WHO IS THE 'GOOD' BULLYING VICTIM/CORPSE?

PATRICIA EASTEAL AM AND JOSIE HAMPTON*

ABSTRACT

Bullying in the workplace is a serious concern both because of its high prevalence and the potential harm caused to its targets and witnesses. Reporting is low. There has been little research done that has examined the bullying victims' journeys down the different legal avenues in Australia. We aim to address at least part of that gap in this paper. We do that by first describing briefly the various remedial pathways available to victims, and then we report on our analysis of a sample of relevant legal cases. From the latter, we identify some demographic variables about the complainants and aspects of the bullying background to discover what type of target pursues the matter legally. We also determine if certain types of bullying appear to be more likely to result in upheld complaints, and to identify at least some of the other factors that may affect a complainant's success in disputes that involve bullying.

I INTRODUCTION

A recent survey of the Victorian public sector found 21% of respondents had experienced bullying at work, and 34% had witnessed it being directed at someone else.[1] In fact, a 2009 Australian survey of 800 employees across occupations found that one-quarter had been a target of bullying while more than one-half had been a witness.[2] Bullying is therefore a serious concern because of its high prevalence. This seriousness is enhanced by the potential harm caused to victims/targets.[3] According to the Victorian State Service Authority:

> There is a substantial amount of research on the potential negative impact of bullying on individuals … This research shows that victims of bullying are likely to experience a range of negative effects including stress, reduces sense of self-efficacy, poor work performance, depression and anxiety.[4]

Where a target is more vulnerable, the chance of developing a severe psychological injury is greater and can even lead to suicide.[5] Bullying also affects witnesses, people closely connected with the victim, and the workplace in which it occurs.[6]

---

* Patricia Easteal AM is a professor in the Faculty of Law at the University of Canberra. Josie Hampton is a former UC student.

[1] Victorian State Service Authority, *Trends in Bullying in the Victorian Public Sector: People Matter Survey 2004-2010* (2011) 2.

[2] *Workplace Bullying Still Rife in Australian Companies* (2009) Drake International <http://www.drakeintl.com/au/pdf/workplace-bullying-in-australian-companies.aspx>.

[3] We use the terms 'victim' and 'target' interchangeably.

[4] Victorian State Service Authority, above n 1, 12.

[5] One example is the tragic and highly publicised case of Brodie Rae Constance Panlock who committed suicide in 2006 following several years of bullying as a café employee. See the following example of media coverage: Jen Vuk, 'Brodie's Death a Warning to Small Business', *Sydney Morning Herald* (online), 24 December 2009 <http://www.smh.com.au/opinion/society-and-culture/brodies-death-a-warning-to-small-business-20091223-ldfn.html>.

What exactly does 'bullying' mean? According to WorkCover NSW, 'bullying is repeated unreasonable behaviour towards a worker or group of workers that creates a risk to health and safety.'[7] Most definitions of workplace bullying in Australia are quite similar to this,[8] and can usually be broken up into the following elements: systematic and repeated, negative behaviour towards another worker or workers, which is unreasonable, and which poses a risk of injury to the victim. Note though that whilst bullying is ordinarily repetitive, it could be a one-off incident.

Bullying may involve both *overt* and/or *covert* behaviours, which are unreasonable in the circumstances.[9] Examples of the former, which is the most common type of bullying, include: abusive behaviour or language, inappropriate comments, teasing, pranking or playing jokes, tampering with a worker's belongings or working equipment, isolation and exclusion of the victim, and threats of and/or actual physical assault.[10] Covert bullying behaviours may include: making it difficult or impossible to achieve working goals or deadlines, overworking or underworking, setting tasks above or below the person's ability, ignoring the victim, denying access to information or resources, and unfair treatment in relation to workers' entitlements.[11]

Bullying is often subtle and therefore difficult to prove.[12] Thus, not surprisingly, previous research has found that the formal reporting of unacceptable workplace behaviour more commonly occurs in response to 'violent behaviours' in contrast to more covert stressful experiences.[13] Feelings of powerlessness and concern about employment elsewhere, coupled with a lack of understanding of employees' rights concerning workplace safety, probably also play a role in low levels of reporting.[14]

Reporting may be problematic too, since bullying is quite a broad concept. It can encompass other anti-social behaviours, such as harassment, victimisation, antisocial behaviour, incivility and violence.[15] Confusing bullying with these other narrower forms of behavioural abuse can be problematic, and:

> [t]argets need to be able to accurately decide whether they are experiencing unacceptable behaviour, and be able to identify the nature of the behaviour. This helps to prevent spurious or

---

[6] Bullying has negative repercussions on productivity, absenteeism and morale, and results in staff turnover: above n 1, 5.

[7] WorkCover Authority of NSW and WorkSafe Victoria, *Preventing and Responding to Bullying at Work*, (3rd ed, 2009) 3.

[8] See, eg: Victorian State Service Authority, above n 1, 5; Commission for Occupational Safety and Health, Western Australia, *Code of Practice: Violence, Aggression and Bullying at Work* (2010) 18; *Occupational Health, Safety and Welfare Act 1986* (SA), s 55A; *What is Bullying at Work?* (2011) Beyond Bullying <http://www.beyondbullying.com.au/what.html>.

[9] WorkSafe Western Australia, Code of Practice: Violence, Aggression and Bullying at Work (2010) 19.

[10] Ibid. See also Drake International, above n 2, where it was found that silence, isolation and verbal insults constituted 36% of the bullying incidents, with public humiliation and criticism accounting for 26%.

[11] WorkSafe Western Australia, above n 9.

[12] Donna-Louise McGrath, 'The National Hazard of Workplace Bullying: Implications of an Australian Study' (paper presented at Our Work Our Lives 3rd National Conference, Women & Industrial Relations, Darwin Convention Centre, Northern Territory, 12-13 August 2010) 2.

[13] Nick Djurkovic, D McCormack and Gian Casimir, 'The Behavioural Reactions of Victims to Different Types of Workplace Bullying' (2005) 8(4) *International Journal of Organizational Theory and Behavior*, 439.

[14] Donna-Louise McGrath, above n 12, 2.

[15] Sara Branch, 'You Say Tomatoe and I Say Tomato*:* Can We Differentiate between Workplace Bullying and Other Counterproductive Behaviours?' (2008) 13(2) *International Journal of Organisational Behaviour* 4, 8.

> vexatious reporting. The avenues available to targets are vastly different if the behaviour is harassment, discrimination or violence, as opposed to bullying.[16]

What about the minority of victims who do disclose their experience(s) of workplace bullying[17] and may consider pursuing a legal remedial pathway? There is no precise legislation that victims of bullying can look to in order to determine their rights to a remedy under the law in Australia. Instead, they must shape their experiences to fit into a legal pathway for which the law recognises a remedial right.[18] As Margaret Thornton summarises:

> For the most part, workplace bullying is inchoate as a legal harm, despite the dramatic increase in its reportage, if not its incidence. To date, bullying has been understood largely as a managerial rather than a legal problem.[19]

There has been little research done that has examined the bullying victims' journeys down the different legal avenues in Australia.[20] We aim to address at least part of that gap in the present paper (albeit in a way limited by the size and the nature of the sample as discussed in the following section on methodology). We do this by first describing briefly the various remedial pathways available to victims, and then we report on our analysis of a sample of relevant legal cases. From the latter, we identify some demographic variables about the complainants and aspects of the bullying background to discover *who* ends up in court or in a tribunal. We also aim to determine if certain types of bullying are more likely to result in upheld complaints, and to identify at least some of the other factors that may affect a complainant's success in disputes that involve bullying.

II METHODOLOGY

We searched the Australasian Legal Information Institute (AustLII) database using the terms 'workplace' AND 'bullying.' This resulted in over 200 'hits'. We then listed the results by date, with the aim of retaining the most current 30 matters[21] for each of the following six remedial pathways—discrimination and equal opportunity, occupational health and safety, industrial relations, workers compensation, tort and criminal. We identified the first 30 matters for the workers compensation and industrial relations pathways but the other paths did not have this many to record: there were 20 cases where discrimination and workplace bullying was mentioned; 15 with occupational health and safety; 11 tort matters, and five judgments where criminal assault and workplace bullying was mentioned. From these six lists we then excluded matters that were not useful for our analysis because: the complainant

---

[16] Carlo Caponecchia and Anne Wyatt, 'Distinguishing Between Workplace Bullying, Harassment and Violence: A Risk Management Approach' (2009) 25(6) *Journal of Occupational Health and Safety, Australia and New Zealand* 439, 442.

[17] We do know that before Christine Hodder's 2005 suicide (an act that a parliamentary inquiry found to have resulted from workplace bullying in the Cowra ambulance service) she had filed two formal complaints but 'had lost faith in management over dealing with her complaints': Natasha Wallace, 'Bullying Caused Woman's Suicide, Story Told', *Sydney Morning Herald* (online), 9 July 2008 <http://www.smh.com.au/articles/2008/07/08/1215282835387.html>.

[18] Bruce Arnold, *Australian Bullying Law* (2010) Caslon Analytics <http://www.caslon.com.au/cyberbullyingnote9.htm>.

[19] Margaret Thornton 'Corrosive Leadership (Or Bullying by Another Name): A Corollary of the Corporatised Academy?' (2004) 17 *Australian Journal of Labour Law*, 161, 176.

[20] Ibid; Bruce Arnold, above n 18; Robyn Kieseker and Teresa Marchant 'Workplace Bullying in Australia: A Review of Current Conceptualisations and Existing Research,' (1999) 2(5) *Australian Journal of Management & Organisational Behaviour*, 61, 68-69.

[21] We refer to 'matters' rather than cases to capture either one case, or a number of cases involving the same parties and the same disputed 'matter.' In the paper we refer to the final or last outcome.

was not bullied, but rather the accused was the bully; we were unable to detect a final decision in the matter; bullying was not an essential part of the claim being made; and/or the matter did not disclose enough information to be used. This selection process resulted in a sample of 21 judgments.[22]

Caveats: The findings in this study are specific to matters, which were not successfully settled before a final hearing, and our paper reflects only upon characteristics of the cases that are reported on AustLII. These are not exhaustive and may be neither representative of all cases that culminate in adjudication nor reflect the actual proportions of victims that travel along the different remedial pathways.[23] Also, given the small sample size, our findings should be viewed only as potentially indicative.

III POSSIBLE LEGAL PATHWAYS

A Common law

Where bullying creates an unsafe working environment which causes injury to an employee, in terms of the common law, that employee can elect to remedy their injury under either contract or negligence.[24] Remedies, which a victim might commonly seek include damages, a declaration as to the rights of the employee under the contract for employment, or injunctive relief.[25] Disputes can be instituted in a court,[26] or a tribunal that hears civil claims.[27]

An unsafe working environment can constitute a breach of contract, depending on what the (express or implied) terms of the contract seek to cover.[28] Dismissing an employee due to bullying can also constitute a breach of contract. In terms of the common law, it is the 'wrongfulness' and 'unlawfulness' of a dismissal which attract a right to remedy, in comparison with the broader Industrial Relations remedial pathway discussed below, under which the 'fairness' of a dismissal determines a victim's right to remedy. However, it must be noted that unfair dismissal legislation may exclude certain employees, and thus the common law remains an essential avenue for some victims to bring an action.[29]

Under the common law victims of bullying can also action wrong done to them in tort. Torts that may be relevant include breach of statutory duty,[30] trespass to the person (assault, battery and false imprisonment), defamation and, more commonly, negligence. Under the common law relating to negligence, an employer owes a duty of care to all employees[31] to provide a safe workplace that is, to the extent which is reasonable,[32] free from stressors such as

[22] These were discrimination and equal opportunity, occupational health and safety, industrial relations, workers compensation and tort matters since there were no criminal cases in the sample.
[23] For example, in February 2010 the OH&S proceedings concerning the workplace bullying experienced by Brodie Panlock were decided in the Victorian Magistrates' Court; however the judgment is not on AustLII.
[24] Natalie Van Der Waarden, *Employment Law: An Outline* (LexisNexis Butterworths, 2nd ed, 2010) 88.
[25] See, eg, injunctive relief such as reinstatement.
[26] The choice of court will depend on the amount of damages which are being sought and the respective Court's monetary jurisdiction.
[27] Such as a Civil and Administrative Tribunal or equivalent.
[28] See, eg, *Goldman Sachs JB Were v Nikolich* [2007] FCAFC 120.
[29] Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 619.
[30] Occupational Health and Safety legislation provides a legislated duty that employers must maintain a safe working environment for employees. See discussion on laws below.
[31] *Hamilton v Nuroof* (1956) 96 CLR 18.
[32] Natalie Van Der Waarden, above n 24, 93.

bullying.[33] Whether this duty has been breached depends on what is 'reasonably foreseeable' to cause injury or harm, which will vary from employee to employee. Some employees may require more care than others.[34]

B Discrimination legislation

If bullying experienced by a victim can be constructed as an act of discrimination or harassment, a remedial right may be found under Commonwealth and State discrimination legislation:[35]

> However, to have recourse to anti-discrimination legislation, a person must be able to show that he or she was bullied *because* of his or her sex — or race — or disability — or sexuality — or other trait that constitutes a proscribed ground.[36]

Remedies which may be granted for breach of these laws include apologies, damages, declarations, and orders directing a respondent not to repeat or continue certain conduct.[37] The principles of torts are 'a starting point for the assessment of damages under discrimination legislation, but those principles should not be applied inflexibly.'[38]

Complaints under discrimination legislation must be made to the appropriate agency of the jurisdiction in which the claim is to be instituted. For example, in the Federal jurisdiction, this is the Australian Human Rights Commission (AHRC). The AHRC, after receiving a complaint, will either investigate the matter further, or decline to do so.[39] If a choice is made to investigate the matter, the President of the Commission must attempt to conciliate the matter.[40] If conciliation is unsuccessful, or if for another reason the President elects to terminate the complaint,[41] the complainant can apply to the Federal Court or the Federal Magistrates Court to have the matter resolved.[42] There may be lengthy delays for such a process and if the complainant loses, (s)he may be responsible for both her/his own legal costs plus those of the respondent, which can be a disincentive.[43]

C Occupational Health and Safety laws

Under Occupational Health and Safety (OH&S) legislation[44] an employer generally owes a duty to protect the health and safety of employees at work as far as is reasonably

---

[33] *Wilson & Clyde Coal Co v English* [1938] AC 57.
[34] *Paris v Stephney Bourough Council* [1951] AC 367.
[35] See, eg, *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Anti-Discrimination Act 1997* (NSW); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1994* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).
[36] Margaret Thornton, above n 19, 178.
[37] *Federal Discrimination Law* (2009) Australian Human Rights Commission <http://www.hreoc.gov.au/legal/FDL/FDL_2008_2009/chap7.html - 7_6>.
[38] Ibid, chapter 7 at 1, citing *Hall v Sheiban* (1989) 20 FCR 217.
[39] *Australian Human Rights Commission Act 1986* (Cth), s 46PF (1), s 46PF (5).
[40] Ibid, s 46PF(1).
[41] Various grounds for termination are listed under: Ibid, s46PH.
[42] Ibid, s 46PO.
[43] Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: an Evaluation of the New Regime* (Themis Press, 2011).
[44] These laws are also referred to as workplace safety laws. See *Occupational Health and Safety Act 1991* (Cth); *Work Safety Act 2008* (ACT); *Occupational Health and Safety Act 2000* (NSW); *Workplace Health and Safety*

practicable.[45] When bullying takes place, directors, managerial staff and other employees may also be liable for a breach of duty under OH&S legislation.[46]

Each jurisdiction has an agency that administers OH&S legislation. For example, under the Commonwealth scheme it is Comcare, and in New South Wales and Victoria, the appropriate authority is called WorkCover. Employees who work for the Commonwealth are covered by the Federal legislation, whereas other employees are protected by their respective State or Territory's enactments.[47]

Inspectors who are responsible for investigating alleged OH&S breaches hold the power to issue a notice of infringement, penalty or prohibition.[48] Inspectors can also initiate prosecution that may result in a fine,[49] publication of the offence and/or orders for remedial action to improve or rectify the health and safety issue in dispute.[50] These matters may be heard by a Commission[51] or in a local court, depending upon the jurisdiction.

It should be noted that under this pathway, the individual target of bullying does not receive compensation or an apology; however OH&S laws are usually 'complemented by statutes that mandate workplace insurance',[52] as discussed next.

D Workers' compensation claims

Under workers' compensations schemes, employers are obliged to insure their workers against the development of injury or disease arising out of work. Each State and Territory has its own legislative scheme, as does the Federal jurisdiction. The latter applies to agencies and those employed by the Commonwealth.[53] Aside from a liability for the harms that have arisen

---

Act 2007 (NT); *Workplace Health and Safety Act 1995* (Qld); *Occupational Health, Safety and Welfare Act 1986* (SA); *Workplace Health and Safety Act 1995* (Tas); *Occupational Health and Safety Act 2004* (Vic); *Occupational Safety and Health Act 1984* (WA).

[45] See, eg, *Occupational Health and Safety Act 1991* (Cth), s 16(1); *Occupational Health, Safety and Welfare Act 1986* (SA), s 19(1); *Occupational Health and Safety Act 2004* (Vic), s 21(1).

[46] Karen Böhm, *Liability of Directors and Managers Under Occupational Health and Safety Law* (2006) Truman Hoyle Lawyers <http://www.trumanhoyle.com.au/downloads/ldmohsl0706.pdf>.

[47] Breen Creighton and Andrew Stewart, above n 29, 260.

[48] See, eg, *Occupational Health and Safety Act* (Vic) (2004), Division 9, ss 110-120, which outlines powers to issue notices. Note that during the investigation, the alleged offender may remain in the workplace.

[49] Each piece of OH&S legislation has a differing penalty provision. For example under the *Occupational Health and Safety Act 2004* (Vic), s 21(1), an employer who breaches their duty to an employee is liable for 1,800 penalty units (natural person) or 1,900 penalty units (body corporate). See also under the *Occupational Health and Safety Act 2000* (NSW) that an employer is liable for 7,500 penalty units (previous offending corporation) or 5,000 penalty units (not previously offending corporation) or 750 penalty units (previously offending individual) or 500 penalty units (not previously offending individual). Prosecution may be becoming more prevalent: see Neil Cunningham, 'Prosecution for OHS Offences: Deterrent or Disincentive?' (2007) 29 *Sydney Law Review* 359.

[50] Breen Creighton and Andrew Stewart, above n 29, 264.

[51] For example, the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees can hear OH&S matters under the Commonwealth regime while s 105 of the *Occupational Health and Safety Act 2000* (NSW) provides that proceedings under that Act are to be brought before either the IR Commission (in Court session) or a local Court.

[52] Bruce Arnold, above n 18.

[53] See, eg, *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Workers Compensation Act 1951* (ACT); *Workers Compensation Act 1987* (NSW); *Workplace Injury Management and Workers Compensation Act 1998* (NSW); *Workers Rehabilitation and Compensation Act 1986* (NT); *Workers Compensation and Rehabilitation Act 2003* (Qld); *Workers Rehabilitation and Compensation Act 1986* (SA); *Workers Compensation and Injury*

within the context of their employment, employers may also be liable for aggravation of pre-existing conditions if the worker can show a connection to the employment as a reason for aggravation.[54]

In terms of the procedure for obtaining compensation, an employee, employer or third party can notify the relevant scheme agent of the injury.[55] From here, the scheme agent will respond, notifying the employee whether they are entitled to receive compensation. If they are not, the employee can generally dispute that decision with the scheme agent. If this does not resolve the matter, the disputes can be reviewed in a court or tribunal.[56]

Successful compensation usually results in reimbursement for medical expenses and a degree of income replacement during the time period that the victim is unable to work.[57] Where a disease or injury complained of reaches a prescribed level of seriousness, action under the common law may also be possible, but will be capped in some way.[58]

E Industrial relations disputes – unfair dismissal

Victims of bullying who have been 'unfairly' dismissed or felt they had no choice but to leave the employment (constructive dismissal) may choose to seek either reinstatement or compensation in lieu of reinstatement under Industrial Relations (IR) laws.[59] The application of these laws can be quite confusing. Employees must determine if they fit the requirements to rely on the *Fair Work Act 2009* (Cth) (FWA), or whether they need to rely on their respective State's legislation.[60] Under both federal and State regimes, the victims' applications are considered by a specialist body.[61] Applicants must apply within the amount of time specified by the specific legislation. Under the FWA, that period is 14 days.[62] Most States and Territories cut off applications after 21 days,[63] although the time period allowed in Western Australia is longer—28 days.[64]

Management Act 1981 (WA); *Accident Compensation Act 1985* (Vic); *Workers Rehabilitation and Compensation Act 1988* (Tas).

[54] See, eg, *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 5A(1)(c); *Workers Compensation and Rehabilitation Act 2003* (QLD), s 32(3)(b) etc.

[55] See, eg, *Step by Step Claims Process* (2010) WorkCover New South Wales <http://www.workcover.nsw.gov.au/INJURIESCLAIMS/MAKINGACLAIM/Pages/Stepbystepclaimsprocess.aspx>.

[56] See, eg, Queensland Industrial Relations Commission (for reviews from Q-Comp); Administrative Appeals Tribunal (for reviews of decisions of Comcare) etc. Also see County Court of Victoria in *de Petro v International Airlines Services Pty Ltd* [2009] VCC 1478, decided under the *Accident Compensation Act 1985* (Vic).

[57] See, eg, *Benefits and Entitlements* (2010) WorkCover New South Wales <http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/default.aspx>.

[58] South Australia and the Northern Territory have abolished the right to seek common law compensation for employer-employee disputes.

[59] See, eg, *Fair Work Act 2009* (Cth), Ch 3, Pt 2-3; *Industrial Relations Act 1996* (NSW), Ch 2, Pt 6; *Industrial Relations Act 1999* (Qld), Ch 3; *Fair Work Act 1994* (SA) Ch 3, Pt 6; *Industrial Relations Act 1979* (WA), ss 23A, 29, 29AA; *Industrial Relations Act 1984* (Tas), ss 29-31.

[60] *Guide – Unfair Dismissal* (2011) Fair Work Australia <http://www.fwa.gov.au/index.cfm?pagename=resourcefactsunfair#topofpage>.

[61] This is Fair Work Australia under the *Fair Work Act 2009* (Cth), and an Industrial Relation Commission or equivalent under state and Territory regimes.

[62] *Fair Work Act 2009* (Cth), s 394(2)(a).

[63] See, eg, *Industrial Relations Act 1996* (NSW), s 85(1); *Industrial Relations Act 1999* (Qld), s 74(2) etc.

[64] *Industrial Relations Act 1979* (WA), s 29(2).

Applicants may also be limited by certain eligibility criteria, depending on the particular legislation that they rely upon. For example, s 383 of the FWA provides that an employee must have served a minimum employment period to apply. The *Fair Work Regulations* also state that the worker must be covered by a modern award, or enterprise agreement, or the sum of the employee's annual rate of earnings must be less than the high-income threshold.[65] Particular types of employees may also be excluded from use of this remedy: casual employees who are not employed on a regular systematic basis,[66] transferred employees,[67] or short term or probationary employees.[68]

Generally, the relevant body will attempt to resolve the matter by conciliation before it arbitrates the matter.[69] The test for deciding whether someone has been unfairly dismissed is a determination of whether the dismissal was 'harsh, unjust or unreasonable.'[70]

F Criminal law (particularly for assault)

Where a bully's conduct constitutes a criminal offence, such as an assault,[71] the victim may notify police. If the matter is prosecuted, summary offences will be heard in the Magistrates Court of the respective jurisdiction, whereas indictable offences will generally be heard in the District/County Court or Supreme Court after a committal hearing.

A bully may be found guilty of an offence and punished in a way considered appropriate by the court with respect to that jurisdiction's sentencing procedures.[72] Possible punishments may involve incarceration.

Criminal law is rarely relied upon to remedy assaults in the context of workplace bullying, as evidenced both by the lack of criminal law cases in our sample and by the perceived need for the *Crimes Act 1958* (Vic) to be amended recently.[73] Workplace and cyber bullying are now included in the Victorian *Crimes Act 1958*, with the prospect of expanding the definition of stalking and broadening the intention to include self-harm.[74]

---

[65] See *Fair Work Regulations 2009* (Cth), r 3.05.
[66] See, eg, *Fair Work Act 2009* (Cth), s 384(2)(a).
[67] See, eg, Ibid, s 384(2)(b).
[68] See, eg, *Industrial Relations Act 1999* (Qld), s 72.
[69] Breen Creighton and Andrew Stewart, above n 29, 306.
[70] See, eg, *Fair Work Act 2009* (Cth), s 385; *Industrial Relations Act 1996* (NSW), s 83(1A)(a).
[71] See, eg, the *Criminal Code 1899* (Qld), s 245(1), which defines assault as: 'A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an assault.'
[72] See, eg, *Crimes (Sentencing) Procedures Act 1999* (NSW); *Criminal Law (Sentencing Act) 1988* (SA) etc.
[73] The Crimes Amendment (Bullying) Bill 2011 (Vic) was recently assented to and amended section, s 21A of the *Crimes Act 1958* (Vic). The offence of stalking now applies to situations of serious bullying and provides for a maximum sentence of 10 years.
[74] See Explanatory Memorandum, Crimes Amendment (Bullying) Bill 2011 (Vic).

IV ABOUT THE BULLYING: WHO ENDS UP IN THE COURT OR TRIBUNAL?

A Gender

In the Victorian Public Sector study, 23% of females reported having experienced bullying, compared to 18% of men.[75] The Drake International survey mentioned earlier found that males and females were 'almost equally at fault as the bully or as the target of the behaviour.'[76] Interestingly, though, in our sample of legal cases, a higher proportion of the complainants were female (65%), and the bully was a woman in only three out of the 21 matters. Of additional interest, Table 1 shows that the cases most likely to be upheld consist of a male being bullied by a male or males. No one bullied *by* a woman had her complaint upheld.

Table 1: Gender of the Victim/Bully and Outcome

Sex of parties known	Upheld (n = 9)	Dismissed (n = 11)
Male bullied by a male (n = 7)	5	2
Female bullied by a male (n = 10)	4	6
Female bullied by a female (n = 2)	-	2
Female bullied by male and female (n = 1)	-	1

One variable that may be influencing the outcome is the number of male bullies in the matter.[77] In three of the five upheld male bully/male victim situations, there was more than one bully. For instance, in one situation, a 16-year-old boy was bullied by a group of five male employees.[78] In another, three men in higher positions bullied an apprentice.[79] And, in *Ferguson*, the victim was bullied by two men who were both in higher positions than him. [80]

One of the successful female victims (discrimination path) was also bullied by two males: this was short-term bullying in a butcher shop.[81] In that matter, the incidents included sexually harassing behaviour, such as the bullies saying derogatory things about other women and putting pigs' tails in their trousers to imitate a penis; verbal abuse, and an altercation involving physical contact.

The female complainants who were unsuccessful had not experienced the extreme physical abuse that was seen as a characteristic in the male victims' disputes which were upheld. For instance, three torts cases that were unsuccessful on appeal involved female victims and non-physical bullying behaviours. In *Bau*, the target was a woman employed in a police special projects unit. She alleged that an air hose was shot up her dress.[82] She also experienced

[75] Victorian State Service Authority, above n 1, 27.
[76] Drake International, above n 2.
[77] Note that in one of the two male/male cases that were dismissed, there were also two bullies: *Domenico Cascio and the Trustee for Elsa Trust trading as Anywhere Computer Accessories* [2009] NSWIRComm 1096. However in that case, there had been no physical abuse. Alleged behaviours included a phone call to the victim's father about him being a trouble-maker and a verbal altercation between the victim and a member of managerial staff.
[78] *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317.
[79] *Blenner-Hassett v Murray Goulburn Co-Operative Co. Ltd. & Ors* [1999] VCC 6.
[80] *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184. (13 March 2009)
[81] *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914.
[82] *Bau v State of Victoria* [2006] VCC 1779; *Bau v State of Victoria* [2009] VSCA 107.

comments that she or any other employee could leave the workplace if they didn't like the bullies' conduct, verbal abuse and having to listen to the men bragging about oral sex on the phone and making inappropriate comments/jokes. Another unsuccessful matter that went to appeal was heard in first instance in the Victorian County Court.[83] That case involved a female senior account/event manager. A male supervisor wrongly accused her of misconduct and violence towards him and taking unauthorised breaks (ie it appeared that the woman was set up in numerous ways). The bully sent threatening emails to the victim too. In addition, she witnessed the bully causing distress to co-workers. The third negligence claim by a female victim that failed (despite her reporting quickly and having expert evidence) included allegations of verbal slander, aggressiveness and a general unwillingness to co-operate.[84]

B Age

Our sample shows that targets can be any age ranging from 16 to 61. However, as Table 2 highlights, there may be a correlation between youth and success with a legal remedy: all victims of bullying aged 18 or younger had their complaints upheld.

Table 2: Age of the Victim and Outcome

Age of the victim known	Upheld (n = 6)	Dismissed (n = 6)
Victim 18 and younger at the onset of bullying (n = 3)	3	-
Victim older than 18 (n = 9)	3	6

C Type of Work

Bullying takes place in a broad spectrum of workplaces – from butcher shops to law firms. However, only 13% of those employed as professionals were successful in court or tribunal, in comparison with the majority of blue collar, retail or other employee types (see Table 3). This may be related to the type of bullying that occurs in the different sorts of workplaces (discussed further next), with the most brutal behaviour occurring in manual labour environments.

Table 3: Type of Workplace and Outcome

Type of employee	Upheld (n =10)	Dismissed (n =11)
Professional (n =8)	1	7
Blue collar (n =6)	4	3
Retail (n =2)	2	0
Other[85] (n =5)	3	1

One example of such brutality was a case in which a 16-year-old male factory apprentice was bullied by a group of males for a half hour. The torturous events included being wrapped in plastic wrap, fastened to a trolley, spun around, and having sawdust and wood glue put in his mouth, shoes and clothing.[86]

[83] *Turner v Victorian Arts Centre Trust* [2009] VSCA 224.
[84] *Pecenka v Minister for Health* [2010] WADC 163.
[85] These include security, bowling club and hospital workers.
[86] *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317.

D Type of bullying

Most of the cases in our sample involved a variety of bullying behaviours. Three quarters of complainants who had been physically abused (eight of the 21) were successful. We found that usually direct or indirect assaults on a person's body were accompanied by other types of bullying, such as intimidation and verbal abuse. The former comprised tactics such as raising one's voice, using physical force on an object near the victim, threatening to terminate the victim's employment, bullying other people in front of the target, giving the victim meaningless tasks or tasks that were destined to fail and humiliating the victim. In these cases, verbal abuse included harsh, derogatory and aggressive use of wording expressed verbally, or through electronic means, to the victim, including things said about someone close to the victim.

An example of these multiple manifestations of bullying took place in *Naidu's* case.[87] The physical assault in the matter (touching and squeezing the victim's genitals) had been preceded by the bully saying, 'I will do you' and then punching a hole in a wall. On a daily basis the target was called names such as 'cocoanut [sic] head, monkey face, only a black man, poofter' not only in private conversation but in the presence of contractors, security personnel and common staff too. Other behaviours that do not fit into the categories of intimidation, verbal abuse and physical abuse also took place. For instance, the target was made to start work at 6.30 am and finish at midnight or later six days a week, and sometimes seven days, for eighteen months whilst being paid only for eight hours a day in a five day week. He was also pressured to behave in certain ways such as being required to telephone his boss if he wanted to go to the toilet.

In another example of physical assault (*Blenner-Hasset*), the victim's clothes were forcibly removed and grease was applied to his genitals.[88] Additionally, he was hung from a safety harness and paint was put in his hair. He was put into a 44-gallon drum and rolled around the workshop. Pinned with his overalls in a vice, he was also intimidated and threatened that glue would be put up his anus if he did not bring cake into work. He also witnessed a work experience employee being hung by a harness with a fire lit under that employee. The young man, who was aged between 17 and 21 over the four year period of bullying, was also told that he would be physically assaulted if he told anyone about the incidents.

Finally, in *Ferguson*, physical abuse included tossing a full cup of hot black tea onto the target, burning him, throwing plastic tables and chairs at him and grabbing his shirt and attempting to push him.[89] As with the other examples of physical assaults, this workplace environment was redolent of other types of bullying: setting the victim up for failure by giving him the wrong machine to work on and then making out he was responsible for the mix-up; humiliating him in front of other employees in regards to his speeding offence displayed in a newspaper; and telling him he was an incompetent worker and then smashing his tools on the ground in front of him. He was verbally abused too, such as being called a terrorist due to his dark features.

[87] *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618.
[88] *Blenner-Hassett v Murray Goulburn Co-Operative Co Ltd & Ors* [1999] VCC 6.
[89] *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184.

E Length of the bullying

As it is clear from the incidents just described and from the accepted definitions of what constitutes bullying conduct, bullying is not commonly a one-off incident but often takes place over a substantial period of time. Thirteen of 21 of the cases in our sample occurred for more than three months. Table 4 indicates what we would predict from the cases just described, such as the *Naidu* matter, which extended for five years:[90] long-term bullying complaints (three months and longer) are more likely to be upheld—62% of the long-term bullying compared to only one quarter of the short-term matters—although it should be noted that one of the successful short-term matters, discussed earlier, consisted of a single instance of intense brutality lasting 30 minutes.[91]

Table 4: Duration of Bullying and Outcome

	Upheld (n =10)	**Dismissed (n =11)**
Short term bullying (n = 8)	2	6
Long term bullying (n = 13)	8	5

Cranston v Consolidated Meat Group is an example of a short-term bullying complaint. The alleged incident was a one-off heated altercation that failed in a negligence and trespass to the person (assault) suit. It involved a man waving a butcher knife aggressively and being verbally abusive to a female victim in the butcher shop where they both worked.[92]

F Reporting[93]

Does reporting quickly make a victim seem more credible to decision-makers? Interestingly our findings are somewhat counter-intuitive, with half of matters in which the victim reported within a week being upheld in contrast to two thirds of those who either did not disclose or did so more than a week after the incident. When we look at the facts in a few of the upheld cases that had delayed or no reporting though, this finding becomes more comprehensible.

For instance, in *W v Abrob*, the victim, an 18-year-old retail employee, had no one to complain to other than the male bully, who was the boss and the only employee senior to her.[94] She did not complain formally until some seven months after the bullying had started. This was done verbally in a meeting with her employer/bully and another member of staff. In this matter, the bullying included unwanted touching, physical assault – punching the victim in the upper right leg – and verbal abuse.

In another successful (discrimination) case, in which the target did not report, the person who was responsible for hearing complaints about behaviour such as bullying was also one of the bullies. Accordingly, the victim, in his affidavit, said:

> How can you say something to a person saying that I feel bullied when he was the bloke giving me the – the bullying and throwing stuff at me and all that sort of stuff, so how – you don't win so what's the use of saying that, you've just got to wear it and keep going.[95]

[90] *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618.
[91] *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317.
[92] *Cranston v Consolidated Meat Group Pty Ltd & Anor* [2008] QSC 41.
[93] We are defining 'reported' as an informal or formal complaint to someone in an authority position.
[94] *W v Abrob Pty Ltd t/a Schoonens' Computer Services & Simon Schoonens* [1996] HREOCA 11.
[95] *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184.

The victim in the *Blenner-Hasset* matter did not report the bullying until 14 years after the first incident; this was about ten years from the last incident and also a decade since he had left that workplace. Notwithstanding this delay, the complaint was upheld, perhaps due to the youth of the victim at the time, the brutal nature of the four-year-long bullying described above and the medical evidence of on-going trauma.[96]

If the behaviour is common knowledge, according to the decisions in two cases, there need not be a formal reporting. Adams J in the *Naidu* matter found that regardless of not detailing the specifics of the bullying incidents, merely reporting that the bully/supervisor was 'demanding' on numerous occasions (coupled with the common knowledge that the other employees in the workplace had that the bully/supervisor was demanding) was enough to have warranted investigation.[97] Therefore, without such investigation, the employer of the victim effectively breached their duty of care in negligence to take reasonable measures to eradicate bullying.[98]And, in the *Barton* unfair dismissal case involving a female legal secretary being verbally abused for about one year by male lawyers/partners, most employees were already aware of the bullying in the workplace. Although it was some three months before a meeting was held and the complaints were raised, her complaint was upheld.[99]

V ABOUT THE LEGAL PATHWAYS

Table 5 shows from our sample of relevant matters which legal paths were pursued and their outcomes.

Table 5: Pathway and Outcome of Complaint

	Upheld (n = 10)	**Dismissed (n =11)**
Discrimination (n = 5)	2	3
OH&S (n = 1)	1	-
Workers compensation (n = 3)	-	3
Industrial relations (n = 5)	4	1
Torts law[100] (n = 7)	3	4[101]

It appears that the complaints were more likely to be upheld in the OH&S (100%) and Industrial Relations (80%) pathways. We note, though, that one of the cases in the latter category was an appeal (*Fary*).[102] In this case, a male diesel mechanic was bullied for ten months. The bullying included tampering with or stealing the victim's belonging and pay-sheets being altered. The matter was reported quickly but there were no expert witnesses used. The victim had been found at first instance not to have been terminated for a harsh,

[96] *Blenner-Hassett v Murray Goulburn Co-Operative Co Ltd & Ors* [1999] VCC 6.
[97] *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618, 180-182.
[98] Ibid.
[99] *Barton v Baker Johnson Lawyers* [2003] QIRComm 349; 173 QGIG 867.
[100] Four of the tort matters also ran in contract law: *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618, which was successful for both, and the three unsuccessful cases: *Bau v State of Victoria* [2009] VSCA 107; *Turner v Victorian Arts Centre Trust* [2009] VSCA 224; *Pecenka v Minister for Health* [2010] WADC 163.
[101] The victim pursued action in tort for both negligence and trespass to the person (assault) in *Cranston v. Consolidated Meat Group Pty Ltd & Anor* [2008] QSC 41.
[102] *Fary v Clements Techforce Pty Ltd* [2002] SAIRComm 7.

unjust or unreasonable reason. However, this decision was quashed on appeal, and then in a re-hearing the result was reversed.[103]

The high amounts of damages awarded in the successful torts matters far exceed the remedies in the other pathways. In *Naidu,*[104] almost three and a half million dollars was ordered to be paid by the two defendants—the Group 4 Securitas Pty Ltd and News Limited. The complainant in *Bailey* received $507,550, which was made up of loss of earning capacity $117,000, future loss of earning capacity $334,305, super, tax and costs.[105] And, in *Blenner-Hasset,* the complainant was awarded $350,000.00 which included $150,000 in general damages, damages for pain, suffering and the loss of enjoyment of life.[106]

Significant damages can also be awarded for non-physical abuse if a psychiatric condition has resulted that has been shown to prevent the complainant from being capable of 'remunerative employment because of … disabling and ongoing psychiatric problems.'[107]

If one pursues the discrimination path, the damages awarded are generally significantly lower. This correlates with what has been found in research on sexual harassment remedies.[108] For instance, in the *W v Abrob* matter, the respondents were ordered to pay $22,599, comprising general damages of $12,000, loss of wages of $7,302.70, interest on loss of wages of $876.32, $420 for future treatment and $2,000 for loss of income-earning capacity. The victim in *Styles* could not recover for the loss of wages (past or future) since the retrenchment itself did not breach the *Equal Opportunity Act 1995* (Vic).[109] She did, however, receive $8,000 by way of compensation for embarrassment, humiliation and stress and it was ordered that a written apology in a form and at a time to be agreed between the parties would be required of the respondents.

Industrial Relations Commissioners may order reinstatement or compensation for lost wages. Examples from the sample include: in *Paul Baker* the amount awarded was equal to 13.2 weeks pay plus 9% ($13,283.00);[110] in *Barton* the compensation was equivalent to six months' wages based on the salary the applicant received immediately prior to the dismissal; and in the *Fary* appeal, four weeks pay was ordered to be paid by the respondent to the applicant as compensation. [111]

In the OH&S matter, *Inspector Gregory Maddaford*, the company was convicted and fined $24,000. Additionally, the directors were personally convicted and fined $1,000 each. WorkCover appealed against the fines of the two directors; these were increased to $9000 and $12000.[112] Other employees in that case were convicted and fined or had to pay costs since:

> what started out as a simple episode of bullying got out of control leading to a serious physical threat to Doyle's health and safety … In those circumstances, there is a need for this Court to

[103] Ibid; *Fary v Jctf Pty Ltd Formerly Trading As Clements Techforce* [2003] SAIRComm 24.
[104] Naidu v Group 4 Securitas Pty Ltd and Anor [2006] NSWSC 144.
[105] *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284, 20: the plaintiff was assisted by having kept diaries 'corroborative of abusive behaviour …of an intimidatory, harassing and bullying nature'.
[106] Blenner -Hassett v Murray Goulburn Co-Operative Co. Ltd. & Ors [1999] VCC 6.
[107] *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284, 71.
[108] Patricia Easteal and Skye Saunders 'Interpreting Vicarious Liability with a Broad Brush in Sexual Harassment Cases' (2008) 33(2) *Alternative Law Journal* 75, 108.
[109] *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914.
[110] *Paul Baker v Australian Guarding Services Pty Ltd* [2007] AIRC 543.
[111] *Fary v Clements Techforce Pty Ltd (Appeal)* [2002] SAIRComm 56.
[112] *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317.

> impose sentences which compel attention to occupational health and safety. Accordingly, issues of general deterrence are significant in the determination of penalty in the present matter.[113]

A Tribunal/Court

The location of the hearing may depend upon both the pathway and the jurisdiction. For example, as mentioned earlier, a discrimination matter heard under the Commonwealth legislation will be heard in Federal Court or Federal Magistrates Court. Table 6 shows that 36% of court cases were successful for the bullying victim, compared to 60% of the matters that took place in a commission or tribunal.

Table 6: Venue and Outcome

	Upheld (n = 10)	**Dismissed (n = 11)**
Court (n = 11)	4	7
Commission/Tribunal (n = 10)	6	4

One might theorise that this is due to the latter not usually being bound by the rules of evidence. Accordingly, in *Healthscope*, a workers compensation matter, which resulted in a dismissal, the Commissioner described the Tribunal as 'an informal jurisdiction in which parties are not obliged to provide pleadings which articulate and confine the issues.'[114] In *Ferguson*, a court case, the judge noted that two supporting affidavits were led by the plaintiff, a lot of the content of which was inadmissible due to high levels of hearsay.[115] On the other hand, when hearsay evidence is allowed in the tribunal context, it may work against the side leading it, such as in the *Paul Baker* matter, where it was deemed to make the respondent's account less credible, and thus the victim's evidence was favoured:

> It is worthy of note at this point that there is a jungle of hearsay in the evidence of the witnesses for the respondent concerning what is in issue …[116]

In practice however, are there actual differences in the *application* of the rules of evidence? It has been observed that:

> The absence of formality and the technical requirements of the rules of evidence does not displace due process, natural justice or procedural fairness … In a Tribunal, evidence may be received in a form which would not be permitted in accordance with the rules of evidence. However, the opposing parties will always be given the opportunity to test the evidence if it is reasonably challenged. Broadly speaking, procedural fairness requires Tribunals to do what is fair in the circumstances of each case. [117]

Accordingly, the Commissioner in *Styles* described the relationship between the Victoria Civil and Administrative Tribunal (VCAT) and the rules of evidence as follows:

> Section 98 of the VCAT Act provides that the Tribunal is not bound by the rules of evidence although it is bound by the rules of natural justice and may inform itself as it thinks fit. The Tribunal, however, can determine that it is bound by the rules of evidence. But to say that the Tribunal considered itself not bound by the rules of evidence does not mean that it cannot use those rules as a guide. Indeed, it frequently does so. [118]

---

[113] Ibid 14, 81.
[114] *M v Healthscope (Tasmania) Pty Ltd* [2007] TASWRCT 29, 31.
[115] *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184. Note that despite the Court's application of evidence rules in a way that reduced the strength of the plaintiff's case, the complaint was upheld.
[116] *Paul Baker v Australian Guarding Services Pty Ltd* [2007] AIRC 543, 57.
[117] The Hon Justice Garry Downes AM, 'Tribunals in Australia: Their Roles and Responsibilities' (2004) 84 *Reform* <http://www.aat.gov.au/SpeechesPapersAndResearch/SpeechesAndPapers/Downes/Tribunals.htm>.
[118] *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914, 28.

In that VCAT matter, the applicant had sought the use of two statutory declarations. The individuals who had made them could not be found for cross-examination. Even if required to abide by the rules of evidence in the *Evidence Act 1958* (Vic), the documents would still have been able to be used. However, discretion was exercised by the Deputy President not to not allow the documents in the proceedings since the Tribunal 'had no opportunity to judge the demeanour of the makers of the documents or to ask them questions' and other witnesses who were cross-examined gave evidence on the relevant issues anyway.[119]

B Expert evidence

Almost every complainant in the sample had corroborative evidence and about two thirds (for whom information was available) offered expert witness testimony or reports. These witnesses do not appear to affect outcomes[120] but are seemingly used to document the degree of injury. In *Naidu*, as an example, a psychiatrist and two forensic psychiatrists were called to give evidence which supported that the complainant suffered from anxiety, depression and PTSD which were likely to have been caused by the bullying. The judge was more favourably inclined to these witnesses than to the medical practitioner who gave evidence in favour of the defendant since the latter's evidence detailed a strong and pervasive scepticism towards the truthfulness of the victim which was inconsistent with the need for an unbiased medical report.[121]

The victim in *Bailey* offered evidence from two general practitioners, a clinical psychologist, a consultant psychologist and two consultant psychiatrists; the respondent had three consultant psychiatrists.[122] This was run as a negligence suit. The 52-year-old female bar steward had experienced a range of bullying behaviour by her male supervisor, including verbal abuse, sexual harassment, threats to terminate employment, coercive behaviour and accusations of theft. The experts showed that the bullying had resulted in:

> a serious chronic generalised anxiety disorder, post-traumatic stress disorder and depression. She was unlikely to fully recover and, given her age, was unlikely to return to paid employment.[123]

A respondents' experts may contribute to a matter being dismissed. For instance, in *D'Urso*, the respondents used experts to show that the victim had failed to identify to the Court that her reactive depression was a pre-existing condition.[124] *Healthscope* (a workers compensation case in which the female orderly, after disagreeing with roster changes, was ostracised by other employees, verbally abused, laughed at and joked about) is another example of conflicting views of experts.[125] A consultant psychiatrist gave evidence on behalf of the employer indicating that other stressors had caused the depression, or at least made it worse. This practitioner testified that it could not be said that any one incident or stress had resulted in the worker's illness. Her evidence was favoured over that of two experts for the complainant who both concluded that the change of roster was the precipitator of the worker's condition and that the reason for the worker's depression was the harassment.

---

[119] Ibid, 30.
[120] In our sample, 55% of matters that used expert witnesses were upheld compared to half of those that did not.
[121] *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618.
[122] *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284.
[123] Bruce Arnold, above n 18.
[124] *D'Urso v Peninsula Support Service Inc (Anti-Discrimination)* [2005] VCAT 871.
[125] *M v Healthscope (Tasmania) Pty Ltd* [2007] TASWRCT 29.

There is not always a battle of the experts; in *Blenner-Hassett*, for instance, medical evidence on behalf of the (successful) plaintiff was given by four different medical practitioners but there was no medical evidence led on behalf of the defendant company.[126]

C Credibility of the Complainant

As one would expect, the norm is for complainants who are successful to be deemed credible. The decision-maker appears to look for a certain presentation:

> [The victim's] manner when giving this evidence was of someone recalling a vivid and distressing memory. I have no doubt she was telling the truth about what occurred to her in her employment.[127]

Dignity plus a display of (some) emotion seem to be desirable and perceived as believable:

> In my view the plaintiff was a most credible witness. Notwithstanding that the subject matter of the proceedings was undoubtedly greatly distressing to her she gave her evidence in a measured and dignified manner.[128]

Also predictably, the victim's evidence is often compared to that of the alleged bully. For instance, in *Styles*:

> I prefer Ms Styles' evidence. Ms Styles' evidence was given in a direct and, in my view, candid and unhesitating manner. [The respondent] Mr Howe appeared to me at times reluctant to give direct answers to questions.[129]

And, in *Baker*, Commissioner Lewin commented that the respondent's evidence included 'convoluted, contradictory and inconclusive hearsay …'[130] However, the Commissioner found that the victim's 'evidence was robust and resilient in these circumstances' and preferred the 'demeanour of Mr Baker.'[131]

There were exceptions, however, where the complaint was upheld but the plaintiff's testimony questioned:

> I found it difficult to accept the truthfulness of his account, so extraordinary did his descriptions of Mr Chaloner's conduct seem and so passive was the plaintiff's response. However, I have been persuaded that the substance of the plaintiff's evidence in this regard is not only truthful (in the sense that he believes it to be true) but also by and large reliable. At the same time, I think that it contains some exaggeration and repetition. This is an overall impression and does not fasten on any particular incident; it is a common sense evaluation of the plaintiff's evidence as a whole.[132]

Perhaps this judicial perception of exaggeration was offset by the witness' 'genuine and spontaneous' emotional responses. As the judge noted:

> Many of [the complainant's] … answers gave me the impression of unconscious reconstruction or even confabulation. At times, he appeared to "switch off", occasionally in mid-answer. Despite my initial scepticism, I came to accept that that he did indeed suffer from the "flashbacks" which, when asked to explain what he was feeling, he said he was experiencing.[133]

---

[126] *Blenner-Hassett v Murray Goulburn Co-Operative Co Ltd & Ors* [1999] VCC 6.
[127] *W v Abrob Pty Ltd t/a Schoonens' Computer Services & Simon Schoonens* [1996] HREOCA 11.
[128] *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284, 5.
[129] *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914, 33.
[130] *Paul Baker v Australian Guarding Services Pty Ltd* [2007] AIRC 543.
[131] Ibid, 143.
[132] *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618, 13.
[133] Ibid, 18.

And, in *Ferguson*, although finding in his favour, Her Honour Judge Millane was not impressed with the plaintiff's evidence. This was the case in which a male tradesman/fitter and turner experienced long-term bullying (listed earlier), such as insults, verbal abuse, physical abuse by male managerial staff:

> At times during the hearing, the plaintiff appeared confused and he had difficulty placing events and responding to some of the questions asked. There were inconsistencies in his evidence and discrepancies in the histories recorded by various doctors, to some of which cross-examination was directed, although not in a manner which satisfied me that the plaintiff generally recalled or accepted that in each case the doctor's record accurately summarised matters reported by him.[134]

In an unsuccessful matter, a complainant witnesses was described as 'doing herself a disservice in the manner in which she has presented her case' with evidence redolent of 'hyperbole, the hubris and the extravagant (and at times embarrassing) language'.[135] The testimony of another unsuccessful victim witness was found to be 'contradictory, confusing, evasive, non-responsive and at worst, disingenuous.'[136] Evasiveness was mentioned too in *Bau,*[137] while exaggeration was also raised in *Pacenka*:

> I conclude that Ms Pecenka is an emotional person who is susceptible to persons challenging her or criticising her. She is also inclined to give exaggerated descriptions of events and attach exaggerated importance to minor conflicts or challenges to her position.[138]

VI CONCLUSION: WHO WALKS (BEST) ALONG THE LEGAL PATHWAYS?

In examining legal remedies in bullying cases, our first observation is how few cases appear to go down the various legal pathways. This conclusion is of course qualified by the limits of the methodology. And, as we remarked earlier, it is possible that a high percent of bullying complaints are settled informally outside of court or tribunal.[139] More research would be needed to test that hypothesis.

If there are in fact relatively few victims pursuing a legal remedy, this is no doubt a reflection at least in part of the nature and the effects of the bullying behaviour. The people most vulnerable to violence are those without power. That powerlessness becomes exacerbated by bullying behaviours and is coupled with feelings of anxiety and low self-confidence[140] that are not conducive to disclosure. Plus, as noted above, there are many bullying behaviours that are covert and may become a normative part of the workplace environment. Neither the target nor the employer may see these behaviours as injurious to workplace safety. For these and many other reasons, including financial costs and fear and lack of knowledge about appropriate pathways, it would seem that reporting of bullying is uncommon although the actual incidence is high.

---

[134] *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184, 7.
[135] *Penhall-Jones v State of New South Wales (No.2)* [2006] FMCA 927, 115.
[136] *D'Urso v Peninsula Support Service Inc (Anti-Discrimination)* [2005] VCAT 871, 22.
[137] *Bau v State of Victoria* [2009] VSCA 107, 45.
[138] *Pecenka v Minister for Health* [2010] WADC 163, 229,
[139] For instance, we do know a public apology was given by the company and that there was a confidential settlement in one extremely brutal bullying case that included being hit in the head with a 30 cm piece of wood with such force that it induced vomiting, having his thumb and wrist broken in two places after using a machine which was not safe to use and having his pay docked for taking a fellow employee to hospital during work hours after a workplace accident. See Ben Schneiders, 'Public Apology to Bullying Victim', *The Age* (online), 9 September 2010 <http://www.theage.com.au/victoria/public-apology-to-bullying-victim-20100908-151bq.html>.
[140] Maarit Vartia 'Consequences of Workplace Bullying with Respect to the Well-being of its Targets and the Observers of Bullying,' (2001) 27(1) *Scand J Work Environ Health 2001*, 63.

Our second observation is that if one does report or if the bullying is identified by other employees or the employer, then there are a number of legal options available, but each has its limitations. There is no remedy for bullying *per se* and so victims need to use the facts of their matter to create a narrative arguing that bullying resulted in a breach of a particular piece of legislation or the common law. The ability to make the facts constitute an infringement of the particular law may be problematic. For instance, in a recent case, the complainant argued that bullying behaviour such as being threatened with dismissal, being shown no respect and being yelled at, being ignored, being punished for doing work she was directed to perform and not keeping a complaint confidential constituted sex discrimination, contrary to s 25(2)(c) of the *Anti-Discrimination Act 1977* (NSW).[141] The bullying behaviours alleged by her, even if made out, had to be shown by the applicant to have been made because she was a woman, and that a male comparator would not have been treated in the same way. This matter was dismissed, as were more than half (52%) of the matters in our AustLII case sample.

Thirdly, we have observed that there tends to be a certain type of person and particular contextual background factors that are seen as more serious, believable and meriting a legal remedy. In our sample the victim most likely to be successful in his legal case was a young male from a blue-collar workplace whose victimisation had included acts of physical assault perpetrated by more than one man in a senior position to him. This physical abuse was rarely a one-off incident but most often long-term: a part of an environment marked with intimidation, verbal abuse and other repeated and unreasonable controlling actions. Those targeted for three months or longer were more than twice as likely to have a favourable legal outcome.

Somewhat unexpectedly we did not find a correlation between rapid reporting and having the complaint upheld. If the complainants only had the bully to complain to or if there was knowledge within the workplace community about the bullying, the adjudicators appear to have been persuaded that, despite a delay in disclosure, the bullying allegations were still believable.

We also found that if the matter is heard in a tribunal, it was more likely to be upheld than if heard in a court. Our initial assessment was that this could be because the more informal jurisdictions are not in theory bound by rules of evidence. However, analysis of the judgment material showed that in actual practice there may be little difference in the interpretation and application of these rules. The greater likelihood of success in a tribunal could reflect the relatively high success rate for bullying victims who are arguing that they were unfairly dismissed. We must note though that the number of cases we examined is too small for a statistically significant effect to be detected and this indication of a difference would need to be assessed in a larger sample.

Aside from having the matter heard in a commission or tribunal, being the 'right' sex, age, social class, and experiencing the 'right' kind of bullying, what else have we found to correlate with success for the target? We have identified that adjudicators do seem to measure credibility in part from the demeanour and the presentation of the victim witness. This is not surprising since we know from research on sexual assault and sexual harassment matters that

[141] *Chacon v Rondo Building Services Pty Ltd* [2011] NSWADT 72.

there does seem to be a 'right' (calm and consistent) way for these victims to present evidence;[142] for instance, an 'even' presentation is good, but 'studied' responses perhaps not so much. And, 'one can be too "even"' and not emotional enough'.[143] However, one should not be so emotional that one's focus seems to be disturbed.[144] In the bullying matters that we examined, similarly, limited displays of distress ('genuine and spontaneous' emotion) appeared to be regarded as acceptable. 'Measured' and not 'exaggerated', 'dignified', 'direct' and not evasive, simple and not too confused, and of course internally 'consistent' were all mentioned as contributing to judicial perceptions of credibility.

Fourthly, we found (not surprisingly) that the type and amount of compensation differed significantly depending upon the legal avenue. Victims who follow the discrimination or IR paths will not 'win' as much of a monetary payout as the substantial damages awarded on occasion under torts and contracts law. The amount granted seems to be influenced by the expert witnesses' assessment of injury and the strength of their argument of a causal link of injuries with bullying behaviours. These damages ultimately then reflect the decision-makers' measurement of harm. It would seem that behaviour involving physical violence is normally seen as having more long-term traumatic effects than the trauma resulting from verbal abuse.[145] What about the price put on the ultimate physical injury—death? In the OH&S matter following the suicide of Brodie Panlock, the defendants were fined a total of $335,000.

This brings us to our fifth point: there are no laws specifically responding to bullying in the workplace and it seems that tragedies have to take place to act as catalysts for the enactment of more appropriate legal remedies. In Victoria, for instance, we have seen how Brodie's suicide contributed to the movement to amend the *Crimes Act* to recognise bullying behaviour. A workplace bully could now be sentenced to ten years of imprisonment. Another example from that Victoria: an independent review conducted in 2004 resulted in the *Occupational Health and Safety Act 2004* recognising the importance of psychological health at work.[146] The review was purportedly prompted at least in part by the suicides of other young workers and adolescents bullied in school.[147]

It is a sad commentary on Australian society that these few attempts at legislative reform had such tragic underpinnings. Workplace bullying does appear to be fairly commonplace. There is an urgent need for more research that unearths both the obstacles to reporting and to access to justice along the different legal pathways. More policy changes and law reform are sorely

---

[142] Denise Lievore 'Victim Credibility in Adult Sexual Assault Cases' (2004) *Trends and Issues in Crime and Criminal Justice No 288* (Canberra: Australian Institute of Criminology) 4.
[143] Patricia Easteal and Keziah Judd '"She Said, He Said" Credibility and Outcome in Sexual Harassment' (2008) 31(5) *Women's Studies International Forum*, 341.
[144] Ibid.
[145] This prioritising of physical over psychological injuries conforms with the substantial literature on domestic violence and the systemic institutional minimising of the long-term impact and harms of emotional violence. See, eg Jennifer Hickey and Stephen Cumines *Apprehended Violence Orders: A Survey of Magistrates*, Judicial Commission of New South Wales, (1999); Belinda Carpenter, Susan Curry and Rachael Field 'Domestic Violence: Views of Queensland Magistrates' (2001) 3 *Nuance*, 15.
[146] Chris Maxwell, *Occupational Health and Saftey Act Review* (2004) <http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/MaxwellReport_06Apr04/$File/MaxwellReport_06Apr04.pdf>.
[147] Stuart McGregor, apprentice chef; Angela McGregor, schoolyard bullying: Helen Weseterman, 'In Harms Way' *The Age* (online), 10 March 2010 <http://www.theage.com.au/small-business/in-harms-way-20100309-pvxm.html>.

needed but should be extracted from a solid foundation of empirical research. Our five conclusions are a start in that direction. These findings need to be built upon to provide a knowledge base for further legal reform.