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**AFEI Submission to the
House Standing Committee on Education and
Employment**

Inquiry into Workplace Bullying

29 June 2012

AFEI
Australian Federation of
Employers & Industries

Australian Federation of Employers and Industries (AFEI)

The Australian Federation of Employers and Industries (AFEI), formed in 1904, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception.

With over 3,500 members and over 60 affiliated industry associations, our main role is to represent, advise, and assist employers in all areas of workplace and industrial relations and human resources. Our membership extends across employers of all sizes and a wide diversity of industries.

AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation. We have been the lead employer party in running almost every major test case in the New South Wales jurisdiction and have been a major employer representative in the award modernisation process under the Fair Work Act.

AFEI is a key participant in developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.

1 Additional national regulation of bullying is not needed

1. The Prime Minister and the Minister for Industrial Relations have signalled the prospect of national legislation to regulate workplace bullying:

And one way we could add to what we are doing now is to take Brodie's law nationally and to have common national laws to deal with bullying at work.¹

And

I believe that there is enough bipartisan good will to take the initiative of using a parliamentary inquiry to look at having a common national law, wherever you are in Australia, you cannot bully people at work.²

2. The "Brodie's law" cited by the Prime Minister refers to the Victorian Crimes Amendment (Bullying) Bill 2011 which amended the Victorian Crimes Act 1958. The effect of the amendment is to extend the definition of stalking in the Victorian Crimes Act include behaviour such as making threats to the victim, engaging in abusive acts, or acting in ways that could reasonably be expected to cause the victim to engage in self-harm.
3. Additional national regulation to prevent workplace bullying and punish offenders is not needed. The actions of those in cases such as the Brodie Panlock case can and are prosecuted within the criminal law and the onerous health and safety legislation already in place in each state. There are further alternative avenues for redress under the Fair Work Act, anti discrimination legislation and the common law.³ The perpetrators in the Brodie Panlock case were criminally prosecuted and fined under existing work health and safety laws. Other instances of criminal assault have been similarly dealt with in Victoria and other jurisdictions.⁴

¹ Prime Minister Julia Gillard Transcript of joint doorstep interview, Melbourne Saturday 26 May 2012

² Minister Bill Shorten op cit

³ Obligations under such laws are additional to obligations under work health safety law. See Attachment 1 which reproduces Appendix D from WorkCover NSW and WorkSafe Victoria Guide to Preventing and Responding to Bullying at Work 2009 listing other avenues of redress.

⁴ For example Inspector Gregory Maddaford v M A Coleman Joinery (NSW) Pty Ltd, 2004 NSWIRComm 5 May 2004); *WorkSafe Victoria v Ballarat Radio Pty Ltd (Victorian Magistrate's Court, August 2004)*; R v Mathew Lever Victorian Magistrates Court November 2010, Inspector Estreich v Zaccardelli & Ors [2012] NSWIRComm 47

4. Under existing laws, all Australian employers have a duty to ensure, so far as reasonably practicable, the health, safety, and welfare of workers and other persons affected by the conduct of their undertaking. Breaches of these duties constitute criminal offences attracting substantial penalties and imprisonment.
5. Consequently, prosecutors under existing work health and safety and criminal laws may fine or imprison perpetrators of bullying involving or threatening abusive or offensive acts, violence or aggression. A person who recklessly engages in conduct that places, or may place, another person at a workplace in danger of serious injury (including psychological injury) is guilty of an offence attracting a term of imprisonment of up to five years under existing work health and safety laws.
6. Under criminal law, conduct which is proven to amount to assault, negligence or reckless indifference to human life, attracts maximum penalties. Workers may also seek damages from employers for workplace negligence. Other courses of action to remedy workplace bullying matters include discrimination complaints, breach of contract proceedings, professional misconduct hearings and defamation.
7. According to the amendments to the Victorian Crimes Act 1958 to counter bullying this behaviour includes:
 - making threats to the victim;
 - using abusive or offensive words to or in the presence of the victim;
 - performing abusive or offensive acts in the presence of the victim;
 - directing abusive or offensive acts towards the victim;
 - acting in any other way that could reasonably be expected to cause physical or mental harm to the victim, including self-harm; or
 - arousing apprehension or fear in the victim for his or her own safety or that of any other person.⁵
8. The list of behaviours captured is extensive and in essence conduct of this kind already falls within the ambit of criminal legislation in each jurisdiction. Prevention of such behaviour and remedies are available in each jurisdiction.

⁵ Crimes Amendment (Bullying) Bill 2011

9. S.59 of the NSW Crimes Act 1900 deals with assault occasioning actual bodily harm while s.61 addresses the lesser offence of common assault not occasioning actual bodily harm. If the threats or abuse directed at an employee by another induced a reasonable fear of actual harm, such conduct could come within the realm of a s.61 offence.
10. S.245 of the Queensland Criminal Code 1899 provides for physical assault and focuses on the application of force so as to cause injury or discomfort. S.320A deals with the offence of torture which deals with the infliction of mental, psychological or emotional pain. S.359B provides for the offence of stalking which can also be used in circumstances involving bullying.
11. In the South Australian Criminal Consolidation Act 1935, s.20 deals with assault as not only the application of force but also the threat of the application of force. S.19AA deals with stalking offences in much the same way as the other jurisdictions. In this jurisdiction there is also an offence in s.23 and s.24 for causing harm and serious harm to persons. This includes both physical and mental harm.
12. Tasmania's Criminal Code Act 1924 has an offence for common nuisance which provides a broad avenue for redress. It also has offences including committing an unlawful act intended to cause physical harm (s.170(2)) and assaults (s.182 – s.184).
13. In Western Australia's Criminal Code Compilation Act 1913, s.223 deals with assault and what actions will constitute assault under the code. Once again this offence deals with the application of force or the threat of the application of force. S.338A, B and C all deal with the offence of threats and s.338E deals with the offence of stalking.
14. The Australian Capital Territories Crimes Act 1900 covers such offences as assault (s.24), common assault (s.26), stalking (s.35) and torture (s.36).
15. The Northern Territory Criminal Code Act has offences for common assault (s.188) which include the threat of physical harm, unlawful stalking (s.189) and criminal defamation (Division 8).

2 What is workplace bullying?

16. In our experience, workplace bullying is regarded by employers as an extremely serious matter. They expend considerable time and resources developing and implementing policies and procedures to prevent its occurrence. They take measures to meet work health and safety compliance requirements. They undertake investigations where bullying is alleged to occur. These processes are time consuming, resource intensive and, in the case of investigations, are frequently disruptive and do not concern behaviour which a reasonable person would see as victimising, humiliating, undermining or threatening.
17. Employers are concerned with the subjective interpretation of the meaning of bullying in current workplace regulation which does little to allay employer fears about further legislation. They are concerned that new legislation will both duplicate current regulation and further restrict their reasonable management of workplaces.
18. We question the conflation of bullying manifest as violence and physical assault with matters which are bound up issues of personal perception and its interaction with workplace management. While there may not be a precisely uniform agreed definition of workplace bullying there is a high level of consistency in the definitions of workplace bullying across the jurisdictions.⁶ The common element central to these definitions is that the behaviour is repeated, unreasonable or inappropriate which victimises, threatens or intimidates an employee or group of employees and creates a risk to health and safety. Despite the Productivity Commission identifying definitional inconsistency as a source of uncertainty and increased cost for multi jurisdiction employers, this assertion was not substantiated in any way.⁷ In our daily experience working with hundreds of multistate employers we find they have no difficulty in having a common approach to the prevention of bullying and harassment across their organisations.
19. What concerns employers is the breadth of these definitions which allow a limitless range of actions and behaviour to be construed as bullying by workers – in all jurisdictions. This is where the regulatory difficulty lies. It is not that there are differences in regulatory requirements but that compliance is impossible to achieve. This is because the concept of workplace bullying, as viewed by regulators, is not confined to recklessness, intimidation, aggressive or violent acts, threatening actions or behaviour, verbal abuse or

⁶ See Attachment 2 Extract from Productivity Commission 2010, *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*, Research Report, Canberra. Table 11.4

⁷ op cit page 297

20. In our view there is a clear distinction between acts of assault or the threat of physical and mental harm (to wrap an employee with plastic, shoot with a stud gun, cover with oil, threats and abuse, etc.) which are criminal matters (requiring the involvement of police and criminal proceedings) and workplace actions and behaviour which are merely perceived as bullying.
21. Regulator workplace guidance material which has been in place for nearly a decade is consistent across the jurisdictions on what constitutes bullying. According to this material it includes:
 - unreasonably overloading a person with work or not providing enough work;
 - setting timelines that are difficult to achieve or constantly changing deadlines;
 - setting tasks that are unreasonably below or beyond a person's skill level;
 - deliberately excluding, isolating or marginalising a person from normal work activities;
 - withholding information that is vital for effective work performance;
 - deliberately denying access to information, consultation or resources;
 - deliberately changing work arrangements, such as rosters and leave, to inconvenience a particular worker or workers; or
 - unfair treatment in relation to accessing workplace entitlements such as leave or training.
22. Similarly regulator guidance materials consistently identify the following as "risk factors":
 - organisational culture and change (change in supervisor/manager; significant technological change; restructuring; downsizing; change in work method/s; outsourcing);
 - leadership styles (eg autocratic or laissez faire);
 - systems of work (how work is organised, scheduled and managed);
 - workplace relationships, and workforce characteristics.⁸

⁸ For example WorkCover NSW Bullying Risk Indicator accessed 19 June 2012 - http://www.workcover.nsw.gov.au/formspublications/publications/Documents/bullying_risk_indicator_2236.pdf

23. The Queensland Prevention of Workplace Harassment Code includes harrassing behaviour as including sabotaging an employee's work by withholding information, hiding documents or equipment so they cannot complete tasks and not providing appropriate resources. Such fanciful behaviour on the part of an employer would be irrational, and unsustainable even if perpetrated by fellow employees.
24. The Victorian WorkSafe and WorkCover NSW Guide to Preventing and Responding to Bullying at Work links workplace violence or bullying with management style and supervision, job design, consultation processes, performance expectations, and workplace layout, amongst other factors. It includes the following example of repeated unreasonable behaviour of a worker bullied by more than one person and the risk to health and safety:

Julia was a team leader working at a company undergoing restructuring. The change process had taken over eight months to complete. During that time, Julia felt she was put under unreasonable pressure by a number of staff who were more senior than her. The behaviour she was subjected to included:

- *having her and her team's performance requirements repeatedly changed by different managers at very short notice;*
- *being told that reports she had submitted were not up to scratch. When Julia asked how she could improve the documents her direct manager rolled his eyes and said 'don't bother, I'll fix it';*
- *being belittled by a colleague who said in front of a number of senior managers 'do you have any idea how to do your job?';*
- *being told at a meeting to 'stop asking questions – just get on with it!';*
- *not being included in regular meetings to which she was previously invited;*
- *having the CEO look out the window and ignore her when she spoke to him during meetings;*
- *finding out that she was no longer being invited to work social functions.⁹*

Julia felt distressed, had trouble sleeping and felt nauseous before starting work. She left the company once she found a suitable job.

⁹ WorkSafe Victoria Preventing and Responding to Bullying at Work Edition No. 3 June 2009 page 5

25. There is no way of knowing the objective circumstances of this scenario however the reactions of senior staff suggest Julia's performance did not match expectations and she was not contributing positively as a team leader to the complex demands of a restructuring exercise. We do not know if other measures were taken to address Julia's inadequate performance but if these managerial reactions constitute bullying then any critical or even slightly irritated comment within the workplace is to be viewed as such. Legislation to regulate human behavior so that it is always perfect in the most minute detail while at work (although apparently not required in other aspects of life) is simply not realistic.
26. If Julia was legitimately adversely affected there are national avenues of remedy already in place.
27. The Western Australian Code of Practice for Violence, Aggression and Bullying at Work specifies reasons for bullying as including changes at the workplace and in workloads, and bullying behaviour as including:
 - overloading a person with work or not providing enough work;
 - setting timelines that are difficult to achieve or constantly changing deadlines;
 - constantly setting tasks that are below or beyond a person's skill level;
 - ignoring or isolating a person;
 - deliberately denying access to information, consultation or resources;
or
 - unfair treatment in relation to accessing workplace entitlements such as leave or training.
28. Each of the above can be matters of individual perception and interpretation. As a consequence of this regulatory approach it is open to any worker to construe themselves as repeatedly and deliberately over or underworked, required to undertake tasks they don't like; subjected to continual change, having an incompatible boss or colleague or denied access to resources and thus subject to bullying.
29. A recent case demonstrates this outcome. The tribunal did not rule on the question of whether the employee was actually bullied, but accepted that she perceived that "[the manager] was bullying, obstructing and harassing her" at a time when changes to her workplace environment and duties were

causing her stress:

On the present evidence, I am not able to determine with certainty whether her perceptions are correct, nor am I comfortably able to rule out the possibility.

30. The tribunal found her psychological disorder was caused and aggravated by the her employer's reasonable decision to change group managers, postpone a project undertaken by the worker, move tasks performed by the worker to another office, and offer her alternative duties.¹⁰

31. The Productivity Commission while advocating expanded regulation of bullying acknowledged the uncertainty surrounding workplace bullying cases:

Inspectors described bullying cases as being emotive and involving a range of different individual interpretations of the events, making it more difficult to substantiate a claim. As a result of these difficulties, some inspectors reported that they were reluctant to handle psychosocial complaints.¹¹

32. The loose use of bullying terminology and the growing level of spurious claims has attracted media attention:

Unions, regulators and complaints tribunals report that workplace bullying complaints have tripled or even quadrupled in recent years, but most reported incidents turn out to be minor personal clashes or disputes over other issues such as workload or performance.

An analysis for The Weekend Australian showed that more than two-thirds of the 2080 complaints lodged with WorkSafe, the Victorian government's workplace inspector, in 2010-11 were rejected or withdrawn, and only eight were deemed serious enough to warrant possible prosecution.

WorkSafe reports that bullying complaints have more than quadrupled in three years. Executive director of health and safety, Ian Forsyth, said there was a growing risk regulators were so distracted by spurious cases that "a big case isn't taken up".

WorkCover NSW receives an average of 360 bullying calls a month, nearly double the rate of four years ago, and calls to the Australian Human Rights Commission have nearly tripled since 2005.

¹⁰ Fox and Comcare [2012] AATA 204 (5 April 2012)

¹¹ Productivity Commission 2010, *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*, Research Report, Canberra. page 299

The Community and Public Sector Union says it gets more than three times the number of bullying calls it did in 2007, but the union's national secretary, Nadine Flood, acknowledged that many callers were raising issues that had little to do with bullying.

Ms Flood said she had a "real concern" that many workers failed to understand what bullying was and mistakenly believed pursuing a legal grievance claim over a minor office dispute would make their workplace happier.¹²

33. Employers are confronted with the potential for such claims when setting work goals or deadlines, carrying out reasonable supervisory practices or setting achievable performance goals or disciplinary action. This is despite reassurance in regulatory guidance material that "reasonable management actions" do not constitute bullying.¹³ Despite regulator assertions to the contrary, leadership styles of themselves, poor workplace relations and other workplace characteristics such as heavy or unpredictable workloads do not constitute bullying behaviour.
34. Additional legislation will provide yet another avenue for a discontented worker to claim their discontent is caused by the unreasonable and bullying conduct of their employer or co-workers. Alleged adverse or unfavourable work conditions or management directions which they perceive as disadvantageous to them are already readily construed as bullying. It will not be difficult for workers to construe such circumstances (for example, Julia's situation in the above regulatory example) as threatening or abusive or arousing apprehension and fear for personal safety. Having multiple layers of regulation and avenues of remedies will not assist employers in meeting their compliance obligations.
35. Further, employers do not believe prosecutions for bullying will be equally applied to employees and employers. Employers are vicariously liable for the behaviour of their workers and customers.¹⁴ There has always been a reluctance to prosecute employees given their lesser duties and obligations at the workplace (the common law duty of care) and the far more onerous obligations of employers to ensure safety at work and protect persons at work from risks to their health, safety and welfare by eliminating these risks at their source.

¹² Richard Guilliart :The Australian November 2011

¹³ See for example WorkCover NSW Preventing and Responding to Bullying at Work page 6

¹⁴ Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377, [191].

3 Existing regulatory frameworks provide a sufficient deterrent against workplace bullying

36. Employers currently can face legal action for actions categorised as workplace bullying under a wide range of laws – criminal, workplace, health and safety, anti-discrimination and workers compensation – as well as personal injury liability and breach of contract. This is already an area of extensive and onerous regulation.

The Fair Work Act

37. Remedies within the Fair Work Act include civil penalties, injunctions, compensation and reinstatement.¹⁵

Fair Work Act Part 3–1 General Protections – Adverse Action/ Discrimination

38. Any potentially harassing conduct perceived to be undertaken for an unlawful or discriminatory reason may result in an adverse action or discrimination claim. The damages claimed are uncapped.
39. The purpose of this Part of the Act as expressed in the Fair Work Bill 2009 Explanatory Memorandum is to prohibit a person taking adverse action (defined in s.342) against another person in relation to that person's workplace rights. In our view the breadth of employer actions identified under s.342(1) as adverse or prejudicial to an employee's actual or future employment is excessive and the nature of a "workplace complaint" is all encompassing. Compounding this unbalanced legislation is the presumption in s.361 that the action was taken for that reason or with that intent unless the employer proves otherwise.
40. The legislative scope of a 'workplace right' under s.341 has significantly widened the protected rights of employees. Workers now have a protected workplace right to make a complaint or inquiry 'in relation to his/her employment'. The provisions prohibit a person from taking, or threatening to take, adverse action against another person where such action is motivated, either wholly or in part, by certain workplace rights. These rights protect employees' entitlement to benefits under workplace laws and their ability to make complaints in relation to their employment. In addition, s.351 of the Fair Work Act prohibits employers from taking adverse action against an

¹⁵ Fair Work Act 2009 Chapter 4; ss545 and 546

employee (or proposed employee) because of certain prescribed attributes. Both these provisions capture claims of bullying.

41. Mere questions relating to a person's employment have the potential to found applications by a discontented former employee. Workers are clearly utilising these provisions in circumstances where bullying or harassment allegations are made.¹⁶

Fair Work Act Part 3–2 Unfair Dismissal

42. If an employee resigns as a result of perceived bullying, or is dismissed in circumstances where there are allegations of bullying they may bring unfair dismissal proceedings against the employer.¹⁷ If the employee can establish they were constructively dismissed due to the conduct compensation may be awarded up to 26 weeks' wages or they may be re-instated to their former position.

¹⁶ *Stevenson v Airservices Australia* [2012] FMCA 55; *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; *Cugura v Frankston City Council* [2012] FMCA 340; *Ratnayake v Greenwood Manor Pty Ltd* [2012] FMCA 350; *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FCA 563; *McCulloch v Preshil*; *The Margaret Lyttle Memorial School* [2011] FCA 1218; *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341; *Dr Dimitri Gramotnev v Queensland University of Technology* [2010] FWA 6237; *Nicole Lord v WorkSafe Victoria* [2012] FWA 4569; *Ms Lauren Hansen v Apex Cleaning & Polishing Supplies Pty Ltd T/A Apex Cleaning Supplies* [2011] FWA 1566; *Miss Melissa Kerr v Ballarat Truck Centre Pty Ltd* [2011] FWA 3894; *Leza Howie v Norilsk Nickel Australia Pty Ltd*; *Dmitry Lafitskiy*; *Dennis Fulling*; *Roman Panov*; *Dmitry Kondratiev and Edwin Leeuwijn* [2012] FWA 2853; *Tammy Sparkes v Chubb Fire and Security Pty Ltd* [2012] FWA 5204; *Zhan Gao v Department of Human Services* [2011] FWA 8072; *Belinda Mosterd v Mega Pet Warehouse Pty Ltd T/A Mega Pet Warehouse Pty Ltd* [2012] FWA 2722; *Ms Louise Elliot v Grace Wakeman Family Trust Pty Ltd t/as Williamstown*; *Newsagency and General Store* [2012] FWA 2328; *Mr David Tse v Ready Workforce (A division of Chandler Macleod) Pty Limited* [2010] FWA 8751; *Ms Brittany-Jaymes Samson-Anand Anbardan v Trimatic Contract Services Pty Ltd* [2012] FWA 3295; *National Tertiary Education Industry Union v University of South Australia* [2011] FWA 1103

¹⁷ *Dr Bing Du v University of Ballarat* [2011] FWA 5225; *Ms SW v S Pty Ltd* [2010] FWA 3944; *Brad Linsell v Cronulla Sutherland Leagues Club Limited T/A Sharkies* [2011] FWA 3193; *Lance Gunther & Michele Daly v B & C Melouney T/A Easts Riverside Holiday Park* [2012] FWA 2473; *SB v FC Pty Ltd* [2010] FWA 4179; *Siriwardana Dissanayake v Busways Blacktown Pty Ltd* [2011] FWA 3549; *Evan Dickinson v Calstores P/L* [2011] FWA 6858; *Mr Jonathon Rowland v Austar Coal Mine Pty Limited* [2010] FWA 4874; *Rajnik Matta v The Trustee for Security Manpower Services Trust* [2012] FWA 4664; *Mr Steven Lambley v DP World Sydney Limited T/A DP World Sydney* [2012] FWA 1250; *Mr Tommy Sebasio v Ergon Energy Corporation Limited* [2010] FWA 4917; *Mr Timothy Neil Willot Vickridge v Signature Security Group* [2011] FWA 2501; *Ms Azidah Atan v SMEC Services Pty Ltd T/A SMEC Australia* [2011] FWA 3084; *Ropafadzo Tokoda v Westpac Banking Corporation T/A Westpac* [2012] FWA 3995; *Mr Trevor McLean v Latrobe Regional Hospital* [2012] FWA 3337; *David Wennerborn v Renegade Security Pty Ltd* [2011] FWA 4422; *Mr Paul Warner Dobson v Qantas Airways Limited* [2010] FWA 6431; *Nandalcumaran Krishnakanth v Saai Bose Pty Ltd* [2010] FWA 4678; *Richard Gorkowski v AGR Asia Pacific Pty Ltd* [2010] FWA 7507; *Mr Walter Goebel v QR Limited* [2011] FWA 3711; *Ms Jacqueline Parchomenko v T&H Walton Stores Pty Ltd* [2012] FWA 95; *Nadia Kose v Arcorp Enterprise* [2010] FWA 2079; *Barbara Meffert v Paperlinx Australia Pty Ltd T/A Spicers Paper* [2010] FWA 8144; *Mr Mahmud Jawadbin Rashid v GPO Sydney T/A GPO Sydney Pizza by Wood Pty Ltd* [2010] FWA 8930; *Karen Albert v Techni-Clean Australia* [2011] FWA 2665; *Dale Smith v The Trustee for The R and L Napier Trust T/A Kyabram Bakery Co* [2011] FWA 7507; *Christopher Hepburn v Costas Mitre 10* [2012] FWA 3069; *Mr Tony Favios v Power Crank Batteries Pty Ltd* [2012] FWA 4214; *Mr Greg Ebbott v FMSA* [2010] FWA 2177; *Linda Gasper v Faxton Developments Pty Ltd T/A Kings Transport* [2010] FWA 4035; *Mr Mark Williams v St Vincent de Paul Society* [2011] FWA 6457; *Applicant v Virgin Australia Airlines Pty Ltd (formerly Virgin Blue Airlines Pty Ltd t/a Virgin Blue Airlines)* [2011] FWA 5595; *Adam James Harley v Aristocrat Technologies Australia Pty Ltd* [2010] FWA 62; *Natalie Carmody v Flight Centre Limited* [2010] FWA 9228; *Shane Gentry-Pike v Manpower Services (Australia) Pty Limited T/A Manpower Professional* [2011] FWA 2039.

Work Health Safety legislation

43. Work health and safety legislation in each jurisdiction imposes a duty on persons in control of a business or undertaking (PCBU), employers and others to ensure, so far as reasonably practicable, the health, safety and welfare of their workers and others affected by the conduct of their undertaking. Breaches of these duties constitute criminal offences. Substantial penalties and jail sentences can be imposed by the courts. Prosecutions may be instituted where an employer, a person in control of a business or undertaking, an officer or employee fails to comply with a positive health and safety duty and exposes an individual to a risk of death or serious injury or illness.
44. While the statements of the general duties in each jurisdiction do not make specific reference to bullying or psychosocial hazards, they are clearly encompassed by the breadth of those duties and are prosecuted accordingly.¹⁸ Under work health and safety legislation, PCBUs and employers have prime responsibility for the health and safety of workers and others affected by their work, while workers must take reasonable care that their actions at work do not adversely affect the health and safety of other persons. "Health" includes psychological health.
45. Further, employers and other duty holders' general duties in work safety legislation statutes obligations are not confined to their own workers or workplaces but extend to any others who may be affected by their operations. The duties encompass the health and safety consequences of work wherever it is done and whoever may be subject to these consequences.
46. In addition, the model Work Health and Safety Act 2011 imposes due diligence obligations on 'officers' to ensure compliance with health and safety obligations.¹⁹ The Act imposes a positive and proactive duty on an officer to exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation. Due diligence is codified in the model Act. Officers can be prosecuted if they have not exercised due diligence even if their corporation or organisation is not in breach. Under the NSW Work Health and Safety Act 2011, the objectively least serious offences carry penalties of up to \$50,000 for an individual, \$100,000 for a PCBU or officer and \$500,000 for a corporation, with offences involving recklessness having penalties of up to \$300,000 for an individual and/or five years

¹⁸ Neal v Shaw McDonald Pty Ltd & Anor [2002] NSWIR Comm 298; Inspector Gregory Maddaford v Graham Gerard Coleman & Anor [2004] NSWIRComm 317; WorkSafe Victoria v Ballarat Radio Pty Ltd (Victorian Magistrate's Court, August 2004); R v Mathew Lever Victorian Magistrates Court November 2010; Inspector Estreich v Zaccardelli & Ors [2012] NSWIRComm 47

¹⁹ Currently in effect in NSW, QLD, the ACT and NT; Tasmania from 1 January 2013.

imprisonment, \$600,000 for a PCBU or officer and/or imprisonment and \$3 million for a corporation.

47. Similarly Victorian occupational safety legislation contains the offence of recklessly endangering persons at a workplace. S.32 of the Occupational Health and Safety Act 2004 applies the same standards, tests and penalties as s.23 of the Victorian Crimes Act 1985. S.32 makes it an offence where a person “recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury”. This 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.

Anti Discrimination legislation

48. Anti discrimination legislation at both federal and state level is a further option to seek redress for bullying. Where workplace bullying is linked to an actual or perceived attribute of a worker, and that attribute is prescribed, the worker may seek a remedy in one of these jurisdictions. Prescribed attributes in this legislation include: race, colour, sex, age, gender, sexual preference, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Breach of contract

49. Workers who consider themselves to be bullied or harassed may claim that their employer has repudiated the employment contract and to seek damages for the breach. Such claims may be founded on an employer's non-compliance with contractual bullying policies or grievances procedures, or may be based upon a breach of the implied contractual term of mutual trust and confidence.

Common law

50. An employee can sue in negligence at common law, alleging a breach of the employer's duty of care. Under common law an employer who does not take suitable precautions may be liable for any physical or psychological injury suffered by the victim.²⁰
51. Employers can be held accountable for bullying conduct within their workplace either directly or vicariously.

²⁰ Bailey v Peakhurst Bowling & Recreation Club Ltd [2009] NSWDC 284

52. Direct liability would involve allegations that the employer has failed to take reasonable steps to prevent the offensive conduct and, as such, breach its implied terms of trust and confidence owed to employees - *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377, which also found the bullying conduct also came within the implied duty of care owed by employers to its employees. Such a duty compels employers to take reasonable care to avoid foreseeable risks of physical or psychological injury arising out of the employment relationship.
53. This duty may require an employer to dismiss a violent employee rather than risk future injury to other employees (*Gittani Stone P/L v Packovic* [2007] NSWCA 355) or to take positive steps to ensure staff abide by work health and safety policies.
54. In recent years this duty of care has been expanded to incorporate a more specific duty to provide a safe system of work – *Telfer v Berkley Challenge* [2000] NSWCA 24.

4 The prevalence and costs of bullying

55. Heavy reliance has been placed on the Productivity Commission's estimate of the prevalence and cost of bullying in Australia.²¹
56. The Productivity Commission acknowledges the paucity of reliable data on bullying in Australia and relies on cost estimates from overseas self report surveys.²² Its estimate of \$6 billion to \$36 billion (in 2000) is a very wide margin.
57. In fact, no validated evidence exists to show the actual magnitude of bullying or that it is on the increase. There are a range of estimates using various definitions and are largely dependent on unvalidated self report. The Productivity Commission cites data initially produced by the Beyond Bullying Association "*using the results of international research*" which was then reported by the Australian Human Rights Commission.²³

²¹ Prime Minister Julia Gillard Transcript of joint doorstep interview, Melbourne - Saturday 26 May 2012; House Standing Committee on Education and Employment Committee Inquiry into workplace bullying Terms of Reference

²² From Productivity Commission 2010, *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*, Research Report, Canberra. page 287

²³ op cit

58. Workers compensation data provides an indication of the extent and cost of workplace bullying which is not based on estimates or self report.
59. The jurisdictions have had the capacity to accurately record and report in detail on workplace violence and bullying for well over a decade. Coding issues have been clarified at the national level since at least since 2005.²⁴ Yet this data is not available from the published Compendium of Workers Compensation Statistics or highlighted as an issue forming part of the National OHS Strategy. The Productivity Commission report provides the most recent publically available data at the national level.²⁵ That data, using incidence rates, did not demonstrate a marked increase in accepted bullying claims in the observed time frame of 2002-03 to 2007-08:

The data show significant declines in the rate of combined claims for bullying/harassment and occupational violence in the Commonwealth, Queensland, South Australia and Western Australia, and to a lesser extent in New South Wales. Tasmania was the only jurisdiction to record an increase in the rate of claims during the interval while the rate of accepted claims in Victoria, the Northern Territory and ACT Government were relatively stable (see table 11.2).²⁶

60. An indication of the level of bullying claims in terms of actual numbers is available at the national level for 2004-05. This data does not separately identify workplace bullying from occupational violence such as armed hold up or client assault but does specifically include bullying in the category of harassment:

In 2004–05p, the most common sub-categories of Mental stress were Work pressure (3305 claims, 41% of all mental stress claims), Harassment (1730 claims, 22%), Exposure to workplace or occupational violence (1300 claims, 16%), and Other mental stress factors (1250 claims, 16%).²⁷

61. The most recent national data does not provide this detail and again, bullying is not identified as a separate mechanism of injury. Bullying and harassment leading to compensable claims are included in the category of mental stress. It is surprising that detailed data on mental stress and the contributing agent and mechanism of injury is not provided in their published reports if bullying is considered of serious concern to regulators.

²⁴ TOOCS3 Decisions Register Mechanism of Injury/Disease Updated May 2008

²⁵ Productivity Commission op cit Table 11.2

²⁶ op cit page 284

²⁷ The Mechanism of Mental Stress - Extract from Compendium of Workers' Compensation Statistics 2004-2005 Australian Safety Compensation Council 2007

62. Mental stress at 6% of all serious claims is well below sprains, strains and falls which account for 43% of all serious claims.²⁸ Numbers of claims for mental stress have not increased significantly since 2001²⁹, although the cost of these claims and the time off work have increased with poor claims management.
63. Further, workers compensation data, even if regarded as “the tip of the iceberg” on the extent of bullying due to alleged underreporting cannot be used to support the need for further legislation on bullying. The “no fault” compensation system operates with an onus of proof on the employer or agent to disprove a claim. Other than providing a medical certificate the worker is not required to prove their claim of bullying or harassment leading to psychological injury. Claims agents frequently relinquish the decision making role to the treating doctor who makes a decision leading to claims acceptance based only on the worker’s version of events and with inadequate investigation of the circumstances surrounding the claim on the part of the claims agent (including performance management of the worker).

²⁸ Compendium of Workers’ Compensation Statistics Australia 2009–10p. vii, page 13

²⁹ 2001 - 6945 mental stress claims; 2009 - 7045 mental stress claims (incidence and frequency rates not provided) op cit

APPENDIX D – OTHER LAWS

Bullying at work can fall within the scope of various state and federal laws. Obligations under such laws are additional to any obligations under OHS law.

Anti-discrimination laws

State and federal anti-discrimination laws prohibit behaviour that amounts to discrimination or harassment. Some forms of bullying at work may breach these laws. For further information on anti-discrimination laws, contact:

- Victorian Equal Opportunity and Human Rights Commission
03 9281 7100 or **1800 134 142**
- NSW Anti-discrimination Board **02 9268 5544** or **1800 670 812**
- Human Rights and Equal Opportunity Commission (Federal)
1300 656 419.

Criminal law

Physical assault and sexual assault are criminal matters and should be referred to the police. Other forms of bullying can be offences under criminal law (eg threats to harm someone and damage to property). Phone your local police station to report criminal forms of bullying.

Industrial laws

Employment conditions, grievances, disciplinary action and termination of employment are covered by industrial laws. For further information on industrial laws and bullying, employers should contact:

- their industry association
- Business Victoria **13 22 15**.

Workers should contact:

- their union, Unions NSW **02 9264 1691** or the ACTU **1300 362 223**
- Job Watch **03 9662 1933** or **1800 331 617**
- Business Victoria **13 22 15**
- NSW Office of Industrial Relations **13 16 28** or **1800 803 868**
- Workplace Ombudsman (Federal) **1300 363 264**
- NSW Ombudsman **02 9286 1000** or **1800 451 524**.

Table 11.4 Definitions of bullying included in OHS Acts, codes of practice and guidance notes

Source		Definition of bullying
Cwlth	Guidance note	'repeated, unreasonable behaviour directed towards a person or group of persons at a workplace, which creates a risk to health and safety'. ^a
NSW	Guidance note	'repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.'
Vic	Guidance note	'repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.'
Qld	Code of practice	'repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person's employer or a co-worker or group of co-workers of the person that: (a) is unwelcome and unsolicited (b) the person considers to be offensive, intimidating, humiliating or threatening (c) a reasonable person would consider to be offensive, humiliating, intimidating or threatening.'
SA	s. 55 (A) of OHS Act	'any behaviour that is repeated, systematic and directed towards an employee or group of employees that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten and which creates a risk to health and safety.' ^b
WA	Code of practice	'repeated unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety.'
Tas	Guidance note	'persistent and repeatedly aggressive behaviour (that) goes beyond a one-off disagreement, ... increases in intensity and becomes offensive or harmful to someone,...can include psychological and physical violence'
NT	Guidance note	'repeated, unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety'
ACT	Guidance note	'repeated, unreasonable behaviour directed towards a person or group of persons at a workplace, which creates a risk to health and safety'

^a 'Repeated' refers to the persistent or ongoing nature of the behaviour, not the specific type of behaviour, which may vary. 'Unreasonable behaviour' means behaviour that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten. 'Risk to health and safety' includes the risk to the emotional, mental or physical health of the person(s) in the workplace. ^b Repeated refers to the persistent or ongoing nature of the behaviour and can refer to a range of different types of behaviour over time. Systematic refers to having, showing or involving a method or plan.

Source: OHS Acts, codes of practice and guidance notes.