

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

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 seriously, 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 wrongdoing. Many acknowledged that their resulting psychosocial injuries had

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 ACCL, *Submission 62*, pp. 16-17.

