

Workplace Bullying in Australia: The Fair Work Act and its impact

Ben French, Department of Employment Relations and Human Resources,
Griffith University Business School, Queensland, Australia
b.french@griffith.edu.au

Maree V. Boyle, Department of Employment Relations and Human Resources,
Griffith University Business School, Queensland, Australia

Olav Muurlink, Department of Management,
Central Queensland University Business School, Queensland, Australia

**Workplace
Bullying in
Australia**

Page | 69

ABSTRACT

Workplace bullying represents a significant compliance and wellbeing challenge to workplaces, and changes in Australia's legal framework in relation to bullying will only amplify these challenges. Their implications for similar jurisdictions, such as New Zealand, where there remains no specific legislation to hold organisations to account for bullying that occurs in the workplace, are insightful. This article examines the crystallising of a single framework from state frameworks, and discusses recent case law and its implications for employers. While only a single case has been successfully prosecuted, cases that have failed to result in a 'stop bullying' order illuminate the potential for increased compliance pressure on employers, and the authors point to litigation that may flow through to other courts from application of the 2013 changes to the Fair Work Act. Law does not develop in a local or national vacuum, and in the absence of immediate precedent can be shaped by international influence—hence it is likely that the changes in Australia will be echoed in New Zealand, and vice versa.

Key words: Workplace Bullying, Implications, Fair Work Amendments

THE LAW ENTERS THE BULLYING FRAY

Workplace bullying is a complex problem resulting in profound negative impacts on the individual (Lutgen-Sandvik, Namie & Namie, 2009), and the organisation (Mayhew & Chappell, 2001), depressing productivity and increasing costs to organisations, the community and individual workers (House of Representatives 'Standing Committee on Education and Employment, 2012'; Thirlwall, 2011). Its impact has been recently measured in the New Zealand context (e.g. Bentley et al., 2012; Gardner et al., 2013). Although recognition, prevention, reduction and resolution of workplace bullying has been approached from various perspectives, including human resource (HR) policy, there is no universally agreed strategy to prevent its occurrence or mitigate its impact. This paper provides a different lens to examine bullying in an organisational context: the evolving legal climate. This paper particularly focuses on the Australian situation; however its implications for similar jurisdictions, such as New Zealand, where there remains no specific legislation to hold organisations to account for bullying that occurs in the workplace (Blackwood & Bentley, 2013) are insightful. First, we provide a historical perspective of various definitional and contextual issues that have been problematic with respect to workplace bullying research, before outlining the diversity of legal jurisdictions dealing with workplace bullying in Australia. In order to operate efficiently, the law, naturally, requires definitional focus, and we next outline how bullying is

defined under the *Fair Work Act 2009* (Cth) (subsequently referred to as FWA or ‘the Act’, with Cth standing for *Commonwealth* legislation) as a result of the recent House of Representatives ‘Inquiry into Bullying in the Workplace’ (‘the Inquiry’) and critique the court’s interpretation of the Act. We conclude by discussing the implication of these changes for human resource policy and practice within Australian workplaces, making recommendations for future HR practice. With only six months of casework to examine, this study represents an early examination of the implications of the FWA, and signals changes in practice for HR managers—but also likely further adjustment in the law.

Bullying: A Literature In Search Of Focus

As noted by scholars, a coherent approach to the recognition, prevention, reduction and resolution of workplace bullying, has been hampered by lack of clarity in the definition of ‘workplace bullying’ (Bartlett & Bartlett, 2011; Branch, Ramsay & Barker, 2013). For legislators and courts, the problem cannot remain merely academic, and efforts to define have urgency (Lippel, 2010; Squelch & Guthrie, 2010). Within its 2002 Report, *Workplace Violence in the Health Sector*, the International Labour Organisation (ILO) identified significant diversity between jurisdictions in not just defining ‘workplace bullying’, but even labelling it, making it hard to compare ‘like with like’ (ILO, 2002). Terms such as ‘mobbing’ (drawn from animal behaviours) (Leymann, 1996), ‘incivility’ (Cortina, Magley, Williams & Langhout, 2001) and ‘workplace harassment’ (Davenport, Schwartz & Elliott, 1999) are more or less interchangeable (Diamond, 1997; Lutgen-Sandvik & Sypher, 2009), and are common within Anglo-Saxon jurisdictions including New Zealand, but also Australia, the US and the UK. In French speaking jurisdictions, the term ‘harcèlement moral’ or ‘moral harassment’, is preferred (Lerouge, 2010). The term ‘workplace bullying’ has captured what Branch et al (2013) refer to as “persistent abusive treatment within the workplace” (p. 281), and will be the term we prefer here. It incorporates a range of behaviours, including harassment, intimidation, aggressive, or violent behaviour towards a worker in a workplace context (Branch, Ramsay & Barker, 2007, 2013), where the conduct is ‘repeated’ (Leymann & Gustafsson, 1996; Squelch & Guthrie, 2011; Thirlwall, 2011).

Underlying the definitional uncertainty has been the increasing multi-disciplinary interest in the field, each discipline bringing a subtly different approach; including in methodology, ranging from psychological/behavioural research with a clinical focus, to industry case study research (Liefsooghe & Olafsson, 1999; Samnani, 2013). Some academics argue that these disparate approaches result in a lack of coherence (Cowan, 2012; McCarthy & Rylance, 2001), producing what Timo et al. call “mono-causal...and mono-dimensional explanations of complex workplace behaviours” (Timo, Fulop & Rutherford, 2004, p. 58). We have seen investigations of workplace bullying in contexts as diverse as higher education (Keishley & Neuman, 2010; Thirlwall, 2011), health (Hutchinson, Wilkes & Jackson, 2009; Quine, 2001), aged care (Timo, Fulop & Rutherford, 2004), bus driving (Glaso, Bele, Nielsen & Einarsen, 2011), the military and police (Pershing, 2003; Tuckey, Dollard, Hosking & Winefield, 2009) and even the legal profession (Hoy, 2013; Omari & Paull, 2014;). The diversity and depth of literature has however helped raise awareness of the impact and prevalence of workplace bullying (Hoel & Cooper, 2000, 2001) and resulted in augmented reflection and debate amongst scholars, primarily across the human resource management (HRM), organisational and psychological literature (Brotheridge, 2013; Farrell & Bobrowski, 2003).

The legal debate over bullying has also drawn focus to the question of the degree of responsibility of managers and organisations for its prevalence, but in fact causes of bullying can be separated broadly into three, two of which are relevant to the current debate.

Individual: At the one extreme, scholars have pointed to individual causes of workplace bullying, arising from a deficient ‘moral compass’ or other aspects of personality (Parkins, Fishbein & Ritchey, 2006; Mathisen, Einarsen & Mykletun, 2011). There is good reason to at least allow a focus on extra-organisational variables. Bullying, as Einarsen (1999) has previously argued, is common outside the workplace, or, more generally, outside the organisation. Gender has been highlighted as a factor, with Einarsen (2000) suggesting that males are more likely to instigate bullying type behaviours, though the research is not unequivocal (Leymann, 1996). Hoel and Cooper (2000) suggest that individual characteristics may also play a role in the regularity of workplace bullying. Their research suggests that younger workers are more vulnerable to bullying than older workers (Hoel & Cooper, 2000). In contrast, Leymann (1996) found that age was of little significance. It may be, as Einarsen (2000) observes, that while younger employees may be targeted more, they are less likely to perceive the behaviour as workplace harassment, and more eager to accommodate workplace mistreatment early in their careers.

Organisation: Extending the individual focus to inequitable power relations between individuals or between or within groups (e.g. Hunter, Boyle & Warden, 2007) brings organisational structures, and greater opportunity for organisational intervention, into the frame. However, power imbalances can also be interpreted as a function of the problem individual, rather than the toxic environment. The distinction, as we will see, has significant legal implications. Research suggests that bullying behaviours may be vertical or horizontal, and between groups, sub-groups or individuals (Lutgen-Sandvik et al., 2009; Timo et al., 2004). As for the vertical nature, Einarsen, Hoel, Zapf and Cooper (2003) also note that subordinates ‘bully-up’ (Lutgen-Sandvik et al., 2009; Shallcross, Ramsay & Barker, 2010; Thirlwall, 2011; Wallace, Johnston & Trenberth, 2010) albeit rarely. However, more characteristically, bullying follows traditional top-down pathways of power. According to Hoel and Cooper (2000), the Australian Council of Trade Unions (ACTU) (2000) and Timo et al. (2004) the use of bullying to exercise control is quite common, especially in middle management and supervisory ranks and in service industries with direct client contact where organisational and client goals come into conflict (Carnero, Martinez & Sanchez-Mangas, 2010 in Omari & Paull, 2010). In fact, beyond individual and organisational interpretations of bullying, Beale and Hoel (2011) have argued that workplace bullying is actually ingrained in capitalistic societies, rather than merely the *organisation*, because it is a form of exercising managerial control. However there is significant variation in incidence of bullying, suggesting that the macro-economic context does not solely or inevitably drive the phenomenon. A less pessimistic organisational viewpoint that acknowledges the macroeconomic context, however, suggests that workplaces experiencing rapid structural change are more likely to foster bullying behaviour (e.g. Hutchinson, 2012, Timo et al., 2004), a variant of the ‘strain theory’ of crime (Agnew, 1992)¹. Thus workplaces that encourage competition, or operate in conditions of higher competition, and those that exhibit job insecurity, or are going through periods of work intensification are considered likelier to foster bullying (Einarsen, 2000; Hoel & Cooper, 2001).

The legal context

Law does not develop in a local or national vacuum, and in the absence of immediate precedent can be shaped by international influence—hence it is likely that the changes in Australia will be echoed in New Zealand, and vice versa. Within the bullying context, one key actor in the development of law has been Article 7 of the United Nations’ through its *International Covenant on Economic, Social and Cultural Rights* (ICCPR) which requires signatories, such as Australia and New Zealand to recognise the universal right to the enjoyment of just, favourable, safe, and healthy working conditions (United Nations, Office of the High Commissioner for Human Rights, n.d.), and in New Zealand the Human Rights Act 1993 has taken this a step further (Blackwood & Bentley, 2013). In Australia, this fundamental principle has underpinned a patchwork of diverse

¹ Strain theory postulates that stress caused by social structures or individual factors (such as economic strain) causes crime.

legislative schemes across jurisdictions in an attempt to protect employees, and supervisors, from being bullied. This has occurred with questionable success, coherence and consistency (Ballard & Easteal, 2014; Department of Justice, n.d.; Stojanova, 2014).

Legislation *directly* pertinent to bullying is very new, particularly in the case of cyberbullying, with the early scholarly literature reflective of the courtroom, focusing on bullying in a schools rather than workplace context. The US lead the field in this regard, with *J.S. v. Bethlehem Area School* (2000) being one of the very early cases, where the US Supreme Court ruled that a school was within its rights taking action against a student who was expelled for creating an internet page targeting school faculty, despite appeals to rights to free speech (Donegan, 2012). In Australia, early interventions lacked legal teeth, and instead sought to remind employers of their obligations, with the Australian Council of Trade Unions for example launching a nationwide campaign on workplace bullying in 2000. Until recently, workplace bullying was not *explicitly* defined in federal or state legislation or regulations, except within the South Australian *Occupational Health, Safety and Welfare Act 1986* (SA) (Squelch & Guthrie, 2010), up until 2012, at which time that Act was repealed and replaced in that state with the *Workplace Health & Safety Act 2012*. The introduction of that 2012 Act was based on Commonwealth ‘model’ workplace health and safety legislation being progressively introduced across Australia at the time. Inspection of the two South Australian Acts, reveals that one of the consequences of the Commonwealth’s model legislation being replicated, was the repeal, and non-replacement of, section 55A of the 1986 Act—a section that specifically recognised inappropriate behaviour towards an employee, which included a definition of bullying.

Thus, without explicit definition, the concept of workplace bullying has been dispersed across various pieces of Australian legislation, regulations and codes of practice rather than being specifically embedded in general industrial relations statutes (e.g. the FWA and equivalent State Acts). The lack of a ‘comprehensive or coherent’ system has left employers and employees alike unsure of their legal rights and obligations under a complex legal system (Ballard & Easteal, 2014; Stojanova, 2014; House of Representatives ‘Standing Committee on Education and Employment, 2012’). We will briefly describe the different elements that, collectively, make up the Australian legal framework on bullying.

Mental health and bullying regulations, as just noticed have been widely dispersed—through *general WHS laws* (Squelch & Guthrie, 2012; Thirlwall, 2011), and *WHS codes of practice and guidelines* (McDonald & Dear, 2008; Squelch & Guthrie, 2012), and aspects of *worker’s compensation law* (McDonald & Dear, 2008; Riley, 2007; Squelch & Guthrie, 2012). There are a number of points of relevance to bullying in *anti-discrimination laws*, particularly when the bullying is based on an attribute listed in the discrimination provisions in the FWA (See Part 3-1-5) or relevant Federal or State Anti-Discrimination Act (Squelch & Guthrie, 2010), or when considered the conduct may be considered victimisation because of the way a person was treated after engaging in ‘protected conduct’, such as making a discrimination complaint (Rees, Rice & Allen, 2014; Ronalds & Raper, 2012), but bullying *per se* is not a cause of action under these Acts and can only be used as an example of discriminatory conduct. Redress has also been available via the seldom-used section 85c of the former *Trade Practices Act 1974* (Cth), the predecessor to the *Competition and Consumer Act 2010* (Cth) (Timo et al., 2004). Another option for addressing workplace bullying has been by use of statutory industrial instruments such as *Enterprise (Collective) Agreements*, which often have dispute resolution clauses (Stojanova, 2014). Whilst contingent upon the extent of the socio-psychological and/or physical injuries, it is in fact *common (case) law* made by judges that has awarded the most significant damages in occasional cases, to individuals harmed for either *breach of contract* or *duty of care*. Although the common law allows

non-legislative avenues of redress for workplace bullying, it has often been inadequate in addressing these claims (Riley, 2007). Common law has however increased its focus on what constitutes ‘harm’ in the workplace and connecting that harm with ‘working relationships’ has become an increasingly common legal argument. Employers have found themselves vicariously liable for the actions of others in the employer’s workplace. However, taking a matter to court is often a ‘last resort’ because of the expense, effort (Thirlwall, 2011) and emotional turmoil inherent in litigious actions (Squelch & Guthrie, 2010).

On rare occasions, where the workplace bullying action has included violence, or the threat of violence, action can be taken via *criminal statutes* for example, the *Criminal Code 1995* (Cth) (Kift, Campbell & Butler, 2009; Timo et al., 2004). Indeed some of the highest-profile bullying cases have criminal implications that are not always fully exposed, but remain as a significant backdrop to organisational behaviour. A relatively recent example serves to illustrate: the suicide death of a young waitress, Brodie Panlock who had been ruthlessly and relentlessly bullied at work by her co-workers (See, *WorkSafe Victoria v Map Foundation Pty Limited t/as Café Vamp & Ors.* Magistrates Court of Victoria, 8 February 2010), saw the amendment of the definition of stalking within the *Crimes Act 1958* (Victoria) (Stojanova, 2014) to include criminal sanctions *specific* to serious bullying behaviour, often separately deemed to be ‘workplace violence’ or ‘workplace harassment’. Now behaviour such as abusive language, threats of harm, and mental harm is specified in the state legislation. The amendments are known as ‘Brodie’s Law’ and penalties for breach of these sections include terms of imprisonment up to 10 years (Department of Justice n.d.). In ‘Brodie’s case’, none of the defendants were charged under the *Crimes Act 1958* (Vic). Instead the offenders were prosecuted under provisions of the Victorian *Occupational Health and Safe Act 2004*. After pleading guilty, the court sanctioned the four male offenders with fines totalling \$115,000, whilst the company was also convicted and fined \$220,000. Without suggesting criminal sentencing should be the norm, Kift et al argues that criminal law “may be apposite to more instances than might be generally appreciated” (2009, p. 68).

Finally, a dismissed worker can take an *unfair dismissal action* under the *FWA*, but this type of action requires an employee to be dismissed (See *FWA* Part 3-2), and whilst bullying can be used as evidence against the employer, a bullying claim is not specifically denoted as a separate right of action (Squelch & Guthrie, 2010). Likewise, since the introduction of the *FWA* in 2009, some categories of workers have been able to take general protections claims if they have been treated adversely—including bullying—in a workplace setting. However, to date nothing suggests that these actions have provided quick and effective remedies to prevent bullying from occurring—something that the new amendments attempt to remedy.

The Fair Work Act enters the bullying domain

On 27 June 2013 Australia’s federal parliament passed amendments to the *FWA* that included specific provisions on workplace bullying. The amendments give effect to the government’s response to the House of Representatives Standing Committee on Education and Employment’s (2012) Report into Workplace Bullying. The report notes that to most Australians, “work provides a sense of dignity and is central to our individual and collective sense of identity” (House of Representatives Standing Committee on Education and Employment, 2012, p. 1.) and bullying can significantly disturb that sense of dignity and identity.

Individual workers who ‘reasonably believe’ they are victims of workplace bullying now have a relatively clear avenue of redress: they can lodge a complaint with the Fair Work Commission (FWC) for a ‘stop-bullying order’, although the new conservative government has already flagged amendments in which mediation may be required first. The new amendments to the *FWA* now place more comprehensive obligations on ‘constitutionally covered businesses’, that umbrella term

covering a broad range of workers, including contractors, subcontractors, labour hire personnel and other workers (including volunteers and other unpaid roles) engaged to perform work in any capacity. There are some exclusions: Australian Armed Forces and Australian Federal Police are exempt due to the unique features of the work and command structure, but there is speculation that the new government will broaden the FWA provisions so that *employers* who have been bullied by union officials have redress.

To successfully apply for a stop bullying order, workers need to demonstrate that the offending behaviour falls within a specified *definition* of bullying:

1. An individual or group has behaved ‘unreasonably’ towards the worker or a group of workers to which the worker is a member;
2. The behaviour has been of a repetitive nature; and
3. The behaviour creates a risk to health and safety.

S789FF of the FWA stipulates that the commission has to determine whether the bullying is likely to continue before making a stop-bullying order. Furthermore the worker’s belief that they have been or are being bullied must be ‘reasonable’. Reasonableness provisions are not uncommon in the law: they take the form of an objective test: what a reasonable person, having regard to the circumstances, would consider reasonable. An employer is required by s789FD(2)(1) to demonstrate that it has acted in a reasonable manner, that is, having taken ‘reasonable management action’ carried out in a ‘reasonable manner’.

With recent research indicating early intervention to stop further bullying can help prevent possible further harm to a person’s health and well-being (Nelson, 2013), the Act offers unusual timeliness, in contrast to industrial law in general. Consequently, the FWC must start to ‘*deal with*’ a listed complaint within 14 days of the application being lodged. S789FF(2) states that in issuing an order, the FWC will take context into account, including the provisions within the workplace to resolve grievances or disputes. Finally, the orders may be issued against the employer, employees or a visitor to the workplace, and orders are quite flexible in content. They can include individual or group ‘stop orders’, and provision of support and training to workers, as well as a review of an organisation’s bullying policy (Explanatory Memorandum, para 120, p. 30).

How the law has played out

A Senates Estimates Enquiry heard predictions that the FWC would receive 3500 bullying stop order applications per year (Senate Standing Estimates Committee, 2013), and the Commission received \$5.2 million in funding to deal with the deluge. It has yet to materialise. In six months of operation, only 348 anti-bullying applications were lodged (Australian Labour and Employment Relations Association (ALERA), 2014).

Complaints to date have clustered around clerical, education, health and welfare and large employers (ALERA, 2014), but we will focus on a small number of particular cases that cast light on where the case law will likely end up.

At this stage it is unclear whether a party other than a worker can submit a claim on behalf of a worker. The FWA amendments only use the term ‘worker’ in referring to the plaintiff. As a test case, the National Union of Workers recently applied for a ‘stop-bullying order’ without identifying the particular labour hire workers employed by Hoban Recruitment Pty Ltd (Hoban), and engaged by Caterpillar of Australia Pty Ltd (Caterpillar). Anonymity was sought to protect workers from potential repercussions. Hoban and Caterpillar both disputed the union’s right to file the actions on the basis that the NUW was not a ‘worker’. Whilst the case has been withdrawn, the case is a likely legal harbinger.

A significant number of the applications have been deemed to fall outside the scope of the amended Act, and it is illustrative to briefly examine these. The FWC's first Full Bench decision demonstrates that the legislation can include pre-2014 bullying behaviour: (*Kathleen McInnes* [2014] FWCFB 1440) although this case was eventually dismissed on other jurisdictional grounds, as the respondent was not a 'constitutional corporation', the FWC Full Bench acknowledged that bullying before the commencement of the FWA provisions could be considered. In finding the case beyond the scope of the federal legislation, the FWCFB stated that it did not consider the case to involve a 'trading corporation', as it was a community organisation that provided free services, which did not have the character of commercial trade, and trading activities were not significant. Another application that the FWC refused to hear on jurisdictional grounds was *Balthazaar v Department of Human Services (Commonwealth)* [2014] FWC 2076. In that case the complainant was a carer for family member, and therefore deemed not to be a 'worker of a constitutional corporation', as per the requirements of section 789FC&D of the FWA. The Kathleen McInnes case referred to earlier also shone some light on these limits. Similarly, in the case of *Mitchell Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank* [2014] FWC 3408; *Haines* [2014] FWC 3408), the FWC was unable to hear the matter as the employee had been dismissed after he lodged his claim; as such the employee was not at risk of the 'bullying continuing' (our emphasis). Nonetheless, as the applicant employee is seeking re-instatement as part of an unfair dismissal claim, the FWC stated that there is nothing to prevent him from re-lodging his application for a stop-bullying order should he be reinstated.

Interestingly, the 'reasonable management action' term (where behaviour is justified on the basis that the alleged 'bullying' is in fact management) was first tested in the FWC's new anti-bullying jurisdiction in what Lutgen-Sandvik et al. (2009) call a case of 'bullying-up'. In the legislation's first substantive test, *Ms SB* [2014] FWC 2104, the FWC rejected the applicant manager's case of being bullied by two of her subordinates. The case failed because while the applicant was able to sustain one allegation of bullying, there was an absence of 'repeated actions of unreasonable behaviour'. Importantly for employers, all other allegations were found to be 'reasonable management action in a reasonable manner'. The case highlighted that an employer's investigation into an alleged claim of bullying is not in itself considered bullying, unless it is carried out in an unreasonable manner.

In fact, at this stage only one complainant has been successful in obtaining a stop-bullying order (ALERA, 2014). However this is not to say that there have not been other satisfactory outcomes, as a stop-bullying order is a final resort used for the severest of situations that cannot be remedied by agreed conciliation. While it would be useful to be able to illuminate the Act by giving a detailed account of the case, the names of the parties were suppressed in *Applicant v Respondent* PR548852, Sydney, 21 March 2014, as were the background facts. Instead, we have to rely on the nature of the orders to guess at the nature of the offence. The order does illustrate the degree to which the FWC can customise relief to suit particular instances and organisational contexts. In this case, the bully was ordered to:

- Complete any exercise at the employer's premises before 8.00 am (and the applicant conversely was ordered not to arrive at work before 8.15 am)
- Have no contact with the applicant unless in the company of others
- Make no comment about the applicant's clothes or appearance
- Send no emails or texts to the applicant except in emergency circumstances

Raise all work issues in the first instance with the Chief Operating Officer or his subordinate. In addition the parties were given scope to have a further conference with the FWC should there be difficulty in implementing the orders.

Penalties

Interestingly, the FWC cannot issue an order for reinstatement, fines or a compensatory order to pay a pecuniary amount. However, a contravention of the order makes the offending party liable under the civil remedy provisions (with a maximum of 60 penalty units – 1 unit = \$100). It is interesting to note that prosecutions under various WHS Acts provide for *more* substantial fines - for example *Work Health & Safety Act 2011* (Qld) against individuals and companies.

Workplace Bullying in Australia

Page | 76

On the surface, the FWA appears to be a relatively limp legal implement. Generally an individual cannot be subject to criminal or civil sanctions as a result of an application under these provisions. However if the perpetrator does not comply with the term of the stop bullying order, the applicant may seek a civil remedy, such as possible monetary compensation or fine against the employer, and workers may still commence proceedings or make an application under the *Work Health and Safety Act 2011* (Cth) and corresponding WHS State laws in relation to the bullying, which as highlighted may provide more severe penalties or under the Workers Compensation Acts, in regard to damages. It is these flow-on legal impacts that, in our view, are the key consequence of the changes in legislation. As we have noted, the FWA offers a relatively quick, streamlined *entrée* to the legal system, which for both employee and employer may be a positive development—but for the employer carries risk. A significant consequence of the FWA is that another layer of legislative protection for the worker has been added, without a layer being removed. This is in line with the Inquiry Committee which recommended that all workers who are bullied should have access to quick and cost effective remedy, but that workers compensation and criminal law may in some instances be more appropriate.

The manager's defence

For employers fearing their prerogative is being eroded by changes in industrial law, it is worth remembering that a defendant may still defeat a claim of bullying at the FWC by proving that their actions were 'reasonable'. In light of the many elements that workers need to make out to prove they have been repeatedly and unreasonably treated, it may be difficult for a manager/owner to then argue such actions were reasonable. Nevertheless, the Inquiry Committee found that a balance needed to be struck between the need for managers to be able to manage their staff, and preventing bullying in the workplace (Fair Work Amendment Bill [Explanatory Memorandum], 2013). Managers need to be able to respond to poor performance or take disciplinary action, such as being able to give workers constructive feedback (see for example, *George v Northern Health (No3) [2011] FMCA 894*, brought as a general protections application but dismissed on basis that the dismissal was substantiated, because the managers were responding to the employee's poor performance). According to the (Fair Work Amendment Bill [Explanatory Memorandum], 2013) these actions are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and does not leave the individual feeling (for example) victimised or humiliated from a reasonable person's viewpoint. Finding for the employer in a recent *unfair dismissal* case, Commissioner Roe of the FWC in *Choi v Country Fire Authority T/A CFA [2013] FWC 469* explained that, "Just because performance management is stressful, does not make it inappropriate or unfair." Clearly, the Commission is on guard against vexatious claims. Commissioner Cloghan states: "Where complaints are not sound, and there will be such circumstances, the complainant should also be informed swiftly and counselled in proportion to the scale of the accusations made. In such cases, managers and supervisors are left with the task of healing or repairing working relationships - which will be, in some circumstances, an unenviable task" (at para 41).

DISCUSSION: IMPLICATIONS FOR EMPLOYERS AND EMPLOYEES

Workplace health and safety is frequently ranked as the highest priority amongst HR managers (Smallman, 2001) particularly in an increasingly litigious industrial environment (Clark, 2010), which has added substantial financial cost to the human cost of poor WH&S performance (Fernández-Muñiz, Montes-Peón & Vázquez-Ordás, 2009; Hofmann, Morgeson & Geras, 2003). However, it has been suggested that the impact and intensity of occupational violence and workplace bullying behaviours is an incrementally evolving process, and therefore often more difficult to detect within a work context than outside the field of work, especially if there is a climate that militates against reporting such behaviour (Zapf & Einarsen, 2005).

Workplace Bullying in Australia

Theoretically, a relatively easily comprehensible, lean, and rapid-response legislative framework, has benefits for both the employee and the employer, but as foreshadowed in the preceding, there are a number of shortcomings and risks in the FWA changes. For an employer, the FWC provides a framework wherein grievances can be quickly aired, and the focus is on resolving the matter and enabling a return to normal working conditions, rather than punitive compensation or reinstatement.

Page | 77

The FWA changes have set new standards of legal clarity and alacrity, and employers need to mimic those standards, thus amplifying the rewards of prevention. Employers need to ensure that they have procedures and policies in place that enable their organisation to not only deal with bullying claims, but deal with them quickly. Once the complaint has gone to the FWC, time is even more of the essence. The onus will be on employers to take measures to ensure they take ‘reasonable management action’ in any given circumstances. However, good, genuine mechanisms of employee voice will help to ensure that bullying complaints are captured in-house in the first instance, and it is then up to the organisation’s HR department to act appropriately.

The FWA has provided a powerful comprehensible working definition of bullying, and there are examples embedded in the Code of Practice by Safe Work Australia, giving the changes high workplace relevance. This information needs to be transmitted clearly through an organisation’s induction, and WHS and workplace behaviour training. Importantly this should include having proper performance and disciplinary processes in place. The FWC has recommended organisations “select line managers with good interpersonal skills, to help them prevent bullying claims” (Workplace Express, 26 August, 2014). Implementing good systems is likely to help the FWC come to a conclusion of “reasonable management action” in marginal cases. Merely creating policies and procedures is insufficient. Poor communication skills and a failure to ‘follow up’ by management about complaints contributes to bullying being recognised as an accepted part of workplace culture, particularly where such behaviours are seen as unchallenged (Hauge, Stogstad & Einarsen, 2009). Employers that are active in communicating company bullying/grievance policies are seen as less likely to have employees reporting bullying experiences (Van Fleet & Van Fleet, 2012).

While it is true that the FWC only has powers to make ‘stop bullying orders’ against employers, without financial penalty to the employer or compensation to the employee, this does not make the provisions relatively benign from an employer’s perspective. The FWC is a legislative body which compels participation on the part of defendants. The cost of time away from the place of business for senior and not-so-senior staff, in addition to legal fees, including an independent (internal or external) investigation is serious. Managers also need to consider the impact of a FWC hearing on an organisation’s public image. Case law to date indicates that the FWC will allow closed hearings, which help mitigate the public relations impact of bullying cases on an organisation’s reputation, even though this will not always occur (Justin Corfield [2014] FWC 4887). In that case, Commissioner Bissett advised the parties that, similar to unfair dismissal proceedings and in accordance with the open justice [principle], mere embarrassment, distress or damage by publicity

was not a sufficient reason to suppress the identities of the parties.

The relative accessibility of FWC measures may lead to an increase in formal bullying complaints. A wave of complaints and cases was anticipated, and as we have seen, only one has reached arbitration, although several have been conciliated (ALERA, 2014). However, and perhaps most importantly, a decision by the FWC to make a stop-bullying order may also affect an employer's defence to a common law negligence claim stemming from bullying conduct, or a defence against a workers' compensation claim relating to 'reasonable management action'. Employee lawyers will inevitably learn to work the system and use the evidence of a stop bullying order in a later workers' compensation or common law tort claim. A FWC case, even one where the action by the complainant fails, may act as an indicator of a poor safety climate at work. In summary, the Fair Work amendments may eventually give rise to activity in other courts.

From an employee perspective, the changes also have some severe limitations. Complaints can only be dealt with where there is a risk of the bullying continuing, in other words where employment has been terminated or an employee has resigned due to bullying, these changes offer no comfort. This is a significant limitation. The process in itself may trigger further friction in the workplace, unless a graduated approach is taken. Mindful of this, the FWC is holding original conferences in private as per s592, but the Commission can answer its public 'transparency charter' by simply taking steps to inform itself of a matter and/or holding a hearing in public if it feels necessitated to do so. These Stop-Bullying orders are arguably no more than has been available via other means such as an injunction, statement of claim, or a letter from the aggrieved employee's solicitor; although it is noted that these other actions do not provide for *quick, inexpensive or even effective* compensation to those bullied in the workplace. However, at this stage legally, an employee may be better to take alternative claims that have been available but limited by the courts and insufficiently used.

HR practitioners need to bear in mind that the amendments have not been fully tested by the tribunals and higher courts. However, if factors such as interpersonal conflict, peer group pressure, occupational ranking, work intensification, cost minimisation, competitive work environments and poor management skills contribute to workplace bullying behaviours (Cowan, 2012; Houshmand, O'Reilly, Robinson & Wolff, 2012; Hutchinson et al 2009;), then even with the advent of the recent bullying amendments to the FWA, solutions may be far more difficult to implement than recognised by the FWA. Complexity may arise out of its simplicity.

REFERENCES

- Agnew, R. (1992). Foundation for a general strain theory of crime and delinquency. *Criminology*, 30(1), 47-88.
- Australian Council of Trade Unions. (2000). *Being bossed around is bad for your health*. Retrieved October 28, 2003, from http://www.actu.asn.au/public/ohs/bullying/1063694361_23162.html.
- Ballard, A., & Easteal, P. L. (2014). Mapping the legal remedy pathways for workplace bullying: A preliminary overview, 39(2), 94-98.
- Bartlett J. E., & Bartlett.M.E. (2011). Workplace bullying: An integrative literature review. *Advances in Developing Human Resources*, 13(1), 69-84.
- Beale, D., & Hoel, H. (2011). Workplace bullying and the employment relationship exploring questions of prevention, control and context. *Work, Employment & Society*, 25(1), 5-18.
- Bentley, T. A., Catley, B., Cooper-Thomas, H., Gardner, D., O'Driscoll, M. P., Dale, A., & Trenberth, L. (2012). Perceptions of workplace bullying in the New Zealand travel industry: Prevalence and management strategies. *Tourism Management*, 33(2), 351-360.
- Blackwood, K., & Bentley, T. (2013). Out of step?: The efficacy of trans-Tasman law to combat workplace bullying. *New Zealand Journal of Employment Relations*, 38(1), 27.
- Branch, S., Ramsay, S., & Barker, M. (2013). Workplace bullying, mobbing and general harassment: A review. *International Journal of Management Reviews*, 15(3), 280-299.
- Brotheridge, C. M. (2013). Explaining bullying: using theory to answer practical questions. *Team Performance Management*, 19(3/4), 185-200.
- Carnero, A., Martinez, B. & Sanchez-Mangas, R. (2010) Mobbing and its determinants: the case of Spain, *Applied Economics*, 42(29), pp. 3777-3787.
- Clarke, S. (2010). An integrative model of safety climate: Linking psychological climate and work attitudes to individual safety outcomes using meta-analysis. *Journal of Occupational and Organizational Psychology*, 83(3): 553-578.
- Cortina, L. M., Magley, V. J., Williams, J. H., & Langhout, R. D. (2001). Incivility in the workplace: incidence and impact. *Journal of Occupational Health Psychology*, 6(1), 64.
- Cowan, R. L. (2012). It's Complicated: Defining workplace bullying from the human resource professional's perspective. *Management Communication Quarterly*, 26(3), 377-403.
- Coyle, I. R., Sleeman, S. D., & Adams, N. (1995). Safety climate. *Journal of Safety Research*, 26(4), 247-254.
- Department of Justice, (n.d.). *Bullying law in Victoria – 'Brodies law'*. Retrieved September 1, 2014, from <http://www.victimsofcrime.vic.gov.au/utility/about+us/news+and+events/new+bullying+law+-+brodies+law>
- Donegan, R. (2012). Bullying and cyberbullying: History, statistics, law, prevention and analysis. *The Elon Journal of Undergraduate Research in Communications*, 3(1), 33-42.
- Farrell, G., & Bobrowski, C. (2003). *Scoping workplace aggression in nursing*. Unpublished paper. Tasmania: University of Tasmania.
- Einarsen, S. (2000). Harassment and bullying at work: A review of the Scandinavian approach. *Aggression and Violent Behaviour*, 5(4), 379-401.
- Einarsen, S., Hoel, H., Zapf, D., & Cooper, C. (Eds.). (2003). *Bullying and emotional abuse in the workplace: perspectives in research and practice*, New York: New CRC Press.
- Fair Work Amendment Bill [Explanatory Memorandum], 2013. Canberra: Australian Government. Retrieved 16 October, 2014 from http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5028
- Fernández-Muñiz, B., Montes-Peón, J. M., & Vázquez-Ordás, C. J. (2009). Relation between occupational safety management and firm performance. *Safety science*, 47(7), 980-991.
- Flin, R., Mearns, K., O'Connor, P., & Bryden, R. (2000). Measuring safety climate: identifying the common features. *Safety Science*, 34(1), 177-192.

- Gardner, D., Bentley, T., Catley, B., Cooper-Thomas, H., O'Driscoll, M., & Trenberth, L. (2013). Ethnicity, workplace bullying, social support and psychological strain in Aotearoa/New Zealand. *New Zealand Journal of Psychology*, 42(2), 84-91.
- Hauge, L., Skogstad, A., & Einarsen, S. (2009). Individual and situational predictors of workplace bullying: Why do perpetrators engage in the bullying of others? *Work & Stress*, 23(4), 349-358.
- Hofmann, D. A., Morgeson, F. P., & Gerras, S. J. (2003). Climate as a moderator of the relationship between leader-member exchange and content specific citizenship: safety climate as an exemplar. *Journal of Applied Psychology*, 88(1), 170.
- Hoel, H., & Cooper, C. (2000). *Destructive conflict and bullying at work*. Manchester: Manchester School of Management.
- Hoel, H., & Cooper, C. (2001). Origins of bullying: theoretical frameworks for explaining workplace bullying. In N. Tyehrani (Ed.), *Building a culture of respect: managing bullying at work* (3-19). London: Taylor and Francis.
- Hor, J. (2013) Bullying 'pandemic' in law firms, Lawyers Weekly, 4 March. Available at: <http://www.lawyersweekly.com.au/the-new-lawYer/comment-debate/bullying-pandemic-in-law-firms>.
- House of Representatives Standing Committee on Education and Employment. (2012). *Workplace bullying, "We just want it to stop": The report*. Canberra: Australian Government. Retrieved 20 September, 2014 from: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ee/bullying/report.htm
- Hunter, S. C., Boyle, J. M., & Warden, D. (2007). Perceptions and correlates of peer-victimization and bullying. *British Journal of Educational Psychology*, 77(4), 797-810.
- Hutchinson, J. (2012). Rethinking Workplace Bullying as an Employment Relations Problem. *Journal of Industrial Relations*, 54(5), 637-652.
- Keishley L., & Neuman, J. H. (2010). Faculty experiences with bullying in higher education: Causes, consequences, and management. *Administrative Theory and Praxis*, 32(1): 48-70.
- Kift, S., Campbell, M., & Butler, D. (2009). Cyberbullying in Social Networking Sites and Blogs: Legal Issues for Young People and Schools. *Journal of Law, Information and Science*, 20(2).
- Liefooghe, A., & Olafsson, R. (1999). Scientists and amateurs: Mapping the bullying domain. *International Journal of Manpower*, 20(1/2), 39-49.
- Lippel, K. (2010). Law of workplace bullying: An international overview, *The Comparative Labour Law & Policy Journal*, 32(1).
- Lerouge, L. (2010). Moral harassment in the workplace: French law and European perspectives. *Comp. Lab. L. & Pol'y J.*, 32, 109.
- Leymann, H. (1996). The content and development of mobbing at work. *European Journal of Work and Organisational Psychology*, 5(2), 165-184.
- Leymann, H., & Gustafsson, A. (1996). Mobbing at work and the development of post-traumatic stress disorder. *European Journal of Work and Organizational Psychology*, 5(2), 251-275.
- Lutgen-Sandvik, P., Namie, G., & Namie, R. (2009). Workplace Bullying: Causes, consequences, and corrections. In P. Lutgen-Sandvik & B. D. Sypher (Eds.). *Destructive organizational communication: Processes, consequences, and constructive ways of organizing* (p. 27). New York: Routledge.
- Mathisen, G., Einarsen, S., & Mykletun, R. (2011). The Relationship Between Supervisor Personality, Supervisors' Perceived Stress and Workplace Bullying. *Journal Of Business Ethics*, 99(4), 637-651.
- Mayhew, C., & Chappell, D. (2001). Internal violence (or bullying) and the health workforce, Taskforce on the Prevention and Management of Violence in the Health Workplace. *Discussion Paper No. 3*. Sydney: University of New South Wales, School of Industrial relations and Organisational Behaviour and Industrial Relations Research Centre.

- McCarthy, P., & Rylance, J. (2001). The bullying challenge. In P. McCarthy., R. Rylance., R. Bennett, & H. Zimmerman (Eds.). *Bullying: From backyard to boardroom* (xi). Sydney: Federation Press.
- McDonald, P., & Dear, K. (2008). The incidence and patterns of discrimination and harassment affecting working women in Australia. *Women's Studies Journal*, 22(1), 37-48.
- Omari, M., & Paull, M. (2013). 'Shut up and bill': workplace bullying challenges for the legal profession. *International Journal of the Legal Profession*, 20(2).
- Parkins, I. S., Fishbein, H. D., & Ritchey, P. N. (2006). The influence of personality on workplace bullying and discrimination. *Journal of Applied Social Psychology*, 36(10), 2554-2577.
- Pershing, J. (2003). To snitch or not to snitch? Applying the concept of neutralisation techniques to the enforcement of occupational misconduct. *Sociological Perspectives*, 46(2), 149-187.
- Rees. N., Rice. S., & Allen, D. (2014.) *Australian anti-discrimination law: Text, cases and material*. The Federation Press.
- Riley, J. (2007) "Mental Health and Employment: Issues for Lawyers" UNSWLRS 38.
- Ronalds, C., & Raper, E. (2012). *Discrimination law and practice*. Federation Press.
- Samnani, A. (2013). Embracing new directions in workplace bullying research: a paradigmatic approach, *Journal of Management Inquiry*, 22(1), 26-36.
- Senate Standing Estimates Committee (2013), Education, Employment and Workplace Legislation Committee, 3 June 2013. Canberra: Hansard.
- Shallcross, L., Ramsay, S., & Barker, M. (2010). A proactive response to the mobbing problem: a guide for HR managers. *New Zealand Journal of Human Resource Management*, 10(1), 27-37.
- Smallman, C. (2001). The reality of "revitalizing health and safety". *Journal of Safety Research*, 32(4), 391-439.
- Squelch, J., & Guthrie, R. (2010). Australian legal framework for workplace bullying, the *Comp. Lab. L. & Pol'y J.*, 32(15).
- Stojanova, N. (2014). The regulation of workplace bullying in Victoria: is legislation required?. *Labour & Industry: a journal of the social and economic relations of work*, 24(2), 146-160.
- Thirlwall, A. (2011). *Workplace Bullying in New Zealand. Institutes of Technology and Polytechnics: Prominence, processes, and Emotions*. Doctoral Thesis, University of Waikato.
- Timo, N., Fulop, L., & Ruthjersen, A. (2004). Crisis? What crisis? Management practices and internal violence and workplace bullying in aged care in Australia. *Research and practice in human resource management*, 12(2), 57-89.
- Tuckey, M., Dollard, M., Hosking, P. J., & Winefield, A. H. (2009). Workplace bullying: The role of psychosocial work environment factors. *International Journal of Stress Management*, 16(3), 215-252.
- United Nations, Office of the High Commissioner for Human Rights, (n.d.). Retrieved from: <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> on 16 October, 2014.
- Van Fleet, D., and Fleet, E.W. "Towards a Behavioral Description of Managerial Bullying." *Employee Responsibilities and Rights Journal* 24, no. 3 (2012): 197-215.
- Wallace, B., Johnston, L., & Trenberth, L. (2010). Bullying the Boss: The prevalence of upward bullying behaviours. *The Australian and New Zealand Journal of Organisational Psychology*. 3, 66-71.
- Zapf, D. & Einarsen, S. (2005). *Mobbing at Work: Escalated Conflicts in Organizations. Counterproductive Work Behaviour: Investigations of Actors and Targets*. Fox, S & Spector, P E. Washington, DC: American Psychological Association vii. p.329.