

Enforcement and remedies

[National Network of Working Women's Centres] know that the current regulatory system is not working because of the sheer volume of women who seek our assistance with workplace bullying and because of the fact that so few of those women are able to seek an appropriate legal remedy.¹

I do not believe that only using the occupational health and safety legislation is enough. I believe we need to have laws that protect workers, just like they do with sexual harassment. Bullying and harassment needs to be brought from the darkness into the light and it needs to happen now.²

Law can provide a powerful incentive for employers to provide bullying-free workplaces.³

Introduction

- 6.1 Despite efforts to prevent workplace bullying and resolve it through early intervention measures, some cases escalate to the point where the targeted worker is injured or has to remove themselves from the workplace to avoid injury.
- 6.2 Targets of bullying expressed a sense of injustice because bullies and employers who did not protect them from bullying were not held

1 National Network of Working Women's Centres (NNWWC), *Submission 86*, p. 9.

2 Ms Jan Shepphard, Senior Industrial Advocate, Australian Services Union (ASU), *Committee Hansard*, Brisbane, 18 July 2012, p. 24.

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

accountable for their inaction.⁴ Work health and safety (WHS) regulators are criticised for not investigating complaints of bullying or prosecuting or issuing compliance notices to people for breaching their duties of care. The police can be called on to prosecute individuals who commit criminal acts, such as assault and stalking, when they bully others at work.⁵

- 6.3 Feelings of injustice and powerlessness are amplified for the many people who discover they have no right of individual recourse to seek remedies such as compensation or damages for the injury they suffered because of workplace bullying.
- 6.4 Chapter 2 identified the enforcement measures available under WHS law and criminal law to penalise those who engage in, or employers who do not adequately prevent, workplace bullying. It also identified the more limited individual remedies available under anti-discrimination law and industrial relations law, as well as workers' compensation arrangements available to some workers.
- 6.5 In addition to the limited remedies for individuals, many people spoke of being unable to return to work owing to injuries they had sustained because of workplace bullying, particularly mental health injuries. This indicates there may be a lack, or a perceived lack, of support for these workers to return to the workforce.
- 6.6 This chapter will consider the responses that are available, or should be available, to cases of workplace bullying that have not been resolved through early intervention. Specifically, it will consider:
 - whether the enforcement measures currently available are sufficient to respond to all instances of workplace bullying and whether they are effectively applied;
 - whether there is a need to improve access to individual remedies for those adversely affected by bullying at work; and
 - what support services can be provided to assist workers injured by bullying to return to the workforce.

4 For example, see MS, *Submission 204*, p. 1; Name withheld, *Submission 66*, p. 2.

5 Mr Damian Panlock and Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 51; MR, *Submission 233*.

Enforcement

- 6.7 Under WHS or criminal legislation, criminal charges may be brought against an individual who bullies others in the workplace.
- 6.8 Employers can be charged for breaching their statutory WHS duties by not complying with their duty of care to protect workers from the risk of workplace bullying.⁶
- 6.9 Harmers Workplace Lawyers argued that in order to truly deter workplace bullying there is a need for a new law specifically prohibiting workplace bullying, with timely and effective enforcement measures.⁷ There is no such prohibition in any current WHS or criminal laws across Australia.⁸
- 6.10 However, the value of such a law was challenged by claims that current laws adequately address workplace bullying.⁹ People and Culture Strategies, a specialist workplace relations law firm that assists employees and employers in dealing with workplace bullying matters, argued that new legislation could have a detrimental impact:
- ...if further legislation is enacted to prohibit workplace bullying it is highly likely that this will lead to vexatious bullying claims which has the unfortunate impact of detracting attention from genuine claims.¹⁰
- 6.11 The Chamber of Commerce and Industry Queensland (CCIQ) also argued 'that there is already sufficient existing legislation through which workplace bullying can be addressed'.¹¹
- 6.12 Mr Nick Behrens, General Manager at CCIQ referred to report findings of a ministerial working group, established by the previous Labor Government in Queensland, that the existing laws should be more strongly enforced:

6 See chapter 2 for a discussion on how employers and workers can be held accountable for workplace bullying under current criminal laws and work health and safety laws.

7 Harmer's Workplace Lawyers, *Submission 88*, p. 6.

8 Harmer's Workplace Lawyers, *Submission 88*, pp. 4-5; Ryan Carlisle Thomas Solicitors (RCT Solicitors), *Submission 106*, pp. 8-9.

9 People and Culture Strategies, *Submission 108*, p. 3.

10 People and Culture Strategies, *Submission 108*, p. 3.

11 Chamber of Commerce and Industry Queensland (CCIQ), *Submission 67*, p. 1. See also Australian Industry Group (AiG), *Submission 59*, p. 16.

It is interesting that ... that reference group ... concluded that no additional regulation was necessary but we needed to enforce what legislation was in place and we needed to significantly increase those activities associated with raising awareness and educating stakeholders in what their responsibilities were.¹²

Work health and safety laws

6.13 Where breaches of WHS laws are detected an inspector can enforce the law by issuing improvement or prohibition notices or escalating the action to formal procedures notices which are addressed through the courts for serious contravention of the legislation'.¹³

6.14 Mr Karl Luke, Partner at Thomsons Lawyers outlined the enforcement mechanisms available under Australia's WHS laws:

The regulator could investigate and put in an infringement notice, an improvement notice saying, 'Your risk control measures are not adequate; these are the things you need to do to improve,' or a prohibition notice potentially. The regulator could prosecute the employer if it is a particularly bad case. I think the attractiveness of this model is that there is a whole suite of different enforcement mechanisms from education right through to prosecution that a regulator can use.¹⁴

6.15 A strategic approach is taken to determine what enforcement method should be used. Comcare explained how Commonwealth WHS inspectors determine the appropriate action:

The type of intervention required will be determined based on an analysis of the allegation, the action taken (or not taken) by the employer and its previous compliance history.¹⁵

12 Mr Nick Behrens, General Manager, Advocacy, CCIQ, *Committee Hansard*, Brisbane, 18 July 2012, p. 18. Mr Behrens commented that the report was prepared by a Ministerial working group under the previous Labor Government in Queensland. There was a change of government in Queensland in early 2012. The report has not yet been published.

13 Safe Work Australia, 'Comparative Performance Monitoring Report', 13th edn (October 2011), p. 17 <http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/609/Comparative_Performance_Monitoring_Report_13th_Edition.pdf> viewed 26 September 2012. See also Chapter 2 for further discussion of the enforcement mechanisms available under Australia's work health and safety laws.

14 Mr Karl Luke, Partner, Thomsons Lawyers, *Committee Hansard*, Adelaide, 7 August 2012, p. 30.

15 Comcare, *Submission 120*, p. 16.

Inadequate enforcement of work health and safety laws

- 6.16 Although it was acknowledged that there has been some enforcement of WHS laws by the regulators to hold employers accountable for breaching their duty of care, employee support organisations and lawyers criticised regulators for not enforcing the law often enough.¹⁶
- 6.17 Ryan Carlisle Thomas Solicitors (RCT Solicitors) contended:
- The number of prosecutions for ‘bullying’ behaviour remains low and there is room for improvement in terms of regulators’ responses to ‘bullying’ complaints.¹⁷
- 6.18 The Australian Council of Trade Unions (ACTU) argued that enforcement of the law in response to non-physical workplace bullying is particularly poor.¹⁸ On this point, Mr Michael Harmer from Harmers Workplace Lawyers said:
- I am aware of safety prosecutions relating to bullying, but they are rare and they normally relate to the more extreme cases, because it is difficult for the inspectors to detect and protect against that area.¹⁹
- 6.19 The Community and Public Sector Union said that the lack of prosecutions brought by work health and regulations ‘fails to provide general and specific WHS deterrence’.²⁰
- 6.20 The Australian Nursing Federation (Victorian Branch) commented that poor enforcement can also hinder public awareness of the law:
- ...there is a significant lack of knowledge at the community level in relation to this framework [for the prevention and management of workplace bullying] due to lack of community education and enforcement by the regulator.²¹
- 6.21 JobWatch stated that the burden on the regulators to prove beyond reasonable doubt that workplace bullying occurred was discouraging regulators from bringing about more prosecutions:

16 Australian Council of Trade Unions (ACTU), *Submission 63*, p. 24; Victorian Trades Hall Council (VTHC), *Submission 139*, p. 12; RCT Solicitors, *Submission 106*, p. 9; NNWWC, *Submission 86*, p. 7.

17 RCT Solicitors, *Submission 106*, p. 9.

18 ACTU, *Submission 63*, p. 24.

19 Mr Michael Harmer, Harmer’s Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 3.

20 Community and Public Sector Union (CPSU), *Submission 188*, p. 10.

21 Australian Nursing Federation (Victorian Branch), *Submission 117*, p. 32.

Due to there being a criminal standard of proof...WorkSafe [Victoria] seems to prosecute only where there is an admission of bullying by the employer and/or its employees or where there is overwhelming evidence e.g. video evidence etc. ... The criminal standard of proof is therefore prohibitive to obtaining penalties against workplace bullies and to creating any real deterrent effect.²²

- 6.22 The Community and Public Union suggested that improvement notices should require employers to improve their management of workplace bullying and therefore prevent it from happening rather than relying on prosecutions which 'are the end of the process.'²³

Improvement and prohibition notices

- 6.23 Improvement notices are used by WHS regulators to require duty holders to improve standards to comply with their health and safety duties. Master Builders Australia explained that these notices 'outline the nature of the breach and can include directions as to the measures that the duty holder needs to take in order to rectify the breach'.²⁴
- 6.24 Prohibition notices on the other hand require a duty holder to cease a prohibited action immediately.
- 6.25 Mr Paul O'Connor, Chief Executive Officer of Comcare explained that his agency uses improvement and prohibition notices to encourage employers to improve how bullying, harassment and inappropriate work relationships are being addressed.²⁵
- 6.26 It appears that regulators use notices sparingly and that prohibition notices are less commonly used than improvement notices. The ACT Government stated that '[i]n 2010-11 four improvement notices and one prohibition notice were issued by WorkSafe ACT in response to specific matters involving allegations of bullying at work'.²⁶ The Comparative Performance Monitoring Report, published by Safe Work Australia each year, provides details on the number of notices issued by regulators each year.²⁷ At the time of reporting, the 2012 edition which would include the

22 JobWatch, *Submission 103*, p. 18.

23 CPSU, *Submission 188*, p. 18.

24 Master Builders Australia, *Submission 105*, p. 10.

25 Mr Paul O'Connor, Chief Executive Officer, Comcare, *Committee Hansard*, Canberra, 17 August 2012, p. 25.

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

27 The data does not include the mining sector. See Safe Work Australia, 'Comparative Performance Monitoring Report', 13th edn (October 2011), p. 17, <<http://www.safeworkaustralia.gov.au/publications/comparative-performance-monitoring-report>>.

data from 2010-11 had not been released. However, the previous edition in 2009-10 showed that the ACT issued 187 improvement notices in total and 103 prohibition notices in relation to all types of WHS breaches in the Territory.²⁸

- 6.27 SafeWork SA said that since 2006 they had issued 174 improvement notices, but no prohibition notices.²⁹ By comparison earlier figures from mid-2006 to mid-2010 indicate that the South Australia regulator issued 9823 improvement notices and 2578 prohibition notices for breaches of WHS legislation.³⁰
- 6.28 The Committee did not receive evidence on the number of notices issued by the regulators in the other jurisdictions but the Commonwealth and New South Wales regulators commented that they do issue notices in relation to workplace bullying cases.³¹

Prosecutions

- 6.29 The National Network of Working Women's Centres (NNWWC) said that being 'witness to the successful prosecution against perpetrators of workplace bullying by WHS or other regulators' is essential for educating the broader community about the consequences of allowing or engaging in bullying in the workplace.'³²
- 6.30 Limited evidence was received in relation to the number of prosecutions pursued in relation to workplace bullying under WHS laws across Australia. SafeWork SA commented that no prosecutions for workplace bullying had been pursued in South Australia and that very few files reached the stage of being considered for prosecution.³³ The lack of

safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/609/Comparative_Performance_Monitoring_Report_13th_Edition.pdf> viewed 26 September 2012.

28 Safe Work Australia, 'Comparative Performance Monitoring Report', 13th edn (October 2011), p. 21, < http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/609/Comparative_Performance_Monitoring_Report_13th_Edition.pdf> viewed 26 September 2012

29 SafeWork SA, *Submission 82*, p. 4.

30 Safe Work Australia, 'Comparative Performance Monitoring Report', 13th edn (October 2011), p. 21, < http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/609/Comparative_Performance_Monitoring_Report_13th_Edition.pdf> viewed 26 September 2012.

31 Mr O'Connor, Comcare, *Committee Hansard*, Canberra, 17 August 2012, p. 25; Mr Shay Deguara, Representative, Unions New South Wales and Public Service Association of New South Wales, *Committee Hansard*, Sydney, 10 July 2012, p. 22.

32 NNWWC, *Submission 86*, p. 7.

33 SafeWork SA, *Submission 82*, p. 4.

prosecutions may reflect the complexities of dealing with bullying matters:

... as it is often difficult to establish whether or not the alleged behaviours constituted workplace bullying or rather were reasonable actions taken by an employer.³⁴

- 6.31 A 2010 Productivity Commission report indicated that 'Victoria and New South Wales had been the most active in pursuing incidents of bullying in the courts'.³⁵ However, WorkCover New South Wales submitted that although there had been some recent convictions for bullying involving physical injury, they did not know of any bullying prosecutions which related only to psychological injury.³⁶
- 6.32 Mr Mark Crossin, Occupational Health and Safety Officer of Unions NT, said that between 2002 and 2008, when he was Director of NT WorkSafe, the regulator did not prosecute anyone in relation to psychological behaviours like workplace bullying.³⁷
- 6.33 These low prosecution rates across Australia are criticised as indicative of regulators not adequately addressing workplace bullying. For example, Mr Crossin argued that the WHS regulators have not effectively responded to workplace bullying. He contended that their inaction was largely associated with a lack of relevant expertise in the area of workplace bullying but that it was also because the regulators were under-resourced.³⁸
- 6.34 The ACTU suggested that low prosecution rates are indicative of regulators not pursuing workplace bullying cases that involve only covert and non-physical bullying behaviours.³⁹
- 6.35 Others suggested that the low prosecution rates are largely due to the difficulties of gathering sufficient evidence to support a court case, particularly where the bullying is not overt. For instance, Mr Neale Buchanan, the Director of Operations at Workplace Standards Tasmania,

34 SafeWork SA, *Submission 82*, p. 4.

35 Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*, March 2010, p. 279.

36 Mrs Pamela Estreich, State Inspector, WorkCover Authority of New South Wales and Mr John Watson, General Manager, Work Health Safety Division, WorkCover Authority of New South Wales, *Committee Hansard*, Sydney, 10 July 2012, pp. 2 and 5.

37 Mr Mark Crossin, Occupational Health and Safety Officer, Unions NT, *Committee Hansard*, Darwin, 17 July 2012, p. 10. Mr Crossin explained that he was Director of NT WorkSafe from 2002 to 2008.

38 Mr Crossin, Unions NT, *Committee Hansard*, Darwin, 17 July 2012, p. 11.

39 ACTU, *Submission 63*, p. 24.

said, 'it is very difficult to find a clear-cut, black-and-white proven beyond reasonable doubt prosecution case.'⁴⁰

6.36 Similarly, the Government of South Australia submitted:

Because of the nature of bullying behaviour, it is often exceptionally difficult to prove 'beyond reasonable doubt' that bullying occurred, as even overt behaviours are rarely witnessed either individually or electronically. This is one of the key reasons why bullying is so difficult to prosecute as a WHS breach under the WHS legislation.⁴¹

6.37 The Independent Education Union of Australia (IEUA) argued that these difficulties weaken the deterrent effect of the laws:

Current regulatory frameworks place the burden of proof upon the prosecuting party and the standard of proof is beyond reasonable doubt. The outcome is often a long delay in progressing from initial complaint to a court hearing. Setting aside the impact of bullying upon effected members and their families, such challenges risk creating a culture in duty holders of being unlikely to be prosecuted. It is the opinion of the IEUA that existing regulatory frameworks do not provide a sufficient deterrent against workplace bullying.⁴²

Training

6.38 Union groups argued that WHS laws are not enforced more often because WHS inspectors are not adequately resourced and skilled to investigate and respond to workplace bullying.⁴³

6.39 Mr Rex Hoy, Chief Executive Office of Safe Work Australia, said:

I think the jurisdictions will tell you that they really do not have the capacity to train up their people. Equally they have issues about training their inspectors to enforce the legislation.⁴⁴

40 Mr Neale James Buchanan, Director, Operations, Workplace Standards Tasmania, *Committee Hansard*, Hobart, 12 July 2012, pp. 19-20.

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

42 Independent Education Union of Australia, *Submission 70*, p. 5.

43 For example, see Mr Kevin Harkins, Secretary, Unions Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 2; ACTU, *Submission 63*, p. 28. See also: Ms Caroline Dean, President, Challenge Bullying Inc, *Committee Hansard*, Hobart, 12 July 2012, p. 10.

44 Mr Rex Hoy, Chief Executive Officer, Safe Work Australia, *Committee Hansard*, Canberra, 17 August 2012, p. 18.

- 6.40 Ms Caroline Dean, the President of Challenge Bullying contended that inspectors:

have very good training around occupational health and safety physically but they do not have it around bullying and harassment. In my experience, when inspectors are called in to examine a case that somebody believes is bullying, they often do not find in favour of that person; they find in favour of the organisation, because they do not understand the complexities and nor do they understand the operation of power [at the workplace].⁴⁵

- 6.41 As workplace bullying and other psychological hazards at the workplace are so different to physical hazards, inspectors cannot rely on the same skills and knowledge to effectively investigate each. For that reason some organisations, including WHS regulators, submitted that inspectors need to be specially trained in how to investigate and respond to workplace bullying complaints to ensure that the law is enforced properly and effectively in this area.⁴⁶

- 6.42 SafeWork SA explained the types of skills and knowledge that inspectors need:

In order to overcome the difficulties in assessing psychosocial risks, it is important for inspectors handling bullying complaints to have a good working knowledge of the factors that lead to, and increase the likelihood of such hazards arising in the workplace.⁴⁷

- 6.43 The South Australian Government discussed why it is so important that inspectors possess specialist skills when investigating workplace bullying:

It is fundamentally important that inspectors are well trained and skilled in order to gain community respect in dealing with this very challenging issue. WHS inspectors must be able to go out into the community and possess the right set of skills, knowledge and understanding to raise awareness of the psychosocial hazards associated with workplace bullying. They need to assist businesses with the necessary resources and information dealing with prevention, management and control of bullying hazards.

45 Ms Caroline Dean, President, Challenge Bullying Inc, *Committee Hansard*, Hobart, 12 July 2012, p. 10.

46 For example, Ms Dean, Challenge Bullying Inc, *Committee Hansard*, Hobart, 12 July 2012, p. 10; SafeWork SA, *Submission 82*, p. 11; Government of South Australia, *Submission 216*, pp. 7-8; Mr Buchanan, Workplace Standards Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 16.

47 SafeWork SA, *Submission 82*, p. 11.

Inspectors must also have the right set of skills and experience to be able to respond to bullying complaints and conduct their investigations in a timely, efficient and sensitive manner.⁴⁸

- 6.44 The NNWWC commented that the current skill levels of inspectors vary between jurisdictions:

Some [W]HS regulators are staffed with specialist psychosocial complaints handlers who have specialist workplace bullying skills and knowledge. Some [W]HS complaints handlers do not.⁴⁹

- 6.45 This was evident in comments received from the Tasmanian regulator. Mr Neale Buchanan, Director of Operations at Workplace Standards Tasmania who said that they currently have only two inspectors who are adequately skilled to address workplace bullying complaints.⁵⁰
- 6.46 Indicative of similarly low levels of expertise in Northern Territory, Ms Rachael Uebergang, the Co-coordinator of the Northern Territory Working Women's Centre that WorkSafe NT may not be as equipped as other regulators to respond to take on complaints of workplace bullying and investigate them.⁵¹
- 6.47 This is in stark contrast to the approach taken in Queensland. Ms Jan Shepphard, Senior Industrial Advocate from the Australian Services Union (ASU) commented that the Queensland regulator has a specialist psychosocial unit with a staff of trained psychologists to address complaints such as workplace bullying.⁵²
- 6.48 Similarly, Comcare referred to an 'established ... specialist team to focus on workplace bullying – the Workplace Relationship Resolution Team'.⁵³
- 6.49 SafeWork SA also noted specific training to be provided to inspectors in 2012, to be run by the Centre for Applied Psychological Research this year.⁵⁴
- 6.50 However, personal impact statements at public hearings and submissions from individuals suggested wide-spread gaps in every Australian jurisdiction.

48 Government of South Australia, *Submission 216*, p. 8.

49 NNWWC, *Submission 86*, p. 8.

50 Mr Buchanan, Workplace Standards Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 16.

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

52 Ms Shepphard, ASU, *Committee Hansard*, Brisbane, 17 July 2012, p. 26.

53 Comcare, *Submission 120*, p. 16.

54 SafeWork SA, *Submission 82*, p. 11.

- 6.51 The Government of South Australia suggested that there is scope within the WHS harmonisation process for Safe Work Australia to develop ‘a national training programme to equip WHS inspectors with the skills required to deal with bullying issues, including the provision of mediation and conciliation services’.⁵⁵

Committee comment

- 6.52 WHS regulators in all jurisdictions have identified the need for inspectors to be trained to respond specifically to complaints of workplace bullying. However, it appears that resource constraints have limited the ability to provide such training.
- 6.53 The Committee supports the suggestion from the Government of South Australia that a national program for WHS inspectors be developed because a harmonised approach to training can allow a program that borrows from the experience and knowledge of each of the jurisdictions to be developed. It means that all jurisdictions can train their inspectorate in what is best practice in responding to workplace bullying. Coordinating resources to develop training could also assist those jurisdictions with fewer resources.
- 6.54 The suggestion of training inspectors in conciliation or mediation is also supported. However, the training program should aim primarily to assist inspectors in identifying when mediation or conciliation may or may not be appropriate. It should be noted that conciliation and mediation procedures should not be mandatory in all cases of workplace bullying because, as discussed in chapter 5, in some cases they can cause more damage than repair already fractured workplace relationships.

Recommendation 20

- 6.55 **The Committee recommends that the Commonwealth Government, through Safe Work Australia, develop a national accredited training program for all work health and safety inspectors that equips inspectors to identify and address instances of workplace bullying.**

55 Government of South Australia, *Submission 216*, p. 7.

Harmonising an approach to enforcement of work health and safety laws in workplace bullying cases

- 6.56 WHS regulators cannot investigate all complaints of workplace bullying.⁵⁶ Not only would so doing impose an unrealistic burden on resources, there is no doubt some complaints can be resolved by the provision of advice to the complainant on initial contact.
- 6.57 Evidence suggests that each of the WHS regulators utilise an assessment tool when determining which complaints should be further investigated. Following an investigation an inspector will make a determination of which, if any, enforcement measures should be used.⁵⁷
- 6.58 However, the NNWWC explained, that in their experience, the responses of regulators to workplace bullying complaints vary between jurisdictions:

The manner in which workplace bullying enquiries and complaints are handled by [W]HS authorities varies greatly between jurisdictions. ...Whilst some Working Women's Centres have success in enabling their clients to have complaints of workplace bullying investigated by their [W]HS regulator, some Working Women's Centres find that their [W]HS regulator will not accept or action an enquiry or complaint of workplace bullying. It is not uncommon for complainants in some jurisdictions to be informed by a staff member of an [W]HS regulator that they do not deal with workplace bullying and inappropriately refer the matter to an anti-discrimination commission or Fair Work Australia.⁵⁸

Harmonised approach to compliance and enforcement

- 6.59 The Government of South Australia submitted that there is 'scope to develop a national enforcement and compliance manual to deal specifically with bullying matters and that doing so could improve people's experiences when dealing with the regulators.'⁵⁹ They explained

56 Comcare, *Submission 120*, p. 16; NNWWC, *Submission 86*, p. 12.

57 Safe Work Australia, 'Role of inspectors in compliance and enforcement', <<http://www.safeworkaustralia.gov.au/sites/swa/legislation/guidance-material/pages/guidance-material.aspx>> viewed 10 September 2012; WorkSafe Victoria, 'What Actions Can Inspectors Take', <<http://www.worksafe.vic.gov.au/safety-and-prevention/workplace-inspections/what-actions-can-inspectors-take>> viewed 24 September 2012; SafeWork SA, *Submission 82*, p. 8.

58 NNWWC, *Submission 86*, p. 8.

59 Government of South Australia, *Submission 216*, p. 7.

that a harmonised approach to compliance and enforcement, in addition to consistent training for inspectors, could:

... potentially assist the dispute resolution process and act as a support for preventative measures to be established in workplaces, as well as providing a heightened awareness among employers and employees of the consequences of workplace bullying. A common set of regulatory principles and approaches to workplace bullying would also create consistency for the national inspectorates in the investigation and management of workplace bullying complaints.⁶⁰

6.60 Harmonising regulators' approaches to compliance and enforcement is already underway, but not specifically in regards to workplace bullying. Safe Work Australia noted that as part of the harmonisation package a National Compliance and Enforcement Policy was developed.⁶¹ The Policy was endorsed by all jurisdictions in November 2011.⁶²

6.61 The Safe Work Australia website explains:

The National Compliance and Enforcement Policy sets out the approach work health and safety regulators will take to compliance and enforcement under the model WHS Act and Regulations.⁶³

Committee comment

6.62 It would be a positive step to harmonise the approach regulators take to encouraging compliance and determining when enforcement measures should be imposed on those who breach their duties. Such harmonisation might provide an opportunity to reassure the community that WHS regulators in all jurisdictions respond effectively to workplace bullying. There is also an opportunity for regulators to improve their approaches by sharing skills and expertise.

60 Government of South Australia, *Submission 216*, pp. 7- 8.

61 Safe Work Australia, *Submission 74*, p. 6; Mr Rex Hoy, Chief Executive Officer, Safe Work Australia, *Committee Hansard*, Canberra, 17 August 2012, p. 12.

62 Safe Work Australia, 'National Compliance and Enforcement Policy', <<http://www.safeworkaustralia.gov.au/sites/swa/legislation/ncp/pages/ncp.aspx>> viewed 13 September 2012.

63 Safe Work Australia, 'National Compliance and Enforcement Policy', <<http://www.safeworkaustralia.gov.au/sites/swa/legislation/ncp/pages/ncp.aspx>> viewed 13 September 2012

- 6.63 It is unclear whether the National Compliance and Enforcement Policy developed by Safe Work Australia has been implemented by all of the jurisdictions, or just those that have enacted the model WHS laws.⁶⁴ However, the endorsement of the policy demonstrates a willingness of the regulators to harmonise their approach to encouraging compliance with WHS laws and using enforcement measures.
- 6.64 Any national compliance and enforcement policy specific to workplace bullying should have a similar approach to the broader, current National Compliance and Enforcement Policy insofar as it should encourage regulators to adopt a balance between compliance monitoring and enforcement to deter non-compliance with the use of positive motivators to encourage compliance.⁶⁵ This approach could assist in creating a more proactive approach to managing workplace bullying and in turn assist in lowering rates of workplace bullying.
- 6.65 Developing a national compliance and enforcement policy specific to workplace bullying could complement the ongoing work that Safe Work Australia is doing in developing the model *Code of Practice: Managing the Risk of Workplace Bullying*.

Recommendation 21

- 6.66 **The Committee recommends that the Commonwealth Government seek agreement from the work health and safety regulators of each jurisdiction through the Safe Work Australia process, for the development and endorsement of a uniform national approach to compliance and enforcement policy for preventing and responding to workplace bullying matters.**

Accountability where workers' compensation is awarded

- 6.67 Each jurisdiction provides workers' compensation under no-fault schemes.⁶⁶ This means that a successful workers compensation claim is based only on whether the injury or harm suffered related to work, not on

64 The model Work Health and Safety Act and Regulations have only been enacted in the Commonwealth, New South Wales, Queensland, Northern Territory, Australian Capital Territory and Tasmania to date.

65 Safe Work Australia, 'National Compliance and Enforcement Policy', published 26 September 2011, p. 2, <<http://www.safeworkaustralia.gov.au/sites/swa/legislation/ncp/pages/ncp.aspx>> viewed 13 September 2012.

66 Workers' compensation laws were also discussed in chapter 2.

whether someone at the workplace or the employer is at any fault for the injury or harm.

- 6.68 In many jurisdictions the WHS regulator is the same organisation responsible for the jurisdiction's workers' compensation scheme. WorkCover NSW supported both authorities being within the one organisation that allowed them to monitor files and investigate when there is a change that might indicate a WHS issue.⁶⁷
- 6.69 Despite the complementary way in which WHS and workers' compensation laws appear to work, the ACTU argued that there is a significant disconnect between them. They said that there are many cases where a worker has made a successful workers compensation claim for an injury resulting from workplace bullying but the WHS regulator has not been able to substantiate the allegations of workplace bullying. Thus, no one is held responsible for the bullying and breaching their WHS duties.⁶⁸
- 6.70 The Victorian Trades Hall Council (VTHC) submitted that because of this disconnect between successful workers' compensation claims and enforcement of WHS 'the bullying behaviours which caused the injury are rarely addressed and prevented from [re]occurring'.⁶⁹

Committee comment

- 6.71 The importance of having no-fault workers' compensation schemes is to ensure that injured workers can be fairly compensated without prejudice for injury or harm which is attributable to their work. However, this principle should not prevent a party from being held responsible for breaching their WHS duties where the injury sustained was a result of that breach.
- 6.72 Indeed, a better connection between workers' compensation decisions and the enforcement of WHS laws could provide better outcomes for all workers. If employers are more often held responsible under the law for breaches of their health and safety duties that led to injuries for which workers have received workers' compensation there would be more incentive for them to improve their management of the risks of workplace bullying.

67 Mr John Watson, General Manager, Work Health and Safety Division, WorkCover Authority of New South Wales, *Committee Hansard*, Sydney, 10 July 2012, p. 4.

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

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

- 6.73 The Committee understands that if a workers' compensation claim for a workplace injury, be it for a physical or psychosocial injury, is successful, Comcare currently does not investigate whether there has been a breach of WHS duties at the workplace.
- 6.74 The Committee would like to recommend that once awarding a compensation claim and where there is evidence of workplace bullying, Comcare should determine whether a breach of WHS duties has also occurred. However, that would entail a wider review of workers compensation which is beyond the scope of the inquiry's terms of reference. A site visit or investigation could potentially differentiate between the treatment of physical and psychosocial injuries. If workplace bullying was found to have caused a breach of WHS duties, that finding could help to highlight the problem and ensure that the employer takes steps toward remedying the breach.
- 6.75 The Committee is aware that some jurisdictions may reward employers through workers' compensation premiums for good risk management. Similar disincentives for those employers who do not comply with their WHS duties could perhaps encourage greater compliance and management of the risks of workplace bullying.

Criminal law

- 6.76 There were some calls for a national criminal law, based on Brodie's Law in Victoria, expressly prohibiting workplace bullying.⁷⁰ However, constitutional limitations mean that it is not possible for the Commonwealth to make a law criminalising any bullying or anti-social behaviour other than that which is typical of cyber bullying.⁷¹ This is because the Commonwealth's powers in this regard are restricted to the use of a carriage service, such as the internet or telephones, to menace or harass another person.⁷²

Need to clarify the effect of State and Territory criminal laws

- 6.77 Some state and territory criminal laws, such as the Australian Capital Territory's *Crimes Act 1900* and the Western Australian *Criminal Code*

70 Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p.51; Harmers Workplace Lawyers, *Submission 88*, p. 7; Harmers Workplace Lawyers, *Submission 88*, p. 7,

71 See chapter 2 and The Alannah and Madeline Foundation (AMF), *Submission 125*, p. 28.

72 ACT Government, *Submission 191*, p. 7; AMF, *Submission 125*, p. 28; *Crimes Act 1914* (Commonwealth), s. 474.17.

Compilation 1913, were purported to have the same effect as Brodie's Law in Victoria.⁷³

- 6.78 However, there were also suggestions that some state and territory criminal laws are not as far reaching as Brodie's Law. For example, Mr Kevin Harkins, the Secretary of Unions Tasmania, commented that Tasmania does not have the same criminal offence of stalking that is fundamental to Brodie's Law in the Victorian *Crimes Act 1958*.⁷⁴
- 6.79 Furthermore, Mr and Mrs Panlock, the parents of Brodie Panlock, suggested that in some cases the police are reluctant to enforce the criminal law in cases of workplace bullying. They commented that there were no criminal charges laid by the police in relation to the suicide of their daughter following ongoing and insidious workplace bullying.⁷⁵ Mr Panlock said:

At the time the police did not want to pursue it any further. We did have one particular officer that went way beyond what she should have done or was supposed to do, and she is still trying, but to no avail. There is still assault, and there were certain other laws back then that could have been proceeded with, but the police did not go any further. We have spoken to high-ranking police as well, and they all sort of just go, 'Thwip!'⁷⁶

- 6.80 In August 2012, the Victorian Attorney-General, the Hon. Robert Clark, launched the 'Take a stand against bullying' campaign, which is being supported by Mr and Mrs Panlock to:

[urge] workplaces to take a stand against bullying and report such behaviour to authorities...[and] will see information about bullying and bullying laws distributed to more than 8,000 schools, workplaces and police stations across Victoria.⁷⁷

73 See ACT Government, *Submission 191*, pp. 6-7; WorkSafe WA, *Submission 206*, p. 10; Department of Education, Employment and Workplace Relations (DEEWR), *Submission 84*, p. 19. See discussion on current state and territory criminal laws in chapter 2.

74 Mr Kevin Harkins, Secretary, Unions Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 1.

75 Mr and Mrs Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 51.

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

77 Department of Justice, Victoria, Australia, 'Victorians Urged to Take a Stand Against Bullying', 8 August 2012, <<http://www.justice.vic.gov.au/find/news/victorians+urged+to+take+a+stand+against+bullying>> 9 October 2012.

Criminal sanctions should complement enforcement of WHS laws

6.81 It was strongly argued that criminal enforcement should not be a replacement or an alternative to enforcement of WHS laws.⁷⁸

6.82 Workplace bullying expert, Dr Carlo Caponecchia asserted that criminal laws do not address workplace bullying as effectively as WHS laws can:

The primary intended outcome of developing criminal laws is the punishment of individuals, with the flow on effect of deterrence. This approach seems to fall into the trap of viewing bullying as a one-on-one interpersonal exchange, based solely on interpersonal issues, where one individual should be held responsible for their effects on another (after those effects have occurred). This may be appropriate in some extreme cases, but in most cases...the role of the context and work environment is important in both preventing bullying from occurring in the first place, and/or from mitigating its effects.⁷⁹

6.83 The ASU argued that enforcement of criminal laws alone is ineffective to address workplace bullying because:

[the] emphasis [is] on holding individual bullies responsible when it is too late rather than [on] an employer's obligation to provide a safe workplace.⁸⁰

6.84 Similarly, Associate Professor Maryam Omari, who has conducted extensive research on workplace bullying in Australia in the past decade, commented that criminal legislation to deal with workplace bullying may result in addressing the issue when it is too late, that is, when the target of the bullying has already been adversely affected.⁸¹

6.85 Mr Bryan Russell, Executive Director of SafeWork SA said that the South Australian Government supports workplace bullying continue to be dealt with in a WHS context rather than in a criminal law context:

Elimination of bullying behaviour is central to the dynamics of safe and healthy workplaces, and bullying is a hazard that can have significant long-term effects on a worker's psychological

78 Dr Carlo Caponecchia, *Submission 81*, p. 8; Australian Services Union (ASU), *Submission 72*, p. 12; ACTU, *Submission 63*, p. 8; ACT Government, *Submission 191*, p. 13; Government of South Australia, *Submission 216*

79 Dr Caponecchia, *Submission 81*, p. 8.

80 ASU, *Submission 72*, p. 12.

81 Professor Maryam Omari, *Committee Hansard*, Perth, 8 August 2012, p. 5. See also Professor Maryam Omari and Mr David Blades, *Submission 28*.

health, safety and welfare. Therefore, it should be treated like any other workplace hazard with the aim of identifying the hazard, assessing the risks and implementing steps to eliminate or minimise any identified risks.⁸²

- 6.86 However, arguing for the consideration of workplace bullying primarily as a WHS issue does not preclude the availability of criminal sanctions in serious cases.⁸³ For instance, Safe Work Australia submitted:

While WHS laws are an appropriate way to prevent and address workplace bullying and strong penalties are included in the model WHS Act for serious bullying, it is still appropriate that serious cases of bullying are capable of being addressed under the relevant criminal law system.⁸⁴

- 6.87 The availability of criminal law in those cases reflects that, whether committed in a workplace or elsewhere, a person who commits a criminal offence should be penalised accordingly under criminal laws.

Criminal laws and deterrence

- 6.88 The mere existence of criminal laws and the potential to be held liable for bullying someone in the workplace can serve as a significant deterrent to workplace bullying.⁸⁵

- 6.89 Dr Donna-Louise McGrath, a researcher who has written a number of articles about workplace bullying and workplace behaviours commented:

The national introduction of 'Brodie's Law' could be a greater deterrent [than work health and same duties alone] to workplace bullying because perpetrators and their allies may have a greater fear of the personal consequences of their actions. At present, many perpetrators are able to bully without fear of punishment. In addition, individuals who are unlikely to bully alone may participate in bullying within the 'safety net' of a group; perhaps reasoning that any punishment will be apportioned between members of the group. An awareness of Brodie's Law could thus

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

83 For example see Safe Work Australia, *Submission 74*, p. 3; Justitia Lawyers and Consultants, *Submission 104*, p. 5.

84 Safe Work Australia, *Submission 74*, p. 3.

85 See Mrs Rae Panlock, *Committee Hansard*, Melbourne, 11 July 2012, p. 52; Mr Harmer, Harmer's Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 5; Dr Donna-Louise McGrath, *Submission 87*, pp. 2 & 7.

make every participant in bullying responsible for their behaviour.⁸⁶

- 6.90 Mr Michael Harmer of Harmers Workplace Lawyers submitted that the response of employers to the introduction of Brodie's Law is illustrative of the deterrent effect criminal laws can have:

There was, around the introduction of [Brodie's Law], a spate of education in corporations across Australia reinforcing the importance and the alignment of genuine systems of management to the achievement of the prevention of bullying.⁸⁷

Committee comment

- 6.91 Workplace bullying should first and foremost be dealt with by enforcement of WHS laws. Only those laws can be used to hold employers (the legal entity, not necessarily the individual) accountable for their part in allowing workplace bullying to occur; for not effectively managing the risks of workplace bullying. And only WHS laws promote a risk management approach to workplace bullying; requiring employers to prevent, as far as reasonably possible, workplace bullying from occurring rather than responding to complaints of bullying when it is 'too late' for the targets of the bullying who have already been affected.
- 6.92 WHS laws can also be used to hold individual workers who participate in bullying accountable for any act of workplace bullying, regardless of the severity of the consequences. This is significant because it is not only bullying of a criminal nature that should be penalised. All perpetrators of workplace bullying should be held to account to ensure that this type of behaviour is eradicated across Australia, whether that accountability is made at the workplace level or through the WHS regulator. In some instances, being held accountable under workplace bullying policies by their employer may be sufficient to deter further bullying.
- 6.93 Criminal prosecution should not be seen as an alternative to enforcement of WHS law because the laws serve different objectives. This is especially significant where there are suggestions that the employer may have breached their duty of care to workers by negligently or recklessly failing to prevent workplace bullying because they cannot be penalised under criminal laws.

86 Dr Donna-Louise McGrath, *Submission 87*, p. 7.

87 Mr Harmer, Harmer's Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 5.

- 6.94 The Committee was saddened to hear of a workplace bullying case in Victoria where it was reported that WorkSafe Victoria failed to take any action because the individual perpetrator had been charged under criminal legislation with assault.⁸⁸ It appeared that no action was taken against the employer despite reports they had knowingly failed to prevent the risks of bullying at the workplace. It is important that serious acts of workplace bullying that amount to criminal offences under criminal legislation should be punished as such.
- 6.95 There is some disagreement amongst stakeholders as to whether all current state and territory criminal laws can be used to penalise perpetrators of serious instances of workplace bullying in the same way that the Victorian *Crimes Act 1958* follows the amendments made by Brodie's Law. The Committee received evidence indicating uncertainty in the community of the powers of current criminal laws as well as the willingness of police to enforce those laws. Regardless of the location, a criminal offence should be treated as such and everyone should know that they are protected from criminal behaviour both inside and outside of the workplace.
- 6.96 An overriding message of the inquiry is that the laws to-date (in the way that they have been implemented) do not necessarily deter workplace bullying behaviour. The hundreds of submissions to the inquiry show this to be the case. The Committee received evidence indicating uncertainty in the community about the powers of current criminal laws as well as the willingness of police to enforce those laws. Regardless of whether this is due to a lack of prosecutions or need for greater education about their existing powers the Committee recommends that states and territories revisit their criminal laws in this area.
- 6.97 At the Standing Council on Law and Justice meeting in November 2011, members⁸⁹ noted the introduction of Brodie's Law in Victoria. They also noted:
- the importance of finding effective means of dealing with all forms of bullying whether in the workplace, school yard, sporting club, cyberspace or elsewhere.⁹⁰
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88 Details of the case and allegations were reported on the ABC News, see 7.30 ABC, 'Lawyers question workplace bullying protections', Transcript, 10 September 2012, <<http://www.abc.net.au/7.30/content/2012/s3587167.htm>> viewed 11 September 2012.

89 'The Standing Council on Law and Justice comprises the Attorneys-General of the Commonwealth and states and territories, the Western Australia Minister for Corrective Services and the Minister of Justice of New Zealand', see Standing Committee of Attorneys-General, <www.scag.gov.au> viewed 14 September 2012.

- 6.98 Given the interest of the Standing Council in addressing workplace bullying, the Committee suggests that it may be the most appropriate forum for the Commonwealth Government to facilitate coordination and collaboration between state and territory counterparts on the effectiveness of criminal laws to deal with serious instances of workplace bullying and a willingness of authorities to enforce those laws when appropriate. It is important to convey a single and united message that workplace bullying is not tolerated in Australian workplaces; that such behaviour has consequences and can be prosecuted by criminal law.

Recommendation 22

- 6.99 **The Committee recommends that, through the Standing Council on Law and Justice, the Commonwealth Government:**
- **encourage all state and territory governments to coordinate and collaborate to ensure that their criminal laws are as extensive as Brodie's Law; and**
 - **encourage state and territory governments to consider greater enforcement of their criminal laws in cases of serious workplace bullying, regardless of whether work health and safety laws are being enforced.**

Individual right to seek remedies

- 6.100 Many individuals spoke of the financial hardship as well as psychological and physical injuries that they have endured because of their workplace bullying experiences. In many instances, financial hardships result from being unable to work because of their injuries and the legal costs associated with trying to obtain some compensation or other remedy for the bullying they endured.⁹¹
- 6.101 The only remedy that may be available to bullied workers is workers compensation, which few people can make a successful claim for based on the nature of workplace bullying injuries, or compensation if they can

90 Standing Council on Law and Justice, 'Communique', 18 November 2011, <[http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCLJ_Communique_18_November_2011_FINAL.pdf/\\$file/SCLJ_Communique_18_November_2011_FINAL.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCLJ_Communique_18_November_2011_FINAL.pdf/$file/SCLJ_Communique_18_November_2011_FINAL.pdf)> viewed 19 September 2012.

91 For example, see AH, *Submission 10*; KL, *Submission 157*; KB, *Submission 201*.

prove the bullying was unlawful under anti-discrimination law or the *Fair Work Act*.⁹²

6.102 However, because these remedies were not created as specific responses to workplace bullying they are not available to all bullied workers.⁹³ For that reason, many people spoke of having to ‘shop around’ in an attempt to try to find a legislative or regulatory framework that provides them with the right to seek individual recourse. Some individuals submitted that the process of trying to seek justice for themselves, compensation for their loss and accountability of those who bullied them, can be just as or more damaging than the initial bullying.⁹⁴

6.103 RCT Solicitors commented:

A by-product of this unsatisfactory state of affairs is that workers begin to doubt the commitment of the legislature, and the legal system, to address the problem of ‘bullying’.⁹⁵

6.104 WHS is the only legislative regime that currently responds specifically to workplace bullying.⁹⁶ However, that legislation only gives the regulators⁹⁷ a right to enforce the law against those who have a statutory duty of care; it does not give individuals a right to seek remedies when they are adversely affected because their co-worker or employer has breached their duties of care. Harmer’s Workplace Lawyers explained:

While an employee is entitled to make a complaint to an authority such as WorkCover NSW about incidents of workplace bullying, these laws provide no meaningful way for an employee to pursue a civil remedy to redress the impact of workplace bullying on their health and career.⁹⁸

6.105 South Australia’s WHS laws are the only ones in Australia that set out a process for resolving workplace bullying complaints outside of the workplace. Section 55A of the *Occupational Health, Safety and Welfare Act 1986* allows a dispute to be referred to the Industrial Relations Commission for conciliation or mediation.⁹⁹ However, SafeWork SA

92 See chapter 2.

93 See chapter 2 for further discussion on these legislative frameworks.

94 For example, see JK, *Submission 55*; MM, *Submission 236*

95 RCT Solicitors, *Submission 106*, p. 9.

96 See chapter 2 for further discussion on work health and safety law.

97 In NSW the legislation also gives unions limited rights to prosecute. See *Work Health and Safety Act 2011* (NSW), s. 230(1)(c).

98 Harmer’s Workplace Lawyers, *Submission 88*, p. 4.

99 See *Occupational Health, Safety and Welfare Act 1986*, s. 55A. This provision was discussed in more detail in Chapter 2 of this report.

commented that it is limited in giving the target of bullying a resolution because the commission cannot make a determination of whether there has been bullying or impose a penalty.¹⁰⁰ It is also limited because the resolution process is not available if the worker has left the workplace.¹⁰¹

- 6.106 The Government of South Australia acknowledged that the focus of investigations on how the hazard of bullying is being managed by an employer, rather than on the individual circumstances of the person who complained for being bullied, can be perceived as unsatisfactory:

In many cases the complainants are left with the perception that they have not received 'justice', and that the alleged bully has been 'allowed to get away with it'.¹⁰²

- 6.107 Dr Caponecchia suggested that the lack of an individual right to seek remedies under WHS laws may not be a flaw within that legislative regime so much as a misconception within the community about the role of WHS regulators.¹⁰³ It was noted by the Anti-Discrimination Commissioner for Tasmania, Ms Robin Banks, that WHS regulators have 'a prosecutorial function which deals with [workplace bullying] as a wrong against the state.'¹⁰⁴ Ms Banks contrasted this with a 'process like discrimination law that deals with it as a wrong against the person and seeks to remedy that wrong for them.'¹⁰⁵
- 6.108 In noting their support for an individual right to seek remedies following workplace bullying, SafeWork SA suggested that the criminal law system in which WHS laws sit may not be the most appropriate place to locate an individual right to seeking redress.¹⁰⁶ Mr Bryan Russell, Executive Director of SafeWork SA stated:

The South Australian government considers that [there] should also be a mechanism for individuals to pursue their own workplace bullying complaints separate to the occupational health safety regulator but outside of the criminal law system. A low-cost, easily accessible judicial or dispute resolution process would allow an individual affected by workplace bullying to lodge a

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

101 Government of South Australia, *Submission 216*, p. 10.

102 Government of South Australia, *Submission 216*, p. 10.

103 Dr Caponecchia, *Submission 81*, p. 7.

104 Ms Robin Banks, Anti-Discrimination Commissioner, Office of the Anti-Discrimination Commissioner, Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 20.

105 Ms Banks, Office of the Anti-Discrimination Commissioner, Tasmania, *Committee Hansard*, Hobart, 12 July 2012, p. 20.

106 Mr Russell, SafeWork SA, *Committee Hansard*, Sydney, 7 August 2012, p. 6.

complaint and seek some form of redress in instances where a prosecution under the work health and safety laws has not been pursued by the regulator.¹⁰⁷

6.109 Other submissions, including that from the Law Institute of Victoria, argued that there needs to be a 'quick, cost effective civil remedy through an appropriate tribunal for bullying in the workplace'.¹⁰⁸

6.110 The VTHC contended that the process must be fast, efficient, specific to workplace bullying and under civil law where the complainant does not have to prove their complaint to the stricter and more difficult to satisfy standard that is required under criminal law.¹⁰⁹

6.111 The Australian Institute of Employment Rights said that, given the lack of enforcement by WHS regulators, an individual recourse such as this could also provide an additional deterrent to workplace bullying: :

While occupational health and safety legislation recognises the onus on employers to protect employees from physical and mental health risks resulting from poor workplace culture, it is extremely rare for an employer to be prosecuted in this area. Enforcement mechanisms exist for ordering penalties for a workplace injury or death arising from a physical hazard. However, for an employee who, having been subject to long term bullying and other negative behaviours at work, develops a serious mental illness or even dies, there is usually no effective mechanism to monitor this abuse and to enforce a penalty against the employer. Without such a mechanism there is little incentive for employers to improve workplace culture, and certainly very little to deter them from the existence of poor workplace culture in their business.¹¹⁰

Could the Fair Work Act be extended?

6.112 Many submissions supporting the introduction of a specific civil right of recourse for individuals suggested that it should be provided under industrial relations law, or more specifically the *Fair Work Act 2009*.¹¹¹

107 Mr Russell, SafeWork SA, *Committee Hansard*, Sydney, 7 August 2012, p. 6.

108 Law Institute of Victoria, *Submission 52*, p. 3; Australian Nursing Federation, *Submission 117*, p. 8; VTHC, *Submission 139*, p. 12; C.P, *Submission 145*, p. 5.

109 VTHC, *Submission 139*, pp. 7 and 12.

110 Australian Institute of Employment Rights (AIER), *Submission 109*, p. 17

111 For example, see Harmer's Workplace Lawyers, *Submission 88*, p. 6; Government of South Australia, *Submission 216*, pp. 3 and 11; Australian Nursing Federation, *Submission 117*, p. 8; VTHC, *Submission 139*, p. 12.

- 6.113 As well as applying to nearly all Australian workers, there was support for extending the *Fair Work Act* to address all types of workplace bullying because the legislation already provides effective and timely resolution processes.¹¹² Currently these processes can only be utilised in very limited workplace bullying matters that involve unfair dismissal or adverse action taken against a worker because they have or have exercised a workplace right, such as making a complaint to their WHS regulator.¹¹³
- 6.114 Harmers Workplace Lawyers suggested that providing a means of resolution through the *Fair Work Act* could be achieved by requiring claims of workplace bullying to be ‘made initially to Fair Work Australia so as to allow an opportunity for a compulsory conciliation conference to occur’.¹¹⁴ They argued that utilising this forum could result in early resolution of workplace bullying complaints because:
- the members of Fair Work Australia not only have extensive experience in dealing with a range of workplace issues and disputes, but are also very experienced in facilitating early intervention in claims with a view to achieving a resolution by way of conciliation.¹¹⁵
- 6.115 Harmers contended that only if complaints cannot be resolved through the conciliation process should the complainant have the right to pursue the matter and seek remedies through the court system.¹¹⁶ This is because currently Fair Work Australia does not have the power to make orders about resolution, so the matter must proceed to court for such remedial orders to be made.¹¹⁷
- 6.116 The United Mineworkers’ Federation of Australia (UMFA) submitted that if the *Fair Work Act* is expanded to capture all types of workplace bullying, Fair Work Australia should be empowered ‘to arbitrate disputes that arise between an employee and their employer about behaviours that constitute bullying and by order be able to remedy it’. UMFA argued that this is

112 Harmer’s Workplace Lawyers, *Submission 88*, p. 6; Australian Nursing Federation, *Submission 117*, p. 8; VTHC, *Submission 139*, p. 12.

113 See chapter 2 of this report for further discussion of the *Fair Work Act 2009* and when it can be relied on in relation to workplace bullying. See also Ms Bernadette O’Neill, General Manager, Fair Work Australia, *Committee Hansard*, Canberra, 13 September 2012, pp. 1-2.

114 Harmer’s Workplace Lawyers, *Submission 88*, p. 6.

115 Harmer’s Workplace Lawyers, *Submission 88*, p. 6.

116 Harmer’s Workplace Lawyers, *Submission 88*, p. 6.

117 United Mineworkers’ Federation of Australia (UMFA), *Submission 118*, pp. 6-7.

necessary because the ‘complicated, protracted and expensive’ nature of the court process deters many workers from seeking remedies.¹¹⁸

- 6.117 It is, however, unclear whether the functions of Fair Work Australia could be expanded to enable them to make determinations about all cases of workplace bullying, regardless of whether they fall under the criteria of the current general protections or unfair dismissal provisions of the *Fair Work Act*. Ms Bernadette O’Neill, General Manager of Fair Work Australia commented that following the High Court’s decision in regards to Work Choices it is very likely that the Commonwealth Government does have the constitutional legal capacity to deal with workplace bullying under industrial relations laws. However, she also acknowledged that it would be a monumental change and the legal and constitutional capacity is only one of many factors that would need to be taken into account.¹¹⁹

Committee comment

- 6.118 In recognition of the many calls from individuals who gave their personal accounts of bullying in the workplace, as well as a number of other stakeholders, the Committee supports the availability of a single right of individual recourse for all workers affected by workplace bullying.
- 6.119 The current legislative and regulatory frameworks have created perceptions of an unfair and unjust system whereby only a very limited group of workers who have been bullied can seek individual recourse and remedies under anti-discrimination law, the *Fair Work Act* and workers’ compensation law.
- 6.120 Providing a new individual right of recourse would ensure an equal right for all workers to seek restitution if they are bullied at work. Regardless of whether a worker is bullied on discriminatory grounds such as race, gender or age, because they have exercised a workplace right protected under the *Fair Work Act* the consequences for that bullying behaviour could be treated the same.
- 6.121 Providing one right of recourse for all people who have been affected by workplace bullying could also address the distress and harm experienced by targets of workplace bullying at the moment who must navigate through a number of legislative and regulatory frameworks that may given them only some limited right of redress.

118 UMFA, *Submission 118*, p. 7.

119 Ms O’Neill, Fair Work Australia, *Committee Hansard*, Canberra, 13 September 2012, p. 4.

- 6.122 It is unclear whether the *Fair Work Act* could be extended to provide a formal resolution process, with the potential for the complainant to seek remedies, for all workplace bullying disputes. This is because workplace bullying is not only a matter of industrial relations. The evidence has clearly indicated the desirability of viewing it as first and foremost a WHS issue because of the risks it poses to health and safety.
- 6.123 However, there was widespread support for a right of individual recourse that replicates that which is available to workers who are adversely affected because of their workplace rights under the *Fair Work Act*.
- 6.124 It is necessary that any arbitration process to address workplace bullying and provide remedies to affected workers rely on the expertise of those experienced in resolving such matters, such as Fair Work Australia, and those equipped with the knowledge and skills to address workplace bullying specifically, such as Safe Work Australia and the jurisdictional WHS regulators.
- 6.125 The Committee notes concerns that the court process can be arduous and often too difficult for individuals to navigate their way around. However, as this type of process is provided to workers seeking remedies in relation to other workplace disputes under the *Fair Work Act* and anti-discrimination laws, the Committee believes it may be appropriate to adopt a similar process in relation to workplace bullying.
- 6.126 Such a process should be not be costly nor a drawn out process. It should adhere to the same principles and practices of effective dispute resolution that Fair Work Australia already utilises and promotes for facilitating the resolution of a grievance or dispute between the parties by reaching an agreement through conciliation or mediation. However, if agreement cannot be reached an individual should have access to an adjudicative process that provides decisions on cases in a quick manner, with limited costs incurred by the parties, such as that which the Committee understands is provided by Fair Work Australia.
- 6.127 These processes should sit within a civil law jurisdiction because of the lower burden of proof that is required. In relation to the availability of criminal laws, there may be some temptation to rely on the application of civil penalties and this could in turn dilute the application of WHS and criminal penalties to workplace bullying. For that reason WHS regulators and police should not perceive individual remedies as a replacement for penalties enforceable under WHS and criminal legislation.

Recommendation 23

- 6.128 **The Committee recommends that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process.**

Support for getting workers back into the workforce

- 6.129 Many submissions highlighted that often workers who are injured at harmed by bullying need to take periods of leave to recuperate. There are also people who need to leave the workplace where they were bullied indefinitely because the circumstances there pose too much of a risk to their health and safety.¹²⁰ Evidence was also presented from people who are prevented by their injuries, such as severe anxiety and depression, from ever being fit to return to work.¹²¹
- 6.130 The Australian Industry Group explained that return-to-work assistance is available to these workers through workers' compensation:
- Employers are obliged to provide workers' compensation to workers who suffer an illness or injury resultant from bullying behaviour. This obligation includes a positive duty to facilitate the employee's return to work in a full or partial capacity.¹²²
- 6.131 However, the limited availability of workers' compensation to workers who suffer injuries arising from workplace bullying means that this assistance will not be available to all workers who are out of the workforce because of workplace bullying.¹²³

Workers' compensation return-to-work programs inefficient

- 6.132 The NNWWC explained that if a worker has made a successful workers' compensation claim for workplace bullying, they may be placed on a workers' compensation return to work plan.¹²⁴ However, a small

120 For example, NNWWC, *Submission 86*, p. 11.

121 For example, JN, *Submissions 175 & 175.1*.

122 AiG, *Submission 59*, p. 14.

123 The limited availability of workers' compensation was discussed in chapter 2 of this report.

124 NNWWC, *Submission 86*, p. 11.

proportion of people succeed in making a successful workers' compensation claim for workplace bullying.¹²⁵

- 6.133 The risks of workplace bullying at a workplace cannot be viewed in the same way as physical risks and hazards can. Return to work programs that primarily cater to return workers who have suffered physical injuries at the workplace to work are not necessarily effective in return workers who are injured because of non-physical workplace bullying engaged in by people whose behaviour cannot be managed in the same way as physical hazards. The NNWWC elaborated:

Return to work plans, whilst well intentioned, are often unable to affect the cause of the psychosocial injury because the perpetrator of workplace bullying remains in the same work site as the target, there is no education or training to accommodate the bullied workers and no support systems or people in place for the bullied worker to go to upon their return.¹²⁶

- 6.134 The Community and Public Sector Union also discussed the failure of workers' compensation schemes to address the issue before a worker is returned to the workplace:

Notably, the Workers Compensation System does not bring about any resolution of the issue, but merely seeks, where claims are accepted, to compensate the target for any loss incurred financially or in quality of life. Once declared fit for work, the target may then be returned to exactly the same workplace situation, or transferred to another workplace. Once again, it is the target who pays the price.¹²⁷

Broader assistance is available through employment participation programs

- 6.135 The Department of Education, Employment and Workplace Relations (DEEWR) explained that they have responsibility 'for a range of measures aimed at increasing participation outcomes for disadvantaged and vulnerable Australians'.¹²⁸

125 See chapter 2 of this report and also NNWWC, *Submission 86*, p. 11.

126 NNWWC, *Submission 86*, p. 11.

127 Community and Public Sector Union – State Public Service Federation Group, *Submission 188*, pp. 10-11.

128 DEEWR, *Submission 84*, p. 21.

- 6.136 Unfortunately, evidence was not received about the specific measures available and whether they could assist people who are injured to any degree by workplace bullying return to the workforce. However, DEEWR noted :

In the 2012–13 Federal Budget the Government committed \$7.1 million over four years to ensure five Community Based employment Advice Services can continue to assist thousands of Australia’s most vulnerable workers. These not-for-profit organisations provide advice, assistance and information to Australians who experience difficulties in asserting and exercising their rights at work.¹²⁹

Committee comment

- 6.137 The Committee was struck by the number of individuals who courageously spoke about and submitted evidence of their struggles to return to work because of the injuries they sustained being bullied at work. The large majority, if not all, of the individual submissions presented by people who are currently outside of the workforce noted a desire to return to work; however, some people require support to overcome their injuries, regain their confidence and regain employment.
- 6.138 It is acknowledged that through workers’ compensation schemes some workers adversely affected by bullying are provided with assistance in returning to work. However, there are many workers who cannot access workers’ compensation for the injuries they sustained from bullying because of the difficulties in proving they arose from work, and therefore cannot access these return to work programs.
- 6.139 If this assistance is tied to returning the worker to the same workplace where they were bullied, the appropriateness of that is questioned. No one should feel they have to choose between returning to a workplace where they will be subjected to bullying or trying, without support, to gain other employment, especially when overcoming injuries sustained because of bullying.
- 6.140 The Committee recognises that these people may be entitled to assistance through the workplace participation programs that DEEWR has responsibility for. However, given the number of people who spoke of having no support to return to work though, it would be beneficial for there to be more public awareness of the assistance that can be provided to

129 DEEWR, *Submission 84*, p. 21.

people to re-enter the workforce, particularly those who feel they are unable to work because of psychological injuries arising from workplace bullying.

- 6.141 A worker who has suffered a workplace injury because of bullying but cannot obtain workers' compensation should not be left to suffer on their own with no support to regain employment.

Amanda Rishworth MP

Chair

