Chapter II - A right of recourse for workplace bullying

Post-implementation review of Part 6-4B of the

*Fair Work Amendment Act 2013*
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The purpose of the post implementation review

The purpose of this Post Implementation Review (PIR) is to assess whether the right of recourse to the Fair Work Commission (FWC) for workers who have been bullied at work, implemented through the Fair Work Amendment Act 2013 (Cth), remains appropriate and how efficient and effective it has been in meeting its objectives.

As a Regulation Impact Statement was not prepared prior to this initiative being implemented on 1 January 2014, the Department of Employment (the department) must conduct a PIR of these amendments in accordance with the Australian Government’s regulation impact analysis requirements.

Background on the right of recourse to the FWC

The previous government established a right of recourse for a worker to apply to the FWC for an order to stop workplace bullying in response to the 2012 House of Representatives Committee (the Committee) inquiry into workplace bullying in Australia. This inquiry examined the nature, causes and extent of workplace bullying and culminated in a report entitled Workplace Bullying: “We just want it to stop” (the Workplace Bullying Report).

The Workplace Bullying Report contained 23 recommendations to prevent bullying in the workplace and to support workers and employers to respond more effectively to allegations of bullying. A copy of the Workplace Bullying Report can be found at:


Recommendation 23 was:

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

This recommendation was implemented through provisions included in the Fair Work Amendment Act 2013 (Cth), outlined below. Also implemented was Recommendation 1 of the Workplace Bullying Report, which proposed national adoption of the following definition of workplace bullying:

Workplace bullying is repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety.

While other recommendations from the Workplace Bullying Report were also implemented (see Attachment A) the impacts of these initiatives are not being assessed through this PIR as they did not involve legislative reform. It is important to note that implementing these other recommendations necessarily affects the department’s ability to measure the impact of the right of recourse to the FWC alone.
Overview of the right of recourse to the FWC

Commencement
Part 6-4B of the *Fair Work Act 2009* (Cth) (the Fair Work Act), which allows a worker who has been bullied at work to apply to the FWC for an order to stop bullying, commenced operation on 1 January 2014. Applications to the FWC in relation to workplace bullying can rely on alleged bullying behaviour that occurred before that date.

For an overview of the way in which the FWC processes applications for an order to stop bullying, see Attachment B.

Scope
Section 789FD defines when a worker is bullied at work for the purposes of Part 6-4B and sets the scope of the right of recourse to the FWC.

Who is a worker?
For the purposes of Part 6-4B, a ‘worker’ has the same meaning as in the *Work Health and Safety Act 2011* (Cth) (the WHS Act) and is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer. Under section 789FC(2), members of the Australian Defence Force are specifically excluded from this definition.

What behaviour constitutes workplace bullying?
As set out above, the definition of workplace bullying that was recommended by the Workplace Bullying Report was included in the Fair Work Act. Section 789FD provides that a worker is ‘bullied’ at work if an individual (or group of individuals) repeatedly behaves unreasonably towards them and that behaviour creates a risk to their health and safety. Reasonable management action carried out in a reasonable manner does not constitute bullying.

The types of behaviour that the FWC has found to constitute workplace bullying within the meaning of section 789FD include belittling and humiliating conduct, swearing, yelling and use of otherwise inappropriate language, threats of violence, engaging in criticism or defamatory gossip, acting in a hostile and aggressive way, and making inappropriate comments.

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1 *Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston; Ms Lisa Bird; Mr James Bird [2015] FWC 6556; CF [2015] FWC 5272*
2 *CF [2015] FWC 5272*
3 *CF [2015] FWC 5272*
4 *Ms Nadia Page [2015] FWC 5955*
5 *Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston; Ms Lisa Bird; Mr James Bird [2015] FWC 6556*
6 *Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston; Ms Lisa Bird; Mr James Bird [2015] FWC 6556*
Which workplaces are constitutionally covered businesses?
Section 789FD provides that a worker is bullied at work if bullying occurs while the worker is at work in a ‘constitutionally covered business’. A ‘constitutionally-covered business’ is a person conducting a business or undertaking (PCBU) (within the meaning of the WHS Act) where either:

- the PCBU is:
  - a constitutional corporation;
  - the Commonwealth;
  - a Commonwealth authority;
  - a body corporate incorporated in a Territory; or
- the business or undertaking is conducted principally in a Territory or Commonwealth place.

All workers can apply to the FWC for an order to stop bullying unless they are engaged by the following types of entities:

- unincorporated businesses such as sole traders and partnerships (unless in a territory);
- volunteer associations (whether incorporated or not) that do not employ anyone;
- most State public service departments and agencies; and
- most State government business enterprises and entities that are not characterised as constitutional corporations.

Specific exclusions
Consistent with the WHS Act, the right of recourse to the FWC for an order to stop workplace bullying is specifically limited to ensure it does not unreasonably interfere with Australia’s defence, national security or covert or international law enforcement action.7

Remedy
Where the FWC is satisfied that a worker has been bullied at work and there is a risk that the worker will continue to be bullied at work, it may make any order it considers appropriate under section 789FF. Any order made by the FWC must be directed towards preventing the worker from future workplace bullying.

Orders may require, for example:

- the individual or group of individuals to stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer’s workplace bullying policy;
- the provision of information and additional support and training to workers; or
- a review of the employer’s workplace bullying policy.

The only prohibition under section 789FF is on the FWC making orders for payment of a pecuniary amount. That is, the FWC cannot order that monetary compensation be paid to a worker.

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7 See sections 789FE(2) and 789FI-FL of the Fair Work Amendment Act 2013
Interaction with other laws

Workplace bullying may often be dealt with through other Commonwealth, state and territory laws, depending on the nature of the alleged unreasonable behaviours. These include but are not limited to, laws dealing with work health and safety, discrimination, physical violence, threats and stalking. Pursuing a remedy for workplace bullying through the FWC does not preclude these other avenues of redress.

The FWC must take into account the outcomes arising from an investigation by another person or body, outcomes from other procedures available to the worker to resolve grievances or disputes and any other matters it considers relevant to the anti-bullying application. The FWC anti-bullying provisions are often utilised in parallel, prior or subsequent to the following laws and provisions.

Work health and safety (WHS) laws

Section 789FH specifically permits a worker to apply to the FWC for an order to stop bullying while also taking steps to remedy workplace bullying under WHS laws. That is, the right of recourse is in addition to any remedies already available.

Workers’ compensation laws

Workers’ compensation claims related to workplace bullying can be lodged, processed, accepted or dismissed without affecting any application made to the FWC for a stop bullying order. A worker in receipt of workers’ compensation will however need to be at ongoing risk of workplace bullying in order for the FWC to make a stop bullying order.

Part 3-1 of the Fair Work Act (General protections)

Making an application to the FWC for an order to stop bullying constitutes exercising a ‘workplace right’ for the purposes of the adverse action provisions of Part 3-1 of the Fair Work Act. This means a worker cannot be disadvantaged for making an application for an order to stop bullying. A worker may make both an application to the FWC for an order to stop bullying and an adverse action application under Part 3-1 or alternatively, may lodge just the adverse action application.

Part 3-2 of the Fair Work Act (Unfair dismissal)

A worker who has been dismissed from work for making an application for an order to stop bullying may apply for an unfair dismissal remedy under Part 3-2 of the Fair Work Act (for example, reinstatement). However, the worker’s application for a stop bullying order is likely to be dismissed by the FWC as the worker is no longer at risk of bullying in that workplace. The FWC may only make a stop bullying order if it is satisfied that there is a risk that the worker will continue to be bullied at work. People who believe that they have been bullied at work and have not lodged an application for a stop bullying order, may apply for an unfair dismissal remedy if their employment is terminated.
If reinstated under Part 3-2 of the Fair Work Act, a worker is not prevented from making a future application to the FWC for an order to stop bullying if they are again subject to workplace bullying.8

The problem

In 2012, when the Committee conducted its inquiry into workplace bullying in Australia, there was no law specifically designed to provide individuals with a right of recourse to stop bullying in the workplace. In addition, the Committee found that the only laws that specifically responded to workplace bullying – WHS laws – were deficient by in several ways. For an overview of the remedies available under the laws in existence at the time of the Committee’s inquiry and the deficiencies that the Committee identified in WHS laws, see Attachment C.

As a result of this, individuals subjected to workplace bullying reported to the Committee that they had to ‘shop around’ in an attempt to find a legislative or regulatory framework that would provide them with the right to seek individual recourse.9 They stated that the process of trying to seek justice for themselves, compensation for their loss and accountability of those who bullied them, was just as or more damaging than the initial bullying.10

The lack of a definition to provide workers and employers alike with clarity about what constitutes workplace bullying was also seen as a key problem.

The Workplace Bullying Report estimated the cost of workplace bullying to the Australian economy to be in the range of $6 billion to $36 billion per annum.11 The Report noted other costs to the economy including public sector costs such as the health and medical services, and income support and other government benefits provided to individuals who prematurely depart the workforce based on their bullying experience and injuries suffered.

Objective of government action

The government empowered the FWC to deal with applications from individuals to stop bullying in the workplace. The Explanatory Memorandum to the Fair Work Amendment Bill explained the purpose of the amendments, stating that, ‘the focus is on resolving the matter and enabling normal working relationships to resume.’ In a press release issued on 12 February 2013, the previous government stated that empowering the FWC to deal with bullying complaints would also provide an accessible, affordable and timely pathway for workers and employees to help resolve bullying matters.12

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8 Judah [2015] FWC 8529
9 Workplace Bullying Report, p 184 at 6.102
10 JK, Submission 55 to the Committee Inquiry; MM, Submission 236 to the Committee Inquiry
This outcome was to be achieved by:

- not requiring workers to have exhausted any other avenues (such as an internal grievance mechanism) before making an application to the FWC for an order to stop bullying;
- charging a fee of $69.60 for an application to the FWC (which would be waived in cases of serious financial hardship); and
- requiring the FWC to start dealing with applications within 14 days.

**Policy options considered**

The ability for an individual worker to address workplace bullying by seeking swift and inexpensive recourse through workplace relations law was a key recommendation of the Workplace Bullying Report. The Committee recommended an adjudicative process, but did not provide further prescription on how this individual right of recourse should be delivered. The recommendation was made in the context of the Committee’s comments below about the Fair Work Act and the FWC:

- many submissions suggested that the individual right of recourse should be provided under the Fair Work Act because that legislation provides effective and timely resolution processes;\(^\text{13}\)
- general protections provisions of the Fair Work Act were already used to seek resolution and remedies in bullying cases, however the protection was limited to prescribed workplace rights;\(^\text{14}\)
- any arbitration process to address workplace bullying would need to be provided by those experienced in resolving such matters, such as the FWC;\(^\text{15}\) and
- the FWC would offer a relatively quick adjudicative process that provides decisions on cases with limited costs to parties.\(^\text{16}\)

As a result, no options other than providing a right of recourse through the FWC or maintaining the status quo were formally considered.

**Consultation**

The department undertook an extensive consultation process for the purposes of this PIR. This included:

- consultation with the National Workplace Relations Consultative Council (NWRCC) – see Attachment D for submissions received from NWRCC members;
- a call for public submissions from key stakeholders and other interested parties, which resulted in 14 written submissions to the PIR – see Attachment D for a list of submitting organisations and their principal position;
- liaison with Commonwealth, state and territory WHS regulators; and
- interviews with individuals to seek qualitative and quantitative information on the effectiveness and efficiency of the anti-bullying jurisdiction – see Attachment E for a list of interviewees.

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\(^\text{13}\) Workplace Bullying Report, p 186 at paras 6.112 and 6.113
\(^\text{14}\) ibid, p 58 at para 2.116
\(^\text{15}\) ibid, p 189 at para 6.124
\(^\text{16}\) ibid, p 189 at para 6.126
The PIR also takes into account:

- stakeholder feedback on the Fair Work Amendment Bill 2013 to the House of Representatives Standing Committee on Education and Employment and the Senate Standing Committee on Education, Employment and Workplace Relations; and
- submissions to the Productivity Commission’s 2015 Inquiry into the Workplace Relations Framework (PC Inquiry), which included a review of the anti-bullying provisions of the Fair Work Act - see Attachment F for a summary of views expressed on anti-bullying.

In addition, the PIR draws on findings from a qualitative research project commissioned by the department and conducted by the Social Research Centre. The purpose of this project was to explore the individual experiences of workers who had applied for a stop bullying order, those alleged to have engaged in workplace bullying and employers. The project involved 45 one-on-one interviews, with 27 of these being with people who had made applications to the FWC. Given the small sample size and the subjective nature of individual experiences, the responses provided to the Social Research Centre provide individual insights only and are not necessarily representative of the thousands of people who have been involved in anti-bullying applications so far. Further views from those personally involved with the anti-bullying jurisdiction were also available from a quantitative online survey conducted by the FWC and shared with the department. With 137 individuals responding to this survey, caveats relating to limited sample size and other factors apply. Key information about the Social Research Centre project and the FWC online survey is at Attachment G.

**Impact analysis**

**Employers and businesses**

**Costs**

Employer and business groups were almost unanimous in their calls to remove the anti-bullying provisions from the Fair Work Act. They submitted that the right of recourse to the FWC had exacerbated the regulatory burden on employers and businesses, given that they already faced legal action for behaviour categorised as workplace bullying under a wide range of laws. The right of recourse to the FWC was seen as adding another layer of unnecessary regulation, increasing complexity and giving rise to forum shopping. In its submission to the department, the Australian Chamber of Commerce and Industry (ACCI) called for the repeal of the right of recourse, stating:

“...the jurisdiction is not necessary and workplace bullying is more appropriately addressed as a work health and safety issue within the work health and safety regime.”

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17 Australian Chamber of Commerce and Industry (ACCI) Submission to the PIR, p 13; Restaurant and Catering Submission to the PIR, p 8; Master Builders Australia (MBA) Submission to the PIR, p 7; Housing Industry Association (HIA) Submission to the PIR, p 9; Australian Federation of Employers and Industries (AFEI) Submission to the PIR, p 17; National Retail Association Submission to the PIR, p 14; Chamber of Commerce and Industry of Western Australia (CCI) Submission to the PIR, p 6

18 ACCI Submission to the PIR, p13
Employer groups also identified specific financial impacts for employers and businesses (especially small businesses) involved with an application to the FWC for an order to stop bullying, including:

- investigation costs to prepare evidence for the FWC (such as witness statements and written responses to claims);
- costs associated with involvement (sometimes requiring attendance) in mediations, conferences or hearings at the FWC;
- time costs (especially where proceedings go on for some months);
- legal costs (to obtain advice and assistance in preparing a case); and
- ‘settlement expenses’ (otherwise referred to as ‘go away money’ or ‘departure arrangements’).

Referring to its first-hand experience, the Australian Federation of Employers and Industries (AFEI) claimed that these costs can be well in excess of $50,000.

The research report undertaken by the Social Research Centre involved interviewing employers about the time and resources required to respond to applications and there was wide variation in their responses (from 5 – 30 hours). Only a minority of employers paid for external help, but the costs were often significant (ranging from $7500 to $15,000). Many of the employers interviewed felt that the costs were disproportionate to the outcome achieved and concern was expressed that the impact might be greater for small businesses. Alternatively, one employer described the costs as ‘part and parcel’ of running a business. It is also worth noting that some, if not all, of these costs may have been incurred regardless of the existence of the right of recourse to the FWC under other legislative frameworks.

Several employers recognised that although costly, it was worthwhile in that it probably brought the issue to a head, with one reporting that it delivered the ‘best outcome for all parties’. This view was supported by other stakeholder comments gathered for the PIR. It appears that in some cases FWC mediation provided an impetus for ‘departure arrangements’ to be sorted out between the parties, bringing an end to an employment relationship that may have been in dispute for some time. One employer reported choosing to offer a financial settlement, despite considering it was in the right, in order to avoid a protracted legal process which would distract from running the business. One legal professional suggested that some parties negotiate payments as reparation for wrongs where there is a complete breakdown of the employment relationship, without necessarily assigning fault.

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19 AFEI Submission to the PIR, pp 7-9; MBA Submission to the House of Representatives’ Standing Committee on Education and Employer Inquiry into the Fair Work Amendment Bill 2013, p 12; ACCI Submission to the PC’s Inquiry, p132; Australian Mines and Metals Association (AMMA) Submission to the PC’s Inquiry, p331; Peabody Energy’s Submission to the PC’s Inquiry
20 AFEI Submission to the PC’s Inquiry, p 71
21 Department interview with Kamal Farouque, Maurice Blackburn Lawyers, 18 November 2015;
23 Department interview with Kamal Farouque, Maurice Blackburn Lawyers, 18 November 2015;
A right of recourse for workplace bullying – Post Implementation Review of Part 6-4B of the Fair Work Act 2009 (Cth)

The Housing Industry Association (HIA)\(^{24}\) and AFEI\(^{25}\) expressed concern that employers can be caught up in applications to the FWC involving workers whose work they do not directly supervise or control and which may involve alleged bullying by persons not their employees – including customers, clients and students. This concern relates to the way in which a ‘worker’ is defined broadly for the purposes of Part 6-4B of the Fair Work Act. This definition is the same as the definition of a worker in the WHS Act, therefore duties on employers to manage workplace bullying outside the traditional employment relationship are consistent with obligations under the WHS laws which have been in operation in most Australian jurisdictions for several years. Data from the FWC shows that the majority of applicants who apply to the FWC for an order to stop bullying are employees rather than contractors or employees of labour hire companies (for example, in 2014, 652 of 996 applicants to the FWC were employees).\(^{26}\)

A number of employer groups submitted that the right of recourse to the FWC constituted unnecessary government intervention in business affairs, with the Australian Mines and Metals Association (AMMA) stating that the involvement of ever-greater numbers of third parties in this area serves only to further undermine direct employment relationships and weaken managerial control.\(^{27}\) The Catholic Commission for Employment Relationships (CCER) submitted to the PC Inquiry that when a third party arbitrator becomes prematurely involved in a workplace dispute, tensions escalate, positions become entrenched and it can become increasingly difficult to salvage the workplace relationship.\(^{28}\)

ACCI’s view was that running a business involves personal interactions within a workplace and, despite the best of intentions these interactions and relationships will sometimes be less than ideal. ACCI would prefer to see workplaces with a healthy culture of dignity and respect, encouraged to work these issues out in the workplace without regulatory intervention. It expressed the view that while there should be boundaries on people’s interactions in the workplace, regulation on top of regulation is not necessarily going to give desirable outcomes.\(^{29}\)

Government intervention in this area is not new. Other previously existing legal avenues for addressing workplace bullying similarly involve third party intervention, for example:

- under WHS laws, a complaint about workplace bullying may result in an investigation of the workplace by WHS regulators;
- under the Fair Work Act, a general protections application could be made in relation to a workplace right; and
- under criminal law, an allegation of serious workplace bullying would result in a police investigation to determine whether charges should be laid.

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\(^{24}\) HIA Submission to the PIR, p 11
\(^{25}\) AFEI Submission to the House of Representatives’ Standing Committee on Education and Employer Inquiry into the Fair Work Amendment Bill 2013, p 17
\(^{26}\) Commissioner Johns’ presentation to AGS Employment law forum 20 October 2015
\(^{27}\) AMMA Submission 96 to the PC’s Inquiry, p 320
\(^{28}\) CCER Submission 99 to the PC’s Inquiry, p 3
\(^{29}\) Departmental Interview with Carolyn Davis, ACCI, 14 October 2015
The perceived need for government intervention was due to the fact that workplace bullying matters often lead to a breakdown of workplace relationships, where third party intervention is often the only chance of resolution for one or more parties to the dispute. The intent of the FWC’s operations in bullying matters was to enable normal working relationships to resume.

Employers advised the Social Research Centre that the anti-bullying matters that they had been involved in had arisen as the culmination of long term disputes. Employers often viewed these employees as having difficult or disruptive personalities and their approach to the FWC tended to occur at the point when relationships had become intractable. Some employers perceived that mental health issues were playing a part in the difficulties and behaviours underlying the anti-bullying applications. Employer groups, individual employers and some legal professionals raised concerns that anti-bullying applications were being used to counter workplace performance management mechanisms and to derail internal grievance processes. Sometimes this would be related to longer term issues about difficult relationships, but in others the performance issues emerged from job capability or as the result of long-term, but unacknowledged ill health.

In addition to this, AMMA submitted that the jurisdiction was in fact encouraging an emerging reluctance to manage performance, arguing that some managers fear personal orders or findings against them. ACCI claimed that this fear to performance manage was common amongst members and that it believed that there were many cases of workers applying for anti-bullying orders after management action had taken place.

ACCI’s written submission to the PC Inquiry further suggested that the jurisdiction increases the burden on employers in fighting unmeritorious claims, stating,

“it is an unfortunate reality that vexatious and unmeritorious claims are already often experienced by employers under unfair dismissal, adverse action and anti-discrimination laws.”

Employer groups raised similar concerns prior to the implementation of the anti-bullying provisions. It is evident that most of these concerns remain and examples were provided as to how the jurisdiction imposes costs on employers and businesses. Despite the lower than anticipated numbers

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31 Departmental Interview with Carolyn Davis, ACCI, 14 October 2015; Social Research Centre, Qualitative Review of the Anti-Bullying Provisions of the Fair Work Act 2009 – Draft Final Report, February 2016 (unpublished); Departmental Interview with Sally Woodward, Norton Rose Fulbright, 5 November 2015; Departmental Interview with Jamie Robinson, HBL Ebsworth, 6 November 2015 AFEI Submission to the House of Representatives’ Standing Committee on Education and Employer Inquiry into the Fair Work Amendment Bill 2013, p 16; Innovative Research Universities Submission 196 to the PC’s Inquiry, p 3; Peabody Energy Submission 241 to the PC’s Inquiry, p 3.
32 Jobs Australia Submission 221 to the PC’s Inquiry, p 13
34 AMMA Submission to the PIR, p 21
35 Departmental Interview with Carolyn Davis, ACCI, 14 October 2015
36 ACCI Submission 161 to the PC’s Inquiry, p 133
of applications and the best efforts of the FWC to implement the provisions, employer groups remain concerned that the additional regulation is a burden for business and has the potential to interfere with managerial prerogative.

Benefits

The Australian Industry Group (AiG) submitted to the department that the right of recourse to the FWC had not had an adverse impact on most businesses and employers to date. It gave the following reasons for this:

- there is no compensation payable and therefore employees are discouraged from making unmeritorious claims and lawyers are unable to offer representation on a contingency fee basis;
- the FWC has made it clear publicly that no compensation is payable and its mediators will not be involved in facilitating monetary settlements; and
- to access the right of recourse, an employee must remain employed and most employees are reluctant to pursue FWC claims against their employers.37

In terms of positive impact, Master Builders Australia (MBA) submitted that the new right of recourse had refocused the building and construction industry’s attention on not permitting the sort of culture that leads to workplace bullying.38 This cultural change was supported by other stakeholders who stated that the mere existence of the right of recourse had had a positive effect in increasing awareness of bullying and addressing issues of organisational culture which might engender bullying conduct.39

Legal professionals and employee representatives also submitted to the department the impact of the jurisdiction on employers and businesses. In interviews with the department, legal professionals noted the jurisdiction encourages employers to be more proactive as bullying is ‘front of mind’, increases awareness generally and encourages the development of effective workplace policies.40 Further, the very possibility of a case being raised with the FWC encouraged workplaces to deal more quickly with allegations of bullying to avoid an application being made or to resolve the matter at the workplace level prior to an order being made. In its submission to the PC’s Inquiry, the Australian Council of Trade Unions (ACTU) acknowledged:

“The jurisdiction may, over time, act as an authoritative deterrent to workplace bullying. The process of an applicant having their story heard and seeking to resolve a bullying issue before a FWC member, should in the best cases assist in changing workplace management practices and cultures.”41

The FWC has also made a number of determinations regarding what constitutes ‘reasonable management action’. This growing body of case law should progressively inform workplaces and

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37 AiG Submission to the PIR, p 7
38 MBA Submission 157 to the PC’s Inquiry, p 12 of Attachment B
39 Department interviews with Kamal Farouque, Maurice Blackburn Lawyers, 18 November 2015; Dr Kirsten Way, 23 October 2015; MBA Submission 157 to the PC’s Inquiry, p 13 of Attachment B
40 Department interview with Kamal Farouque, Maurice Blackburn Lawyers, 18 November 2015
41 ACTU Submission 167 to the PC’s Inquiry, p 332
provide greater clarity and certainty for managers around what constitutes ‘reasonable management action’, serving to address the employer concerns outlined above.

Ongoing cultural change that results in workplace bullying being prevented or successfully addressed will produce significant savings for employers and businesses. Safe Work Australia estimates that the median lost time for workers' compensation claims related to bullying and/or harassment in 2011-12 was 9.2 weeks and the median direct cost was $20,900 per claim. These figures were drawn from just over 2000 accepted compensation claims for work-related harassment and/or bullying during that period. In contrast, the consequences of bullying being allowed to continue in workplaces can be significant, and may include:

- lowered performance and work-group standards;
- increases in staff turnover;
- increased absenteeism, presenteeism and sick leave;
- fall in productivity;
- financial implications (e.g., costs associated with increased insurance premiums);
- reputational damage; and
- loss of potential talent.

A final benefit noted in consultations was the relatively inexpensive nature of the FWC adjudicative processes in comparison to commissioning external mediation, investigations or involvement in workers compensation claims for workplace bullying.

**Unintended consequences**

A significant unintended consequence associated with the establishment of the right of recourse to the FWC for an order to stop bullying was highlighted during consultations. This involves employers offering ex-gratia payments to employees to terminate their employment. There is no data indicating the average amount of these payments, however the Australian Road Transport Industrial Organisation claimed that they can often be up to five or six thousand dollars.

Some were of the view that these payments are being offered by employers to avoid dealing with workplace bullying matters before the FWC. For example, AFEI asserted that ‘many’ cases before the FWC are settled with ‘go away money’ being paid to avoid costly and lengthy disputes. However, no aggregate data was provided by the AFEI to support these claims.

On the other hand, legal professionals involved in the anti-bullying jurisdiction noted that they were aware of payments being made in cases where the employment relationship had broken down significantly, and there was little chance of normal working relationships resuming. In such cases legal professionals argued that there was value for both employers and employees in agreeing to

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42 Safe Work Australia, *Psychosocial Health and Bullying in Australian Workplaces, 2015 Annual Statement*, p 1
44 Australian Road Transport Industrial Organisation Submission to the PC’s Inquiry, p 7
45 AFEI Submission to the to the PC’s Inquiry, p 70
46 Department interview with Jamie Robinson, HBL Ebsworth, 6 November 2015
these payments and that the payments can reflect an employer’s recognition of the loss incurred by an employee in severing their employment arrangement.47

**Individuals**

**Costs**

While few concerns were raised about the financial cost involved in making an application to the FWC for an order to stop bullying ($69.60, which can be waived), WorkSafe Victoria had observed that very few applications to the FWC are from young workers (ages 15 to 19) and suggested that the application fee may be a potential barrier to young workers making a claim.48 Some applicants interviewed by the Social Research Centre considered that the cost of lodging an application should have been borne by their employer as they considered their employer to have been at fault.49 The application fee is consistent with application fees for other FWC jurisdictions and while it does not cover the cost of dealing with an application, it may prevent spurious claims.

The FWC recognises that there is both a legislative obligation and a practical imperative for dealing with anti-bullying matters as quickly as possible. The rapid rate at which the FWC commences matters within the legislated 14 day period and the relatively short period of time taken to deal with matters substantively by listing matters for proceeding, reflects this concern. For the 2014-15 financial year, the median time taken to start dealing with anti-bullying matters was one day.50 Further, in the same period the median time taken for matters to have their first proceeding was 35 days after the lodgement date. In the interim, the triage process had taken place with all parties contacted, information exchanged, a report provided to the Panel Head and the matter allocated to an FWC Member. A significant number of cases have their first substantive proceedings conducted less than 25 days after lodgement.51

The FWC is able to determine the length of time taken to finalise anti-bullying matters, but cautions against the use of such a measure when evaluating the efficiency or effectiveness of the anti-bullying measure. For example, it is often appropriate for a Member to hold a matter open for the parties to be able to report back over a period of weeks or months on the progress of the resolution reached. There are also circumstances where the medical condition of one of the parties, or the desirability of permitting a workplace investigation to be completed, results in a delay in the final determination/resolution of the matter. The FWC has not published data around the time taken to finalise matters for these reasons.

WorkSafe Victoria stated it had received anecdotal feedback from several bullying complainants (who had concurrent complaints lodged with the FWC and the WHS regulator) that the FWC process

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47 Department interviews with Kamal Farouque, Maurice Blackburn, 18 November 2015 and Sally Woodward, Norton Rose Fullbright, 5 November 2015  
48 WorkSafe Victoria Submission to the PIR  
51 FWC advice to Department of Employment, February 2016
was too lengthy, taking more than six months before resolution was reached.\textsuperscript{52} In contrast, the Textile, Clothing and Footwear Union of Australia (TCFUA) submitted to the PC’s Inquiry that, in a case in which it represented a member, the FWC process had provided a quick and effective remedy.\textsuperscript{53} The ACTU submitted to the department that it had received mixed reports as to the timeliness in which matters were dealt with by the FWC.\textsuperscript{54}

The anti-bullying jurisdiction has significant social impacts which go beyond the financial cost of making an application. The anti-bullying jurisdiction cannot resolve or compensate for the impact of any workplace bullying which may have occurred prior to an application, but aims to prevent future incidences occurring which is, in part, intended to address the ongoing personal impacts of bullying.

The FWC’s Annual Report showed that almost two-thirds of applicants who applied for an order to stop bullying discontinued their matter.\textsuperscript{55} An online survey conducted by the FWC found that of the applicants they surveyed who had reported discontinuing their matter, just over 22 per cent cited the burden of pursuing the application as a reason for discontinuance, typically in the face of employer opposition.\textsuperscript{56} The Social Research Centre reported that the emotional impact of the bullying and proceeding with their application to the FWC became overwhelming for some applicants. Around three quarters of the 27 applicants interviewed perceived that once the parties had been notified of the application, the relationship with their employer deteriorated. This may provide further context for why applications are terminated due to the discontinuation of the employment relationship.\textsuperscript{57}

The National Working Women’s Centres (NWWC’s) submission to the PC’s Inquiry stated that some of their clients fear lodging an application for an anti-bullying order and have opted instead to leave the workplace because ‘they had nothing left to fight with’.\textsuperscript{58} The FWC has recognised the potential health impacts in designing the case management model and is considering further support mechanisms for parties involved in workplace bullying proceedings.\textsuperscript{59}

Approximately 16 per cent of respondents to the FWC’s survey reported their decision to leave the workplace/end their employment as a reason for withdrawing their application and just over 22 per cent of applicants who discontinued their matter did so because their employment was terminated either prior to, or after lodgement of their application. It should be noted that multiple responses were permitted to the survey question which measured reasons for discontinuance and this may have resulted in overlapping responses. For example, some of the applicants who reported the burden of pursuing the application in the face of employer opposition as a reason for discontinuing

\textsuperscript{52} WorkSafe Victoria Submission to the PIR
\textsuperscript{53} TCFUA, Submission 214 to the PC’s Inquiry, p 56
\textsuperscript{54} ACTU Submission to the PIR, p 2
\textsuperscript{55} FWC Annual Report 2014-15, p 106
\textsuperscript{56} FWC Anti-bullying Applicant Online Survey, November 2015 (unpublished)
\textsuperscript{58} NWWC’s Submission 242 to the PC’s Inquiry, p 15
\textsuperscript{59} FWC Annual Report 2014-15, p 110
their application, may have also reported their decision to leave the workplace as a reason for discontinuing their application.

Applicants interviewed by the Social Research Centre also provided reasons for discontinuing their matter. These included:

- the applicant being overwhelmed by the volume of legal process and documentation generated by the employer;
- the applicant’s employment was terminated;
- the applicant was encouraged to resign, particularly where employment arrangements were temporary or casual.60

While the SRC results are qualitative, they may indicate that those engaged in temporary or casual work may be less likely to access the anti-bullying jurisdiction. However, other evidence to support this conclusion is limited.

Some stakeholders indicated that the legislative requirement for there to be a risk that the worker will continue to be bullied at work in order for the FWC to make an order to stop bullying may limit access to the jurisdiction. Departure of the employee from the workplace prevents the FWC acting on an application as the risk of the bullying continuing no longer exists. In its submission to the PC Inquiry, HR Business Direction stated:

“This makes pursuing the right of recourse to the FWC very difficult given the individual has to continue to work with the alleged bully in order for the FWC to progress the application and to make an order to stop the bullying.”61

Thirty three percent of the respondents to the FWC’s online survey who reported their matter as resolved, indicated that their employment had ended either prior to or since their matter was finalised. It is likely that this involves a combination of factors, including that some applications are made late in a performance management process. The FWC notes that these figures may indicate that some relationships are ultimately difficult to salvage.62 More than half of the 27 applicants surveyed by the Social Research Centre considered that once they had made their application, the employment relationship deteriorated to the point where they felt employers sought to terminate their employment encouraging their resignation or making them redundant.

The findings described above indicate that the policy intent of allowing normal working relationships to resume is, in many cases, not being met.

The individual costs of the new right of recourse do not only affect workers who apply to the FWC for an order to stop bullying. The named parties to an anti-bullying matter may include the employer, manager, other employees or contractors, clients and customers, all of whom may have

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61 HR Business Direction, Submission 91 to the PC’s Inquiry
62 FWC Anti-bullying Applicant Online Survey, November 2015 (unpublished)
their interests affected by the publication of a decision. In consultations, concerns were raised about the potential reputational damage arising from the publication of names in anti-bullying applications, particularly for those alleged to be ‘bullies’ in preliminary decisions and hearing lists, before the FWC determines whether these allegations amount to bullying at work. The FWC has capacity to grant applications from parties to be de-identified in any published materials. The FWC’s Anti-bullying Benchbook advises however:

“it is not sufficient to justify the making of a non-disclosure order merely because allegations have been made which are embarrassing, distressing or potentially damaging to reputations.”

It was also noted by staff at the FWC that some named individuals may not previously have been aware that there was an issue in the workplace or that their behaviour might be impacting in the manner described in an anti-bullying application. Representatives of the FWC have acknowledged that this can be particularly confronting for those individuals. Under FWC’s case management process, the employer or principal are made aware of the allegations first. This gives them the opportunity to manage any issues in the workplace, including being the first person to discuss the application with the person named. Further, the named persons are contacted by FWC staff prior to receiving a copy of the application and this provides them with some important context and information.

**Benefits**

Since 1 January 2014, 1037 individuals have utilised the right of recourse to the FWC, as set out below. In 100 per cent of cases, the FWC commenced processing these applications within the required 14 day timeframe as required under the legislation.

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<td></td>
<td>151</td>
<td>192</td>
<td>189</td>
<td>169</td>
<td>173</td>
<td>163</td>
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The cases of 873 individuals have been finalised by the FWC as set out below.

<table>
<thead>
<tr>
<th>Finalisation of matters</th>
<th>2013–14</th>
<th>2014–15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application withdrawn early in case management process</td>
<td>59</td>
<td>185</td>
</tr>
<tr>
<td>Application withdrawn prior to proceedings</td>
<td>34</td>
<td>122</td>
</tr>
<tr>
<td>Application resolved during the course of proceedings</td>
<td>63</td>
<td>191</td>
</tr>
</tbody>
</table>

63 *Anti-Bullying Benchbook*, FWC, May 2015
64 FWC advice to Department of Employment, February 2016
65 Latest data available as at 30 June 2015 from FWC Quarterly Reports
66 Data drawn from FWC Quarterly Reports
67 FWC Annual Report 2014-15, p 105
An online survey conducted by the FWC has provided some indicative views from individuals on the level of satisfaction with the outcome agreed by the parties and the extent that they were confident that the bullying behaviour would stop. In this survey, of those applicants whose matter had been resolved, almost one third indicated that their matter was resolved by agreeing to a course of action with their employer that satisfied them the bullying would stop. In 20 per cent of these cases, resolution of the matter required action being taken.68

The FWC has made twelve stop bullying orders in three matters.69 In the case of Applicant v Respondent [2014] FWC 9184, the process for the applicant was so successful that they asked the FWC to lift the orders with a view to the matter being managed at the workplace from then on. The applicant provided the following feedback:

“The past year of intervention from Fair Work has been very positive and helpful and I am very grateful for the support that has been given to me...”70

Applicants reported to the Social Research Centre their appreciation of the timeliness with which their applications were actioned. One applicant reported that without this quick progress, people could be caught up in untenable positions and would eventually resign.71

Feedback from stakeholders in relation to the low number of orders by the FWC and the lower number of applications than expected was varied. While employer groups72 submitted that the figures and in particular the low number of orders, show that the right of recourse to the FWC has been overwhelmingly ineffective in terms of the benefits outweighing the costs, other stakeholders73 cautioned against judging success or otherwise based on these figures alone. The ACTU considered that the low number of orders reflects the skill of the FWC to resolve matters

<table>
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<tr>
<th>Finalisation of matters</th>
<th>2013–14</th>
<th>2014–15</th>
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</thead>
<tbody>
<tr>
<td>Application withdrawn after a conference or hearing and before decision</td>
<td>20</td>
<td>118</td>
</tr>
<tr>
<td>Application finalised by decision6</td>
<td>21</td>
<td>60</td>
</tr>
<tr>
<td>Total matters finalised</td>
<td>197</td>
<td>676</td>
</tr>
</tbody>
</table>

1 Applications withdrawn with Case Management Team or Panel Head prior to substantive proceedings.
2 Includes matters that are withdrawn prior to a proceeding being listed; before a listed conference, hearing, mention or mediation before a FWC Member is conducted; and before a listed mediation by a staff member is conducted. This also includes matters where an applicant considers the response provided by the other parties to satisfactorily deal with the application.
3 Includes matters that are resolved as a result of a listed conference, hearing, mention or mediation before a FWC Member or listed mediation by a staff member.
4 Of those matters finalised by decision in 2014-2015, 59 were dismissed and one order was made.
5 The anti-bullying jurisdiction commenced on 1 January 2014, therefore this data relates to the date range 1 January 2014 to 30 June 2014.

68 FWC Anti-bullying Applicant Online Survey, November 2015 (unpublished)
70 Applicant v Respondent [2014] FWC 9184
72 National Farmers Federation (NFF) Submission to the PIR, p 2; National Retail Association Submission to the PIR, p 14; AMMA Submission to the PIR, p 19; ACCI Submission to the PIR, p 13
73 Department interview with Mr Michael Borowick, ACTU16 November 2016; Victorian Government Submission 176 to the PC’s Inquiry, p 2; Department interview with Commissioner Hampton
without needing to make an order, outlining that conciliation and mediation was being done well.\textsuperscript{74} This view was also acknowledged by a number of stakeholders, who indicated that one of the key benefits of the jurisdiction lies in the mediation services provided during the application process, which may allow matters to be resolved without requiring an order to be made.\textsuperscript{75} The PC’s Report further concluded that the mere existence of a right of recourse to the FWC, regardless of whether it is used, provides a degree of reassurance to individuals.\textsuperscript{76}

The intervention of a third party arbitrator into the employment relationship was also seen by applicants engaged in interviews with the Social Research Centre as a benefit to individuals. Whilst some applicants from larger organisations said they had sought help with their concerns about workplace bullying by talking to managers, HR staff and others at their workplace, this had not proved helpful\textsuperscript{77}. In the case of small businesses, where an employee can be in the difficult position of having to raise the issue directly with the person perceived as bullying, the observation was made that the FWC provided an important avenue for the employee to escalate their complaint outside of the workplace\textsuperscript{78}.

Some stakeholders promoted the importance of the FWC’s role in addressing individual situations not provided for by other mechanisms for addressing workplace bullying. The ACTU submitted that the focus of the FWC is on developing a specific response to a situation occurring at the workplace right now, where a worker is at risk.\textsuperscript{79} It held this in contrast with the approach of WHS regulators which seek to establish whether the employer has appropriate policies and procedures in place to reduce or deal with instances of workplace bullying. The Shop, Distributive and Allied Employees Association (SDAEA) submitted that, prior to the introduction of anti-bullying laws, the ability to effectively manage bullying complaints was incredibly frustrating, difficult and rarely resulted in a positive resolution for the person experiencing the bullying behaviour.\textsuperscript{80}

In its submission to the department, the ACTU noted its affiliates had reported the existence of the right of recourse to the FWC for workplace bullying had permitted earlier intervention in some instances of bullying than previously experienced, without filing an application with the FWC.\textsuperscript{81}

When the Social Research Centre asked applicants why they had approached the FWC for an anti-bullying order, the most common reason given was the apparent inaction by their employer to

\textsuperscript{74} Department interview with Mr Michael Borowick, ACTU, 16 November 2016
\textsuperscript{75} Department interviews with Stephen Amendola, Ashurst, 30 October 2015; Michael Borowick, ACTU, 16 November 2015; Sally Woodward, Norton Rose Fulbright, 5 November 2015
\textsuperscript{76} Productivity Commission 2015, \textit{Workplace Relations Framework}, Final Report, Canberra p 282
\textsuperscript{77} The FWC does not collect data on the proportion of applications which have accessed internal processes prior to approaching the FWC. FWC administrative data indicated that nearly 70% of applications are from individuals working for organisations employing more than 50 persons, which should have established policies and procedures for dealing with reports of bullying.
\textsuperscript{78} FWC data indicates that 12% of applicants work for entities employing 1-14 staff, while a further 11.6% work for entities employing 15-50 staff.
\textsuperscript{79} ACTU Submission to the PIR, p 2
\textsuperscript{80} SDAEA Submission 175 to the PC’s Inquiry, p 65
\textsuperscript{81} ACTU Submission to the PIR, p 2
address the bullying behaviour and some stated that it was their last option to address the bullying behaviour they were experiencing.

Jurisdictional coverage

There was concern expressed by some stakeholders and applicants to the FWC that eligibility to apply to the FWC for an anti-bullying order is limited to workers in ‘constitutionally covered businesses’. The jurisdiction is limited in this way because the referrals of power from the states for a national industrial relations system do not extend to work health and safety matters and therefore there are constitutional limitations to the scope of the Commonwealth to legislate in this area. In their submission to the PC Inquiry, the NWWC considered it ‘puzzling’ that the laws don’t cover a broader range of workers and specifically mentioned health and community sector workers who are constantly the highest ranked sector for bullying according to NWWC reporting data. One applicant interviewed by the Social Research Centre did not become aware that their employer was a non-constitutionally covered business until after they had lodged their application.

Recent reports calling for reform to address workplace bullying in Australia have recommended that more workers, such as employees in unincorporated bodies, and other entities which are not constitutional corporations (such as private sector employees in non-constitutional enterprises and in not-for-profit or voluntary associations), should have access to the Fair Work Commission for stop-bullying orders. The reports therefore conclude that it is arbitrary and inequitable to leave employees in unincorporated bodies and other entities which are not constitutional corporations without access to an anti-bullying jurisdiction.

Unintended consequences

As outlined above an unintended consequence of the FWC anti-bullying jurisdiction involves employers offering ex-gratia payments to employees to terminate their employment. In cases where the employment relationship had broken down significantly, and there was little chance of normal working relationships resuming, legal representatives argued that there was value for both employers and employees in agreeing to these payments and that the payments can reflect an employer’s recognition of the loss incurred by an employee in severing their employment arrangement.

The FWC’s survey indicates a quarter of the individuals reporting that their matter had been resolved, also indicating that they had sought and/or received some form of financial compensation as part of the resolution of their matter.

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82 Government of South Australia, CPSU (Victorian Branch), NWWC; Submissions to the PC’s Inquiry
83 NWWC’s Submission 242 to the PC’s Inquiry, p 14
86 Department interviews with Kamal Farouque, Maurice Blackburn, 18 November 2015 and Sally Woodward, Norton Rose Fullbright, 5 November 2015
A right of recourse for workplace bullying – Post Implementation Review of Part 6-4B of the *Fair Work Act 2009* (Cth)

**Government and community**

**Benefits**

Stakeholders were universally positive about the definition of workplace bullying provided by the legislative provisions and there was a view that having a clear, consistent legal definition was helpful for employers, workers and the community more generally.  

In addition, the new right of recourse to the FWC has enabled a body of case law to be developed to clarify what does and does not constitute workplace bullying in different circumstances. Importantly, this has resulted in the FWC clarifying the statutory meaning of important concepts such as ‘reasonable management action’ and when a person is bullied ‘at work’. Several submissions outlined that the FWC had taken a balanced and pragmatic approach to claims of workplace bullying and had applied reasonable boundaries in relation to the responsibilities and liability of employers (with the *DP World* decision being highlighted as an example of this). Commissioners were also praised for their approach to matters, particularly for being practical, sensitive, and focused on dispute resolution.

A broader education and awareness raising function has also taken place through the public’s day to day contact with the FWC. The FWC’s Annual Report records that during 2014-15:

- there were more than 150,000 unique hits on their website (including a total of 7,198 users accessing the FWC Anti-Bullying Bench Book, which was viewed 12,606 times); and
- more than 6,300 telephone inquiries related to workplace bullying.

The Social Research Centre found that most of the applicants they interviewed had little difficulty locating the information relevant to them on the FWC website. The majority commended the content provided, although some questioned the legalistic language and content and were concerned that this may limit accessibility for some parts of the community. Most applicants were able to establish that they were eligible to apply to the jurisdiction and had absorbed and understood the legal definition of workplace bullying. These findings are supported by the online survey conducted by the FWC, where feedback indicated that 81 per cent of the applicants who had

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87 ACTU Submission to the PIR; Master Grocers Australia Submission 246 to the PC’s Inquiry, p 20  
90 Department interviews with Sally Woodward, Norton Rose Fullbright 5 November 2015; Steven Amendola, Ashurst 30 October 2015; Dr Kirsten Way, University of Qld, 23 October 2015; Jobs Australia Submission 221 to the PC’s Inquiry, p 13  
91 Victorian Employers’ Chamber of Commerce and Industry Submission 79 to the PC’s Inquiry, p 101  
92 Department interviews with Steven Amendola, Ashurst 30 October 2015; Jamie Robinson, HBL Ebsworth, 6 November 2015; Michael Borowick, ACTU, 16 November 2015  
93 FWC Annual Report 2014-15, p 25  
94 FWC Annual Report 2014-15, p 104  
used the FWC information materials thought the language used was easy to understand and 76 per cent agreed that the content was relevant to their needs.96

Unintended consequences

One legal representative interviewed by the department raised the possibility of an unintended consequence of the new right of recourse, relating to the reduction in the number of bullying complaints being received by WHS regulators since its introduction. This submitter suggested that this reduction in the number of complaints may result in WHS regulators pulling back from addressing workplace bullying and encourage WHS regulators to deskill in this area.97 The department received no evidence to support this claim. Data received from WHS regulators showed that WHS regulators in Queensland, Northern Territory, Tasmania and Victoria had experienced drops of around 50% in the number of bullying complaints, enquiries and requests for service since 1 January 2014.98 As stated earlier, the FWC appears to be providing welcome clarity regarding definitions of ‘workplace bullying’ and ‘reasonable management action’. This may be assisting to reduce the number of unmeritorious workers’ compensation claims (see page 26).

Western Australia’s WHS regulator reported while they have not had a record of any formal referrals to the FWC, their department of Commerce website includes information on the appropriate organisation to contact (including the Fair Work Commission) in different circumstances and it is possible that people are self-filtering using these tools.99 In enforcing WHS laws, WHS regulators can take a proactive, educative approach to help prevent workplace bullying (and hence harm) from occurring and thereby prevent the making of workers’ compensation claims which can be financially and emotionally costly for both businesses and workers.

While the FWC has the power to refer matters to a WHS regulator for investigation in certain circumstances,100 data obtained by the department from WHS regulators did not show any recorded instances of this occurring. Unlike the FWC, WHS regulators have the power to deal with the systemic issues in the workplace which give rise to workplace bullying.

Regulatory cost impact

The OBPR Guidelines indicate that the costs of engaging with a Tribunal (such as the FWC) are excluded from the requirements of a Regulatory Burden Measurement as ‘costs of non-compliance’.101 However, given the policy intent was to provide a low cost option, the department considers it appropriate to provide indicative administrative costings up until the FWC begins to formally consider the matter.

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96 FWC Anti-bullying Applicant Online Survey, November 2015 (unpublished)
97 Department interview with Jamie Robinson, HBL Ebsworth, 6 November 2015
98 Data obtained by the Department from WHS regulators
99 WorkSafe WA advice to Department of Employment, November 2015
100 This issue was considered in Mr Richard Bassanese [2015] FWC 3515. This can either be done in the form of an order under 789FF(1) (which requires the FWC to be satisfied that there is an ongoing risk), or by the President under s 655
101 Office of Best Practice Regulation, Regulatory burden measurement framework guidance note, 2014, p3
Table 3: Indicative costings

<table>
<thead>
<tr>
<th>Cost for individuals to lodge application with the FWC</th>
<th>Cost for employers to provide an initial response to the FWC in relation to an application</th>
<th>Costs for named individual to provide an initial response to the FWC (optional)</th>
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<tr>
<td>$201.12 (a)</td>
<td>$161 (b)</td>
<td>$131 (c)</td>
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(a) Based on an assumption of one hour to complete the application form and an additional hour to gather and provide copies of supporting documentation. It includes the application fee of $68.60 which is indexed under the legislation and will rise to $69.60 on 1 July 2016.

(b) Based on an assumption of one hour to complete the response form and an additional hour to meet with relevant people within the business, such as human resources staff, the applicant or the person/s named in the application.

(c) Based on an assumption of one hour to complete the response form and an additional hour to meet with the employer or human resources staff to discuss the response.

Net Cost/Benefit assessment

During consultations, some stakeholders stated that the right of recourse to the FWC for an order to stop bullying had not resulted in a net benefit to the community and should accordingly be repealed. This argument was sometimes based solely on a comparison of the financial costs of administering the anti-bullying jurisdiction against the number of orders made by the FWC to date. This review has identified a much broader range of costs and benefits associated with the right of recourse to the FWC (see Impact Analysis) and found that the FWC is resolving the vast majority of cases before a stop-bullying order might have been required. Basing an assessment of the jurisdiction purely on the number of orders issued is therefore essentially flawed.

As highlighted by the Productivity Commission, attempting to assess whether the right of recourse has resulted in a net benefit to the community does, however, pose particular difficulties.

“While all Australian estimates of the prevalence and cost of workplace bullying point to a considerable problem, such estimates are experimental and so rather imprecise.”

This conclusion was made by the PC Inquiry in light of the fact that these estimates depend on the definition of bullying, the breadth of industry coverage, the date of the different surveys, the methodology of these surveys, and the measure of prevalence. These factors make an assessment of any trends particularly challenging, if not impossible. It is difficult to assess in any meaningful way whether there has been a downward or upward trend in the prevalence rates or costs of workplace bullying since the introduction of the right of recourse.

Based on the following positive impacts identified by stakeholders during consultations, the right of recourse to the FWC for an order to stop workplace bullying has had overall benefit to the community:

- the usefulness of a clear, consistent legal definition of workplace bullying to employers and workers alike;
- an increased awareness and understanding of what behaviour does and does not constitute workplace bullying;

102 The wage rates used are the OBPR economy wide wage rates for employees and Managers plus on costs based on ABS Cat No. 6306.0 Employee Earnings and Hours, 2014
103 Productivity Commission 2015, Workplace Relations Framework, Final Report, Canberra, p 635
104 ibid
• the opportunity for individuals to have their claims of workplace bullying heard and assessed by an external third party at relatively low cost (and an order made where there is a risk of future workplace bullying);
• reports of workplaces being more responsive to claims of workplace bullying.

It was reported that these factors have assisted in positive cultural changes in some workplaces, including industries with a reputation for condoning behaviour that would constitute workplace bullying.

In considering whether these positive impacts outweighed the costs associated with the right of recourse, the discussion below presents the department’s findings in relation to some of the costs identified during consultations.

While concerns were raised about the financial costs for businesses and employers involved with applications to the FWC, businesses and employers recognised that they already held duties and faced the possibility of legal proceedings for workplace bullying under a range of other laws. Employers may therefore have incurred similar costs as a result of legal proceedings via other avenues of recourse. Indeed, stakeholder submissions indicate that the FWC processes are relatively inexpensive, particularly in relation to the provision of expert legal advice and mediation along with the legislation prohibiting the FWC from making orders for monetary compensation.

The finding that the number of bullying complaints to WHS regulators has reduced since the FWC process was introduced may mean that employers and individuals are benefitting from a more cost-effective process of dealing with workplace bullying complaints, with issues being resolved before relationships further deteriorate, thereby reducing the possibility of harm occurring and a workers’ compensation claim being made. The department took into consideration the costs of alternative mechanisms and legal avenues when weighing up whether the right of recourse has resulted in a net cost or benefit to the community.

The department considered the following costs associated with the right of recourse in its assessment:

• the regulatory impost on businesses and employers;
• the potential for WHS regulators to have less involvement in preventing workplace bullying and addressing systemic issues within workplaces, due to existence of the individual right of recourse to the FWC; and
• the potentially adverse impacts on individuals involved in anti-bullying proceedings, noting that these impacts may have been experienced by individuals seeking redress for workplace bullying through other legal mechanisms.

In terms of effectiveness and efficiency in meeting its objectives, the right of recourse to the FWC has provided an accessible and affordable pathway for workers and employers to help resolve bullying matters by:

• not requiring workers to have exhausted any other avenues (such as an internal grievance mechanism) before making an application to the FWC for an order to stop bullying;
• only charging a fee of $69.60 for an individual to apply to the FWC for an order to stop bullying (which is waived in cases of serious financial hardship); and
• the FWC managing anti-bullying matters informally in a relatively inexpensive manner compared with the much higher costs involved in engaging commercially provided mediation services.

While the right of recourse was intended to also provide a timely pathway for workers and employers to help resolve bullying matters it is possible that this has not been achieved given the mixed reports provided by stakeholders during consultations. If this is the case, this could be attributed to the complexity of workplace bullying matters brought before the FWC. Regardless of the avenue or type of remedy sought, matters of this nature do not lend themselves to rapid resolution given the significant emotional impact they can have on parties. It may be reasonably inferred that resolution in these circumstances would take considerable time and skill on the part of the FWC. Given these mixed reports from stakeholders about the timeliness of FWC proceedings, the department did not count the time taken to resolve a workplace bullying application into account as either a cost or benefit for the purposes of its assessment.

Based on evidence from consultations, the right of recourse to the FWC does not necessarily enable normal working relationships to resume, which was one of the original objectives. Stakeholder feedback highlighted that resolving the anti-bullying cases to the satisfaction of all parties is sometimes unachievable, as the relationship in the workplace has already irreparably broken down by the time an application is brought to the FWC. In cases where the original objective is not met, there may yet be benefit in FWC finalising the matter such that each party goes their own respective way more quickly than might otherwise occur, and without greater cost to either the worker or employer.

The department has assessed that the right of recourse to the FWC for an order to stop workplace bullying has overall benefit, given that it has resulted in a net benefit to the community, and at least does not result in any net cost. On balance, the right of recourse to the FWC remains necessary and appropriate and affords individuals a unique opportunity to have their claims of workplace bullying heard and resolved.

**Conclusion**

On balance, this review supports retention of the FWC anti-bullying jurisdiction.

**Key points**

1. All stakeholders acknowledged that workplace bullying remains an issue that must be addressed but disagreed on the best way to do this. Other legal frameworks that provide remedies for workplace bullying (such as work health and safety laws) are still subject to the inadequacies that were identified in the Workplace Bullying Report in 2012.
2. The individual right of recourse to the FWC is readily accessible to those eligible to apply and the FWC has helped clarify important issues for businesses, workers and the community as a whole.

   (a) Stakeholders largely agreed that the information provided by the FWC (through its website, hotline and Benchbook) is useful.
(b) Clarification around what constitutes workplace bullying has been beneficial for all stakeholders.
(c) There remains some confusion about the meaning of ‘reasonable management action carried out in a reasonable way’ but the case law is helping to shed light on this concept.

3. The jurisdiction has not met all desired policy objectives but, on balance, has resulted in a net benefit to the community.

(a) The intervention by the FWC has not necessarily resulted in the resumption of normal working relationships between parties. However it is possible that this is due to the complex, sensitive and often protracted nature of workplace bullying matters.
(b) While the right of recourse to the FWC does add another layer to the legislative frameworks available to address workplace bullying, it provides individuals with a unique opportunity to have their claims of workplace bullying heard and resolved.
(c) The FWC has met legislative timeframes for beginning to deal with workplace bullying applications within 14 days. However, the complicated nature of cases before the FWC means that it may not be reasonable or appropriate to expect the rapid resolution of these matters, particularly where they have developed over some time.
(d) The right of recourse to the FWC has resulted in some positive cultural change in workplaces. It has encouraged businesses to more proactively engage in preventing bullying by for example, requiring staff to undergo management training, putting anti-bullying policies in place and devising internal processes to resolve bullying complaints promptly.
(e) There are costs for workers and employers involved in a workplace bullying matter before the FWC but these costs are not unique and would likely occur when seeking a remedy for workplace bullying under any other legal framework.

4. The individual right of recourse to the FWC should be retained.

(a) The practical, consistent decision making of the FWC is proving informative for workers, employers and legal professionals and is instilling confidence in their handling of workplace bullying matters.
(b) Recent reports on workplace bullying in Queensland and Tasmania have found the mechanism to be a suitable one for resolving workplace bullying.

5. Some future amendments could be considered.

(a) The current arrangement where the FWC recommends but does not require that workers try to address workplace bullying matters through internal grievance processes first, appears to strike a reasonable balance. However, the FWC could consider strengthening this recommendation where appropriate.
(b) The limited eligibility to access the jurisdiction remains a concern of some stakeholders and a source of confusion for some workers. The FWC’s jurisdiction could be extended to address this, with one suggestion being to cover workers of ‘national system employers’ instead of ‘constitutionally covered businesses’.
A right of recourse for workplace bullying – Post Implementation Review of Part 6-4B of the Fair Work Act 2009 (Cth)

Remaining issues
In the course of this review, stakeholders revisited the long-standing question of the appropriate mechanism for addressing workplace bullying, whether this be through WHS laws or a separate jurisdiction within the Fair Work Act.

Many stakeholders view workplace bullying as a WHS issue and consider that WHS laws are the appropriate mechanism for addressing workplace bullying. These stakeholders (mostly employers) submit that WHS laws provide protection for workers who are bullied at work and that the right of recourse to the FWC is unnecessary and duplicative and should not be contained in industrial relations laws. Similar views were provided to the 2012 House of Representatives Committee (the Committee) inquiry into workplace bullying in Australia. The 2012 Workplace Bullying Report concluded that from the evidence presented, there was insufficient legal redress for an individual subject to workplace bullying under WHS and other laws in existence at that time.

Another long-standing issue raised during the review was whether workers should be required to seek assistance from their employer, another agency or regulator before applying to the FWC for an anti-bullying order. This was seen as a more effective way to initially deal with an allegation of bullying. However, this overlooks a problem that can occur in businesses (particularly small business) where a worker has to raise their bullying issue with their alleged perpetrator. The current arrangement where the FWC recommends but does not require that workers address matters within the workplace first, appears to strike a reasonable balance. Additionally, the FWC is able to take into account the outcomes of an internal process if appropriate. This view was supported in the PC Inquiry’s final Report, which suggested that the FWC could further encourage applicants to first access internal review mechanisms before making an application but did not recommend making this compulsory.

Emerging issues
Stakeholders also identified a number of new issues during the review in terms of the operational impact of the right of recourse to the FWC since its introduction in 2014.

Employer groups raised the concerns of their members about the interplay between the anti-bullying right of recourse and reasonable management actions such as performance management and business restructures. There were claims that workers were lodging anti-bullying applications in response to management actions, with the intention to delay, reverse or retaliate against those actions. Legal professionals supported these claims, but also acknowledged the subjective and sometimes subtle nature of bullying, and that management actions are not always conducted in a ‘reasonable manner’.

The FWC has broad discretion to determine what constitutes ‘reasonable management action’ and stakeholders consider that the FWC is doing this well. The information provided on the FWC’s anti-bullying website and in the Anti-bullying Benchbook was also considered helpful. It was suggested that the developing case law be used to educate and could even provide additional detail on reasonable management action within the Fair Work Act. The practical, consistent decision making of the FWC is proving informative for employers and legal professionals and instilling confidence in
the handling of anti-bullying matters. These decisions, if accurately reported, could assist in limiting the burden on employers from bullying applications, particularly those linked with management actions.

**A future review?**

The outcomes being reported anecdotally, through the FWC’s initial survey and the research commissioned by the department, indicate that the jurisdiction requires ongoing monitoring. The anti-bullying remedy has only been in operation for two years. More time is required to assess the effectiveness and efficiency of the provisions and their implementation.
Attachment A:
Implementation of recommendations of the House of Representatives Standing Committee on Education and Employment Workplace Bullying Report

In addition to implementing recommendation 1 and 23 through the establishment of a right of recourse for workplace bullying in Part 6-4B of the Fair Work Act, the following other recommendations from the Workplace Bullying Report, which did not require legislative reform, were implemented:

- **Recommendations 2, 3, 4, 6 and 9** – through the development and finalisation of the Safe Work Australia Guide for Preventing and Responding to Workplace Bullying and Dealing with Workplace Bullying – a Worker’s Guide.
- **Recommendation 8** – through system changes to the Merit Protection Commission’s database to allow for data collection on ‘fit for duty’ review applications and analysis of how this test is used to respond to bullying across the Australian Public Service.
- **Recommendations 17 and 18** – through Safe Work Australia’s annual statement on Psychosocial Health and Safety and Bullying in Australian Workplaces: Indicators from Accepted Workers’ Compensation Claims.
- **Recommendation 19** – through the provision of information on bullying to young workers through the government’s myFuture website and the FWC’s website.
- **Recommendations 20 and 21** – through Comcare’s inspector training on workplace bullying and its development of a national compliance and enforcement policy for preventing and responding to workplace bullying matters.
- **Recommendation 22** – through liaison with state and territory governments on the use of consistent criminal laws to deal with serious bullying.
Attachment B: Fair Work Commission processes

Note: the diagram below sets out the anti-bullying process as it applies in general terms

Attachment C:  
Overview of legislative framework prior to 1 January 2014

The following provides an overview of the remedies available for workplace bullying under laws existing at the time of the Committee’s inquiry.106

<table>
<thead>
<tr>
<th>Bullying Conduct: repeated, unreasonable behaviour directed towards a worker that creates a risk to health and safety</th>
</tr>
</thead>
<tbody>
<tr>
<td>WHS laws</td>
</tr>
<tr>
<td>No need for the bullying to have caused an &quot;injury&quot; or &quot;disease&quot;</td>
</tr>
<tr>
<td>Generally regulator will only intervene once internal complaint mechanisms exhausted.</td>
</tr>
<tr>
<td>Only regulator may prosecute</td>
</tr>
<tr>
<td>No individual right to sue provided</td>
</tr>
<tr>
<td>Worker’s Compensation laws</td>
</tr>
<tr>
<td>Only applicable if bullying caused an &quot;injury&quot; or &quot;disease&quot;</td>
</tr>
<tr>
<td>Provides an individual right to sue if injury serious enough</td>
</tr>
<tr>
<td>Not available if injury caused by &quot;reasonable management action&quot;</td>
</tr>
<tr>
<td>Variation between states and territories re: aggravation of pre-existing conditions</td>
</tr>
<tr>
<td>Generally no need to go through internal mechanisms first</td>
</tr>
<tr>
<td>Fair Work Act, prior to 2013 amendments</td>
</tr>
<tr>
<td>Could only raise bullying in context of general protections or unfair dismissal claims etc., person was usually reactive (i.e. worker forced to resign or had been dismissed)</td>
</tr>
<tr>
<td>No requirement to follow internal complaint mechanisms</td>
</tr>
<tr>
<td>Whistler range of orders available, reinstatement generally inappropriate and compensation usually paid to compensate for loss of employment</td>
</tr>
<tr>
<td>Anti-Discrimination laws</td>
</tr>
<tr>
<td>Provides an individual right to sue and seek compensation</td>
</tr>
<tr>
<td>No need for any &quot;injury&quot; to have resulted from bullying but worker must fit within one of the protected categories; i.e. the bullying was based on race, gender, disability etc.</td>
</tr>
<tr>
<td>Civil Liability legislation and/or common law of negligence</td>
</tr>
<tr>
<td>Provides an individual right to sue and seek compensation</td>
</tr>
<tr>
<td>May be possible to run parallel claims (e.g. workers compensation)</td>
</tr>
<tr>
<td>Criminal law</td>
</tr>
<tr>
<td>Police may prosecute</td>
</tr>
<tr>
<td>Significant variance between states and territories</td>
</tr>
<tr>
<td>If bullying involves use of electronic equipment, Commonwealth laws may be applicable</td>
</tr>
<tr>
<td>May provide &quot;victims of crime&quot; compensation</td>
</tr>
<tr>
<td>Can be run parallel to other claims (e.g. unfair dismissal)</td>
</tr>
</tbody>
</table>

While only WHS laws responded specifically to workplace bullying, the Committee noted that submissions to its inquiry had highlighted the following deficiencies in these laws:

- the laws only give regulators a right to enforce the law against those who have a statutory duty of care;
- the focus of investigations by regulators is on how the hazard of bullying is being managed by an employer, rather than on the individual circumstances of the person who complained of being bullied;
- that WHS regulators have a prosecutorial function which deals with workplace bullying as a wrong against the state;
- there was a lack of enforcement of the laws by regulators in cases of workplace bullying; and
- the criminal burden of proof applies under these laws, that is, to prove beyond reasonable doubt that workplace bullying has occurred.

Attachment D:
Written submissions to the post implementation review

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Principal Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Australian Chamber of Commerce and Industry (ACCI)</td>
<td>Seeks repeal of the anti-bullying provisions on the basis that workplace bullying is a matter pertaining to the health, safety and welfare of workers and is more appropriately dealt with by the WHS regime. The requirement for a FWC anti-bullying jurisdiction has not been established.</td>
</tr>
<tr>
<td>2. Australian Council of Trade Unions (ACTU)</td>
<td>Supports the provisions and considers they are largely working well and leading to positive outcomes. The jurisdiction has permitted earlier intervention in some instances than previously experienced. Expressed concern that some matters appear to be taking too long to be resolved.</td>
</tr>
<tr>
<td>3. Australian Federation of Employers and Industries (AFEI)</td>
<td>Seeks repeal of the anti-bullying provisions on the basis that they are unwarranted and intrusive legislation. Particular objections include: matters proceed without jurisdiction; investigations are costly; details of parties are not required to be kept confidential; the process is lengthy; and the FWC becomes involved in trivial and minute details of the workplace.</td>
</tr>
<tr>
<td>4. Australian Industry Group (AiG)</td>
<td>Believes the anti-bullying provisions have not had an adverse impact on most businesses, especially given no compensation is payable under the jurisdiction.</td>
</tr>
<tr>
<td>5. Australian Mines and Metals Association (AMMA)</td>
<td>Considers the anti-bullying provisions are wrongly located in WR legislation and are more properly the preserve of WHS. Believes applicants should be required to seek independent assistance from another agency or regulator first. Argues that the provisions should apply to union officials.</td>
</tr>
<tr>
<td>6. Chamber of Commerce and Industry of Western Australia (CCIWA)</td>
<td>Seeks repeal of the anti-bullying provisions on the basis that they represent unnecessary duplication and red tape, effectively replicating WHS legislation and enforcement provisions.</td>
</tr>
<tr>
<td>7. Housing Industry Association (HIA)</td>
<td>Opposes the anti-bullying provisions on the basis that they are inconsistent with the Australian Government’s cutting red tape principles and impose a regulatory burden on employers, particularly small business employers.</td>
</tr>
<tr>
<td>8. Master Builders Australia (MBA)</td>
<td>Considers the anti-bullying provisions to be unnecessary given other regulatory bodies better equipped to deal with complaints.</td>
</tr>
<tr>
<td>9. National Farmers’ Federation (NFF)</td>
<td>Supports repeal of the anti-bullying provision on the basis they are unproductive and resource intensive.</td>
</tr>
<tr>
<td>10. National Retail Association (NRA)</td>
<td>Supports repeal of the anti-bullying provision on the basis that they are unnecessary and duplicative. Arguments that the jurisdiction is being utilised at a relatively low rate and represents a regulatory and risk compliance burden for employers.</td>
</tr>
<tr>
<td>11. Queensland Government – Queensland Treasury</td>
<td>No issues have been identified in relation to the FWC’s anti-bullying jurisdiction.</td>
</tr>
<tr>
<td>12. Restaurant and Catering Australia (RCA)</td>
<td>Considers the anti-bullying provisions are wrongly located in WR legislation and are more properly the preserve of WHS. Particular objection is that employers cannot afford to have their brand name tarnished by being named in FWC processes.</td>
</tr>
</tbody>
</table>
Supports the anti-bullying provisions the additional level of protection offered to bullied workers.

14. Western Australian Government – Department of Commerce
No comment.
Attachment E:
Individuals interviewed for the post implementation review

<table>
<thead>
<tr>
<th>Stakeholder</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Carolyn Davis (ACCI)</td>
</tr>
<tr>
<td>2. Dr Kirsten Way (Academic, Qld University and Qld Government)</td>
</tr>
<tr>
<td>3. Steven Amendola (Ashurst)</td>
</tr>
<tr>
<td>4. Clare Dewan (CD &amp; Associates)</td>
</tr>
<tr>
<td>5. Sally Woodward (Norton Rose Fullbright)</td>
</tr>
<tr>
<td>6. Jamie Robinson (HBL Ebsworth)</td>
</tr>
<tr>
<td>7. Michael Borowick (ACTU)</td>
</tr>
<tr>
<td>8. Kamal Farouque (Maurice Blackburn Lawyers)</td>
</tr>
</tbody>
</table>
## Attachment F:
Submissions to the Productivity Commission’s 2015 Inquiry into the Workplace Relations Framework (PC Inquiry) – Stakeholder comments on the anti-bullying provisions

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Principal Position</th>
</tr>
</thead>
</table>
| **1. Australian Chamber of Commerce and Industry (ACCI)** | Recommends repeal of the anti-bullying provisions on the following grounds:  
- the result is a complex WHS/WR system that employers must navigate;  
- there has been a widening exposure to potential claims of workplace bullying;  
- the cost in time and money of managing this exposure (eg responding to allegations and claims and defending applications);  
- the possibility of facing multiple investigatory and adjudicative processes arising out of the same set of circumstances;  
- the possible impact on managerial prerogative including where bullying allegations arise during a performance management process.  
Suggests workplace bullying remain fundamentally as pertaining to the health, safety and welfare of workers and not as a broader industrial relations matter. |
| **2. Australian Council of Trade Unions (ACTU)** | Notes both pros and cons of the anti-bullying provisions, as follows.  
**Pros**  
Can be therapeutic for members as at the end of the process, they feel justified in making their complaint. The process works - bullying is stopped. Workers feel empowered by organising around the issue and seeing a result. Employer can sometimes recognise there is an issue and address it accordingly.  
**Cons:** Has to be an immediate threat to the member. Takes too long for the matter to be listed. Psychologically damaging to member to continue working with the bully. Managing members’ (workers’) expectations. Is employer managing the bully in the correct manner or covering up the issue?  
Suggests that as there is no way of knowing how far a settlement will go towards changing a workplace culture or stopping bullying behaviour over the long-term, the FWC could order a process of long-term monitoring of policies, practices and training within a workplace. Suggests there could also be benefit in the FWC calling on the expertise of investigatory and other staff from a WHS regulator. |
| **3. Australian Federation of Employers and Industries (AFEI)** | Supports repeal of the anti-bullying provisions for the following reasons:  
- the low level of meritorious claims relative to number of applications;  
- requirements already exist for employers to respond to bullying complaints under WHS legislation;  
- the disproportionately high level of time and resources required of employers to deal with claims relative to the level of actual bullying in workplaces and the impact on productivity;  
- the ease with which claims can be made to the FWC;  
- the ease with which concurrent claims can be made (WC and general protections); and  
- the destabilising nature of FWC processes on workplaces. |
| **4. Australian Industry Group (AiG)** | Believes anti-bullying provisions have not had an adverse impact on most businesses. Suggests cyber-bullying is an issue which should be monitored. |
## Stakeholder and Principal Position

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Principal Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Australian Higher Education Industrial Association (AHEIA)</td>
<td>Has concerns about the WHS effects for individuals labelled a bully in FWC proceedings and suggests applications should be dismissed where an applicant is no longer employed or has not utilised an internal grievance process prior to lodging their application. Recommendations an increase to the application fee to deter claims with no reasonable prospect of success and supports cost orders to deter frivolous applications.</td>
</tr>
</tbody>
</table>
| 6. Australian Human Resources Institute (AHRI)                              | Reports results of surveys conducted in relation to anti-bullying provisions, which found:  
  - 50% of respondents believe bullying provisions should be dealt with by occupational health and safety legislation, other 50% thought that they should remain in the Fair Work Act; and  
  - 46% of respondents reported no change to their organisation as result of the bullying provisions.                                                                                                                                                                                               |
| 7. Australian Mines and Metals Association (AMMA)                          | Supports the repeal of the anti-bullying provisions on the basis that they are wrongly located in the WR system, are an unnecessary extra mode of third-party interference for employers which has added little or nothing to the protection of employees and serve only to further undermine direct employment relationships and weaken managerial control.  
  Suggests that anti-bullying provisions should extend to union officials and that applicants should be required to take their complaints of workplace bullying through internal processes and WHS regulators before going to the FWC.  
  Questions how workplace relations fare after FWC processes and whether the experience is ultimately good or bad for all concerned (suggesting FWC remedies may potentially be damaging for both employers and employees). |
| 8. Australian Retailers Association                                          | No particular position on the anti-bullying provisions.                                                                                                                                                                                                                                                                                               |
| 9. Australian Sugar Milling Council                                         | Supports the anti-bullying provisions and suggests the FWC can be effectively involved in the resolution of workplace bullying disputes given the overlap with employment related issues.                                                                                                                                                                           |
| 11. Business SA                                                              | Supports repeal of the anti-bullying provisions because the low number of applications demonstrates that the former processes were adequately dealing with workplace bullying.                                                                                                                                                                                          |
| 12. Carlo Carbonecchia                                                       | Supports the anti-bullying provisions and suggests the provisions complement the WHS bullying jurisdiction which has a different focus and scope. Notes the NSW Legislative Council discussed extending similar anti-bullying provisions to NSW public servants.                                                                                                                                               |
| 13. Catholic Commission for Employment Relations (CCER)                     | Claims the FWC process is lengthy, resource intensive and adversarial. Believes a more collaborative process (through other forms of alternative dispute resolution) may achieve better outcomes for all involved.                                                                                                                                                     |
| 14. Chamber of Commerce and Industry of Western Australia (CCIWA)            | Supports repeal of the anti-bullying provisions on the basis that they represent unnecessary duplication and red tape and encourage forum shopping.                                                                                                                                                                                                 |


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<thead>
<tr>
<th>Stakeholder</th>
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</thead>
<tbody>
<tr>
<td>15. Civil Contractors Federation</td>
<td>Claims workplace bullying is a WHS issue and is better addressed through state WHS legislation. Argues the anti-bullying provisions add unnecessary complexity.</td>
</tr>
<tr>
<td>16. Clare Dewan and Associates</td>
<td>Suggests the lower than expected number of applications to the FWC show that there is not excessive or genuine bullying in workplaces and that the lack of compensation is turning applicants away.</td>
</tr>
<tr>
<td>17. Clubs Australia Industrial</td>
<td>Supports the anti-bullying provisions but recommends that the FWC be required to dismiss applications where a person is no longer employed (even if there is a possibility of them being reinstated and being subjected to future bullying).</td>
</tr>
<tr>
<td>18. Community and Public Sector Union (CPSU)(SPSF Group)</td>
<td>Claims a major flaw in the anti-bullying provisions is the exclusion of State employees employed by NES, such as employees of the Crown in right of the State of Victoria. Suggests that the application of the provisions to ‘constitutional corporations’ makes the provisions complex.</td>
</tr>
</tbody>
</table>
| 19. Employment Law Centre of WA | Considers the anti-bullying provisions have had a generally positive impact for workers but recommends they be broadened to:  
  - apply to employees who have resigned or been dismissed from a workplace in which they experience bullying and  
  - enable the FWC to impose civil penalties and compensate victims. |
| 20. Glencore | Questions the effect of the anti-bullying provisions on workplace productivity. Recommends that the provisions extend to unions and associations. |
| 21. Government of South Australia | Supports the additional level of protection afforded by the anti-bullying provisions and suggests they should apply to all workers in the national workplace relations system. |
| 22. Housing Industry Association (HIA) | Argues that workplace bullying is more suitably addressed by WHS legislation and claims the anti-bullying provisions encourage forum shopping and enable the bringing of multiple, concurrent actions on the basis of alleged bullying in different jurisdictions. Suggests the application of the provisions beyond the regulation of the employment relationship has inappropriately imposed industrial relations regulation on other forms of legitimate work arrangements. |
| 23. HR Business Direction | Believes that orders to stop bullying are not enough (that they don’t prevent or deal with workplace bullying) and that the FWC should be able to impose penalties. |
| 24. Innovative Research Universities | Believes protections against unfair dismissal and bullying are being used to undermine effective performance management in workplaces. |
| 25. Jobs Australia | Suggests that if there is to be any fine-tuning of the anti-bullying provisions, the FWC should be granted greater discretion to quickly dismiss claims that have no reasonable prospect of success. |
| 26. Justice Iain Ross | Summarises the operation of the anti-bullying provisions, noting:  
  - the majority of applications are lodged by employees and allege unreasonable conduct by the applicant’s manager or supervisor;  
  - the most common industries for anti-bullying applications have been the clerical, health and welfare, retail, educational services, manufacturing, hospitality and social community home care and disability services sectors; and  
  - many matters involve difficult interpersonal issues and sometimes complex and multiple employment/contractual relationships (resulting in these matters being more resource intensive than many other applications dealt with by the Commission). |
| 27. Rene Laan | Notes that the general protections provisions, if broadened, could encompass the anti-bullying provisions. |
## Stakeholder Responses

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Principal Position</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>28. Legal Aid NSW</strong></td>
<td>Supports the anti-bullying provisions as striking an appropriate balance between the protection of workers and the preservation of employers’ ability to manage employees in the workplace. Notes the vast majority of matters seem to be resolved at conciliation, which is appropriate.</td>
</tr>
<tr>
<td><strong>29. Master Builders Australia (MBA)</strong></td>
<td>Supports repeal of the anti-bullying provisions given they add a layer of complexity and give rise to the possibility of bullying complaints being raised concurrently through different channels. Recognises the anti-bullying provisions have refocused the building and construction industry's attention on not permitting the sort of culture that leads to extreme workplace 'pranks'.</td>
</tr>
</tbody>
</table>
| **30. Master Grocers Australia and Liquor Retailers Australia** | Recognises the anti-bullying provisions have resulted in the following benefits:  
- a clear definition of the meaning of bullying conduct; and  
- more employers adopting policies and procedures to avert or eliminate bullying. |
| **31. National Farmers’ Federation (NFF)** | Argues that the anti-bullying provisions are overwhelmingly ineffective, unproductive and resource intensive. |
| **32. National Retail Association (NRA)** | Suggests that the scope of FWC orders should be limited so as not to affect productivity and efficiencies at the workplace. |
| **33. National Working Women’s Centres** | Recommends that:  
- anti-bullying provisions be amended to apply to workers in non-constitutional corporations (given many health and community sector workers are not currently covered but experience high rates of workplace bullying);  
- research be conducted to follow up on workers who have successfully negotiated staying on at work through the FWC process;  
- the FWC compile a list of preferred providers in the fields of workplace bullying training, counselling, mediation etc.  
Suggests there is a need to clarify the relationship between the FWS and WHS regulators in terms of sharing reports of bullying investigations or recommending compliance activities. |
<p>| <strong>34. Office of the Commissioner for Public Employment (NT Government)</strong> | Suggests state and territory agencies should be excluded from coverage because of other legislative and policy based protections for workplace bullying. |
| <strong>35. Peabody Energy</strong> | Believes employees and unions are using anti-bullying provisions to delay or avoid workplace processes, such as performance management and workplace restructuring. Suggests that legal fees to defend complaints of workplace bullying are high, FWC processes are delayed and employers become tentative and avoid making necessary decisions to improve the workplaces or employee performance. Recommends that FWC Commissioners have the power to refuse to proceed with bullying allegations if satisfied the employer has adequate procedures for dealing with bullying in place, and there is no compelling evidence of genuine bullying (as opposed to management action). |
| <strong>36. Ports Australia</strong> | Believes anti-bullying provisions should not be extended, but if they are, then union officials should be covered. |
| <strong>37. Professionals Australia</strong> | Believes that the anti-bullying provisions amendments have had the unintended consequence of employers seeking to resolve bullying allegations through ex-gratia payments to workers to terminate their employment. |</p>
<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Principal Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>38. Queensland Employment Law Service</td>
<td>Notes that the varying legal frameworks for addressing workplace bullying are complex and confusing. Proposes funding for a dedicated employment law advice service to provide advice, advocacy and support for vulnerable workers, including those experiencing workplace bullying.</td>
</tr>
<tr>
<td>39. Restaurant and Catering Australia (RCA)</td>
<td>Argues that workplace bullying is a workers’ compensation matter and should not be subject to the jurisdiction of the FWC.</td>
</tr>
<tr>
<td>40. Shop, Distributive and Allied Employees’ Association</td>
<td>Supports the retention of the anti-bullying provisions to provide a personal dispute resolution and remedy to workplace bullying. Considers the FWC the most appropriate and effective jurisdiction to deal with bullying issues (given expertise and better resources to manage claims quickly and cheaply). Notes that the OHS regulatory framework is grossly inadequate and unable to deal with workplace bullying issues.</td>
</tr>
<tr>
<td>41. South Australian Government – SafeWork SA</td>
<td>Supports the retention of the anti-bullying provisions and the additional level of protection it offers to bullied workers.</td>
</tr>
<tr>
<td>42. Textile, Clothing and Footwear Union of Australia (TCFUA)</td>
<td>Supports the retention of the anti-bullying provisions and noted that in one member’s case the process not only provided a quick and effective remedy (including the preservation of the employee/employer working relationship) but has also had broader benefits in the ongoing education of management and changing the workplace culture.</td>
</tr>
<tr>
<td>43. Victorian Employers’ Chamber of Commerce and Industry</td>
<td>Notes the FWC’s powers and reach in this space are currently being handled appropriately in a restrained fashion.</td>
</tr>
<tr>
<td>44. Victorian Government</td>
<td>Notes no conclusion can be drawn about the effectiveness of the provisions given their limited period of operation but suggest that knowing there is a forum and a capacity to make a complaint can be a significant positive for persons wishing to raise bullying concerns – even if it is simply to query whether an issue constitutes bullying.</td>
</tr>
<tr>
<td>45. Western Australian Government</td>
<td>Suggests issues may arise from the overlap in jurisdiction between WorkSafe and the FWC but notes the differing roles of these bodies in addressing workplace bullying.</td>
</tr>
</tbody>
</table>
Attachment G:
Key Information on Social Research Centre Project and Fair Work Commission’s online survey

Qualitative Research Project – Social Research Centre

The department commissioned a qualitative research project from the Social Research Centre to explore the perspectives of the following parties to an anti-bullying matter:

- workers who have made an application to the Fair Work Commission (FWC) under the anti-bullying provisions of the Fair Work Act;
- persons who have been named in an anti-bullying application to the FWC (named individuals); and
- employers/principals of businesses named in an anti-bullying application to the FWC.

The project involved a series of semi-structured one-on-one interviews, which were analysed to identify common themes and generate insights into the outcomes of the anti-bullying jurisdiction’s interventions for the target population.

The Social Research Centre’s report, Qualitative Review of the Anti-bullying Provisions of the Fair Work Act 2009 was informed by in-depth interviews with 27 applicants to the FWC, who volunteered to participate following a recruitment approach to over 150 recent applicants whose cases were commenced and had been finalised in 2015.

The limited data set available for the purposes of this project reflected the relatively low rate of FWC clients giving consent for their contact details to be provided to a third party for research purposes, the decision to only include cases commenced and settled within the 2015 calendar year, and the need to restrict access to contact details for clients who had a confidential resolution/settlement or confidentiality order.

The Social Research Centre also conducted a workshop with FWC Staff and an interview with the anti-bullying Panel Head, Commissioner Hampton.

Due to the small sample size, there is increased potential for response bias and lack of representation from named individuals and employers. Therefore excerpts from the report should be interpreted with caution.

Key findings of the Social Research Centre’s report
The research report will remain confidential and will not be published, in order to protect the identity of the participants involved. However, the key findings of the report are as follows:

Employers and applicants appreciated the professionalism of the FWC: employers and applicants commended the professionalism and the insight of Commissioners and conciliators.
Internal resolution was preferred: most applicants and employers would have preferred to resolve the issues taken to the Jurisdiction through internal processes.

Employers were concerned over the multiplicity of jurisdictions: some employers were concerned about the number of jurisdictions to which a worker could apply in order to pursue a workplace bullying allegation.

Pre-screening of cases could be enhanced to ensure that only those that clearly met jurisdictional definitions were taken forward: employers were concerned about the impact, in terms of time, cost, disruption and emotional impact that an application to the FWC could have on their business and team. This was particularly true for applications that were perceived as vexatious or did not appear to meet the jurisdictional definition of bullying behaviour.

Guidance on ‘reasonable management action’ could be improved: from both an employer and an applicant perspective, there was ambiguity about what behaviour constituted reasonable management action (or performance management), and what constituted bullying.

Employers appeared to feel obligated to support the named person: In many cases, employers found that it was appropriate to provide more support to the named person than the applicant. Some employers described concern for the wellbeing of the named person as a driver for this while others were concerned that the Commission might place more weight on the applicant’s views and wellbeing than that of the named person.

Greater support would benefit all parties, particularly those in small business: applicants, employers and named persons would benefit from better understanding of the jurisdictional process, what is required at each stage and the potential implications for all parties.

There appears to be imbalance in legal representation: employers explained that they required legal support when responding to applications. From the applicants’ perspective, lodging and progressing an application without legal representation was often perceived as overwhelming, and even intimidating (to the point where some applications were withdrawn for this reason alone).

Importance of the Commissioners’ role: the role of the Commissioner in the review and recommendations of the application was highlighted as particularly important. Employers explained that review by the Commissioner had been a positive experience; all parties had been encouraged to put their case forward resulting in a fair hearing.

Most applicants did not remain with their employer: this may be due to mutual agreement (recognising the damage already done to working relationships), the stress on the worker (arising from the alleged bullying situation or from the application process) or employers terminating the working relationship in order to halt the proceedings before the matter was progressed by the FWC.

Attitudes of parties to bullying matters remained adversarial: All parties (applicant, employer, named persons) felt aggrieved at certain points in the process – including the point at which the
application was first lodged. This may impact on the opportunity for the FWC to restore ‘normal working relationships’.

Viability of ‘normal working relationships’ is questionable: there were a number of concerns expressed about the viability and sustainability of the applicant continuing in the workplace. Conclusion of the FWC matter does not necessarily lead to permanent and/or positive change in the workplace.

Completion of the FWC bullying matter does not always mean resolution: applicants felt that bullying behaviour, or even bullying cultures, remained unaddressed. Employers felt that applicants who made unjustified or vexatious applications were not held accountable.

Bullying cultures within workplaces often appeared to remain unaddressed: Some applicants reported that their experience was not isolated, and that a number of their present or former colleagues had had similar experiences at the same workplace, sometimes by the same named person or persons.

Post-jurisdictional support for employers: As a result of the jurisdictional process, employers noted that weaknesses in their systems, processes, policies or practices may be highlighted with a need to be addressed.

FWC Online survey

The FWC conducted a survey to seek feedback from applicants, Named persons and employer/principals about the experience of engaging with the FWC in relation to an anti-bullying matter. This survey was conducted as part of the FWC’s continuous business improvement processes and sought to gather feedback about the processes undertaken by the Fair Work Commission related to applications for an order to stop bullying. This survey did not aim to evaluate satisfaction with the outcome of anti-bullying matters or with the provisions of the legislation covering your application. Rather, it was an opportunity to anonymously provide feedback on the process itself and the information and assistance provided by the Fair Work Commission.

In total, 362 applicants received invitations to participate in the online survey via email. Approximately one-third (32 per cent) of the applicants that received the invitation to participate completed the survey (i.e. 117 of the 362 applicants that received the survey invitation).

The client types of Named persons and Employer/Principal were combined for the online survey mainly due to overlap between the individuals so that an individual would only be sent one request to participate. In total, 453 Employer/Principal and Named persons received invitations to participate in the online survey via email. This includes some persons who were both named by the applicant and responded to the application as a person named and were also the Employer/Principal. Approximately 26 per cent of the Employer/Principal and Named persons who received the invitation to participate completed the online survey (i.e. 120 of the 453 persons responding to the application that received the survey invitation).
The online survey analysis should be considered indicative of the experiences of applicants and those who have responded to an application over the survey reference period. Where appropriate, the outcomes of this survey have been drawn upon for the purposes of this PIR, however due to relatively low sample sizes and further analysis required regarding possible response bias, the results of the survey need to be interpreted with caution. Preliminary findings of the online survey have been incorporated into this PIR and subsequent analysis from the FWC’s ongoing feedback process may inform future policy.