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**THE PROBLEM OF WORKPLACE BULLYING
AND THE DIFFICULTIES
OF LEGAL REDRESS:
AN AUSTRALIAN PERSPECTIVE**

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The Problem of Workplace Bullying and the Difficulties of Legal Redress: An Australian Perspective

Caroline Kelly

I. INTRODUCTION

In the recent past there has been an increasing recognition of workplace bullying as a serious issue both internationally and within Australia. Research clearly indicates its disturbing prevalence in the modern workplace and, moreover, illuminates the burdensome pecuniary and non-pecuniary costs of workplace bullying for the victim, the workplace and the wider community.

Presently there are various legal avenues that may be available to individuals who are the targets of workplace bullying. At common law, workplace bullying may give rise to a number of actions both in tort and contract. Under statute, targets of workplace bullying may be able to pursue legal redress pursuant to occupational health and safety legislation, anti-discrimination legislation or workers' compensation legislation. In addition to this, in certain circumstances, targets of bullying in the workplace may also seek recourse through the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') if they can demonstrate the breach of an enterprise agreement or modern award, unfair dismissal or adverse action.

This paper will argue, however, that when subjected to scrutiny it is apparent that these avenues may prove inadequate or unavailable for many victims of workplace bullying; where some are highly limited in their application, others may give rise to evidentiary problems as well as great cost and uncertainty. Though a wide variety of avenues of legal redress exist, none target workplace bullying as a legally cognisable harm in itself. Both individually and collectively, it will be contended that these avenues ultimately fail to address this serious issue and that, as a result, the legal landscape that confronts victims of workplace bullying is fragmented and inaccessible, with a number of substantial lacunae. To further demonstrate this point, a case study which is representative of both the nature of workplace bullying itself, and the difficulties of pursuing legal redress in its wake, will be examined.

It will be contended, then, that legal reform is necessary to address this issue. Based, in part, on specific legislative initiatives that have been implemented in countries such France and Belgium, this paper will propose a new, targeted statutory regime which seeks, through civil means, to name, proscribe and prevent workplace bullying *in specific terms*. The proposed legislation seeks to tackle workplace bullying on an individual level, through the proscription of workplace bullying behaviours, and on an organisational level, through the imposition of new obligations upon the employer to provide a workplace free from bullying. The enactment of such legislation under the umbrella of the *Fair Work Act* would enliven the complaint and compliance mechanisms of both the courts and the regulatory agencies of the Fair Work System. The proposed legislation would therefore tackle the problem of workplace bullying systematically and comprehensively, operating in both a preventive and remedial capacity. Such

an approach, this paper will argue, is fundamental in counteracting the cultural normalisation of bullying in Australian workplaces.

II. THE RISE AND RECOGNITION OF WORKPLACE BULLYING

Workplace bullying is increasingly recognised by scholars, public authorities and international institutions as a serious issue in workplaces all over the world. As Chappell and Di Martino have recognised, though

attention has traditionally focused on physical violence, and the typical profile of violence at work which has emerged has been largely one of isolated, major incidents ... in more recent years new evidence has been emerging of the impact and harm caused by non-physical violence in the workplace.¹

Workplace bullying has become a global issue as 'market pressures and deregulation'² have driven continuous 'restructuring, downsizing, outsourcing and performance management'³ in workplaces. As McCarthy and Mayhew argue, these experiences in workplaces 'have resonated with wider socio-economic and political threats'⁴ with workplace bullying emerging as 'a new signifier of distress that has acted as a solar collector of resentments'⁵ in an increasingly corporatised age where the pursuit of profit is paramount.

Workers, employers, public bodies, unions and scholars have expressed concern about the extent and severity of the issue and, perhaps in response to this, there has been a sharp rise in the number of surveys and reports conducted on the problem of workplace bullying. On the international front, the ILO has found psychological violence, harassment or bullying at work to be the most rapidly growing complaint from workers worldwide.⁶ In Europe workplace bullying was reported by over 13 million workers in the year 2000.⁷ In the United States a study conducted by the US National Institute for Occupational Safety and Health found that 24.5% of companies surveyed reported that some degree of bullying had occurred in their workplace during the preceding year.⁸ In developing countries the emergence of psychological violence and bullying at work has emerged as particularly widespread in the health sector. A study of workers in the health care sector across a variety of developing countries found that verbal abuse, bullying and mobbing were prevalent in Brazil (where 40% of respondents reported verbal abuse and 15% bullying or mobbing), Bulgaria (32% and 40%, respectively), South Africa (60%, 21%), Thailand (48%, 11%) and Lebanon (41%, 22%).⁹

¹ Duncan Chappell and Vittorio Di Martino, *Violence at Work* (International Labour Organisation, 3rd ed, 2006) 17.

² Paul McCarthy and Claire Mayhew, *Safeguarding the Organisation against Violence and Bullying* (Palgrave MacMillan, 2004) xv.

³ Ibid xiv.

⁴ Ibid xv.

⁵ Ibid.

⁶ 'When Work Becomes Hazardous' (1998) 26 *World of Work: The Magazine of the ILO* (online) <<http://www.ilo.org/public/english/bureau/inf/magazine/26/violence.htm>>.

⁷ Chappell and Di Martino, above n 1, 38.

⁸ Ibid 50.

⁹ Ibid 58.

As Di Martino and Chappell have highlighted, these general patterns and trends confirm ‘the global magnitude and dramatic importance’¹⁰ of this problem. The ILO has labelled psychological violence and bullying in the workplace as ‘a major policy issue and concern’¹¹ and have subsequently responded with a number of initiatives as a part of their ‘long standing and continuing commitment’ to ‘worker protection, dignity at work and safe and productive work environments’.¹² Foremost among these perhaps is the series of initiatives directed at drawing links between workplace violence (including psychological violence) and workplace stress through anti-stress manuals and more recently a ‘Stress at Work’ seminar of the Work Programme of the European Social Partners 2003—2005 with the aim of negotiating a voluntary agreement.

The widespread proliferation of workplace bullying and the increasing recognition of the phenomenon have been reflected in Australian workplaces. The Australian Council of Trade Unions have found that the most common source of stress at work is bullying by employers¹³ and bullying has even been discussed as ‘a new truth about contemporary workplaces’.¹⁴ The issue has recently attracted significant media coverage,¹⁵ particularly after the suicide of a young Victorian woman who was bullied in her café job.¹⁶ In a study conducted in 2002, psychological violence at work in Australia was shown to be far more prevalent than physical violence, with 67% of respondents reporting verbal abuse and 10.5% reporting mobbing and bullying.¹⁷

As McCarthy et al highlight, research and thinking about workplace bullying both internationally and within Australia is becoming increasingly refined and complex.¹⁸ Where early research could ‘arguably be characterised as a configuration of thought that recognised bullying as a single objective entity with mono-causal factors and mono-dimensional characteristics’,¹⁹ recently a more ‘sophisticated awareness of the complexity and heterogeneity of bullying experiences’²⁰ has indeed emerged. This new sophistication is defined by

¹⁰ Ibid 68.

¹¹ Ibid 266.

¹² Ibid.

¹³ Australian Council of Trade Unions Occupational Health and Safety Unit, *Stop Stress at Work* (October 2000) <http://workstress.net/downloads/aussiestressguide.doc>.

¹⁴ Caroline Hatcher and Paul McCarthy, ‘Workplace Bullying: In Pursuit of Truth in the Bully – Victim – Professional Practice Triangle’ (2002) 29 *Aust J Communication* 45.

¹⁵ See for example, Ben Schneiders, ‘Workplace Bullying Case ‘Worst Ever Seen’’, *The Age* (online), 29 April 2010 <http://www.theage.com.au/small-business/managing/workplace-bullying-case-worst-ever-seen-20100428-tshs.html>, Evelyn Field, ‘Employers have Failed to Help Victims of Workplace Bullying’ *The Age* (online), 12 February 2010 <http://www.theage.com.au/opinion/society-and-culture/employers-have-failed-to-help-victims-of-workplace-bullying-20100211-nuzt.html>, AAP, ‘Death Prompts Workplace Bullying Action’ *The Age* (online), 12 February 2010 <http://news.theage.com.au/breaking-news-national/death-prompts-workplace-bullying-action-20100212-nwok.html>.

¹⁶ This has prompted the introduction of the Crimes Amendment (Bullying) Bill 2011, which as of 11 April 2011 was being read for a second time in the lower house. This will be discussed in further detail in Part VIII(B) below.

¹⁷ Chappell and Di Martino, above n 1, 58.

¹⁸ See generally, Mayhew and McCarthy, above n 2, preface.

¹⁹ Paul McCarthy et al (eds), *Bullying: From the Backyard to the Boardroom* (The Federation Press, 2nd ed, 2001), xi.

²⁰ Ibid 1.

'complexity, multidimensionality, and an exploration of subjectivity and the construction and meaning of the phenomenon'.²¹

III. DEFINING WORKPLACE BULLYING AND IDENTIFYING ITS TARGETS AND PERPETRATORS

Though workplace bullying has been defined by various government departments, scholars, institutions and researchers, a conclusive sociological definition of workplace bullying remains elusive. Despite this, there appear to be a number of essential or *objective* elements that are common to most suggested definitions. According to these, workplace bullying:

- is **repeated** behaviour that is offensive, oppressive, unreasonable, unfair or inappropriate in the workplace;²²
- may be the behaviour of a **superior** or **co-worker**;²³
- may take place **in front of third parties** but need not necessarily do so and may be **covert** or occur **out of sight**;²⁴
- usually **escalates** in intensity over time;²⁵ and
- must be distinguished from **legitimate management practices**.

As Rylance highlights, however, definitions of workplace bullying are complicated by 'the growing awareness of the heterogeneity of the experience in terms of its nature and causal factors'.²⁶ Indeed, it is becoming increasingly apparent that subjectivity is 'essential to any understanding of workplace bullying'.²⁷ Thus, some such as Einarsen have defined workplace bullying as occurring when 'someone persistently, over a period of time, perceives himself to be on the receiving end of negative actions from one or several others, in a situation where the one at the receiving end has difficulties defending against these others'.²⁸

In any case, it is well established that workplace bullying can occur 'in a number of ways'²⁹ and may include any of the following behaviours:³⁰

- verbal abuse, intimidation or hostility;
- physical gestures;

²¹ Ibid xii.

²² Des Butler, *Employer Liability for Workplace Trauma* (Ashgate Publishing, 2002) 24.

²³ Ibid.

²⁴ Ibid. See also Chappell and Di Martino, above n 1, 20.

²⁵ Chappell and Di Martino, above n 1, 20.

²⁶ Jane Rylance, 'Bullying in the Helping Professions' in McCarthy et al (eds *Bullying: From the Backyard to the Boardroom* (The Federation Press, 2nd ed, 2001) 23, 24.

²⁷ Ibid.

²⁸ Stale Einarsen, 'Bullying and Harassment at Work: A Review of the Scandinavian Approach' (2000) 5 *Aggression and Violent Behaviour* 379.

²⁹ Chappell and Di Martino, above n 1, 21.

³⁰ UNISON, 'Bullying at Work: Guidance for Safety Representatives and Members on Bullying at Work and How to Prevent it' (London, 1996); Loreleigh Keashly, 'Emotional Abuse in the Workplace: Conceptual and Empirical Issues' (1998) 14 *Journal of Occupational Health and Safety* 575, 576; Paul McCarthy, 'The Safeguarding Challenge' in Paul McCarthy and Claire Mayhew, *Safeguarding the Organisation against Violence and Bullying* (Palgrave MacMillan, 2004) 1, 9.

- ignoring or giving the target the ‘silent treatment’;
- insulting, belittling or demeaning the target either in front of colleagues or privately;
- bad-mouthing the target to others behind the target’s back;
- insisting that a particular way of doing things is always right;
- refusing to delegate or provide work to the target;
- withholding information from the target;
- making unreasonable work demands of the target, such as overloading beyond capacity or reducing deadlines in order to make the target appear incompetent;
- taking credit for a target’s work;
- deliberately blocking promotion in the hope that the target will resign; or
- excluding the target from social aspects of work.

Some have argued that targets and perpetrators of workplace bullying commonly fit typical profiles. Butler, for example, identifies four main ‘types’ of target: ‘nice people’ who are ‘perceived by bullies as being unlikely to confront or stop them’, ‘vulnerable people’ who ‘present a non-threatening profile’ and the ‘best and brightest people’ who are ‘targeted because they threaten the bully’s presumption of superiority and reinforce the bullies’ own feelings of inadequacy’.³¹ Thornton and Yamada argue that bullies, on the other hand, are likely to be ‘of institutional superiority’³² and may themselves be mediocre or perform inadequately at work. Thornton also identifies what may be described as a ‘serial bully’³³ who may target multiple individuals with similar characteristics, moving ‘from target to target’.³⁴ Some such as Clarke have labelled such individuals ‘workplace psychopaths’³⁵ who are skilled in manipulation, deception and intimidation. It is dangerous, however, to attempt to type cast those who bully or who are the targets of bullying. The phenomenon of workplace bullying is one of complex multidimensionality that makes simple assumptions and distinctions impossible to draw.

It should also be noted that various studies, including those conducted by the ILO,³⁶ have shown that workers in particular occupational groups and situations — including tertiary, health, military, construction and police sector employees — were at increased risk of being subjected to bullying, psychological violence, or violence more generally at work.

IV. THE CAUSES AND COSTS OF WORKPLACE BULLYING

A. *The Causes of Workplace Bullying*

As Butler highlights, ‘no one truly knows why people bully’.³⁷ Indeed, identifying the causes of bullying has proved to be a key problem in the literature.³⁸ Zapf identifies four potential causes

³¹ Butler, above n 22, 25-26.

³² Margaret Thornton, ‘Corrosive Leadership (Or Bullying by Another Name): A Corollary of the Corporatized Academy?’ (2004) 17 *Australian Journal of Labour Law* 1, 6, David Yamada, ‘The Phenomenon of Workplace Bullying and the Need for Status-Blind Work Environment Protection’ (2000) 8 *Georgetown L Jnl* 475, 483.

³³ Thornton, above n 32, 7.

³⁴ *Ibid.*

³⁵ John Clarke, *Working with Monsters: How to Identify and Protect Yourself from the Workplace Psychopath* (Random House, 2005).

³⁶ Chappell and Di Martino, above n 1, ch 3.

³⁷ Butler, above n 22, 26.

of workplace bullying: the perpetrator, the organisation, the social group at work and the victim.³⁹ It should be noted, however, that these causal paths are complex and overlapping; as Zapf highlights, for example, 'whilst organisational factors may lead to observable bullying behaviour and to health complaints in the victim, one could also assume that anxious, depressive or obsessive behaviour produces a negative reaction in the group, resulting in bullying after some time'.⁴⁰

Some studies have shown that the most frequent reason victims or targets have given for their situation is a desire on behalf of the bully to 'push [them] out of the company'.⁴¹ Other studies have shown causal factors related to the perpetrator such as envy,⁴² weakness and competition for tasks, status, advancement or a superior's favour.⁴³ Some such as Thornton have also suggested that the main reason bullying occurs is to hide inadequacy.⁴⁴ Organisational factors such as career pathways and promotional structures may affect the incidence of workplace bullying, and some have also argued that corporatisation and managerialism have a role to play. Thornton, for example, highlights that the pervasiveness and impermeability of managerial rhetoric facilitates workplace bullying by masking workplace brutality with the positive language of management.⁴⁵ The characteristics of the victim and their social group at work have also been recognised as potentially affecting the occurrence of workplace bullying.⁴⁶

Ultimately it must be recognised that there are multiple, often overlapping, causes of workplace bullying and it is essential, when discussing the issue, to appreciate the 'heterogeneous nature of bullying and its various causes'.⁴⁷

B. The Costs of Workplace Bullying: A High Price to Pay

Research clearly demonstrates that the costs, both pecuniary and non-pecuniary, of workplace bullying for the victim, the workplace and the community as a whole can be devastating.

As Di Martino and Chappel have highlighted, on an individual level 'the cost of personal suffering and pain'⁴⁸ resulting from workplace bullying is hard to quantify. Targets of workplace bullying may experience feelings of helplessness, isolation, withdrawal, fear of dismissal, damage to their reputation or damage to career prospects. These kinds of suffering and humiliation, however, are not 'self-contained events'⁴⁹ and can in turn lead to depression, anxiety, anger and severe stress. The ILO has found that if the causes of such feelings are not halted, and the effects not contained, such symptoms can 'develop into physical illness,

³⁸ Dieter Zapf, 'European Research on Bullying at Work' (1999) in McCarthy et al (eds *Bullying: From the Backyard to the Boardroom* (The Federation Press, 2nd ed, 2001) 1, 15.

³⁹ Ibid.

⁴⁰ Ibid 16.

⁴¹ Ibid.

⁴² See for example Bjorkqvist et al, 'Aggression Among University Employees' (1994) 20 *Aggressive Behaviour* 379 and Stale Einarsen et al 'Bullying and Harassment at Work and Their Relationships to the Work Environment Quality: An Exploratory Study' (1994) 4 *European Journal of Work and Organisational Psychology* 381.

⁴³ Einarsen, above n 27.

⁴⁴ Thornton, above n 32.

⁴⁵ Ibid.

⁴⁶ Zapf, above n 38, 19.

⁴⁷ Ibid 20.

⁴⁸ Chappell and Di Martino, above n 1, 136.

⁴⁹ Ibid.

psychological disorders, tobacco, alcohol and drug abuse and ... can culminate in reduced employability, invalidity and even suicide'.⁵⁰ Scott and Stradling have suggested that Post Traumatic Stress Disorder can result from a situation in which an individual is the target of 'prolonged and unremitting bullying at work'.⁵¹

The devastating personal ramifications of workplace bullying can extend beyond the target to people 'in proximity to the act and even to people far removed or physically absent from the place'⁵² where the bullying has occurred. As Chappell and Di Martino point out, then, the effects of workplace bullying and violence can 'pervade the entire workplace, the family of the victim and the community in which they live'.⁵³

A comprehensive study of the financial costs of workplace bullying conducted by Sheehan et al in 2001 evidences the demonstrable pecuniary costs involved.⁵⁴ The study estimates that every case of workplace bullying costs the workplace involved between AU\$16,977 and AU\$24,256. Average annual costs to smaller organisations were estimated to be between AU\$17,000 and AU\$24,000 per annum and cost estimates for larger corporations, including direct, hidden and lost opportunity costs ranged from AU\$600,000 and \$3.6 million per 1,000 employers, per annum. The study also estimated national costs to be AU\$6 — 13 billion including hidden and lost opportunity costs. This model indicated that between 350,000 and 1.5 million Australians could be the targets of workplace bullying.

As the ILO has reported, there seems to be widespread acceptance that psychological violence or bullying at work is a 'major though still under recognised issue' which poses an 'extremely costly burden to the worker, the enterprise and the community'.⁵⁵ It is not just 'an episodic, individual problem' but rather a 'structural, strategic problem rooted in wider social, economic, organisational ... and cultural factors'⁵⁶ which is overwhelmingly detrimental to the workplace. Most importantly, it is a problem which needs to be 'tackled, and tackled now'.⁵⁷

This paper will now focus upon the legal aspects of this issue by first presenting those avenues presently available to targets of workplace bullying and, second, interrogating the adequacy of those avenues.

V. WORKPLACE BULLYING IN AUSTRALIA: AVAILABLE AVENUES OF REDRESS

Issues of legal responsibilities and rights where workplace bullying is concerned are inherently complex. As the ILO has highlighted, the 'statutory and regulatory provisions that apply can touch on difficult questions of ... civil law, occupational health and safety legislation, workers'

⁵⁰ Ibid.

⁵¹ Michael Scott and Stephen Stradling, 'Trauma, duress and stress' in Noreen Tehrani (ed) *Building a Culture of Respect: Managing Bullying* (Taylor and Francis, 2001) 33. For a medical perspective of workplace trauma, see also Butler, above n 22, ch 1.

⁵² Chappell and Di Martino, above n 1, 136.

⁵³ Ibid.

⁵⁴ Sheehan et al, 'A model for assessing the impacts and costs of workplace bullying' (Paper presented at the Standing Conference on Organisational Symbolism, Trinity College Dublin, 30 June – 4 July 2001).

⁵⁵ Chappell and Di Martino, above n 1, 23.

⁵⁶ Ibid.

⁵⁷ Ibid.

rehabilitation and compensation statutes and environmental and labour laws'.⁵⁸ Indeed, this paper seeks to explore the complex interaction between these legal areas and the legal landscape they constitute.

The legal avenues that *may* currently be open to individuals who are targets of bullying in the workplace will now be explored. At common law, the occurrence of workplace bullying may give rise to a variety of actions in tort and contract, often concurrently. A number of statutory avenues may also be available under occupational health and safety legislation, anti-discrimination legislation, workers' compensation and the *Fair Work Act*.

A. Common Law Avenues

1. Tort

(a) Breach of the Employer's Duty of Care

Employers owe their employees a personal duty to provide a safe system or place of work or 'to take reasonable care to avoid exposing employees to unnecessary risks of injury'.⁵⁹ In some circumstances, where an employee is subjected to bullying in the workplace, such an occurrence may give rise to a breach of this non-delegable duty which also extends to the provision of a workplace free of psychiatric injury.⁶⁰ To establish a successful negligence claim for breach of this duty an employee must satisfy several main elements: existence of the duty of care, breach of the relevant standard of care and resulting damage which is not too remote and which has been caused by the employer's conduct. Therefore, a plaintiff is required to show proof of injury caused by the negligence of the employer in circumstances 'where a reasonably prudent employer would have foreseen and guarded against the risk of the injury occurring'.⁶¹

(b) Vicarious Liability

Where an individual is bullied in the workplace by a fellow employee, a common law cause of action may arise on the basis that the employer is vicariously liable for the actions of other employees. Employers bear legal responsibility for actions by employees which are either expressly authorised or which amount to 'an unauthorised mode of doing an authorised act'.⁶² Liability, however, does not attach to actions which are undertaken by an employee independently and outside the scope of employment.⁶³

(c) Liability for Intentional Infliction of Harm

The harassment or bullying of a plaintiff by a fellow employee may constitute the intentional infliction of harm or of psychiatric illness based on the principle enunciated in *Wilkinson v Downton* [1897] 2 QB 57 ('*Wilkinson*'). In that case, the plaintiff, who suffered nervous shock as a result of a fellow employee's practical joke, successfully recovered damages for that injury 'in an action comprising a wilful act calculated to cause, and in fact causing, physical harm to the

⁵⁸ Chappell and Di Martino, above n 1, 147.

⁵⁹ *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18, 25 per Dixon CJ and Kitto J.

⁶⁰ *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR 383.

⁶¹ Breen Creighton and Peter Rozen, *Occupational Health and Safety Law in Victoria* (The Federation Press, 2nd ed, 1997) 68.

⁶² Butler, above n 22, 85.

⁶³ *Joel v Morison* (1834) 6 C&P 501, 503.

plaintiff.⁶⁴ Wright J considered the defendant to be liable because ‘the defendant’s act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant’.⁶⁵

Though in *Magill v Magill* (2006) 226 CLR 551 Gummow, Kirby and Crennan JJ commented that the *Wilkinson* principle has been entirely subsumed under the law of negligence, it has since been successfully utilized to provide remedy in a case of workplace bullying in the recent case of *Nationwide News v Naidu* (2007) ATR 81 (*‘Naidu’*). The exact requirements of *Wilkinson*, however, which have ‘puzzled generations of tort lawyers’,⁶⁶ in particular the meaning of ‘calculated’, were not explored in detail in that case. In addition to this, as Rathmell and Whitbourn highlight, the result in *Naidu* was clearly ‘dependent upon a particular alignment of facts’⁶⁷ in the sense that the bullying of the employee in that case was extreme, sustained and, furthermore, known to the employer itself.

2. Contract

(a) Breach of the Employer’s Implied Duty of Care

There is an implied, if not express, duty in all employment contracts as a matter of law to take reasonable care not to expose employees to health and safety risks at work. Bullying in the workplace may constitute the breach of such a duty. The content of the duty itself is identical to the tortious personal duty of the employer outlined above and exists concurrently,⁶⁸ though the requirements and rules in establishing liability are different.

To successfully establish this cause of action, a plaintiff must prove that the employer has breached the implied term, and that the loss to the plaintiff was caused by the breach and was not too remote.⁶⁹ A plaintiff also cannot recover damages to the extent that the loss could have been mitigated by reasonable efforts of the plaintiff.

(b) Breach of the Implied Term of Mutual Trust and Confidence

In recent times, Australian courts have tentatively recognised an implied term of mutual trust and confidence in Australian employment contracts. This is the duty of the employer not to act in a manner likely to damage or destroy the relationship of mutual trust and confidence between the parties as employer and employee. Though this has ‘long been a feature of employment law in the United Kingdom’⁷⁰ uncertainty still surrounds its application in Australia and judicial acceptance of the term could be described as tacit at best.

Despite this there is some chance, albeit minimal, that targets of workplace bullying may be able to argue that exposure to such bullying constitutes a breach of this implied duty.

⁶⁴ Aaron Rathmell and Michaela Whitbourn, ‘*Wilkinson v Downton* at Work: Employer’s Liability for Intentionally Inflicted Psychiatric Injury’ (2008) 21 *Australian Journal of Labour Law* 339, 347.

⁶⁵ *Wilkinson v Downton*, 59.

⁶⁶ *Wainwright v Home Office* [2002] QB 1334, [75] as per Buxton LJ.

⁶⁷ Rathmell and Whitbourn, above n 63, 351.

⁶⁸ *Matthews v Kuawait Bechtel Corporation* [1959] 2 QB 57, 65.

⁶⁹ Damage will be considered not too remote if it, in accordance with the rule from *Hadley v Baxendale* (1854) 9 Exch 341, arises in the natural course of things and ought reasonably to have been in the parties’ contemplation at the time of formation of contract.

⁷⁰ Rachael White, ‘A Set Back for Mutual Trust and Confidence?’ (2010) 17 *Australian Journal of Labour Law* 220.

B. Statutory Avenues

1. Occupational Health and Safety Legislation

Occupational health and safety legislation in every Australian jurisdiction imposes a duty upon the employer to ensure, so far as is reasonably practicable, a working environment that is safe and without risks to health.⁷¹ The duty includes attention to tangible factors such as machinery and substances used at work, work processes, work arrangements and the physical environment of the workplace but also extends to the 'intangible environment'⁷² including the 'presence of stress factors'⁷³ such as working hours, staffing levels and harassment by fellow employees. For all intents and purposes this duty could be said to be 'a statutory reenactment of the common law duty of care'⁷⁴ and targets of workplace bullying may pursue this avenue by arguing that exposure to bullying at work constitutes a failure to provide a safe working environment.

2. Anti-Discrimination Legislation

There are laws in all Australian jurisdictions that prohibit discrimination in a range of contexts including education, the provision of goods and services and, of course, employment. Such laws prohibit not only discriminatory conduct in the course of hiring, firing, the provision of entitlements and career path progression, but also 'various forms of harassment or vilification'.⁷⁵ Targets of workplace bullying may be able to seek redress under anti-discrimination law if they feel that the relevant behaviour has occurred in relation to a particular attribute of the target such as their sex, sexuality, race, colour, age, physical or mental disability, marital status, pregnancy, religion, political opinion or social origin. Each of the central federal statutes deal with a different form of discrimination.⁷⁶ Targets of discriminatory workplace bullying may alternatively make a complaint under state legislation.⁷⁷

3. Workers' Compensation

The statutory schemes of workers' compensation⁷⁸ are designed to provide compensation for individuals who suffer from work-related injuries and targets of workplace bullying may be able to pursue this remedial avenue. The statutory regime provides 'no-fault' cover; that is, a claim

⁷¹ *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth), s 16; *Occupational Health and Safety Act 1983* (NSW), ss 15, 53; *Occupational Health and Safety Act 1989* (ACT), s27; *Occupational Health and Safety Act 1985* (Vic), s 21; *Occupational Safety and Health Act 1984* (WA), s 19; *Work Health Act 1986* (NT), s 29; *Workplace Safety Act 1995* (Qld), s 28; *Occupational Health, Safety and Welfare Act 1986* (SA), s 19; *Workplace Health and Safety Act 1995* (Tas), s 9.

⁷² Creighton and Rozen, above n 60, 66.

⁷³ *Ibid.*

⁷⁴ *Ibid.* 69.

⁷⁵ Andrew Stewart, *Stewart's Guide to the Law of Employment* (The Federation Press, 2nd ed, 2009), 246.

⁷⁶ The central federal statutes are the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Age Discrimination Act 2004* (Cth) and the *Disability Discrimination Act 1992* (Cth).

⁷⁷ This includes the *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1995* (Vic), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1985* (SA), *Equal Opportunity Act 1985* (WA), *Anti-Discrimination Act 1998* (Tas), *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1992* (NT).

⁷⁸ See *Workers' Compensation Act 1951* (ACT); *Workers Compensation Act 1987* (NSW); *Work Health Act 1986* (NT); *WorkCover Queensland Act 1996* (Qld); *Workers Rehabilitation and Compensation Act 1986* (SA); *Workers Rehabilitation and Compensation Act 1988* (Tas); *Accident Compensation Act 1985* (Vic); *Workers' Compensation and Rehabilitation Act 1981* (WA); *Safety, Rehabilitation and Compensation Act 1988* (Cth).

can be successful 'regardless of whether the injury or illness arose from any negligence on the part of the employer'.⁷⁹ To make a successful claim for payment, an applicant must usually show that they have suffered an injury which arose out of or in the course of employment and that the injury resulted in a consequence specified by the legislation. Each scheme provides more detail as to what falls within or outside the scope of employment and some illnesses may only be considered compensable where there is some 'significant' link to work in regards to causing the illness.⁸⁰ Claims for psychiatric illness arising from workplace stress are further limited by the proviso that illness caused by 'reasonable administrative action' by the employer is not compensable.

It is important to note that in many Australian jurisdictions a claim for workers' compensation may affect the ability of the applicant to seek common law damages; in NSW, for example, a claimant must elect either statutory compensation for permanent impairment *or* common law damages.

4. *The Fair Work Act*

In 2009 the *Fair Work Act* replaced the Workplace Relations Act 1996 (Cth) as Australia's national industrial legislation. The *Fair Work Act* seeks to regulate the employment relationship through the provision of a 'safety net' of minimum terms and conditions through the National Employment Standards (NES) and modern awards, as well as through an emphasis on enterprise-level collective bargaining, which cannot be undermined by individual employment agreements. Though workplace bullying is not in itself illegal under the Act, in limited circumstances its occurrence may enliven some of the Act's remedies. Notably, the Fair Work Ombudsman has the power to investigate alleged contraventions of the Act and may litigate on behalf of a national system employee against a national system employer for any contravention of the Act.

(a) Workplace Bullying as a Contravention of an Enterprise Agreement or Modern Award

If an enterprise agreement which applies to a target of workplace bullying contains a clause dealing with workplace health and safety or bullying and harassment, the target may claim that a contravention of the enterprise agreement has occurred pursuant to s 50 of the *Fair Work Act*. This is a civil remedy provision under Part 4-1 of the Act, the contravention of which enables the Court to make 'any order the Court considers appropriate',⁸¹ which may include an order granting an injunction, or interim injunction to prevent, stop or remedy the effects of a contravention,⁸² an order awarding compensation for loss that a person has suffered because of a contravention,⁸³ or an order for reinstatement of a person.⁸⁴ Importantly this means that an employer could be forced by court order to remove a workplace bully from the working environment of the complainant in the event that a contravention of an enterprise agreement is established.

⁷⁹ Stewart, above n 75, 267.

⁸⁰ Ibid.

⁸¹ *Fair Work Act 2009* (Cth) s 545 (1).

⁸² Ibid s 545(2)(a).

⁸³ Ibid s 545(2)(b).

⁸⁴ Ibid s 545(2)(c).

Indeed, recent media coverage of the issue indicates that particular trade unions, including the Construction, Forestry, Mining and Energy Union will 'demand there be a clause in future [enterprise] agreements that ensures companies act quickly on complaints in a fair, proper, impartial investigation',⁸⁵ provide adequate support to victims, keep good records of meetings and develop anti-bullying policies.⁸⁶ The Union's Victorian and Assistant National Secretary commented recently that the 'groundbreaking' strategy would become 'a standard clause in our agreements' and that companies with whom the Union was negotiating for the first time 'would be hit with the clause'.⁸⁷ In addition to this, companies with whom the union has already dealt would be forced to face the new strategy when new enterprise agreements were negotiated. Professor Andrew Stewart highlighted that this approach provides 'a new avenue' for unions and workers that exists separately from 'any common law rights or rights under occupational health and safety laws' and would 'place employers in a difficult position'.⁸⁸ Professor Stewart further commented that though situations involving workplace bullying were 'often tricky and ... complicated', this measure 'makes [the employer] directly liable as an organisation in a way that may not have been the case before'.⁸⁹ Notably, should such provisions exist in a modern award that applies to a target of workplace bullying, similar results could be achieved should that provision be contravened pursuant to s 45 of the Act.

(b) The General Protections of the Fair Work Act

The General Protections under Part 3-1 of the *Fair Work Act* proscribe an employer from taking 'adverse action' against an employee because the employee has exercised, proposed to exercise or failed to exercise a workplace right.⁹⁰ Adverse action includes dismissing the employee,⁹¹ injuring the employee in his or her employment⁹² or altering the position of the employee to the employee's prejudice.⁹³ Targets of workplace bullying may be able to bring a claim, for example, where an employer bullies the employee in response to the employee having taken industrial action. Alternatively, an employee may be able to claim adverse action where they have made a bullying-specific complaint directly to the employer and the bullying behaviour by the employer continues or worsens. Such a claim, were it to be successful, would result in the contravention of a civil remedy provision.⁹⁴

The General Protections of the Act also prohibit an employer from taking adverse action against an employee because of the employee's 'race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin'.⁹⁵ Thus, if an employee is subjected to workplace bullying by an employer because of one of the above attributes, the employee may be able to pursue a claim for contravention of the Act and take advantage of the remedies it offers.

⁸⁵ Ben Schneiders, 'Unions to Use Courts to End Bullying', *The Age* (online) 10 September 2010 <http://www.theage.com.au/victoria/union-to-use-courts-to-end-bullying-20100915-15cnc.html>.

⁸⁶ Ibid.

⁸⁷ As quoted by Shneiders, above n 85.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ *Fair Work Act 2009* (Cth) s 340.

⁹¹ Ibid s 342(1), 1(a).

⁹² Ibid s 342(1), 1(b).

⁹³ Ibid s 342(1), 1(c).

⁹⁴ Ibid s 340.

⁹⁵ Ibid s 351.

Importantly, a complainant may apply to have Fair Work Australia deal with a General Protections dispute involving a dismissal.⁹⁶ FWA may also be requested to deal with non-dismissal disputes,⁹⁷ however both parties must agree to the FWA-organised conference.⁹⁸

(c) Unfair Dismissal under the Fair Work Act

If a national system employee has been pressured into resignation as a result of workplace bullying they may be able to seek recourse through the unfair dismissal provisions of the *Fair Work Act*. If the employee satisfies the minimum employment period requirement⁹⁹ and they are either below the high income threshold¹⁰⁰ or are covered by an award or enterprise agreement,¹⁰¹ a target of workplace bullying may be able to show that they were constructively dismissed; that is, that they were forced to resign because of the conduct of the employer.¹⁰² It is important to note, however, that the implications of the term ‘forced’ are somewhat unclear; as Stewart highlights, whether this requires the employee ‘to show that they were effectively compelled to resign, that they had no real option to remain’ or whether it is sufficient to show that the employer has ‘seriously breached its obligations’ is uncertain.¹⁰³ In any case it is well established that resignation of the employee’s own accord without any repudiation by the employer is insufficient to constitute a dismissal.

VI. THE LEGAL LANDSCAPE OF WORKPLACE BULLYING IN AUSTRALIA: DO THE PARTS MAKE A WHOLE?

Upon reflection it is clear that there are a large number of potentially available avenues of legal redress open to individuals who are the targets of workplace bullying. This paper will now inquire into the extent to which these avenues are adequate to address workplace bullying which, as was discussed in Part I above, is a serious issue in Australian workplaces. It is important to interrogate whether the various avenues discussed present, individually or collectively, a response which is comprehensive, efficient and accessible for workers subjected to bullying in the workplace. It will be argued that, when scrutinised closely, they do not. Despite the positive developments that have been introduced by the *Fair Work Act*, the legal landscape which ultimately confronts the targets of workplace bullying is fragmented, uncertain and in some instances, totally inadequate. Indeed, gaps in the existing framework are so substantial, that many victims of workplace bullying may find themselves with no attainable avenues of recourse at all.

⁹⁶ Ibid s 365.

⁹⁷ Ibid s 372.

⁹⁸ Ibid s 374(1)(b).

⁹⁹ Ibid s 382(a). Under s 383- 384 an employees satisfies the minimum employment period if they have worked for a period of continuous service for either 6 months if the employer is not a small business employer, or 1 year if the employer is a small business employer.

¹⁰⁰ Ibid s 382(b)(iii).

¹⁰¹ Ibid s 382(b)(i)-(ii).

¹⁰² Ibid s 386(1)(b).

¹⁰³ Stewart, above n 75, 305.

A. *The Uncertainty and Inaccessibility of Recourse at Common Law*

The common law causes of action which were discussed above in Part V(A) are perhaps the avenues most widely available to targets of workplace bullying. Despite this, however, the degree to which they are in reality *accessible* to many Australian workers and the level of *certainty* they offer leaves much to be desired.

The tortious avenues discussed above, including actions for breach of the employer's personal non-delegable duty of care, vicarious liability and intentional infliction of harm, present onerous requirements which may prove fatal to claims of workplace bullying. This may be the case on a number of levels. First, it may be difficult to establish that a legally-recognisable harm has occurred. Though the law does recognise psychiatric injury as a compensable harm, as Butler highlights, at common law 'no compensation is provided for lesser harm' or 'ordinary emotional responses' such as anxiety, fear, horror, loneliness or shame.¹⁰⁴ Indeed, as Thornton argues, Anglo-Australian law does not recognise 'dignitary harms', such as the damage that workplace bullying can cause to the autonomy, personhood, privacy, decency and self-respect, as compensable or choate.¹⁰⁵

Second, it may be very difficult to establish that the harm caused to the plaintiff was reasonably foreseeable. Because reasonable foreseeability is an objective standard, the courts have recognised the requirement of a 'normal standard of susceptibility'.¹⁰⁶ Thus, if a plaintiff is judged to be of extraordinary sensitivity, and their mental injury unlikely to have been sustained by a 'normal person', they will be unable to recover damages unless the employer had specific knowledge of their sensitivity. Though it has been recognised that the idea of 'a man of normal emotional fibre as distinct to a man sensitive, susceptible and more easily disturbed emotionally and mentally is ... imprecise and scientifically inexact',¹⁰⁷ this test has been embraced by Australian courts and has furthermore been applied in the context 'of a claim by an employee against his or her employer for psychiatric injury arising from a failure to provide a safe system of work'.¹⁰⁸

Third, a plaintiff bringing an action in negligence in the context of workplace bullying may also have difficulty proving that the relevant conduct *caused* their mental injury. As by its very nature workplace bullying can be covert or underhanded, even proving its initial existence can be difficult and proving that it is those matters which caused the harm to the plaintiff can sometimes be impossible.¹⁰⁹ In addition to these difficulties, pursuing adversarial litigation in tort can be, and often is, lengthy and costly, making it practically inaccessible for many working Australians. The evidentiary difficulties that may arise with claims of this nature, moreover,

¹⁰⁴ Butler, above n 22, 80.

¹⁰⁵ Thornton, above n 32, 1.

¹⁰⁶ *McLoughlin v O'Brian* [1983] 1 AC 410, 431.

¹⁰⁷ *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR 383, 405 as per Windeyer J.

¹⁰⁸ See for example, *Bunyan v Jordan* (1937) 57 CLR 1, 14; *Arnold v Midwest Radio Ltd* (1998) Aust Tort Reports 81; *State of New South Wales v Seedsman* [2000] NSWCA 119.

¹⁰⁹ See for example the case of *Arnold v Midwest Radio* (1998) Aust Tort Reports 81. This case involved a plaintiff who was subjected to severe and relentless bullying in her workplace at the hands of another employee. At trial the employer company was found liable on two bases: for breach of the personal duty to provide a safe working environment as well as vicarious liability for the actions of the bullying employee. This result was overturned appeal where it was held that the plaintiff had failed to show that 'it was those matters in isolation that caused the condition from which the plaintiff suffered'. Special leave to the High Court was denied.

may further increase the cost of pursuing such an avenue. The expense and uncertainty of pursuing such an avenue may act, then, as a significant deterrent to targets of workplace bullying, especially if they are suffering from mental injuries caused by their treatment at work.

The pursuance of a common law action in contract for breach of the implied term obliging the employer to provide a safe working environment is not greatly advantageous in comparison with its tortious counterpart. As the test for remoteness is somewhat less demanding than the satisfaction of reasonable foreseeability in tort, issues of proof may be marginally less difficult in a contractual action. Other than this small benefit, however, targets of workplace bullying may find a contractual avenue to be similarly costly, time consuming and uncertain. Moreover, there is an opportunity for the employer to argue that the victim failed to mitigate the loss caused by breach of the implied term and, to the extent that this can be proved, damages will be reduced.¹¹⁰

Where claims for breach of the implied term of mutual trust and confidence are concerned, the uncertainty of the existence and content of the term in Australia limit the value of this avenue, despite the fact that in England employees have successfully sought remedy via this avenue where no such remedy was available in tort.¹¹¹

B. The Limitations of Statutory Avenues

Though a number of potential statutory avenues exist where workplace bullying is concerned, upon closer inspection it seems that, where some add little to the avenues available at common law, others will be available only in very limited circumstances.

As Butler highlights, an action under occupational health and safety legislation may 'add little if anything to the strength of the case of a plaintiff who is already suing for breach of common law duty of care'.¹¹² Moreover, utilization of the statutory avenue does not 'obviate the need for the plaintiff to demonstrate a causal link between his or her condition and the deficiency in the workplace'¹¹³ required for an action in common law.

Anti-discrimination laws, whilst they provide highly useful and reasonably accessible remedial avenues to individuals who are bullied at work *because* of some prescribed personal attribute such as race, sex or gender, do not cater to the large number of workers who are subjected to non-discriminatory workplace bullying or harassment.

Avenues of redress that have recently become available under the *Fair Work Act*, whether through the enforcement of modern awards and enterprise agreements or through the general protections of the Act against discrimination, adverse action and unfair dismissal, may be extremely useful to those who are able to utilize them. It remains, however, that many targets of workplace bullying may find that they are not covered by the Act in these senses. Even assuming that a worker is covered by the Act in the sense that they are a national system employee, if that worker does not have a modern award or enterprise agreement which addresses workplace bullying, cannot show that adverse action has occurred, has not been

¹¹⁰ Though the plaintiff is not required to have resort to measures which are costly, complex or extravagant, they are still required to do what is 'reasonable' under the circumstances: *Burns v MAN Automotive* (1986) 161 CLR 653.

¹¹¹ See for example, *Gogay v Hertfordshire County Council* [2000] IRLR 703.

¹¹² Butler, above n 22, 84.

¹¹³ *Ibid.* See also, for example, *Queensland Corrective Services Commission v Gallagher* [1988] QCA 426.

discriminated against or has not been dismissed, constructively or otherwise, the behavior in question may not be unlawful under the Act. In other words, though the *Fair Work Act* provides a number of avenues which *may* be useful to *some* targets of workplace bullying, the Act does not prohibit workplace bullying in itself and most of the time targets will have no recourse pursuant to its provisions.

C. *The Collective Inadequacy of Available Avenues of Redress*

Some targets of workplace bullying may have multiple avenues of recourse available to them. If bullying is discriminatory in nature, anti-discrimination laws may provide useful means of redress and if the individual can demonstrate breach of an enterprise agreement or modern award, adverse action or unfair dismissal, they may be able to utilise the various protections of the *Fair Work Act*.

Ultimately, however, a significant proportion of Australian workers who are harmed by the experience of workplace bullying — for example, those who cannot show that the relevant conduct constitutes discrimination, adverse action or the breach of an enterprise agreement or modern award — will find that their only avenues of potential legal recourse lie at common law, occupational health and safety or workers' compensation laws.

As Chappel and Di Martino highlight, access to common-law remedies 'can be difficult', the pursuit of which 'after an incident of violence can draw plaintiffs into costly, indeterminate and stressful litigation'.¹¹⁴ As McCarthy argues,

while legal remedies for overt forms of violence may be accessible ... difficulties remain in proving less overt negative actions ... were the predominant cause of psychological injury. The accessing of legal remedies is time consuming and involves the painstaking recall, documentation and witnessing of incidents and their attributed causes and effects. The added trauma and cost entailed also acts to sustain and compound the severity of impacts.¹¹⁵

As occupational health and safety and workers' compensation laws do little to enhance this situation, it is the contention of this paper that the avenues of redress explored above present, collectively, a legal landscape which is fragmented, uncertain and inadequate. Though a multiplicity of avenues exist, none are directed specifically to addressing the unique but ubiquitous problem of workplace bullying. In order to pursue legal remedy victims of workplace bullying must demonstrate that their treatment fits into a recognised category of legal harm as workplace bullying *in itself* is not legally cognisable.

This paper will now turn to examine a real-life case study that is representative both of the nature of workplace bullying itself and the difficulties of pursuing legal redress in its wake.

¹¹⁴ Chappell and Di Martino, above n 1, 173.

¹¹⁵ Paul McCarthy, 'Preventing Risk/Severity Spirals: A Cross-Sectoral Approach' in Paul McCarthy and Claire Mayhew, *Safeguarding the Organisation against Violence and Bullying* (Palgrave MacMillan, 2004) 179, 179-183.

VII. WORKPLACE BULLYING AND UNCERTAIN AVENUES OF REDRESS: A CASE STUDY

Dr Andrews*¹¹⁶ is a qualified medical practitioner and was engaged in a professional capacity in the Australian public health system for a number of years. As a highly experienced practitioner he was well-recognised within the profession.

Relations between Dr Andrews and his superior Dr Black were at first friendly and cooperative. Upon appointment, it was agreed in writing by Dr Black and the department itself that Dr Andrews would work a nine day fortnight. Soon, however, Dr Black began to renege on this agreement and informed Dr Andrews that because it was in a separate letter and 'not in the contract' itself it would be 'cancelled immediately'. Dr Andrews was 'most unhappy' about this but felt he was not in a position to complain.

From this point onwards, and over the next couple of years, Dr Andrews found his working relationship with Dr Black to be more and more difficult. Dr Black began, on a frequent basis, to telephone Dr Andrews' home and to voice criticisms to Dr Andrews' wife. After Dr Andrews experienced a very troubling personal incident, which significantly hindered his capacity to work effectively, Dr Black refused Dr Andrews' special leave and criticised him instead for inefficiency during the period concerned. Dr Black's criticism of Dr Andrews' 'backlog' of work escalated whilst he simultaneously increased Dr Andrews' workload. Dr Black engaged increasingly in conduct aimed at degrading Dr Andrews, including:

- sustained and continuous demeaning of Dr Andrews openly in front of other staff by making disparaging comments about him in both his presence and absence;
- ignoring Dr Andrews' presence in front of other colleagues;
- renegeing on his approval of Dr Andrews' request for annual leave, granted more than one year previously;
- calling Dr Andrews whilst he was on annual leave and demanding that he be on call. When Dr Andrews reiterated that he was interstate, Dr Black proceeded to verbally abuse Dr Andrews;
- ensuring that Dr Andrews, as much as possible, was 'cut-off' from other staff, enforcing a closed door policy whilst at work and proscribing Dr Andrews from participating in 'non-core' activities such as academic work;
- circulating documents amongst staff containing erroneous representations of Dr Andrews' backlog of work; and
- further increasing Dr Andrews' workload whilst also sabotaging Dr Andrews' attempts to attend to it.

Dr Andrews made an internal complaint about Dr Black's behaviour and received no response. Soon afterwards he was informed that a review of his performance was to be conducted. Dr Andrews soon found that the supposedly routine performance review was in actual fact a 'disciplinary process' related to his backlog of work. Dr Black, against whom Dr Andrews had made the complaint, was notably on the disciplinary panel considering the matter and according to Dr Andrews the meetings he attended were deliberately misrepresented in

* To protect the confidentiality of the individuals to which this case study relates, their names have been changed. The details of all correspondence referred to in this case study have also been removed, including dates and the name of the law firm from whom 'Dr Andrews' received advice.

transcripts produced. Furthermore, Dr Black would often enter Dr Andrews' office and inform him that it was 'not looking good' for him.

By this stage Dr Andrews' stress was such that he could not cope; he was diagnosed with anxiety and depression and medicated accordingly. Eventually, Dr Andrews found himself unable to go to work at all. Upon lodging a second formal complaint against Dr Black, Dr Andrews was informed by the department that he must not enter the workplace, speak to colleagues or access his personal belongings.

At this point, Dr Andrews sought legal advice as to how he might seek redress for the situation in which he found himself and soon discovered that accessing legal remedies may be very difficult. Dr Andrews could not show that Dr Black's behaviour was a breach of the relevant modern award as it made no provision for workplace bullying and as Dr Black's conduct could not be considered to be discriminatory in any way, anti-discrimination protections could not be utilised. As it would have been very difficult to prove that Dr Black's behaviour was in response to the exercising of a workplace right, and not in response to Dr Andrews supposed 'backlog', his conduct could not easily be established as the taking of adverse action and these protections of the *Fair Work Act* proved unhelpful. Dr Andrews was not advised to pursue a claim for constructive dismissal.

Dr Andrews' lawyers advised him that, though the option to bring an action in common law in tort was open to him, such a claim 'would be of very limited value and ... not worth considering'.¹¹⁷ Dr Andrews was advised that, 'leaving aside the very difficult time'¹¹⁸ he had experienced, he would have 'great difficulty'¹¹⁹ in overcoming the relevant legal thresholds in establishing the negligence of his employer, which would 'no doubt be fully contested'.¹²⁰ This advice was given in spite of the fact that Dr Andrews' lawyer commented that the case was extremely well documented and that other employees from the department had provided sworn affidavits corroborating Dr Andrews' version of events.

Dr Andrews was advised to pursue a claim for Workers' Compensation which was subsequently denied as it was considered by the insurer that Dr Andrews' incapacity for work was not related to any injury sustained in the course of employment and was wholly or predominantly caused by reasonable action taken by his employer in respect of performance and discipline. An appeal against this decision was lodged, but when the employer offered a settlement package to Dr Andrews, the legal advice he received was that the negotiation of settlement was 'the best possible outcome'¹²¹ available. Dr Andrews accepted a settlement of three months pay and three months of paid study leave, including legal costs. The settlement was also conditional upon Dr Andrews signing a confidentiality agreement. Though this has provided him with a short-term solution, Dr Andrews believes that this signals the end of his career as his reputation has been 'widely blackened'¹²² and his psyche permanently damaged. As a father to young children, this outcome has serious ramifications.

¹¹⁷ Letter from unnamed law firm to Dr Andrews.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Interview with Dr Andrews.

Unfortunately, Dr Andrews' case is highly representative of the common experience of seeking recourse in response to the occurrence of workplace bullying. Indeed, as McCarthy has shown there are 'six typical stages of escalation',¹²³ all of which are present in this case:

- Stage 1: Exposure to negative experiences that bring vulnerability factors into play for the individual and the organisation;
- Stage 2: Failure to cope, naming the experience as a form of bullying and taking the position of victim;
- Stage 3: Complaint failure, payback for complaining, absenteeism and workers' compensation claim;
- Stage 4: Difficulties in pursuing legal claims, job loss;
- Stage 5: Symptoms of severe psycho-physical injury and relationships breakdown;
- Stage 6: Permanent displacement from work, obsessive seeking of justice or revenge.¹²⁴

Dr Andrews' case is clearly demonstrative of the difficulties of obtaining legal remedies in the aftermath of the occurrence of workplace bullying. Where bullying in the workplace is non-discriminatory, is not addressed by a modern award or enterprise agreement and cannot be classified as adverse action or unfair dismissal, legal redress can be extremely difficult. The insidious and underhanded nature of workplace bullying can make attempts to recover workers' compensation complicated or unsuccessful and the uncertainty and cost of common law action makes its remedies largely inaccessible. Such inadequacies in the law must be addressed and this paper will now turn to focus upon the potential for legal reform.

VIII. WORKPLACE BULLYING AND THE NEED FOR LAW REFORM

This paper has argued that the legal landscape confronted by individuals who are subjected to workplace bullying is fragmented and uncertain and its potential avenues often inaccessible and inadequate. As was discussed above, despite the severity and prevalence of workplace bullying there is often no clear legal recourse for those whose personal and professional lives are destroyed by its occurrence. It is apparent, then, that there is a need for legal reform to address this problem which poses an ongoing threat to Australian workers and workplaces. Ideally, such reform would seek to provide those who have been subjected to workplace bullying with centralised, comprehensive, efficient and accessible avenues of recourse at law. Additionally, however, such reform would seek to address the root of the issue by helping to prevent the occurrence of workplace bullying.

Other countries such as France and Belgium have, with similar aims, implemented specific legislative initiatives, considered in more detail below, that are directed to the prevention and resolution of workplace bullying, harassment and victimisation. The implementation of a such a statutory regime in Australia, it will be argued, would not only provide clearer and more effective recourse in the aftermath of workplace bullying, but aid in its prevention by providing a powerful incentive for employers to provide bullying-free workplaces.

¹²³ McCarthy, above n 113, 179.

¹²⁴ Ibid 179-183.

A. International Approaches to the Legal Prevention, Proscription and Resolution of Workplace bullying

Numerous countries have made comprehensive advances 'on the broad legislative and regulatory front'¹²⁵ in responding to the bullying which plagues workplaces worldwide. As, for the purposes of this paper, an exhaustive exploration of these approaches is neither possible nor necessary, focus will be directed towards efforts in France and Belgium.

1. France

In France, provisions that seek specifically to tackle moral harassment¹²⁶ at work have been introduced into the Labour Code and Penal Code. This legislation was introduced against a background of increasing concern about 'the scope of severity'¹²⁷ of workplace violence after the 1999 Debout's report to the Economic and Social Council which illuminated its prevalence. In addition to this, extensive case law already existed that dealt explicitly with the issue of psychological harassment at work. In particular, the Supreme Court, in two important decisions in 2000 and 2001, established the vicarious liability of the employer for the bullying behaviour of employees. This, in combination with widespread public awareness of workplace bullying, provided the foundations for legislative reform.

The French Labour Code now stipulates that employees have the right not to be subjected to acts of moral harassment which have the effect of degrading the employee's rights and dignity, affecting the employee's physical or psychological health or affecting the employee's professional future. The provisions outline the obligations of the employer to take all measures necessary to prevent moral harassment and offer 'extended protection to the victim' including the 'possibility of making recourse to an external mediator'.¹²⁸ Employees must not be treated adversely for refusing to endure moral harassment under this legislation and power is also given to trade unions to intervene in cases of moral harassment.

In the event that these provisions are breached, the Labour Code stipulates a penalty of one year in prison and the option of an additional €3750 fine while the French Penal Code provides that moral harassment is punishable by one year in prison and €15,000.

2. Belgium

In 2002 legislation was enacted in Belgium 'relating to protection from violence, moral harassment (bullying) and sexual harassment at the workplace'.¹²⁹ This legislation requires employers to put in place a series of preventative measures to reduce the risk of violence or moral harassment in the workplace including adjustments to the physical organisation of the workplace, providing help for targets, the fast and impartial investigation of complaints of

¹²⁵ Chappell and Di Martino, above n 1, 173.

¹²⁶ Article L.1152-1 of the French Labour Code stipulates that 'employees shall not be subjected to repeated actions constituting moral harassment which intentionally or unintentionally deteriorate their working conditions or are likely to violate their rights and dignity, impair their physical or mental health or jeopardize their professional future'.

¹²⁷ Ibid 156.

¹²⁸ Chappell and Di Martino, above n 1, 156.

¹²⁹ Ibid 157.

moral harassment and the provision of information and training. The statute also emphasises the responsibility of all levels of management to prevent stress to employees.

The legislation provides for a number of avenues of redress including through an adviser on prevention or a manager. It also stipulates that the burden of proof lies with the individual accused and that throughout the course of these procedures the working relationship between the complainant and the employer cannot be terminated or modified.

3. *The Effectiveness of Targeted Legislative Action*

As the legal developments in France and Belgium discussed above are relatively new there is little information available indicating their levels of success in addressing the problem of bullying, harassment and victimisation at work. As Chappell and Di Martino suggest, however, enhanced regulatory frameworks that address this behaviour in 'specific terms' appear 'to be more effective at tackling the problem of workplace violence in a targeted way and in addressing ... psychological aggression'.¹³⁰ It is the argument of this paper that directed legislative initiatives, such as those discussed above, are important and necessary because they posit workplace bullying as a *legal issue in its own right*, as opposed to a managerial problem which may under limited circumstances result in legal ramifications. For this reason, the introduction of a statutory regime in Australia which addresses workplace bullying in specific terms will now be recommended. This paper suggests an approach which combines some of the proscriptive elements of French legislation, with the preventive approach taken in Belgium.

B. From Awareness to Action: Towards Legal Reform in Australia

This paper proposes a new, targeted legislative approach to workplace bullying which seeks to establish the right of all workers to be free from bullying harassment and victimisation in the workplace. This would be achieved through the proscription of bullying in the workplace and through the provision of new complaint mechanisms and compliance and enforcement measures, the details of which will be considered below.

Such legislation would be implemented with four main aims:

- to counteract the fragmentation of the current legal landscape through the provision of a centralised regime which proscribes workplace bullying and provides directed avenues of recourse;
- to surmount some of the difficulties that presently exist in proving more underhanded forms of workplace bullying in a legal setting;
- to reduce the cost, duration, indeterminacy and consequential trauma of legal recourse in the wake of workplace bullying by providing for targeted, efficient and cheap dispute resolution; and
- to counteract the normalisation of workplace bullying in Australian workplaces through the implementation of preventive measures.

In accordance with these aims it is recommended that legislation addressing the problem of workplace bullying *in specific terms* be enacted under the auspices of the *Fair Work Act*. Addressing this issue under the umbrella of Australia's national industrial legislation elevates

¹³⁰ Chappell and Di Martino, above n 1, 173.

the issue of workplace bullying as a matter of importance in law and highlights the issue as one of mainstream significance. This will assist in naming, understanding, proscribing and preventing workplace bullying as a serious, legal workplace issue.

It is recommended that such legislation would operate:

- on an *individual* level through the specific proscription of workplace bullying; and
- at an *organisational* level through the imposition of new employer obligations to take reasonable steps to provide a bullying-free workplace.

Notably, the proposed legislation is civil in nature. This runs counter to the French criminalisation of moral harassment and to the approach recently taken by the Victorian Government. The suicide of Brodie Panlock, a young Victorian woman who was relentlessly bullied in her hospitality job, has prompted the *Crimes Amendment (Bullying) Bill 2011* which amends the *Crimes Act 1958* in relation to stalking. As of 11 April 2011, the Bill was being read for a second time in the lower house in the Parliament of Victoria. The Bill seeks to impose criminal sanctions of up to ten years imprisonment for workplace bullies and encompasses behaviour that includes making threats, using abusive or offensive language or performing abusive or offensive acts or acting in any other way that could reasonably be considered to cause physical or mental harm or arouse apprehension or fear. Whilst this criminal legal reform represents a positive development in the sense that it ensures the punishment of serious offenders, this paper argues that a punitive, legalistic approach such as this to the issue of workplace bullying, whilst providing some benefits,¹³¹ is inadequate for three main reasons. First, such an approach would be directed to the punishment of serious offenders. Only the most severe cases of workplace bullying, therefore, would fall under the new provisions and those cases perceived as less serious may go unaddressed. This is compounded by the onerous criminal standard of proof of 'beyond reasonable doubt'. Second, the prospect of criminal proceedings, which can be traumatic and lengthy, may act as a deterrent for victims to take action. Third, the criminalisation of workplace bullying from the outset does not cater to that part of the issue which is organisationally, as opposed to individually, driven.

1. *Proscribing Workplace Bullying at an Individual Level*

It is proposed that the suggested legislation would specifically proscribe persons from bullying others in the workplace. It is noted that the substantive prohibition bears some similarity to that which presently addresses adverse action under the *Fair Work Act*.¹³² Thus, the prohibition could provide that:

"A person, must not bully, harass or victimise another person in the workplace"

It would be necessary for such legislation to provide some legal definition of workplace bullying, harassment or victimisation. As was discussed in Part III, providing such a definition in any disciplinary context, whether it be managerial, sociological, psychological or legal, can be a challenging matter. In a legal context, it is not desirable to provide an exhaustive definition of workplace bullying as by its very nature it can encompass a very wide variety of continually

¹³¹ Some conceivable benefits of an approach that criminalises bullying could be a clear social and legal condemnation of bullying, the provision of obvious and heavy penalties as a deterrent and the mobilisation of the resources of the police and the Department of Public Prosecutions.

¹³² Pursuant to Part 3-1, Division 3 of the *Fair Work Act*.

evolving behaviours and can be comprised of both objective and subjective factors. A legal definition of workplace bullying, then, must be open-ended. An example of such an open-ended definition may be:

“Bullying, harassment or victimisation means repeated behaviour in the workplace that:

(a) is offensive, unreasonable, unfair or inappropriate; and

(b) causes the target to feel demeaned, belittled, intimidated, threatened or similarly; and

(c) is distinct from legitimate management practices.’

If considered necessary, an inclusive list of behaviours that may constitute such behaviour, such as those outlined in Part III of this paper, could be provided.

This paper recommends that, in order to be clear, a wide definition of ‘workplace’ also be provided. An example of such a definition is the ILO definition of workplace as ‘all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer’.¹³³ This allows for the inclusion of non-traditional workplaces which are ‘mobile or geographically diverse’¹³⁴ or based within the home of the employee.

The provision, as outlined above, that a ‘person must not bully, harass or victimise another person in the workplace’ also allows the prohibition to be enforced against different types of persons in the workplace. That is, employers, employees, independent contractors, principals, industrial associations or officers and members of an industrial association, are, for example, *all* proscribed as individuals from engaging in the behaviours encompassed by the definition.

2. Preventing Workplace Bullying at an Organisational Level

It is proposed that the suggested legislation, in addition to proscribing workplace bullying at an individual level, impose new obligations upon organisations and employers to take all reasonable steps to provide a bullying-free workplace. This would be aimed at aiding the prevention of workplace bullying through the requirement that organisations act pre-emptively against its occurrence.

It is proposed that this obligation would provide that:

“Employers must take all reasonable steps to provide a bullying-free workplace through the implementation of appropriate management systems”

The phrases ‘all reasonable steps’ and ‘appropriate management systems’ will of course be crucial in giving meaning to this obligation. It is the recommendation of this paper that, rather than specifically defining these terms in the legislation, Fair Work Ombudsman issue best-practice guides to give definition to these terms, a suggestion which will be discussed in more detail below.

¹³³ ILO, ‘Workplace violence in service sectors and measures to combat this phenomenon’ (2004) 4.

¹³⁴ Chappell and Di Martino, above n 1, 31.

3. *Complaint Mechanisms*

The enactment of the proposed legislation under the auspices of the *Fair Work Act* enables the provision of three main complaint mechanisms.

First, it is proposed that both the individualised prohibition of workplace bullying, as well as the organisational obligation to provide a bullying-free workplace, as outlined above, be enacted as civil remedy provisions. As such, a target could apply to the courts for orders in relation to a contravention or proposed contravention of these provisions either in isolation from one another or concurrently as the situation requires.¹³⁵

Second, a target could make a workplace complaint to the Fair Work Ombudsman, who would be authorised to investigate and prosecute on behalf of National System Employees in the event of a suspected contravention of the legislation.

Third, should the proposed legislation expressly provide,¹³⁶ a person who has been subjected to bullying at work in a way they believe contravenes the new legislation, could apply to have Fair Work Australia deal with the dispute as an alternative to the pursuance of action in court.

4. *Compliance and Enforcement Measures*

(a) Court Orders

Should the court be satisfied that a person has contravened or proposes to contravene either of the proposed civil remedy provisions outlined above, the court could make any order it considers appropriate.¹³⁷ This would include an order granting an injunction or interim injunction to prevent, stop or remedy the effects of a contravention,¹³⁸ an order awarding compensation for loss that a person has suffered as a result of the contravention,¹³⁹ or an order for reinstatement of a person.¹⁴⁰ The court could also, on application, order a person to pay a pecuniary penalty that the court considers appropriate if the court is satisfied that a person has contravened one of the civil remedy provisions¹⁴¹ outlined above.

(b) Compliance Powers of the Fair Work Ombudsman

Under the proposed legislation, the Fair Work Ombudsman would have the power to investigate and inquire into complaints and suspected contraventions of the relevant legislative provisions proscribing workplace bullying.¹⁴² The Fair Work Ombudsman would also have the power to take steps to enforce those provisions through the commencement of court proceedings where necessary¹⁴³ and to represent employees who are party to those proceedings.¹⁴⁴ Notably, the Ombudsman would be empowered to enforce compliance with the proposed provisions by

¹³⁵ *Fair Work Act*, s 539.

¹³⁶ *Ibid* s 595(1).

¹³⁷ *Ibid* s 545(1).

¹³⁸ *Ibid* s 545(2)(a).

¹³⁹ *Ibid* s 545(2)(b).

¹⁴⁰ *Ibid* s 545(2)(c).

¹⁴¹ *Ibid* s 546(1).

¹⁴² *Ibid* s 682(1)(c).

¹⁴³ *Ibid* s 682(1)(d).

¹⁴⁴ *Ibid* s 682(1)(f).

making applications to Fair Work Australia¹⁴⁵ and may represent employees who become party to a matter before Fair Work Australia.¹⁴⁶

In addition the Ombudsman may promote 'harmonious, productive and cooperative workplace relations' and compliance with the *Fair Work Act*, potentially including the proposed legislation addressing workplace bullying, through providing education, assistance and advice to employees, employers and producing best practice guides to workplace relations or workplace practices.¹⁴⁷

This paper proposes that the Ombudsman mobilise these compliance powers to promote organisational preventative measures, giving effect to the new obligation upon the employer to take 'all reasonable steps' as proposed above. The Ombudsman could make recommendations including:

- the ongoing assessment of personal and organisational vulnerability to workplace bullying;
- the implementation of behavioural compliance codes;
- the adoption of 'zero-tolerance' policies for workplace bullying; and
- the implementation of a formal internal complaint system which includes the efficient and impartial resolution of complaints.

The Ombudsman could then monitor compliance through workplace inspections and make specific recommendations in the event that 'all reasonable steps' are not being taken.

(c) Functions and Powers of Fair Work Australia

In dealing with the resolution of disputes concerning contraventions or alleged contraventions of the proposed legislative provisions above, by either individuals or organisations as the case may be, Fair Work Australia would be empowered to facilitate alternative dispute resolution through mediation, conciliation or the making of recommendations as it sees fit¹⁴⁸ and could utilise these methods to ensure compliance under the proposed legislation addressing workplace bullying.

Were Fair Work Australia to be expressly authorised under the proposed legislation, they could also deal with workplace bullying disputes through arbitration.¹⁴⁹ This would enable Fair Work Australia to make any orders it considers appropriate, the contravention of which constitutes an offence punishable by twelve months imprisonment.¹⁵⁰

Fair Work Australia is obliged to perform these compliance powers and functions in a manner that is fair and just, quick, informal and avoids unnecessary technicalities, open and transparent and promotes harmonious and cooperative workplace relations.¹⁵¹

¹⁴⁵ Ibid s 682(1)(d).

¹⁴⁶ Ibid s 682(1)(f).

¹⁴⁷ Ibid s 682(1)(a).

¹⁴⁸ Ibid s 595(2).

¹⁴⁹ Ibid s 595.

¹⁵⁰ Ibid s 675.

¹⁵¹ Ibid s 577.

5. *The Advantage of Seeking Redress through the Regulatory Bodies of the Fair Work System*

In the context of workplace bullying, it is the contention of this paper that access to avenues through the Fair Work Ombudsman and Fair Work Australia, as outlined above, would provide cheap, efficient and accessible dispute resolution as well as the appropriate means by which to enforce preventative measures against workplace bullying.

As has been discussed in this paper, pursuing legal action through the court system can be extremely costly, time consuming and traumatic, even with the provision of a cause of action which seeks to address directly the problem of workplace bullying. It is the recommendation of this paper that, where possible, forms of no-blame conflict resolution should be utilised. Under the proposed legislation, this is made possible through the capacity of Fair Work Australia to facilitate mediation, conciliation and to make recommendations. The additional capacity of Fair Work Australia, however, to facilitate arbitration and to enforce escalating sanctions through the making of orders, enables the counteraction of the normalisation of bullying in workplace cultures and the provision of a strong deterrent.

The capacity of the Fair Work Ombudsman to investigate, make applications to Fair Work Australia and to represent employees in matters before Fair Work Australia is also extremely advantageous in the context of workplace bullying. This provides targets with a highly cost-efficient and minimally stressful way of pursuing redress through the proposed legislation. In addition to this the Fair Work Ombudsman is also well equipped to ensure that organisations and employers comply with the obligation to take all reasonable steps to provide a bullying-free workplace through preventative measures.

6. *Legal Reform: Changing the Culture of Bullying*

As McCarthy highlights, addressing the issue of workplace bullying may be ‘a process of long-term cultural change’.¹⁵² Indeed, at its core, workplace bullying is a social and cultural problem which ultimately concerns the way in which people interact with one another.

The proposed legislation aims to implement a network of obligations, complaint mechanisms and enforcement measures at both an individual and organisational level, and in a way that is both preventative and remedial. It is argued that an approach such as this, where the law provides both redress in the wake of workplace bullying *and* the impetus for the implementation of preventive measures to counteract its normalisation, allows the law itself to have a fundamental role in stimulating workplace culture change.

Ultimately, then, it is argued that the implementation of the proposed legislation, which utilises the regulatory bodies of the Fair Work System, is necessary in order to name, proscribe and prevent workplace bullying. In its role as a remedial and preventive tool, it is argued that legal reform of this nature is not only important but indispensable to tackling the insidious and serious problem of workplace bullying in Australia.

¹⁵² McCarthy, above n 113, 181.

IX. CONCLUSION

Workplace bullying is increasingly being recognised as a serious global problem, the associated pecuniary and non-pecuniary costs of which are nothing short of grave. Moreover, since its emergence as a concept, understandings of workplace bullying continue to evolve as its complexity becomes more apparent and the interplay of various causal factors and consequences more obvious. This paper has explored the question of whether the law presently accommodates and addresses this issue adequately in light of its prevalence and multidimensionality. There are indeed a wide variety of avenues of recourse which *may* be available to those who are harmed by the experience of bullying at work, including those at common law in tort and contract, and in statute under anti-discrimination laws, workers' compensation legislation, occupational health and safety legislation and the *Fair Work Act*. This paper has argued, however, that upon closer inspection these avenues are in many cases inaccessible or inadequate either by virtue of their cost and indeterminacy or in the sense that they are only available under limited circumstances. Where an individual who has been subjected to bullying in the workplace cannot show discrimination, unfair dismissal, breach of an enterprise agreement or modern award or adverse action, seeking legal redress can prove extremely difficult. The very nature of workplace bullying, which can be covert and underhanded, can make attempts to recover workers' compensation unsuccessful and the evidencing of common law causes of action impossible. Many targets of workplace bullying, then, may find themselves to be confronted with a legal landscape that is patchy and disjointed, and ultimately providing no legal remedy.

This paper has argued that legal reform is necessary in order to address these inadequacies. Thus, new legislation has here been proposed that seeks, through civil means, to proscribe and prevent workplace bullying *in specific terms*. Inspired by targeted legislative initiatives in France and Belgium, the proposed legislation would be enacted under the auspices of the Fair Work System and involve two levels of regulation: first, the proscription of workplace bullying at the level of the individual as well as, at an organisational level, the imposition of an obligation on employers to take all reasonable steps to provide a bullying-free workplace.

Targets of workplace bullying would have access to complaint mechanisms provided by the court system, the Fair Work Ombudsman and Fair Work Australia. The enforcement and compliance mechanisms of the latter two it has been argued, as the regulatory bodies of Australia's national industrial legislation, are particularly useful in the context of workplace bullying. Through the dispute resolution facilities of Fair Work Australia, targets of workplace bullying could find efficient, cheap and accessible avenues of redress, the pursuit of which could be aided by the investigatory and representative powers of the Fair Work Ombudsman. In addition to this, the compliance powers of the Ombudsman could have a fundamental role in the enforcement of organisational-level preventive measures, enabling the law to have a fundamental role in thwarting the cultural normalisation of workplace bullying.

Bullying poses a serious and ongoing threat to Australian workers and workplaces which requires urgent attention. It is the ultimate recommendation of this paper that a legal response that aims to name, proscribe, prevent and remedy workplace bullying must therefore be embraced and implemented in the very near future.

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