

Legislative and regulatory frameworks

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

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

Introduction

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

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

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

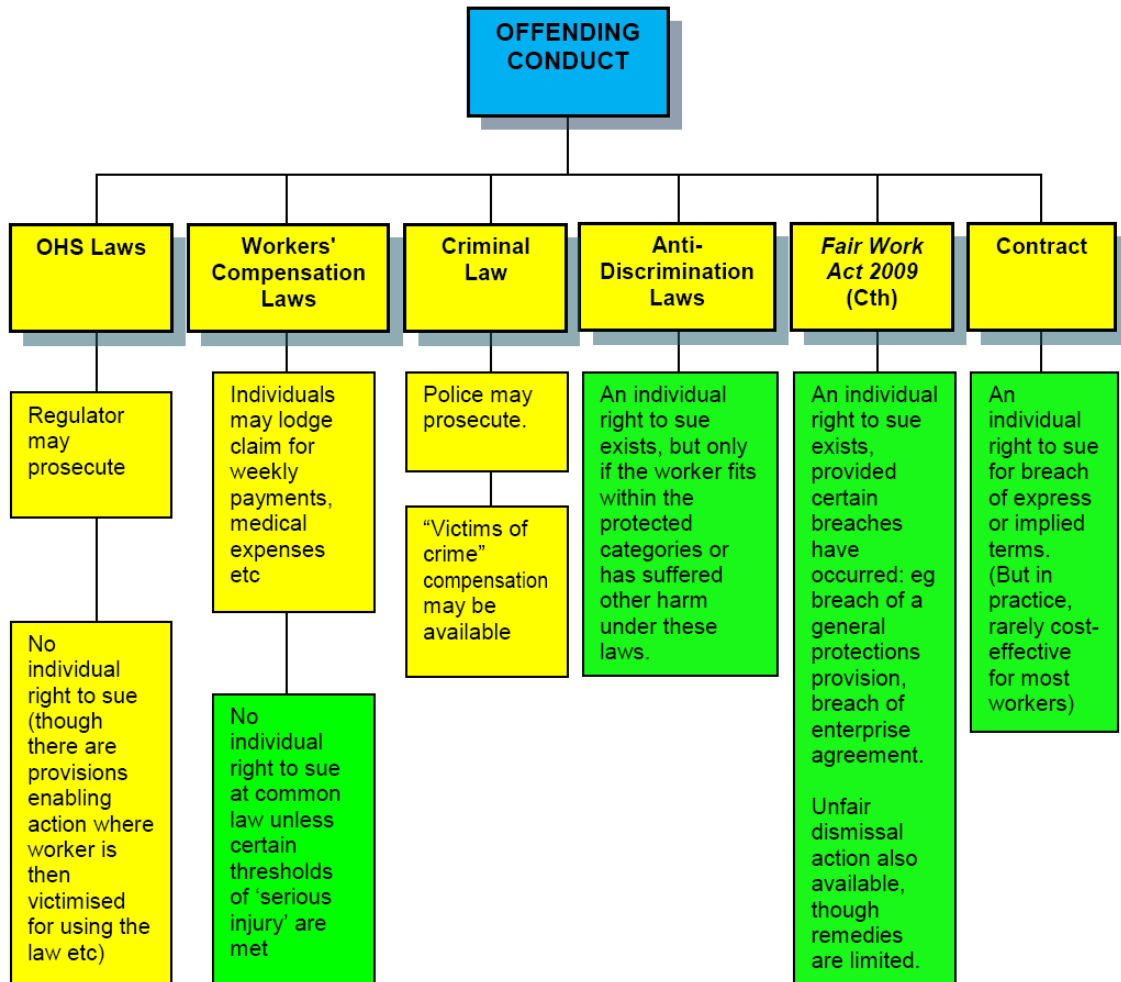
- 2.2 Throughout the inquiry people who have experienced workplace bullying expressed frustration at the lack of appropriate and satisfactory avenues for resolution within the existing legislative and regulatory frameworks.
- 2.3 This chapter outlines the legislative and regulatory frameworks that are relevant to addressing workplace bullying issues. These frameworks fit broadly into the following categories: work health and safety law, criminal law, anti-discrimination law, industrial relations laws and workers' compensation law. Each category of law will be considered in terms of the resolution and remedial measures available to individuals and why many people do not have a right to take action against the perpetrators of workplace bullying or be informed of what course of action has been taken by government authorities.³
- 2.4 Some targets of workplace bullying may have a right to sue their employer for breach of employment contract. However, the little evidence that was presented suggested that this course of action is dependent on the terms of a workers' employment contract. For that reason, it will not be considered in this report.

Workplace bullying triage

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

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

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



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

- 2.6 The balance of Commonwealth, state and territory government responsibilities varies across each of these categories. States and territories have primary responsibility for work health and safety law, criminal law and workers' compensation. The Commonwealth has primary responsibility for industrial relations and anti-discrimination laws. However, there is also some overlap in responsibilities – states and territories have anti-discrimination laws, some states and territories legislate on industrial relations for limited workers, and the Commonwealth has some criminal powers.
- 2.7 The respective roles of the Commonwealth, state and territory governments in relation to each of these areas of law are outlined with particular focus on their roles in enforcing the laws to protect people from, or hold people accountable for, workplace bullying.

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

Work health and safety law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

submissions received during a three month public consultation period in 2011.¹⁴ The implications of the draft Code of Practice will be discussed in further detail below. However, it is necessary first to understand how the laws operate across Australia.

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

Current obligations

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

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

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

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

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

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

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

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

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

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

Obligations of employers to prevent workplace bullying

- 2.20 In all Australian WHS laws there is a primary duty of care on employers to protect, so far as is reasonably practicable, the health and safety of workers¹⁸ while they are at work.¹⁹
- 2.21 Although there is no explicit duty on an employer to prevent workplace bullying in any of Australia's WHS laws,²⁰ the Diversity Council of Australia, Safe Work Australia and SafeWork SA were some of the stakeholders who asserted that it is implicit in the primary duty of care that an employer has responsibility for detecting and managing the risks of workplace bullying because it poses risks to the psychological health of those in the workplace.²¹ That is, the duty to protect the health and safety of workers is not limited to the physical health of workers, but also extends to their mental health.
- 2.22 SafeWork SA submitted that the inclusion of psychological health in the definition of 'health' in the model WHS Act and the Victorian *Occupational Health and Safety Act 2004* removes doubt that the primary duty of care extends to the protection of mental health.²²
- 2.23 They said that the successful prosecution of Brodie Panlock's employer for breaching his primary duty of care under the Victorian *Occupational Health and Safety Act 2004* demonstrates that the duty on employers extends to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Duty on officers to ensure employer complies

- 2.29 Under all current WHS laws an officer of an employer faces liability if the employer fails to meet its duty of care.³⁰ An officer is a person who is at a substantial decision making level of the organisation, such as a board member or company director.³¹
- 2.30 At time of writing, Victorian, Western Australian and South Australian WHS laws do not include an express duty of care on officers. Rather, an officer can be held to be liable, in addition to the employer, where the employer's breach of duty is attributable to the officer's conduct.³²
- 2.31 Comparatively, Safe Work Australia and AFEI explained that under the model WHS Act there is an express duty on officers to exercise due

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

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

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

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

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

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

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

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

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

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

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

Obligations of workers to not bully others

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

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

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

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

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

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

- 2.35 This was highlighted in a recent case in Victoria. In 2006, Brodie Panlock, a 19 year old waitress, committed suicide in 2006 after enduring persistent and vicious bullying at work. Following Miss Panlock's death the co-workers who had bullied her at work were found to have breached their duty of care under the Victorian *Occupational Health and Safety Act 2004*. The three workers convicted for breaching their duties as employees in that case were fined between \$10,000 and \$45,000 each. Notably, the manager of workplace, who was the company director, was fined for the employer's breach of duty as being an officer to whom that breach is attributable.³⁸
- 2.36 Analysis of penalties available under all WHS laws provided by Safe Work Australia indicates that workers across Australia are liable to penalties at this level and higher if they bully others at work.³⁹

South Australia's Section 55A

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

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

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

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

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

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

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

2.38 SafeWork SA explained that:

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

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

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

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

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

Role of the regulator in enforcing the law

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

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

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

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

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

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

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

- 2.43 Under all WHS laws in Australia there are two types of enforcement measures available to the regulators: compliance notices in the form of improvement notices and prohibition notices; and prosecution.⁴⁹
- 2.44 A duty holder can be issued with a notice or prosecuted for breaching their WHS duties regardless of whether there is anyone adversely affected. For example, Safe Work Australia explained that under the model WHS Act there are three levels of offences. The lowest level of offence is for non-compliance with a duty with penalties of up to \$50,000 for a worker, \$100,000 for an officer and \$500,000 for a body corporate.⁵⁰

Improvement and prohibition notices

- 2.45 Improvement and prohibition notices are issued by WHS inspectors when they consider that there is a risk at the workplace that is not being managed properly or that there has been conduct which is in breach of the law. Ms Yvonne Henderson, the Equal Opportunity Commissioner for Western Australia explained that when a workplace bullying complaint has been made an improvement notice may be issued to an employer, requiring them 'to improve the systems for preventing bullying in the workplace or to improve reporting and investigating procedures'.⁵¹
- 2.46 Prohibition notices on the other hand require the person to whom they are issued to cease prohibited conduct. If a notice is not complied with, further penalties apply in addition to the potential penalty for the initial breach of duty.⁵²

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

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

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

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

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

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

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

Penalties for non-compliance

- 2.48 Under all WHS laws the regulator is able to prosecute any party believed to be in breach of their WHS duty by failing to prevent workplace bullying or, in the case of a worker, bully another person in the workplace. A breach of a WHS duty is a criminal offence.
- 2.49 There are significant criminal penalties in WHS laws that a court may order in convicting an individual or an organisation of breaching their WHS duties.⁵³
- 2.50 Safe Work Australia noted that the penalties available under the model WHS Act are higher than in non-harmonised jurisdictions.⁵⁴ A person who breaches their duty under the model WHS Act is liable for criminal fines of up to \$3 million for a body corporate; \$600,000 or five years imprisonment for an officer or an individual employer;⁵⁵ and, up to \$300,000 or five years imprisonment for workers.⁵⁶ These levels of penalties apply in relation to offences 'of the most serious kind involving recklessness'.⁵⁷
- 2.51 The AFEI submitted that high penalties also apply for the offence of recklessly endangering another person at a workplace under the Victorian *Occupational Health and Safety Act 2004*. That offence is 'punishable by a maximum penalty of over \$215,000 and/or five years imprisonment for individuals and, in the case of corporate offenders, a maximum fine of over \$1 million'.⁵⁸
- 2.52 DEEWR submitted that the inclusion of such high criminal penalties in WHS legislation:

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

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

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

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

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

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

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

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

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

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

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

Codes of practice and guidance material

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

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

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

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

- 2.56 In the Australian Capital Territory, Queensland and Western Australia workplace bullying is addressed in codes of practice.⁶² They provide practical guidance on how employers and workers can comply with their WHS duties specifically in relation to workplace bullying. The directions in a Code of Practice are not mandatory, but they do set the minimum standards that must be met by duty holders.⁶³ Mr Mark McCabe, Work Safety Commissioner of the ACT explained that the current ACT Code of Practice sets the benchmark of what an employer must do to manage the risks of workplace bullying.⁶⁴
- 2.57 As there is no requirement that duty holders must comply with the directions in a code of practice, a person cannot be prosecuted if they do not follow any directions set out in the code of practice. However, as they set the minimum standards that must be met, a duty holder must be able to show that the actions they took to meet their duties under the legislation in relation to workplace bullying provided the same or a higher standard of health and safety than would have been provided had they followed the directions in a code of practice.
- 2.58 And although there is no requirement that a code of practice must be complied with, a code of practice is automatically admissible in court proceedings as evidence of what an employer should have known about for managing the risks of workplace bullying.⁶⁵
- 2.59 The ACT Government stated for that reason, duty holders should comply with a code of practice unless there is another solution for addressing workplace bullying which achieves the same or a better result.⁶⁶

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

63 Safe Work Australia, *Submission 74*, p. 11; See also: Government of Western Australia, Department of Commerce, 'Codes of practice', <http://www.commerce.wa.gov.au/WorkSafe/Content/About_Us/Legislation/Codes_of_practice.html> viewed 5 October 2012; *Occupational Safety and Health Act 1984* (WA), s. 57; model Work Health and Safety Act, ss. 274 and 275.

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

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

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

- 2.60 In all other jurisdictions, including South Australia, workplace bullying is addressed in guidance material.⁶⁷ Dr Jenkins and Mr Luke explained that these guides do provide practical guidance, in a similar way to codes of practice, to assist with the identification and management of risks of workplace bullying.⁶⁸ However, unlike codes of practice, guidance materials are not recognised in WHS legislation.
- 2.61 The ACT Government commented that their current Code of Practice is based on the guidance material that was developed by the Victorian regulators and subsequently adopted by the New South Wales regulator.⁶⁹ This indicates that there is some consistency across some jurisdictions.

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

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

Committee comment

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

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

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

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

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

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

Recommendation 3

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

Recommendation 4

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

Elevating employers' obligations and standards to nationally consistent regulation

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

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

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

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

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

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

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

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

2.69 They also submitted:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee comment

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

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

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

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

84 DD, *Committee Hansard*, Closed Session.

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

Recommendation 5

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

Criminal law

- 2.77 Some cases of workplace bullying can also be prosecuted under criminal legislation. Although WHS laws impose criminal punishments, they are distinct from criminal legislation in that they are enforced by WHS regulators. Comparatively, it is up to the police to enforce criminal law or legislation.
- 2.78 Like WHS law, criminal legislation is the responsibility of governments in each jurisdiction. Behaviour that may be seen in serious cases of workplace bullying can be prosecuted under criminal legislation, and so under the criminal justice system, of each jurisdiction. The Victorian Government recently amended their criminal legislation to remove doubt that workplace bullying can be a criminal offence.

Victoria and Brodie's Law

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

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

- 2.80 Brodie Panlock's case gained public attention when, in 2011, the Victorian Government made amendments to the *Crimes Act 1958* to remove doubt that serious instances of bullying, such as that experienced by Brodie, are criminal offences. The amendments, colloquially known as Brodie's Law, were introduced in response to community outrage at the apparent inadequacy of sanctions against the parties who bullied Brodie. Although the men who bullied Brodie were fined for breaching their health and safety duties by bullying her, they were not charged with serious criminal offences under criminal legislation.⁸⁶
- 2.81 DEEWR explained that Brodie's Law amended the offence of 'stalking' in the Victorian *Crimes Act 1958* to 'expressly include making threats, using abusive or threatening words, performing abusive or offensive acts, or acting in a way that could reasonably be expected to cause the victim harm or self-harm'.⁸⁷
- 2.82 Brodie's Law did not create an offence of workplace bullying. The behaviours referred to under the law are criminal offences regardless of whether they are engaged in at a workplace or elsewhere. However, the ACT Government noted that Brodie's Law removes doubt that stalking covers serious instances of workplace bullying and that perpetrators face up to 10 years imprisonment.⁸⁸
- 2.83 Ryan Carlisle Thomas Solicitors (RCT Solicitors) noted that Brodie's Law also made amendments to the *Person Safety Intervention Orders Act 2010* (Vic) so that it 'contains mechanisms whereby certain orders may be obtained to protect those who are subjected to behaviour often associated with "bullying", such as stalking, among other things'.⁸⁹
- 2.84 The Western Australian Commissioner for Equal Opportunity, Ms Yvonne Henderson, commented:

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

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

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

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

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

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

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

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

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

- 2.86 The ACTU noted that the Brodie's Law 'does not and cannot address the majority of bullying behaviours, nor the workplace risk factors which can lead to such behaviours'⁹².
- 2.87 Mr Damian and Mrs Rae Panlock called for Brodie's Law to be made a national law.⁹³ Mrs Panlock argued that there should be one law for all of Australia because currently the laws are slightly differently in each jurisdiction.⁹⁴ Harmers Workplace Lawyers also supported a proposed nationalisation of Brodie's Law.⁹⁵
- 2.88 A nationally consistent definition of workplace bullying across Australia that secures the rights of all Australian workers to be safe from bullying was almost universally supported in evidence to the inquiry.⁹⁶ However, the specific objective of a national Brodie's law cannot be met simply by the introduction of legislation by the Commonwealth.

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

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

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

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

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

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

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

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

The Commonwealth and cyber-bullying

- 2.90 Although constitutional limitations mean that the Commonwealth criminal law cannot address many instances of workplace bullying, Commonwealth does extend to prosecution of cases of cyber-bullying because it does deal with offences relating to the electronic transmission of material.⁹⁹
- 2.91 The Association of Professional Engineers, Scientists and Managers Australia stated that of 3.8 per cent of its members who reported that they were bullied at work said that they had experienced cyber-bullying.¹⁰⁰ Similarly, Master Grocers Australia submitted that its members, who are employers, reported a significant increase in the complaints from employees about cyber-bullying.¹⁰¹
- 2.92 DEEWR explained how the Commonwealth *Crimes Act 1914* could be used to address cyber-bullying:

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

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

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

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

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

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

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

Other state and territory criminal laws

- 2.93 Beyond the highly publicised enactment of Brodie’s Law in Victoria, criminal laws in other states and territories capture the behaviours and conduct typical of serious workplace bullying.¹⁰³
- 2.94 WorkSafe WA confirmed that ‘behaviours that constitute workplace bullying can be treated as a case of stalking under the *WA Criminal Code [Compilation Act 1913]*’ in the same way that they can under Brodie’s Law in Victoria.¹⁰⁴ The AFEI commented that the WA Criminal Code would also address assault or threats in the workplace.¹⁰⁵
- 2.95 The ACT Government submitted that a number of offences under the ACT *Crimes Act 1900* ‘may apply in circumstances where an employee is experiencing workplace bullying’.¹⁰⁶ Those offences include inflicting bodily harm, assault, stalking and aiding or abetting the suicide, or attempted suicide, of another.¹⁰⁷
- 2.96 Evidence was not received from other state or territory governments about how their criminal laws might apply to bullying cases. However, the AFEI outlined the criminal laws in all other states and territories that could address behaviours that might be seen in serious cases of workplace bullying:
- the NSW *Crimes Act 1900* provides for the offences of assault, both that occasioning and not occasioning actual bodily harm, and threats or abuse directed at an employee that induces a reasonable fear of actual harm could also be an offence;
 - the Queensland *Criminal Code 1899* provides the offences of physical assault causing injury or discomfort, torture which deals with the infliction of mental, psychological or emotional pain and stalking.
 - the South Australian *Criminal Consolidation Act 1935* provides the offences of assault and the threat of assault, stalking and causing physical or mental harm and serious harm to persons;

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

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

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

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

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

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

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

Anti-discrimination law

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

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

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

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

Protected attributes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Individual right to seek remedies

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

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

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

Industrial relations law

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

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

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

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

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

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

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

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

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

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

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

2.111 The Fair Work Ombudsman website adds:

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

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

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

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

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

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

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

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

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

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

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

Fair Work Act 2009

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

Protection limited to prescribed workplace rights

- 2.116 The *Fair Work Act* protects workers from being bullied because they have exercised or enforced certain workplace entitlements. However, that protection is limited to workplace rights that are listed in the legislation.
- 2.117 Ms Yvonne Henderson, the Commissioner for Equal Opportunity in Western Australia, succinctly explained the operation of the general protections provisions and their limitations in protecting workers from bullying:

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

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

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

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

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

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

Individual resolution and remedies

- 2.119 Much of the support for utilising the *Fair Work Act* to respond to workplace bullying complaints focussed on the individual civil remedies that the Act provides.
- 2.120 If the bullying experienced by a worker is on grounds that constitute a breach of the *Fair Work Act*, they can apply to Fair Work Australia for assisted resolution of the matter. Fair Work Australia can deal with the dispute by conciliation or mediation, during which recommendation can be made on how the matter can be resolved.¹³¹
- 2.121 The Northern District Branch of the Construction, Forestry, Mining and Energy Union explained that if the issue is not resolved through the conciliation process because the parties cannot agree to an outcome or the employer refuses to participate, the worker is able to pursue the matter in court.¹³²
- 2.122 DEEWR noted that the court can make any order that it sees fit, including monetary penalties of up to \$6,600 for an individual.¹³³
- 2.123 The exception is where the matter involves an unfair dismissal claim. RCT Solicitors noted that in such a case the available remedies are restricted to reinstatement and capped compensation for economic loss.¹³⁴ They suggested that the unfair dismissal remedies are not the best response to

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

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

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

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

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

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

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

Workers' compensation law

- 2.124 Workers' compensation can be described as a system that complements WHS. Whereas WHS is about risk management to ensure people are safe from harm or injury at work, the purpose of workers compensation is to compensate people for any harm or injury that they sustain in the workplace.
- 2.125 Workers' compensation laws can give some workers injured or harmed by workplace bullying an entitlement to compensation. It is not available to all workers though. Safe Work Australia submitted:
- workers' compensation is only available to about 88 per cent of workers and is not available to the self-employed.¹³⁶
- 2.126 The ACCI commented:
- [d]epending on the harm or injury suffered as a result of bullying, statutory compensation may be available through relevant "no-fault" workers' compensation schemes applying in each jurisdiction.¹³⁷
- 2.127 The principle of 'no-fault' is explained by Safe Work Australia:
- ...to be eligible, workers only have to prove that their injuries were work related - they do not need to prove negligence on the part of an employer.¹³⁸
- 2.128 Workers' compensation is regulated independently by state, territory and Commonwealth governments for workers within their jurisdiction. However, the schemes are broadly similar between jurisdictions.¹³⁹

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

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

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

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

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

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

- 2.129 In order to make a successful workers' compensation claim an injured worker must be able to show, on the balance of probabilities, that the harm or injury occurred in the course of their employment.¹⁴⁰
- 2.130 Although this requirement seems reasonable because the objective of workers' compensation is to compensate only for work related injuries, it could create a barrier to compensation for many people harmed or injured by workplace bullying.
- 2.131 JobWatch suggested that because the injuries that typically arise from workplace bullying are psychological in nature, such as stress, depression and anxiety, it is difficult for a person to point to evidence that proves the injuries exist or prove that they are work related.¹⁴¹ Similarly, headspace noted that this is in part because it is difficult to substantiate claims of bullying, particularly in those cases where the bullying is 'insidious or underhanded'.¹⁴²
- 2.132 Similarly, the Government of South Australia commented:
- Because of the nature of bullying behaviour, it is often exceptionally difficult to prove 'beyond reasonable doubt' that bullying occurred, as even overt behaviours are rarely witnessed either individually or electronically. This is one of the key reasons why bullying is so difficult to prosecute as a WHS breach under the WHS legislation.¹⁴³
- 2.133 By contrast, if a worker suffers a physical injury, it is much easier to identify and point to the physical cause of that injury at the workplace.
- 2.134 JobWatch added that because it is difficult to clearly shown that the harm or injury is work-related, workers' compensation claims for workplace bullying injuries are often denied by insurers in the first instance. They

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

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

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

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

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

Reasonable management action

2.135 A number of submissions drew attention to what could be a fine line between workplace bullying and reasonable management action where reasonable management action was perceived to be bullying¹⁴⁵ or where management action had crossed the line into bullying.¹⁴⁶ The Victorian Trades Hall Council (VTHC) explained that workers' compensation laws do not entitle workers to compensation for mental harm resulting from reasonable management action.¹⁴⁷

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

Stress arising out of management action taken on reasonable grounds and in a reasonable manner is excluded from compensation. The complication is that the line between bullying and legitimate discipline, or other specified action, is a fine one indeed and the hurdle of proving that action was taken unreasonably will often deter the aggrieved worker from pursuing the matter.¹⁴⁸

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

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

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

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

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

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

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

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

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

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

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

It is a common experience for VACC members that employees claim to have been bullied when they have actually been either disciplined or just asked to get on with their work. One VACC member reported an employee in tears because he had been asked to stop distracting other workers and return to his workstation. The worker complained to the Human Resources Manager that he had been bullied.

This example highlights the importance of ensuring that managers are free to manage their workplaces appropriately. Overly prescriptive regulation can only lead to more workplace disputation and confusion.¹⁵¹

Common law rights

- 2.140 Solicitors and industry stakeholders commented that workers may be able to sue their employer under common law for a workplace bullying injury if the employer was reckless or negligent in not preventing the bullying.¹⁵² However, workers' compensation laws expressly restrict, or in some jurisdictions prevent, injured workers from suing their employer for damages under the common law.¹⁵³
- 2.141 Safe Work Australia stated that in South Australia and the Northern Territory workers' compensation legislation extinguishes any right of injured workers to bring a common law claim for damages.¹⁵⁴
- 2.142 In other jurisdictions injured workers cannot bring a common law claim for damages against their employer unless the injury is of a level of seriousness prescribed in legislation.¹⁵⁵ For example, RCT Solicitors explained that in Victoria:

...even if it can be shown that the risk of injury was foreseeable, an employer can be sued for damages only if the worker has suffered

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

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

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

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

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

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

Disconnect between workers compensation and work health and safety laws

- 2.143 The ACTU stated that despite the complementary way in which the WHS laws and workers compensation appear to work, there is a disconnect between the regimes. They said this arises because a successful workers' compensation claim for a workplace bullying injury does not lead to an employer or individual 'bullies' being held responsible for the injury. Therefore, there is no accountability under WHS laws for employers who have breached their duty by not preventing the bullying or individual workers who actually engaged in the bullying.¹⁵⁷
- 2.144 This disconnect suggests that workers' compensation laws provide little incentive for an employer to improve their risk management and meet their WHS duties. Indicative of this, the VTHC submitted that even where there is a successful workers compensation claim, 'the bullying behaviours which caused the injury are rarely addressed and prevented from [re]occurring'.¹⁵⁸
- 2.145 The ACTU suggested that a better connection between workers compensation and the enforcement of WHS duties would provide better outcomes for injured workers.¹⁵⁹

Concluding comments

- 2.146 Workers in all Australian jurisdictions are protected against workplace bullying by a variety of existing legislative and regulatory frameworks. These frameworks encompass WHS law, criminal law, anti-discrimination law and industrial law as well as rights under common law and workers' compensation when protections fail.
- 2.147 However, none of these frameworks provide an 'all in one' response to workplace bullying; that is, none provide both universal protection and recourse. Thus, workers are left to navigate the overlapping frameworks,

156 RCT Solicitors, *Submission 106*, p. 14.

157 ACTU, *Submission 63*, p. 23.

158 VTHC, *Submission 139*, p. 3.

159 ACTU, *Submission 63*, p. 23.

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

- 2.148 The ongoing harmonisation of Australia's WHS laws will improve clarity about the protections that all workers have from workplace bullying. However, these laws alone cannot meet all people's expectations of how the law should address workplace bullying. Not least because there is a lack of transparency to allow a complainant to know what action has been taken by a regulator. Also, the high burden of proof that must be satisfied in criminal prosecutions under WHS laws mean that convictions are unlikely, particularly where the bullying has not been overt.
- 2.149 Remedies for bullied workers available under anti-discrimination, industrial relations and workers' compensation laws are limited because of the specific objectives of those laws. Navigating their way through these processes with little prospect of obtaining the types of remedies sought places further strain on people.
- 2.150 Attempting to access workers compensation could be particularly traumatising for a bullied worker because of the difficulties they encounter in trying to prove that their injury is work related. This trauma is no doubt exacerbated for those people who have an unsuccessful claim and are not able to use the common law to sue their bully for damages.
- 2.151 The next chapter considers how legislation is translated into practice through workplace policies and procedures that seek to prevent and redress workplace bullying.

