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Bullying at Workplace: A Comparative Analysis

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Abstract

This is the final research paper, hereby submitted to comply with the requirements of Laws 533, Masters of Law (LLM) programme. This paper highlights the issue of workplace bullying, which is prevalent at workplaces across all the industries affecting the daily life of employees. If such an issue is not regulated efficiently, it leads to serious consequences, not only on the employee but also on the organisation. For this purpose, it draws attention to the current legislations in Australia and New Zealand to address the issue of workplace bullying as well as it contains my proposition to amend the statutes to include workplace bullying in order to help minimise the risks of workplace bullying.

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Subjects and Topics

- I. Anti-Bullying jurisdiction
 1. Fair Work Act 2009 (Australia)
- II. Health and safety laws
 1. Work Health and Safety Act 2011 (Australia)
 2. Health and Safety at Workplace Act 2015 (New Zealand)
- III. Employment Relations Act 2000 (New Zealand)

CONTENTS

Particulars	Page Nos
I. Introduction	4-6
II. Definition and nature	6-8
III. Australian Laws governing bullying	8-13
IV. Laws in Canada	13-14
V. New Zealand laws governing bullying	14-16
VI. General Challenges to bullying	16-17
VII. My Proposition	17-20
VIII. Conclusion	20
IX. Bibliography	21- 23

Bullying at Workplace: A Comparative Analysis

I. Introduction

Working provides a feeling of living a dignified life and moulds the personality of an individual. The workforce is most productive while working in its office space and this also helps to contribute to the GDP of the nation. Work plays a crucial role in the constitution of a society as the interdependence of citizens through their work, is one of the most important structural bonds of any community¹. Any element which disrupts this work environment can lead to serious consequences on the health and safety of people as well as on the organisation as a whole.

Workplace bullying is a very serious and widespread problem². Bullying has been defined in the Australian and New Zealand jurisdictions in its statutes, guiding principles and judgments; as well as by International Labour Organisation. Bullying is unreasonable behaviour which is repeated and which creates a threat to health and safety³. Bullying was defined by an Authority determination, *Isaac v Chief Executive of the Ministry of Social Development*, wherein it was stated that bullying is about behaviours that are repeated and carried out with a desire to exert dominance and an intention to cause fear and distress⁴. However, there was a need to drift away from the rigid definitions of bullying and accordingly, the simplest yet comprehensive definition of bullying was provided in Australia's Fair Work Act 2009 (FWA), to mean a repeated and unreasonable behaviour directed towards the worker which creates a risk to health and safety while the worker is carrying out work⁵.

Bullying literature has categorised workplace bullying into vertical, horizontal and institutional bullying. Vertical bullying refers to the act of bullying carried out by an individual who is at a higher rank to the person being bullied, typically a manager or supervisor. Horizontal bullying occurs across the same level of hierarchy for instance, bullying by a colleague. Institutional bullying amounts to unfair practices by the organisation for instance imposing unrealistic targets on the employees to be completed in a small timeframe. Bullying has also been classified into covert and overt behavioural patterns.

Bullying occurs in the form of physical or emotional harm as well as it can take place over online platforms which is very common nowadays, termed as cyber-bullying. Thus the core elements of bullying are frequency, duration, power imbalance and hostility.

However, bullying excludes reasonable management action taken in a reasonable manner against an employee. The reasonable management actions may include not offering

¹ Australian House of Representatives Standing Committee on Education and Employment Report, "Workplace Bullying "We just want it to stop", on 26 November 2012 at 2 (1.2).

² *FGH v RST [2018] NZEmpC 60 at [202]*.

³ Frank Darby and Andrew Scott-Howman, "Workplace Bullying" on September 2016.

⁴ *Isaac v Chief Executive of the Ministry of Social Development NZERA Auckland [2008] AA200/08 at [55]*.

⁵ 'Fair Work Act 2009', s 789FD

promotions, legitimate criticisms and transfers. It even excludes disagreements and workplace conflicts between employees.

Workplace bullying has serious personal, social and economic consequences on people which are well documented across various literatures thus proving to be a potential risk factor to the health and wellbeing of workers. The most serious consequence of bullying is that it destroys the employment relationship between the parties and they may or may not be able to resume the same employment relationship as it existed previously. The impact of bullying on individuals include low productivity, absenteeism from work, anxiety, work and personal life imbalance, low self-esteem, psychological illness, depression and suicides in extreme cases.

There are a number of risk factors which contribute to bullying including work constraints. Red Tape is one of such factors whereby a lot of bureaucracy and adherence to official rules and formalities can give rise to workplace bullying. The other crucial risk factor is the role ambiguity among workers. If there is lack of work clarity wherein the workers are not aware of the exact nature of the role to be performed, there are bound to be problems at the workplace⁶.

Bullying not only affects the individuals but also the organisation as a whole by reducing the morale of other employees working in the same place, decreased financial profits as well as causes harm to the goodwill of the organisation. In the Canadian case of *Boucher v Walmart Canada Corp*⁷, the employee was bullied by her store manager after she refused to falsify information on a temperature log which recorded temperatures of food stored in coolers. The impact on the employee was so serious that she had to quit the job and also suffered from stress related physical symptoms. The jury deciding the case held that the employee was constructively dismissed and awarded damages of \$200,000 on the Defendant. The Court of Appeal subsequently reduced the quantum of damages to \$25,000 on the employer⁸. Thus bullying has far reaching consequences on the employee as well as the employer.

This research paper will present a comparative analysis of the Australian and New Zealand laws addressing the issue of workplace bullying and will critique the present New Zealand laws on the subject. It argues that though bullying forms part of the health and safety laws in New Zealand, it needs to be addressed as a separate issue in the manner it has been dealt with in the Australian jurisdiction by means of strong legislation coupled with enforcement mechanisms.

To this end, Part II will introduce the concepts of bullying as defined by the respective countries jurisdictions and by an international organisation. Part III will discuss and analyse the Australian laws on workplace bullying and the judgments of Court addressing these issues along with the health and safety laws. Part IV addresses the laws at present in Canada addressing the issue of workplace bullying. Part V will then outline the present laws in New Zealand addressing bullying just as a part of the health and safety laws. Part VI will then critique the present laws and advocates for having a strong legislation in force under the Employment Relations Act 2000, by preferably including workplace bullying as a separate

⁶ SafeWork Australia, 'Building a bully-free workplace', (Podcast) <https://www.safeworkaustralia.gov.au/media-centre/building-bully-free-workplace>.

⁷ *Boucher v Walmart Canada Corp*, 120 O.R. (3d) 481 (ONCA).

⁸ Above n 7 at [116].

provision or alternatively under the definition of sexual harassment. The inclusion of this provision would eventually form a ground to seek personal grievance against the employer. At the end, it also recommends having good practice guidelines which need to form a part of the anti-bullying policies for every workplace and should be implemented strongly to avert and address the issues of workplace bullying.

II. Definitions and nature

Bullying has been defined in the Australian laws whereas in New Zealand, bullying forms part of the guiding workplace principles. The International Labour Organisation (ILO) has also defined and discussed workplace bullying.

A. Australia:

- i. Part 6-4B of the Fair Work Act 2009 (FWA) addresses the concerns of workplace bullying by defining ‘workers being bullied at work’ and by laying down the procedure for workers to approach the Fair Work Commission against such bullying practices. It defines bullying as ‘a repeated unreasonable behaviour directed towards the worker, or a group of workers of which the worker is a member and such behaviour creates a risk to health and safety while the worker is at work in a constitutionally covered business’⁹. This is a simple yet comprehensive definition of workplace bullying which involves the repeated and irrational behaviour engaged by an individual while the worker is at work and must not be reasonable management action taken in a reasonable manner.
- ii. In the case of *Amie Mac v Bank of Queensland Ltd*, the meaning of bullying conduct was examined further to mean that the assessment of behaviour is the objective for inferring that the individual behaved in an unreasonable manner¹⁰. There has to be a causal link between the behaviour and the risk to health and safety. It accounts for more than one occurrence of unreasonable behaviour but not necessarily the same specific behaviour.
- iii. A worker is ‘bullied at work’ if, he is working in a business organisation and hence the meaning of ‘at work’ is of prime significance to the operation of Part 6-4B of the FWA. In the case of *Bowker, Combe and Zwarts v DP World Melbourne Ltd and the Maritime Union of Australia*, the Full Bench Commission considered the meaning of the expression ‘while the worker is at work’ and held that ‘at work’ means performing work or engaging in employer authorised or permitted work place activities and is not limited to the confines of a physical workplace¹¹. It is not necessary for the individuals who engage in unreasonable behaviour to be ‘at work’. It also held that the meaning would depend on all the circumstances of the case and it is appropriate that the jurisprudence develops on a case by case basis¹².

⁹ ‘Fair Work Act 2009’, s 789FD

¹⁰ *Amie Mac v Bank of Queensland Ltd*, FWC [2015] 774.

¹¹ *Bowker, Combe and Zwarts v DP World Melbourne Ltd and the Maritime Union of Australia* [2014] FWCFB 9227 (Unreported, Ross P, Hatcher V-P, Deputy President Gostencnik, Commissioner Hampton and Commissioner Johns, 19 December 2014).

¹² Above n 11.

- iv. 'SafeWork' which is Australia's health and safety regulator, in its guiding principles has defined workplace bullying to mean repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety¹³.

B. International Labour Organisation (ILO)

The ILO has defined bullying as constituting offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees and such persistent negative attacks on their personal and professional performance are typically unpredictable, irrational and unfair¹⁴. The ILO has time and again given multiple interpretations to the definition of the term bullying and has analysed the nature and its impact on people¹⁵. It has recognised bullying as a major work related violence in its various conferences and surveys with the help of current statistics around the subject¹⁶. However, the ILO has not issued any strong guidelines to tackle the situation of bullying save and except the one provided under the Maritime Labour Convention, 2006 by enabling the seafarers to raise their grievances against the shipping companies¹⁷. However, these are restricted to the maritime jurisdiction and are not applicable to other areas of work. Thus it has reasonably failed to address the real situation bullying.

C. New Zealand:

- i. Bullying has been practically prevalent at workplaces across industries all over the world and particularly in New Zealand thus making it one of the major workplace problems. An academic survey showed that New Zealand had the second worst rate of workplace bullying among the developed world countries with one in five workers being afflicted to bullying¹⁸. Bullying in New Zealand was not only restricted to workplaces but has also been prevalent in schools with the majority of the children becoming victims to it¹⁹.
- ii. The legal profession is no exception to this menace, with the latest occurrence of sexual harassment and bullying incidence at Russell McVeagh law firm; wherein about five women employed as summer clerks were subject to sexual harassment on several occasions and thus became a case study for an independent analysis²⁰. The members of the High Court of New

¹³ "Guide For Preventing And Responding To Workplace Bullying", SafeWork Australia Guidelines at [1.1].

¹⁴ International Labour Organisation, 'Violence at Work: A major workplace problem', 1st Jan 2009 at Submission 59, [7].

¹⁵ Above n 14.

¹⁶ 19th International Conference of Labour Statisticians, 'Work-related violence and its integration into existing surveys', Geneva on 2-11 October 2013

¹⁷ ILO Guidelines, 'Guidance on Eliminating Shipboard Harassment and Bullying', <http://www.ics-shipping.org/docs/default-source/Other-documents/guidance-on-eliminating-shipboard-harassment-and-bullying.pdf?sfvrsn=4>.

¹⁸ Adele Redmond, 'New Zealand has world's second highest rate of workplace', on 27th Aug, 2016 online ed bullying <https://www.stuff.co.nz/business/better-business/83618177/New-Zealand-has-worlds-second-highest-rate-of-workplace-bullying>.

¹⁹ Vanessa A. Green, Susan Harcourt, Loreto Mattioni and Tessa Prior 'Bullying in New Zealand Schools: A Final Report', Victoria University of Wellington, April, 2013.

²⁰ Dame Margaret Bazley, 'Independent Review of Russell McVeagh' 5th June, 2018 online ed at 11.

Zealand, have however tried to tackle the situation of bullying in the judiciary by framing guidelines which are termed as ‘Guidelines for Judicial Conduct’²¹. However, these are just the practice guidelines issued by the judiciary for the members of the judiciary but have not yet been pronounced by the Court in any of its judgments.

- iii. New Zealand’s health and safety regulator, ‘WorkSafe’ in its guiding principles have defined bullying as ‘repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm’²². However, this is just a guideline to address workplace bullying but fails to form part of any statute and thus lacks any substantial means to enforce an action on breach of these guidelines.
- iv. Thus, there is neither any particular legislation at present in New Zealand which specifically addresses the situation of workplace bullying nor any means to seek recourse. Australia has however, attempted to deal efficiently with the problems of bullying by implementing a robust legislation which specifically addresses the issue and even provides for redress mechanism to adjudicate the cases for bullying.

III. Australian Laws governing bullying

A. FWA

1. Background to the anti-bullying jurisdiction

The House of Representatives Standing Committee on Education and Employment (‘Parliamentary Committee on Workplace Bullying’) had published its Report in 2012 in respect of workplace bullying in Australia²³. The authors of this report recommended that the government should implement measures that allow individuals who are targeted by workplace bullying, a right to recourse in order to seek remedies through an adjudicative process. The government responded to this report by giving jurisdiction to Fair Work Commission (FWC) which was established under the FWA to hear and determine applications against bullying, thereby providing a quick and effective remedy to individuals²⁴. The main purpose of this jurisdiction is to encourage early intervention by the authorities to stop bullying, to help people resume regular working relationships and to prevent any incidents of bullying at workplace in the future²⁵.

B. FWC

- i. FWC has been established under the FWA for adjudication of disputes at workplace²⁶. FWC is Australia’s national workplace relations quasi-judicial Tribunal, which functions in an open and fair manner. The FWC has been conferred the anti-bullying jurisdiction; which allows it to

²¹ ‘Guidelines for Judicial Conduct’, Practical Guidance to members of judiciary on March 2013.

²² ‘Preventing and Responding to Bullying at Work’, WorkSafe New Zealand Good Practice Guidelines

²³ House of Representatives Standing Committee on Education and Employment Report, ‘Workplace Bullying: We just want it to stop’ The Parliament of the Commonwealth of Australia on Oct 2012.

²⁴ Fair Work Act, 2009, s 789FA.

²⁵ Hon Bill Shorten, Commonwealth Parliamentary Debates, House of Representatives, 21st March 2013 at [2908].

²⁶ ‘Fair Work Act, 2009’, s 585.

hear applications from all the individuals on workplace bullying²⁷. Part 6-4B of the FWA provides for a procedure for adjudication of disputes by the FWC if the worker has bullied at work. Any worker who reasonably believes that he has been bullied at work can apply to the FWC for an order to stop bullying²⁸. However, applicants to anti-bullying proceedings are not entitled as a right to be represented by a lawyer and they are usually self-represented. If a worker wishes to be represented by a lawyer or a paid agent, permission needs to be sought from the FWC²⁹.

- ii. An Application to the FWC for any anti-bullying complaint is the speedy process of adjudication of disputes since the FWC has been given exclusive authority to adjudicate on the complaints of bullying. This would save a lot of court's time and the victim would not have to go through the whole legal procedure in order to seek redress.
- iii. Adjudication by FWC:

The FWC adopts a case by case approach in dealing with the anti-bullying applications and does not propose a straight jacket formula for settlement of disputes. Once an application is lodged, FWC may refer the dispute for mediation to be held in a confidential manner; wherein the parties try to resolve the disputes among themselves voluntarily. It may hold preliminary private conferences between parties as well as determinative conferences for the settlement of disputes. If all the above processes fail, the FWC would then conduct hearings on the applications in a quasi-judicial capacity during which evidence and submissions are tendered in a structured manner at which, the FWC pronounces its judgment on these applications and publishes it on the FWC website³⁰.

- iv. Scope of Orders:

The FWC has the power to grant anti-bullying orders it considers appropriate where it is satisfied that the applicant has been bullied at work and that there is a risk that the worker will continue to be bullied by an individual or group³¹.

The primary objective of the FWC is an early intervention into the matters and aims to resolve disputes at first instance. The orders passed are preventive in nature if the FWC is satisfied that there is a persistent risk to the health and safety of the individual. The scope of the orders passed by the FWC is narrow as it can neither pass an order imposing fine or penalty on the individual engaged in an unreasonable behaviour nor can it award any compensation to the victims. It also cannot pass any orders directing arrests of the guilty persons in prison. The kind of anti-bullying orders that can be passed by the FWC require people to stop any kind of unreasonable behaviour, requiring employer to establish proper standards of behaviour at workplace, review employer's workplace bullying policies, directing the employer to regularly monitor the behaviours bringing about a change in the working placements of people, extra

²⁷ Fair Work Act, 2009, Above n 24.

²⁸ Fair Work Act, 2009, s 789FC.

²⁹ Fair Work Act, 2009, s 596.

³⁰ Fair Work Commission, 'Anti-bullying' (Podcast), <https://www.fwc.gov.au/disputes-at-work/anti-bullying>.

³¹ Fair Work Act, 2009, s 789FF (1).

information, training and additional support required to be provided by the employer to the workers etc³².

- v. The aim of FWC is to focus on preventing further bullying and maintaining the workplace relations by implementing measures which the FWC considers are immediate behaviours of the individuals in order to address the situation³³. FWC even conducts a 'risk evaluating' process in order to identify the potential risks for the applicant. The matters pertaining to anti bullying jurisdiction can be resolved at any stage of proceedings with the help of the FWC if necessary. It strives to make on-going employment relationship safer for all the workers.
- vi. FWC does not conduct any investigation into the applications filed by the victims; it only hears the applications and adjudicates upon it by applying the principles of natural justice. While adjudicating upon disputes, it looks forward for the potential risks that are involved at any future point of time in the employment relationship between the parties and passes orders accordingly³⁴.
- vii. In the case of *Atkinson v Killarney Properties Pty Ltd*, the Full Bench Commission analysed the essential requirement of adjudicating bullying complaints which requires the FWC to be satisfied that, there must occur a potential risk to the applicant of being continued to be bullied at work by an individual or group of individuals³⁵. It requires consideration whether the applicant will be able to continue work with the relevant individual and whether there arises reasonable prospect of bullying occurring in the future. It also held that, it is not always appropriate for the FWC to dismiss an anti-bullying application, where an employee has been dismissed from employment since it needs to consider positively the prospects of reinstatement through other proceedings.
- viii. There are relatively low number of orders being passed by the FWC since most of the disputes get settled mid-way during the process as a result of the existing mechanisms in place set up by the FWC.

C. Effectiveness of FWC

The FWC has been quite effective in its working as it has resolved or helped to resolve a number of anti-bullying applications. The annual report released by FWC outlines the statistics of work performed by the FWC³⁶. Out of the total 695 finalised applications for an order to stop bullying, 188 applications were resolved during the course of proceedings, 151

³² Fair Work Commission, 'the anti-bullying jurisdiction of the Fair Work Commission - Part 1: the lecture' (Podcast)
<https://www.youtube.com/watch?v=m5dDDquG2yY&t=941s&list=PLmGoVTOii6BEnzEeLQkYzSoStYc2wH56d&index=10>.

³³ Fair Work Commission, 'Guide Anti-bullying jurisdiction', on 30 August 2018, Fair Work Commission, https://www.fwc.gov.au/documents/documents/factsheets/guide_antibullying.pdf.

³⁴ Above n 33.

³⁵ *Atkinson v Killarney Properties Pty Ltd*, FWCFB 6503 (2015)

³⁶ Fair Work Commission 2016–2017 Annual Report, 'Access To Justice', 21st September 2017
<file:///F:/Regulating%20Labour%20and%20Work/fwc-annual-report-2016-17.pdf> at 96

applications were withdrawn after a conference or hearing and before a decision of the FWC and 60 applications were finalised by a decision by the FWC³⁷. The fact of filing the application before the FWC in itself has helped resolve disputes. The remaining applications were either withdrawn early in the case management process or before the commencement of proceedings.

D. Priority to internal settlement of disputes

Reports of workplace bullying should be raised within the workplace, and reasonable attempts should be made to resolve the matter internally before referring to external agencies. Most external agencies encourage complainants to attempt to resolve the situation within the workplace through an informal or formal process (where available) prior to seeking their assistance.

WHS Regulators and the Fair Work Commission may be contacted where reasonable attempts to resolve a workplace bullying complaint through internal processes within the workplace have failed³⁸. The most appropriate agency will depend on the nature of the complaint and the desired outcome³⁹.

E. Health and safety laws

1. SafeWork Australia Act 2008

This statute creates a body called SafeWork Australia (SWA) to improve work health and safety outcomes and workers' compensation arrangements in Australia. In 2011, SWA developed a single set of WHS laws to be implemented across Australia known as 'model' laws; the aim of which was to provide all workers in Australia the same standards of health and safety irrespective of their type of employment or the place of employment. The Model WHS laws include the model WHS Act, the model WHS Regulations and the model Code of Practice. For the model WHS laws to become legally binding, the Commonwealth, states and territories must separately implement them as its own laws. In addition to this, it provides guidance materials for dealing with workplace bullying⁴⁰.

A brief analysis of the Model WHS laws is as follows:

a. Work Health and Safety Act, 2011 (WHS Act)

The primary aim of WHS Act is to provide for a framework to protect the health, safety and welfare of all workers at work by eliminating the risks arising out of the workplace and to provide mechanism for fair and effective representation to the workers to address and resolve health and safety issues⁴¹. For this purpose, the WHS Act sets out work health and safety

³⁷ Above n 36

³⁸ SafeWork, 'Guide For Preventing And Responding To Workplace Bullying', May 2016 at [25] <https://www.safeworkaustralia.gov.au/system/files/documents/1702/guide-preventing-responding-workplace-bullying.pdf>

³⁹ Above n 38

⁴⁰ SafeWork Australia, 'Dealing With Workplace Bullying - A Worker's Guide', May 2016 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/workers-guide-workplace-bullying.pdf>

⁴¹ Work Health and Safety Act 2011, s 3

duties for PCBUs, officers, unincorporated associations, government departments and public authorities including municipal governments, workers and other people at a workplace⁴². It is the obligation on the PCBU to protect the health and safety of workers and for doing so, the WHS Act has imposed a primary duty of care on the PCBUs to ensure the health and safety of all the workers engaged by the person and also whose work is influenced by the person while they are work as far as it reasonably possible⁴³.

The WHS Act provides for three tiered reckless conduct structure for breach of the health and safety duties and imposes penalties on the persons committing a breach of these duties⁴⁴. The maximum penalties are different depending on the category of the offence and whether the offender is an individual (e.g. a worker, or a PCBU), an officer or a body corporate⁴⁵.

b. WHS Regulations

The WHS Regulations specify the manner in which the duties under the WHS Act must be performed and prescribes procedural or administrative requirements to support the WHS Act. For instance the requirement of licences for carrying out specific activities and for the keeping of records⁴⁶.

c. Model Codes of Practice

Model Codes of Practice are in the form of practical guiding tools in order to achieve the standards of health and safety as required under the model WHS Act and Regulations⁴⁷.

d. Review of the model WHS Laws

In order to ensure that the WHS laws are operating effectively, a review was carried out by the Australian government and accordingly, SafeWork Australia was given the authority to examine and report on the scope and content of the model WHS laws. The review examined the working of the model WHS laws and determined whether it was able to achieve the objectives for which it was drafted or has it resulted in some unwarranted consequences⁴⁸. A majority view supported the model WHS laws by suggesting that the laws are working efficiently and have sunk in smoothly with some concerns over the length and complexity of the Regulations and Codes⁴⁹. A final review report on the subject is due in December 2018⁵⁰.

⁴² Work Health and Safety Act 2011, Part 2

⁴³ Work Health and Safety Act 2011, s 19

⁴⁴ Work Health and Safety Act 2011, s 30 to s 33 Division 5.

⁴⁵ Work Health and Safety Act 2011, Above n 44

⁴⁶ SafeWork Australia, 'Model Work Health and Safety Regulations', on 28th Nov 2016

<https://www.safeworkaustralia.gov.au/system/files/documents/1703/model-whs-regulations-28nov2016.pdf>.

⁴⁷ 'How to manage work health and safety risks, Code of Practice', SafeWork Australia,

https://www.safeworkaustralia.gov.au/system/files/documents/1809/code_of_practice_-_how_to_manage_work_health_and_safety_risks_1.pdf.

⁴⁸ SafeWork Australia, '2018 Review of the model WHS laws', <https://engage.swa.gov.au/review-consultation>

⁴⁹ Marie Boland, 'Public Consultation Summary', SafeWork Australia, 2018

<https://engage.swa.gov.au/review-consultation> at 1.

⁵⁰ '2018 Review of the model WHS laws', Above n 48.

2. South Australia (SA)

- a) In South Australia, workplace bullying fell within the scope of the health and safety laws. It was given a statutory recognition in the Occupational Health, Safety and Welfare Act 1986 (OHSW Act).
- b) A duty of care was imposed on the all employers to provide a safe working environment to its employees and similarly an employee must also take reasonable care to avoid adversely affecting the health or safety of any other person through an act or omission at work⁵¹.
- c) The OHSW Act allows SafeWork SA OHS inspectors to refer workplace bullying complaints to the Industrial Relations Commission of South Australia (the Commission) for conciliation or mediation where they have reason to believe that the matter is capable of resolution⁵². SafeWork SA is also able to prosecute an employer or an employee for a breach of the provisions of the OHSW Act.
- d) Redress mechanisms:

In South Australia, bullying disputes can be referred to the Commission for mediation or conciliation by an OHS inspector. Once referred, bullying matters are dealt with by way of mediation and conciliation offered by the Commission.

It is pertinent to note here that, the OHSW Act has now been repealed and replaced by the Work Health and Safety Act 2012. A reference was being drawn to this statute in order throw light on the effective mechanisms which existed in South Australia to govern the bullying complaints in collaboration with SafeWork SA and to support my arguments that the New Zealand legislation should take inspiration from the Australian laws in order to address the issue of workplace bullying.

IV. Laws in Canada

Legislations addressing the emerging workplace health and safety issues of bullying are rapidly developing in many countries to protect workers from bullying. Canada and nine European countries have enacted anti-bullying laws, including Sweden, France and Serbia⁵³. I will address the legislation in Canada for the limited scope of this paper.

Canada has addressed the issue of workplace bullying in 'Canada Occupational Health and Safety Regulations' which is a part of its health and safety laws. Part XX of the regulations provides for a workplace violence prevention policy wherein it is an obligation of the employer to provide a safe, healthy and violence-free work place and also to dedicate sufficient attention, time, and resources to address workplace violence including bullying⁵⁴. The employer can assesses the potential for work place violence using various factors and subsequently develops

⁵¹ Occupational Health Safety and Welfare Act 1986, s19
Occupational Health, Safety and Welfare Act 1986 s21.

⁵² Above n 51.

⁵³ Ellen Pinkos Cobb, 'Workplace Bullying: A Global Health and Safety Issue', 2012
<http://ilera2012.wharton.upenn.edu/RefereedPapers/CobbEllen.pdf> at 8

⁵⁴ 'Canada Occupational Health and Safety Regulations', s 20.3

and implements such systematic control mechanisms as appropriate within a period of 90 days from the date of the assessment of work place violence in order to minimize the risks at workplace⁵⁵.

These regulations ensure that potential risk of workplace bullying is identified, assessed and controlled effectively by the employer as a part of its health and safety duties.

V. New Zealand Laws:

A. Health and safety laws

1. Background to the health and safety laws

New Zealand has in the recent past carried out significant reforms in the Health and Safety laws by giving due importance to the health and safety of people at workplace. The triggering factor which led to these reforms was the coal mine explosion at Pike River which caused death of many workers working on the site. The Report of the Royal Commission on the Pike River Coal Mine Tragedy highlights the failure of the Health and Safety in Employment Act 1992 and bats for bringing a reform to the current health and safety laws⁵⁶.

The Independent Taskforce on workplace health and safety was set up to conduct an overall review of the health and safety laws and for this purpose considered the Australian model laws on work health and safety. It recommended the need for having a new legislation based on the Australian model laws and associated regulations by taking into consideration the distinctive New Zealand conditions; since the model laws are the most recent articulation of the Robens approach available to New Zealand⁵⁷. The Independent Taskforce also complimented the model WHS laws by suggesting that, Australia has been through an extensive modernisation process, and has drawn both Australian and international experience in order to develop these model Laws⁵⁸. On the basis of these recommendations, New Zealand government responded to the report by drafting a health and safety bill namely, 'Working safer: A blueprint for Health and Safety at Work 2013' based on the Australian model Work Health and Safety Law⁵⁹. This eventually led for the formation of new legislation in New Zealand.

2. Health and Safety at Workplace Act, 2015

- a. The Health and Safety at Work Act 2015 (HSWA) is New Zealand's workplace health and safety law. The primary aim of HSWA is to provide for a framework to protect the health, safety and welfare of all workers at work by eliminating the risks arising out of the workplace and to provide mechanism for fair and effective representation to the workers to address and resolve health and safety issues⁶⁰. For the purpose of minimising risks at workplaces, the HSWA has entrusted certain duties on PCBU, officers, workers themselves and several other

⁵⁵ 'Canada Occupational Health and Safety Regulations', s 20.6

⁵⁶ 'Royal Commission on the Pike River Coal Mine Tragedy' on 30th Oct 2012

⁵⁷ Robens Report, 'Report of the Committee on Safety and Health at Work chaired by Lord Roben', in 1972 at [129]

⁵⁸ 'The Report of the Independent Taskforce on Workplace Health & Safety 2013', in 2013

⁵⁹ 'Working safer: A blueprint for Health and Safety at Work 2013' on August 2013

<https://www.mbie.govt.nz/info-services/employment-skills/workplace-health-and-safety-reform/document-and-image-library/working-safer-key-documents/safety-first-blueprint.pdf>.

⁶⁰ Health and Safety at Work Act 2015, s 3.

persons which must be followed at any point of time to ensure the health and safety of the workers. HSWA has imposed a primary duty of care on the PCBUs to ensure the health and safety of all the workers engaged by the person and also whose work is influenced by the person while they are work as far as it reasonably possible⁶¹. PCBUs also owe a similar duty of care to others who are at risk from work carried out by the business or undertaking. WHS Act also imposes further duties on persons who are involved in the management and control of the workplace. The WHS Act has also imposed a duty on the workers to take reasonable care for their own health and safety and also of others who may be affected by their actions or omissions⁶².

- b. Under HSWA, an inspector can issue notices if he reasonably believes that the person has contravened or is likely to contravene any of the provisions of the Act or Regulations⁶³. The regulator may bring a civil proceeding in Court for contravening any of the duties⁶⁴.
- c. HSWA appoints WorkSafe as regulator to monitor and enforce compliance with health and safety laws which has framed guidelines for dealing with bullying. Provisions for breach of these guidelines are to approach the dispute resolution mechanism of the employer. However, there is an absence of formal adjudicating authority to enforce the breach of any of these guidelines.

3. WorkSafe NZ Act 2013

WorkSafe has been established as an entity under WorkSafe NZ Act 2013 to promote a balanced framework for securing the health and safety of workers at workplaces and to perform the role of an administrator under all the health and safety laws. WorkSafe is New Zealand's primary workplace health and safety regulator. WorkSafe supports businesses and workers dealing with workplace bullying concerns through its 'Good Practice Guidelines to preventing and responding to bullying at work guide' and 'Bullying prevention toolbox'. These guidelines are an update to the 2014 guidelines, 'Preventing and Responding to Workplace Bullying' due to the introduction of the HSWA. These guidelines act as a guide for PCBU's, by encouraging them to take preventive measures which would help minimise the risks of bullying at workplace.

B. Employment Relations Act 2000 (Employment Relations Act)

The Employment Relations Act makes provision for maintaining a duty of good faith among the persons entered into an employment relationship with each other⁶⁵. This duty implies that the persons entered into an employment relationship should behave with each other in a cordial manner and not to engage in an improper conduct. However, there is no provision in the Employment Relations Act defining workplace bullying.

⁶¹ Health and Safety at Work Act 2015, s 36.

⁶² Health and Safety at Work Act 2015, s 45.

⁶³ Health and Safety at Work Act 2015, Part 4 Subpart 1.

⁶⁴ Health and Safety at Work Act 2015, Part 4 Subpart 3.

⁶⁵ Employment Relations Act 2000', s4

Due to the absence of such specific provision addressing bullying under this statute, anti-bullying applications indirectly formed part of personal grievance which can be raised with the employer. For instance, under a claim of constructive dismissal, where the employee had no other option but to leave the workplace or for a claim of unjustified disadvantage⁶⁶. In the case of *FGH v RST*, the concept and legal framework around bullying was discussed at length by the Employment Court. The court held that, the Defendant had failed to initiate an independent investigation, in spite of repeated complaints and references to bullying and therefore the employee's claim for unjustified disadvantage was proved successfully⁶⁷.

This proves that the Employment Courts in New Zealand are capable to address the issue of workplace bullying, however in order to be governed more efficiently, it needs to be provided for separately under the Employment Relations Act.

Additionally, the procedure as laid down under this statute is a lengthy procedure as, after investigation if the employer holds the conduct of the other co-worker to be bullying' and takes any disciplinary action, it can be challenged before Employment Relations Authority (ERA) and dispute would thus continue to exist till it is being finally decided.

C. Ministry of Business, Innovation and Employment (MBIE)

The MBIE sets out general guidelines and duties for dealing with the problems of workplace bullying, harassment and discrimination and advocates for creating a bully free environment at workplace⁶⁸. It lays down the available options for the employees who feel that they have been bullied at workplace which includes handling the problems by themselves or dealing with the problem informally by involving a superior usually the manager to address the situation or to file a formal complaint with the employer. The employer has the duty to conduct an investigation on receiving a complaint of bullying from the person bullied or any other person and to take appropriate action against the person who has resorted to this behaviour.

However, this is just a generic process which has been laid down to deal with the bullying but lacks the necessary laws to adjudicate and resolve the problem efficiently.

VI. General challenges to bullying

There are a number of challenges for an effective implementation of anti-bullying jurisdiction, some of which are listed below:

- i. The major problem is of under reporting of cases, wherein if the problems of bullying are not reported to the respective authorities, it can never be addressed and settled efficiently. There are a number of reasons for not reporting the bullying incidents which include

⁶⁶ 'Employment Relations Act 2000', s 103(1)(a) and (b)

⁶⁷ *FGH v RST*, above n 2 at [278].

⁶⁸ MBIE, 'Creating a workplace free from bullying, harassment and discrimination', <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/general-process/>.

embarrassment, low self-esteem, fear of losing job and lack of trust in the administrators handling the bullying complaints⁶⁹.

- ii. Another important hindrance is providing evidence of bullying as it is quite challenging to prove charges of bullying, if sufficient evidence is not produced to the authorities by the applicant. The burden of proof for proving the charge of bullying falls on the applicant to justify constructive dismissal. In the case of *Managh & Associates and Café Down Under Ltd v Wellington*, the Court of Appeal held that the allegation needs to be proved at a relatively high standard in the case of sexual harassment and bullying⁷⁰. The instances of bullying sometimes are subtle, indirect and go unnoticed by other colleagues. The witness testimony may or may not be impartial. The victims also subjectively mischaracterise the bullying behaviour.
Thus, there is a need to drift away from the old concepts of 'burden of proof' and a need to adopt a comprehensive definition and procedure to adjudicate the problems of workplace bullying
- iii. Another challenge is to maintain the employer employee relationship between the parties during the pendency of proceedings before any court or tribunal. This is so because, the court loses its jurisdiction if the applicant is dismissed from work and would render the whole proceedings infructuous. In Australia, in the case of *Mitchell Shaw v ANZ Banking Group Limited*, it was held that stop bullying orders cannot be passed by the FWC if there is no reasonable prospect for the applicant to return to work at that workplace i.e. if the applicant has received notice of termination of employment and has not made an application to contest the termination⁷¹.
- iv. It is a new jurisdiction and hence case law needs to be developed around the subject. Given the remedies and legislative constraints on applications and remedies, it is clear that FWC might not cater to all cases of workplace bullying.
- v. Since the applicants to the anti-bullying proceedings are self-represented, they need to have some knowledge of legal procedures and be able to develop and present a case; even though the procedures before the FWC are more informal and less technical⁷².

VII. My proposition

A. Inadequacy of the present New Zealand laws to deal with bullying

As evident from the above analysis, laws in New Zealand at present, are inadequate to deal with workplace bullying neither in substance nor remedies and have failed to appreciate the insidious cases of bullying and its impact. This has resulted in the failure of law to protect the

⁶⁹ Rodney Worth and Joan Squelch, 'Stop the Bullying: The Anti-Bullying provisions in the Fair Work Act and Restoring the Employment Relationship' UNSW Law Journal Volume 38(3) at 1026.

⁷⁰ *Managh & Associates and Café Down Under Ltd v Wellington*, 1998 2 ERNZ 337 (CA).

⁷¹ '*Mitchell Shaw v ANZ Banking Group Limited*', [2014] FWC 3408.

⁷² 'Stop the Bullying: The Anti-Bullying provisions in the Fair Work Act and Restoring the Employment Relationship', Above n 69.

victims of bullying. Thus, the only option available to the victim is to resign and make a claim for constructive dismissal and in the meantime the bully might be ready to find another victim⁷³. Additionally, it is quite impossible to point out the exact timeline from which the victim was first subjected to bullying as the employee needs to raise a personal grievance with the employer within 90 days from the date of occurrence of the incident. If the employer decided the conduct constituted bullying and took disciplinary action against the 'bully' that could lead to the involvement of a third party i.e. an Employment Relations Authority (ERA), determining whether the conduct of the alleged bully amounted to serious misconduct, and if so, whether it warranted dismissal.

Bullying at workplace is more inclined towards being soft law jurisprudence under the health and safety laws. As pointed out earlier, the laws are more generic in terms of its inclusion under the health and safety duties which outlines a very broad perspective but lacks any specific provision in dealing with it. Hence it is inefficient to address the complaints of workplace bullying. New Zealand does not have a robust legislation like the anti-bullying jurisdiction provided in FWA as applicable in Australia or the Commission as existed in South Australia to address complaints of bullying.

B. Amending the present laws

1. I therefore propose to introduce bullying at workplace preferable as a separate provision into the Employment Relations Act or alternatively, as a part of the definition of sexual harassment under the Employment Relations Act. Thus by inserting this provision, it forms a new and separate ground for a personal grievance claim which the employee can have against the employer and thus gives rise to a separate cause of action. This personal grievance ground would be similar to sexual harassment, in that an employer would be both directly liable for their own or their representative's misconduct and for lack of management action on behalf of the employer to handle the situation where bullying was by a co-worker⁷⁴.
2. The employer should strive to resolve the dispute first by mediation since it is an informal process where the parties can speak and negotiate freely any possible settlement to the situation. The mediator has the discretion to outline the services to be adopted which are appropriate to a particular case in order to reach an amicable outcome⁷⁵. Alternatively, the employer should institute an independent investigation into the matter and take appropriate actions on the basis of this investigation⁷⁶.
3. After exhausting the above remedies, if the disputes still remain unsettled or if the employer fails to take any action, then the ERA would be conferred jurisdiction to adjudicate upon the anti-bullying applications wherein it can either follow its usual procedure or should preferably transplant in itself a procedure similar to Australia's FWC as it has proved to be quite effective in Australia⁷⁷.

⁷³ Gordon Anderson and Neisha Chhiba, 'Intractable Issues In The Workplace: Dealing With Workplace Bullying, Typhoid Chris And Stress', Victoria University of Wellington Legal Research Papers Vol 4, Issue No 3, 2014

⁷⁴ Employment Relations Act 2000, s108

⁷⁵ Employment Relations Act 2000, s 147

⁷⁶ *FGH v RST, above n 2 at [239]*.

⁷⁷ Fair Work Commission 2016–2017 Annual Report, Above n 36.

4. The Employment Relations Act states the type of orders, which the ERA may award to the employee on successfully proving the misconduct on behalf of the employer or an employer's representative which include reinstatement of the employee, reimbursement of sums lost as a result of the grievance and compensation⁷⁸. The applicant to the ERA raising the grievance of workplace bullying, can thus pray for any of these remedies in the application and it may so grant depending on the circumstances of each case. This jurisdiction of the ERA to award compensation and other remedial damages to the applicant, can take the New Zealand jurisprudence a step ahead of the Australian legislation since the FWC has no authority to pass any of these orders as listed above.
5. A logical corollary to the above proposition is also to amend s 123(d) to include bullying along with the words 'sexually or racially harassed' in the statute as this would give bullying its desired recognition as forming part of the personal grievance claim and eventually under the remedies⁷⁹.
6. The availability of redress mechanisms to approach a Tribunal is thus the major institutional difference between the laws in Australia and New Zealand to rule on the bullying complaints. It is the need of the hour to deal with bullying as a separate issue by itself rather than just being a part of the health and safety duties and guidelines. Exclusive jurisdiction needs to be conferred on a separate authority like the ERA to adjudicate specifically on the complaints relating to workplace bullying.
7. I also lay my proposition on the basis of the success of adoption of health and safety laws in New Zealand which are a mirror reflection of Australia's health and safety laws. On a comparative analysis, it is evident that New Zealand has transplanted Australia's WHS Act into its HSWA. A substantial amount of resources have been spent by the Australian draftsmen on pulling together and implementing such efficient and comprehensive health and safety legislations and the amount of success it has achieved so far; which by itself was a precedent for New Zealand to absorb these laws into its own jurisdiction. In a similar way, there is also a need to adopt and implement laws on Australia's anti-bullying jurisdiction especially the enforcement mechanisms. Australia is one of the very few countries in the world who has such robust procedures in place for dealing with the problems of workplace bullying.
8. Thus, the inclusion of the anti-bullying jurisdiction will blend well within the New Zealand laws, paving way for eliminating the risks of workplace bullying.

C. Human Resource policy recommendations

In order to comfort the victims of bullying, each workplace should have 'good practice' policies which can provide an immediate relief to the workers who have become victims of

⁷⁸ Employment Relations Act 2000, s 123

⁷⁹ Above n 78.

bullying. The below mentioned recommendations can form a part of policies which can be termed as 'anti-bullying policies' and it needs to be implemented by each workplace in order to address the problems of workplace bullying efficiently. These anti-bullying policies must be similar to the policies on sexual harassment and should be implemented efficiently.

i. Appointment of Counsellors

The workplace should appoint counsellors who can advise and hear the concerns of workers if they feel that they are being bullied at work give them the appropriate directions and psychological comforts.

ii. Private Grievance Procedure

Every office should set up a private grievance mechanism like an anti-bullying committee to monitor the day to day difficulties of people including hearing any anti-bullying complaints which the employees may have and also to provide immediate support and relief to the victims of bullying. This committee can also take preventive measures such as publishing anti-bullying notices as well as creating awareness and educating people about the consequences of bullying. The logical corollary to this should include a work culture that allows people to speak up against any kind of workplace violence⁸⁰.

iii. Rewarding behaviour of people

Similar to the other merit based rewards which the workplace gives to its employees, there should also be recognition of good behaviour by felicitating the employees involved in good and moral behaviour in the workplace in order to encourage the good conduct of the employees.

iv. Structural organisation

There should be a systematic organisation structure at the workplace irrespective of the size of the business. The work design must be structured in a manner depending on how demanding the situation is and what preventive measures are in force to address it. Balanced supervision structure must exist at the workplace including the working relationship of managers and workers. There should be role clarity among the employees and the right person should be appointed for the right job.

v. Feedbacks:

It is important for the employer to give timely feedbacks to the employees on the performance of their work and guide them in the appropriate direction.

VIII. Conclusion:

Thus, there is a need to amend the statutes, to incorporate the provisions of bullying in order to put more accountability on the employer as well as it will act as a deterrent to the individuals resorting to bullying in the first place.

⁸⁰ SafeWork Australia, 'Building a bully-free workplace', (Podcast)
<https://www.safeworkaustralia.gov.au/media-centre/building-bully-free-workplace>.

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