

WAPOU

WA Prison Officers' Union



MINISTERIAL REVIEW OF THE STATE INDUSTRIAL RELATIONS SYSTEM

***A WORKPLACE FREE FROM BULLYING:
WAPOU SUBMISSIONS ON LAW REFORM***

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WAPOU SUBMISSIONS ON LAW
REFORM

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A WORKPLACE
FREE FROM
BULLYING

The Western Australian
Industrial Relations Act

1979 (WA) can play a
pivotal role in regulating

workplace bullying by

giving power to the

WAIRC to ensure

employees have a safe,

quick and objective forum

to resolve workplace

bullying claims.

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1. INTRODUCTION

For more than 75 years the Western Australian Prison Officers' Union (**WAPOU**) has been the collective voice for the men and women who work as prison officers in the Western Australian prison system.

The WAPOU represents more than 2400 prison officers in Western Australia and has a membership base which represents 95% of Western Australia's prison officers.

The WAPOU has always maintained a role in advocating for the best pay, conditions and safety standards for its members. The WAPOU works to create a real change within the lives of not only prison officers, but also their families and communities they live in. As a stakeholder in the Western Australian prison system, the WAPOU makes a tangible difference within Western Australia.

Approximately 75% of the WAPOU's members have their employment governed by the *Industrial Relations Act 1979 (WA)* (**IR Act**) by virtue of being public sector employees and are regarded as state system workers. The remaining members are subject to the *Fair Work Act 2009 (Cth)* (**FW Act**) employed by a constitutionally covered business and are regarded as Federal system workers.

Since 1 January 2014, a worker employed by a constitutionally-covered business can seek an anti-bullying order from the Fair Work Commission (**FWC**)¹. Currently, there is no equivalent legislative protection available to Western Australian public sector employees or any other state system workers.

The state system covers up to one-third of Western Australian workers,² and therefore about 33% of Western Australian workers cannot access the FW Act's anti-bullying regime and cannot obtain any assistance from any industrial umpire if they are being bullied in the workplace, this includes the 75% of WAPOU members who are not employed by a constitutionally-covered business.

On 22 September 2017 the Western Australian Government announced a review of the Western Australian Industrial Relations system including a review of the IR Act to be headed by prominent industrial relations Barrister and former Acting President of the Western Australian Industrial Relations Commission (**WAIRC**), Mark Ritter SC.

The WAPOU makes these submissions to Mr Ritter SC for amendments to the IR Act to give non-constitutionally covered employees working in Western Australia, which includes public sector employees, access to the WAIRC to seek an anti-bullying order where that worker alleges bullying in the workplace.

¹ See section 789FD FW Act.

² Government of Western Australia, Media Statements – Review of State industrial relations system, 22 September 2017.

In brief, these submissions will discuss:

1. The current limited options available for Western Australian state system employees that are experiencing bullying in the workplace;
2. How the new proposed Western Australian anti-bullying legislative provisions accord with the Ministerial Review of the state industrial relations system;
3. That the WAIRC has capacity to cope with a new proposed anti-bullying jurisdiction including a snap shot of the bullying statistics of the Federal system;
4. An in depth analysis and recommendations for the new proposed anti-bullying provision for Western Australian state system employees; and
5. How other states in Australia that once lacked a state based anti-bullying jurisdiction have amended their industrial legislation to cater accordingly.

A compilation of the recommendations made throughout these submissions is provided at the end of these submissions.

2. CURRENT OPTIONS FOR STATE SYSTEM EMPLOYEES

Currently there exists no anti-bullying legislation in Western Australia for state system employees. Anti-bullying legislation does exist for Federal system employees, however this legislation does not apply to state system employment.

Some recourse for workplace bullying for state system employees may be found in 3 ways:

1. Via the *Occupational Safety and Health Act 1984 (WA)* (**OSH Act**) (discussed in further detail below).
2. Via a workers' compensation claim (for example, by virtue of a mental injury such as stress).
3. Via equal opportunity/ discrimination legislation, for example if a person is bullied/discriminated against on a proscribed ground such as sex, colour, race etc.

However these legislative options are not designed to appropriately deal with bullying claims and therefore their effectiveness in dealing with matters pertaining to bullying is inadequate.

2.1.RECOURSE UNDER THE OSH ACT

Even though bullying is not defined at law in Western Australian legislation, bullying may come under the scope of the OSH Act. But even then, workplace bullying is not expressly dealt with in OSH legislation so a bullying claim would need to be categorised as a safety issue to become relevant under OSH legislation. Therefore the affected employee would need to establish that a breach of OSH legislation has occurred by showing that bullying occurs in the workplace in such a way that it is a safety issue that creates a hazard in the workplace.³

The process in simplified form is that an affected employee lodges an occupational health and safety enquiry with WorkSafe in relation to bullying and WorkSafe may instigate an investigation. However, even though employers may be prosecuted for breaching the requirement to maintain a safe workplace, an employee may not be able to pursue or institute the prosecution as ordinarily, WorkSafe assume carriage of matters pertaining to the safety of workplaces.

The WorkSafe investigator (or inspector) may issue the employer with an improvement notice under Part VI of the OSH Act. The improvement notice may direct the employer to ensure adequate systems are in place to prevent or stop the hazardous situation (the "bullying"), or the improvement notice may direct the person(s) doing the bullying to stop the behavior that affects the safety and health of an employee.

³ See, for example, section 19 of the OSH Act.

Referring a bullying complaint to WorkSafe under the auspices of a workplace hazard is far from an effective means of dealing with the bullying complaint and a burden on our state's resources. WorkSafe understandably is (or at least should be) more concerned with preventing work place deaths over dealing with bullying in the workplace.

3. REVIEW OF THE STATE INDUSTRIAL RELATIONS SYSTEM

The state system has not been comprehensively reviewed and updated since 2002, and the industrial relations and employment environment has changed significantly since then. The aim of the review is to deliver a state industrial relations system that is contemporary, fair and accessible,⁴ and as described by the Hon. Bill Johnston:

*"The state system needs to be updated to address the changed employment environment and to meet the needs of its constituents - predominately small business employers and employees, and the public sector. We are committed to ensuring the State industrial relations system is modernised and the review will provide a blueprint on how best to do this."*⁵

3.1. TERMS OF REFERENCE OF REVIEW

The Ministerial Review of the state industrial relations system is to consider and make recommendations with respect to the following matters (Terms of Reference):

1. Review the structure of the WAIRC with the objective of achieving a more streamlined and efficient structure.
2. Review the jurisdiction and powers of the WAIRC with the objective of examining the access for public sector employees to the WAIRC on a range of matters for which they are currently excluded.
3. Consider the inclusion of an equal remuneration provision in the IR Act with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the WAIRC.
4. Review the definition of "employee" in the IR Act and the *Minimum Conditions of Employment Act 1993* with the objective of ensuring comprehensive coverage for all employees.
5. Review the minimum conditions of employment in the *Minimum Conditions of Employment Act 1993*, the *Long Service Leave Act 1958* and the *Termination, Change and Redundancy General Order* of the WAIRC to consider whether:
 - a. the minimum conditions should be updated; and if
 - b. there should be a process for statutory minimum conditions to be periodically updated by the WAIRC, without the need for legislative change.
6. Devise a process for the updating of State awards for private sector employers and employees, with the objectives of:
 - a. ensuring the scope of awards provide comprehensive coverage to employees;

⁴ Government of Western Australia, Media Statements – Review of State industrial relations system, 22 September 2017.

⁵ Government of Western Australia, Media Statements – Review of State industrial relations system, 22 September 2017 comments attributed to Commerce and Industrial Relations the Hon. Minister Bill Johnston.

- b. ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;
 - c. ensuring awards are written in plain English and are user friendly for both employers and employees; and
 - d. ensuring that any award updating process is driven by the WAIRC, with appropriate input from the award parties and other relevant stakeholders.
7. Review statutory compliance and enforcement mechanisms with the objectives of:
- a. ensuring that employees are paid their correct entitlements;
 - b. providing effective deterrents to non-compliance with all state industrial laws and instruments; and
 - c. updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.
8. Consider whether local government employers and employees in Western Australia should be regulated by the state industrial relations system, and if so, how that outcome could be best achieved.⁶

These submissions are relevant to Terms of Reference 2 and 7(b), whereby:

1. Reviewing the jurisdiction and powers of the WAIRC to create a WAIRC anti-bullying jurisdiction satisfies Terms of Reference 2 as it would give access for public sector employees to the WAIRC for a matter which they are currently excluded from seeking relief for from the Federal anti-bullying regime.
2. With respect to Term of Reference 7, a review of the State industrial relations system to create a statutory state system anti-bullying regime should ensure the IR Act provides effective deterrents to non-compliance with the IR Act anti-bullying regime. Suggested deterrents and dealing with non-compliance is dealt with later in these submissions.

⁶ Government of Western Australia, Media Statements – Review of the State industrial relations system, 22 September 2017.

4. WAIRC BULLYING JURISDICTION AND CONFERENCES

At present an employee can refer 2 types of industrial matters to the WAIRC (sitting as a single Commissioner) under its general jurisdiction:

1. An unfair dismissal claim; or
2. A denied contractual benefits claim.

This jurisdiction is derived from sub sections 29(1)(b)(i) and (ii) together with section 23 of the IR Act.

A new provision should be inserted at section 29(1)(b) to allow for an employee to bring a 3rd type of industrial matter to the Commission, a claim seeking an anti-bullying order. The referral should be to a single Commissioner sitting as the Commission.

Recommendation 1

A new anti-bullying provision be inserted at section 29(1)(b) of the IR Act

Anti-bullying claims are matters that ought properly be dealt with by way of conciliation at first instance. Inserting a new anti-bullying provision at section 29(1)(b) would ensure the anti-bullying claim is classed as an “industrial matter” for the purposes of being captured by section 32 of the IR Act which would allow the Commission to endeavor to resolve the matter by conciliation at first instance. This would also accord with the objects of the IR Act.⁷

Recommendation 2

IR Act should allow an anti-bullying conference be held at first instance

⁷ See section 6(b) IR Act which says it is an object of the IR Act to encourage conciliation. Note also section 23 of the IR Act which allows the Commission to enquire into a deal with any industrial matter and note section 7 definition of the term “industrial matter”.

4.1. CAPACITY FOR WAIRC TO DEAL WITH A NEW ANTI-BULLYING JURISDICTION

A new WAIRC anti-bullying jurisdiction will inevitably create additional work for the WAIRC, however the additional work will not be burdensome on the WAIRC as the matters dealt with by Commissioners sitting alone have dropped in recent years. The following statistics were published by the Chief Commissioner of the WAIRC in her most recent annual report, 2015-2016:

Matters dealt with by WAIRC				
	2012/13	2013/14	2014/15	2015/16
Commissioners sitting alone				
Conferences	111	279	104	88
Unfair dismissal matters concluded				
Unfair Dismissal claims	176	159	146	118
Contractual Benefits claims	94	104	113	121

The Chief Commissioner outlines in the same report that the total matters dealt with by the WAIRC (inclusive of all the WAIRC's constituent authorities) are as follows:

Matters dealt with by WAIRC				
	2012/13	2013/14	2014/15	2015/16
Totals	624	803	747	634

As evident from the above tables, the WAIRC has experienced a decline in the matters it has dealt with since 2013/14.

Adding an additional bullying jurisdiction will not be burdensome on the WAIRC. In any regard, it is to be noted that the IR Act has scope to appoint such number of Commissioners as necessary.⁸

⁸ Section 8(2)(d) IR Act.

At his presentation given on 2 November 2017,⁹ Deputy President of the Fair Work Commission, Bull estimated that the FWC received approximately 700 to 800 bullying applications per year. Of those, Bull DP estimated that only about 50 applications were made or filed in Western Australia by Federal system employees.

Given that the Federal system covers a greater number of employees than the Western Australian state system, it is reasonable to foreshadow that the number of bullying applications that will be made by Western Australian state system employees to the WAIRC will be significantly lower than 50 per year.

⁹ Presentation entitled "The Anti-bullying jurisdiction of the Fair Work Commission" given at UnionsWA Industrial Officers and Lawyers Network Conference.

5. FWC BULLYING STATISTICS

(Source – 2016/17 FWC Annual report)

The number of anti-bullying applications and outcomes has been relatively consistent since the jurisdiction commenced, on 1 January 2014.

In 2016/17, a total of 722 applications for an order to stop bullying were lodged with the FWC. This was consistent with the number of applications in previous years, as shown in the table below.

	No. lodged				No. finalised			
	2016/17	2015/16	20114/15	2013/14	2016/17	2015/16	2014/15	2031/14
Anti-bullying	722	734	694	343	695	705	676	197

Note: The anti-bullying jurisdiction under the FW Act commenced on 1 January 2014. Figures for 2013–14 are for six months from 1 January to 30 June 2014.

A total of 695 applications for an order to stop bullying were finalised in 2016/17 by the FWC:

- 171 applications were withdrawn early in the case management process.
- 125 applications were withdrawn before proceedings.
- 188 applications were resolved during the course of proceedings.
- 151 applications were withdrawn after a conference or hearing and before a decision.
- 60 applications (9 per cent) were finalised by a decision.

The majority of matters in the Federal anti-bullying jurisdiction are resolved without the need to make an order. These matters can be resolved in various ways, including the employers' recognition of, and response to, a workplace complaint and subsequent implementation of workplace solutions such as providing training or adjusting lines of reporting.

6. FEDERAL ANTI-BULLYING REGIME

Since its operation commenced in January 2014, the FW Act regime works well for Federal system employees. It provides a balanced system for both employers and the workers with a focus on: quick and early resolution of the matter; and importantly for the maintenance of industrial harmony within the workplace.

Further, anti-bullying legislation works well for both workers and employers as it prevents potential workers' compensation claims as the bullying is dealt with at the earliest possible stage.

The FWC having wide ranging powers to make anti-bullying orders works well as it does not limit the scope on what needs to be put in place to ensure the bullying stops.

That there is no monetary compensation ensures that claims are not brought vexatiously or frivolously and the bullying claim is genuine.

6.1. DEFINITIONS AND SCOPE

By virtue of the FW Act, bullying in the work place may be unlawful and a stop bullying order may be sought by a worker who reasonably believes they are being bullied at work.¹⁰

Only a worker that works for a constitutionally covered business can seek an anti-bullying order from the FWC. A constitutionally covered business is essentially a constitutional corporation; the commonwealth or a commonwealth authority. This does not include state government employees.¹¹

It must be noted that the FW Act uses and defines the term "worker" which it distinguishes from its definition of "employee."¹² It is a "worker" that can seek an anti-bullying order under the FW Act anti-bullying regime. The *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [103] explains that the term "worker" is to be given the same meaning as in the *Work Health and Safety Act 2011* which adopts a broad definition of "worker" at section 7 of that Act. The term extends to employees, contractors, subcontractors, outworkers, apprentices, trainees, work experience students and volunteers and also includes Members of the Australian Federal Police and Commonwealth statutory office holders.¹³ Broadly speaking, a worker is any individual who performs work in any capacity.

¹⁰ Part 6-4B – Workers bullied at work (ss. 789FA-789FL) of the FW Act deals with bullying in the workplace. See also, the *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [99].

¹¹ Sections 789FD(1) and (3) FW Act.

¹² An "employee" and "employer" are to be given their ordinary meanings with respect to the FW Act's anti-bullying regime: Section 789FB FW Act.

¹³ Note: the the *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [103] contemplated that members of the Australian Defence Force be included in the definition of a "worker", however, this does not seem to have been passed by Parliament as section 789FC(2) of the

The IR Act currently has a definition of “employee”,¹⁴ and whilst not narrow in its application, it is not as broad as the definition of “worker” under the FW Act. The IR Act should have a definition of “worker” to apply to the relevant new proposed sections of the IR Act that deal with anti-bullying. This definition should be broad to capture any state system person who performs work in any capacity.¹⁵

Recommendation 3

IR Act should define “worker” to apply for the purposes of the proposed anti-bullying regime. The definition of “worker” should be broader than the definition of “Employee” in the IR Act

Although the anti-bullying FWC jurisdiction commenced on 1 January 2014, an applicant may nevertheless rely upon alleged bullying behaviour which occurred before 1 January 2014. The FW Act did not contemplate such a scenario and it was left to the FWC Full Bench to determine this.¹⁶ A provision to deal with such a scenario should be expressed in the new proposed state anti-bullying legislation.

Recommendation 4

IR Act amendments should allow alleged bullying behaviour which occurred prior to the proposed commencement of the IR Act anti-bullying provisions to be taken into account

FW Act expressly excludes members of the Australian Defence Force. See, also, section 789FF(2) which says the FWC can dismiss an application where matters involve Australia’s defence and Australia’s national security.

¹⁴ See definition of “employee” at section 7 IR Act.

¹⁵ These submissions use the term “worker” and “employee” interchangeably to have the same general meaning. A reference to a “worker” in these submissions does not import its legal definition under the FW Act, likewise, a reference to an “employee” does not import its legal definition under the IR Act or FW Act.

¹⁶ See *Re McInnes* (2014) 241 IR 158; [2014] FWCFB 1440.

6.2. EXPEDITIOUS AND INEXPENSIVE DEALINGS

The *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [88] explains that it was a key recommendation that there be provision for an individual who is bullied at work to seek recourse to help resolve the matter “*quickly and inexpensively*”. This is advanced by the FW Act at section 789FE which requires the FWC to deal with an anti-bullying application within 14 days after the application is made.

It makes sense that a bullying application is dealt with promptly because if it is not, the behaviour that person is being subjected to could possibly lead to mental injury and a workers’ compensation claim. It would likely be an extra cost burden on the state if a workers’ compensation claim is made instead of a bullying application.

Recommendation 5

IR Act amendments should require the WAIRC to deal with a bullying application within 14 days of such application being made

6.3. WHEN BULLYING OCCURS

Bullying may occur when the following two factors have been met:

1. That a worker has repeatedly been bullied by an “individual” or “group of individuals”; and
2. The behaviour creates a risk to a worker’s health and safety.¹⁷

The express use of the term “repeatedly” in the FW Act makes it clear that it cannot be a “once off” incident. Logically, and it makes sense, that a person is not bullied if it is a “once off” incident. This would also likely significantly reduce the number of bullying claims that are made with the FWC.

Further, the *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [109] explains that the “repeated behaviour” must be “unreasonable behaviour” that a reasonable person may see as unreasonable. This imports an objective test. Notably, the FW Act falls short of expressing whether isolated “repeated behaviour” spread over time means the behaviour is not repeated.

¹⁷ Section 789FD(1) FW Act; see the *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [108] which describes the development of the definition of when a worker is bullied at work.

Recommendation 6

The IR Act amendment or Explanatory Memoranda should express that bullying is not a “once off” incident; that it is an objective test; and how close in time incidents must be before they fall outside of the “repeated” concept

The FWC has found that the terms “individual” and “group of individuals” does not necessitate that the person or persons themselves be employees or workers themselves. For example, in *Re Manderson*¹⁸ it was held that the FW Act covered residents towards a caretaker employed at a residential resort. Presumably this places a higher onus on the employer to limit a worker’s exposure to health and safety risks at the workplace.

Recommendation 7

The IR Act amendments should express whether the conduct extends to non-employees

The FWC has determined that proof of actual harm to an employee’s health or safety is not necessary provided that there is a risk to health and safety.¹⁹ So that judicial consideration is avoided, this should be dealt with by the new IR Act anti-bullying provisions.

Recommendation 8

The IR Act amendments should express that actual harm to health and safety is not required to be proved by the claimant

¹⁸ [2015] FWC 8231.

¹⁹ Re G.C. [2014] FWC 6988 (Hampton C, 9 December 2014) at [50].

Further, the FWC has usefully determined that bullying behaviour may include aggressive or intimidating conduct, belittling or humiliating comments, unreasonable work expectations,²⁰ malicious rumours, exclusion from work events²¹ and practical jokes.²²

Recommendation 9

The IR Act or Explanatory Memoranda should outline a non-exhaustive list of examples of when bullying may occur with consideration of previous FWC decisions. This would obviate a need in some circumstances for the WAIRC to decide what bullying actually is

6.4. DEALING WITH THE MATTER INTERNALLY AT FIRST INSTANCE

Prior to making any anti-bullying orders, the FWC must take into account what procedures are available internally for the employee to pursue; and whether there have been any final or interim outcomes of an internal investigation/ or arising out of the lodgement of a an internal grievance.²³ This is to ensure the FWC's orders are consistent with action taken by the employer or another body such as a health and safety regulator.²⁴

Although not expressed in the FW Act as such, practically, and via experience in practising in this jurisdiction, the FWC will look into what steps the worker has taken internally with their employer or with an external body (such as a health and safety regulator) to address any bullying before it proceeds with the matter and makes anti-bullying orders. This is an important provision as it allows the worker to discuss the matter with the employer with the view that if resolved it will keep the matter out of the FWC, and thereby, reducing the number of claims made.

However as the FW Act does not expressly compel a worker to undertake these pre-steps to an anti-bullying application, a worker is often making premature applications to the FWC. When a premature application has been made as such, it has been our experience that the FWC adjourns the matter so that an investigation can firstly be undertaken by the employer independent of the FWC.²⁵ For obvious reasons, this is not an ideal use of the resources of the FWC. The problem is the FW Act falls short of

²⁰ *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618 (24 June 2005).

²¹ *Willett v State of Victoria* [2013] VSCA 76 (12 April 2013).

²² *WorkCover Authority (NSW) (Inspector Maddaford) v Coleman* [2004] NSWIRComm 317 (3 November 2004), [(2004) 138 IR 21].

²³ Section 789FF(2) FW Act; Explanatory Memorandum to the *Fair Work Amendment Bill 2013* at [121].

²⁴ Explanatory Memorandum to the *Fair Work Amendment Bill 2013* at [122].

²⁵ Presumably so that the FWC does not find itself in a position that it cannot make anti-bullying orders because it could not take into account what it must consider at section 789FF(2) before making any orders.

this pre-application prescription and therefore it is recommended that any new provision of the IR Act that deals with anti-bullying should expressly require a worker to take steps internally with their employer or with an external body (such as a health and safety regulator) to attempt to address any bullying before it makes an anti-bullying application. Further, it should be noted that in the FW Act there is no express obligation on the employer to undertake an internal investigation in a reasonable time frame and therefore the worker could be subjected to an unnecessary prolonged period of bullying. It is recommended that any new provision of the IR Act that deals with anti-bullying should express a timeframe for which an employer should undertake an internal investigation and if not complete within that time frame, then the worker is not precluded from seeking an anti-bullying order in WAIRC.

Recommendation 10

The IR Act amendments should express that the worker must have made attempts to resolve the issue internally or via external means and that the employer is time bound to deal with the internal matter. The Explanatory Memoranda could explain what constitutes “attempts”. The IR Act should also require any anti-bullying orders be consistent with interim or final decisions of the matter being dealt with internally or externally

6.5. REASONABLE MANAGEMENT ACTION

It is important for business efficacy that an employer is able to manage and improve the performance of its workers without having anti-bullying applications made against it. Therefore reasonable management action carried out in a reasonable manner cannot be held to be bullying.²⁶ For example, disciplinary matters, sub-standard performance processes or feedback.²⁷

²⁶ Section 789FD(2) FW Act; *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [111] explains how it is important for managers to be able to manage their staff.

²⁷ See *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [112].

Recommendation 11

The IR Act amendments should expressly exclude reasonable management action. The Explanatory Memoranda could provide that this includes reasonable disciplinary matters, sub-standard performance processes or feedback

6.6. ORDERS THE FWC CAN MAKE

The FWC may make any order it considers appropriate (other than a monetary order or reinstatement to employment) to prevent the worker from being bullied at work by the individual or group.²⁸

The focus for the FWC is to stop bullying and restore harmony in the workplace.²⁹

Section 789FF of the FW Act only prohibits the making of pecuniary penalties (the prohibition of reinstatement or compensation is expressed in the Explanatory memorandum). A live question is whether the FWC being able to make an order involving continued employment is in itself, due to the fact the worker will continue to receive remuneration, amount to a pecuniary penalty? This is a question that has not received judicial consideration however if the FWC was unable to order continued employment, then this would go against the essence of the legislative regime. For the elimination of doubt and litigation, the new proposed IR Act anti-bullying regime should express that an order involving continued employment does not fall foul of any express legislative prohibition on awarding pecuniary penalties.

Recommendation 12

The IR Act amendments should express that an order involving continued employment is not in contravention of the prohibition to award pecuniary penalties

²⁸ Section 789FF FW Act; *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [119].

²⁹ *Fair Work Amendment Bill 2013* at [119]. See also *Re v McInnes* (2014) 241 IR 158; [2014] FWCFB 1440 at [9] where it was determined that the aim is not to punish for past bullying behaviour or compensating victims for past behaviour, the aim is to prevent future bullying.

Examples of the wide power/orders that can be made can be found in the *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [120] which are as follows:

1. Requiring the individual or group of individuals to stop the specified behaviour.
2. Regular monitoring of behaviour by the employer.
3. Requiring compliance with an employer's workplace bullying policy.
4. The provision of information and additional support and training to workers.
5. Requiring a review of the employer's workplace bullying policy.

The first of the relatively limited number of bullying orders made to date was the decision of Senior Deputy President Drake in *Applicant v Respondent*.³⁰ The order was made by consent. The following restrictions were placed on the alleged bully:

1. Shall complete any exercise at the employer's premises by 8am.
2. Shall have no contact with the applicant alone.
3. Shall make no comment about the applicant's clothes or appearance.
4. Shall not send any emails or texts to the applicant except in emergency circumstances.
5. Shall not raise any work issues without notifying the Chief Operating Officer of the respondent, or his subordinate, beforehand.
6. The applicant was also ordered not to arrive to work before 8:15 am.

It is interesting that there was no end date given to the orders and that in that case they would apply indefinitely. The observation here is that the FWC is capable of determining on a case by case basis whether a time frame on orders is imposed or not. It would be against the essence of the anti-bullying legislation if orders expired and then the bullying re-commences.

Recommendation 13

The IR Act amendments should expressly allow the WAIRC to make any order it considers appropriate other than a monetary order or reinstatement to employment. The regulations or explanatory memorandum can list examples

³⁰ (unreported, 21 March 2014).

6.7.NO ORDERS WHERE NO RISK OF FUTURE BULLYING

Because of the need in section 789FF of the FW Act for there to be a risk that the worker will be bullied in the workplace in the future, the FWC cannot make any orders to stop bullying if the worker is no longer employed by the employer.³¹

Further, and for the same reasons in section 789FF, the same applies if the alleged bully resigns from the workplace or no longer attends the workplace.³²

Although the above can be read into the operation of section 789FF, its lack of express provision in the legalisation as such may mean that a former worker that is not legally educated files an anti-bullying application despite the worker or alleged bully no longer being employed in the workplace.

There have been numerous instances where we have had to give advice to workers that are not legally educated that the FWC cannot deal with the application, if one or both of the above exclusions apply, and an application should be discontinued or not made.

So that the WAIRC does not receive these types of applications where there is a lack of jurisdiction, and unnecessarily waste the resources of the WAIRC, the new proposed anti-bullying legislative provisions should expressly deal with this.

Recommendation 14

The IR Act amendments should express that if a worker is no longer employed by the employer or attends the workplace, an anti-bullying application cannot be made. If the alleged bully or bullies are no longer at the workplace, an anti-bullying application cannot be made

³¹ *Shaw v Australia & New Zealand Banking Group Ltd* [2014] FWC 3408 at [15]; *Re KM* [2016] FWC 2088 at [62].

³² See *RE Fsadni* [2016] FWC 1286 at [24].

6.8. APPEALS

An appeal of a stop bullying order can be brought within 21 days of the decision being issued.³³ Under the IR Act, an appeal of a single Commissioner's decision can be brought to the Full Bench of the WAIRC within 21 days of the decision being issued.³⁴ The new anti-bullying regime should allow an appeal to the Full Bench of the WAIRC.

Recommendation 15

The IR Act amendments should deal with an appeal of an order

6.9. BREACHING AN ORDER

The breach of an order by a party may attract a civil penalty,³⁵ but does not constitute an offence. Where a contravention has occurred, an application must be made to the Federal Court of Australia or the Federal Circuit Court of Australia. Fines for individuals can be up to \$10,800 or up to \$54,000 for corporations per offence.³⁶

Recommendation 16

The IR Act amendments should expressly deal with contravention of an anti-bullying order

³³ Section 604 FW Act as to the right of appeal; and rules 56(2)(a) and (b) of the FWC Rules as to the time limit.

³⁴ Section 49 IR Act.

³⁵ Section 789FG FW Act; *Fair Work Amendment Bill 2013 Explanatory Memorandum* at [123].

³⁶ Section 539 Item 38 FW Act.

7. REGULATION OF WORKPLACE BULLYING IN OTHER AUSTRALIAN STATES

Following a comprehensive review of Queensland's industrial relations laws in 2015, the *Industrial Relations Act 2016* (Qld) (**QLD IR Act**) was passed by the Queensland Parliament late last year (2016) and came into effect on 1 March 2017. The QLD IR Act repealed the *Industrial Relations Act 1999* (Qld).³⁷

One of the significant changes brought about by the new QLD IR Act is the introduction of new powers granted to the Queensland Industrial Relations Commission (**QIRC**) to deal with bullying in the workplace.³⁸ The new QLD IR Act gives power to the QIRC to make orders with the purpose of preventing workplace bullying.³⁹

Queensland's new anti-bullying measures apply to employees of the state of Queensland, which means, for example, teachers in state schools, nurses, doctors and allied health professionals in public hospitals, and other public servants employed in various Queensland state government departments now have access to a dedicated anti-bullying regime, when previously they did not have a dedicated anti-bullying regime and could not access the Federal anti-bullying regime.⁴⁰

From a reading and comparison of the QLD IR Act anti-bullying regime, it is readily apparent that the new provisions are modelled on those in the *Fair Work Act 2009*, such was the recommendation of the report of the Queensland Industrial Relations Legislative Reform Reference Group "A review of the industrial relations framework in Queensland" (December 2015).⁴¹

Before the new QLD IR Act came into effect, State employees in Queensland were unable to make applications for stop bullying orders,⁴² similar to Western Australian state employees.

³⁷ See, for example, the report of the Queensland Industrial Relations Legislative Reform Reference Group "A review of the industrial relations framework in Queensland" December 2015 available at <https://s3.treasury.qld.gov.au/files/review-of-qld-industrial-relations-framework.pdf>

³⁸ See Chapter 7 of the *Industrial Relations Act 2016* (Qld).

³⁹ Section 275 *Industrial Relations Act 2016* (Qld).

⁴⁰ See clause 7.1 of the report of the Queensland Industrial Relations Legislative Reform Reference Group "A review of the industrial relations framework in Queensland" December 2015 available at: <https://s3.treasury.qld.gov.au/files/review-of-qld-industrial-relations-framework.pdf>

⁴¹ See recommendation 32 at clause 7.2 of the report.

⁴² See clause 7.2 (last paragraph) of the report of the Queensland Industrial Relations Legislative Reform Reference Group "A review of the industrial relations framework in Queensland" December 2015 available at: <https://s3.treasury.qld.gov.au/files/review-of-qld-industrial-relations-framework.pdf>

8. LIST OF RECOMMENDATIONS

Recommendation 1

A new anti-bullying provision be inserted at section 29(1)(b) of the IR Act

Recommendation 2

IR Act should allow an anti-bullying conference be held at first instance

Recommendation 3

IR Act should define “worker” to apply for the purposes of the proposed anti-bullying regime. The definition of “worker” should be broader than the definition of “Employee” in the IR Act

Recommendation 4

IR Act amendments should allow alleged bullying behaviour which occurred prior to the proposed commencement of the IR Act anti-bullying provisions to be taken into account

Recommendation 5

IR Act amendments should require the WAIRC to deal with a bullying application within 14 days of such application being made

Recommendation 6

The IR Act amendment or Explanatory Memoranda should express that bullying is not a “once off” incident; that it is an objective test; and how close in time incidents must be before they fall outside of the “repeated” concept

Recommendation 7

The IR Act amendments should express whether the conduct extends to non-employees

Recommendation 8

The IR Act amendments should express that actual harm to health and safety is not required to be proved by the claimant

Recommendation 9

The IR Act or Explanatory Memoranda should outline a non-exhaustive list of examples of when bullying may occur with consideration of previous FWC decisions. This would obviate a need in some circumstances for the WAIRC to decide what bullying actually is

Recommendation 10

The IR Act amendments should express that the worker must have made attempts to resolve the issue internally or via external means. The Explanatory Memoranda could explain what constitutes “attempts”. The IR Act should also require any anti-bullying orders be consistent with interim or final decisions of the matter being dealt with internally or externally

Recommendation 11

The IR Act amendments should expressly exclude reasonable management action. The Explanatory Memoranda could provide that this includes reasonable disciplinary matters, sub-standard performance processes or feedback

Recommendation 12

The IR Act amendments should express that an order involving continued employment is not in contravention of the prohibition to award pecuniary penalties

Recommendation 13

The IR Act amendments should expressly allow the WAIRC to make any order it considers appropriate other than a monetary order or reinstatement to employment. The regulations or explanatory memorandum can list examples

Recommendation 14

The IR Act amendments should express that if a worker is no longer employed by the employer or attends the workplace, an anti-bullying application cannot be made. If the alleged bully or bullies are no longer at the workplace, an anti-bullying application cannot be made

Recommendation 15

The IR Act amendments should deal with an appeal of an order

Recommendation 16

The IR Act amendments should expressly deal with contravention of an anti-bullying order