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**THE PUBLIC POLICY RESPONSE TO WORKPLACE BULLYING IN
AUSTRALIA: HAS ENOUGH BEEN DONE?**

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THE PUBLIC POLICY RESPONSE TO WORKPLACE BULLYING IN AUSTRALIA: HAS ENOUGH BEEN DONE?

ARAS MOLLISON*

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I INTRODUCTION

Workplace bullying is a damaging and prominent societal phenomenon which has perhaps always existed. Yet, in recent decades, workplace bullying has been increasingly recognised as being an issue of concern to the broader community,¹ as well as those directly involved. Research shows that workplace bullying occurs in many countries,² though its prevalence may vary considerably between different jurisdictions.³ The focus of this article is Australia's experience. More specifically, this article examines the public policy response that has emerged in relation to workplace bullying. It aims to evaluate the measures that have been taken and indicate the extent to which law is capable of responding to this complex problem.

A Structure

The article begins by briefly discussing what workplace bullying is and why it is a problem. It then proceeds to examine the legislative action that parliaments have taken to address workplace bullying. The article accepts that the current legislative mechanisms which deal with workplace bullying provide a multi-faceted response to the problem. However, it is contended that, despite the numerous options available under legislation for victims to seek redress for bullying, the law has a limited capacity to deal with the problem. The current legislative framework does not have strong enough preventative effects and is too reactive in nature; often only becoming enlivened once damage has already been done. Further, the processes that must be engaged in to enforce legislation are often time-consuming, costly and stressful;⁴ factors which can be particularly problematic for victims who may already be suffering personal and financial hardship.

The second part of the article examines some examples of complimentary, non-legislative action, which has been taken by government to assist in dealing with workplace bullying. It is argued that prevention of bullying should be the aim of public policy-makers and, since the current legislative framework is not adequate to achieve this goal, the focus of public policy should now be shifted to alternative non-legislative measures. An obvious issue for public policy-makers is that many preventative mechanisms need to be undertaken at an organisational level, which may limit the extent to which government can control outcomes.

¹ Dev Pillay, 'Out of the Shadows: Getting to the Heart of Harassment' (2012) *Proctor* 41.

² See, eg, Angie Ng, "'Chasing Rainbows": Challenging Workplace Bullying in Australia and the United States' 15 *Journal of Workplace Rights* 213.

³ 'Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety' (Research Report, Productivity Commission, March 2010) 287.

⁴ Allison Ballard and Patricia Easteal, 'Mapping the Legal Pathways for Workplace Bullying: A Preliminary Overview' (2014) 39 *Alternative Law Journal* 94, 98.

Nevertheless, it is argued that government can and should play a role in facilitating these types of initiatives.

B *What is 'Workplace Bullying'?*

One of the many difficulties that arise for policy-makers in dealing with workplace bullying is reaching agreement on a definition. Workplaces are inherently subject to power structures through hierarchy, alliances and influence. As such, individuals are bound to feel 'bossed around' or 'left-out' at different stages of their career.⁵ However, just because a worker is asked to complete a task they do not want to do, or is not invited to a non-work related social event, this does not mean that they are necessarily being 'bullied'. Conversely, everyone should be able to go to their job and not be demeaned, harassed or put down. Add to these tensions differing perceptions of behaviour and it is understandable that it took time for consensus to be reached on a definition of workplace bullying in Australia. Indeed, prior to the federal parliamentary inquiry into workplace bullying in 2012,⁶ there were various definitions used in different states and territories, albeit with some similarities.⁷ The first recommendation of the inquiry's report was that the federal government promote national adoption of the definition of workplace bullying as 'repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety.'⁸ At a federal level, this definition has been embraced in the 2013 amendments to the *Fair Work Act 2009* (Cth) ('FWA') and therefore it will be used for the purpose of this article as it appears to have broad acceptance. Additionally, the terms 'bully' and 'victim' will be used for clarity of discussion, even though their application can be problematic in certain circumstances; for example, where the bullying behaviour is mutual.

C *Why is Workplace Bullying a Problem?*

There generally seems to be consensus across the community that workplace bullying is a problem that warrants a response, though different stakeholders have different views as to why and how this should be done. This article asserts that workplace bullying has negative impacts upon employers, employees and the public at large for a variety of reasons. It is a problem which has broad repercussions and it is contended that this justifies a holistic and

⁵ Michael Tooma, 'Bullying: The Implications of a Changing Legal and Regulatory Landscape' (2013) 4 *Workplace Relations* 112, 115.

⁶ House of Representatives Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We Just Want it to Stop* (2012).

⁷ *Ibid* 15.

⁸ *Ibid* 18.

comprehensive policy response which combines both legislative and non-legislative measures.

For employers, workplace bullying has economic costs for their business.⁹ It can lead directly to absenteeism, lower productivity through ‘presenteeism’ or time spent conducting investigations,¹⁰ WorkCover claims (resulting in higher insurance premiums) and sanctions or damages awards from work health and safety regulators and courts. There are also more indirect costs to a business such as hiring and training of new employees when someone resigns because of bullying (perceived or actual).¹¹ The bottom line is that workplace bullying can shift resources away from the primary goals of a business and reduce its profitability.

In comparison, employees who are victims generally bear a more personal cost from bullying. It often leads (at the severe end of the scale) to mental health problems and stress leave,¹² but more generally, unhappiness and dissatisfaction with their job.¹³ These impacts can be both short and long term.¹⁴ This is not to say there are not financial costs for employees too. They may be driven out of the workplace, fail to have a WorkCover claim accepted by the insurer and not be compensated for time away from work, or need to attend expensive counselling to help them cope with their situation. They could also miss out on bonuses or promotion through decreased performance.¹⁵

The general public are also incidentally impacted by workplace bullying, even if they do not feel directly affected, and this provides further reason why public policy action is justified to deal with the issue. The Productivity Commission (‘PC’) has estimated that in 2000, workplace bullying was costing the Australian economy between \$6–36 billion a year,¹⁶ reducing our national standard of living. Furthermore, significant tax dollars are spent funding work health and safety and employment regulators, social security payments

⁹ Tooma, above n 5, 113.

¹⁰ ‘Presenteeism is defined as the lost productivity that occurs when employees come to work but, as a consequence of illness or other conditions, are not fully functioning. In comparison, absenteeism occurs when employees do not come to work’: ‘Economic Modelling of the Cost of Presenteeism in Australia’ (Report prepared for Medibank Private, Econtech, May 2007) 3.

¹¹ Productivity Commission, ‘Performance Benchmarking’, above n 3, 285–6.

¹² Tooma, above n 5, 114.

¹³ Belinda Wallace, Lucy Johnston and Linda Trenberth, ‘Bullying the Boss: The Prevalence of Upward Bullying Behaviours’ (2010) 3 *The Australian and New Zealand Journal of Organisational Psychology* 66, 70.

¹⁴ Kristy Richardson, ‘Racial Taunts and Bullying and Harassment in the Workplace’ (2014) 34 *Queensland Lawyer* 19, 22.

¹⁵ Al-Karim Samni and Parbudyal Singh, ‘Performance-enhancing Compensation Practices and Employee Productivity: The Role of Workplace Bullying’ (2014) 24 *Human Resource Management Review* 5, 14.

¹⁶ Productivity Commission, ‘Performance Benchmarking’, above n 3, 279.

(unemployment benefits, disability pensions, Medicare) and courts/tribunals.¹⁷ It could also be argued that Australia's general sense of community is damaged when people are unhappy in their workplace. If workplace bullying can be reduced, all of these costs could be curtailed. Businesses could be more profitable, employees emotionally and financially better off, and public funds could be spent on the multitude of other public policy priorities.

II LEGISLATIVE SOLUTIONS

Workplace bullying is a particularly difficult issue for public policy-makers to address with legislation for a number of reasons. First, bullying occurs through a spectrum of different behaviours, from physical violence, to verbal or psychological harassment. Second, bullying can be motivated by a range of different factors, both work-connected and totally unrelated to the job. A person may undertake bullying behaviour because they believe a co-worker is not pulling their weight or because they feel that the co-worker is being given special treatment. Bullying behaviour can also be driven by some type of prejudice (race, sex, age, etc.), or a simple clash of personality types. These complexities offer a potential explanation for the diverse range of regulatory responses that may be applicable where workplace bullying occurs. The legal framework needs to be able to respond to workplace bullying in its many forms and a one-size-fits-all approach may be incapable of doing this. There is a role for both specific bullying law (as now exists in the *FWA*) and the more general prohibitions found in criminal law and anti-discrimination legislation, albeit this last category of laws is not a focus of this article. However, it is contended that the range of motivations, and the spectrum of manifesting behaviours, limits the ability of law to ever provide a complete answer to the problem of workplace bullying and that it often needs to be addressed at an organisational level.

In outlining the existing framework, this article will examine key provisions under workplace/occupational health and safety ('*WHS*') legislation,¹⁸ employment legislation and criminal law. It should be noted that in some cases victims may be able to pursue a common law action, such as negligence or breach of contract, however, these avenues will not be discussed in order to focus on the more explicit manifestation of law as public policy, namely statute law. The article gives its main attention to *WHS* and employment law, arguing they are most aptly suited to dealing with the problem from a legislative standpoint, as they are

¹⁷ Ibid 288.

¹⁸ The acronym '*WHS*' will be used to reflect the adoption of this term in the new model legislation which is increasingly being adopted throughout Australia.

more targeted on workplaces and may have the greatest chance of preventing workplace bullying. It also examines whether one of these mechanisms should be the primary means of dealing with the issue.

A Work Health and Safety Law

WHS law has the potential to be used to address workplace bullying, but in practice, it often fails to deliver in terms of deterrence and protecting victims. The harmonised WHS legislation, which applies in most states and territories, places a duty on persons conducting a business or undertaking to provide a safe and healthy workplace.¹⁹ Obligations are imposed upon relevant entities,, as well as individuals, such as supervisors and workers.²⁰ This duty of care extends to protecting against both physical and mental harm,²¹ and can consequently be breached where bullying occurs in the workplace. Within each relevant jurisdiction, a WHS regulator is given power to oversee the operation of the legislation and bring prosecutorial action where there has been an alleged failure to meet health and safety responsibilities.²²

1 Primacy of WHS Law?

It has been stated that workplace bullying is principally a WHS issue because of the types of risks that usually arise for workers who are subject to this behaviour;²³ namely physical or psychological injuries which leave them unfit to work. WHS legislation provides an opportunity to clearly express the duty and standard of care imposed upon organisations and workers, giving them the opportunity to comply with the law and reduce bullying. WHS obligations can also be complemented by compulsory workplace accident insurance (WorkCover) schemes that provide a means by which those who are victims of bullying can be compensated and rehabilitated where they are injured.²⁴ In principle, this combination sounds like a good way of dealing with the problem and may be why both business and union groups (such as the Australian Industry Group and the Australian Council of Trade Unions) see WHS law as the best way of addressing workplace bullying.²⁵ However, it has been argued that in reality, WHS law is not a particularly effective means of dealing with the

¹⁹ See, eg, *Work Health and Safety Act 2011* (Cth) s 19.

²⁰ See, eg, *Ibid* pt II div 4.

²¹ See, eg, *Ibid* s 4 definition of 'health'.

²² See, eg, *Ibid* pt VIII.

²³ House of Representatives Standing Committee on Education and Employment, above n 6, 32.

²⁴ *Ibid* 60.

²⁵ Shane Wescott and Neil Napper, 'Workplace Bullying Laws: Saviour or Scourge?' (2013) 4 *Workplace Relations* 7, 11; House of Representatives Standing Committee on Education and Employment, above n 6, 32.

problem.²⁶ As will be discussed, there are issues with enforcement of WHS law, who it ‘punishes’ and its interaction with WorkCover which challenge its effectiveness.

(a) Enforcement

A key problem with WHS law is that enforcement action is left in the hands of regulators and victims cannot bring an action themselves. This contrasts with employment law, where individuals can pursue their own claims. WHS regulators have a large area of responsibility and are likely to focus on investigating what they see as more serious workplace injuries, such as those resulting in permanent physical impairment or death,²⁷ rather than bullying complaints. This may be exacerbated by the fact that WHS regulators must meet the higher criminal standard of proof, rather than the civil standard.²⁸ The result can be that no action is taken in relation to a complaint, particularly where the perpetrator acts subtly, even though the bullying may be causing a victim serious mental harm. Lack of enforcement has flow-on effects, as it reduces the deterrent effect of WHS law and minimises incentives for organisations to take preventative action.

However, it should be clearly stated that regulators do investigate and take enforcement action in relation to some bullying complaints.²⁹ This has resulted in successful prosecutions of organisations and their officers for allowing workplace bullying to occur, though it can be contended that these were cases where the bullying was severe and there was strong evidence available. For example, in Victoria’s infamous *Café Vamp* case,³⁰ 19 year-old Brodie Panlock had fish oil poured on her hair and clothes, was called fat and ugly and was spat on by her bullies. There were various witnesses of these acts and the bullying sadly resulted in Brodie ending her own life. The case was high profile and therefore demanded action. Likewise, in the renowned New South Wales case of *Coleman*,³¹ a company and those involved were heavily fined after a 16 year-old labourer was subject to an ‘initiation’ where he was wrapped in plastic and pushed around on trolley, sawdust was thrown all over him (he was asthmatic) and glue was squirted over his body and into his mouth. The fact that police are often

²⁶ Ballard and Easteal, above n 4, 95.

²⁷ Ibid 96.

²⁸ Anna Forsyth, ‘Legislative Overreach: Employers and Employees Bullied into a Corner?’ (2014) 20(2) *Employment Law Bulletin* 22, 23.

²⁹ See eg, ‘Mildura Laundry Owner Fined \$50 000 for Bullying Workers’, WorkSafe Victoria, 5 December 2012 <[http://www.worksafenews.com.au/component/k2/item/287-mildura-laundry-owner-fined-\\$50,000-for-bullying-workers.html#sthash.qEUdxJot.dpuf](http://www.worksafenews.com.au/component/k2/item/287-mildura-laundry-owner-fined-$50,000-for-bullying-workers.html#sthash.qEUdxJot.dpuf)>.

³⁰ *WorkSafe Victoria v Map Foundation Pty Ltd* (Magistrates Court of Victoria, 8 February 2010) (‘*Café Vamp*’).

³¹ *Inspector Maddaford v Coleman* [2004] NSWIR Comm 317.

involved in these very serious matters is likely to force the regulator to act, or they otherwise risk appearing to be failing to fulfil their role. Regulators may also be more likely to act where particularly vulnerable people are targeted; in the above cases, young workers.

While a number of WHS prosecutions have resulted in serious and well-publicised outcomes, they are few in number and infrequent; diluting their deterrent value. Thousands of bullying complaints are made to WHS regulators,³² and even if many of them may be without a legal basis,³³ there are numerous others that simply cannot be followed up on due to a lack of evidence or resources.³⁴ This is especially the case in relation to verbal/psychological bullying, where the only witnesses may be the perpetrator and victim.³⁵ Further, the sheer scale of complaints and lack of resources can lead to the adoption of triage-type systems by regulators.³⁶ This can result in less ‘serious’ bullying not being dealt with, even though the victim may have been harmed. Where complaints are not acted upon by regulators, bullies may be emboldened and the organisations allowing the behaviour may see no reason to change their WHS practices. The consequence is that rather than preventing workplace bullying, as should be the goal, a culture may develop where it is accepted as part of the work environment.

(b) Punishment

Another issue with WHS law as a mechanism for dealing with workplace bullying is the gravity of its impact upon employers. Without discounting the role of workplace ethos and standards in allowing bullying to occur, an argument can be made that ‘punishing’ employers for what are often the acts of individuals can be harsh. While individuals may also breach WHS law where they are involved in a contravention,³⁷ it is the employer that is likely to have the ability to pay any fine and will often be the main target where a contravention has occurred. Some would say that culpability should only be borne by the actual individual engaging in certain types of behaviour (e.g. assault). Further, management may have had no knowledge of what may have been occurring if the bully has been subtle and the victim has been keeping incidents private.³⁸ However, the positive effect of this vicarious liability is that

³² Productivity Commission, ‘Performance Benchmarking’, above n 3, 281.

³³ Ibid 283.

³⁴ ‘Bullying Complaints to WorkSafe Victoria have more than Doubled’, Adviceline Injury Lawyers, 2 August 2011, <<http://www.advicelineinjurylawyers.com.au/news/bullying-complaints-made-to-worksafe-victoria-have-more-than-doubled>>.

³⁵ Productivity Commission, ‘Performance Benchmarking’, above n 3, 299.

³⁶ Ballard and Eastal, above n 4, 96.

³⁷ See eg, *Work Health and Safety Act 2011* (Cth) s 27.

³⁸ Tooma, above n 5, 115.

it encourages employers to try to provide internal safeguards and properly supervise their workplace.³⁹ Under WHS legislation, employers may have a viable defence where they are able to demonstrate that they took reasonable steps to provide a safe workplace.⁴⁰ This has led to the introduction in many workplaces of formal policies and procedures for dealing with bullying.⁴¹ Proactive organisations will also provide training to their staff; understanding that preventing bullying from occurring at all is the best way they can protect themselves from a complaint or prosecution.⁴²

(c) Interaction with WorkCover

WorkCover schemes are mandatory for employers in Australia and are intended to provide a safety net for workers. WorkCover schemes are ‘no-fault’ in the sense that workers do not need to prove negligence on the part of their employer, just that their injury exists and is work-related.⁴³ However, this does not mean that all bullying-related claims will be automatically accepted by the insurer. With physical injuries it may be relatively easy to identify the when, where, what and how, but this can be much more difficult with psychological injuries.⁴⁴ The consequence is that the accident insurer may often challenge the requisite connection with work, arguing that any mental health issues have arisen from the bullying victim’s personal life.⁴⁵ There is also a ‘reasonable management action’ defence to WorkCover claims, which restricts liability for injury where it has arisen from management action taken on reasonable grounds and in a reasonable manner.⁴⁶ Consequently, where the bullying behaviour is more subtle, and a victim finds it hard to show any objective evidence of its occurrence and that the behaviour was the *cause* of their mental injury, they may be forced to either drop their claim or litigate against the insurer (causing further stress).⁴⁷ The key issue with this eventuality is that this is also the type of victim that is less likely to have their bullying complaint pursued by a WHS regulator. WorkCover can therefore fail to cover the holes in the WHS system and may only be responsive to the especially serious incidences of bullying; failing to protect many victims. Removing the reasonable management action

³⁹ Ibid 116.

⁴⁰ See eg, *Work Health and Safety Act 2011* (Cth) s 19(1).

⁴¹ Ian Freckelton, ‘Employers’ Liabilities for Bullying-induced Psychiatric Injuries’ (2008) 16 *Journal of Law and Medicine* 9, 10.

⁴² Pillay, above n 1, 41.

⁴³ *Key Workers’ Compensation Information, Australia: 2011* (30 September 2010) SafeWork Australia <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/579/WC_Information%20booklet%202011_web.pdf>.

⁴⁴ Productivity Commission, ‘Performance Benchmarking’, above n 3, 280.

⁴⁵ Wescott and Napper, above n 25, 9.

⁴⁶ See eg, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 40.

⁴⁷ Wescott and Napper, above n 25, 9.

defence might enable WorkCover schemes to provide a more effective complementary role to WHS law, but there is no suggestion that this is likely to occur. Currently, WorkCover does not provide a complete solution to the enforcement problem mentioned above and in some ways could be said to amplify it.⁴⁸ Accordingly, the existence of WorkCover does little to strengthen the argument for WHS law being the primary mechanism for dealing with bullying.

(d) Should Primacy be Retained?

It seems that WHS law is thought to be the natural primary avenue for dealing with bullying because the focus of reform discussion is usually on the health and safety impacts that bullying can have on individuals, demonstrated by the inquiry into workplace bullying.⁴⁹ However, WHS law does not do enough to address these impacts; with a lack of enforcement undermining its deterrent effect and ability to protect victims. WorkCover does not currently overcome these problems. Moreover, as established in the introduction, bullying also has broader impacts on businesses and the public. Given these wider effects and WHS law's failings, it is contended that workplace bullying should be conceptualised as an industrial relations and management issue, just as much as a health and safety one. Lower scale bullying further demonstrates why this conceptualisation is necessary. As discussed, subtle bullying behaviour which leads to more low-level effects, such as reduced self-confidence, depression and distraction, is unlikely to be dealt with sufficiently by WHS law. Yet, this type of bullying still results in lower productivity and dysfunctional teams. As far as a legislative response is concerned, it is argued that employment legislation has an equal, if not greater, role to play in dealing with workplace bullying.

WHS law's key strength as a mechanism for dealing with bullying is that, through both primary and secondary liability, it provides an incentive for organisational reform and implementation of best practice. This can then result in the prevention of bullying, which should be the focus of public policy. However, this incentive effect is not unique to WHS law. Other law such as employment legislation also provides similar motivation, as organisations with effective policies and procedures for preventing bullying can minimise the risk of individuals bringing an action against them. Bullying is not sufficiently addressed by WHS law alone and its greatest positive effect can also be produced by other legislation.

⁴⁸ Ibid.

⁴⁹ House of Representatives Standing Committee on Education and Employment, above n 6, 32.

Therefore, public policy-makers should take a broader approach and not focus too intently on WHS law.

2 How could WHS Law be Improved?

Even if the position were taken that WHS law should be the primary mechanism for dealing with workplace bullying, a key obstacle is that WHS law generally provides an effective means of dealing with blatant bullying only. This situation might be ameliorated by providing better training and resources to regulators; enabling them to better identify and investigate bullying behaviour. Yet, ultimately, enforcement action will always be a reactive measure. As often lamented, prevention is better than a cure, and that is why it is argued that the most positive aspect of WHS law is the fact that it encourages organisations to manage risk and try and take precautionary measures. This preventative action impact may be intensified if bullying is expressly referred to in WHS legislation.

An explicit reference approach was taken in South Australia through s 55A of its *Occupational Health, Safety and Welfare Act 1986 (SA)*, which made it clear bullying is an important workplace issue by defining and expressly providing a duty to prevent it. In assessing the operation of s 55A, SafeWork SA previously concluded that it provided ‘heightened awareness among employers and employees of the consequences of inappropriate workplace behaviour.’⁵⁰ Unfortunately, this section was superseded when SA enacted the national ‘model’ WHS legislation. It is contended that the model WHS regime, which has now been adopted by all States and Territories, other than Western Australia and Victoria, should be amended to refer explicitly to bullying; defining it in the same terms adopted in the *FWA* and reiterating the duty of employers and employees to take steps to prevent it occurring. This would provide consistency between the two key legislative schemes which deal with workplace bullying and would be a relatively straightforward reform.

3 Holistic Assessment of WHS Law

While this article has largely focused on WHS law’s shortcomings and some areas for potential improvement, its positive effects should not be ignored. Organisations which take their legal obligations seriously and have received good advice from their WHS advisers are likely to have comprehensive policies and procedures in place which address health and

⁵⁰ Productivity Commission, ‘Performance Benchmarking’, above n 3, 296.

safety generally and even target bullying specifically.⁵¹ They will be alive to the risks of bullying and seek to prevent the compliance costs involved with a WHS regulator's potential investigation, along with the fines that could be incurred and consequent damage to reputation that could arise from a prosecution. It is argued that it is not appropriate to focus on WHS law as the primary mechanism for dealing with workplace bullying, but that it can be a component of the solution.

B Employment Legislation

The *FWA*, Australia's primary piece of industrial relations legislation, provides a number of avenues by which victims of workplace bullying may be able to seek redress. Yet, these avenues again have limitations. Most importantly, from 2014, Part 6-4B has enabled workers to apply to the Fair Work Commission ('*FWC*') for an order to stop bullying; the first purpose-made workplace bullying legislation.⁵² This new jurisdiction will be the primary focus of this section of the article, as it provides the most recent and direct attempt at a legislative policy response to bullying. However, the extent to which the 'general protections' provisions of the Act and the unfair dismissal regime may be used in response to workplace bullying will also be discussed.

1 Stop Bullying Orders

Part 6-4B enables a worker who believes they have been subject to repeated unreasonable behaviour at work that has created a risk to their health and safety to apply to the *FWC* for intervention.⁵³ The provisions apply to anyone carrying out work in any capacity for a person conducting a business or undertaking and therefore cover employees, as well as contractors, volunteers etc.⁵⁴ When an application is lodged, the *FWC* must begin dealing with it within 14 days.⁵⁵ If satisfied that bullying has occurred, the *FWC* may make any non-monetary order it considers appropriate to prevent the bullying from continuing.⁵⁶ Penalties of up to \$10,800 for natural persons and \$54,000 for corporations can be incurred if the orders are breached.⁵⁷

⁵¹ Aaron Goonrey and Amanda Harvey, 'Managing Bullying — Time to take it Seriously' (2010) 1 *Workplace Relations* 5, 6; Michelle Grow, 'Hidden Hazards in the Workplace' (2012) 2 *Chemistry in Australia* 32, 33.

⁵² Penny Thew, 'A First for Australia: A Dedicated Federal Anti-bullying Regime' (2013) 4 *Workplace Relations* 104.

⁵³ *Fair Work Act 2009* (Cth) s 789FC(1), FD.

⁵⁴ *Ibid* s 789FC(2).

⁵⁵ *Ibid* s 789FE.

⁵⁶ *Ibid* s 789FF.

⁵⁷ *Ibid* s 789FG.

There were fears that when this jurisdiction was introduced, the FWC would be overrun with applications because of the significant amount of complaints that WHS regulators were receiving in relation to bullying prior to Part 6-4B's enactment.⁵⁸ However, this has not occurred; in the first six months of operation the FWC only received 343 applications.⁵⁹ A variety of explanations have been offered for this result. In particular, it has been argued that the inability to recover compensation is deterring victims from making an application,⁶⁰ and that employees do not wish to 'rock the boat'.⁶¹ Importantly, Part 6-4B should reduce the workload of WHS regulators, which will hopefully enable them to aggressively pursue the most serious incidences of bullying. While the new jurisdiction relies on individuals having the time and resources to pursue their own resolution, it provides an avenue for dealing with complaints that the WHS regulators may choose not to act upon.

Amongst other measures, the enactment of Part 6-4B was a response of the federal government to the federal parliamentary inquiry into workplace bullying. It is an attempt to provide an accessible mechanism to assist workers and organisations to resolve issues with the help of an independent third party. However, as with all legislation, it was subject to the political process and certain compromises had to be struck in order for it to receive the necessary support. The result is that Part 6-4B, like WHS law, has various features which prevent it from being a comprehensive mechanism for dealing with workplace bullying. However, it should be noted that Part 6-4B was not intended to be a fix-all solution, demonstrated by that fact that an action under other legislation and Part 6-4B can be pursued simultaneously.⁶² Some of the main criticisms that have been raised about the way Part 6-4B operates are discussed below.

(a) Problems for Workers

From a worker's perspective, there are a couple of key issues. First, a stop bullying order can only be applied for when the worker is employed.⁶³ Therefore, the FWC will not be able to deal with their claim if their employment is terminated, or they resign, in the period between

⁵⁸ Clay Lucas, 'Fair Work Commission to Start Hearing Anti-bullying Complaints Next Month', *The Sydney Morning Herald* (online) 27 December 2013 <<http://www.smh.com.au/federal-politics/political-news/fair-work-commission-to-start-hearing-antibullyingcomplaints-next-month-20131226-2zy3h.html>>.

⁵⁹ 'Annual Report 2013–14' (Report, Fair Work Commission, 2014) 70.

⁶⁰ 'Anti-bullying Legislation — Call to give FWC Compensation Powers' on, *Diary of a WorkCover Victim* (25 August 2014) <<http://aworkcovervictimsdiary.com/2014/08/anti-bullying-legislation-call-give-fwc-compensation-powers/>>.

⁶¹ Rodney Worth and Joan Squelch, 'Stop the Bullying: The Anti-bullying Provisions in the Fair Work Act and Restoring the Employment Relationship' (2015) 38 *University of New South Wales Law Journal* 1014, 1028.

⁶² *Fair Work Act 2009* (Cth) s 789FH.

⁶³ *Shaw v ANZ Banking Group Ltd* [2014] FWC 3408.

when they lodge an application and when it is actually dealt with.⁶⁴ While the relatively short lead time of 14 days may help ameliorate this problem, even a couple of weeks can be a long time to wait for something to happen when conflict has occurred within the workplace. Second, there must be a risk that the bullying is going to continue,⁶⁵ which again could mean that it offers no help where a perpetrator has left the workplace/been internally relocated such that there is no longer a direct working relationship. The victim may feel that the bully's behaviour has been accepted, even if it would have met the statutory definition of bullying, leaving the law looking ineffectual. Further, the requirements that the bullying victim must be employed at the time of the application places the victim at further risk. In particular, it may discourage victims from attempting to deal with any bullying internally, as it could later limit their ability to get the FWC involved if they feel the organisation is not dealing with their concerns properly. If a victim fails to pursue internal action this could lead to a deterioration in the worker's relationship with their employer as the employer may feel blindsided when they receive a 'please explain' letter from the FWC.⁶⁶ Applications for a stop bullying order may therefore 'escalate workplace tensions rather than resolve them';⁶⁷ which is a poor outcome for all of those involved. However, this is likely to be the effect of *any* legal action taken against an employer. As will be argued, resolving bullying within an organisation may provide a better opportunity to preserve the employment relationship.

(b) Problems for Employers

There are also a number of issues which would primarily be of concern to employers. First, there is no requirement that workers attempt any sort of internal grievance resolution process before lodging an application,⁶⁸ though the FWC can consider whether processes have been followed when determining orders.⁶⁹ This may render useless policies and procedures that have been created by organisations at their own cost to deal with conflict in their workplace. Employers may wish to take firm action in relation to bullying, but be denied the opportunity. Second, the breadth of the orders that the FWC can make are likely to be objectionable to employers, who would like to think they have control over their own organisation's operation. While the numbers of formal orders that have been made are very limited,⁷⁰ the

⁶⁴ Amber Sharp, 'Workplace Bullying: Are Stop Bullying Orders Really the Answer?' 1(1) (2014) *Law Society of New South Wales Journal* 82.

⁶⁵ *Fair Work Act 2009* (Cth) s 789FF(1)(b)(ii).

⁶⁶ Sharp, above n 54.

⁶⁷ Anna Forsyth, above n 28, 24.

⁶⁸ *Ibid.*

⁶⁹ *Fair Work Act 2009* (Cth) s 789FF(2).

⁷⁰ Only one order was made in the first six months: Fair Work Commission, above n 59.

available examples show that the FWC is willing to be quite prescriptive in the way that bullying is managed.⁷¹ For example, in its first official order, the FWC specified what time the two employees were to arrive at work.⁷² Questions have been raised, but not necessarily resolved, as to how far the FWC's powers can and should extend.

(c) The Clarity of Part 6-4B

All stakeholders have an interest in the clarity of the law and the primary problems on this front is the question of when a worker is considered to be 'at work' for the purposes of s 789FC(1). While many relationships are formed at work, they can often extend outside the workplace to employee's personal lives. This can mean that work issues are dealt with in personal time and personal issues are dealt with at work. The increasing connectivity of people through social media exacerbates this blurring of lines. However, the contour that demarks when someone is 'at work' is essential to the operation of Part 6-4B as it either provides (or denies) a worker with the ability to seek a stop bullying order. The Full Bench of the FWC has held that being 'at work' is not limited to the physical confines of the workplace and that it is possible to be 'at work' even though they may not be performing work-related activity (e.g. on a break).⁷³ The Full Bench has also determined that bullying through social media could be classified as occurring at work, depending on when the worker views the relevant content.⁷⁴ Ultimately, it was decided that the law would need to be developed on a case-by-case basis.⁷⁵ It is unclear at present where this will lead,⁷⁶ but further legislative guidance may be needed if clear and consistent application of the concept is not possible. It seems likely that policies and procedures around work practices, social media and use of devices will be influential to future decisions;⁷⁷ giving employers further incentive to ensure theirs are up to date.

(d) Holistic Assessment of Part 6-4B

In the PC's recent draft report into Australia's Workplace Relations Framework, the PC judged it too early to assess the success of the provisions, though it was noted that the FWC's

⁷¹ Sharp, above n 54.

⁷² *Applicant v Respondent* [2014] PR548852 (21 March 2014).

⁷³ *Bowker v DP World Melbourne Ltd* [2014] FWCFB 9227, [48]–[49].

⁷⁴ *Ibid* [56]–[57].

⁷⁵ *Ibid* [53].

⁷⁶ Misa Han, 'Facebook Unfriending Constitutes "Bullying", says Workplace Tribunal', *The Age* (online), 25 September 2015 <<http://www.theage.com.au/business/workplace-relations/facebook-unfriending-constitutes-bullying-says-workplace-tribunal-20150924-gjuk8q.html>>.

⁷⁷ Kristy Richardson, 'When is Someone Bullied "At Work"?': *Bowker v DP World Melbourne Ltd* [2014] FWCFB 9227' (2015) 35 *Queensland Lawyer* 19, 22.

approach to dealing with applications seems to be perceived to be effective.⁷⁸ Whether this perception is consistent with that of workers should be investigated, as (like WHS regulators) the FWC has adopted a triage approach,⁷⁹ which may mean some workers feel left out in the cold when their application is dismissed at an early stage. As already highlighted, ‘bullying behaviour can often be disguised or denied by perpetrators’,⁸⁰ therefore an application may on its face appear to not have a strong basis if the FWC does not make in depth inquiries. Quantitative and qualitative research should be conducted in relation to Part 6-4B, enabling the FWC to continually improve its operation.⁸¹

While the anti-bullying jurisdiction is far from perfect, there are a number of positive aspects. First, like WHS law, Part 6-4B offers protection to less secure workers such as contractors who may be particularly vulnerable to bullying.⁸² This contrasts with unfair dismissal, for example, which is only available to employees. Second, similar to WHS law, Part 6-4B will have a ‘shadow effect’,⁸³ encouraging employers to review bullying policies and strengthen their internal complaints systems so they can try to prevent claims.⁸⁴ Third, the FWC has shown serious commitment to the success of Part 6-4B, demonstrated by the fact that its specialised team has managed to start dealing with disputes within a mean time of one day after an application is received.⁸⁵ And finally, while it has been argued that the framework is ‘likely to best facilitate productive workplaces if it operates as a safety net for employees, rather than as a point of first call’,⁸⁶ the FWC has demonstrated an ability to resolve disputes without the need to proceed to a formal hearing. Over 30 per cent of applications finalised in the first six months of operation were resolved in this manner.⁸⁷ This minimises the costs for all those involved and shows the FWC is focused on fixing workplace disputes, rather than allowing the parties to become locked in adversarial roles.

While it is early days, Part 6-4B appears to represent a positive legislative response to bullying. It has empowered individuals to pursue action where they genuinely believe they

⁷⁸ ‘Workplace Relations Framework’ (Draft Report, Productivity Commission, August 2015) 30.

⁷⁹ Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 5th ed, 2015) 325.

⁸⁰ Tooma, above n 5.

⁸¹ Joanna Vincent, ‘Filling the Regulatory Gap: A New Pathway for Addressing Workplace Bullying’ (2013) 4 *Workplace Relations* 145, 148.

⁸² Anna Forsyth, above n 28, 23.

⁸³ Vincent, above n 81.

⁸⁴ Shane Wescott and Neil Napper, ‘Workplace Bullying Amendments: The Fair Work Amendment Act 2013’ (2013) 4 *Workplace Relations* 100, 103.

⁸⁵ Fair Work Commission, above n 59.

⁸⁶ Vincent, above n 81, 147.

⁸⁷ Fair Work Commission, above n 59, 71.

are being bullied and offers an opportunity to quickly begin dealing with a dispute, hopefully before things have escalated to the point where serious damage has been done. The federal Parliament should continue to review and improve the jurisdiction as it provides an opportunity to decrease the impact and costs of bullying. However, Part 6-4B is again more focused on curing bullying rather than preventing it, which (as with WHS law) undermines its ability to truly solve the problem. Additionally, if Part 6-4B is to remain non-compensatory, WorkCover protection for mental health injuries should also be reviewed to ensure that those who suffer bullying-related injuries are supported. As discussed above, WorkCover does not always act as a safety net in relation to mental injuries. This is a particular problem where the main legislative mechanisms (WHS, Part 6-4B) that deal with bullying do not compensate for the injuries that victims suffer. If expanded to offer less resistance to mental health claims, WorkCover has the capacity to be complementary to both WHS law and Part 6-4B, in the same sense that various parts of the *FWA* can combine to strengthen an employee's protection.

2 The General Protections Provisions

In contrast to Part 6-4B, the general protections provisions of the *FWA* are not targeted towards workplace bullying. Instead, they protect person (which may include employees and independent contractors) from adverse action where it occurs for certain reasons. For example, these reasons may include: where the employee is discriminated against,⁸⁸ where the employee has taken industrial action,⁸⁹ where the person has exercised a workplace right,⁹⁰ or where the employee has taken a temporary absence due to illness or injury.⁹¹ These provisions can potentially be used by a victim of bullying, but only where it can be shown that negative action against them was motivated by one of the specific grounds listed above. Consequently, the general protections will only be useful to certain victims. Helpfully to claimants, there is a reverse onus of proof in the provisions which means that the respondent must prove they took the action for another reason,⁹² but this tends to offer less benefit than would be expected as employers (and principal contractors) can usually raise some other plausible reason for their adverse action.⁹³ The provisions offer a wide range of remedies including reinstatement and compensation and may enable a bullying victim to recover

⁸⁸ *Fair Work Act 2009* (Cth) s 351.

⁸⁹ *Ibid* s 346.

⁹⁰ *Ibid* s 340.

⁹¹ *Ibid* s 352.

⁹² *Ibid* s 361.

⁹³ See *CFMEU v BHP Coal Pty Ltd* (2014) 253 CLR 243, [90]–[93].

significant funds if they can establish their case. However, their greatest utility in relation to dealing with bullying may be in providing protection for employees who take other action, such as pursuing an order under Part 6-4B, as this is considered to be exercising a workplace right.⁹⁴ If an employer were to dismiss an employee who makes a bullying complaint, they may expose themselves to further liability, which should encourage them to try and deal with the problem rather than just trying to make it go away.

3 Unfair Dismissal

The unfair dismissal provisions of the *FWA* provide a similar incentive for employers to try and resolve workplace bullying, rather than just try and terminate or force-out the victim. While there are a number of eligibility requirements in order to make an unfair dismissal claim,⁹⁵ if an employee is protected, they may be able to seek compensation where the dismissal is procedurally and/or substantively unfair.⁹⁶ Further, an employee who is severely bullied may be able to claim they have been constructively dismissed (forced out of the workplace) even if their employment has not been formally terminated by their employer,⁹⁷ providing further risk to employers who allow bullying to occur. However, a problem for victims is that bullies also benefit from the protection unfair dismissal provides.⁹⁸ It may be harder for an employer to get rid of an alleged bully, as they will need to have good evidence and follow a fair procedure to be safe from a successful claim. It is consequently unclear how effective unfair dismissal is at solving the problem of bullying. Like the general protections provisions and criminal law, the regime is likely to be relevant and appropriate for some victims and unhelpful for others.

C Criminal Law

Criminal law throughout Australia has a clear role to play in preventing extreme cases of physical and sexual harassment, especially where there is a risk of repetition. It is important that victims are able to contact police and, for example, press charges for assault where they have been attacked and are fearful for their welfare. The enforcement of the right to be protected from this type of harm is one of the most important roles that government plays in society and is not limited to the workplace environment. A less settled question is whether the

⁹⁴ Vincent, above n 81.

⁹⁵ The employee must have completed a minimum employment period of six months (or 12 for a business with less than 15 employees) and have an award or enterprise agreement apply to them or earn less than the high income threshold: *Fair Work Act 2009* (Cth) s 382–4.

⁹⁶ *Ibid* s 385, 387.

⁹⁷ *Ibid* s 386(1)(b).

⁹⁸ Anna Forsyth, above n 28, 23.

criminal law should deal with subtler types of bullying in the workplace, like repeated verbal and psychological harassment.

As already raised, there is a tension between the control dynamics in the workplace and ensuring the welfare of individuals. However, where very serious harm is occurring it is much clearer that the state has a role to play in protection. This is demonstrated by the Victorian Parliament's response to the tragic case of Brodie Panlock in the *Café Vamp* case referred to above; where steps were taken to clarify Victoria's criminal law and make it more accessible to the victims of particularly severe bullying. Specifically, the stalking provisions of the *Crimes Act 1958* (Vic) were amended to make it clear that threats, as well as abusive and offensive words or acts can constitute a criminal act where they are done with the intention of causing physical/mental harm to the victim.⁹⁹ Importantly, a victim can apply for an intervention order and may be able to protect themselves from further contact with a stalker. These changes are significant primarily in a symbolic way, as they express the Parliament's intention to treat bullying extremely seriously; previously the focus had been on WHS liability.¹⁰⁰ However, the goal of public policy in this area should be to ensure this type of extreme bullying never eventuates. Criminal law is likely to fail to adequately deal with the majority of cases where isolated incidents may seem minor and may not justify police attention, notwithstanding the type of provisions just discussed.¹⁰¹ While these amendments are a sound development, and other states and territories should be encouraged to follow Victoria's lead, this step is not the most pressing priority when it comes to responding to bullying.

D Assessment of the Legislative Framework

On the whole, the preceding review of the legislative framework shows the different ways in which bullying may now be deemed illegal and highlights the diverse range of options that victims of workplace bullying may be able to utilise. The various statutes, particularly the WHS laws and Part 6-4B of the *FWA*, have positive effects in encouraging organisations to address bullying and avoid facing potential enforcement action, police investigation and/or litigation. However, for victims, the legislative framework is likely to seem mostly reactive, only providing them with help once they have already suffered harm. Cost, time and stress are all likely to be factors which discourage victims from utilising legal options. Pursuing a

⁹⁹ *Crimes Act 1958* (Vic) s 21A.

¹⁰⁰ Alison Baker, Karl Rozenbergs and Jessica Fletcher, 'Victoria's New Bullying Laws — What do they mean for Employers?' (2011) 14(7) *Inhouse Counsel* 77, 78.

¹⁰¹ Wescott and Napper, above n 25, 8.

legal action may also damage the employee's relationship with their employer, even if it is only one co-worker that the employee is seeking protection from. In contrast, an internal bullying resolution procedure may be able to provide a means for a victim to have their complaint dealt with in a quick and inexpensive way which preserves their standing within the organisation. Yet, even internal grievance procedures are reactive and kick in once some bullying has already occurred. Therefore, it is argued that further preventative action is needed beyond what has been encouraged by legislation and beyond the measures that some organisations currently have in place. Public policy should now be focused on building on legislation by educating stakeholders about their obligations and helping them to implement organisational level initiatives to stop bullying before it starts.

III COMPLEMENTARY MECHANISMS

There are various public policy measures which can be adopted to tackle workplace bullying and do not require legislation. Public policy action could be targeted at various levels; for example, there could be a greater focus on eradicating bullying in schools which could have a flow-on effect when these individuals join the workforce.¹⁰² The problem with this type of action is the lag that would exist between implementation and large-scale change. A more immediate course of action is to strengthen organisational initiatives, such as creating policies or procedures, developing effective management techniques and fostering positive workplace culture. Public policy can play a role in both supporting these organisational initiatives and providing direction about how organisations should behave through codes of practice or other guidance material, which informs them about what the law requires. This part of the article discusses some of these complementary strategies, arguing that they offer real potential for preventing workplace bullying, rather than just dealing with it once it has occurred.

A Codes of Practice

A formalised code of practice plays a quasi-legislative role, as while it is not legally binding, it provides an expression of what the government expects of organisations and individuals; strengthening the law's shadow effect. In relation to workplace bullying, the most significant example is arguably SafeWork Australia's 'Guide for Preventing and Responding to Workplace Bullying'. The Guide provides 'information for persons conducting a business or undertaking on how to manage the risks of workplace bullying as part of meeting their duties

¹⁰² Robyn Kieseker and Teresa Marchant, 'Workplace Bullying in Australia: A Review of Current Conceptualisations and Existing Research' (1999) 2(5) *Australian Journal of Management & Organisational Behaviour* 61, 71.

under the work health and safety laws'.¹⁰³ The Guide educates organisations about the model WHS regime and can be used as a reference by the courts when deciding whether WHS duties have been met.¹⁰⁴ Therefore, prima facie, compliance with the Guide provides a means by which employers can reduce the negative effects of bullying and relevant risks to their organisation. It has been argued that a workplace which values good governance should consider adopting this type of code as part of their 'raison d'etre'.¹⁰⁵ Codes of practice are easier to navigate than legislation and send a clear message about the seriousness of bullying,¹⁰⁶ though potentially not to the same extent as legislation.¹⁰⁷ It is important that codes of practice are updated and re-circulated as expectations change and understanding of issues develop, for example, in the area of cyber-bullying.¹⁰⁸ An obvious benefit of a code is that this type of change can be made quickly — as it is carried out by an administrative body rather than the parliament — thereby delivering the information to organisations and enabling them to put preventative measures in place sooner.

B Guidance Material

Administrative bodies also play an important public policy role in providing less formal guidance material, which assists parties to understand legislative requirements and become informed as to what is best practice for dealing with workplace bullying. The FWC, Fair Work Ombudsman ('*FWO*'), SafeWork Australia and state and territory WHS regulators all publish information relating to workplace bullying. This provides an ideal starting point for organisations or victims that are seeking to learn more about how to prevent or deal with bullying, as the material is usually accessible and general in nature and directs parties where to go for further information. While it has been found that guidance material is less effective than a formalised code of practice in educating stakeholders about the seriousness of bullying,¹⁰⁹ it is contended that it still plays a useful educational role. Given that the FWC has been given the responsibility of overseeing Part 6-4B of the *FWA*, it should take a leading

¹⁰³ *Guide for Preventing and Responding to Workplace Bullying* (November 2013) SafeWork Australia <<http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/827/Guide-preventing-responding-workplace-bullying.pdf>> 2.

¹⁰⁴ Joan Squelch and Robert Guthrie, 'Workplace Health and Safety: Managing the Risk of Workplace Bullying' (2012) 14 *Health* 9, 17.

¹⁰⁵ Peter Gaughwin, 'On Governance: The Challenge to Eliminate Bullying from the Workplace' (2012) 4 *The Bulletin* 10, 13.

¹⁰⁶ Richard Johnstone, Michael Quinlan and Maria McNamara, 'OHS Inspectors and Psychosocial Risk Factors: Evidence from Australia' (Working Paper No 60, National Research Centre for OHS Regulation, October 2008) 30.

¹⁰⁷ Productivity Commission, 'Performance Benchmarking', above n 3, 296.

¹⁰⁸ Carmel Privitera and Marilyn Campbell, 'Cyberbullying: The New Face of Workplace Bullying?' (2009) 12 *Cyberpsychology & Behavior* 395, 399.

¹⁰⁹ Johnstone, Quinlan and McNamara, above n 106.

role in this area. The FWC currently publishes an ‘Anti-bullying Benchbook’ which provides useful information on the operation of the new jurisdiction, but there is no reason why its role should be limited to this. Section 576(2)(aa) of the *FWA* makes it clear that the FWC has a role to play in ‘promoting cooperative and productive workplace relations and preventing disputes’ and the FWC should be willing to view its role broadly.¹¹⁰ As a government institution with experience in dealing with bullying, the FWC should be especially active in its provision of information and attempts to prevent bullying from occurring.

C Education, Training and Support

As already noted, while government bodies have an important role to play in the non-legislative response, organisational level initiatives are crucial to prevention. Public policy-makers can play a role in helping organisations to provide internal systems through funding programs, which may assist organisations in improving their capacity to deal with workplace bullying. It is argued that the primary areas of focus should be on helping develop policies and procedures, building the capacity of managers and HR professionals and fostering positive workplace culture.

1 Policies and Procedures

Comprehensive and up to date policies and procedures which detail an organisation’s approach and legal obligations in relation to workplace bullying, provide the opportunity to prevent bullying from occurring and may minimise its adverse effects.¹¹¹ A policy should clearly identify what constitutes inappropriate behaviour, along with the consequences for employees who do not comply.¹¹² If all employees are familiarised with the policy, they may firstly, be more conscious of the way they are treating their co-workers, and secondly, be discouraged from exposing themselves to disciplinary action. However, in order to have these effects, it is vitally important that the policies are not just talked about, but are actually implemented. While investigating and managing bullying complaints can be difficult for employers, not doing so correctly can neutralise the deterrent effects of the policy and lead to an escalation of the dispute. Inconsistent enforcement can increase legal risk for employers, making it more difficult to show that they have complied with their WHS obligations and

¹¹⁰ Andrew Stewart et al, ‘“Promoting Cooperative and Productive Workplace Relations”: Exploring the Fair Work Commission’s New Role’ (2014) 27 *Australian Journal of Labour Law* 258, 259.

¹¹¹ Sarven McLinton et al, ‘The Prevalence and Nature of Bullying: A National Study of Australian Workers’ (2014) 30(2) *Australian & New Zealand Journal of Health, Safety and Environment* 1, 20.

¹¹² Pillay, above n 1.

potentially exposing them to an unfair dismissal claim.¹¹³ This is why it is often recommended that organisations hire an appropriately qualified expert to conduct bullying investigations.¹¹⁴ Many organisations have seen the benefits of policies and are able to employ experts. However, the problem for small organisations especially is that the costs of hiring investigators and updating and implementing policies can seem prohibitive. It is argued that government could provide assistance on these fronts. For example, an administrative body could be established which provides means-tested policy drafting and investigatory assistance. This would enable more organisations to prevent or resolve disputes early — rather than see them escalate — benefitting their budgets and their workers.

2 Management Training

Having a structure in place to address workplace bullying is crucial, but ultimately it is individuals that need to identify when and how to apply policies once they are in place. Building the capacity of managers and HR professionals is therefore important to ensuring organisations can prevent and deal with bullying once it occurs. Different industries may require tailored approaches to handling bullying,¹¹⁵ but there are also common management processes that can be used to monitor the risk of bullying, such as examining absenteeism and turnover rates and conducting climate surveys.¹¹⁶ Awareness of issues such as women’s vulnerability in certain stages of their life cycle (e.g. around maternity leave) and the challenges that social media present to overseeing staff interaction are similarly important to cultivate in managers and HR professionals.¹¹⁷ An organisation with particularly skilled managers and HR specialists may even have the opportunity to conduct alternative dispute resolution techniques, such as bullying mediation, in-house.¹¹⁸ Many organisations already understand the importance of well-trained managers and HR employees and invest in building the skills of their staff in an effort to help their operations run smoothly. However, again, smaller organisations may find it harder to justify the costs involved. It is contended

¹¹³ Tooma, above n 5, 118.

¹¹⁴ Pillay, above n 1.

¹¹⁵ Kirsten Way et al, ‘Self-labelling Versus Behavioural Experience of Workplace Bullying: Differences in Sector and Industry-level Prevalence and Sources’ (2013) 29(2) *Australian & New Zealand Journal of Health, Safety and Environment* 1, 14.

¹¹⁶ Tooma, above n 5, 114.

¹¹⁷ Paula McDonald and Kerriann Dear, ‘The Incidence and Patterns of Discrimination and Harassment Affecting Working Women in Australia’ (2008) 22(1) *Women’s Studies Journal* 37, 42–5; Annamarie Rooding, ‘Cyberbullying in the Workplace: Dealing with Social Networking Sites’ (2009) 12(1) *Internet Law Bulletin* 13, 15.

¹¹⁸ David Meale, ‘How to Beat Workplace Bullying’ (2008) *Australasian Law Management Journal* 17; ‘“Family” or Savages? Enhancing Relationships at Work: An Approach to Conflict Resolution of Bullying’ (2006) 17 *Australian Dispute Resolution Journal* 12, 18.

that government could play a role in helping to increase managers and HR professionals' capacity to deal with bullying. Means-tested free training or at least subsidised courses could be provided. In an age where employees move between organisations much more often than they used to, investing in skills of employees may be harder to justify from an individual businesses' perspective. In contrast, the public would still get the benefit if a manager gains those skills and then moves to a new organisation. It is argued that this, along with the more general benefits discussed if workplace bullying can be reduced, provide justification for why public funds should be expended in this way.

3 Workplace Culture

It is essential that organisations possess appropriate policies and properly skilled managers, but it is also important that they cultivate a workplace culture which communicates to their workers that bullying behaviour is not acceptable.¹¹⁹ This can help prevent the bully–victim dichotomy and instead make it clear that bullying is a wrong against the entire organisation.¹²⁰ Employees should be encouraged to speak up where they witness bullying and support others in addressing concerns.¹²¹ The fight against bullying begins with developing a friendly and professional culture and stamping out incivility before it escalates to the level of bullying.¹²² While workplace culture is less tangible and therefore harder to provide explicit guidance about its creation and maintenance, it is clearly influenced by the leadership team within an organisation, who generally set the standards for others. Therefore, organisations can be assisted by public policy-makers ensuring that educational materials exist and are accessible. The partnership between the University of Melbourne and the federal government, through the Centre for Workplace Leadership, provides an example of the type of initiative which can be adopted to improve workplace culture. The Centre conducts research into improving the quality of leadership in Australian workplaces and provides free resources that organisations can use to self-educate.¹²³ It is argued that further investment should be made in these types of partnerships, specifically focusing on developing positive workplace culture, hopefully enabling organisations to develop a better understanding of how to prevent bullying.

¹¹⁹ Pillay, above n 1.

¹²⁰ McLinton et al, above n 120.

¹²¹ Pillay, above n 1.

¹²² Simon Burgess and Dale Trott, 'Combating Workplace Bullying by Focusing on Workplace Incivility' (2012) 28(3) *Australian & New Zealand Journal of Health, Safety and Environment* 1.

¹²³ 'Annual Report 2013–14' (Report, Centre for Workplace Leadership, 2014) 5.

D What is Preventing Non-legislative Strategies from Receiving Focus?

The idea that effective industrial relations policy requires the application of both legislative and complementary non-legislative measures is not a new one. For example, it has been previously argued that the FWO and FWC should contribute to encouraging workplace cooperation and fairness for employees.¹²⁴ However, as the parliamentary inquiry into workplace bullying showed, governments may prefer legislative options, as they provide something concrete that they can point to as action taken to address the problem. The inquiry resulted in 23 recommendations, the last of which was that the federal government introduce a means by which individuals could seek redress for workplace bullying. Yet, it was this recommendation that arguably received the greatest public policy attention.

In an environment where substantial funds are already being spent by governments and organisations through the legal framework, it is difficult to convince either that further expenditure on preventative measures is required. However, there is a need to continue making the case for preventative measures – and their capacity to reduce overall costs. Hopefully if this can be done, governments will see that it makes good public policy sense to invest in these types of measures. If bullying can be stopped before it starts, or at least curtailed, billions of dollars can be brought back into the economy to the benefit of the nation. Further research is needed, particularly economic modelling, which clearly outlines the business case for investment in non-legislative preventative measures. If the flow-on savings could be measured, this would enable governments to make the case to voters for any short-term pain to the budgetary bottom line.

IV CONCLUSION

In summary, this article has argued that legislative action in relation to workplace bullying can only ever achieve a certain amount as it is usually focused around curing, rather than preventing the problem. However, this is not to say that the legislative framework is completely ineffective at dealing with bullying. It is contended that WHS and employment law together send a relatively clear message to employers and employees about their obligations which presents an opportunity to respond with preventative measures. While there are many slight alterations that could be made to the legislative framework, especially in terms of strengthening WorkCover, these changes would be less pressing if more bullying

¹²⁴ Anthony Forsyth and Holly Smart, 'Third Party Intervention Reconsidered: Promoting Cooperative Workplace Relations in the New "Fair Work" System' (2009) 22 *Australian Journal of Labour Law* 117, 145.

could be stopped from occurring in the first place. In order for organisations to effectively deal with workplace bullying and hopefully prevent it from escalating to the point where legal action is needed, further investment is needed in education, training and support for relevant stakeholders. As with all changes to public policy, the difficulty will be in building a political consensus and it is vital that the economic case be developed to this end.

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