
Workplace Health and Safety: Managing the Risk of Workplace Bullying

Joan Squelch

School of Business Law and Taxation
Curtin University

Robert Guthrie

Adjunct Professor of Workers Compensation and Workplace Laws
Curtin University

Abstract

Workplace bullying is a threat to work health and safety. Bullying can create an unsafe, hostile, and threatening working environment. This article addresses workplace bullying in the context of health and safety laws with particular reference to the application of key provisions of the new model *Work Health and Safety Act*. To ensure a safe work environment, businesses have a duty and responsibility under work health and safety legislation to proactively manage risks, which includes a comprehensive and systematic approach to identifying, assessing, controlling and monitoring workplace bullying. Importantly, businesses have a duty to educate employees about their responsibilities in relation to workplace bullying.

Introduction: Why Focus on Workplace Bullying?

Workplace bullying is global, pervasive and a threat to work health and safety. Bullying left unchecked can create an unsafe, hostile, and threatening work environment that can have a very profound impact on employees affected by the bullying, whether it is the person targeted, the bully or the bystanders. Although there is no large-scale study on workplace bullying in Australia, research nonetheless highlights that bullying is a workplace health and safety issue that needs to be purposefully addressed. A national poll conducted by Essential Research in 2011 for Jobwatch reported that almost one in five Australians surveyed reported being bullied, intimidated or harassed at work. Of the 1037 people surveyed, 37% had experienced or were aware of workplace intimidation, bullying or harassment, with 19% having being affected directly.¹ Other research has

highlighted the financial cost of workplace bullying. For example, the Australian Human Rights Commission has estimated that when hidden and lost opportunity costs are considered the annual financial cost of workplace bullying in Australia is between AU\$6 billion and AU\$36 billion.² This estimate was calculated by including costs such as absenteeism, labour turnover, loss of productivity, and legal costs. The Victorian WorkCover Authority estimates that bullying costs businesses more than AU\$57 million a year in that jurisdiction alone.³

Although Australia does not have specific laws that deal with workplace bullying, various systems of protection

¹ JobWatch Employment Rights Legal Centre, 'Survey Shows Intimidation and Harassment Rife in Australian Workplaces' (Media Release, 11 July 2011)

<http://www.jobwatch.org.au/images/stories/pdf/Media_release_Intimidation_Bullying_Rife_Vic.pdf>.

² Human Rights and Equal Opportunity Commission, *Factsheet: Workplace Bullying* (1 December 2004) <http://www.hreoc.gov.au/info_for_employers/fact/workplace.html>.

³ WorkplaceInfo, *Bullying Issues* (2012) <<http://www.workplaceinfo.com.au/nocookie/subjects/OHS/bullying.htm>>.

are incorporated under different areas of the law including occupational health and safety, workers compensation, equal opportunity, contract law, and industrial relations.⁴ A failure to prevent bullying in the workplace is also actionable under common law. This article specially addresses workplace bullying in the context of health and safety laws and regulation with particular reference to the application of key provisions of the model *Work Health and Safety Act*.⁵ This article explains the meaning of workplace bullying, the consequences of workplace bullying and the obligations under the model *Work Health and Safety Act* that are relevant to managing and eliminating workplace bullying.

Defining Workplace Bullying

One of the problems associated with responding to and managing workplace bullying is the imprecise use of the term. However, while there is no single definition of bullying or workplace bullying, definitions in academic literature and workplace codes of conduct consistently characterise bullying as: repetitive, systematic behaviour; an abuse or misuse of power; and unwelcome and unreasonable behaviour that can have physical and psychological consequences for the victims of bullying. Namie and Namie describe bullying at work as 'repeated, health-harming mistreatment of a person by one or more workers that takes the form of verbal abuse; conduct or behaviours that are threatening, intimidating, or humiliating; sabotage that prevents work from being done; or some combination of the three'.⁶ The definition provided by WorkSafe Western Australia is typical of definitions found across all Australian jurisdictions: bullying is 'repeated unreasonable behaviour directed towards a worker or

group of workers that creates a risk to health and safety'.⁷ Similar definitions are to be found in WorkCover and WorkSafe guidelines in other jurisdictions.⁸

Common to most definitions is that workplace bullying is evidenced by at least three essential elements: (i) unreasonable behaviour; (ii) persistent behaviour repeated over a period of time; and (iii) harm or the threat of harm, whether physical or non-physical, to one or more persons. However, for bullying to be present there is no need for the behavior to be intentional.

Definitions and explanations of workplace bullying also refer to the imbalance of power. Field, for instance, notes that bullying at work 'occurs when one person, typically (but not necessarily) in a position of power, authority, trust, responsibility, management etc, feels threatened by another person, usually in a subordinate position who is displaying qualities of ability, popularity, knowledge, skill etc'.⁹ Rigby describes bullying as 'repeated oppression, psychological or physical, of a less powerful person by a more powerful person or group of persons'.¹⁰ This power imbalance is not confined to positional power but may also be based on expertise, experience, control of information and social position.¹¹

⁷ Commission for Occupational Safety and Health, *Dealing with Bullying at Work: A Guide for Workers* (November 2008) WorkSafe WA
<http://www.commerce.wa.gov.au/WorkSafe/PDF/Guidance_notes/Dealing_with%20bullying_english.pdf>.

⁸ See eg, WorkSafe Victoria, 'Your Guide to Workplace Bullying – Prevention and Response'
<http://www.worksafe.vic.gov.au/__data/assets/pdf_file/0008/42893/WS_Bullying_Guide_Web2.pdf>. WorkSafe ACT, *Bullying 3: Recognising and Responding to Bullying* (2010) ACT Government
<http://cdn.justice.act.gov.au/resources/uploads/Worksafe/Publications/Handbooks/WSACT_HB_0016_-_Bullying_3_Recognising_and_Responding_to_Bullying_.pdf>.

⁹ Tim Field, *Bullying in Sight: How to Predict, Resist, Challenge and Combat Workplace Bullying* (Success Limited, 1996).

¹⁰ Ken Rigby, *Bullying in Schools and What to do About It* (Jessica Kingsley Publisher, 1996).

¹¹ Carlo Caponecchia and Anne Wyatt, 'Distinguishing Between Workplace Bullying, Harassment and Violence: A

⁴ For a comprehensive discussion on bullying and the law see Joan Squelch and Robert Guthrie, 'The Australian Legal Framework for Workplace Bullying' (2010) 32(1) *Comparative Labor Law and Policy Journal* 15.

⁵ Safe Work Australia, *Model Work Health and Safety Act*
<<http://www.safeworkaustralia.gov.au/sites/swa/legislation/pages/modelwhslegislation.aspx>>.

⁶ Gary Namie and Ruth Namie, *The Bully at Work* (Sourcebooks, 2009).

Bullying is characterised by behaviour that is repetitive rather than a one-off incident. Nonetheless, depending on the circumstances a one-off episode signals a warning of bullying tendencies, and the incident may well escalate into a pattern of repeated bullying behaviour. The Tasmanian guidance note on bullying explains that if 'behaviour goes beyond a one-off disagreement, if it increases in intensity and becomes offensive or harmful to someone it becomes bullying' and that this is a workplace health and safety risk.¹² Similarly, the Queensland Practice Note on preventing workplace harassment states that a 'single incident of harassing type behaviour is not considered to be workplace harassment'. Nevertheless, 'single incidents of harassing type behaviour should not be ignored or allowed' and may be actionable as forms of harassment and/or assault depending on the circumstances.¹³

The concept of bullying is often used interchangeably with harassment and/or discrimination, which may lead to confusion. Bullying, harassment and discrimination are not mutually exclusive terms. They are distinguishable and should not be confused. Unlike bullying, harassment and discrimination do not have to be repeated and have to be based on some characteristic of the target. Harassment that becomes persistent and repetitive over a period of time may escalate into bullying. Notably however, the Queensland *Code of Practice* uses the term 'workplace harassment' rather than bullying, which is described as 'repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person's employer or a coworker or group of coworkers of the

person that is unwelcome and unsolicited, the person considers to be offensive, intimidating, humiliating or threatening, or a reasonable person would consider to be offensive, humiliating, intimidating or threatening'.¹⁴

In Australia harassment is covered by various Commonwealth and state anti-discrimination legislation. Harassment is generally described as unwanted and unwelcome behaviour that causes humiliation and creates a hostile working environment. Harassment based on a particular characteristic such as gender, race, sexual orientation, age and religion is prohibited under anti-discrimination legislation. Harassment includes sexual and racial harassment that is repetitive, unwanted, demeaning, and threatening. Examples include name-calling, offensive comments and jokes based on race or gender, displaying of offensive material that is sexist and racist, and isolating a person because of their gender or race. For example, s 17(1) of the *Anti-Discrimination Act 1998* (Tas) states that a person must not offend, humiliate, intimidate, insult or ridicule another person on the basis of sex/gender, marital status, pregnancy, breastfeeding, parental status or family responsibilities where a reasonable person, having regard to all the circumstances, would anticipate the other person would be offended, humiliated, intimidated, insulted or ridiculed. Some bullying behaviour may fall within this provision and be unlawful. Harassment, however, may be distinguished from 'discrimination' in that discrimination is concerned with the 'unfair treatment' of a person as opposed to behaviour generally that causes humiliation and an unsafe environment.¹⁵

Risk Management Approach' (2009) 25(6) *Journal of Occupational Health Safety Australia and New Zealand* 439.

¹² Workplace Standards Tasmania, *Bullying: A Guide for Employers and Workers* (June 2010) Tasmanian Government <http://www.wst.tas.gov.au/__data/assets/pdf_file/0006/146256/GB253.pdf>.

¹³ Workplace Health and Safety Queensland, *Prevention of Workplace Harassment: Code of Practice 2004* (2011) Queensland Government <<http://www.deir.qld.gov.au/workplace/resources/pdfs/prevention-workplace-harassment-cop-2004.pdf>>.

¹⁴Ibid.

¹⁵Caponecchia and Wyatt, above n 11, 442. For a useful explanation on harassment and discrimination, see the New South Wales Anti-Discrimination Board, *Harassment and Sexual Harassment* (20 March 2012) NSW Government <http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_harassment#What>.

Bullying: A Risk to Work Health and Safety

Rigby notes that it 'is not uncommon to find people who believe that bullying does no real harm'.¹⁶ However, substantial research-based commentary¹⁷ as well as examples from case law indicate otherwise. Research has shown that respondents who have reported being bullied¹⁸ at work were more likely to report psychosomatic symptoms, and that mobbing has severe health consequences.¹⁹ Bullying does cause harm. Bullying has been associated with absence from work,²⁰ burn-out,²¹ and stress.²² Whether bullying is verbal or non-verbal, physical or non-physical, intentional or unintentional, direct or indirect, the effect is the same: it is designed to control, hurt, intimidate and humiliate, with potentially serious consequences for the health and safety of those concerned. Besides the physical injuries that might be sustained from physical bullying, it can give rise to various psychological symptoms that have severe consequences for the victims including anxiety, fear, depression, low self-esteem and, in some extreme cases of bullying, suicide. Often these symptoms of serious psychological harm render a person unfit for work leading to absenteeism, reduced productivity and incapacity to work.

¹⁶ Ken Rigby, 'Bullying in Schools and the Workplace' in Paul McCarthy et al (eds), *Bullying. From Backyard to Boardroom* (Federation Press, 2001) 5.

¹⁷ See, eg, Namie and Namie, above n 6; Tim Field, above n 9; Margaret Kohut, *The Complete Guide to Understanding, Controlling and Stopping Bullies and Bullying at Work* (Atlantic Publishing Group, 2008).

¹⁸ Mobbing is a term sometimes used to describe bullying behaviour where the perpetrator is a group of people rather than an individual.

¹⁹ Dieter Zapf, Carmen Knorz and Matthias Kulla, 'On the Relationship Between Mobbing Factors, and Job Content, Social Work Environment, and Health Outcomes' (1996) 5(2) *European Journal of Work and Organizational Psychology* 215.

²⁰ Adrian Ortega et al, 'One-Year Prospective Study on the Effect of Workplace Bullying on Long-Term Sickness Absence' (2011) 19 *Journal of Nursing Management* 752.

²¹ S Einarsen, S Matthiesen and A Skogstad, 'Bullying Burnout and Well-Being Among Assistant Nurses' (1998) 14(6) *Journal of Occupational Health and Safety – Australia/New Zealand* 563.

²² Heinz Leymann and Annelie Gustafsson, 'Mobbing at Work and the Development of Post-Traumatic Stress Disorders' (1996) 5 *European Journal of Work and Organizational Psychology* 251.

The harm caused by bullying is starkly demonstrated in a recent case in which a Melbourne café owner was fined AU\$220 000 under Victoria's *Health and Safety Act 2004* for failing to provide a safe work environment after an employee waitress committed suicide because of workplace bullying.²³ The bullying was described as 'persistent and vicious' and included the employee being spat on and regularly called hurtful names. The magistrate reportedly described the atmosphere in the café as poisonous. The coworkers who carried out the bullying were individually fined between AU\$10 000 and AU\$45 000.²⁴ The case of *Naidu v Group 4 Securitas Pty Limited*²⁵ is a further example of the harmful consequences of bullying. In this case the employee was subjected to ongoing harassment, racial and sexual abuse, humiliation, unreasonable workloads and pressure, and threats of violence and financial harm by his supervisor,²⁶ and as result suffered post-traumatic stress disorder and major depression. Adams J noted that 'so extreme was [the supervisor's] behaviour that he well knew, or would have known had he reflected as a reasonable man should have, that prolonged misconduct of the kind he exhibited towards the plaintiff could reasonably be expected to expose him to the real risk of such psychological injury'.²⁷ Adams J further concluded that 'the conduct as a whole indeed

²³ 'Company, Workers Fined \$335k for Waitress's Bullying' *ABC News* (online), 8 February 2010 <<http://www.abc.net.au/news/stories/2010/02/08/2812998.htm?site=Melbourne>>. The Victorian *Crimes Amendment (Bullying) Act 2011* [Assented to 7 June 2011] amends s 21A of the *Crimes Act 1958* (Vic) to apply the offence of stalking to situations of serious bullying. The amendments follow the case of a young waitress who took her own life after being subjected to vicious workplace bullying at a Melbourne café. *Victorian Legislation and Parliamentary Documents: Archive* <<http://www.parliament.vic.gov.au/static/www.legislation.vic.gov.au-bills-archive.html>>.

²⁴ *Ibid.*

²⁵ *Naidu v Group 4 Securitas Pty Limited* [2005] NSWSC 618.

²⁶ For example, the plaintiff was given unreasonably long shifts and he was refused permission to collect his wife from hospital when she had to seek medical treatment for her pregnancy.

²⁷ *Naidu v Group 4 Securitas Pty Ltd* [2005] NSWSC 618, 20. The Court awarded damages against Nationwide News for the sum of \$1 946 189.40 and \$150 000 in exemplary damages because the employer knew about the bullying but did not do anything about it.

resulted in injury of a psychological kind, giving rise to perceptible psychiatric illness and that a substantial cause was internal – that is to say, workplace related’.²⁸ These two cases clearly demonstrate the nature of bullying, the harmful consequences of bullying and the implications for employers who fail to provide a safe work environment and take the necessary steps to address bullying behaviour.

Workplace bullying that may cause both physical and/or psychological harm and injury includes the following unreasonable behaviour: intimidation; abusive and offensive language; aggressive communication, unreasonable excessive criticism; excessive scrutiny of work, threatening to withhold promotion or some other benefit; imposing undue pressure and unreasonable workloads; undermining a person’s work performance; withholding information; initiation and pranks; physical abuse and threats; spreading malicious rumors and gossip about a person; and ostracising a person.²⁹ Cyber bullying via email, text messaging and the internet is also a more recent phenomenon in the workplace. Zapf identified five types of behaviour which constitute the most frequent types of workplace bullying, namely (a) changing work tasks, being given demeaning work tasks, withholding job related information, excessive monitoring or removal of areas of responsibility; (b) social isolation; (c) personal attacks by ridicule or insult; (d) verbal threats; and (e) spreading rumours.³⁰

The hazardous nature of bullying and the associated risks to health and safety are well documented in the literature on workplace bullying, and evidenced in case law. The cost of bullying to employers and the harm caused to employees point to an unequivocal need for organisations to proactively address workplace bullying.

²⁸Ibid 20.

²⁹ See, eg, Namie and Namie, above n 6; Tim Field, above n 9; Rigby, above n 16; Kohut, above n 17.

³⁰Dieter Zapf, ‘Organisational, Work Group Related and Personal Causes of Mobbing/Bullying at Work’ (1999) 20(1) *International Journal of Manpower* 70.

Obligations to manage and reduce bullying in the workplace are found in health and safety legislation.

Model Health and Safety Legislation

All Australian jurisdictions have health and safety laws, as well as various regulations and guidelines that are aimed at ensuring a safe and healthy work environment by reducing hazards and managing risks. In January 2012 the model *Work Health and Safety Act* (*WHS Act*) came into operation.³¹ The aim of harmonising the work health and safety laws was inter alia to significantly reduce the incidence of death, injury and disease in the workplace. The main object of this *Act* is to provide for ‘a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work’.³² Although health and safety legislation in Australia does not specifically mention bullying, it is axiomatic that bullying in the workplace is a hazard that has the potential to harm the health and safety of people, with the most severe bullying leading to suicide, as noted above.

Duty of Care

The *WHS Act* contains general duties to provide a safe workplace. There is a primary duty on persons³³ conducting a business or undertaking (PCBU) to ensure, so far as reasonably practicable, the health and safety of workers³⁴ and others who may be affected by the

³¹Safe Work Australia, above n 5. The new model work health and safety laws commenced in New South Wales, Queensland, the Australian Capital Territory, the Commonwealth and the Northern Territory on 1 January 2012. Western Australia and Victoria have deferred commencement until such time that all the law can be implemented together for all sectors, and Tasmania and South Australia have deferred the debate on the new laws.

³²Model *Work Health and Safety Act*, s 3.

³³ The PCBU is the employer which is broadly defined, see s 5.

³⁴ A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as: an employee; or a contractor or subcontractor; or an employee of a contractor or subcontractor; or an employee of a labour hire company who

carrying out of work.³⁵ The introduction of the concept of PCBU is a departure from narrower concepts of duty which fixed the responsibility for workplace health and safety with the employers. The PCBU concept clearly includes employers and various forms of contractors and managers of workplaces and therefore expands the group of persons who might be liable for breaches of workplace safety. The *WHS Act* further places a positive duty on officers³⁶ of a PCBU, for example directors and senior managers, to comply with duties under the *Act* and to exercise due diligence to ensure that the person conducting the business or undertaking complies with the duty³⁷ to establish a healthy and safe environment. Due diligence essentially means to take 'reasonable steps' such as acquiring up-to-date knowledge of work health and safety matters, understanding operations of the business or undertaking and associated hazards and risk, and ensuring appropriate resources and processes are available to eliminate or minimise risks to health and safety, appropriate processes are in place for receiving and considering information regarding incidents, hazards and risks, and responding in a timely way to information and processes for complying with any duty or obligation under the *Act*.³⁸

There are also provisions that require workers and others (whether or not the person has another duty under this Part) to 'take reasonable care for his or her own health and safety' and 'take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons'.³⁹ The duty to provide a safe environment and take care not to engage in conduct that is likely to cause harm to others extends to preventing and eliminating bullying in the workplace.

has been assigned to work in the person's business or undertaking; or an outworker; or an apprentice or trainee; or a student gaining work experience; or a volunteer; or a person of a prescribed class: *Model Work Health and Safety Act*, s 7.

³⁵ *Model Work Health and Safety Act*, div 2, s 19.

³⁶ Officers are defined as per s 9 of the *Corporations Act* (Cth). It includes officers of corporations and unincorporated associations.

³⁷ *Model Work Health and Safety Act*, s 7(1).

³⁸ *Ibid* s 27(5).

³⁹ *Ibid* ss 28 and 29.

A duty to protect workers from bullying was noted in a New South Wales case in 2004 in which a company was fined when a sixteen-year-old labourer was severely physically and psychologically bullied.⁴⁰ The Industrial Commission reiterated the words of the Chief Industrial Magistrate stating that:

A purpose of the Occupational Health and Safety Act is to eliminate risks to health and safety at the workplace. What occurred on this day is often described as an initiation. It is a polite term for bullying. A bullying culture has been known to exist in some workplaces, often seen as a bit of fun at the expense of someone else. It is a culture that needs to be stamped out. Bullying has no place in the workplace.⁴¹

Moreover the Industrial Commission noted that:

issues of violence and bullying in the workplace require sober and serious consideration. It is imperative, in our view, that the jurisprudence of this Court is unambiguous in its condemnation of such conduct. ... Further, it must be made abundantly clear that **safeguarding health and safety in the workplace extends to protecting employees from bullying and violence from other employees**[emphasis added].⁴²

The employer was fined AU\$24 000 when prosecuted under the New South Wales *Occupational Health and Safety Act 2000*. The two directors, one of whom was in the factory at the time of the incident, were originally fined nominal sums of AU\$1000, but on appeal this was raised to AU\$9000 and AU\$12 000, given the severity of the conduct.⁴³

⁴⁰ *Inspector Maddaford v Coleman* [2004] NSWIR Comm 317 (3 November 2004).

⁴¹ *Ibid* 14.

⁴² *Ibid* 30.

⁴³ The coworkers were also prosecuted and placed on good behaviour bonds, with one worker, Pomente, fined AU\$500.

Risk Management

The *WHS Act* provides that a duty imposed on a person to ensure health and safety requires the person to eliminate risks to health and safety, so far as is reasonably practicable; and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.⁴⁴ ‘Reasonably practicable’ essentially means that which can reasonably be done in the circumstances.⁴⁵ The *WHS Act* interpretative guidelines explain that ‘reasonably practicable’ is an objective test, which means that a duty-holder must meet the standard of behaviour expected of a reasonable person in the duty-holder’s position and who is required to comply with the same duty. To meet this test the duty-holder must first consider what can be done in the circumstances for ensuring health and safety, and then determine whether it is reasonable in the circumstances to do all that is possible.⁴⁶ This requires weighing up all the factors as provided for in s 18, namely assessing:

- the likelihood of the hazard or the risk concerned occurring;
- the degree of harm that might result from the hazard or the risk;
- what the person concerned knows, or ought reasonably to know, about:
 - the hazard or the risk; and
 - ways of eliminating or minimising the risk;
- the availability and suitability of ways to eliminate or minimise the risk; and
- the cost associated with available ways of eliminating or minimising the risk.

Risk management is important for responding to and managing the risks associated with bullying, including risks to the individuals as well as the organisation in terms of lost productivity, reputation, stress claims and legal claims. Comcare provides an example of a risk management process that gives effect to the risk management provisions under health and safety legislation, and which is effective for creating a positive, bully-free workplace.⁴⁷ The Comcare risk management process for workplace bullying is summarised as follows:

Figure 1: Risk Management of Workplace Bullying

Step 1: Identify the Hazard and Sources of Potential Harm	Identify if workplace bullying is a problem and obtain information about the sources of bullying.
Step 2: Assess the Risk	The information gathered is used to determine the likelihood of bullying occurring and the specific behaviours and circumstances where incidents of workplace bullying might occur.
Step 3: Control the Risk	Develop and implement a comprehensive set of practical measures to control the risk of bullying including senior management commitment, leadership initiatives, workplace culture initiatives, organisational initiatives and early intervention strategies.
Step 4: Monitor, Evaluate and Review	Measure and report against agreed targets and performance indicators and review against strategic goals. The aim is continuous improvement.

Consultation

The *WHS Act* requires that a person conducting a business or undertaking must, so far as is reasonably practicable, consult with workers who carry out work

⁴⁴ Model *Work Health and Safety Act* s 17.

⁴⁵ Ibid s 18.

⁴⁶ Safe Work Australia, *Interpretive Guideline – Model Work Health and Safety Act – the Meaning of ‘Reasonably Practicable’* (26 September 2011) <<http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/interpretive-Guideline-reasonably-practicable.aspx>>.

⁴⁷ Comcare, *Bullying Risk Management Tool* (December 2010) Australian Government <http://www.comcare.gov.au/_data/assets/pdf_file/0015/70422/Bullying_risk_management_tool_OHS_74.pdf>. Comcare is the Commonwealth government agency that oversees and administers the *Work Health and Safety Act 2011* (Cth) and the *Work Health and Safety Regulations 2011* (Cth).

for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety. Consultation may take place through health and safety representatives, health and safety committees (discussed below) and various informal arrangements. Health and safety matters on which workers should be consulted include when making decisions about ways to eliminate or minimise risks,⁴⁸ when proposing changes that may affect the health or safety of workers⁴⁹ and when making decisions about procedures that include providing information and training for workers.⁵⁰

It follows that consultation is relevant when managing workplace bullying and would include consultation on matters such as:

- adopting workplace bullying policies and procedures;
- reviewing and revising existing workplace bullying policies and procedures;
- determining procedures for managing bullying complaints; and
- providing information and training.

Training and Supervision

One of the duties that is required of a person conducting a business or undertaking to ensure, so far as reasonably practicable, the health and safety of workers and others is to provide any 'information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking'.⁵¹ This is essential when dealing with workplace bullying. People need to be fully informed about matters relating to bullying such as the nature and consequences of bullying, how to manage bullying, and reporting bullying. There also needs to be adequate

supervision to ensure bullying does not take place and does not go unattended.

The importance and relevance of training and supervision have been at issue in a number of cases. In *WorkSafe Victoria v Ballarat Radio Pty Limited*,⁵² a worker at the Ballarat Radio station in Victoria had been verbally abused by a radio announcer who had also subjected fellow employees to verbal abuse and threats of violence while at work on over ten occasions in 2002 and 2003. He had also physically assaulted a colleague. The Magistrate hearing the complaint reported noted that the 'explosive manner' of the worker in dealing with other employees was inappropriate.⁵³ He noted that the incidents of bullying were serious, repetitive, and extended over a period of time. The worker was convicted and fined AU\$10 000 for intimidating coworkers and for failing to take care of the health and safety of others in the workplace. The broadcasting company was subsequently fined AU\$25 000 for failing to provide a safe workplace, and AU\$25 000 for failing to provide instruction, training, and supervision in relation to bullying. Similarly, in 2000 a panel beater was fined AU\$25 000 for failing to provide adequate supervision and a safe work environment after an apprentice was subjected to months of verbal and physical abuse by other employees. The directors were personally fined AU\$5000 and AU\$8000.⁵⁴ However, in a case in which an apprentice was bullied and suffered serious burns when ignited with brake fluid, the employer was not prosecuted as there was evidence that the company had reinforced its policy on bullying only a month prior to the incident. On the other hand, the two employee defendants were each fined AU\$5000 and dismissed from their employment.⁵⁵ This further illustrates the

⁵² (Unreported Ballarat Magistrate's Court, August 2004).

⁵³ *Ibid.*

⁵⁴ CCH Update – *WorkCover v City Edge Panel Repairs*, Melbourne Magistrates Court, 10 July 2000.

⁵⁵ Worksafe Victoria, Third Prosecution after Apprentice Burnt in Workplace 'Prank' (News Release, 1 July 2010) <<http://www5.worksafe.vic.gov.au/wps/wcm/connect/wsinter>

⁴⁸ Model *Work Health and Safety Act* s 49(b).

⁴⁹ *Ibid* s 49(c).

⁵⁰ *Ibid* s 49(e)(v).

⁵¹ Model *Work Health and Safety Act* s 19(3)(f).

duty placed on workers not to engage in bullying conduct in the workplace that harms others.

Monitoring and Compliance

The *WHS Act* makes provision for the appointment of health and safety representatives and committees. Health and safety representatives and committees have an important role to play in investigating and resolving complaints about bullying as part of their duties and functions. This may include helping to identify bullying in the work place, responding to and investigating complaints in a prompt and appropriate manner, continually reinforcing bullying policy and procedures, monitoring measures taken by the PCBU to address bullying and providing assistance with training.

The regulator responsible for inter alia monitoring and enforcing compliance of the *WHS Act*⁵⁶ may appoint inspectors who provide information and advice about compliance with this *Act* and who assist with resolving work health and safety issues at workplaces, of which bullying would be a key issue.⁵⁷ The importance of properly trained inspectors in dealing with workplace bullying has been recognised in the Australian Capital Territory with the *WHS (Bullying Amendment Bill) 2011*,⁵⁸ which provides for the appointment of at least three inspectors with expertise in workplace bullying and psychosocial issues. There is also to be a Workplace Bullying Advisory Committee that will monitor the relevant health and safety laws in relation to workplace bullying.

net/worksafe/sitetools/news/third+prosecution+after+apprentice+burnt+in+workplace+prank>.

⁵⁶ Model *Work Health and Safety Act*, Jurisdictional Note 156: A jurisdiction will need to include local provisions to ensure that appropriate arrangements are made for the appointment as an inspector of a person who is an inspector under a corresponding WHS law.

⁵⁷ *Ibid* s 160.

⁵⁸ *Work Health and Safety (Bullying Amendment Bill) 2011 (ACT)*
<http://www.legislation.act.gov.au/b/db_43606/default.asp>.

National Code on Managing Workplace Bullying

Safe Work Australia has released various codes of practice to support the implementation of the *WHS Act*. One such code is the proposed *Draft Code of Practice for Preventing and Responding to Workplace Bullying*, an approved code of practice under s 274 of the *WHS Act*.⁵⁹ The *Draft Code* on bullying sets out practical steps on how to comply with health and safety legislation. It assists in providing a consistent understanding of workplace bullying, what constitutes workplace bullying, the implications of workplace bullying and how to manage workplace bullying. The *Draft Code* incorporates much of what is found in guidance and practice notes on workplace bullying and harassment in the states and territories. Importantly, the *Draft Code* recommends the following:

- systematically identifying and managing the risks in the workplace;
- developing a workplace bullying policy (developed as a specific bullying policy or incorporated into an existing work health and safety policy or handbook);
- developing effective procedures to resolve complaints, including a clear process for reporting bullying;
- providing information and training on workplace bullying; and
- encouraging reporting of workplace bullying incidents.

The *Draft Code* is currently under revision following public comment. There have been mixed responses to the *Code* and much public debate and commentary about the proposed code, in particular in relation to disagreement about the meaning and scope of bullying

⁵⁹ Safe Work Australia, *Draft Code of Practice: Preventing and Responding to Workplace Bullying* (September 2011)
<<http://www.safeworkaustralia.gov.au/sites/SWA/Legislation/PublicComment/Documents/Draft%20Model%20Work%20Health%20and%20Safety%20Codes%20of%20Practice%20Public%20Comment/Draft%20Model%20Codes%20of%20Practice%20for%20Public%20Comment/Preventing-and-Responding-to-Workplace-Bullying.pdf>>.

behaviour, its limitations and the implications for implementation.⁶⁰ Union bodies, such as the ACTU and the Australian Manufacturing Workers Union, are reportedly seeking much tougher rules on workplace bullying. For instance, union officials want examples of bullying to include spreading rumours or innuendo, and for the *Code* to expressly state that 'single incidents [of unreasonable behavior] can still create a risk to health and safety'.⁶¹ On the other hand, some employer groups are concerned that the *Code* could lead to a substantial increase in 'bullying claims by those who find their jobs too hard, unpleasant, demanding or boring'.⁶² Businesses, in particular small businesses, have expressed concern about the resources that will be needed to implement the *Code*.⁶³

Conclusion

Creating a safe work environment and eliminating workplace bullying is everybody's business. In the past, laws in relation to bullying have been reactive in so far as they have provided certain remedies when bullying has been proven and when an employee has been harmed. The *WHS Act* puts in place a more proactive approach to bullying and requires employers, employees and others not to engage in conduct that threatens the health and safety of others and creates an unsafe work environment. Workplace bullying falls within the scope of health and safety legislation and is repeated unreasonable behaviour directed towards a

worker or group of workers that creates a risk to health and safety. The consequences of bullying left unchecked may be severe for the individuals concerned and for the organisation. However, workplace bullying that can be covert, subtle and invisible, often goes unreported and is often poorly managed in organisations. To ensure a safe work environment, organisations have a duty and responsibility under work health and safety legislation to proactively manage risks, which include a comprehensive and systematic approach to identifying, assessing, controlling and monitoring workplace bullying. Importantly, organisations have a responsibility to educate employees about their obligations in relation to workplace bullying and to protect them against the harmful consequences of bullying.

⁶⁰ See eg, 'Controversy over Proposed New Bullying Laws', *ABC News* (online), 5 January 2012

<<http://www.abc.net.au/news/2012-01-05/controversy-over-proposed-national-bullying-laws/3760320>>; 'Union Say Definition of Bullying is Confusing', *ABC News* (online), 8 August 2012 <<http://www.abc.net.au/news/2012-08-08/unions-give-evidence-into-workplace-bullying/4185930>>.

⁶¹ Annabel Hepworth, 'Bosses and Unions to Spar Over Bullying as ACTU Pushes New Curbs', *The Australian* (online), 5 January 2012

<<http://www.theaustralian.com.au/national-affairs/industrial-relations/bosses-and-unions-to-spar-over-bullying-as-actu-pushes-new-curbs/story-fn59noo3-1226236904406>>; 'Union Say Definition of Bullying is Confusing', above n 60.

⁶² *Ibid.*

⁶³ 'Questions over Workplace Bullying', *ABC News* (online), 5 December 2011 <<http://www.abc.net.au/news/2011-12-05/questions-over-national-code-for-workplace-bullying/3713824>>; 'Controversy over Proposed New Bullying Laws', above n 60.