAL

51 D.O.

52 Law Institute of Victoria

53 S.S.

54 J.M.

55 J.K.

56 Headspace

57 Challenge Bullying

58 Ms Evelyn Field

59 Australian Industry Group

60 Australian Federation of Employers and Industries

61 Unions NSW

62 Australian Chamber of Commerce and Industry

63 Australian Council of Trade Unions

64 National Tertiary Education Union

65 Australian Higher Education Industrial Association

66 Name Withheld

67 Chamber of Commerce and Industry Queensland

68 Australian Manufacturing Workers Union

69 Australian Services Union, SA and NT Branch

70 Independent Education Union of Australia

71 Community and Public Sector Union

72 Australian Services Union

73 Queensland Law Society

74 Safe Work Australia

74.1 Safe Work Australia

75 Australian Hotels Association

76 R.L.

77 Australian Education Union

78 John F Morrissey & Co Lawyers

79 Office of the Employee Ombudsman

80 Victorian Automobile Chamber of Commerce

81 Dr Carlo Caponecchia

81.1 Dr Carlo Caponecchia

82 Safe Work South Australia

83 Construction Forestry Mining and Energy Union

84 Department of Education, Employment and Workplace Relations

85 Australian Nursing Federation

86 National Working Women's Centre SA Inc

87 Dr Donna-Louise McGrath

88 Harmers Workplace Lawyers

89 Ms Sara Branch PhD, Dr Jane Murray and Dr Sheryl Ramsay

90 G.B.

91 D.M.

92 J.C.

93 D.B.

94 H.M.

95 S.J.

96 Association of Professional Engineers, Scientists & Managers, Australia

97 Defence Force Ombudsman

98 WISE Workplace Investigations

99 Munich Holdings of Australia Pty Ltd

100 Workplace Conflict Resolution

101 South Australian Equal Opportunity Commission

102 National Tertiary Education Union

103 Job Watch Inc

104 Justitia Lawyers & Consultants

105 Master Builders Australia Ltd

106 Ryan Carlisle Thomas Lawyers

107 Victorian Employers' Chamber of Commerce and Industry

108 People and Culture Strategies

109 Australian Institute of Employment Rights

110 CONFIDENTIAL

111 D.W.

112 L.C.

113 D.G.

114 H.L.

115 Master Grocers Australia

116 A.S.

117 Australian Nursing Federation (Victorian Branch)

118 The United Mineworkers' Federation of Australia (Northern District Branch)

119 Shop, Distributive & Allied Employees Association

120 Comcare

121 Australian Human Rights Commission

122 Australian Public Service Commission

122.1 Australian Public Service Commission

122.2 Australian Public Service Commission

123 The Law Society of New South Wales

123.1 The Law Society of New South Wales

124 Australian Mines & Metals Association

125 The Alannah and Madeline Foundation

126 Ms Keryl Egan & Associates Pty Ltd

127 Young Workers Legal Service

128 Australian Lawyers Alliance

129 J.M.

130 The Law Society of Western Australia

131 B.K.

132 C.M.

133 Dr David Moore

134 Workers Health Centre

135 CONFIDENTIAL

136 Bradley John Beasley

137 B.C.

137.1 B.C.

137.2 B.C.

138 D.A.

139 Victorian Trades Hall Council

140 M.S.

140.1 M.S.

141 K.C.

142 D.H.

142.1 CONFIDENTIAL

143 SA Unions

144 D.H.

145 C.P.

146 D.T.

147 D.H.

148 J.C.

149 M.L.

150 J.S.

150.1 CONFIDENTIAL

151 H.E.

152 W.M.

153 John K McGlone and Rosemary Greaves

154 L.W.

155 M.L.

156 Dr Harvey Stern

157 K.L.

158 J.J.

159 K.S.

160 J.R.

161 W.R.

162 J.M.

163 G.O.

163.1 G.O.

164 V.B.

165 Finance Sector Union Australia

166 E.R.

167 Whistleblowers Action Group Qld

168 S.H.

169 Victims

169.1 CONFIDENTIAL

170 T.K.

171 P.O.

172 R.G.

173 L.O.

174 R.M.

175 J.N.

175.1 J.N.

176 R.H.

177 M.C.

178 S.D.

179 J.M.

180 CONFIDENTIAL

181 National Whistleblowing Information Centre

182 Centre for Applied Psychological Research - University of South Australia

183 Dr Moira Jenkins

184 S.B.

185 Diversity Council Australia

186 Office of the Anti-Discrimination Commissioner (Tasmania)

187 M.A.

188 Community and Public Sector Union - State Public Services Federation Group

189 K.B.

190 IRIQ Pty Ltd

191 ACT Government

192 C.W.

192.1 C.W.

193 K.W.

194 CONFIDENTIAL

194.1 CONFIDENTIAL

195 CONFIDENTIAL

196 J.L.

197 Professor Valerie Braithwaite

198 Unions Northern Territory

199 P.G.

200 S.H.

201 K.B.

202 J.W.

203 B.W.

204 M.S.

205 Dr Daniel Teghe

206 WorkSafe WA

207 K.H.

208 CONFIDENTIAL

209 Youth Affairs Council of South Australia

210 Dr Moira Jenkins & Mr Karl Luke

211 Sally Jetson and Associates

212 CONFIDENTIAL

213 CONFIDENTIAL

213.1 CONFIDENTIAL

214 CONFIDENTIAL

215 Law Society of Western Australia

216 Government of South Australia

217 D.M.

218 S.T.

219 S.E.

220 A.T.

221 T.S.B.

222 CONFIDENTIAL

223 CONFIDENTIAL

224 CONFIDENTIAL

225 CONFIDENTIAL

226 CONFIDENTIAL

227 S.C.

227.1 CONFIDENTIAL

228 CONFIDENTIAL

229 CONFIDENTIAL

230 CONFIDENTIAL

231 CONFIDENTIAL

232 L.F.

233 M.R.

234 P.M.

234.1 P.M.

235 N.M.

236 N.T.

237 CONFIDENTIAL

237.1 CONFIDENTIAL

238 CONFIDENTIAL

239 Unions Western Australia

240 CONFIDENTIAL

241 G.M.

242 CONFIDENTIAL

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250 CONFIDENTIAL

251 K.J.

252 APS Dignity

253 S.F.

254 S.B.

255 T.C.

256 CONFIDENTIAL

257 P.R.

258 Equal Opportunity Commission of Western Australia

259 R.S.

260 CONFIDENTIAL

261 S.A.

262 D.O.

263 M.M.

264 K.W.

265 CONFIDENTIAL

266 Dr Helen Farrell

267 L.H.

268 D.C.

268.1 D.C.

269 Employment Law Centre of WA (Inc)

270 CONFIDENTIAL

271 M.M.

272 D.H.

273 J.F.

274 E.R.

275 Name witheld

276 G.K.

277 R.T.

278 Fair Work Ombudsman

279 A.J.

280 M.M.

281 G.F.

282 P.K.

283 T.H.

284 C.C.

285 S.P.

286 Dr Simon Burgess and Dale Trott

287 T.C.

288 M.K.

289 P.C.

290 C.R.

291 D.E.

292 CONFIDENTIAL

293 CONFIDENTIAL

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298 CONFIDENTIAL

299 CONFIDENTIAL

299.1 CONFIDENTIAL

300 CONFIDENTIAL

301 CONFIDENTIAL

302 CONFIDENTIAL

303 CONFIDENTIAL

304 The Employment Law Centre of WA (Inc)

305 A.W.

306 K.L.

307 K.W.

308 CONFIDENTIAL

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312 CONFIDENTIAL

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314 CONFIDENTIAL

315 CONFIDENTIAL

316 C.T.

317 S.R.

317.1 CONFIDENTIAL

318 R.H.

319 CONFIDENTIAL

B

Appendix B –Exhibits

1. WA Equal Opportunity Commissioner, 'Conciliated Outcomes 2001-2012.'

C

Appendix C –Hearings and witnesses

Tuesday, 10 July 2012, Sydney

WorkCover Authority of New South Wales

- Mrs Pamela Estreich, State Inspector; and
- Mr John Watson, General Manager.

Australian Industry Group (AIG)

- Mr Stephen Smith, Director, National Industrial Relations; and
- Ms Genevieve Vaccaro, Senior Adviser, Workplace Relations Policy.

Australian Federation of Employers and Industries (AFEI)

- Ms Jill Allen, Manager of Policy and Research; and
- Mr Garry Brack, Chief Executive.

Unions New South Wales and National Tertiary Education Union (NSW Branch)

- Mr Shay Deguara, Representative, Unions New South Wales; and Public Service Association of New South Wales;
- Dr Sarah Elizabeth Gregson, Branch President, National Tertiary Education Union, Unions New South Wales;

- Ms Kylie Maree McKelvie, Union delegate, Unions New South Wales; and Public Service Association of New South Wales; and
- Mrs Alisha Wilde, Senior Industrial Officer, Unions New South Wales.

Law Society of New South Wales

- Ms Petrine Costigan; and
- Mr Giri Sivaraman.

Keryl Egan and Associates

- Ms Keryl Egan, Director.

Wednesday, 11 July 2012, Melbourne

Australian Chamber of Commerce and Industry (ACCI)

- Mrs Carolyn Davis, Manager, Work Health, Safety and Compensation Policy; and
- Mr Daniel Mammone, Director of Workplace Policy and Director or Legal Affairs.

Headspace

- Ms Victoria Lee (Vicki) Ryall, Eheadspace Manager, headspace National Youth Mental Health Foundation

Law Institute of Victoria

- Ms Moira Rayner, Deputy Chair, Workplace Relations Section

Australian Council of Trade Unions

- Mr Michael Borowick, Assistant Secretary;
- Mr Jarrod Michael Moran, Senior OHS and Workers Compensation Officer; and
- Mr Finian Scallan, OHS and Workers Compensation Project Officer.

Centre for Regulatory Studies, Faculty of Law, Monash University

- Mr Eric Windholz, Associate.

DC Workplace Consulting

- Ms Toni Mellington, Director.

Evelyn M Field Pty Ltd

- Ms Evelyn Margaret Field, Director.

Alannah and Madeline Foundation

- Ms Sandra Craig, Manager, National Centre Against Bullying; and
- Dr Fiona McIntosh, General Manager, Programs.

Business in Mind project

- Dr Angela Martin, Senior Lecturer, Management, University of Tasmania

Mr Damien Panlock, private capacity; and

Mrs Rae Panlock, private capacity.

Thursday, 12 July 2012, Hobart

Unions Tasmania

- Mr Kevin Harkins, Secretary; and
- Ms Nicole Mary Wells, Senior Vice-President.

Challenge Bullying Inc.

- Ms Caroline Dean, President; and
- Ms Debbie Dunn, Treasurer.

Tasmanian Government

- Mr Neale James Buchanan, Director, Operations; and
- Ms Robin Banks, Anti-Discrimination Commissioner, Office of the Anti-Discrimination Commissioner, Tasmania.

Tuesday, 17 July 2012, Darwin

Working Women's Centre

- Ms Nadja Reiter, Industrial Liaison Officer; and
- Ms Rachael Uebergang, Co-ordinator.

Unions NT and affiliate

- Mr Mark Crossin, Occupational Health and Safety Officer; and
- Ms Erina Early, Senior Industrial Officer, United Voice.

Chamber of Commerce NT

- Ms Toni Ah-Sam, Chair, Northern Territory Indigenous Business Network; and
- Mr Michael Maloney, Manager, Workplace Relations.

Employee Assistance Service Australia (EASA)

- Mrs Sarah Marie Davies, Psychological Services Manger; and
- Ms Jade Hamilton, Training and Mediation Consultant.

Wednesday, 18 July 2012, Brisbane

Harmers Workplace Lawyers

- Mr Michael Harmer.

Academic Panel

- Dr Sara Branch, Research Fellow, Key Centre for Ethics, Law, Justice and Governance, Griffith University;
- Dr Jane Murray, Assistant Professor, Bond University; and
- Dr Sheryl Ramsey, Senior Lecturer, Griffith University.

Australian Chamber of Commerce and Industry Queensland (CCIQ)

- Mr Nick Behrens, General Manager, Advocacy;
- Ms Clare East, Education and Training Policy Adviser; and
- Mr Michael McGregor, Policy Analyst.

Dr Donna-Louise McGrath, private capacity

Queensland Council of Unions (QCU) and affiliates

- Ms Katherine Eames, Industrial Services Officer, Queensland and Northern Territory Branch, Independent Education Union of Australia;
- Ms Amanda Marion Richards, Assistant General Secretary, QCU;
- Ms Jan Sheppard, Senior Industrial Advocate, Australian Services Union;
- Mr Alan (Jamie) Shepherd, Professional Officer, Queensland Nurses Union; and
- Dr Elizabeth Todhunter, Research and Policy Officer, Queensland Nurses Union.

Tuesday, 7 August 2012, Adelaide

Youth Affairs Council of South Australia (YACSA)

- Ms Anne Bainbridge, Executive Director; and
- Mr Lucas de Boer, Policy Officer.

South Australian Government

- Ms Marie Boland, Director, Policy and Strategy Group, SafeWork SA;
- Mr Stephen Brennan, Employee Ombudsman, Office of the Employee Ombudsman, South Australia;
- Mr Bryan Russell, Executive Director, SafeWork SA; and
- Ms Sandra Voumard, Principal Inspector of Occupational Health and Safety, Safe Work SA.

Australian Lawyers Alliance

- Mr Graham Harbord, Member; and
- Mr Anthony Kerin, National President.

Unions

- Ms Julia Fox, National OHS Officer and National Industrial Officer, Shop, Distributive and Allied Employees' Association;
- Ms Anne Elizabeth Lindsay, Industrial Officer, Shop, Distributive and Allied Employees' Association;
- Ms Katrine Hildyard, Secretary, South Australia and Northern Territory Branch, Australian Services Union; and
- Ms Deborah Vallance, National OHS Coordinator, Australian Manufacturing Workers' Union.

Thomsons Lawyers

- Mr Karl Luke, Partner.

Dr Moira Fay Jenkins, private capacity

SA Unions

- Ms Janet Giles, Secretary; and
- Ms Anne Purdy, Coordinator, Young Workers Legal Service (YWLS)

Wednesday, 8 August 2012, Perth

Law Society of Western Australia

- Mr David Blade, representing Dr Christopher Kendall, President.

Associate Professor Maryam Omari, private capacity

Chamber of Commerce and Industry Western Australia Inc. (CCI WA)

- Mrs Karin Janna Karina Lee, Manager, Safety and Risk Services;
- Ms Sherill Ellen Lepp, Consultant, Safety and Risk Services; and
- Mr Paul Moss, Manager, Employee Relations Consulting.

Unions WA and affiliates

- Ms Meredith Hammat, President;
- Ms Sue Pethick, Industrial Organiser, WA Branch, Australian Services Union; and
- Ms Sophie Van der Merwe, UnionLink Adviser, Community and Public Sector Union/Civil Service Association of WA.

Equal Opportunity Commission Western Australia

- Ms Yvonne Henderson, Commissioner for Equal Opportunity.

Sally Jetson and Associates

- Ms Gail Margaret Broady, Senior Investigator;
- Mrs Sally Jetson, Consulting Director; and
- Mr Tim Law, Organisational Consultant.

Thursday, 16 August 2012, Canberra

ACT Government

- Mr Andrew Kefford, Deputy Director-General, Chief Minister and Cabinet Directorate;
- Mr Mark McCabe, Senior Director, Worksafe, ACT; and
- Ms Julie Field, Executive Director, Legislation and Policy Branch, Justice and Community Safety Directorate.

Community and Public Sector Union

- Ms Rebecca Fawcett, Acting Deputy Secretary; and
- Ms Melissa Payne, Assistant Director, Member Service Centre.

Friday, 17 August 2012, Canberra

Australian Public Service Commission

- Ms Karin Fisher, Group Manager, Ethics;
- Ms Annwyn Godwin, Merit Protection Commissioner;
- Mr Stephen Sedgwick, Commissionerl and
- Mr David Schmidtchen, Group Manager, Human Capital Research and Evaluation.

Department of Education, Employment and Workplace Relations

- Ms Nikki Armour, Acting Branch Manager, Safety and Compensation Policy Branch; and
- Ms Kylie Emery, Acting Group Manager, Workplace Relations Implementation and Safety Group.

Safe Work Australia

- Ms Amanda Grey, Branch Manager, Policy and Services Branch;
- Mr Rex Hoy, Chief Executive Officer; and
- Mrs Justine Ross, Branch Manager, Work Health and Safety and Corporate Governance Branch.

Attorney-General's Department

- Mr Matt Hall, Assistant Secretary, Human Rights Policy Branch.

Productivity Commission

- Ms Sue Elaine Holmes, Assistant Commissioner.

Fair Work Ombudsman

- Mr Russell Anthony Jacob, Director, Compliance (Queensland, NSW and ACT); and
- Mr Bill Loizides, Group Manager, Workplace Relations Policy, Education and Partner Development.

Comcare

- Mr Paul O'Connor, Chief Executive Officer; and
- Mr Neil Kendall Quarmby, General Manager, Regulatory Services.

Thursday 23 August 2012, Canberra

Dr Carlo Caponecchia, private capacity

Australian Human Rights Commission

- Mr Darren Dick, Director, Policy and Programs;
- Ms Padma Raman, Executive Director
- Ms Tracey Raymond, Director, Investigation and Conciliation Service; and
- Professor Gillian Triggs, President.

Thursday 13 September 2012, Canberra

Davidson Trahaire Corpsych

- Ms Michele Leslie Grow, Chief Executive Director; and
- Ms Kathryn (Kate) Price, Regional Manager ACT.

Coalition Members' Dissenting Report—Mr Rowan Ramsey MP; Mrs Karen Andrews MP; and Mr Alan Tudge MP

Introduction

The Coalition Members of the House of Representatives Education and Employment Committee, Mr Ramsey, Mrs Andrews and Mr Tudge wish to emphasize Australia should reject the notion that bullying in the workplace is 'normal' or that the issues presented by workplace bullying are too difficult to address.

Throughout the course of this inquiry, the Committee learned from many affected individuals the tragic outcomes of unresolved conflict within the workplace. While these cases are not a measure of the extent of bullying in Australia, it is clear that unacceptable bullying does occur in workplaces and can be significantly degrading on people's lives.

Places of work are full of complex relations and different personalities. The Coalition Members recognise that there is frequently great difficulty in determining whether workers have been targeted for unfair abuse or whether those who claim injury have an unreasonably low threshold to legitimate criticism. At the same time it must also be recognised that while workers may be more sensitive than the average to criticism that does not mean their injuries are less real.

The parallels to a workplace accident caused by a missing guard were frequently used throughout the inquiry as an example of how injuries caused by workplace bullying should be treated. It is however worth considering that determining whether a safety guard is missing is a far clearer task than determining what was

or was not said in the place of employment, and whether that constitutes an unacceptable behaviour.

The fact that allegations of bullying can be relating to affairs where there may be no witnesses, means that recommending any actions to government should be taken with great care lest otherwise innocent parties be damaged by unwarranted action. The Committee heard repeatedly that workers wrongly accused of bullying can be damaged in a similar way to those who are actually bullied.

Recommendations

The Coalition Members of the Committee are broadly in support of many of the findings and recommendations of the majority of the Committee. However they were not able to support every recommendation and comment and take this opportunity to highlight our primary points of difference.

The Coalition Members reject the idea that the best way to address workplace bullying is to introduce another raft of inflexible compliance to all parties including employers who are struggling to meet the various, vagarious and expensive requirements of three levels of government already.

In fact the Coalition Members believe moves to introduce formal regulations are likely to be counter-productive. In that circumstance employers are more likely to see compliance to regulation as a signal to do the bare minimum to meet the 'pass mark' and compliance regimes are much more likely to be industry standards developed to tick the boxes instead of finding adaptive and productive solutions to individual workplaces.

Instead they strongly advocate that the best chance of achieving real outcomes in this area is to promote the positive benefits to business of harmonious, caring and co-operative workplaces. The facilitation of best possible practice will work hand in hand with a focus on high productivity. Simply put, a happy workforce is likely to produce the best results for all parties.

By taking a positive approach rather than a punitive path to workplace bullying the Coalition Members believe significant improvements in workplace culture are far more likely.

While recourse to substantial penalties for lack of attention to the issue of bullying may seem a viable path to take, in the members' opinion penalties are also far more likely to make employers reluctant to seek outside advice on how to deal with these issues or to identify workers as bullies for fear of drawing attention of regulators to their business.

That is why the Coalition Members support many of recommendations in the report including calling for the adoption of a national definition, for the

establishment of a national advisory service and support for employers to identify and deal with bullying in the workplace.

The Coalition Members believe there is merit in having a national code which can provide guidance for employers and employees about what constitutes bullying.

However the Coalition Members have serious reservations about the current draft code, as it exemplifies many of the concerns articulated above. For example, the current draft code lists "not providing enough work" as a form of "indirect bullying" along with setting timelines that are difficult to achieve. The draft code also prohibits "eye rolling responses" that might "diminish a person's dignity". The Coalition Members could not support a Code with clauses which are so subjective or plainly ridiculous. Further, as substantial changes to the Code were likely, the Coalition Members were of the view that it would be unwise for any Committee Member to fully endorse the current draft.

The Coalition Members have also supported the Government Members of the Committee in calling for the government to consider the development of a number of services that would assist both employers and workers to address the issues surrounding bullying in the workplace.

All of these recommendations should be part of informing employers and workers alike about the benefits of eliminating bullying and providing tools, advice and assistance to achieve this goal. It should also demonstrate the financial and personal costs of ignoring the issue.

The Coalition Members are particularly opposed to recommendations five and twenty three and have reservations on some other recommendations.

Recommendation 3

As outlined above, the Coalition Members believe there is merit in having a national code to provide best-practice guidance, but have serious reservations about the existing draft Code.

Recommendation 5

Recommendation five advises the Government to introduce Commonwealth regulations which would force employers to meet the conditions of a code of conduct which is still under negotiation and yet to be adopted by Australian regulators.

Australia wide adoption of the national work health and safety laws is steadily progressing. States that have signed on to that harmonised legislation are working towards reaching agreement on a national code of conduct. The Coalition Members believe these changes should be given time to take effect before further regulatory action is considered.

Under regulations, employers would be given the ultimate responsibility of guaranteeing compliance with legislation driven by defined compulsory actions. The Coalition Members consider that it is likely this course of action rather than being a catalyst for reform, may instead lead to this group to identify government agencies as the source of their problems rather than a tool to address these issues. Smaller employers in particular are already struggling to adapt to the rafts of compliance handed down by all levels of government.

To achieve a real change in workplace culture the importance of support from the organisations that represent the bulk of employers in Australia is difficult to overstate. Many of these groups expressed strong concerns at the possibility of enforceable regulations.

Mr Paul Moss for the Chamber of Commerce and industry WA said during the Perth hearing. "The more legislation you have, the more complex the issue is" and "So the more you have, (legislation) the more confusion and the more complexity you have. Employers in running a business have an awful lot of things they need to be aware of and comply with. The more we add in here, the greater the chance of non-compliance will be. So keep it simple".

The Coalition Members are concerned that an inflexible enforcement mechanism could lead to a hardening of attitude between conflicting parties and particularly so between the employers and workers. If that is the case it is likely all parties will be disadvantaged and the co-operation needed to change workplace attitudes will be harder to achieve.

In the Coalition Members opinion, legislated regulation will not help in this area however it is more likely to provide a platform for recompense after a worker has left the place of employment. The sub-title of this report "We just want it to stop", succinctly captures the desires of victims and clearly recommendations should aim for change at work, not after work.

Recommendation 10

The Coalition Members are not opposed to the Commonwealth Government working with industry and employer groups to promote the economic benefits of positive working environments that are free from workplace bullying. However, they question the impact of this recommendation versus implementing a more general awareness campaign about workplace bullying. Further, recommendation 10 suggests to work through the "Centre for Workplace Leadership" as well as employer groups. This Centre is not yet established and Coalition Members are sceptical it will add any real value, but will cost at least $12m over four years.

Recommendation 11

The Coalition Members would also like to draw attention to recommendation eleven which calls for the establishment of a national service to provide advice, assistance and resolution services to employers and workers.

The recommendation while calling for the government to establish this service does not specify whether this service should be run by and within government or whether it could be provided by industry.

The Coalition Members are very wary about any moves to establish expensive new government bureaucracies and consider this potentially valuable service would be best placed outside government.

Should such a service be located within the office of the regulator, that, in itself, would be a problem to an employer identifying their workplace as having issues with workplace bullying. However it is likely that should such a service be located within government anywhere, such attitudes may persist.

Recommendation 13

Coalition Members believe that independent mediation undertaken voluntarily can be an effective mechanism to resolve difficult workplace issues. Many private mediators are already in existence and utilised by employers and employees. Coalition Members questioned the efficacy of a government mediation service particularly when such a mediation service in Victoria was withdrawn because it was not utilised.

Recommendation 19

The Coalition Members support young Australians understanding their rights and responsibilities during work experience programs. Fair Work Australia already provides such information and would be best placed to enhance its efforts if required. Duplicating its work through other arms of government is not supported.

Recommendation 23

The final recommendation of the report, calls for the individuals to be given a right of recourse if they claim to be the victims of workplace bullying.

The Coalition members accept there were numerous calls from individuals in particular for this course of action, but fear that outcomes are far less likely to be satisfactory in practice than in theory.

The Coalition Members are concerned that while the calls from these parties were for justice, it is far from certain that recourse to retributive action would achieve that. The Coalition Members are unconvinced that the enquiry sufficiently

examined what the possible down-sides might be of extended and difficult litigation for all individuals concerned.

Scope currently exists in all jurisdictions for the workplace regulators to take action on behalf of injured parties and we can assume if they choose to pursue such action they will have assessed a reasonable chance of winning the case and have the resources to execute that course of action.

Further, the Coalition Members are concerned that enabling individuals to take such action will open a door to potential abuse of the device. Frivolous actions, or even worse, actions driven by malicious intent would have the ability to tie employers up in rolling court actions for extended periods.

While the Committee took no direct evidence on this possibility the Coalition Members are concerned that in the past seemingly un-associated actions have been part of industrial campaigns against employers and thus are sufficiently wary to decline endorsement of this recommendation.

Closing comments

The Coalition Members would like to make the point that while a body of evidence was received identifying bullying in a wide number of workplaces, the inquiry was far more likely to attract examples of poor practice, rather than good and in that case examples of good and excellent workplace environments were unlikely to be highlighted.

They believe as awareness increases in the community of the personally damaging effects of workplace bullying then change for the better is inevitable and hope that this report will go some way to mapping that change.

Rowan Ramsey MP **Karen Andrews MP**

Deputy Chair

Alan Tudge MP