# Out of Step? The Efficacy of Trans-Tasman Law to Combat Workplace Bullying

KATE BLACKWOOD[*], TIM BENTLEY[**], BEVAN CATLEY[***],
DAVID TAPPIN[****], Darryl Forsyth[*****]

## Abstract

Workplace bullying is of significant concern for organisations internationally. With increasing understanding of the prevalence and consequences of bullying, research attention has turned to exploring effective prevention strategies. Yet, whilst primary prevention is strongly advocated in the literature, the role of the legislative context in supporting these initiatives has received little attention. This paper examines the efficacy of three legislative approaches enacted in Australia and New Zealand to reinforce workplace bullying interventions. The paper argues for occupational health and safety legislation supported by a Code of Practice that encourages organisations to take a preventative approach to managing workplace bullying[1].

## Introduction

In the last 20 years, a considerable body of international research has provided clear evidence of the widespread extent and destructive nature of workplace bullying. Bullying can poison a working environment and result in significant damage to both targets and witnesses. Alongside the damage to individuals, workplace bullying can also result in substantial direct and indirect organisational costs. Recent research suggests that bullying may be relatively commonplace in many Trans-Tasman workplaces (Askew et al., 2012; Bentley et al., 2012; Bentley et al., 2009a,b; Caponecchia, Sun & Wyatt, 2012; Keuskamp, Ziersch, Baum & LaMontagne, 2012; O'Driscoll et al., 2011). On the other hand, however, research indicates that many organisations, internationally, have a poor understanding of workplace bullying with few having appropriate policies or prevention strategies in place (Catley et al., 2011; Ferris, 2004; Hutchinson, Vickers, Jackson & Wilkes, 2006).

Parallels in legislative frameworks, organisational and societal cultures, and close economic relationships afford the opportunity for comparisons to be made between New Zealand and Australia in their approaches to addressing workplace bullying. In both countries, workplace bullying has received considerable media coverage that has resulted in a number of cases detailed in the public arena. Regulatory agencies in both Australia and New Zealand have also begun to turn their attention to providing resources to respond to workplace bullying. This 'spotlighting' of workplace bullying has seen an increasing number of employees identify themselves as targets of bullying and seek redress (Wells, 2011), often via legal action against their employer.

[*] Graduate student, Department of Management, Massey University
[**] Director of the NZ Work Research Institute, AUT
[***]Director, Healthy Work Group, Massey University
[****] Senior Lecturer, Massey University
[*****] Senior Lecturer, Massey University

This paper provides further insight into the management and interventions of workplace bullying from an employment relations and occupational health and safety perspective by examining the literature on workplace interventions alongside a commentary of the Trans-Tasman legislative context. In doing so, we endorse the multi-level approach to organisational interventions (Heames & Harvey, 2006; Vartia & Leka, 2011), but contend that this should be extended to the regulatory context. Thus, our contribution is not intended to diminish the importance of work being done to identify effective organisational interventions to prevent workplace bullying. Indeed, primary and secondary interventions are critical to preventing and managing workplace bullying. In our view, the effectiveness of such initiatives will be enhanced if regulatory interventions are aligned to reinforce and complement organisational initiatives.

Our focus is, therefore, to examine the efficacy of Trans-Tasman legislation with respect to workplace bullying. Australia and New Zealand share a common legal heritage and, while taking somewhat different paths, both countries have found themselves considering the ability of their relevant legal statutes to respond to workplace bullying. In Australia, the process to harmonise occupational health and safety laws at the federal level has provided an opportunity to be proactive in responding to workplace bullying. Several Australian states have also taken bold measures, notably to criminalise workplace bullying, whilst proposed amendments to federal legislation are also likely to hold employers directly accountable for failing to stop bullying as of January 2014. In New Zealand, the response so far has been to retain the legal status quo and instead educate employers and employees via Ministry of Business and Innovation's (MBIE) guidelines. This paper will, therefore, prove beneficial to potentially improving the legislative response, as both jurisdictions can learn from the experiences of the other while at the same time being informative for those working outside of Australia and New Zealand, who can potentially compare the jurisdictions' responses to that of their own.

We provide an analysis of three key approaches adopted by Trans-Tasman legislation – the rehabilitative approach of employment disputes legislation, the preventative approach of health and safety legislation, and specific legislation to criminalise workplace bullying. We contend that each of the existing legislative routes has significant limitations, not only in their alignment with organisational intervention strategies, but also in their ability to provide the potential redress that targets of workplace bullying seek. We propose that accessible health and safety legislation supported by a Code of Practice best aligns with advocated organisational intervention measures and is most likely to reduce or mitigate limitations of the existing legislative frameworks. We start, however, by outlining the phenomenon of workplace bullying and the range of management interventions posited.

## What is workplace bullying?

Despite the wide range of definitions of workplace bullying (Rayner & Cooper, 2006), it is generally agreed that workplace bullying consists of systematic, inter-personal, potentially harmful behaviours inflicted over a period of time that forces a target into a position where they feel unable to defend themselves, and which may cause severe social, psychological and psychosomatic problems in the target (Einarsen, Hoel, Zapf & Cooper, 2011). Bullying behaviours are typically conceptualised as person-related or work-related. Work-related behaviours include imposing unreasonable deadlines and/or unmanageable workloads, excessive work monitoring and assigning meaningless or degrading tasks (Einarsen, et al., 2011). Person-related bullying includes insulting remarks, excessive teasing, gossip and/or rumours, persistent criticism, practical jokes and intimidation (Einarsen, et al., 2011). Workplace bullying can, therefore, be overt but also discrete and subtle, and heavily context dependent. Leading reviews of the literature emphasise, however,

that it is the perceived intent of the behaviour coupled with its persistent and unwelcome exposure that causes harm to targets (Einarsen et al., 2011; Rayner & Cooper, 2006).

Comparing prevalence rates between countries and industries is fraught with difficulties due to the variety of definitions employed and the measurement methods used. Nielsen, Matthiesen and Einarsen (2010) conducted a meta-analysis of prevalence rates published in 86 different articles and concluded that the mean prevalence of bullying varied between 11 percent and 18 percent. In New Zealand, Bentley et al. (2009b) examined responses from 1,728 employees drawn from the health, education, hospitality and travel industries and reported that 17.8 percent of the sample had been bullied. In Australia, there is currently no national data on the prevalence of workplace bullying, with most research being conducted at organisational, occupational or sector level (Keuskamp, et al., 2012). For example, Keuskamp and colleagues (2012) reported 15.2 percent prevalence of bullying from a study of 1,141 South Australian employees and another study of 747 participants in the Australian medical workforce reported bullying prevalence of 25 percent (Askew et al., 2012).

As with the international literature (Einarsen et al., 2011), workplace bullying in Australia and New Zealand has been reported to have a negative effect for both the targets of bullying and the organisation. Targets of bullying commonly suffer from stress, anxiety and depression and have significantly lower levels of emotional well-being and higher levels of strain than non-targets (Bentley et al., 2009b; Einarsen & Mikkelsen, 2003; Keashly & Neuman, 2004). According to media reports, severe cases of bullying have resulted in suicide (Butcher, 2010; Chrisafis, 2012). The personal costs of bullying flow on to the organisation, with both targets and witnesses exhibiting a higher frequency of absenteeism, reduced organisational commitment, job satisfaction and work motivation (Jennifer, Cowie & Ananiadou, 2003; Lutgen-Sandvik, Tracy & Alberts, 2007). Other significant organisational costs include the opportunity costs of displaced time and effort to help targets cope with bullying incidents and the costs associated with investigations and potential court action.

## Workplace bullying management and intervention

Increasing acknowledgement of workplace bullying as a global issue has seen recent action initiated by global institutions and national and local governments throughout the western world. For example, a group of European institutes have developed the European Framework for Psychosocial Risk Management (PRIMA-EF) to encourage policy development at national and organisational levels (Leka & Cox, 2008). Similarly, the World Health Organisation has published a report to raise awareness of psychological harassment in the workplace proposing preventative action at a primary, secondary and tertiary level (Cassitto, Fattorini, Gilioli & Rengo, 2009). At national government level, numerous European countries (e.g. Sweden, France, Norway, Denmark) have enacted legislation that requires employers to prevent psychological harassment and several US state governments (e.g. Washington, Oregon, Hawaii) have considered bills to criminalise bullying.

Following its origins in psychological research, interventions aimed at the characteristics of individual targets or perpetrators and their relationship offer one approach. However, the notion of workplace bullying as an organisational problem that requires interventions aimed at work structures and process that allow or encourage bullying is common (Baillien, Neyens, De Witte & De Cuyper, 2009; Salin, 2003; Vartia & Leka, 2011). Strategies for the prevention and management of workplace bullying are typically categorised as primary, secondary, or tertiary preventions (Vartia & Leka, 2011). As Vartia and Leka (2011) explain the three categories; primary preventions are proactive and aim to prevent the negative effects occurring by minimising the risk of exposure. Secondary preventions seek to reverse, reduce or slow the progression, prevent recurrence, and to

increase the resources of individuals to cope. Tertiary preventions are rehabilitative, aiming to reduce the negative impacts, and restore individual and organisational health and well-being. These different preventative measures can also be targeted at different levels of the workplace: individual; job; and/or organisational (Vartia & Leka, 2011).

A widely advocated primary prevention strategy is to establish an anti-bullying culture where such behaviour is deemed unacceptable (Duffy, 2009; Needham, 2003; Yamada, 2008). Yamada (2008) contends that the necessary components of such a culture include a genuine organisational commitment to culture change, effective education and policies, and attentiveness to people and behaviour. The development and enforcement of a clear policy on workplace bullying is also widely discussed as part of such a commitment and as a key primary prevention measure (Djurkovic, McCormack & Casimir, 2006; Duffy, 2009; Holme, 2006; Pate & Beaumont, 2010; Rayner & Lewis, 2011). As Rayner and Lewis (2011) write, an organisational policy exists to serve two central functions: to communicate the organisation's intent and to summarise the processes in relation to workplace bullying. However, to minimise the costs of bullying, secondary and tertiary measures are also required.

Despite a number of interventions posited as being effective, there are serious barriers to their implementation and potential effectiveness. As bullying can be subtle, procedural and open to debate around interpretation and meaning, it is less amenable to regulation and workplace intervention than more overt forms of harassment, discrimination and violence (McCarthy & Barker, 2000). HR and Occupational Health and Safety (OHS) professionals may have considerable difficulties managing workplace bullying where bullies are senior to them in the organisation. Further, management may be reluctant to address workplace bullying when bullies are otherwise perceived as effective and productive, and bullies may even be rewarded with promotion (Leck & Galperin, 2006). Finally, and perhaps most disturbingly, management may not understand the nature of bullying, nor how it should be prevented, with the inevitable result that employers are failing in their duty of care towards employees. The result can be targets who are left to deal with bullies alone or resorting to other solutions such as leaving the organisation (Hoel & Beale, 2006; Rayner, 1998; 1999). Targets whose experiences are not dealt with effectively by the organisation may feel that their only option for retribution may be to enact grievance procedures, exposing themselves to lengthy and uncertain processes with possibilities of further victimisation and stress (McCarthy & Barker, 2000). It is, therefore, imperative that bullying legislation not only results in bullying complaints being resolved fairly, but that it also encourages the adoption of organisational-level strategies recommended for effective workplace bullying intervention.

## Analysis of statutes in Australia and New Zealand

Although the legislation in Australia and New Zealand is not designed to be prescriptive, we contend that there is room for progress towards statutes that complement the progress being made in addressing workplace bullying at organisational level. To do this, it is imperative to consider not only the intervention measures advocated at the organisational level but also the unique and complex nature of the phenomenon when trying to effectively address bullying complaints via legislation. For example, despite the growing recognition and awareness of workplace bullying in New Zealand, there is no specific legislation or policy to hold organisations or perpetrators legally accountable for the harm caused by workplace bullying. The Human Rights Act 1993 was developed to promote respect and harmonious relations in New Zealand society, yet its emphasis is on harassment in the form of sexual and racial discrimination (Human Rights Commission, 2008). Cases of workplace bullying typically lack such an underpinning (Needham, 2003) and, for those that do, these discrimination regulations are repeated in employment legislation. Hence, the Human

Rights Act appears to be less well suited for workplace bullying and other psychosocial hazards. Therefore, two pieces of legislation – the Employment Relations Act 2000 (ERA) and the Health and Safety in Employment Act 1992 (HSE Act) – are the legal avenues for investigating and determining claims.

Although the Australian legislative framework is slightly more complex due to differing laws at the regional state level, significant progress has been made towards harmonising health and safety legislation across the country and, in certain states, criminalising workplace bullying and introducing specific Codes of Practice. The key statutes, however, align somewhat with the New Zealand context. As with the Human Rights Act in New Zealand, the federal and state anti-discrimination legislation require a bullying complaint to be linked to an attribute covered by the Acts (e.g. age, sex, disability). As this legal avenue excludes many bullying experiences, we limit our analysis to three key pieces of legislation: the Fair Work Act 2009 (FW Act), enforced by the federal government, state government health and safety legislation, and, in Victoria, the Crimes Act (1958) within which workplace bullying has recently been criminalised.

***Employment disputes legislation***

While the employment disputes legislation in Australia and New Zealand differ significantly in the breadth of dispute they cover, there are distinct similarities to their legislative approaches. In New Zealand, the ERA holds organisations accountable for failing to promptly and fairly act on an employee complaint. Targets who believe they have suffered harm as a result of being bullied at work can potentially lodge a personal grievance for unjustified disadvantage and, if the employment arrangement has since been terminated, unjustified dismissal. The ERA is currently the most commonly utilised statute for employees seeking compensation for hurt and humiliation as a result of the employer's failure to adequately address a bullying-related complaint. The Australian federal government's FW Act currently holds organisations accountable only on the grounds of harsh, unreasonable or unjust termination. Cases of workplace bullying are, therefore, only heard under this legislation in circumstances where the applicant's employment has been terminated. Under the FW Act, enforced by the federal 'Fair Work Ombudsman', a target who has resigned as a result of bullying can only be successful in a claim if they can show that the employer instigated their resignation[2]. Similar to the ERA, penalties for breaches of the FW Act may be awarded to the applicant.

Despite these statutes being commonly utilised by targets of bullying, the contention is that these Acts are limited in their ability to deal with a complex phenomenon like workplace bullying where the behaviour is covert and subjective and the harm inflicted is psychological and cumulative. Although researchers have attempted to objectively measure bullying prevalence, bullying is a subjective phenomenon in which the cause of harm is based largely on the target's perceptions (Mayhew et al., 2004; Neidl, 1996; Saunders, Huynh & Goodman-Delahunty, 2007). Further, the harm experienced by a target of bullying is often unable to be located in a single episode and is instead inflicted as an accumulation of numerous systematic behaviours that, experienced in isolation, are unlikely to cause significant harm (Keashly & Neuman, 2004). Thus, behaviours, such as being given unmanageable workloads or unreasonable deadlines, are unlikely to provide strong evidence towards a target's case unless the accompanying context is considered (Archer, 1999; Cowie, Naylor, Rivers, Smith & Pereira, 2002; Hoel & Beale, 2006).As one such determination stated, "many of the incidents about which [the applicant] complained were capable of being interpreted in a manner other than that in which he perceived them" (*Bachu v Davie Motors Ltd* [2009] NZERA 503). A similar Australian case stated "[the applicant] is being bullied but cannot prove how this is being done because it is a subtle form of bullying that is hearsay" (*Saunders v OSI International Foods Pty Ltd* [2012] FWA 6147). Consequently, the often discrete and subtle nature

of bullying is such that the target's ability to provide sufficient factual evidence to support their claim is likely to be problematic in cases of other than extreme bullying.

Unlike many other complaints that are likely to be heard in the legal system, a target of bullying has likely been exposed to numerous discrete and subtle behaviours over a period of months or even years. Concerns regarding the accuracy of recalling historical events as evidence are highlighted in several cases, especially considering the nature of bullying is such that, to parties other than the target, the behaviour at the time may have been perceived as trivial, or even 'normal'. Cases demonstrating conflicts of evidence provided by the parties are common and the legal body is required to determine the facts based on the balance of probabilities (see for example *Corneal v General Distributors Ltd trading as Woolworths at Gull* [2007] NZERA 395). However, reluctance of witnesses to speak out (Paull, Omari & Standen, 2012; van Heugten, 2011), coupled with the often covert nature of bullying, may mean few witnesses to corroborate the target's account but a number of witnesses to corroborate the bully's account of 'normal' or 'unintentional' behaviour towards the target.

As the existing legislation stands, a large amount of responsibility for addressing bullying is placed on the target who is required to report and provide evidence sufficient to prove that the perpetrator's intentions were harmful. One significant problem in this regard is that workplace bullying is severely underreported. For example, Keashly and Neuman (2004) found that only 53 percent of targets reported the bullying to their direct supervisor and only 15 percent lodged a formal complaint. Similar studies have identified that few targets of bullying voice a complaint for fear of being subjected to further harm and/or because they perceive the organisation as being unable and unwilling to resolve the complaint in a fair and timely manner (Bentley et al., 2012; Djurkovic, McCormack & Casimir, 2008; Ferris, 2004; Huntington et al., 2011). A further concern is that, in many contexts, the alleged perpetrator is in a position of greater formal or perceived power and, in some cases, the reporting channels are such that the target is required to report their complaint to the bully themselves (Rayner & Keashly, 2005). Researchers also suggest that underreporting is a key factor influencing organisations limited understanding of the phenomenon and its prevalence (Bentley et al., 2009b; Keashly & Neuman, 2004). Accordingly, managers often dismiss bullying as a personality clash and a problem to be resolved by the individuals involved rather than the organisation (Ferris, 2004). Lack of legislative guidance on workplace bullying not only contributes to underreporting but may allow employers to be apathetic in managing bullying in their organisations.

Hence, although the approaches of the ERA and FW Act are to encourage effective secondary intervention in employment disputes (i.e. dealing effectively and fairly with complaints and terminations), there are clearly a number of concerns regarding their efficacy in determining complaints of bullying. Unlike many of the general disputes heard under employment disputes legislation, workplace bullying is often covert and harm is incurred as a result of the target's interpretation of numerous systematic behaviours over a period of time. This, alongside the question marks over the ability and willingness of witnesses to recall historical events that may have seemed trivial at the time, acts as a complexity that the existing approach of the employment disputes legislation often struggles to accommodate. Further, considering the prevalence of underreporting and lack of knowledge about workplace bullying and effective intervention often present, in many organisations, the responsibility on the target to provide sufficient evidence of their experience is likely to result in the target's inability to be successful in a personal grievance.

### *Health and safety legislation*

The approach of health and safety legislation to determining claims of workplace bullying differs significantly from that of employment disputes legislation. In New Zealand, claims can be brought against organisations or individuals under the HSE Act (1992) for a breach of duty by failing to take all practicable steps to ensure the safety of employees while at work. The legislation requires employers to have in place methods for systematically identifying existing and new hazards and regularly assessing the risk posed by those identified hazards. Furthermore, the legislation requires organisations to eliminate, isolate or minimise hazards deemed 'significant'. Amendments to the Act in 2002 integrated "physical and mental harm caused by work-related stress" into the definition of harm along with a broader definition of a hazard to include "a situation where a person's behaviour may be an actual or potential cause or source of harm". These amendments represented a significant step forward in acknowledging psychosocial hazards in the work environment. In Australia, the occupational health and safety legislation are the only Acts broadly addressing claims of workplace bullying. A model Work Health and Safety Act (WHS Act) was developed by Safe Work Australia in 2011 in an attempt to harmonise occupational health and safety legislation between the different jurisdictions. Currently, the WHS Act, or an amended version has been enacted by the Parliaments of most of the Australian jurisdictions. Although the Act does not directly address psychosocial hazards in the workplace, it is similar to New Zealand's HSE Act in that employers can be held accountable for failing to prevent bullying under the duty to provide a safe and healthy working environment and safe work systems (Safe Work Australia, 2013).

As previously discussed, the extant literature strongly advocates the need for primary measures in effective workplace bullying intervention. As such, a strong 'zero-tolerance' message, supported by relevant policy, training for managers and employees, and on-going monitoring and policy enforcement are considered effective in preventing bullying. Unlike employment disputes legislation, which takes a compensatory and, thus, rehabilitative approach, health and safety legislation in Australia and New Zealand provide a mechanism for holding organisations accountable for deficiencies in primary prevention. This technically makes organisations liable for preventing bullying from occurring in the first place, or subsequently recurring. New Zealand's HSE Act and Australia's model WHS Act feature strong similarities in what is deemed to be 'reasonably practicable' steps in protecting employees' from harm. Both statutes consider the severity of the harm, the employer's current state of knowledge about the risk, and the current state of knowledge about the means available and the costs of those means in eliminating or minimising the risk of harm.

However, unlike a personal grievance under the employment disputes legislation that can be lodged by an individual employee at minimal cost, the expense and complexity of bringing a private prosecution under the health and safety legislation would usually outweigh the level of compensation awarded. In New Zealand, the target can lodge a complaint with MBIE, but it is MBIE who determines whether or not the claim warrants an investigation of the organisation's health and safety standards. For MBIE to pursue legal action, the requirement is often the occurrence of a serious incident or a significant number of complaints. Therefore, many claims are unlikely to meet the threshold for action or have to become serious incidents before they are investigated, by which time significant harm has already occurred. Similarly, in Australia, each jurisdiction has a regulator (often WorkSafe or WorkCover) responsible for assessing complaints of bullying and investigating complaints if deemed sufficiently serious. Hence, an employee cannot seek compensation for a breach of the WHS Act by lodging a grievance directly to a court or tribunal. Instead, each jurisdiction has a form of workers compensation legislation under which a compensation scheme is operating. When an employee lodges a bullying complaint to the regulatory authority, they can also claim for compensation for harm incurred as a result of the bullying.

An additional constraint is that, although the approach of the health and safety legislation seemingly alleviates much of the responsibility on the target to provide sufficient factual evidence of a complaint, the organisation cannot be held accountable for failing to take all reasonably practical steps to prevent the harm should their current state of knowing about the risk be the cause of their inaction. Research suggests that managers are often unaware of the severity of bullying in their organisations (Bentley et al., 2009b; Ferris, 2004) which is likely to be indicative of the covert and discrete nature of bullying and, subsequently, its ability to often go unnoticed. The limited protection offered by the law's requirement to consider the employer's current state of knowledge potentially lowers the efficacy of the legislation in protecting targets and allows employers to take an apathetic approach to the management of bullying and, thus, continue the invisibility of bullying within the organisation. Therefore, it would seem that the current requirement of an employer to obtain knowledge of the hazard still lies with the target or witnesses in bringing the hazard to the employer's attention.

Further, research in Australia, New Zealand and beyond suggests that organisations generally have a poor understanding of the phenomenon and its prevalence and consequences (Bentley et al., 2009b; Einarsen et al., 2011; Ferris, 2004). Employers often acknowledge that bullying is considered normal in organisational culture and that any resulting harm is due to a lack of personal resilience, or they see bullying as a personality clash and often deny that the situation is relevant to the business, leaving the parties to settle the conflict (Ferris, 2004). Due to this lack of clarity and understanding around workplace bullying, the intentions of the health and safety legislation are lost in the existing protections for employers meaning that employees are often not provided with the protection from harm under the health and safety statutes. However, it is not only employers who exhibit a lack of clarity and understanding around workplace bullying. In the year leading up to July 2011, WorkSafe Victoria received 6000 complaints from employees claiming to have been bullied at work. Of these complaints, only 10 percent were referred to the bullying response unit, with many dismissed on the grounds that the complaint did not constitute workplace bullying. Further, of these 10 percent, only one in 10 were deemed sufficiently serious to warrant further investigation from a labour inspector (Wells, 2011). These figures are of concern and emphasise the importance of clarity around workplace bullying to ensure the effective operation of the current health and safety legislative system.

### *Criminalising workplace bullying*

Criminalising workplace bullying is an approach gaining international attention in recent years, with much debate over the efficacy of introducing such legislation. Victoria is the only state government to have specific legislation to hold perpetrators legally accountable for the harm caused by workplace bullying. Recent amendments to the state's Crimes Act (1958) have seen the definition of stalking extended to criminalise workplace bullying and hold perpetrators accountable for their behaviour. This came as a result of the bullying-related suicide of a teenage café worker. Although these amendments mean that a bully can be held criminally liable for their behaviour, no compensation is awarded to the victim as a legal remedy (Bornstein, 2012).

However, although workplace bullying was traditionally viewed as an interpersonal phenomenon, more recently bullying is viewed as a problem of the organisation with risk factors including role conflict and ambiguity, poor leadership, organisational change, reward systems and high workloads (Baillien et al., 2009; Salin, 2003). Criminalising workplace bullying discourages organisations from viewing bullying as a problem of the organisation and further removes the onus from the organisation to address the root causes of bullying. Hence, although criminalising workplace bullying sends a strong message that bullying will not be tolerated, the message it sends to employers in regards to their organisational obligations contradicts that identified in the research

literature and enforces the common existing view that bullying is simply a heightened interpersonal conflict to be resolved by the individuals involved (Ferris, 2004). As Australian law firm Maurice Blackburn point out, the significant majority of bullying cases are not nearly as severe as that of the case that led to the development of the amendments to the Victorian Crimes Act and should not be considered criminal matters (Bornstein, 2012). Although imposing harsh penalties around workplace bullying sends an effective symbolic message, introducing a further legislative approach heightens the already complex legislative frameworks and potentially enhances the ambiguity around the responsibilities and obligations of the parties involved. We contend that this approach fails to address any of the concerns with existing employment disputes and health and safety legislation and, instead, as discussed above potentially reinforces common misunderstandings that are inconsistent with our knowledge of bullying.

## Where to from here?

This analysis draws attention to several key limitations of the existing legislative approaches. There would seem to be significant misalignment between the legislation and the nature of workplace bullying, a cumulative and subjective phenomenon often occurring covertly, being scrutinised and examined under a lens requiring clear factual and objective evidence. As the strength of this evidence usually increases with the duration and severity of harm, the consequence of existing legislative approaches is that they are retrospective rather than preventative. Further, it highlights concerns around the accessibility of the legislation and their ability to compensate victims for hurt and humiliation, and the approaches of the legislation in relation to the intervention recommendations of recent research.

The primary focus of the employment disputes legislation is not whether the applicant is able to provide sufficient evidence to prove that they have been exposed to behaviours that constitute bullying, but instead whether they can provide sufficient evidence that the organisation has subjected them to disadvantage by taking unjustified actions in investigating and resolving their complaint, or in the case of the FW Act, by terminating their employment. The outcomes of the employment disputes legislation are, therefore, rehabilitative and at a tertiary level in that it compensates targets for the harm and humiliation suffered and disciplines employers for inadequate intervention and resolution processes after a complaint has been raised. However, neither the employment disputes legislation or criminalising workplace bullying prevents the target from suffering harm or the organisation incurring harm-related costs, nor does it encourage organisations to be proactive in implementing primary preventions.

Although the existing health and safety statutes have weaknesses concerning their efficacy in protecting targets of bullying, they have been developed to encourage a preventative approach to managing health and safety in the workplace. This approach is aligned with recent research that encourages primary prevention through the lens of impacting organisational structures and processes (Duffy, 2009; Needham, 2003; Yamada, 2008). As it stands, the legislation only requires organisations to reasonably identify hazardous situations conducive to the bully; yet, the perspective from which the statues have been developed has the potential to send a strong message of encouragement to employers to take a proactive approach to primary prevention. However, current health and safety legislation in Australia and New Zealand is unable to address many of the concerns identified in regards to the lack of clarity around bullying, the perceptions of bullying as an interpersonal phenomenon, and in encouraging the utilisation of preventative measures at organisational level. Due to the protections in place that require organisations to intervene only within their ability according to their current state of knowledge, the preventative approach of the health and safety legislation has little prescriptive effect.

Although the employment disputes and health and safety legislation both have similar weaknesses in the context of workplace bullying, they each capture a well-recognised concern of the academic literature; respectively, the need for organisations to resolve conflict promptly and fairly, and the need for a preventative approach to the management of bullying. Initial thinking around workplace bullying has shifted from where bullying was thought to stem from individual risk factors of those involved to acknowledgement of the role that organisational structures and processes play in its development (Hauge, Skogstad & Einarsen, 2009; Hoel & Salin, 2003; Notelaers, De Witte & Einarsen, 2010). Therefore, health and safety legislation parallels the recent literature in its view that bullying is a problem 'of' the organisation, not simply a problem 'for' the organisation, and it is, therefore, management's responsibility to identify, investigate, and resolve. However, current legislation and government policy does not recognise workplace structures and processes that encourage bullying to develop. The health and safety legislation appears to be most suitable for recognising these risk factors but, as it stands currently, organisations are rarely held accountable for bullying under these Acts due to the law's requirement to consider the current state of knowledge about the risk and the considerably higher burden of proof required by the district courts.

It becomes clear that, to increase the efficacy of existing health and safety legislation to determine cases of bullying, more information is required around workplace bullying for both organisations and their employees. We contend that an accessible and authoritative medium through which to communicate such information would be in the form of a Code of Practice specific to a jurisdiction. A typical Code of Practice includes information on what workplace bullying consists of, why it goes unreported, what employers should do to prevent it (including developing a policy, consulting employees, training and monitoring) how to respond to incidents, and how it fits within the legislative framework. Such a Code, designed to support existing health and safety legislation in determining claims, outlines best practices for all stakeholders, informing them of the nature and risk factors associated with workplace bullying and recommending a preventative approach to its management.

In September 2011, SafeWork Australia released a draft Code of Practice for public consultation titled 'Preventing and responding to workplace bullying', which was designed to complement the recently developed model WHS Act. Although the Code is still in its draft stages, the federal government recognised, through a national inquiry into workplace bullying completed in November 2012, the urgency with which the Code needs to be finalised and implemented. Despite the Code not yet being finalised, the Australian Capital Territory has already formalised the Code under the state's WHS Act. The presence of a Code has the potential to reduce the number of unsubstantiated claims, educate employers about workplace bullying and encourage the implementation of prevention initiatives. Organisations that may have previously feigned ignorance under health and safety legislation may now be held accountable for failing to protect employees from harm through workplace bullying. Although in New Zealand there is no sign of a Code of Practice being developed in the near future, MBIE have recently developed guidelines to educate practitioners about workplace bullying and its management.

We contend that the development and implementation of a Code of Practice to complement health and safety legislation in Trans-Tasman jurisdictions is likely to minimise or mitigate many of the identified concerns with the existing legislation as it relates to determining claims of bullying. Not only does it provide employers with the knowledge to prevent workplace bullying and, thus, be held accountable for failing to do so, it provides clarity around bullying for employees, reducing the risk that the increasing popularity of the term is resulting in unsubstantiated claims causing disputes at both organisational level and in the legal system. Finally, a Code of Practice that is admissible as

evidence of what is known about bullying in legal proceedings is likely to enhance clarity for the legal bodies tasked with determining claims in so far as their ability to infuse the subjective and longitudinal elements of the definition of bullying into their determinations.

## Conclusion

Despite a growing body of research and interest from practitioners, many organisations are seemingly unable or unwilling to effectively investigate and resolve bullying complaints. As a result, a number of organisations are finding themselves before legislative authorities for subjecting targets of bullying to an unjustified disadvantage (ERA) or termination (FW Act) or failing to provide a safe working environment. The findings of Trans-Tasman prevalence studies are a clear indication of a significant problem, yet legislation and government mechanisms are currently deficient when addressing the unique and complex nature of workplace bullying. Not only do the current legislation and government mechanisms appear to have weaknesses in their efficacy in protecting targets of bullying, organisations are being shielded by protections within the legislation and an ensuing onus on the victim to provide the organisation with sufficient information about the complaint. Such protection is not only unhelpful, but does not protect targets from harm or the organisation from harm-related costs.

In this paper, we focussed on three legislative approaches – the employment disputes legislation, health and safety legislation, and criminalising workplace bullying. Specifically, we drew attention to the covert and systematic nature of bullying, witnesses' ability and willingness to recall historical events, underreporting, and considerations of the employer's current state of knowledge and contended that these are key factors hindering the efficacy of existing legislative frameworks and the target's ability to seek redress. Further, the employment disputes legislation approach captures ineffective management at the stage of secondary intervention and, thus, fails to encourage bullying prevention whilst criminalising bullying, although attractive on the surface, encourages a focus on individual perpetrators rather than wider organisational issues. Although the health and safety legislation, as it stands, is unable to overcome many of the issues identified, a Code of Practice designed to support the legislation offers a potential solution to many of these obstacles. The argument for a Code of Practice to complement accessible health and safety legislation is not only supported by recent research that encourages a holistic preventative approach to addressing workplace bullying, but also informs employers of the nature of bullying and thus moderates the weaknesses observed in determining claims under the existing legislative framework.

## References

Archer, D. (1999). Exploring 'Bullying' Culture in the Para-Military Organisation. *International Journal of Manpower.* 20(1/2): 94.

Askew, D. A., Schluter, P. J., Dick, M.L., Rego, P. M., Turner, C. & Wilkinson, D. (2012). Bullying in the Australian medical workforce: cross-sectional data from an Australian e-Cohort study. *Australian Health Review. 36*(2): 197-204.

Baillien, E., Neyens, I., De Witte, H. & De Cuyper, N. (2009). A qualitative study on the development of workplace bullying: Towards a three way model. *Journal of Community & Applied Social Psychology.* 19(1): 1-16.

Bentley, T., Catley, B., Cooper-Thomas, H., Gardner, D., O'Driscoll, M P., Dale, A. & Trenberth, L. (2012). Perceptions of workplace bullying in the New Zealand travel industry: Prevalence and management strategies. *Tourism Management.* 33(2): 351-360.

Bentley, T., Catley, B., Gardner, D., O'Driscoll, M., Trenberth, L. & Cooper-Thomas, H. (2009a). Perspectives on Bullying in the New Zealand Health and Hospitality Sectors. *The Journal of Occupational Health and Safety - Australia and New Zealand.* 25(5): 363-373.

Bentley, T., Catley, B., Gardner, D., O'Driscoll, M., Trenberth, L. & Cooper-Thomas, H. (2009b). *Understanding Stress and Bullying in New Zealand Workplaces*. Final Report to OH&S Steering Committee.

Bornstein, J. (2012). *The Myths and Misconceptions about Workplace Bullying.* Paper presented at the Legalwise Seminar, Australia.

Butcher, S. (2010, 8 February). Workers fined $115,000 over bullying of café waitress. *The Age*. Retrieved from: http://www.theage.com.au/national/workers-fined-115000-over-bullying-of-cafe-waitress-20100208-nlrj.html

Caponecchia, C., Sun, A.Y.Z. & Wyatt, A. (2012). 'Psychopaths' at Work? Implications of Lay Persons' Use of Labels and Behavioural Criteria for Psychopathy. *Journal of Business Ethics.* 107(4): 399-408.

Cassitto, M.G., Fattorini, E., Gilioli, R. & Rengo, C. (2009). *Raising awareness of Psychological Harassment at Work.* Retrived from http://who.int/occupational_health/publications/en/pwh4e.pdf

Catley, B., Bentley, T., Forsyth, D., Cooper-Thomas, H., Gardner, D. & O'Driscoll, M. (2011). *Managing Workplace Bullying in New Zealand: Perspectives from Occupational Safety and Health Practitioners*. Paper presented at the 25th ANZAM Conference 'The Future of Work and Organisations', Wellington.

Chrisafis, A. (2012, 5 July). France Telecom boss faces judicial inquiry into workplace bullying. *The Guardian*. Retrieved from: http://www.guardian.co.uk/world/2012/jul/05/france-telecom-judicial-inquiry-workplace-bullying

Cowie, H., Naylor, P., Rivers, I., Smith, P.K. & Pereira, B. (2002). Measuring Workplace Bullying. *Aggression and Violent Behavior.* 7(1): 33-51.

Djurkovic, N., McCormack, D. & Casimir, G. (2006). Neuroticism and the Psychomatic Model of Workplace Bullying. *Journal of Managerial Psychology.* 21(1): 73-88.

Djurkovic, N., McCormack, D. & Casimir, G. (2008). Workplace Bullying and Intention to Leave: The Moderating Effect of Perceived Organisational Support. *Human Resource Management Journal.* 18(4): 405-422.

Duffy, M. (2009). Preventing Workplace Mobbing and Bullying with Effective Organizational Consultation, Policies and Legislation. *Consulting Psychology Journal: Practice and Research.* 61(3): 242-262.

Einarsen, S., Hoel, H., Zapf, D. & Cooper, C. (2011). The Concept of Bullying and Harassement at Work: The European Tradition. In S. Einarsen, H. Hoel, D. Zapf and C. Cooper (eds.), *Bullying and*

*Harassment in the Workplace: Developments in Theory, Research, and Practice* (2nd ed). pp. 3-39). Boca Raton, FL: CRC Press.

Einarsen, S. & Mikkelsen, E. (2003). Individual Effects of Exposure to Bullying at Work. In S. Einarsen, H. Hoel, D. Zapf and C. Cooper (eds.). Bull*ying and Emotional Abuse in the Workplace: International Perspectives in Research and Practice.* (pp. 127-144). London: Taylor & Francis.

Ferris, P. (2004). A Preliminary Typology of Organisational Response to Allegations of Workplace Bullying: See no Evil, Hear no Evil, Speak no Evil. *British Journal of Guidance & Counselling.* 32(3): 389-395.

Hauge, L., Skogstad, A. & Einarsen, S. (2009). Individual and Situational Predictors of Workplace Bullying: Why do Perpetrators Engage in the Bullying of Others? *Work & Stress.* 23(4): 349-358.

Heames, J. & Harvey, M. (2006). Workplace bullying: a cross-level assessment. *Management Decision.* 49(9): 1214-1230.

Hoel, H. & Beale, D. (2006). Workplace Bullying, Psychological Perspectives and Industrial Relations: Towards a Contextualized and Interdisciplinary Approach. *British Journal of Industrial Relations.* 44(2): 239-262.

Hoel, H. & Salin, D. (2003). Organisational antecedents of workplace bullying. In S. Einarsen, H. Hoel, D. Zapf and C.L. Cooper (eds.). *Bullying and emotional abuse in the workplace: International perspectives in research and practice* (pp. 203). London: Taylor & Francis.

Holme, C.A. (2006). Impact not Intent. *Industrial & Commercial Training.* 38(5): 242-247.
Human Rights Commission. (2008). *Enquiries and Complaints Guide: What can I complain about?* Retrieved from: http://www.hrc.co.nz/enquiries-and-complaints-guide/what-can-i-complain-about

Huntington, A., Gilmour, J., Tuckett, A., Neville, S., Wilson, D. & Turner, C. (2011). Is anybody listening? A qualitative study of nurses' reflections on practice. *Journal of Clinical Nursing.* 20(9-10): 1413-1422.

Hutchinson, M., Vickers, M., Jackson, D. & Wilkes, L. (2006). Workplace bullying in nursing: towards a more critical organisational perspective. *Nursing Inquiry.* 13(2): 118-126.

Jennifer, D., Cowie, H. & Ananiadou, K. (2003). Perceptions and experience of workplace bullying in five different working populations. *Aggressive Behavior.* 29(6): 489-496.

Keashly, L. & Neuman, J.H. (2004). Bullying in the Workplace: Its Impact and Management. *Employee Rights and Employment Policy Journal.* 8(2): 335-373.

Keuskamp, D., Ziersch, A., Baum, F. & LaMontagne, A. (2012). Workplace bullying a risk for permanent employees. *Australian and New Zealand Journal of Public Health.* 36(2): 116-119.

Leck, J.D. & Galperin, B.L. (2006). Worker Responses to Bully Bosses. *Canadian Public Policy.* 32(1): 85-97.

Leka, S. & Cox, T. (2008). *The European Framework for Psychosocial Risk Management: PRIMA-EF*. Retrieved from: http://www.prima-ef.org/prima-ef-book.html

Lutgen-Sandvik, P., Tracy, S. & Alberts, J. (2007). Burned by Bullying in the American Workplace: Prevalence, Perception, Degree and Impact. *Journal of Management Studies.* 44(6): 837-862.

Mayhew, C., McCarthy, P., Chappell, D., Quinlan, M., Barker, M. & Sheehan, M. (2004). Measuring the Extent of Impact from Occupational Violence and Bullying on Traumatised Workers. *Employee Responsibilities and Rights Journal,* 16(3): 117-134.

McCarthy, P. & Barker, M. (2000). Workplace Bullying Risk Audit. *Journal of Occupational Health and Safety – Australia and New Zealand.* 16(5): 409-417.

Needham, A. W. (2003). *Workplace Bullying: The Costly Business Secret*. Auckland: Penguin Books.

Neidl, K. (1996). Mobbing and Well-Being: Economic and Personnel Development Implications. *European Journal of Work & Organizational Psychology.* 5(2): 239-249.

Nielsen, M.B., Matthiesen, S. & Einarsen, S. (2010). The Impact of Methodological Moderators on Prevalence Rates of Workplace Bullying. A Meta-analysis. *Journal of Occupational and Organizational Psychology.* 83(4): 955-979.

Notelaers, G., De Witte, H. & Einarsen, S. (2010). A job characteristics approach to explain workplace bullying. *European Journal of Work & Organizational Psychology*. 19(4): 487-504.

O'Driscoll, M.P., Cooper-Thomas, H.D., Bentley, T., Catley, B.E., Gardner, D.H. & Trenberth, L. (2011). Workplace bullying in New Zealand: A survey of employee perceptions and attitudes. [Article; Proceedings Paper]. *Asia Pacific Journal of Human Resources.* 49(4): 390-408.

Pate, J. & Beaumont, P. (2010). Bullying and harassment: a case of success? *Employee Relations.* 32(2): 171-183.

Paull, M., Omari, M. & Standen, P. (2012). When is a bystander not a bystander? A typology of the roles of bystanders in workplace bullying. *Asia Pacific Journal of Human Resources.* 50(3): 351-366.

Rayner, C. (1998). Workplace Bullying: Do Something! *Journal of Occupational Health and Safety - Australia and New Zealand.* 14(6): 581-585.

Rayner, C. (1999). From Research to Implementation: Finding Leverage for Prevention. *International Journal of Manpower.* 20(1/2): 28.

Rayner, C. & Cooper, C.L. (2006). Workplace Bullying. In K.E. Kelloway, J. Barling and J.J. Hurrell Jr (eds.). *Handbook of Workplace Violence.* (pp. 121-145). Thousand Oaks: Sage.

Rayner, C. & Keashly, L. (2005). Bullying at Work: Perspectives from Britain and North America. In S. Fox and P.E. Spector (eds.). *Counterproductive Work Behaviors: Investigations of Actors and Targets* (pp. 271-296). Washington, DC: American Psychological Association.

Rayner, C. & Lewis, D. (2011). Managing Workplace Bullying: The Role of Policies. In S. Einarsen, H. Hoel, D. Zapf and C. Cooper (eds.), *Bullying and Harassment in the Workplace:*

*Developments in Theory, Research, and Practice* (2nd ed). (pp. 327-340). Boca Raton, FL: CRC Press.

Safe Work Australia. (2013). *Bullying, harassment and discrimination.* Retrieved from: http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/guidance/volunteers/pages/bullying-organisations

Salin, D.M. (2003). Ways of Explaining Workplace Bullying: A Review of Enabling, Motivating and Precipitating Structures and Processes in the Work Environment. *Human Performance*, 56(10): 1213-1232.

Saunders, P., Huynh, A. & Goodman-Delahunty, J. (2007). Defining Workplace Bullying Behaviour Professional Lay Definitions of Workplace Bullying. *International Journal of Law and Psychiatry.* 30(4-5): 340-354.

van Heugten, K. (2011). Theorizing active bystanders as change agents in workplace bullying of social workers. *Families in Society.* 92(2): 219-224.

Vartia, M. & Leka, S. (2011). Interventions for the Prevention and Management of Bullying at Work. In S. Einarsen,H. Hoel, D. Zapf and C. Cooper (eds.), *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice* (2nd ed). (pp. 359-379). Boca Raton, FL: CRC Press.

Wells, R. (2011, July 24). Most workplace bullying claims fall short. *The Sydney Morning Herald*. Retrieved from: http://www.smh.com.au/small-business/managing/most-workplace-bullying-claims-fall-short-20110725-1hw1c.html

Yamada, D. C. (2008). Workplace Bullying and Ethical Leadership.*Legal Studies Research Paper Series* (Research Paper 08-37). Boston, Massachusetts: Suffolk University Law School.

## Notes

[1] A version of this paper was presented at the Australia and New Zealand Academy of Management Conference in December 2012, and awarded Best Paper for the HRM stream. The paper has since been substantially revised to account for changes in Trans-Tasman legislation and policy and is current as at November 2013.

[2] Amendments to the FW Act from January 2014 will allow employees to apply to the Fair Work Commission for an order to stop an experience of workplace bullying.