Prosecuting workplace violence:
The utility and policy implications of criminalisation

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EXECUTIVE SUMMARY

Workplace violence or bullying causing psycho-social injury is an emerging and serious problem in Australia and internationally. Annual costs of such injuries have been estimated to exceed 6 billion dollars. Responses to workplace violence causing psychological harm increasingly centre on criminalisation and threats of escalated enforcement action against employers who fail to provide safe working environments.

However this trend takes place amongst a complex inter-meshing of workplace health and safety regulatory systems, criminal law, and other systems such as anti-discrimination and industrial laws. It also occurs in an environment where enforcement is entrusted to regulatory agencies affected by the trend to responsive or risk-based regulation, one effect of which has been a movement in some areas away from enforcement to self-regulation or even deregulation.

This project seeks to understand how regulatory agencies respond to workplace violence or bullying that causes psychological rather than physical harms. In particular it aims to establish the prevalence and outcomes of prosecutions involving workplace behaviours causing psychological injury. Where such prosecutions are not occurring, the study seeks to understand the philosophical, institutional and procedural barriers to such prosecutions. Finally the project examines policy issues including whether criminalisation is appropriate for these types of workplace harms, and whether corporate employers can be made more liable for their failures to provide safe work environments.

To achieve these aims four stages of research were undertaken. First, the legislation, regulation and agencies involved in addressing workplace psychological harm were mapped, to establish their roles and responsibilities. Second, a review of all relevant Australian cases was undertaken. Third, these cases were analysed to identify themes and common issues. Fourth consultations were held with representatives from most relevant workplace health regulators to help understand practices and problems in the area.

The research has shown that despite the availability of stronger legislative measures, regulatory processes continue to rely upon supportive responses to incidents of psychological injury arising in the workplace with priority placed on redressing system or management deficiencies. Financial penalties or other punitive options have rarely been pursued. The combination of the barriers to prosecution, even in cases determined on the basis of reasonable probabilities, has meant that the explicit powers for enforcement (as compared to encouraging compliance) have rarely been

exercised. As a consequence, there has been little translation of regulatory action to explicit liability for harm done. Further, the separation of workplace health and safety regulatory responses to employing organisations from responses for victims has effectively left many complainants with the limited options of seeking workers' compensation or the challenge of taking individual action against the employer through various courts, commissions and tribunals.

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1. Introduction

1.1. Background

Workplace violence causing psycho-social injury is an emerging and serious problem in Australia and internationally. Annual costs of such injuries have been estimated by the Australian Productivity Commission (2010) to exceed 6 billion dollars, and the British Health Services Executive (HSE, undated) has estimated annual costs to exceed 2 billion pounds. Safe Work Australia (2013: 33) reported that a conservative estimate of 3.5% or 395,700 workers experienced such injury in 2012, with an estimated cost of $11.6 billion per year. While there is still controversy over a universally accepted definition of workplace psychological harm (Bowie, 2002; Waddington et al 2005; Liefooghe and Birkbeck, 2005; Lippel, 2010), there is ample evidence that the psychological as well as physical health injuries which accrue from the various forms of workplace aggression are costly for individuals, organisations and the provision of subsequent publically funded health, rehabilitation, legal and support services (Sheehan et al, 2002; McCarthy and Mayhew, 2004; Einarsen et al 2011).

Governments have begun acknowledging and responding to this problem. For example, the *Australian Model Work Health and Safety Act 2011* has now been adopted in all Australian jurisdictions except for Victoria and Western Australia. It specifically defines workplace health to include both physical and psychological health (see for example *Work Health and Safety Act 2011 (Qld)* s4). Employers and their agents are charged with an obligation to ensure so far as is reasonably practicable the health and safety (physical and psychological) of employees (See for example Work Health and Safety Act 2011(Qld) s19). A failure to comply with this obligation can lead to criminal penalties including imprisonment of up to 5 years. Similarly, the *Victorian Crimes Amendment (Bullying) Act 2011*, known as 'Brodie's Law' was introduced following the suicide of a young woman bullied in her workplace. The law makes serious bullying, including in workplaces, a criminal offence. Also in 2011 the Commonwealth House of Representatives Standing Committee Enquiry into Workplace Bullying was established to consider the problem of psychological harm caused by workplace bullying. Its 2012 report recommended that all Australian governments ensure their criminal laws 'are as extensive as Brodie's Law' and 'consider greater enforcement of their criminal laws in cases of serious workplace bullying, regardless of whether work health and safety laws are being enforced' (Recommendation 22).

From these measures it can be seen that government responses to workplace violence causing psychological harm increasingly centre on criminalisation and escalated enforcement action against

employers who fail to provide safe working environments. However this trend takes place amongst a complex inter-meshing of workplace health and safety regulatory systems, criminal law, and other systems such as anti-discrimination and industrial laws. It also occurs in an environment where enforcement is entrusted to regulatory agencies affected by the trend to responsive or risk-based regulation (Parker 2013), one effect of which has been a movement away from enforcement to self-regulation or even deregulation (Tombs and Whyte 2013). It is unclear what impact calls for increased criminalisation and enforcement will have amidst a responsive regulation-based system. In particular, criminalisation cannot work unless regulators actually launch prosecutions.

Despite recognition of the prevalence and impact of workplace violence causing psychological harm, there is limited Australian or international research which addresses these issues. In particular, although there are a number of reports setting out the means by which a victim might take action personally, there has been no examination of the conditions, circumstances or frequency of prosecutions for workplace psychological harms being undertaken under Australian Workplace Health and Safety legislation or criminal law, and what barriers might exist to such actions.

1.2. Study Aims

Accordingly, this study has been designed to:

i) establish the prevalence and outcomes of prosecutions involving workplace behaviours causing psychological injury

ii) address key policy issues arising from these findings, including:

- What are the barriers to enforcement of existing protections and prosecution powers?
- What circumstances are best addressed through criminal law versus workplace health and safety regulation?
- What steps will increase the effective implementation of existing protections?
- What steps will ensure more effective cross regulatory integration in the prosecution of offenders?
- To what extent should corporate culpability for workplace psychological harms be addressed through the lens of criminality?

It is important to recognise that not all adjudicated claims or complaints are upheld and in some instances both individual and organisational culpabilities have been found. This is reflected in the decisions of the courts and tribunals as detailed in appendices to this report. However, the aims of this study have been to consider how effective current protections are for those cases in which

actual harm and culpability can be or has been demonstrated. It is also essential to acknowledge that the cost and demands of pursuing an outcome through various courts or tribunals can be too great for some complainants. As a consequence there is no reliable way to measure the extent to which the cases identified represent a valid sample of those who may have experienced psychological injury as a consequence of workplace abuse but haven't the capacity to act.

1.3 Psychological harms in the workplace, and their regulation

Workplace psychological violence or bullying?

The scope and volume of academic, practitioner and regulatory commentary on psychological injury caused by abuse at work has grown exponentially in the last decade, whether focused on bullying, mobbing, harassing, threatening or intimidating behaviour. Considerable effort has been devoted to defining and categorising behaviours that are characteristics of such terms and establishing antecedent conditions which enable abuse to occur. The prevailing portrayal has characterised such abuse as a form of interpersonal conflict influenced by aspects of the work environment.

Sociologists, psychologists, organisational behaviourists and managerial functionalists have described, categorised and explained the prevalence, antecedents and impacts of this interpersonal violence within the workplace (for example Einarsen et al 2011; Bartlett and Bartlett 2011; Griffin and Lopez 205; Bowie 2002). While the criminality of physical violence is unquestioned, there is greater controversy with respect to those acts of interpersonal workplace violence which result in psycho-social injuries. This is true despite the significant impact on victims and bystanders, with substantial costs to employers and the public purse. The existing literature addressing interpersonal workplace violence documents its prevalence across a diverse range of work environments. This includes (but is not limited to) call centres (D'Cruz et al 2011) the public sector (Shallcross 2008); defence services (Pershing 2003), police (Tuckey et al 2009), higher education (Keishley and Neuman 2010) and nursing (Hutchinson et al 2010).

There is no single universally accepted definition of workplace psychological harm or bullying. Most definitions are inclusive of a continuum of actions or behaviours. The scope of matters included in the various definitions is a reflection of the difficulty posed by trying to differentiate between or classify types of behaviours and practices. Further, such definitions generally subsume separate definitions associated with bullying, aggression, harassment, discrimination and the like.

Generally, interpersonal workplace violence involves an overt or covert threat to personal safety, health and well-being and can take the form of aggression, intimidation, harassment, bullying and threats of physical assault. The British Health Services Executive *Violence at Work a Guide for Employers* (undated) defines work-related violence as "Any incident in which a person is abused, threatened or assaulted in circumstances relating to their work. This can include verbal abuse or threats as well as physical attacks." Similarly the European Agreement (2007) recognises that harassment and violence can be physical, psychological and /or sexual, involve systematic patterns of behaviour or single events, and range from minor to serious acts including criminal offences. These definitions therefore include complementary terminology found in research and regulation such as bullying, anti-social behaviours (Robinson and O'Leary-Kelly, 1998) and workplace aggression (Neuman and Baron 1998). *Critically, these definitions conceptualise violence from an individualized and behaviourist perspective in which contextual factors are absent*.

However, there is a substantive volume of research relevant to the aetiology, risks, and prevention of interpersonal and systemic bullying in the workplace. Empirical studies have focused on establishment of linkages between individual and organisational factors and the incidence of workplace bullying (in its various forms). On an individual level, the psychology of perpetrators and victims has been linked to incidence of bullying and harming behaviours (Einarsen, Hoel, Zapf and Cooper, 2011) and whether acts of aggression are goal directed or reactive, social interaction related explanations such as perceptions of injustice, violation of a group norm, a matter of reciprocity, frustration and stress.

At an organisational level, linkages have been made between the incidence of workplace aggression and bullying with such factors as job design and work organisation, organisational culture and climate, leadership, reward systems and organisational change (Salin 2003; Rayner et al 2002; and Einarsen, Hoel et al 2010). This overlaps with the view that aggression and bullying are a result of systemic and structural aspects of an organisation that legitimate and sanction such behaviour through the exercise of power and authority. Further, it has been argued that economic drivers underpinning restructuring, downsizing and the like have been largely ignored as causal influences (Hatcher and McCarthy, 2002). In a similar context Bowie (2002:6) suggests that organisational violence 'involves organisations knowingly placing their workers or clients in dangerous or violent situations or allowing a climate of abuse, bullying or harassment to thrive in the workplace." In this sense, Liefooghe and Birbeck (2005) argue that the institutionalisation of bullying produces victims and perpetrators.

It can be argued that despite the costly and long term harm that occurs as a consequence of psycho-social injury, the adoption of the terminology of bullying and harassment to describe unacceptable behaviours has effectively redirected the narrative from traditional understandings of worker health and safety. In the absence of physical assault, workplace threats to health and safety has been conceptualised as a lesser order of harm or offending as reflected in its positioning with respect to enforcement. Across all Australian jurisdictions regulatory advisory documents specify that allegations or incidence of physical violence (whether or not it includes harassment or intimidation) within the workplace should be directed to the police as a criminal offence. In contrast responses to behaviours causing psychological and psycho-social injury rely upon a complex set of prospective safeguards within workplace health and safety legislation, human rights and anti-discrimination legislation, industrial and compensation legislation[1].

Interpersonal problems or corporate liability?

A key finding of existing research is the importance of differentiating between acts undertaken by individuals and those which form part of a structural or systemic part of the organisational or corporate way of operating (Bowie, 2002; Rayner, Hoel and Cooper, 2002; Hoel and Einarsen, 2010; Martin and Lavan, 2010; Salin and Hoel, 2011; Beale and Hoegel, 2011). Further, it is argued that the process of individualising, blame shifting, decontextualizing and isolating events has had the impact of obscuring the liability of the employing organisation (Hatcher and McCarthy, 2002; Liefooghe and Birkbeck, 2005; Johnson and Sarre, 2004: Johnson, 2007). As a consequence victims have been left to shoulder the burden of proof which has effectively diverted responsibility for prosecution from organisational culpability and any associated penalty. Importantly, Johnstone and Sarre (2004) found that even in the circumstances of occupational health and safety prosecutions in Victoria that the majority of cases involved physical injury or fatality and were typified by an individualising of blame and events. Beale and Hoel (2011) assert that this is a significant factor in the inability to effectively reduce the incidence of such harm.

A comparison can be made with corporate crime, where classical notions of white collar crime have focused on offenses which involve personal gain, while corporate crime relates to offences which involve increased profits or the survival of the organisation (Slapper and Tombs, 1999). Building on this view, organization corruption has been defined as inclusive of "processes and the attitudes of decision makers and can become entrenched in organizational roles, routines and practices through socialisation processes, reward systems, and rationalizing belief systems, which serve to

institutionalize corrupt practices and activities (Hutchinson et al 2010). As a consequence, anti-social and harming behaviours can become normalised and such practices institutionalised (Hutchinson et al, 2010).

In a system then where victims bear most of the burden for responding to workplace violence, Yamada (2003) provides some guidance on what state system should seek to achieve, including relief, justice and rehabilitation for victims in conjunction with punishment for organisations as well as individual perpetrators. Given that individual victims seeking redress from external intervention generally are those most injured and for whom internal (organisational) procedures have failed to achieve a satisfactory resolution, the ability to assess the outcomes being achieved by such external avenues of remediation is essential. Findings by Hoel and Einarsan (2009) and Schindeler (2012) indicate that such processes have largely failed to adequately deliver on these criteria and in particular in terms of ramifications for perpetrators.

Prosecutory failure?

A number of explanations have been put forward as to why there is a deficiency in undertaking prosecutions in this area. The first of these relates to the way in which criminological discourse has viewed notions of workplace harming whether resulting in psychological or physical injury. Tombs (2007) concluded that 'criminological definitions of violence' have not recognised offences against workers which arise within a work environment. Speaking specifically with respect to a category of 'safety crimes', Tombs found that actions that cause traumatic injury in the workplace would in any other context be considered a form of violence and subject to criminal prosecution. Johnstone and Sarre (2004) assert that the use of fines without conviction reflected a general ambivalence about the actual 'criminality' of some offences. This view was reiterated by Einarsen and Hoel (2009) who found in examining the shortcomings of the Swedish anti-bullying regulations that the lack of punitive sanctions was a critical factor in the failure of regulators or organisations to take effective preventative action. As noted by Finch (2001) once behaviour falls within the parameters of and is adjudicated by the criminal justice system it moves beyond norm violation and the focus shifts to the role of the state in initiating proceedings, as different from action under civil law which the individual victim must initiate. This then raises the question as to the extent to which prosecution by state and territory authorities may produce more effective outcomes.

A complementary argument made by Feinberg (1984) is that the criminal law which is enforceable by penal sanctions can act as a significant vehicle of prevention. For example, Alvesalo and Whyte

(2007) examined the Finnish Government approach in which offences for violation of workplace safety regulation are built into the penal code (including with a possibility of one year imprisonment as well as monetary fines) and are viewed as a corporate offence. This specific inclusion of workplace bullying and harassment in the penal code was intended to reflect the seriousness with which such harms are held. While the Finnish Occupational Safety and Health Administration is responsible for the regulation of safety at work, investigation and charging of offenders remains a police and criminal matter, with a significant reliance on a referral from and support of the OSHA authority. Importantly this enables a separation of those matters deemed by OSHA to be individual as compared with a systemic (structural) corporate offence. A relevant difference in approach is also found in the French legal arrangements. A particularly problematic aspect in addressing workplace injury in Australia has been the extent to which psychological damage has not been treated as equivalent to physical injury. In comparison judges in the French Court of Cassation have taken on a significant role 'by ruling that employers are under strict liability to ensure their workers' safety' and recognising mental health as having equal weight as physical health (Lerouge, 2012).

Finally, beyond the specific context of the placement of protections and enforcement, is the issue of procedures and practice. This includes the processes and specific matters which are used to determine what action to take. For example, Alvesalo and Whyte (2007) found that only one in four cases investigated in the Finnish study resulted in a prosecution; this was explained as being a function of difficulties in collecting required evidence and some reticence by police to pursue such cases as being outside that which was considered 'normal crime'. At the same time Johnstone (2007) pointed out that the focus in Australia on policies and procedures has in essence configured workplace harming as a technical problem largely separate from any legal sanctions (or indeed penalties). This emerges as particularly problematic with respect to the evidence that the misuse of organisational of policies and procedures has been found to be a source of corporate bullying itself (Schindeler, 2012).

Although the positioning of relevant workplace violence regulation in Australia, Europe, Scandinavia and the United States has differed, each legislative response has been conceptualised and situated outside the criminal law. McCarthy (2003) observed that, because such interpersonal violence has been largely constructed as a problem between a perpetrator and victim requiring remedial action, the problem itself has been effectively marginalised from other perspectives, even in the face of evidence to the contrary. He concluded that as a consequence of such positioning, conduct which might otherwise be considered unacceptable has been relegated to a lower or lesser order of violence. This point was also argued by Tombs (2007) with respect to a failure of criminology to

adequately consider 'safety crimes' within the workplace - and in particular corporate liability. A similar assessment made by Hatcher and McCarthy (2002) was that the promotion of mechanisms such as policies and procedures, surveillance and training promote a therapeutic model which largely overlooks systemic factors, criminal or corporate culpability. Taking then the argument by Harding (2007) that legal processes and liability are intertwined and interact with each other, where victims must rely on civil and limited industrial processes for recourse, the problem is effectively oriented away from a criminological framework. As Johnstone and Sarre (2004) point out, for example, the process of fining without conviction reflects ambivalence about 'true criminality' and tends to trivialise occupational health and safety more broadly. This conceptualisation and positioning of protections has not only influenced the way in which such violence is viewed but also the options for intervention or recourse.

Prosecutions and responsive regulation

As a consequence the Australian work health and safety regime, irrespective of jurisdiction, relies upon the principles of a risk based responsive regulation. Underpinning this approach is a central commitment to organisational self-regulation solutions. Accordingly methods of promoting compliance are based on the Ayres and Braithwaite's (1992) pyramid model. This means compliance and enforcement should only escalate from the bottom of a pyramid of potential responses to increasing sanctions where compliance cannot otherwise be achieved. In short, it is assumed that organisations, with the appropriate support and incentives, will voluntarily comply with regulatory expectations.

The key characteristic of the regulatory enforcement regime is its reliance on review and assessment of organisational policy and procedures to determine the quality of compliance with requirements to protect worker health and safety. Imbedded within this model is the pre-eminent concern with the identification and management of risk. As a consequence of this concentration on documentation rather than outcomes, regulatory enforcement becomes largely a technical process itself in which assessing or determining non-compliance does not necessarily lead to individual outcomes or change in performance (Black and Baldwin, 2010).

However the prioritisation of risks by the regulator must be understood in the broader environment in which the regulation operates. As noted by Hawkins (1990) the priorities and decision to enforce, or how to enforce is ultimately determined on the basis of a moral and political commitment or ambivalence to the risk and the problem. When the nature of risk or harm is viewed from the

perspective of normative expectations or labelling, responding to violations which involve health rather than safety can become particularly contentious. As a consequence Hawkins (1990) argues that the regulatory response to such risk or harm is more likely to rely on negotiated compliance rather than sanction of any breach. As noted by Tombs (2008) each employer has primary responsibility for ensuring as far as reasonable the health and safety of those in the workplace.

This reliance on self-regulation is intended to be balanced by the regulators' ability to apply sanctions and ultimately strong (including punitive) enforcement when significant breaches of this responsibility occur. In fact though, as Tombs and Whyte's (2013) study of workplace health and safety in the United Kingdom found, the effect of regulatory regimes in this area may see them better described as 'regulatory degradation', because of the lack of use of the criminal sanction which provides the deterrent effect in responsive regulation. Responsive regulation can work because of the threat of escalated sanctions (Braithwaite 2013): when that threat is not real, because prosecutions do not occur, the regulatory pyramid risks losing its force.

The goal of this research then, is to first establish the extent to which prosecution has been used to respond to workplace psychological harm, and secondly, to examine key policy issues arising from that empirical finding.

1.4 Methodology

Given the complexity of the regulatory environment, the first stage of this study involved mapping the network of agencies involved in responding to claims of workplace injury and events causing psychological, psycho-social and attendant health injuries. These agencies operate under diverse regulatory, legislative, policy and practice guidelines. The way in which these various agencies and frameworks interface, complement or complicate responses to claims or events requires clarification. This is particularly relevant with respect to the regulators' responsibility for compliance and enforcement. A key goal was to identify which agencies had functions and powers to prosecute employers for workplace psychological harm. This process involved searching legislation, academic and grey literature and websites to identify agencies with some role in regulating workplace behaviour, to set out the boundaries of those roles, examine powers and procedures and determine whether they had any potential involvement in prosecutions.

These findings informed the second stage of the project, which focused on identifying prosecutions based on claims of workplace injury and events causing psychological, psycho-social and attendant

health injuries. These cases can arise in a variety of forums - federal and state courts, commissions and tribunals.[2] Relevant cases were identified by a comprehensive search of the AUSTLII database using the search terms threat*, intimidation, bully*, psychosocial injury, harassment, psychiatric injury, depression, assault and aggression.[3] Examination of publically accessible reporting through the regulators' websites and annual reports identified a limited number of prosecutions which are otherwise unreported through court records. Excluded cases involved those in which the dominant claim or allegation primarily involved physical injury, sexual harassment, stress or where the violence was perpetrated by an individual from outside the organisation.

In the third stage identified cases were used to develop a typology of cases involving complaints of workplace victimisation involving psychological, social and health injury, the role of regulators in such cases and the critical factors impacting on decision making in the various jurisdictions. The goal of this analysis was to determine patterns, commonalities and differences to help answer the policy questions set out in the project aims.

The findings of this analysis informed the fourth stage of the project, consultations with regulators in each jurisdiction. Of primary importance here was documentation of the processes, decision making and issues associated with the implementation of regulatory protections and policy frameworks in responding to complaints of victimisation. This included strategies for promoting compliance and enforcement of the employers' duty of care as well as monitoring outcomes for interventions. The goal of this stage was to confirm or otherwise the findings of the case analysis and typology stages. It is noted that representatives of the Commonwealth Administrative Tribunal were unwilling to participate.

Limitations to Case Review:

A critical limitation in the case review has been the lack of prosecutions by regulators *solely* for psychological or psycho –social harm in the absence of any physical or threat of physical violence. As a consequence it was necessary to examine cases in which the victim and/or the insurer initiated the action. While not WHS prosecutions, these cases are useful because they provide valuable evidence with respect to the prevailing ambiguities around employer responsibilities and liabilities as well as the way in which the provisions of the Act have been interpreted and applied by employers and regulators.

As shown in Appendices 1-4, each case identified involved allegations of harassment, intimidation, bullying or other victimisation. This includes:

- 24 cases heard by Federal and State courts
- 19 heard by the Australian Administrative Affairs Tribunal
- 4 heard by two workers compensation commissions
- 26 cases heard by the AIRC
- 28 heard by FWA, the latter two (AIRC, FWA) covering the period 2006-2011.
- 10 cases involving prosecutions in Victoria

This collection of experience provides some evidence of the circumstances in which external adjudication has been involved and the lessons that can derived from such cases.

Consultations and Limitations:

Both State and Commonwealth regulators have established officers having specific responsibilities in responding to claims of bullying and psychological abuse. Following receipt of ethics approval from Griffith University, consultation with such relevant officers formed the fourth research stage and was shaped by a set of 11 open ended questions derived from the case analysis and relevant to the questions shaping this research (see Appendix 5). The intended methodology was to conduct face to face and telephone based interviews. However individual jurisdictions prescribed specific conditions for participation. One jurisdiction required that reporting de-identify regulator and jurisdictional responses. As a consequence reporting which specifically names jurisdictions to which the information relates has not been possible. Additionally four jurisdictions would only provide written responses to the questions from the interview schedule but were unwilling to participate in an interview process. The inability to effectively interact with those jurisdictions impacted on the quality of some consultation outcomes. Where interviews were able to take place, participants were provided with a transcript of notes, which offered an opportunity to seek any follow up or clarifications. Importantly it also enabled participants to add, amend or clarify any issues which they identified. However, for those jurisdictions in which written responses were provided, there was no substantive opportunity for explanatory discussion or follow up. There are also limitations arising from the individual reporting and data record systems employed by the different jurisdictions. Collectively these factors have had an impact on the quality of cross jurisdictional comparisons and interpretation of potential impacts of different modes of operation.

1.5 Structure of this Final Report

This final report sets out the findings from the mapping, case review and consultations. Critically findings from this research must be viewed from the perspective of the existing legislative and policy

frameworks under which jurisdictions operate. These frameworks are summarised in Part 2. Part 3 then documents the way in which regulators have responded to allegations of victimisation, incorporating documentary material and insights obtained from the consultations. Part 4 considers the question of employer liability through the lens of both regulation and external adjudication experience, based on the review of cases. Conclusions set out in Part 5 speak directly to the initial research questions and the implications for longer term research priorities.

2 Legislative Frameworks

2.1 Work Health and Safety Legislation

The primary aim of the existing workplace health and safety regulatory framework is to establish the obligations and duties of care relevant to the provision of a safe and healthy work environment. Although historically such regulation focussed on the prevention of physical injury, there has been an evolving recognition of the importance of broadening protections to include disease and mental health. The prevention of a mental disorder and psychological injury is a national priority for work related disorders (Safe Work Australia: 12) and is a component of the duty of care for all employers. The Commonwealth and each of the state and territory jurisdictions, with the exception of Victoria and Western Australia, have adopted the *Work Health and Safety Act 2011* (*WHS 2011*) as part of a national harmonisation initiative. This Act establishes the duty of care (and consequent responsibilities) of an employer and employees for ensuring and demonstrating actions taken to protect the health and safety of workers. Consistent with the *WHS Act (2011)*, work health and safety regulators have embraced a responsive regulatory approach which is designed to balance positive support to promote compliance and the use of the continuum of compliance and enforcement options.

Under the *WHS Act (2011)* both employers and individual workers are responsible for protecting their own health and safety as well as others within the workplace. Section 17 of the Act requires that an employer eliminate or minimise risks as far as practicable. Further s27 and s28 of the Act allocate responsibilities for health and safety to officers and workers. Health is defined as being inclusive of physical and psychological health. Three categories of offense relevant to this duty (and enforcement processes) include: Category 1 Reckless Conduct leading to risk of death or serious injury or illness; Category 2 Failure to Comply with Health and Safety Duty where the failure exposes an individual to a risk of death or serious injury or illness; and Category 3 Failure to Comply with Health and Safety Duty. The decision to prosecute is primarily linked to Category 1 offenses involving reckless conduct.

A significant aspect of this regulatory framework is the emphasis on an employing organisation's policy, procedures and systems and the extent to which these elements are consistent with the requirements for the protection of health and safety. This includes an emphasis on risk identification and risk management. Arguably, these requirements have generated the weight given to documentation requirements as a primary means by which the employer demonstrates compliance. As a consequence regulatory enforcement and action becomes largely a technical process in which assessing or determining non-compliance does not necessarily address larger contextual factors.

Consistent with the responsive regulatory approach, provision of information, education, and advisory support represents the least intrusive (and for most jurisdictions the preferred) form of response. Escalating in the severity of compliance measures, the regulator is able issue improvement notices (which are remedial not punitive), infringement notices, enforceable undertakings (which are a legal binding agreement) and at the highest level of enforcement, there are powers to revoke or suspend authorisations (which is applicable where there is a high risk) and prosecutions. The latter enforcement tools are rarely applied, and have never been used in a number of jurisdictions. As is noted by each jurisdiction as well as in submissions to the House Committee Enquiry, the challenge of evidence and the burden of proof makes the likelihood and potential for a successful prosecution unlikely.

As discussed below, the terms and scope of regulatory regimes are not framed nor intended to provide any form of outcome for a victim. This is noted in the 2012 House Enquiry Report, *Workplace Bullying We just want it to stop*, the right to individual recourse for harm lies in civil processes that are separate from regulatory or criminal prosecution or penalties. Given the challenges that may persuade a victim not to act (e.g. further victimisation, stigmatisation or ostracism) this requirement represents a substantial barrier to any relief or protection as well as obscuring the liability of employers to enforce their duty of care responsibilities. Importantly this establishes strategic limitations to the workplace health and safety regulatory frameworks explored in this report.

The terminology which has grown up around this problem has had a significant impact on regulator and community perceptions and expectations. Although the specific term workplace bullying is not included in the *WHS Act 2011* it has been widely adopted in the policies and guidelines shaping regulatory practices in response to complaints of non-physical workplace threats to health and

safety. The national Safe Work Australia *Guide for Preventing and Responding to Workplace Bullying*, which is accepted across jurisdictions, defines workplace bullying as "repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety." Further, the Guide clarifies that "Repeated behaviour refers to the persistent nature of the behaviour and can involve a range of behaviours over time. Unreasonable behaviour means behaviour that a reasonable person, having considered the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening" (2013b:2).

This definition has practical implications for regulatory responses. The first of these is the exclusion of events which are a risk to psychological (and psycho-social well-being) health and safety but are not recurring. Most advisory literature produced by the different jurisdictions, including the National Guide, suggests that a single incident should trigger an internal response. Nonetheless any such events raised with regulators are likely to be triaged out from any further action by regulators. (This impost has been identified by regulators who have noted that while such events may have validity and warrant action, they are excluded by definition.) The second problem is the lack of clarity with respect to the nature of evidence required to meet the benchmark of demonstrating repeated behaviour (particularly in the context of he said/she said) and the extent (and duration) to which such behaviour must be endured prior to meeting the definition.

A corollary is the exclusion of actions which are described as reasonable management actions taken in a reasonable way. This requires regulators to adjudicate what constitutes 'reasonableness' as a critical component in any assessment or complaint. As noted by Bluff and Johnstone (2005) the concept of 'reasonably practicable' is contentious. This aspect of regulation was noted in a recent study by Butterworth, Leach and Kiely (2013) who found that:

> "*Experiences of person-related and work-related workplace bullying* (italics inserted) were associated with high job demands, low job control, lack of fair pay for effort, job insecurity, poor organisational culture and lack of support from colleagues and managers. Experiences of violent or intimidating workplace bullying were uncommon but were related to poor organisational culture and lack of support from colleagues. Unsurprisingly, workplace bullying was strongly associated with increased risk of depression."

This raises the question of the extent to which evidence emerging from regulators demonstrates the degree to which work related practices have been identified as the trigger for injury inducing behaviour as compared to simply the outcome of individual misbehaviour to which the employer

should respond. As noted by Braithwaite (2013:7) “the degree to which workplaces encourage bullying or keep it is in check is being regarded increasingly as a reflection of management policy, not simply management neglect”. This perception was echoed by one of the regulators, “Bullying behaviour however, is often part of a broader management, organizational and culture climate issue…..This creates challenges in managing client expectations when bullying complaints are determined to be related to these broader issues”.

This view is well validated in the Australian experience in which regulators have not applied any serious sanctions for abuse of workers causing psychological injury except in cases involving death or serious physical injury. Acknowledging that this is consistent with the *National Compliance and Enforcement Policy*, it is also an important signifier of the relative import which is ascribed to such health based injuries. This in turn could be viewed as a virtual ‘get out of jail free’ card for such breaches.

2.2 National Compliance and Enforcement Policy

In 2008 the Workplace Relations Ministers’ Council agreed to the adoption of a *National Compliance and Enforcement Policy*. The policy and principles set out in this document interface with each individual jurisdiction regulatory and criminal justice systems. This forms the framework for determining the nature of activities regulators may take in response to offences against *the Work Health and Safety Act 2011*. From a compliance perspective, this may entail undertaking a compliance inspection or audit, provision of education and training and offering advisory support. Enforcement options include the issue of provisional improvement notices, letters of warning, enforceable workplace undertakings and ultimately prosecution. Of particular relevance is the policy guiding prosecutions. *Across jurisdictions the regulators’ decision to prosecute requires evidence of a prima facie case, reasonable prospect of conviction, public interest and whether such action is supported by the director of public prosecutions.*

The National Policy promotes positive motivation, compliance monitoring and deterrence. Specific deterrence is linked to addressing alleged breaches by taking appropriate action in response to specific events and general deterrence by publication of information about the outcome of compliance and enforcement outcomes. The policy sets out conditions and circumstances in which various forms of intervention may be employed by regulators. An important take away message from the Policy is the emphasis on ensuring that regulatory responses to breaches are proportional to the risk and severity of injury. Additionally, when the *National Compliance and Enforcement Policy*

is considered in combination with the *WHS Act (2011)* there is an overarching implication that the regulator and those subject to regulation are working collaboratively. This collaboration is grounded in the belief in a shared interest in resolving complaints and incidents without recourse to penalty or liability. The critical outcome measure for both the collaborative and the formal enforcement option then would a demonstrable reduction in the incidence of such injury as a consequence of employer and regulator activity. In the absence of any robust evaluation of the outcomes achieved by the various compliance and enforcement tools, the surrogate measures in terms of compensation, civil cases, and complaints to regulators provide only limited evidence (which is largely anecdotal) of reduction in real terms.

2.3 Complementary State Based Prosecution Policies

Western Australia and Victoria have separate state based legislation and prosecution policies. The Western Australia's *Prosecution Policy* sets out the matters to be considered when deciding whether to pursue a prosecution for an offence under the *Occupational Safety and Health Act 1984 and the Occupational Safety and Health Regulations 1996*. Although WA has not adopted the harmonised legislation, the state based legislation and prosecution policy are consistent with the national approach. Notably, one of the objectives set out in WA policy is that of deterrence, both general and specific. However as a point of distinction, the WA policy also incorporates criteria to be applied when determining whether to prosecute based upon a link to severity of harm, knowledge of risk and potential for avoidance or rectification.

Victoria's *General Guidelines for Prosecutions* mirror the general principles for prosecution and the National Policy. A specific component of the Victorian policy, however, is the provision for targeting prosecutions under health and safety laws where 'there appears to be a high degree of culpability' which is then further defined as including amongst the indicators a failure to control risks despite previous warnings or knowledge' (2010:2). This is an explicit link with s22 *Occupational Health and Safety Act 2004 (Vic)* which requires the employer to monitor the health and conditions within the workplace and s25 which includes requirements for employees to meet the same standard of care and prevention as the employer. The policy suggests that while prosecutions are restricted to the most serious events, there is a commitment to "publish/utilise enforcement information and data to leverage the outcome of prosecution related activity e.g. to enhance deterrence; inform duty holders in same and similar industries; inform future inspection activity". This is evident in the summary of details of prosecutions found on the WorkSafe website. This includes cases involving interpersonal violence causing psychosocial injury.

Compliance and Penalties

Finally work health and safety legislation across all jurisdictions provides for financial penalties as well as a potential for imprisonment for offences against the relevant regulation. However the constraints associated with meeting the applicable criteria and evidentiary demands have significantly reduced the likelihood of prosecutions or the issue of financial penalties. As noted by the Western Australian Commissioner for Equal Opportunity in addressing the House Standing Committee on Education and Employment, "the higher standard of proof required in the criminal justice system, requiring the intervention of the courts and the police, may not translate well into the workplace environment." Similarly, Johnstone (2003) concluded from his study of occupational health and safety prosecutions in Magistrate Courts in Victoria, that the systems and procedures which guide the criminal system are a poor fit with the workplace health and safety environment. To exemplify, Johnstone found that the event or incident based focus which essentially individualises and decontextualizes the case effectively detracts from the context which is critical to the workplace health and safety regulatory environment. This is generally consistent with a widely held view that the adoption of Brodie's Law in Victoria will have limited application.

2.4 National Guide for Preventing and Responding to Workplace Bullying, Work Safe Australia

This guide is designed to assist persons conducting a business or undertaking to understand how to manage the risk of work place bullying including prevention and response. Although it is not intended as a guide for regulators, it is designed to be consistent with both the *WHS Act* (*2011)* and the *National Compliance and Enforcement Policy*. Its importance lies in its standing as a national reference tool which communicates the regulators' interpretation of the requirements to meet the provisions of the Act.

2.5 Workers Compensation and Interface with WHS Regulation

The primary purpose of legislation governing workers compensation (insurance) is to provide assistance for workers injured or suffering from illness arising from work. Although the role, responsibility and criteria applicable to compensation and regulatory frameworks differ, there is an implicit relationship nonetheless. Consistent with the rules guiding entitlements for compensation, the claimant must demonstrate that an injury or disease has occurred, that such injury or disease is a consequence of work related events and that is not the consequence of reasonable management undertaken in a reasonable manner. Importantly, compensation can be awarded on a 'no fault' basis

and is granted independent of any regulatory ramifications; that is even cases involving demonstrated psychological and attendant injury from mistreatment in the workplace (including meeting the definition of bullying) does not automatically trigger a regulatory response. However the extent to which the compensation and regulatory functions are able to inform each other, and in turn provide an enhanced approach to prevention is relevant to consider. For example, analysis of cases involving claims of psycho-social injury helps to bring to the fore the ambiguities (and sometimes contentious debate) which persist in terms of understanding of what is considered 'reasonable management done in a reasonable way'. This ties in with and is relevant to the extent to which it is possible to achieve greater clarity of responsibility and liability for such injuries, with particular regard to organisational behaviours versus individual misbehaviours.

Regulators described how the regulatory and compensation activities interface in their jurisdictions. In some cases there have been recent steps or an intention to enhance the ways in which information is exchanged and to operate in a complementary manner. Based on the information provided by each of the jurisdictions, all have an established system for data transfer between the insurer and the regulator. However the scope and manner of information transfer and how the information is used differs considerably. Some jurisdictions have access or the ability to access all information held by the insurer; some receive information regarding the organisation but not individuals, and some receive only de-identified data showing trends only. These differences are a reflection of jurisdiction specific structural arrangements, individual information management systems and competing views about individual privacy and confidentiality. For example, where the regulatory and insurance arm are co-located within a single department, the likelihood of information exchange may be greater than where private insurers are contracted by state or territory governments.

One jurisdiction has a totally integrated arrangement in which there are established cross referral processes and practices which enable action to be taken relevant to individual agency's roles and responsibilities as well as monitoring and informing priority setting. In another jurisdiction it was noted that compensation claims databases are used to specifically target types of employers, industries or locations, and accounts for approximately 40% of work. In four jurisdictions the data is used to advise priorities in allocating resources and inspectorate activities. Two jurisdictions receive data but experience barriers to its use either due to information management systems or work load demands.

Other caveats on the use of insurer data were identified by some regulators. One example given was the difference in the way cases are determined. For example, it was suggested by one regulator that successful claims for psychological and psycho social injury triggered by stress or overload, would not be deemed to 'fit' nor be accepted for any further action. Thus even where there might be a pattern of successful claims for such injury and for the same reasons, it would not flag a potential failure to provide a healthy and safety workplace. This is relevant because it serves to underline the ambiguous nature of how psychological injury and duty of care is interpreted when the specific definition of bullying is the driving determinant. In short, given the emphasis of regulation on risk assessment and management, and the importance of mental health as well as physical health, the lack of attention to and active exclusion of such cases appears somewhat contradictory. While two regulators asserted that national privacy requirements preclude access to individual case information, this is not an interpretation adopted by all regulators.

2.6 Human Rights and Anti-Discrimination Protections

Commonwealth, State and Territory anti-discrimination legislation has the potential to provide protections where the abuse or actions causing the injury are a consequence of the target having a protected attribute. This includes offending behaviours based upon race, ethnicity, age, sex, disability or any of the other specified attributes. A majority of regulators noted that directing callers to the appropriate agency, particularly in cases mistreatment causing psycho-social injury based on a protected attribute, is part of normal activity and three state jurisdictions have established referral protocols or agreed arrangements for this purpose. It is generally accepted that cases may involve both bullying and discrimination, or bullying based upon protected attributes. In this context it is possible that the most appropriate agency to address complaints would be ambiguous – or even should involve both agencies. For example the AHRC may address the immediate matter while the regulator may rightfully need to investigate what risk management processes are in place to prevent and respond to such behaviours.

The Australian Human Rights Commission (AHRC) publication of conciliated cases shows a number of occasions in which one of the protected attributes was a focus of mistreatment by co-workers resulting in psycho-social harm and what might in some cases be viewed as a form of constructive dismissal. Summaries of reported cases available on the AHRC website reveal that complaints through the Commission have a consistent record of achieving some resolution, including payment to victims. This represents a significant difference from outcomes of any workplace health and safety regulatory intervention or enforcement actions in which there is no direct financial or other

compensatory benefit to the victim. In addition to financial compensation, most cases dealt with by the AHRC also involved the employer providing a statement of regret or acknowledgement of the mistreatment, even in cases when the employer had argued that internal investigations had rejected the complaints. This aspect of the AHRC process is absent from the workplace health and safety regime even in cases where offending behaviour is validated. Requiring such acknowledgement has the potential to influence the employer's commitment to ongoing prevention This would be consistent with the principles of reintegrative shaming. A consistent issue identified by regulators was the separation between the regulator's role in addressing systemic issues and achieving a specific outcome for complainants. Regulators also noted that complainants often express a sense of disappointment that the work of the regulator does not provide them with a personal outcome.

Despite agreements for cross referrals of complainants between the regulator and the Human Rights Commission, there is no apparent reciprocal relationship in terms of follow up despite the implicit link with the requirement of a duty of care for the health and safety of employees. This is also relevant given that the Fair Work Ombudsman defines discrimination in terms of an 'adverse action' yet many cases conciliated by the AHRC involve repeated unreasonable behaviour towards a person based on a protected attribute but may not involve the types of 'adverse action' enumerated by the Ombudsman.

2.7 Fair Work Act 2009 (Cwth)

The scope of matters which the Fair Work Commission, and its predecessor the Australian Industrial Relations Commission (AIRC) as well as other industrial commissions or tribunals, are able to adjudicate or act upon has been constrained by the legislation under which it operates. State and national industrial commissions or courts share an ability to hear claims of unfair dismissal (that is claims made by individuals whose employment has been terminated as a consequence of alleged harmful behaviours) and constructive dismissal (that is claims made by individuals who have felt forced to resign as a consequence of victimisation).

Although not specifically defined within legislation, the *Fair Work Act 2009 (Cth)* includes within the definition of 'dismissal' the situation where a person has resigned from their employment, but was forced to do so because of conduct, or a course of conduct, engaged in by their employer (LexisNexis Dictionary of Legal Terms). This provision has been used by a limited number of claimants (Fair Work Commission has heard approximately 30 cases over the 5 year period to 2011) who have argued

they have been a victim of constructive dismissal as a consequence of ongoing mistreatment, harassment, threats, bullying and intimidation.

In 2013 the *Fair Work Act 2009 (Cth)* was amended allowing the Commission to grant an order to stop bullying on successful application by a worker. This amendment was crafted to be consistent with the *Work Health and Safety Act 2011* with respect to definition of bullying and its exclusions. Importantly the amendment establishes a link between behaviour and risk to health and safety. Under the Case Management model adopted by the Commission, an applicant must be able to demonstrate that there is an *ongoing risk* rather than simply prior victimisation. Although there are a number of options that are available to the Commission in cases found to involve continuing risk, they do not include issuing of penalties or fines. However, failure to comply with a Commission order may attract a civil penalty but it will not be deemed to be an offence.

The Fair Work Commission quarterly report for the period ending March 2014 indicates that there had been 151 applications for an order to stop bullying, of which 48 had been withdrawn or resolved prior to a decision, and of the seven matters decided, one order had been granted. Until there is considerably more experience with the exercise of this additional power, the impact or ramifications remains unclear. For example, while the regulator considers claims based on the compliance requirements of the *WHS Act (2011),* the Commission focuses solely on the immediate protection needs of a claimant. The extent to which the stop order threat will be viewed as promoting corporate accountability is yet untested. Similarly untested is the extent to which the Commission's President will exercise the authority for information to be disclosed to a regulator and what the consequences of this might be in the form of regulatory engagement.

2.8 Summary

The existing regulatory responsibilities and powers found in work health and safety legislation provide the primary vehicle for compliance and enforcement of duty of care obligations of employers and workers. All jurisdictions are committed to responsive regulation and the National Compliance and Enforcement Policy. The primary concern for regulators is the nature and use of policies and procedures of an employing organisation as they apply to their duty of care. In contrast insurance or compensation programs, anti-discrimination protections and the Fair Work Commission powers, have the victim as a primary concern. Given the differences in priorities and concerns, it is relevant to consider the interface of these regimes and the implications for prevention, compliance and enforcement as well as victim outcomes. As observed by several regulators the complexity of

agencies having a legislative role or responsibility in this space can be problematic and negatively impact on complainants.

3 Identifying and Responding to Complaints

3.1 Complaint Identification and Verification

According to regulators, allegations related to psychological injury (arising from abusive behaviours such as bullying, harassment, threats or intimidation) made up only a small proportion of all complaints received. The manner by which data relevant to this study (number of complaints, number and nature of actions taken in response to complaints, compliance and enforcement actions) are collected, stored and is retrievable is unique to each jurisdiction. For this reason, it is not possible from accessible information provided by regulators to construct an integrated cross jurisdictional summary of the number of complaints received involving psychological and psycho social injury, the number which are verified, acted upon and the nature of that action. For example, jurisdictions may combine into one data set different types or causes of psychological or psycho-social injury (e.g. violence, bullying, stress, fatigue or in another case combining cases involving physical violence and assault with psychological injury). Further, most annual reports were found to have limited statistical information specific to the incidence or number of complaints of psychological injury or extent of compliance or enforcement activity with respect to this risk to health and safety. It is noted that the AHRC annual report provides detailed statistical information in this regard and provides a contrasting model of open reporting which would, if emulated, enhance WHS regulator reporting. In the absence of consistent quantitative data, most regulators suggested that there has been no pattern of consistent increases or decreases from year to year in the number of complaints or proportion acted upon, although some report decreases in particular sectors or generally.

There has been considerable effort in some jurisdictions to undertake promotional and information campaigns. While such promotions may generate a spike in complaints, regulators have reported mixed impacts. In some cases it has been observed that promotions may generate complaints which are too old to investigate or where previous complainants have been dissatisfied with the outcomes of the regulator's actions. In one jurisdiction it was reported that an outcome has been an increase in the proportion of complaints received which warrant further action. However, it can also result in an increase in the number of complaints which are lodged but which do not meet definitional requirements. Whether there is an increase in validated complaints or a decline in complaints as a result of better understanding of definitions both outcomes were seen as a positive result by many

regulators. This refers specifically to the definition and requirements to be labelled as 'bullying' not psychological injury.

Triage Processes: Regulators view the triage process as an essential tool for resource and risk management. Individuals will contact the regulators by telephone seeking information and advice or to lodge a complaint. Each regulator reported having an active triage process and specific tools by which complaints are initially assessed. In some cases initial vetting of complaints will lead to a decision that no further action can or should be taken, in others a referral may be made to another agency. Alternatively most regulators will mail to the caller a package of information including a complaint form for completion and return. The return of the completed form will trigger an assessment and determination what, if any, action should be taken. While these processes appear to be similar in nature, this does not suggest that outcomes will be the same. Ultimately however there is a pattern of willowing out the number of complaints which lead to further action based on failure to meet the definition of bullying, lack of a perceived risk to health and safety or insufficient evidence. In those jurisdictions where the number of complaints is very low, there may be some follow up on all complaints, but in those jurisdictions which experience a greater number of complaints, the willowing process may be more stringent. With few exceptions, most jurisdictions identified resources (as in people) were a significant consideration and can have a major impact on demand management.

For those complainants for whom the regulator determines further assessment or action is warranted, the verification processes adopted are regulator specific. A reflection of a difference is found in the manner by which regulators described the main concern of their verification process. Some regulators stressed the point that it is not their responsibility to determine the facts of a specific complainant case, but rather to determine whether the employing organisation has taken all reasonable steps to minimise risk, to manage the risks, and to have and employ appropriate systems and policies for realising responsibilities for health and safety. Other jurisdictions have noted a greater emphasis on the inclusion of case specific evidence in verifying a complaint. This may lead to a potential difference in findings based upon the verification process. There has been a trend toward developing specialist inspector staff to address psychosocial risks although there has also been a move to increase training and capacity of general WHS staff, especially in non-metropolitan environments where staffing is more limited.

Post verification and assessment, it is possible for the regulator to initiate an investigation which represents as an escalation along the responsive regulatory ladder. Investigations are limited to cases in which there is a determination that there are severe health and safety impacts and are most frequently carried out by investigators separate from the initial inspectorate assessment. The numbers of investigations that have been undertaken as a consequence of psychological injury are limited, with some jurisdictions indicating that none have occurred and in other cases primarily where physical injury has also occurred.

3.2 Compliance and Enforcement

In circumstances where an assessment has been made that there has been a breach of the Act and a duty of care, whether intentional or accidental, there is a continuum of actions available to the regulator. This may range from providing advice and support, to corrective action requirements, to active enforcement. Corrective actions may be encouraged through the issue of non-punitive improvement notices which spell out the actions which are required to ensure compliance. There is evidence from the regulators that suggests that the use of such notices is less frequent than the provision of advice and support. Enforceable undertakings set out mandatory requirements for action and failure to comply can lead to more punitive responses. Such undertakings have been rarely employed in cases involving psychological or psycho-social injury. Only one jurisdiction has actively pursued prosecutions in which psychological injury has been present, however these cases generally also involved physical violence or threats to such violence.

3.3 Barriers to Assessment, Investigation and Enforcement

Across jurisdictions, regulators identified similar factors impacting on the assessment, investigation and prosecution of cases involving psychological and psycho-social injury arising from unreasonable behaviours within the workplace. At the same time, individual jurisdictions highlighted different concerns within the context of methods of operation as well as the regulatory environment. As noted by three regulators, the transformation of a physical risk framework into this context is problematic. While physical safety risks can be relatively straightforward to identify, address and prevent, there is no simple parallel which can be transferred to cultural, environmental, and systemic or relationship issues associated with risk and vulnerability to psychological injury. The emotional, subjective and evidentiary problems associated with psychological and psycho-social injury impacts are viewed as inhibiting the potential for regulators to apply strong levels of enforcement or attempt prosecution.

Definitions: The first hurdle to be cleared in the triage process and for a complaint to advance to assessment is an indication that the pre-requisite conditions set out in the definition of bullying are met. For some regulators, it was noted that no action will be taken even when there is a reasonable basis for suspecting that risk factors are present and that early intervention is needed if the definitional requirements for bullying are not met. Given the emphasis on adopting a collaborative approach and the importance of not allowing events to escalate, the definition itself can act as a barrier to effective intervention. Respondents from three jurisdictions highlighted that the definitional constraints were a significant impost to early intervention and the ability to reduce the severity of injury. Notably the delay in intervention can cause the injury to be exacerbated and negatively impact on the potential return to work.

Evidence: All regulators identified a major barrier to prosecution is the difficulty in meeting the evidentiary standard required for a criminal court. (Arguably, the prosecutions that were pursued included evidence of actual or threats of physical violence and injury which may have facilitated the decision to prosecute.) Further, the highly emotional context and subjective nature of such complaints can result in decisions being made largely on a balance of probabilities, which again would not meet the required evidentiary standard. This is made more challenging given the frequent absence of reliable and willing witnesses willing to 'go on record'.

One challenge identified by three jurisdictions is the time that lapses between the events and the receipt of complaints. Complaints which are received after the complainant has left the employment, and in some cases this is a matter of years, can be virtually impossible to progress. In other cases that the time taken to go through internal processes, particularly involving public service employers, can mean that it is months before a complaint is lodged, again inhibiting the ability of regulators to proceed. One regulator indicated that the delay averages 9 months for the not for profit sector, 12 months in the private sector and 24 months for the public sector. Such long delays can make it difficult to investigate.

Despite identification of the evidentiary problems, there is relatively little guidance for what an individual should do to ensure there is adequate evidence for a complaint. Exploration of each regulator's online presence, it was found that only three have specific guidance as to the nature of evidence an individual should collect and how it should be recorded to facilitate an assessment or subsequent investigation despite requiring such evidence as part of the triage process. This is in sharp comparison with the more detailed information which is provided to employers. Given the

challenge of obtaining adequate evidence, there appears to be substantial unrealised potential to better inform workers about the nature of evidence that is needed and how it can be done in a way which is considered robust. This may include, for example, ways in which witnesses can be encouraged to verify documentation at the time incidents or events occur. This may help not only in terms of the robustness of evidence but also provide an acceptable vehicle for supporting witnesses who might otherwise be hesitate to be involved. It is relevant to note that the AHRC in its 2013 bullying initiative for young people identified the importance of engaging bystanders in both prevention and early intervention. This applies equally to the workplace.

Confidentiality and Privacy: There are different views about whether a complainant's identity must be revealed for the regulator to take action. Some regulators will not take action unless the complainant is willing to be identified. In other jurisdictions regulators will undertake a visit to the employing organisation to assess systems without needing to identify the particular complainant. This is explained by the interpretations and approaches adopted by regulators in different jurisdictions. As noted previously, one regulator indicated that complainants are not involved in the assessment process while others involve all parties to the complaint as part of assessment. The preference for anonymity can then be a determining factor in triaging out a complaint and any assessment of potential risks.

Assessing Systems and Management:

It is clear that an organisation having written policies and codes of conduct is insufficient if they are ignored or inadequately enforced. Identification of the issues that create an environment in which such injury can occur, early detection and intervention are the employer responsibility. Most regulators indicate that they require evidence of the implementation of any written policies, systems and procedures. However there is recognition across all jurisdictions that mistreatment causing psychological injury is often a reflection of larger management, organisational and cultural factors. As observed by more than one regulator, when such contextual factors are influential part of the problem this can negatively impact on the regulators' capacity to act as an agent of change.

Systems and Performance Management

Most regulators identified workplace systems and performance management processes as underpinning the majority complaints and allegations of victimisation, rather than inter-personal conflict. Contrary to the findings in cases heard by the Industrial Relations and Fair Work Commission and Administrative Tribunals, no regulator indicated that they had found that an

employing organisation has used its systems to victimise individuals (refer section 4.1) but rather described systems as being flawed or not well applied. The range of issues identified by regulators included:

- the impact of the introduction of new performance review processes, particularly in smaller organisations, which are not well communicated or understood by staff and therefore perceived as bullying
- failure of organisations to implement their own policy and or procedures, including a failure to adequately investigate an allegation or undertake a flawed investigation
- failure to employ an external non-partisan investigator or provision of a flawed brief
- responding to a specific complaint and failing to take action to determine if there are other allegations that may support the complaint or point to a specific risk that needs to be addressed
- transferring the complainant or placing the individual on leave while the alleged perpetrator remains in place which may be seen as punishing a victim and effectively failing to deal with the problematic behaviour; and
- ambiguity among employees about acceptable conduct when there has been a long standing organisational culture of 'rough and tumble'.

The common approach taken by regulators when it appears that there has been a system breakdown, or management performance has been deficient, has been to advise the organisation as to the steps that need to be taken to reduce risk or enhance responses.

Issues of employer liability were not identified as a concern of regulators in any of the consultations. In contrast, analysis of cases heard by the various courts, commissions and tribunals involving psychological injury, in which employers have argued exclusion of liability on the basis of reasonable management done in a reasonable manner, this defence was upheld in only 2 cases (18%). In contrast, where complainant claims were based on the grounds of failure to take reasonable action in response to complaints of victimisation, the claim was upheld in every case. Equally apropos, SafeWork South Australia observed in its submission to the *House Standing Committee on Education and Employment Review into Bullying in the Workplace* (2012:2) "it is often difficult to establish whether or not the alleged behaviours constituted workplace bullying or rather were reasonable actions taken by an employer." Despite this observation, the patterns found in the cases reviewed provide a robust indication that employer culpability has played a significant role in successful claims of psychological injury despite the lack of prosecution or other identifiable enforcement action by regulators.

3.4 Monitoring Outcomes from Interventions

Regulators were asked to indicate what arrangements were in place for monitoring the outcomes of the different forms of intervention including providing support and advice, training, issuing of notices and implementation of higher order enforcement tools. The purpose of this was to identify what evidence, if any, exists as to the impact of the various forms of response in terms of risk reduction and improved conditions. Collectively there are arrangements for the following up with individual organisations where a negative assessment may have been made. This may include undertaking periodic audits, proactive visits, following up on notices or simply maintaining regular contact. In two jurisdictions one-off studies have been made considering impacts on organisational behaviour. There is little evidence of ongoing strategic monitoring and analysis of impacts by WHS regulators based upon the different forms of engagement or intervention that has occurred. None of the regulators referred to any established policy or procedural arrangements for documenting and analysing the impacts of the various intervention types.

Anecdotally most regulators referred to positive participation rates by employers in various training, organisational development and information programs. These initiatives have concentrated on prevention and are viewed as being highly supported by employers. However this is not the equivalent to collecting the evidence required to assess the impact of interventions (in their various formats) in reducing the incidence of psychological injury.

In acknowledging some efforts in this regard, it is relevant to highlight a research initiative funded by SafeWork SA which involves examination of documented cases recorded on the "Inappropriate Behaviour Forms" to track how effective responses to bullying claims have been. It is expected that this will have notable implications for practice. In addition New South Wales completed a review of workplace changes post workplace bullying inspection in 2012. They report that that over three quarters of those involved had made changes immediately after an inspection and over four fifths had made organisation wide changes, with no difference between those organisations that had and had not received a notice of improvement as a consequence of the inspection. WorkCover South Australia noted that return to work data has been used to examine risk factors for chronicity and this has included for those experiencing psychosocial injury. Nonetheless, the problematic associated with the absence of quantitative evidence and the lack of formal methods of collecting and recording evidence of the impact of various types of intervention has made it impossible to

determine the effectiveness of current WHS strategies in reducing risk and responding to avoidable psychological injuries as required by the *WHS (2011) Act*.

4 Liability of Employing Organisations

4.1 Findings from Review of Adjudicated Cases

Despite the limited circumstances in which punitive action has been taken by regulators, examination of adjudicated cases initiated by individuals and workplace insurers provides valuable evidence with respect to the prevailing lack of clarity around employer responsibilities and liabilities. Claims and appeals associated with psychosocial injury arising from the workplace have been heard from the High Court, through federal and state/territory courts as well as specialist tribunals with responsibility for hearing employment related cases. The records of such cases provide an accessible quantum of documented evidence regarding the way in which the various legislative and WHS protections have been interpreted, applied and tested by regulators, employers and insurers (See Appendices 1-4).

Complexity is characteristic of many cases involving claims and counter claims involving workplace violence and abuse. At the same time, the differences in legislative provisions shape the way courts, tribunals and commissions adjudicate cases brought before them. Accordingly, the workplace health and safety legislation, the compensation legislation and the industrial relations legislation are sufficiently different to render it impossible to make direct comparisons. Nonetheless each jurisdiction has currency and relevance to understanding the way in which systems and institutions respond to cases of alleged workplace violence resulting in psychological or psycho-social injury.

Cases Heard by Federal and State Courts / Jurisdictions

Of the 24 cases heard (see Appendix 1) by the various courts which met the criteria for inclusion in this study, three quarters were found for the complainant (employee) and the remaining quarter (including two appeals of the same case) for the employer. Examination of the basis for the determinations made in these cases provides some insight into and evidence of the application of the regulatory framework with respect to such complaints. Of particular relevance is the application of both the safeguards and the exclusionary provisions set out in the relevant legislation. From the perspective of the rights and duties of the employer, the courts consistently consider whether responsibilities are moderated by:

- Actions that are part of reasonable management / administrative action taken in a reasonable manner

- There is lack of foreseeability of injury occurring
- Employment is not a material contributor to injury/disease or
- There is no demonstrable injury in accordance with Act.

From the perspective of the employee, relevant duty of care obligations require that employers

- Provide a safe workplace or system of work
- Take reasonable action in response to injurious behaviours

Further, the courts consider whether the employer has adopted and implemented procedures which are transparent, fair and accountable. This includes providing opportunities for those who make complaints to have them heard, and for those who have been complained against to respond to those allegations. The question of foreseeability is also considered given that there has been an emphasis on the need for employers to demonstrate that they have taken appropriate steps to minimise the risk or incidence of physical or psychological injury.

These considerations have been cited by complainants and employers in cases brought for adjudication. Again within any given case there is likely to be different perceptions of events, different matters considered to be relevant or indicative and varying quality of evidence. By focusing on the reasons for determination of relevant cases, it is possible to expose the way in which such considerations have been interpreted by the courts, and later in this discussion by the relevant tribunal and commission.

Of the six court cases in which the employer was successful, 3 cases involved the same matter with two appeals. Referring to Appendix 1, these are identified as cases 1, 10-12 (same case), 13 and 18. Reasons given for these findings included lack of foreseeability and lack of evidence of injury. Of the remaining 18 court cases in which the judgement was in favour of the plaintiff (employee), it was found that in some cases there were multiple reasons given, although not always. Further, while the language employed was somewhat variable, the fundamental reasoning underpinning the decisions was readily identifiable. A summary of the primary matters identified in court determinations and the cases in which they occurred are set out in table 1 following.

Table 1: Basis of Determination of Court Cases in Which the Plaintiff Claims were Upheld*

Primary Basis Underpinning Case Determination	**Cases as per Appendix 1**
Injury was foreseeable	8,9,22,23,24
Failure to take reasonable action and/or Not reasonable management in a reasonable manner	3,5,6,7,9,14,16,17,21,22,23,24 3, 16
(Primary matter) Injury and Impairment consequence of abusive behaviour/treatment in the workplace	2,4, 8,15,16,19,20,21,22,

* In cases where multiple factors are addressed equally in the determination, they are shown in both categories above.

This review shows that 14 of the 18 cases in which the judgement found for the applicant, the failure to take reasonable action was identified as a determining consideration. Foreseeability and confirmation that the injury and impairment was a consequence of mistreatment were also typical of issues identified by the courts across jurisdictions.

Administrative Appeals Tribunal and Compensation Commissions (AATA)

The Administrative Appeals Tribunal heard 19 cases (see Appendix 2) involving allegations of major psychological injury caused by work-related behaviours and events, including intimidation, bullying, harassment and victimisation. The configuration of allegations, justifications and arguments of defence employed by applicants and respondents to such appeals reflect the critical provisions of the relevant legislation. Although there was limited contention about the presence of a psychological injury (extensive medical evidence is presented to tribunals), disputes centred on whether such injury warranted compensation.

Of the 19 cases heard by the AATA, 17 of the cases involved Comcare and only two cases involved employers directly. Of the 17 cases, Comcare's position was upheld in in 7 cases. Of the cases in which Comcare's position was upheld, the bases for such decisions and cases to which they apply as set out in Appendix 2 were as follows:

- Actions were reasonable in a reasonable manner (Case 1, 8 and 12)
- Injury was not caused by employment (Case 11)
- While evidence of harassment and symptoms were accepted, no treatment had been given (case 14)

- Processes were consistent with policy however noting that fairness was questionable in the circumstances (Case 15)

Of the remaining cases in which the employee's case was upheld, the primary bases for the Tribunal determination were as set out below:

Table 2 : Basis of Determination of AATA Findings in which the Employee Claims were Upheld

Primary Basis Underpinning Case Determination	**Cases as per Appendix 2**
Compensable injury and employment more than a mere contributing factor to psychological injury	2, 4,5, 13, 16
Actions were neither reasonable nor done in a reasonable way, lack of procedural fairness	3,5, 7, 10, 17,19
Not an administrative action – no exclusion applies	9

Consistent with the court findings, 6 out of 19 cases (31%) involved actions that were judged neither reasonable nor done in a reasonable way, including a lack of procedural fairness. With respect to claims regarding the injury itself, in five cases the tribunal found that the psychological injury was a contributing factor against claims by the insurer or employer that this was not the case.

Of the three cases identified in the NSW Workers Compensation Commission all were found for the applicant employee with a determination that psychological injury was a consequence of workplace abuse and mistreatment and compensation was due to the complainant. The Tasmanian Tribunal case found for the employer finding that there was no liability due to reasonable administrative action carried out in a reasonable way.

4.2 Australian Industrial Relations Commission and Fair Work Australia

Examination of claims brought to the Australian Industrial Relations Commission (AIRC) and Fair Work Australia (FWA) on the grounds of unfair dismissal and constructive dismissal over the 2006-2011 period revealed 54 cases in which workplace bullying, harassment, intimidation, threatening and verbal abuse of employees by others formed a significant component of the cases. Cases involving physical assault or sexual assault as a significant factor were excluded. Each of the cases reviewed were brought before the respective commissions subsequent to termination of employment. Claims were based either on grounds of unfair dismissal, that termination was harsh, unjust and/or unreasonable, or on the grounds of constructive dismissal, that is the applicant

claimed that he/she had no option but to resign. A termination may be considered harsh if it were disproportionate to the seriousness of the alleged misbehaviour or action. A termination may be considered unjust if the individual were not guilty of the alleged action and unreasonable if the termination is not supported by the evidence available to the employer. In the case of constructive dismissal claims, the employee must prove that he/she did not resign voluntarily and that the employer forced their resignation whether by actions or failure to act, irrespective of whether victimisation occurred. Each commission is able to exercise discretion in ascribing credibility to evidence and in interpreting the extent to which a case meets the intent of the legislation. It is relevant to acknowledge that while the specific language employed by the commissioners was somewhat variable, the fundamental reasoning underpinning decisions was readily identifiable,

Critically, applications for unfair dismissal have been made by both those alleged to have been perpetrators and those that claim to have been victims of bullying, intimidation, threats and the like. Four cases which were excluded by the relevant commission were referred to other jurisdictional bodies. There are additional cases that were also excluded as applications were made outside the limited time allowable and have not been included given that no determination was made.

A critical feature specific to cases heard by the Commissions is that the matters considered in making a determination are not constructed in the same manner or terms which apply in the courts or tribunals. For this reason it is not possible to make a direct comparison between them. The Commissions operate within the provisions of the *Workplace Relations Act 1996* and subsequently the *Fair Work Act 2009.* Given the legislative frameworks under which the Commissions operate, there is no specific link between the regulator and the Commissions. However there is also no obvious impediment to the regulator reviewing Commission decisions and engaging with employers where, for example, an adverse finding is made by the Commission.

Framed by the legislative provisions of each relevant Act, the substantive elements considered by the Commissions are whether the events being claimed occurred, the nature of the steps taken by both the employer and the claimant as a consequence of such claimed events and the extent to which such facts support or do not support the claim. The relevance of these 50 out of 54 cases included in this review (see list in Appendix 3) lies in the ability to observe the extent to which the matters identified in court and tribunal cases are mirrored in the Commissions' determinations.

There were 14 cases based on claims of constructive dismissal. Of these 4 were found to outside the Commission's jurisdiction and were referred elsewhere and one was denied an extension of time. Of the remaining 9 cases, three were successful and six were not. In the case of the latter, the commissions were inclined to acknowledge the abuse occurred, but cases failed to meet the requirement of forced resignation (See Appendix 3).

Of the cases involving claims of unfair dismissal, three were refused an extension of time or were referred back to the employing organisation and no determination was made. This left 37 cases for review. In total 21 cases it was found that the terminations were unfair, harsh and unreasonable and the terminations overturned. In comparison 17 cases involving such claims were found to be reasonable and were upheld by the commission. However this does not paint an entirely complete picture for a number of reasons. For example, despite commission acknowledgement that in some cases victimisation had occurred, this was found to provide insufficient basis to determine the outcome of the case. Secondly, both victims and alleged perpetrators have lodged cases for unfair dismissal so it is faulty to view such cases as simply those whose employment were terminated as offenders. For example, In the case of *Ranieri and BioGiene Pty Ltd* (FWA, 2011), Commissioner McKenna found for the applicant, Mr Ranieri. This case is relevant as it would appear that Mr Ranieri was summarily dismissed in at least in some part due to allegations of bullying, whereas evidence presented indicated that he had in fact been the victim rather than a perpetrator. Thus, while heard on the basis of unfair dismissal, this case was in reality a process by which a victim had been victimised by the respondent. In this case the Commission found that the respondent had unsuccessfully sought to employ allegations of bullying and harassment as a vehicle for summary dismissal.

Table 3 below provides a snapshot of the principle matters outlined by the relevant commission in making a determination.

Table 3: Basis of Determination of AIRC and FWA Findings for Claims of Unfair Dismissal

Primary Basis Underpinning Case Determination	Cases as per Appendix 3
Termination was unfair, unreasonable and or harsh	6,19,22,35,38,42,54
Termination was unfair unreasonable and or harsh and was characterised by flawed procedures	4.8.9.15.16.20.27.28.31.32.33.40,43,50
Termination was fair and reasonable	5,12,14,21,23,29,46,49,51,52
Termination was fair and reasonable but involved flawed procedures	7,25,34,36,44,45,53

From this review, it can be seen that 14 of the 21 unfair dismissal cases were found by the commission to involve flawed procedures. This is approximately 66.6% of these cases. Of the 17 unfair dismissal cases in which terminations were found to be fair and reasonable, the commissions still found that 7 or 41.1% involved some flawed procedures, or collectively 56.7% of all unfair dismissal cases (whether successful or not) were found to involve procedural failings.

One example is found in the case of *Dr Falk and ACT Health operating as the Canberra Hospital* (AIRC, 2007). In finding for Dr Falk, the Commission observed that the applicant had been denied any realistic opportunity to be informed of the allegations of misconduct or given an opportunity to effectively respond to such allegations. Further the commissions found the employer relied upon a flawed report designed to provide a justifiable basis for dismissal. The Commissioner concluded that the processes and factors asserted as the basis for the termination were selective and largely ignored other relevant information. Given that this conflict occurred over a three-year period, the Commission noted that it would have been responsible for considerable distress to Dr Falk as the victim of the process itself.

To illustrate further, the case of *Doyle and the Department of Justice* (AIRC, 2007) is relevant. In this case the appellant had been subject to unwarranted and unjustified investigation resulting in a determination that she had behaved vexatiously despite the fact that no allegations had ever been made by the applicant and that she had actively sought to make this abundantly clear on numerous occasions. As noted by the Commission this process was undertaken "for the purpose of formulating recommendations for disciplinary action against her, she was treated as a wrong doer" and that this process was flawed, prejudicial and aggravated an existing stress related condition. Accordingly, it was determined that the conduct of the respondent was sufficient to force the appellant to resign involuntarily.

The response of the employer to the action of staff in the form of mobbing as a means of harassing and bullying a peer was also a critical in the case *of Lebsanft vs Oakey Abattoir* (FWA, 2011). Critical issues considered by the Commission included the inconsistent treatment of different staff members who had allegedly engaged in the harassment, the lack of steps taken by the employer to take action to stop or warn staff about the unacceptability of the action and finally a finding that the termination was unfair and reinstatement was the appropriate remediation. In making this decision, the Commission suggested that the fact that employer had specifically targeted the applicant and that the actions taken by the respondent that might have otherwise been regarded as bullying.

The concerns identified by both the AIRC and FWA are consistent with those found in court and tribunal findings. Specifically decisions collectively indicate a pattern of behaviours which victimise workers causing psychological injury and which are often not adequately addressed by management or employer actions.

4.2 Assessment of Issues Arising

Recognition of the need to prevent psychological and psycho-social injury from occurring as a consequence of workplace factors is now universally accepted across jurisdictions as a health and safety responsibility of employers and is reflected in regulation. The critical implication in this context is liability for ensuring compliance with the employer's duty of care and specifically with the duty to protect the health and safety of employees, including psychological (mental) health and safety.

WHS regulators have prioritised information training for, and support to, employers as a general deterrent and as a specific deterrent in cases involving psychological injury. Powers of enforcement have not been employed to any extent and in those few instances that prosecutions have occurred, they have often been coincident with physical injury or threats of such injury. Difficulties in obtaining evidentiary support that will meet the rigours of prosecution have been identified as a key barrier to prosecution. Assessment processes adopted by WHS regulators have largely focused on evidence of risk assessment, risk management and complaint resolution policies and procedures and the extent to which actions taken have been compliant with them. While regulators acknowledge that a combination of flawed processes or failure to implement policies and procedures may be a frequent cause of injury, the aim has been to work supportively with employers to improve performance. Although WHS regulators assert that existing general and specific deterrence efforts are effective, there is also no substantial evidence that the number or frequency of such injuries has decreased in an appreciable way. In contrast trends in compensation claims suggest that there is little evidence that rates have declined.

The consultation process and review of cases heard by various courts, commissions and tribunals has identified a number of significant issues with respect to the problem of addressing psychological and psycho social injury arising from workplace behaviours, both individual and systemic. These in turn have ramifications for considering organisational liability, procedural justice for individuals and the extent to which the WHS regulatory framework can and is effective.

Relying on Terminology of Bullying and Definition

It is evident that the issue of psychological injury has been reinterpreted as one which is bounded by the definition of bullying. This has effectively excluded any circumstances in which such injury occurs as a consequence of workplace behaviours or processes and has effectively limited the regulators' willingness for early intervention. This terminology and definitional construct has framed the problem as a behavioural issue rather than one of harm and its consequences. Changing the narrative to acknowledge psychological injury as a health and safety issue rather than relying on the restrictive definition of 'bullying' would not only enable more effective early intervention but also provide a response more consistent with the intent of protecting individual health and safety. While the willowing out process is linked to the definition of bullying, the frequency and extent of injury may be exacerbated. Current approaches are not consistent with more conventional understandings of liability associated with physical injury, violence or criminality.

Organisational Accountability and Liability for Injury

In the absence of strong enforcement initiatives, there is limited evidence that organisations have been held liable for the psychological injury to workers, even when regulators have found a case of failed management performance and flawed processes. Evidence from adjudicated cases shows that there has been a propensity by employers to view claims from an event based perspective, separate from contextual, systemic or management perspectives, thereby masking liability by adopting a strategy of individual blaming, including victim blaming. Significantly, the policy and procedures adopted by WHS regulators in responding to psychological injury are not intended to address actual liability by employers (despite the powers to take more punitive action) in the absence of physical injury. With an emphasis on soft approaches that emphasize supporting employers, the result of interventions fail to require the employer to take any action that would substantially acknowledge liability for injuries or failure in meeting a duty of care. Again, the dominant argument by regulators has been that the collaborative approach is effective in long term prevention although a paucity of evidence was provided that supports this claim.

Drawing from relevant cases adjudicated by the courts, commissions and tribunals, there is documented evidence that psychological and psych social injury has in many cases been caused by the failure of employers to demonstrate reasonable management in a reasonable manner or to take reasonable action in the face of complaints. While workplace health and safety regulators continue to promote softer approaches to compliance, there remains a need to make liability more explicit

not only as means of fostering compliance but also as a means of better linking the actions of regulators and the intent of the regulation.

A comparison between the procedures adopted by Workplace Health and Safety regulators and the AHRC conciliatory approach in dealing with employment related complaints (including involving bullying and harassment) has demonstrated that there are alternative options for making explicit an employing organisation's liability for injury. This is not to argue that all cases can be resolved in this way (and indeed the AHRC acknowledged that such processes are not successful in about one third of cases conciliated) but rather than it does provide a model in which there has been success in requiring acknowledgement and liability by employers. Of particular relevance when considering this option is the way in which the victim is served by current arrangements and processes, and as discussed below.

4.3 Linking Organisational Liability to Individual Outcomes

The structural and procedural separation of WHS regulation, compensation and industrial relations processes would benefit from greater consideration. It can be suggested that the existing system fails to deliver a number of critical outcomes for individual victims or organisational responsibilities.

- The separation of employer liability for compliance and liability to a victim of injury can effectively exacerbate the harm to the individual, and the potential for return to work
- The lack of punitive actions taken by the WHS regulators has arguably diminished appreciation of the significance of psychological injury as compared with physical injury. In contrast lessons from adjudicated cases suggests that there is a need for greater clarity that flawed processes and unsubstantiated claims to exclusionary provisions do not eliminate liability for psychological injury.

An under researched dimension to this problem is the relationship between the AHRC approach which aims to bring the parties together and that of the WHS regulator. Acknowledging that the WHS regulators are not concerned with individual outcomes, the question remains what impact there might be if this limited scope were expanded. There is, potentially a capacity to make employer liabilities, including to individuals, more explicit, and influence organisational motivations for greater emphasis on prevention.

5 Conclusions

The aim of this study was to examine the extent to which current workplace health and safety regulatory arrangements, including prosecution of breaches of the WHS Act (2011), respond to psychological injury arising from mistreatment in the workplace. More specifically this research has investigated the extent to which current methods promote corporate accountability and liability for such injuries.

The study has shown that regulatory processes have been designed to rely upon constructive and supportive responses to incidents of psychological injury arising in the workplace with priority placed on redressing system or management deficiencies. Financial penalties or other punitive options have rarely been pursued. The combination of the barriers to prosecution, even in cases determined on the basis of reasonable probabilities, has meant that the explicit powers for enforcement (as compared to encouraging compliance) have rarely been exercised. As a consequence, there has been little translation of WHS regulatory action to explicit liability for harm done. (It is relevant to note that, as outlined previously, only Victoria includes 'culpability' as criteria to be considered in determining whether to prosecute. This may, to some extent, provide an n explanation for the jurisdiction being the only one which has pursued prosecutions in this context.)

Further, the separation of WHS regulatory responses to employing organisations from responses for victims has effectively left many complainants with the limited options of seeking workers' compensation or the challenge of taking individual action against the employer through various courts, commissions and tribunals.

The unique aspect of the WHS regulatory regime which separates it from anti-discrimination protections and compensation claims is its solitary focus on the employer organisation and absence of any responsibility to the specific victim. This then has significant implications in terms of liability both for compliance with duty of care responsibilities and to the individual victim. Drawing on the initial research questions it can be concluded that there is currently no significant interface between regulatory practices, prosecution or criminal frameworks. Specific findings include:

Enforcement of existing protections and prosecutions: The workplace health and safety regime is predicated on the principles of motivated self-regulation and anticipates that management processes will provide the main vehicle of prevention and intervention. Accordingly regulators have consistently expressed the view that the relationship with employers is one of collaboration, and support. Compliance and enforcement through punitive measures, including but not limited to

prosecution, do not form any real role in current regulatory practice. As a consequence questions of liability have been largely excised from the implementation of regulatory interventions.

Barriers to punitive measures including prosecution have been identified as a mix of the policy of responsive regulation that places emphasis on 'soft approaches' and difficulties in obtaining the evidence required for a robust prosecution. National approaches to regulation and to prosecution policy indicate that while mandatory compliance and punitive measures as well as prosecutions have been pursued for failure to protect health and safety involving physical injury there is no parallel when it involves responding to diagnosed psychological injuries resulting from a failure to protect.

Corporate culpability addressed through the lens of criminality: Following on from the regulatory approach to responding to allegations of mistreatment leading to psychological injury, there has been no significant attention to how responsibility would translate to culpability or liability. This has been argued by regulators in terms of both focusing on prevention rather than enforcement and in terms of difficulties with evidence. In contrast, it would appear that cases involving discriminatory treatment resulting in psychological injury and those heard through industrial commissions and tribunals, that employer responsibility can be determined along with balanced compensatory or restorative measures. Further, despite the commitment to general deterrence through reporting processes by regulators, this is poorly visible. Again this compares poorly with the reporting by the AHRC, courts, commissions and tribunals. Thus while prosecution under criminal law regimes may be difficult, the use of compliance and enforcement mechanisms that may highlight culpability has been largely under-employed in comparison. This would suggest that while workplace health and safety regimes are not able to easily pursue criminal prosecutions for such injuries, there are other options which could translate to more effective enforcement of existing protections.

Position of WHS Regulation: The structural and procedural separation of WHS regulation, compensation and industrial relations processes would benefit from greater consideration. It can be suggested that the existing regulatory system as interpreted by regulators, fails to deliver a number of critical outcomes with respect to both individual victims and organisational responsibilities. The separation of employer liability for compliance and liability to a victim of injury can effectively exacerbate the harm to the individual, and the potential for return to work. At the same time, the lack of punitive actions taken by the WHS regulators has arguably diminished appreciation of the significance of psychological injury as compared with physical injury. In contrast lessons from

adjudicated cases suggests that there is a need for greater clarity that flawed processes and unsubstantiated claims to exclusionary provisions do not eliminate liability for psychological injury Acknowledging that the WHS regulators are not concerned with individual outcomes, the question remains what impact there might be if this limited scope were expanded. There is, potentially a capacity to make employer liabilities, including to individuals, more explicit, and influence organisational motivations for greater emphasis on prevention.

This research suggests that under the current regulatory framework and its implementation employer liability or culpability has not been integrated into responses to allegations of mistreatment leading to psychological injury. This includes where such injury and its causes have been verified by the balance of probabilities. Further, it was argued by all regulators that responsive regulation policy in combination with the evidentiary demands of prosecution, effectively direct regulators away from active enforcement options. Given the significant endorsement of enforcement when physical injuries accrue within the work environment, and the acceptance of employer liabilities when such injuries occur, it would seem that there is a journey to go before psychological injuries occurring within and because of workplace treatment achieves equivalent recognition. This suggests that there is a need for significantly better evidence of the extent to which the softer approach by regulators reduces risk, improves quality of responses by employers and acts as an effective deterrent. In the absence of such evidence, it will remain questionable whether existing policies and practices are capable of reducing the incidence of such injuries, the harm that is done, and the capacity for restorative justice.

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APPENDICES

APPENDIX 1: Table of Cases Heard by Courts and State Commissions

Date	Court/Commission	Case	Employer	Key Issues	Defence	Determination
2005 Case 1	High Court of Australia	Koehler v Cerebos (Australia) Ltd.	Cerebos (Australia) Ltd	Negligence, Duty of Care Content of an employer's duty to take reasonable care to avoid psychiatric injury Making an agreement requiring work above industry standard	Foreseeability of risk of psychiatric injury Agreement to perform work which brought about injuries	*Found for Respondent:* Determination based on foreseeability of psychiatric injury different from physical injury Appellant agreed to perform the duties which caused the injury
2006 Case 2	High Court of Australia	Canute v Comcare	Department of Defence	Liability for permanent disability Act concerned with injuries not incidents Definition of injury, impairment and disease	Denied liability due to appellant failing to meet criteria of at least 10% impairment	*Found for Plaintiff* Appeal allowed with costs due to adjustment disorder being found to constitute an injury with permanent impairment 10%
2012 Case 3	Federal Court of Australia	Commonwealth Bank of Australia v Mark Reeve	Commonwealth Bank of Australia	Exclusionary provision –reasonable administrative action in respect of an employee's employment per s5A of the SRC Act	The parameters of administrative action and employee's employment was too narrowly defined by the Tribunal (AAT)	*Found for Respondent:* Liability to pay compensation as actions were operational not administrative in respect of respondent's employment. (*not reasonable management*)
2011 Case 4	Federal Magistrates Court of Australia	Noble v Baldwin & Anor	Paul Baldwin and R&P Pty Ltd	Whether harassment, victimisation by fellow employee based on racial hatred creates liability of employer Vicarious liability for unlawful acts of employee	Questioned jurisdiction of court to hear claims Submitted claims were deficient Submitted not consistent with HREOC Act	*Found for Plaintiff:* Payment of $2000 compensation for unlawful discrimination
2013 Case 5	Supreme Court of Queensland	Muckermann v Skilled Group Ltd & Anor	Skilled Group and Vinidex	Negligence for failure to provide safe workplace; Failure to prevent and respond to injurious behaviours	Plaintiff did not comply with provisions of WCRA No claim of negligence in original claim	*Found for Plaintiff* Without prejudicing further trial, Court found for plaintiff

Date	Court/Commission	Case	Employer	Key Issues	Defence	Determination
2010 Case 6	Supreme Court of Queensland	Gjenie Wolters v University of the Sunshine Coast	University of Sunshine Coast	Duty to take reasonable care to avoid psychiatric injury Foreseeability Liability for injury at common law What constitutes evidence that plaintiff must provide	Because 1st victim left did not investigate although complaint not cancelled Informal investigation was deemed sufficient to the circumstance	*Found for Plaintiff* Nominal damages for breach of contract for failing to take reasonable action
2005 Case 7	Supreme Court of Queensland	Ivers v Keith McCubbin, State of Queensland, John Briton, Glen Stewart, Cara McNicol Elionor Ratcliffe	Queensland Department of Primary Industries	Failure to try to solve by mediation or similar non-adversarial means Failure to follow public service policy in responding to complaints	Ability to investigate significant cases without due process Resignation countered obligations to individual	*Found for Plaintiff* Found that alleged perpetrator became victim of the system bypass
2007 Case 8	NSW Supreme Court – Court of Appeal Case 8	Nationwide News v Naidu ISS Security v Naidu	Group r Securitas Pty Ltd and Nationwide News	Appeal against 2005 Supreme Court of NSW decision finding negligence	Error in judgement, prejudicial in assessing evidence; not foreseeable	*Found for Respondent* Findings as per previous decision of liability, foreseeability and failure to provide safe work
2013 Case 9	Supreme Court of Victoria	Wendy Lorraine Swan v Monash Law Book Cooperative	Monash Law Book Cooperative trading as Legibook	Tort Negligence Duty of Care Reasonable Foreseeability Acting on complaints breach of duty of care	Repeated behaviour was not unreasonable	*Found for Plaintiff* Injury was foreseeable, failure to take reasonable steps as duty of care Damages $300,000.
2012 Case 10	County Court of Victoria	Brown v Maurice Blackburn Cashman	Maurice Blackburn Cashman	Scope of duty of care Foreseeability of injury Was there a breach of duty of care an injury arising out of or in the course of ... employment	Behaviours were not overt or covert bullying, harassment, or threatening	*Found for Defendant* No liability or damages awarded dismissing claims of plaintiff
2013 Case 11	Supreme Court of Victoria – Court of Appeal	Brown v Maurice Blackburn Cashman	Maurice Blackburn Cashman	Allegation of vicarious liability for acts of fellow employee direct liability for an unsafe system of work. Having medical assessment of severe psychological disease is this challengeable vis a vis estoppel	Denied applicant suffered injury, loss or damage	*Found for Defendant* Confirmed view that it was not reasonably foreseeable that an injury might occur Findings rest credibility of witnesses

Date	Court/Commission	Case	Employer	Key Issues	Defence	Determination
2013 Case 12	High Court of Australia	Maurice Blackburn Cashman v Brown	Maurice Blackburn Cashman	Having medical assessment of severe psychological disease is this challengeable vis a vis estoppel Evidence proving serious injury	Clarification from County Court and Supreme Court adjudications	*Found for Plaintiff* No issue estoppel arises out of the opinions expressed by a Medical Panel under s 104B(9) in an action later brought by a worker against the worker's employer
2012 Case 13	District Court of Western Australia	O'Donovan v WA Alcohol and Drug Authority	Western Australian Alcohol and Drug Authority	Foreseeability of risk of psychiatric injury Breach of duty Injury sustained in course of employment Issue estoppel as to cause of psychiatric injury	Followed procedures required by the organisation	*Found for Defendant* Lack of evidence of ill health argued against foreseeability Claim of negligence dismissed as was claims of breach of duty
2013 Case 14	Magistrates Court of Victoria	Stichling v State of Victoria	Department of Human Services	Whether reasonable action taken in a reasonable way	Followed procedures with extensions on agreement in time frame	*Found for Plaintiff* While agreement that investigation was appropriate and procedures were followed, not taken in reasonable way.
2013 Case 15	Magistrates Court of Victoria	Vella v Honeywell Ltd	Honeywell Ltd	whether employment a significant contributing factor to recurrence, aggravation, acceleration, exacerbation or deterioration of condition Real or perceived instances of bullying/harassment at work place	Contended that there were non -work related stressors that were impacting on the applicant	*Found for Plaintiff* Incidents of bullying and harassment accepted as having significant contribution to depression and mental health issues

Date	Court/Commission	Case	Employer	Key Issues	Defence	Determination
2011 Case 16	Magistrates Court of Victoria	Meyer v State of Victoria	Department of Human Services	Exclusion by reasonable disciplinary action Principal cause of injury	Condition was predominantly caused by disciplinary process	*Found for Plaintiff* Compensation required as sustained injury from her employment
2010 Case 17	Magistrates Court of Victory	Garland v Berry Street	Berry Street Victoria	Whether condition arose from reasonable action in reasonable manner	Investigation and processes were reasonable action in a reasonable way	*Found for Plaintiff* While acknowledging action should have been taken, it was not done in a reasonable way.
2010 Case 18	County Court of Victoria	Brzozek v Gerhardt Australia Pty Ltd	Gerhardt Australia Pty Ltd	Duty of care Negligence in not providing a safe place to work Foreseeability Evidential support	Accepted psychiatric injury and mistreatment but denied foreseeability Not solely work related	*Found for Defendant* No damages awarded based on lack of foreseeability and contradictory evidence
2008 Case 19	County Court of Victoria	Ferguson v Strautman Australia Ltd and Victorian Workcover Authority	Strautman Australia	Responsibility for injury Reasonable administrative action in reasonable manner Foreseeability	Conceded mental health conditions but not caused by workplace factors, conduct and instructions given in the workplace did not constitute bullying and harassment and no evidence of complaint until after plaintiff left employment	*Found for Plaintiff:* Accepted claims backed up by insurer acceptance of compensable harm and irrespective of other matters, the harm caused by bullying and harassment were material to the psychiatric injury.
2009 Case 20	NSW District Court	Bailey v Peakhurst Bowling and Recreation Club Ltd	Peakhurst Bowling & Recreation Club	Liability and duty of care to provide a safe place and system of work Extent of damages	Admitted breach of duty of care and breach caused plaintiff to suffer psychological injury	*Found for Plaintiff* Found no mitigation with damages awarded $507550

Date	Court/Commission	Case	Employer	Key Issues	Defence	Determination
2013 Case 21	Country Court of Victoria	Dawson v Department of Justice	Department of Justice	Duty to provide safe workplace Failure to address behaviour	Factors alleged as causing injury did not occur or Injury not caused by employment Reasonable management taken in a reasonable way	*Found for Plantiff* Psychiatric injury arose from behaviour subjected to by other employees Failure to take reasonable management action
2013 Case 22	Supreme Court of Victoria	Swan v Monash Law Book Co-operative	Monash Law Book Co-operative	Whether injury arose out of or in course of employment where employment is significant contributing factor Reasonable management action taken in a reasonable way	Agreed personal injury being a psychological or psychiatric condition But not employment related and reasonable action taken in a reasonable way.	*Found for Plaintiff* Psychiatric injury arose from behaviour at work, was foreseeable, failure to take appropriate action.
2011 Case 23	Supreme Court of NSW	Sneddon V Speaker of the Legislative Assembly	Speaker NSW Government	Psychiatric injury due to harassment and bullying Failure to provide reasonable action	Denied cause of injury No liability	*Found for Plaintiff* Psychiatric injury arose from behaviour at work, was foreseeable, failure to take appropriate action.
2014 Case 24	Supreme Court of Queensland	Keegan v Sussan Corporation (Aust.) Pty Ltd	Sussan Corporation	Psychiatric injury from intimidation, harassment and bullying Failure to take reasonable action in a reasonable way	Reasonable management and lack of foreseeability	*Found for Plaintiff* Injury foreseeable and lack of reasonable action

APPENDIX 2: Table of Cases Heard by AAT and Compensation Commissions

Administrative Appeals Tribunal (AATA) - Legislation: Safety Rehabilitation and Compensation Act 1988 (SRC)							
	Year	Case and year	Employer	Harm	Key Issues	Defence	Determination
1	2013	Commonwealth of Australia v Comcare (and Ms Haseler)	Australian Government- Centrelink	Accepted as suffering an adjustment disorder contributed to in a significant degree by employment - consistent with s5A and B of the SRC	- Whether actions were reasonable and taken in a reasonable manner - procedural fairness	Consistent with APS Code of Conduct and written policy for suspected Code breaches	*Found for Employer:* Upheld appeal finding action was reasonable in reasonable manner
2	2013	Susan Hey v Comcare	ACT Government Department of Territory and Municipal Services	Anxiety disorder with phobia arising from prolonged period of bullying and harassment features consistent with PTSD	Whether actions were reasonable and taken in a reasonable manner	Contended that there were non -work related stressors that were impacting on the applicant	*Found for Employee* Accepted compensable disease and employment more than a mere contributing factor Determined that administrative actions were reasonable in reasonable manner
3	2012	Dimitra Michalopoulos v Comcare	Australian Government- ATO	Accepted an injury (disease) Adjustment Disorder in respect of employment	Whether actions were reasonable and taken in a reasonable manner	Claim to management of underperformance	*Found for Employee:* Upheld appeal – actions were neither reasonable nor done in a reasonable manner – Lack of procedural fairness or natural justice
4	2012	Michael Ralser v Comcare	Australian Government- ATO	Accepted psychological symptoms, adjustment disorder and mental impairment criteria	Whether employment contributed to the ailment to a significant degree	Injury will not arise if it does not result in an incapacity for work or impairment	*Found for Employee:* Liability exists although quantum of liability not determined

	Year	Case and year	Employer	Harm	Key Issues	Defence	Determination
5	2012	Sandra Fox and Comcare	Australian Government- Department of Education, Employment and Workplace Relations (DEEWR)	Suffered a disease, being an adjustment disorder with features of depression and anxiety, to which her employment contributed to a significant degree	Whether actions were reasonable and taken in a reasonable manner	The disease to which her employment significantly contributed will not be an 'injury' under the Act if it was suffered "as a result of reasonable administrative action in a reasonable manner in respect of her employment" [s 5A(1) SRCA 1988	*Found for Employee:* Employment significantly contributed to the Disorder and not to be "reasonable administrative action taken in respects to her employment"
6	2012	Shardlow v Comcare	ACT Department of Health – Canberra Hospital	Adjustment disorder mixed with anxiety and depression arising out of his employment with the Canberra hospital	Whether actions were reasonable and taken in a reasonable manner	Refused by Comcare on the basis it was reasonable administrative action conducted in reasonable manner, and therefore exempted under the SRCA 1988 ss 4, 5A, 5B	*Found for Employee*: Even if it was reasonable administrative action, was not conducted in a reasonable manner.
7	2012	Maria Martinez vs Comcare (1)	Department of Education, Employment and Workplace Relations	Adjustment disorder with depressive reaction	Reasonable administrative action undertaken in a reasonable manner And significance of employment related disorder	Initially denied disorder. On Review acknowledged disorder but not work related and exempt "as a result of reasonable administrative action in a reasonable manner in respect of her employment" [s 5A(1) SRCA 1988	*Found for Employee:* Even if it was reasonable administrative action, was not conducted in a reasonable manner.
8	2013	Comcare v Martinez (2) Federal Court of Australia*	Department of Education, Employment and Workplace Relations	Adjustment disorder with depressive reaction	Reasonable administrative action undertaken in a reasonable manner	Other personal factors, reasonable in accordance with policy for underperformance	*Found for Comcare:* Reasonable administrative action in reasonable manner Referred back to Tribunal

	Year	Case and year	Employer	Harm	Key Issues	Defence	Determination
9	2012	Bradley Beasley v Comcare	Australian National University	Psychological injury	Reasonable administrative action undertaken in a reasonable manner	Contention of date (given change in Act) and reasonable action in reasonable manner but acknowledging injury	*Found for Employee:* Date of injury (disease) within scope and action was not administrative and no exclusion applies.
10	2011	KRDV and National Australia Bank Ltd	MLC as subsidiary of NAB	Psychiatric injury in form of depressive/anxiety disorder	Reasonable administrative action undertaken in a reasonable manner	Accepts injury but denies liability on grounds of date of occurrence and on basis of exclusion s5A of Act reasonable action	*Found for Employee* Found that the actions taken were not reasonable and processes were flawed.
11	2010	Baker and Comcare	Medicare	Psychiatric disease – depression and anxiety	Reasonable administrative action undertaken in a reasonable manner	Accepts an injury but not caused by employment – exclusionary provisions apply	*Found for Comcare:* Injury not caused by employment. Exclusions apply
12	2010	Gary Wilson and Comcare	Department of Defence	Adjustment reaction with mixed emotional features arising from bullying and harassment	Reasonable administrative action undertaken in a reasonable manner	Reasonable administrative action' and thus not an 'injury' within section 5A of the Act.	*Found for Comcare* noting "reasonable action does not have to be perfect, provided it is '*tolerable and fair*'" – actions were consistent with policy, procedures and lawful
13	2010	Hart and Comcare	Child Support Agency	Psychological Injury	Did the applicant suffer an injury out of or in the or to which employment significantly contributed; Whether her condition is not compensable because, it was contributed to by reasonable administrative action taken in a reasonable manner.	The performance management process was the primary factor in the psychological injury and therefore not compensable	*Found for Employee:* Although performance management may have contributed to the problem, it was not a significant causal influence. Compensation is owed.

	Year	Case	Employer	Harm	Key Issues	Defence	Determination
14	2010	Richardson and Comcare	Department of Defence	Claim for compensation for injury (not disease) from harassment, stalking	Whether applicant suffer an injury outside boundaries of normal function and whether liable	No diagnosable psychiatric condition	*Found for Comcare* – noting that while harassed and accepted symptoms not eligible because no treatment given
15	2010	Lynch and Comcare	ACT Health	Claim compensation and rehabilitation from psychological injury	Whether applicant suffered injury as a result of processes adopted in responding to complain and failure to provide natural justice	Accept that a psychological injury occurred but adopted reasonable administrative action in reasonable manner	*Found for Comcare* – noting processes were consistent with policy but also accepted that fairness was questionable given the circumstances.
16	2010	Guan Khoo and Comcare	Therapeutic Goods Administration	Psychological injury	Date of injury; Whether injury outside boundaries of normal functioning; whether materially contributed to by employment; Whether failure to obtain a benefit	Failure to obtain benefit exclusion not materially caused by employment (s14 SRC Act)	*Found for Employee* Suffered a psychological injury materially contributed to by his employment and liability for compensation
17	2009	Maura Millichap and Comcare	Australian Taxation Office (ATO)	Psychological Injury	Accepted injury but failure to ascribe to employment	Failure to obtain a benefit and therefore failure to be compensated (s14 SRC Act)	*Found for Employee* No benefit was lost and system used to victimise applicant
18	2008	Lorraine Amos and Australian Postal Corporation	Australian Postal Corporation (APC)	Permanent disability from psychological injury previously acknowledged	Prior partial aggravation accepted but not permanent disability of 10%	Lack of permanent disability	*Found for Comcare:* No liability as no evidence of permanent disability

	Year	Case	Employer	Harm	Key Issues	Defence	Determination
19	2006	Tital Ilian and Comcare Case 19	Australian Broadcasting Corporation (ABC)	Aggravation of major depressive disorder	Reasonable disciplinary action Failure to obtain benefit	Events constituted reasonable disciplinary action AND Failure to obtain a benefit either from performance appraisal or return to former position and combined excluded under s 14(1) of the Act.	*Found for Employee*: Reference to Section 4 of and 14(1) of the Act Accepted that she experienced a disease as defined in s 4(1) 2 cited incidents were not disciplinary There was no failure to obtain a benefit
Workers Compensation Commission, NSW- Legislation: Workers Compensation Act 1987 and Workplace Injury Management and Workers Compensation Act 1998							
	Year	Case	Employer	Harm	Key Issues	Defence	Determination
20	2010	Department of Ageing, Disability and Homecare v Pye	Dept of Ageing, Disability and Homecare	Psychological injury	Whether worker received an injury arising from employment; Whether breach of worker's privacy and constituted harassment	Conduct was not intimidating, bullying or harassing; Response to complaints was reasonable	*Found for Employee:* The applicant is liable for compensation and that the injury was a consequence of employment
21	2010	Department of Environment, Climate Change & Water v J	Department of Environment, Climate Change	Psychological injury, PTSD	Date of injury Definition of injury Cause of injury	Initial acknowledged injury ended Injury not predominantly work related	*Found for Employee* Liable for compensation s 37 of Act as injury was progressive and related to acknowledge prior harassment and bullying
22	2007	State Transit Authority of NSW v Chelmer	State Transit Authority	Psychological injury (note there had been a HREOC Deed of Settlement for racial hatred, vilification case)	Was injury consequence of disciplinary process or harassment, victimisation and discrimination	Exclusion by virtue of s11A of the Act that arises predominantly from disciplinary action	*Found for Employee* Liability for compensation as harassment, vilification, bullying not just discipline cause of injury
Workers Rehabilitation and Compensation Tribunal of Tasmania - Legislation: Workers Rehabilitation and Compensation Act 1988(Tas) s 25, s25(1A), s69							
23	2007	M v Healthscope (Tasmania) Pty Ltd	Healthscope - Hobart Private Hospital	Depression	Was injury consequence of unreasonable management and harassment	Reasonable administrative action	*Found for Employer* No liability as reasonable administrative action in a reasonable manner

APPENDIX 3: Cases Heard by the Australian Industrial Relations Commission and Fair Work Australia

The following cases have been heard by the Australian Industrial Relations Commission (AIRC) and Fair Work Australia (FWA). It is relevant to note that there was an overlap of several months when both were operational. FWA commenced on 1 July 2009 and the AIRC concluded hearing cases in December 2009. Cases in which sexual harassment or physical violence were involved were not included. Cases involving requests for extension of time were also largely excluded, with a few included as exemplars.

	Date	Authority	Case	Sector	Determination
1	2006	AIRC	Pellow vs Community Council	NGO	Application dismissed. Found that a case for constructive dismissal was not made.
2	2006	AIRC	Mennie vs Adsteam Harbour	Private	Application dismissed. Found that a case for constructive dismissal was not made.
3	2006	AIRC	McNiece vs Big Punt	Private	Application dismissed. Found that a case for constructive dismissal was not made. However acknowledged that if there were physical evidence of claims would have been upheld.
4	2006	AIRC	Petkoski vs Wiredex Pty Ltd	Private	Application upheld. Unfair dismissal found. (a) Language appropriate to cultural context and (b) no warning or process prior to summary dismissal.
5	2006	AIRC	Christine Thomas and Patricia Goddard v St Vincent de Paul Aged Care & Community Services	NGO	Application denied – Dismissal fair and reasonable. (a) Evidence of abusive behaviour and (b) processes were fair and reasonable.
6	2006	AIRC	Barnaby Stevenson v Guardian Hall Pty Ltd	Private	Application - Appeal by Employer of prior decision: Denied Termination was unreasonable and unfair – compensation owed.
7	2006	AIRC	Frank Graf and Hyne & Son Pty Ltd	Private	Application denied (a) not unreasonable or harsh (b) Failure to provide procedural fairness
8	2007	AIRC	Rowley vs EDI Ltd	Private	Application upheld – Unfair dismissal found. (a) Failure to follow appropriate process (b) denied right to respond to allegation. (c) iImplied interpersonal animosity by decision maker.
9	2007	AIRC	Marcia Doyle vs DOJ (Vic)	Public	Application upheld – Unfair dismissal found. (a) Failure to follow appropriate process
10	2007	AIRC	Lianna Taranto vs Macquarie Community College	Private	Application Upheld – Constructive dismissal met

11	2007	AIRC	Nicholson Vs RACQ	NGO	Application dismissed. Found that a case for constructive dismissal was not made.
12	2007	AIRC	Balsdon vs Dunpec P/L	Private	Application dismissed – Dismissal fair and reasonable. (a) Evidence of abusive behaviour by applicant.
13	2007	AIRC	Independent Education Union of Aus & Yipirinya School Council (Inc)	Public	Referred back to Employer: Commission recommended need to develop more effective procedures for dealing with bullying and harassment. Matter referred back to the School Council.
14	2007	AIRC	Hudson vs Woolworths	Private	Application denied – Dismissal fair and reasonable. (a) Evidence of abusive behaviour by applicant.
15	2007	AIRC	Owens vs Whyalla Aged Care Inc	Private	Application upheld – (a) Dismissal not fair or reasonable (b) Decision not based on reasonable processes
16	2007	AIRC	Falk vs ACT health THC	Public	Application upheld – Dismissal unfair and unreasonable (a) Flawed investigation processes
17	2008	AIRC	Smith vs Epworth Foundation	Private	Application denied – (a) Case for constructive dismissal not met (b) Abuse did not force resignation
18	2008	AIRC	Bell vs Pacific National	Private	Application upheld- Constructive dismissal met
19	2008	AIRC	Vettros vs Railcorp NSW	Public	Application Upheld – Dismissal was unfair and unreasonable
20	2008	AIRC	Brown vs Macedon Ranges Shire Council	Public	Application Upheld- Dismissal unfair and unreasonable (a) Applicant had been victim of abuse (b) Termination procedurally unsound
21	2008	AIRC	Fatialofa v Coles	Private	Application Denied – Termination was not harsh or unreasonable (b) Due process followed
22	2008		Brown v Coles,	Private	Application Upheld – Termination was harsh and unreasonable (a) Actions constituted harassment but not sufficient for termination.
23	2008	AIRC	Karen Sinapi and Coles Supermarkets Australia	Private	Application Denied - Termination was not harsh or unreasonable (b) Due process followed
24	2009	AIRC	Arcus Vs SG Fleet	Private	Application denied – Not constructive dismissal (a) Acknowledge victimisation occurred (b) Resignation still voluntary
25	2009	FWA	Robert Uitdenbogerd v Australian Taxation Office	Public	Application denied – judged not to be harsh or unreasonable – Note performance over victimisation

26	2009	AIRC	Peary v Australian Hearing vs	NGO	Application Upheld – Constructive dismissal occurred (a) Conduct of employer coercive and (b) contributed to ill health
27	2009	FWA	French vs Lufsa Investments	Private	Application Upheld - Termination was harsh and unreasonable (a) Applicant (as victim) had not erred (b) no reasonable processes undertaken
28	2009	AIRC	Mrs Lorraine Margaret Stanton; Australian Nursing Federation-Tasmanian Branch v Aged Care Services Australia Group Pty Ltd	Private	Application Upheld – (a) Termination was harsh and unreasonable and (b) Respondent did not follow appropriate processes. (note applicant was victim)
29	2010	FWA	Carmody vs Flight Centre	Private	Application Denied (a) Applicant was mistreated but (b) was offered other employment options
30	2010	FWA	Mocsari vs Expanse Pty ltd	Private	Application for Constructive Dismissal – judged to be outside FWA jurisdiction and not determined.
31	2010	FWA	Sebasio v Ergon Energy	Public	Application Upheld – (a) judged to be unreasonable and (b) did not follow appropriate processes esp given HR service capacity
32	2010	FWA	Taylor vs Sota Tractors	Private	Application Upheld – (a) judged to be unreasonable and unfair and (b) was not afforded due process
33	2010	FWA	Bilson vs Mission Aus	NGO	Application Upheld – (a) judged to be unreasonable and unfair and (b) flawed investigation and procedures
34	2010	FWA	Gramotnev vs QUT	Public	Application denied – judged not to be harsh or unreasonable despite procedural flaws associated with the termination
35	2010	FWA	TNT Pty LTd vs Zoumas	Private	Application Denied: Appeal by employer against previous decision that termination was unreasonable and unfair.
36	2010	FWA	Williams v Dtarawarra	Private	Application denied – judged not to be harsh or unreasonable despite procedural issues associated with the termination
37	2010	FWA	Carmody vs Flight Centre	Private	Application Dismissed – Not constructive dismissal and outside FWA jurisdiction
38	2011	FWA	Stutsel v Linfox Australia Pty Ltd	Private	Application Upheld – (a) judged to be unreasonable and unfair

39	2011	FWA	Smith vs Napier Trust	Private	Application for Constructive Dismissal – judged to be outside FWA jurisdiction and not determined.
40	2011	FWA	Ranieri and Biogene	Private	Application Upheld – (a) was harsh, unreasonable (b) no supporting evidence (c) lack of procedural justice
41	2011	FWA	Centofanti vs Assisi Centre		Application Dismissed – Not constructive dismissal and outside FWA jurisdiction
42	2011	FWA	Lebsanft vs Oakey Abbatoir	Private	Application Upheld – (a) judged to be unreasonable and unfair
43	2011	FWA	Mar vs Laser Wizard	Private	Application Upheld – (a) judged to be unreasonable and unfair and (b) flawed procedures
44	2011	FWA	Barber vs Commonwealth	Public	Application denied – judged not to be harsh or unreasonable despite procedural issues in process
45	2011	FWA	Music vs Mackies Asia Pacific	Private	Application denied – judged not to be harsh or unreasonable despite failure to acknowledge other persons involved
46	2011	FWA	Murphy vs David Robinson Landscaping	Private	Application denied – judged not to be harsh or unreasonable
47	2011	FWA	Brad Linsell v Cronulla Sutherland Leagues Club Limited T/A Sharkies	Private	Application for constructive dismissal – extension of time not granted but acknowledged case was able to be made.
48	2011	FWA	Leza Howie v Norilsk Nickel Australia Pty Ltd; Dmitry Lafitskiy; Dennis Fulling; Roman Panov; Dmitry Kondratiev; and Edwin Leeuwin	Private	Application for constructive dismissal – referred to Federal Court on jurisdictional matter. Noted that such referral is based on reasonable chance of success.
49	2011	FWA	Ozzimo v Australian Postal Corporation T/A Australia Post	Public	Application denied – judged not to be harsh or unreasonable despite
50	2011	FWA	Blackford v Bamboo Direct Pty Ltd	Private	Application Upheld – (a) judged to be unreasonable and unfair and (b) was not afforded due process
51	2011	FWA	Horan v North Coast Tavern Pty Ltd T/A North Shore Tavern	Private	Application Denied – Judged not to be harsh or unreasonable – summary dismissal
52	2011	FWA	Seaman v BAE Systems Australia Logistics Pty Limited	Private	Application Denied – Judged not to be harsh or unreasonable – summary dismissal
53	2011	FWA	Saunders vs OSI International Foods	Private	Application denied – judged not to be harsh or unreasonable despite procedural flaws associated with the termination
54	2011	FWA	Stutsel v Linfox Australia Pty Ltd Application	Private	Application Upheld – termination unreasonable and unfair.

APPENDIX 4: Record of Prosecutions: WorkSafe Victoria

Accused	Sector	Act & Section	Determination
LA HQ Pty Ltd (Company) (2012)	Retail	OH&S Act 2004 – s 21(1) & 2(a) Failure to provide & Maintain so far as was practicable for employees a safe working environment – plan and systems of work	Conviction, Fine $6000 – Conditions applied including completion of anti-bullying course $1000 costs
Nicholas Smallwood (2010)	Retail	H&S Act 2004 - s 25(1)(b) Employee failed to take reasonable care for the health & safety of persons who may be affected by their acts or omissions at workplace	Conviction – Fine 45,000 [1800 penalty units] Indictable offence
Gabriel Toomey (2010)	Retail	OH&S Act 2004 - s 25(1)(b) Employee failed to take reasonable care for the health & safety of persons who may be affected by their acts or omissions at workplace [1800 penalty units] Indictable offence	Conviction – Fine $10,000
Rhys MacAlpine (2010)	Retail	OH&S Act 2004 - s 25(1)(b) Employee failed to take reasonable care for the health & safety of persons who may be affected by their acts or omissions at workplace [1800 penalty units] Indictable offence	Conviction – Fine $30,000
Marc Luis Da Cruz (2010)	Retail	OH&S Act 2004 - s 21(1) & (2)(a) Employer failed to provide & maintain so far as was practicable for employees a safe working environment - plant & systems of work OH&S Act 2004 - s 21(1) & (2)(e) Employer failed to provide & maintain so far as was practicable for employees a safe working environment OH&S Act 2004 - s 144 Liability of officers of bodies corporate	Conviction – Fine $30,000
MAP Foundation	Retail	OH&S Act 2004 - s 21(1) & (2)(a) Employer failed to provide & maintain so far as was practicable for employees a safe working environment - plant & systems of work [OH&S Act 2004 - s 21(1) & (2)(e) Employer failed to provide & maintain so far as was practicable for employees a safe working environment - information instruction training & supervision	Conviction – Fine $220,000
Wagstaff Crabourne (2006)	Manufacturing	OH&S Act 1985-s43(3) Fail to comply with an improvement notice	Fine $2,000 without conviction
Brett Robertson (2009)	Public Service	OH&S Act 1985 s 25(1) Employee failed to take reasonable care for safety	Committed to trial
Matthew Lever (2010)	Manufacturing	OH&S Act 2004 s 25(1) Employee failed to take reasonable care for the health & safety of persons who may be affected by their acts or commissions at workplace	Fine $5,000 with conviction
Kevin James Andrew (2010)	Retail	OH&S 2004 s21 Failure to provide and maintain so far as was practicable for employees a safe working environment	$50,000 fine and $50,000 costs

Source: WorkSafe Victoria http://www.worksafe.vic.gov.au/laws-and-regulations/enforcement/prosecution-result-summaries

APPENDIX 5: Interview Schedule: Regulator Consultations

- As a regulator, have you seen any changes in patterns in the nature or frequency of incidents or situations involving non-physical violence being referred to you? To what extent do you think promotions by regulators or news coverage of cases has impacted on the reporting patterns?

- To what extent have investigations of such incidents identified systemic or operational processes as being problematic as compared to individual interactions?

- What are the significant challenges that face investigators when responding to complaints of workplace bullying, harassment, intimidation or other forms of non-physical workplace violence?

- There are a number of options available in responding to proven cases of such harming behaviour. What are the factors that are considered when determining the action to be taken?

- A review of cases heard by various courts and tribunals found that there is a recurring pattern of claims of 'reasonable action carried out in a reasonable way' and failure to foresee harm or injury but the success rate of such claims is relatively limited. Considering the types of cases which are typically investigated, to what extent have you found that organisations are or have been in some ways complicit in the problem occurring or not being resolved and has this been relevant to the decision as to what type of action to take?

- Given then the focus on encouraging compliance, what measures are used to monitor the effectiveness of non-enforcement strategies (such as providing advice or training) in deterring further offending?

- Thinking about more active enforcement options, to what extent have improvement notices or enforceable undertakings been used in responding to workplace violence incidents? Are monitoring processes different from those used in conjunction with other compliance strategies and how might the outcomes for change compare?

- To what extent do changes in regulation and legislation impact on the likelihood that prosecutions might be pursued? If not, what, if any, changes would be likely to underpin any move to employ more active enforcement strategies in response to such violence?

- What, if any, implications are there for the apparent rise in cyber-attacks of employees by others from the workplace in terms of intervention or prosecution?

- There appears to be little structural or operational linkage between regulatory and insurer (compensation) processes. Given that compensation claims might act as a useful indicator of a need for some preventative intervention, what other benefits or drawbacks might occur should the systems be better integrated?

- What steps might be taken that would impact on either the reduction of this problem or increasing the effectiveness of regulatory effectiveness?

APPENDIX 6: Contributors to Study:

Australian Human Rights Commission

ComCare

Northern Territory WorkSafe

Office of Fair and Safe Work Queensland

SafeWork South Australia

WorkCover Authority of New South Wales

WorkCover Queensland

WorkCover South Australia

WorkSafe Tasmania

WorkSafe Western Australia

WorkSafe Australian Capital Territory

WorkSafe Victoria