

A PROPITIOUS MOMENT? WORKPLACE BULLYING AND REGULATION OF THE LEGAL PROFESSION

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I INTRODUCTION

There is plenty of evidence that all is not well in the legal profession. Empirical studies have shown that lawyers have high rates of depression,¹ the attrition rate for young women lawyers is alarmingly high,² and the gender imbalance at the higher echelons of the profession is stubbornly persistent.³ These problems have attracted academic attention.⁴ However, despite widespread recognition, solutions to these difficulties remain elusive. This article considers the role ‘workplace bullying’ plays in this picture. There are a number of surveys of lawyers that indicate that workplace bullying is a feature of modern legal practice.⁵ It is plausible that if bullying is a significant element within the legal

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1 Christopher Kendall, ‘Report on Psychological Distress and Depression in the Legal Profession’ (Report, Council of the Law Society of Western Australia, March 2011); Norm Kelk et al, ‘Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers’ (Report, Brain and Mind Research Institute, University of Sydney, January 2009); Laura Helm, ‘Mental Health and the Legal Profession: A Preventative Strategy’ (Report, Law Institute Victoria, September 2014).

2 Law Council of Australia, ‘National Attrition and Re-engagement Study Report’ (Final Report, March 2014) 9 (*NARS Report*).

3 Victorian Equal Opportunity and Human Rights Commission, *Changing the Rules: The Experiences of Female Lawyers in Victoria* (2012) 8 (*Changing the Rules Report*). The report explains that ‘while more than half of all law graduates are female, a recent survey revealed that only 21 per cent of partners in Australian law firms are women’: at 3. See also *NARS Report*, above n 2, 5.

4 See, eg, Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1995); Margaret Thornton, ‘Hypercompetitiveness or a Balanced Life? Gendered Discourses in the Globalisation of Australian Law Firms’ (2014) 17 *Legal Ethics* 153.

5 See, eg, *NARS Report*, above n 2, 6, 32, 36; Maryam Omari, ‘Towards Dignity and Respect at Work: An Exploration of Work Behaviours in a Professional Environment’ (Final Report, Law Society of Western Australia, August 2010) 13–14 (*Towards Dignity and Respect at Work Report*); Law Society of New South Wales Equal Opportunity Committee, *Strategies to Help Eliminate Bullying from the NSW Legal Profession* (2003) 8 <<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026535.pdf>>.

workplace, it may contribute to the difficulties set out above. Furthermore, if this is the case, it may be that effective initiatives that tackle it could make inroads in creating a happier and healthier profession. It is also possible that such changes could have a wider effect on the ways members of the public experience the justice system.⁶

While a developing literature on workplace bullying has emerged in recent years,⁷ and a number of professional associations have examined its prevalence within the legal profession,⁸ little work has been done that draws on understandings of the ‘way lawyers work’ as a significant explanatory factor in lawyers’ experiences of bullying.⁹ This article examines the pressures that might contribute to workplace bullying within the legal profession and considers how that problem is addressed by the regulatory framework. It argues that the existing regulation of workplace bullying does not apply consistently and effectively to those who work within the legal profession. The alternative regulatory pathway of regulation applicable specifically to the legal profession provides a more promising, though as yet under-utilised, option for addressing bullying within the professional context.

The article proceeds as follows. Part II of the article will examine the concept of workplace bullying and the evidence that suggests it may be a particular problem within the legal profession. In Part III we consider whether the culture of the legal workplace, with its emphasis on adversarialism and hierarchy, its professional mores and its limited bureaucratic development, creates an environment that makes bullying behaviours more likely. Part IV of the article will analyse whether the existing ordinary regulatory framework is adequate to respond to the problem of workplace bullying within the profession. This discussion will also consider the criminal law, workplace safety laws, and professional codes of ethics. The final part of the article will conclude with recommendations about practical steps that could address this problem and

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- 6 A submission to the Law Reform Commission of Western Australia’s inquiry into the civil and criminal justice system identified client experiences of bullying behaviours as a serious problem: Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Submissions Summary, Project No 92 (1999) 24. See also the experiences of members of the public at the hands of a Magistrate as discussed below n 73 ff and text accompanying.
 - 7 See, eg, Randy Hodson, Vincent J Roscigno and Steven H Lopez, ‘Chaos and the Abuse of Power: Workplace Bullying in Organizational and Interactional Context’ (2006) 33 *Work and Occupations* 382; Jacquie Hutchinson, ‘Rethinking Workplace Bullying as an Employment Relations Problem’ (2012) 54 *Journal of Industrial Relations* 637; Margaret Thornton, ‘Corrosive Leadership (or Bullying by Another Name): A Corollary of the Corporatised Academy?’ (2004) 17(2) *Australian Journal of Labour Law* 161.
 - 8 See, eg, *Towards Dignity and Respect at Work Report*, above n 5; Law Society of New South Wales Equal Opportunity Committee, above n 5.
 - 9 Recent exceptions are Maryam Omari and Megan Paull, ‘“Shut Up and Bill”: Workplace Bullying Challenges for the Legal Profession’ (2014) 20 *International Journal for the Legal Profession* 141; Joanne Bagust, ‘The Culture of Bullying in Australian Corporate Law Firms’ (2014) 17 *Legal Ethics* 177.

identifies this as a propitious point in time given recent developments in the professional conduct rules.

II DEFINING WORKPLACE BULLYING

Workplace bullying is a term used to describe a range of unacceptable behaviours that arise within a workplace situation. It is, however, not an easy concept either to define, or identify and its manifestations ‘can take many forms’.¹⁰ In fact, it is plausible that the norms within a particular context, and the persons involved, may have a significant impact on whether particular events are described as workplace bullying.¹¹ Although it is difficult to frame a precise definition, the literature indicates certain factors that are associated with bullying. Common themes include clear indications of an imbalance of power, and the use of a wide range of techniques and behaviours to bully.¹²

While a range of regulatory provisions may be invoked to deal with the problem of workplace bullying,¹³ recent amendments to the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*), which came into effect from 1 January 2014, provide at the outset a useful example of a legal definition of bullying in Australia.¹⁴ Bullying at work is now defined in the *Fair Work Act* as occurring when ‘an individual; or a group of individuals; repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and that behaviour creates a risk to health and safety’.¹⁵ This definition focuses on three main elements of bullying behaviour: it is ‘repeated’, ‘unreasonable’, and ‘creates a risk to health and safety’, and all three elements must be satisfied in

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- 10 Gina Vega and Debra R Comer, ‘Sticks and Stones May Break Your Bones, but Words Can Break Your Spirit: Bullying in the Workplace’ (2005) 58 *Journal of Business Ethics* 101, 105. On the difficulties of identification and definition of bullying, see House of Representatives Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We Just Want It to Stop* (2012) 14–18 [1.45]–[1.65] (*‘Workplace Bullying Report’*).
- 11 *Towards Dignity and Respect at Work Report*, above n 5, 7. See also *Brown v Maurice Blackburn Cashman* [2013] VSCA 122 (*‘Brown Appeal’*), discussed below Part IV. See also Kathryn JL Jacobsen, Jacqueline N Hood and Harry J Van Buren III, ‘Workplace Bullying across Culture: A Research Agenda’ (2014) 14 *International Journal of Cross-cultural Management* 47, 54, which argues that national cultures will affect the extent to which particular behaviours are identified as bullying.
- 12 *Towards Dignity and Respect at Work Report*, above n 5, 7. See also discussion below n 22 and accompanying text.
- 13 See below Part IV.
- 14 See *Fair Work Amendment Act 2013* (Cth) inserting a new pt 6-4B in the *Fair Work Act*. This legislation was enacted in response to the *Workplace Bullying Report*, above n 10. The definition adopted in the legislation accords with the recommendation of that *Report*: see at Recommendation 1, 18 [1.64]–[1.65]. For comment, see Caroline Kelly, ‘An Inquiry into Workplace Bullying in Australia: Report of the Standing Committee on Education and Employment – Workplace Bullying: We Just Want It to Stop’ (2013) 26 *Australian Journal of Labour Law* 224. The main requirements of the definition also capture elements found in a range of other regulatory measures: see below Part IV.
- 15 *Fair Work Act* s 789FD(1).

order for bullying at the workplace to be found. This definition was considered in *Ms SB*,¹⁶ the first reported case to apply the new provisions. Commissioner Hampton determined that ‘repeatedly’ did not mean that a set number of bullying events was required (although it did require more than a one-off event), and that the unreasonable conduct ‘might refer to a range of behaviours over time’ that are different in nature.¹⁷ The unreasonableness of the behaviours is to be assessed objectively, with regard to the circumstances.¹⁸ It may include behaviour that is victimising, humiliating, intimidating or threatening, although it is not limited to that.¹⁹

Finally, in order to establish the necessary ‘risk to health and safety’, a real possibility of danger needs to be identified.²⁰ That is, there is a need to demonstrate some causal link between the behaviour and the risk created. In line with the approach in other areas of the law, it is not necessary to prove that the behaviour was the only cause of the risk, but it must be a ‘substantial cause ... viewed in a commonsense and practical way’:

A risk to health and safety means the possibility of danger to health and safety, and is not confined to actual danger to health and safety. The ordinary meaning of ‘risk’ is exposure to the chance of injury or loss. In the sense used in this provision, the risk must also be real and not simply conceptual.²¹

Bullying behaviour can encompass a very wide range of actions: it is not limited to verbal or physical abuse, but extends also to gestures, tone of voice, silence, and other acts or signs of exclusion or isolation.²² A bullying environment can magnify other events or episodes otherwise innocuous.²³ The

16 [2014] FWC 2104.

17 *Ibid* [41]. See also *Applicant v General Manager and Company C* [2014] FWC 3940. For a similar idea at common law, see *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64. See also *Swan v Monash Law Book Co-Operative* (2013) 235 IR 63, 84–8 [86]–[87], 90–1 [94], showing that instances of behaviour, which alone might be insignificant, together may be unreasonable bullying and even if interspersed with quite reasonable behavior might provide the element of unpredictability and ‘intermittent reinforcement’, often the hallmark of the control exercised by the bully. Cf *Dalglish v MDRN Pty Ltd* [2014] FCCA 1138.

18 *Ms SB* [2014] FWC 2104, [43] (Commissioner Hampton).

19 *Ibid* [40] (Commissioner Hampton). See also Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth) [109].

20 *Ms SB* [2014] FWC 2104, [45] (Commissioner Hampton).

21 *Ibid* [44]–[45] (Commissioner Hampton), citing *Newcastle Wallsend Coal Company Pty Ltd v WorkCover Authority (NSW) (Inspector McMartin)* (2006) 159 IR 121, 225–6 [301] (Walton J, V-P and Boland J); *Thiess Pty Ltd v Industrial Court (NSW)* (2010) 78 NSWLR 94, 107–8 [65]–[67] (Spigelman CJ); *Abigroup Contractors Pty Ltd v WorkCover Authority (NSW)* (2004) 135 IR 317, 337 [58] (The Commission).

22 Examples of the range of bullying behaviours are evident in various cases: see, eg, *Naidu v Group 4 Securitas Pty Ltd* (2005) EOC 93-408, affirmed in *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; *Bailey v Peakhurst Bowling and Recreation Club* [2009] NSWDC 284; *Sneddon v Speaker of the Legislative Assembly* (2011) 208 IR 255; *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64; *Swan v Monash Law Book Co-Operative* (2013) 235 IR 63.

23 See *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64, especially [69], [102] (Henry J); *Swan v Monash Law Book Co-operative* (2013) 235 IR 63, especially 79 [69], 90–1 [94] (Dixon J).

making of deliberately false or vexatious claims of bullying, the spreading of rude and/or inaccurate rumours, or conducting an investigation into a bullying complaint in an unfair or inappropriate way are all capable of being bullying.²⁴

While the behaviour of those responsible for responding to complaints of bullying at work may, if inadequate or inappropriate, contribute to the risk to health and safety,²⁵ and even amount to bullying in itself,²⁶ ordinary management action (for example, in relation to performance monitoring) will not be regarded as bullying. Thus, the *Fair Work Act* also includes a ‘qualification’ for ‘reasonable management action carried out in a reasonable manner’.²⁷ Once again all three elements need to be established to exclude the action from the category of bullying behaviour as defined by the legislation: it must be carried out by management, be reasonable for management to have taken the action, and be carried out in a reasonable manner.²⁸ In expounding on the interpretation of this provision in *Ms SB*, the Fair Work Commission (‘FWC’) ruled that it was to be given a ‘wide meaning’ as the Explanatory Memorandum to the legislation made clear that Parliament intended ‘everyday actions to effectively direct and control the way work is carried out to be covered by the exclusion’.²⁹ Performance management or the management of workplace change, although they may cause stress to some workers, are not in themselves ordinarily bullying behaviours.³⁰ However, unwarranted criticism, unfair exclusion of a worker, or the imposition of meaningless tasks by a manager may be.³¹ The ‘reasonableness’ requirement indicates the need for ‘an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time’, with considerations including, for example, the circumstances leading to it, operating at the time and flowing from it.³² In addition, ‘[t]he specific “attributes and circumstances” of the situation including the emotional state and

24 See the examples in *Ms SB* [2014] FWC 2104, especially [80], [105] (Commissioner Hampton).

25 For examples see *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64; *Swan v Monash Law Book Co-Operative* (2013) 235 IR 63.

26 See *Ms SB* [2014] FWC 2104.

27 *Fair Work Act* s 789FD(2). The legislation thus responds to concerns that claims of bullying should not undermine ordinary managerial functions: see, eg, Industrial Law Committee of the Federal Litigation Section of the Law Council of Australia, Supplementary submission to the Senate Education, Employment and Workplace Relations Legislation Committee, *Fair Work Amendment Bill 2013*, 17 May 2013.

28 *Ms SB* [2014] FWC 2104, [47] (Commissioner Hampton). The applicant must prove these elements: see *Applicant v General Manager and Company C* [2014] FWC 3940. See also *Applicant v Respondent* [2014] FWC 2285.

29 See *Ms SB* [2014] FWC 2104, [48] (Commissioner Hampton). See generally at [46]–[54]. See also *Tao Sun* [2014] FWC 3839, especially [70] (Commissioner Cloghan); *Applicant v General Manager and Company C* [2014] FWC 3940.

30 See *Applicant v General Manager and Company C* [2014] FWC 3940.

31 See, eg, *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64; *Swan v Monash Law Book Co-Operative* (2013) 235 IR 63.

32 *Ms SB* [2014] FWC 2104, [49] (Commissioner Hampton).

psychological health of the worker involved may also be relevant'.³³ There is a further requirement that management's action must also be taken in a 'reasonable manner' and thus may depend on 'the facts and circumstances giving rise to the requirement for action, the way in which the action impacts on the worker and the circumstances in which the action was implemented and any other relevant matters'.³⁴ Importantly, however, as Commissioner Hampton also made clear in *Ms SB*, the test is not whether there was a 'more reasonable' or 'more acceptable' way in which management could have proceeded.³⁵ As interpreted, the legislation thus acknowledges the discretion exercised by management in the conduct and operation of its business.³⁶ In practice, it means that management action does not have to be perfect; indeed, some of the steps taken by management in the course of responding may not, when viewed alone, fit the description of 'reasonable action'. The 'unreasonableness' must arise from the action itself, and not the applicant's perception of it. Where there is a 'significant departure' by management from established policies or procedures, the reasonableness of that departure will be examined.³⁷

In Australia, in recent years bullying and harassment in the workplace have been identified as one of the most significant risks to workers.³⁸ The costs, both direct and indirect, for individuals and also more widely for workplaces and society at large, are extensive. Individual victims of bullying may suffer detrimental impacts on their health and wellbeing, which in turn can affect every aspect of their work and family life, and undermine their sense of self-esteem and morale. Empirical studies have associated bullying with 'depression, anxiety, aggression, insomnia, psychosomatic effects, stress and general physical and mental ill health'.³⁹ The impacts on businesses range from dealing with the consequences for individual workers, managing investigations and their outcomes, right up to responding to the negative impacts of publicised cases on reputation, brand name and goodwill. More generally, workplace bullying has been acknowledged as impacting negatively on productivity and on intra-sector opportunity costs (such as the failure of workers to take up training, negative impact on creativity and innovation, and the need for re-training and dealing with staff turnover). It can also lead to the loss of productive personnel, and the need

33 Ibid [50] (Commissioner Hampton).

34 Ibid [53] (Commissioner Hampton).

35 Ibid [51].

36 Early indications are that the FWC takes a cautious approach in relation to finding that, for example, the allocation of tasks (even where beyond the skill of an employee), negative outcomes in performance appraisals, or the discretionary allocation of bonuses amount to bullying: see *Mr Tao Sun* [2014] FWC 3839, especially [42], [62], [70] (Commissioner Cloghan).

37 *Ms SB* [2014] FWC 2104, [51] (Commissioner Hampton).

38 Verity Edwards, 'Australian Workplace Bullying – Sixth Worst in the World', *The Australian* (online), 18 September 2014 <<http://www.theaustralian.com.au/national-affairs/industrial-relations/aussie-workplace-bullyingsixthworst-in-world/story-fn59noo3-1227062026746>>.

39 Vega and Comer, above n 10, 106.

to recruit and train alternative workers.⁴⁰ The consequent financial costs are not only to the organisation involved but also to the national economy.⁴¹ In 2001, estimates put this cost for Australia as somewhere between \$6–13 billion at the lower end and up to \$16–36 billion at the higher end.⁴²

There are several studies that have examined the extent and nature of bullying within the legal profession. In Western Australia, the *Towards Dignity and Respect at Work Report* indicated that, of the legal practitioners surveyed, 21 per cent reported that bullying occurred at their current place of employment.⁴³ The *NARS Report* commissioned by the Law Council of Australia found that one in two women and one in three men reported having been bullied or intimidated in their current workplace.⁴⁴ The Victorian Human Rights Commission, examining the experiences of female lawyers in Victoria, revealed that 40 per cent of the survey respondents reported some discrimination.⁴⁵ It is possible that some of these experiences would fall into the category of workplace bullying. As the report states: ‘Of the 168 women who reported discrimination, 84 said discrimination took the form of a hostile work environment. Sixty-seven reported workplace bullying [and] 65 reported unfair work allocation.’⁴⁶

While statistics such as these may indicate that there is a problem, they should also be considered with caution. The difficulty associated with the definition of bullying means that bullying may be under-reported, or over-reported, depending on an individual’s perception of bullying. A second problem is that such reports tend to omit workers who have left the workplace as a consequence of their experiences.⁴⁷

III BULLYING WITHIN THE LEGAL PROFESSION

Legal practice has undergone significant change in the last several decades. The growth of large law firms;⁴⁸ the rapid pace, and expanding complexity, of legal work; the changes in the ways that clients, particularly corporate clients,

40 Ibid.

41 See, eg, the evidence and information contained in the *Workplace Bullying Report*, above n 10; Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* (2010) especially ch 11 ‘Psychosocial Hazards’.

42 See data cited in Productivity Commission, above n 41, 287.

43 *Towards Dignity and Respect at Work Report*, above n 5, 10.

44 *NARS Report*, above n 2, 6.

45 *Changing the Rules Report*, above n 3, 4.

46 Ibid.

47 Omari and Paull, above n 9, 153.

48 Harland Koops, ‘Should Major Law Firms Have a Social Conscience?’ (2001) *University of Western Sydney Law Review* 127, 127; Sharyn L Roach Anleu, ‘The Legal Profession in the United States and Australia: Deprofessionalization or Reorganization?’ (1992) 19 *Work and Occupations* 184, 189–90.

procure legal services; and the increased competition within, and for, legal positions have all increased the pressure on lawyers in practice.

While some things have changed, others have remained the same. As Fortney explains:

Although lawyers have practiced in group settings for decades, lawyers are generally independent by nature. Referring to the independent nature of lawyers, commentators have compared managing lawyers with herding cats ... Cats, as well as lawyers, can be unyielding and self-centered.⁴⁹

The profession still predominantly organises itself as sole practitioners and partnerships,⁵⁰ though some have adopted limited liability partnerships.⁵¹ About 20 per cent of firms have taken the option of incorporation.⁵²

Self-regulation remains a clear imperative in a number of jurisdictions. Even if self-regulation has given way to an independent disciplinary process, members of the profession retain control of these processes as well as determining the standards against which lawyer conduct is evaluated.⁵³ The professional identity is strong and readily asserted to protect professional boundaries.⁵⁴

It should also be noted that there is a diversity of practice settings within the profession. The Law Council's *Snapshot of the Legal Profession* indicated that in 2008, 5.2 per cent of lawyers were barristers and 5.1 per cent worked for community legal centres. Of the remainder, 4.2 per cent worked for government and the balance worked in a range of traditional legal firms, corporate law departments, or as sole practitioners.⁵⁵ This diversity means that it is difficult to generalise about the 'way lawyers work'. The analysis below draws on scholarship about law firms and may not reflect the positions of lawyers in other practice settings. However, some aspects of the discussion may be relevant to lawyers working in other sectors as well. It is notable that the *NARS Report* indicates that female barristers were more likely than their counterparts in private

49 Susan Saab Fortney, 'Law Firm General Counsel as Sherpa: Challenges Facing the In-firm Lawyer's Lawyer' (2005) 53 *University of Kansas Law Review* 835, 835.

50 See Anleu, above n 48, 189–90. However, this is not to ignore the fact that beneath these partnerships, the legal arrangements through which the firm works are often quite complex: for instance, often the solicitors who are not equity partners and other administrative staff are employed through service companies, the directors of whom may be drawn from the equity partners.

51 Saab Fortney, above n 49, 840.

52 Australian Bureau of Statistics, *Legal Services, Australia 2007–08* (24 June 2009) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features12007-08?OpenDocument>>.

53 See, eg, the South Australian Legal Practitioners Disciplinary Tribunal membership: *Legal Practitioners Act 1981* (SA) s 78. This provides that the legal practitioner members of the Tribunal are nominated by the Chief Justice and must be legal practitioners of at least five years standing.

54 See, eg, the response of the Chief Justice of the High Court to a reform proposal that potentially meant the legal profession would be subject to a regulation by a committee composed of delegates of the Attorney-General: Letter from Chief Justice Robert French to Roger Wilkins, 6 November 2009 <<http://ethics.qls.com.au/sites/all/files/Chief%20Justice%20French%20ltr%20re%20Legal%20Profession%20Reform.pdf>> (arguing that any national reform must preserve the independence of the legal profession).

55 Law Council of Australia, 'Snapshot of the Legal Profession' (Brief, September 2009).

practice to report 'discrimination due to gender, bullying or intimidation, and discrimination due to family/carer responsibilities'.⁵⁶

Considering the problem of bullying in legal practice involves drawing on understandings of that practice as well as the insights about unethical behaviour more generally. It is possible that the scholarship on the root causes of unethical conduct in business organisations may illuminate the causes of bullying in legal practices. This literature defines unethical behaviour as including both illegal and unethical behaviour, and therefore extends to bullying. The potential for unethical behaviour in organisations is theorised as flowing from three main causes: 'bad apples', 'bad cases' and 'bad barrels'.⁵⁷ Using this categorisation, 'bad apples' represent the individuals who are prone to engage in unethical behaviour. 'Bad cases' are interactions where the ethical dimensions are likely to be overlooked or ignored. 'Bad barrels' are organisations that are organised and conducted in ways that maximise the likelihood of unethical conduct. Empirical work has indicated that unethical behaviour will increase in the presence of each of these phenomena.⁵⁸ While these categories are theoretically distinct, in practice they will interact and overlap in complex ways. For example, it is plausible that bad apples in leadership positions could encourage the creation of bad barrels.⁵⁹ Nonetheless, the three categories can assist in developing an understanding of the extent to which each may be implicated in bullying within the legal profession. The following discussion considers all three categories and the part each may play in the prevalence of bullying in the legal profession.

A Bad Apples

It is possible that a few 'bad apples' are responsible for bullying in legal practice. This would fit with the regulatory regime adopted for the profession. The legal profession is regulated as if individual bad apples were the most significant problem.⁶⁰ The educational and character requirements that must be met prior to admission suggest that bad apples can be excluded from the profession. The conduct rules are also focussed on deterring individual

56 *NARS Report*, above n 2, 80.

57 Jennifer J Kish-Gephart, David A Harrison and Linda Klebe Treviño, 'Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence about Sources of Unethical Decisions at Work' (2010) 95 *Journal of Applied Psychology* 1, 2.

58 *Ibid.*

59 It is widely argued that the attitude, behaviour and commitment of those in leadership positions is important for the creation of an ethical organisation: see, eg, Mark S Schwartz, Thomas W Dunfee and Michael J Kline, 'Tone at the Top: An Ethics Code for Directors?' (2005) 58 *Journal of Business Ethics* 79, 87. See also Neil W Hamilton and Verna Monson, 'The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law' (2011) 24 *Georgetown Journal of Legal Ethics* 137, 183.

60 Christine Parker et al, 'The Ethical Infrastructure in Larger Law Firms: Values, Policy and Behaviours' (2008) 31 *University of New South Wales Law Journal* 158, 158–9.

practitioners who might stray from the line required of the ethical practitioner.⁶¹ However, the character test applied to those who seek entry to the legal profession is imperfect. As it stands, it requires applicants to self-disclose events that throw light on their character. In general, the kinds of events that are seen as significant are criminal convictions, charges and acquittals, acts of bankruptcy, and academic misconduct.⁶² This process is unlikely to reveal any history of bullying which might have emerged in the context of prior employment and is unlikely to lead to criminal charges.

The character test is also designed to be a 'look back' process. That is, if self-disclosure is made, it provides only a picture of behaviours emerging prior to admission. Once admission has been granted, there is no ongoing monitoring of practitioner behaviour. Transgressions are generally only identified where clients complain, or matters emerge into the public eye, such as by virtue of criminal or other proceedings.⁶³ In general it is improbable that bullying will emerge in this way. Clients, the most likely source of complaints, are unlikely to become aware of bullying behaviours, unless they are at the receiving end. The likelihood that bullying will lead to legal proceedings is slim. Even if the bullying is widely known, it may be tolerated either as 'normal' or, if seen as aberrant, because the bully is untouchable due to their seniority or productivity.⁶⁴ In addition, the respect still accorded to lawyer independence may discourage intervention. It is, therefore, possible that bad apples within the profession are responsible for some bullying behaviours, and that refinement of the disciplinary processes to address this could provide useful solutions.

There is, however, a difficulty with explaining the apparent pervasiveness of bullying in the legal profession by employing the theory of the bad apple. If a few bad apples were responsible, we would expect to see a limited number of cases emerging, as bad apples are, by their nature, anomalies. The existing evidence that bullying within the legal profession is widespread suggests a systemic rather than isolated problem. This implies that even if there is an

61 See, eg, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (March 2002) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/ModelRules.pdf>>. The *Model Rules* are focused exclusively on individual practitioners. Disciplinary proceedings for breach of the rules proceed on the basis that an individual practitioner has engaged in unsatisfactory professional conduct or professional misconduct: *Legal Practitioners Act 1981* (SA).

62 See, eg, Law Society of South Australia, *Guide to Admission* (2014) <<http://www.lawsocietysa.asn.au/pdf/GuidetoAdmission.pdf>> 5–7.

63 Eg, *Kanapathy v In De Braekt [No4]* [2013] FCCA 1368. In this case, a legal practitioner was found to have breached the *Racial Discrimination Act 1975* (Cth) by engaging in bullying behaviour in the form of racial vilification aimed at a court official. The legal practitioner was fined. The Western Australian Supreme Court also struck her off for this and other misconduct: *Legal Profession Complaints Committee v In De Braekt* [2013] WASC 124.

64 See, eg, the way bullying and sexual harassment by a senior lawyer were largely tolerated over a 30-year period: Alice Wooley, '#Yesallwomen/#Notallmen: Sexual Harassment in the Legal Profession' on ABlawg (13 June 2014) <<http://ablawg.ca/2014/06/13/yesallwomennotallmen-sexual-harassment-in-the-legal-profession/>>. See also discussion below in text accompanying fn 85.

element of individual responsibility for bullying behaviours, there is also some other factor involved.

B Bad Cases

The second option is that bullying in the profession is attributable to 'bad cases'. That is, bullying is the kind of ethical issue where the identification of, or motivation to respond to it as such, is low. This might explain its prevalence.

Jones has argued that the ethical intensity of any issue is determined by six factors.⁶⁵ First, the magnitude of the consequences: that is, where the extent of the harm that may flow from the act is perceived to be low, the actor is less likely to see the act as ethically significant. In the context of bullying this may be the case. While it is perfectly clear that bullying may lead to serious health consequences,⁶⁶ this understanding may not be widely held. Alternatively, there may be reasons why behaviours might be seen as harmful in one context, while in another they might be seen as unlikely to affect the individuals concerned. The individuals may be seen as having accepted, to some degree, the stress associated with the professional context.⁶⁷

The second factor is the degree of social consensus: that is, where the level of social agreement that the act is wrong is low, it is easier to see the act as ethically negotiable and, therefore, to rationalise it as ethically acceptable. In a workplace where bullying is prevalent, it may well be easier to accept it as either appropriate 'performance management', or simply 'the way things are done'.⁶⁸ Where examples of bullying occur in public and appear to be sanctioned by prominent members of the legal profession, they may contribute to a tolerance of bullying that makes addressing it all the more difficult.

In most cases, the court system operates so as to pit parties and their lawyers against each other. This competition occurs in the presence of the judge, whose role it is to decide between the competing sides. In turn, the decision of that judge may be evaluated by judges higher up in the court hierarchy and so on, until it reaches the highest court of appeal. In this highly stressful, competitive and adversarial context, it is unsurprising that at times the behaviour of those within the system may take on the characteristics of bullying behaviours. The Hon Michael Kirby, writing shortly after his retirement from the High Court bench, identified some judicial behaviours as conduct amounting to bullying. These included:

65 Thomas M Jones, 'Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model' (1991) 16 *Academy of Management Review* 366.

66 See above n 39 and accompanying text.

67 See, eg, the judicial acceptance of the stresses of legal work in *Brown Appeal* [2013] VSCA 122, [166], discussed below n 172 and accompanying text.

68 Parker et al, above n 60, 165

displaying personal animosity; disrespect towards advocates or litigants or their arguments; courtroom rudeness; attempting to isolate or ignore a colleague; arrogance towards advocates or colleagues; gossiping and laughing in private conversations with other judges during argument.⁶⁹

Appleby and Le Mire have also identified a number of historical and contemporary examples of judges engaging in bullying behaviours and argued that:

Conduct in this category may demonstrate that an individual concerned does not have the appropriate poise and character to engage in the judicial role. It is also likely to damage the confidence of litigants and other members of the public who witness the interactions.⁷⁰

While from time to time bullying behaviours affecting legal practitioners come to light, generally they attract scrutiny in the context of complaints about other aspects of the judicial officer's work. So the critique is often built around the way the judicial officer has conducted the case more broadly, or has treated a member of the public.⁷¹ In the examples below, the conduct towards legal practitioners who are performing their professional role within the court goes unremarked, or is only noted in the context of a wider complaint about the way a member of the public was treated. This suggests a tolerance for overbearing behaviour towards legal practitioners.⁷² An example of this dynamic can be seen in a number of complaints made against a judicial officer in New South Wales.

In 2011, the conduct of a magistrate, Jennifer Betts, in New South Wales became the focus of public attention and an adverse finding by the Judicial Commission of New South Wales ('Commission').⁷³ This magistrate was brought before the New South Wales Parliament to explain why she should not be removed from office. Ultimately, the Legislative Council voted that she should retain her judicial office but a number of members expressed concerns about her

69 Michael Kirby, 'Judicial Stress and Judicial Bullying' (2013) 87 *Australian Law Journal* 516, 523 (citations omitted).

70 Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38 *Melbourne University Law Review* 1, 16.

71 See, eg, *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407.

72 In more recent times, some reports may indicate that such tolerance is waning: see, eg, Josh Jerga, 'Lawyer "Berated" in Court Before Death', *Sydney Morning Herald* (online), 20 August 2010 <<http://news.smh.com.au/breaking-news-national/lawyer-berated-in-court-before-death-20100820-138pm.html>>.

73 Justice Simpson, D H Lloyd and K Moroney, 'Report of an Inquiry by a Conduct Division of the Judicial Commission of NSW in Relation to Magistrate Jennifer Betts' (Report, Conduct Division, Judicial Commission of New South Wales, 21 April 2011). This case, as dealt with in the New South Wales Parliament, highlighted, as did the case heard in relation to Magistrate Brian Maloney, the complex intersection between mental health and inappropriate bullying behaviours. On the relationship with stress, see also Kirby, above n 69.

conduct.⁷⁴ The basis of the proceedings was that four complaints were made about Magistrate Betts's conduct in four matters that came before her court between 2003 and 2009. Two were complaints put forward by unrepresented litigants; one in concert with a court observer, and one alone. Legal practitioners made the other two complaints. The treatment of these latter complaints illustrates the tendency to downplay the exhibition of bullying behaviours toward legal practitioners.

In the first, a legal practitioner, Mr Farago, was subjected to an extraordinary attack from the magistrate for failing to provide copies of the authorities upon which he was relying 'well before' the hearing.⁷⁵ In fact, the magistrate had only requested that the authorities be provided 'before the hearing', and Mr Farago had complied with this. The complaint described the magistrate as being 'immediately aggressive', failing to listen, and displaying 'belligerence'.⁷⁶ Ultimately, the Commission agreed that the behaviour of the magistrate was unacceptable as it was 'discourteous, to an extreme degree'.⁷⁷ However, there was no mention of bullying.

In the second complaint, Mr Castle, also a legal practitioner, described the conduct of the magistrate as subjecting his client to the 'most outrageous abuse and bullying from the Bench that it has ever been my misfortune to encounter'.⁷⁸ However, he does not mention that he too was subject to behaviours that appear to fall within the category of inappropriate behaviours. Throughout the case the magistrate repeatedly interrupted and contradicted his submission. The following passage from the transcript is typical:

HER HONOUR: P-plate drivers are subject to 7 points for a P2 licence. Your client has got 9, two speeding matters.

MR CASTLE: Ah, one of them was on a double demerit weekend. I appreciate that the first double demerit was –

HER HONOUR: You have said that twice.

MR CASTLE: Yes, well, I think it's fairly significant, your Honour.

HER HONOUR: No, it's not.

MR CASTLE: It's – it's a –

HER HONOUR: Twice, she has been in and out of –

MR CASTLE: (Indistinct)

74 New South Wales, *Parliamentary Debates*, Legislative Council, 16 June 2011, 2479–96. In part, the decision appears to be attributable to concerns that her removal would discourage those with mental illness from seeking employment and treatment: see, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 16 June 2011, 2489 (John Ajaka). A similar outcome was reached in proceedings for the removal of Magistrate Brian Maloney: New South Wales, *Parliamentary Debates*, Legislative Council, 13 October 2011, 6149–78.

75 Justice Simpson, Lloyd and Moroney, above n 73, 22–3.

76 Ibid 23.

77 Ibid 40.

78 Ibid 30.

HER HONOUR: Don't talk to me when I'm talking to you, okay?⁷⁹

The Commission agreed that 'the magistrate was rude, offensive and bullied Ms Cooper [the client] while she was giving evidence'.⁸⁰ On the subject of the behaviour towards Mr Castle, their response was far less emphatic: 'the Magistrate did not permit Mr Castle an adequate opportunity to make submissions'.⁸¹

While the Commission's report centred on the treatment of defendants who were before the court, in the course of the proceedings it was also reported that a complaint had been made against Magistrate Betts in 2003 in relation to her treatment of a lawyer.⁸² The complaint followed an appearance at the court where a legal practitioner was subjected to abuse, including being described as a 'showman'. Yet, despite the complaint being made to the New South Wales Criminal Defence Lawyers Association, it does not appear to have been taken any further.

There are good reasons why the Commission was focused on the behaviour towards members of the public who were seeking justice from the court. As the Commission stated:

Other than the Farago complaint, which was essentially of gross discourtesy, and unfairness to a legal practitioner (but not unfairness in the outcome of the proceedings, or in the decision making process), the complaints are of conduct that call into question the impartiality of the magistrate, and, importantly, her capacity to discharge that most basic function of a member of the judiciary, to afford a fair, dispassionate and impartial hearing to litigants.⁸³

Thus, the fact that there were serious questions about whether the magistrate had perpetrated 'actual injustice' effectively operates to drown out the complaints of legal practitioners.

There is also some evidence that unreasonable expectations of legal practitioners in some practice settings have become so normalised that they are not seen as problematic. In a forum where a managing partner was accepting a 'best firm' award, he explained the reasons why his firm had won:

We don't run this place as a holiday camp. We expect our people to treat the client as if they were God and to put themselves out for clients. You don't say, 'Sorry I can't do it, I'm playing cricket on the weekend' ... You don't have a right to any free time.⁸⁴

79 Ibid Annexure D.

80 Ibid 37.

81 Ibid.

82 Chris Merritt, 'Solicitor Clashed with Magistrate Eight Years before Adverse Findings', *The Australian* (online), 17 June 2011 <<http://www.theaustralian.com.au/business/legal-affairs/solicitor-clashed-with-magistrate-eight-years-before-adverse-findings/story-e6frg97x-1226076670490>>.

83 Justice Simpson, Lloyd and Moroney, above n 73, 36.

84 Lucinda Schmidt, 'Best Large Law Firm', *Business Review Weekly* (Melbourne), 3 March 2005, 48 citing Tom Poulton, a former managing partner of Allens Arthur Robinson.

It would seem plausible that practitioners operating in this kind of environment, where the interests of staff are seen as unimportant, might regard bullying behaviours as simply part of the scene, rather than something that requires intervention.

Omari and Paull have explained the potential for those engaging in problematic behaviours to be ignored when they perform well in other aspects of their practice:

The comment: ‘Partners who make lots of money for the firm are tolerated and effectively immune from the firms [sic] bullying policy’ provides evidence that, at least for some, there was a perception that inaction was deliberate, and the behaviour tolerated, and tacitly condoned by the firm.⁸⁵

Prominent examples of bullying behaviours that are not addressed in effective and transparent ways may operate to reduce the capacity of other members of the profession to ‘see’ the problem and be motivated to address it.

Returning to Jones’s analysis, the third factor is that the probability of the effect or harm will affect the assessment of the ethical intensity.⁸⁶ So if bullying is seen as unlikely to cause serious harm for the majority of people, the ethical intensity will be lower. Temporal immediacy is the fourth factor. This refers to the time lag between the act and the harm. Bullying is a repeated activity and there may well be a gap between the action and the harm becoming evident. It is also, however, possible for the harm to flow closely from the bullying activity.⁸⁷

According to Jones, the cultural, physical, social and psychological proximity of the victim can increase the ethical intensity.⁸⁸ In the case of bullying within the legal profession, the proximity is likely to be high, with significant physical, cultural, social and psychological common ground between the parties. It is unlikely that a lack of proximity is a relevant factor in this context. The final factor is concentration of effect, which refers to whether the effect of the conduct falls heavily on one or a few parties, or more lightly on large numbers. Bullying by its nature is generated by personal interactions, so again this factor appears to be present.

This analysis indicates that there are some factors that may well reduce the potential for those within the legal profession to appreciate the ethical significance of bullying actions. It is possible that the ability to see the ethical dimensions of bullying may be affected by the way legal practice is organised. As Parker et al explain, ‘[I]awyers can also get so used to “the way we do things around here”, and the values exhibited by a particular leader or group, that they do not even think of ways in which others might think that these habits

85 Omari and Paull, above n 9, 151. See also Bagust, above n 9, 198.

86 Jones, above n 65.

87 See, eg, *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64 (bullying over three days led to a medical condition and a damages award of almost \$240 000).

88 Jones, above n 65, 376–7.

are unethical'.⁸⁹ Again, however, the bad case theory seems to have insufficient explanatory power to account for the level of reported bullying in the legal profession.

C Bad Barrels

It is also plausible that the third cause of unethical behaviour, bad barrels, may be in play. This theory suggests that organisations may be conducted in ways that allow unethical conduct to flourish, or at least not to be impeded. Scholarship in a variety of disciplines has identified organisational structures and processes as able to influence the actions of individuals.⁹⁰ The significance of the practice setting as an influence on lawyer conduct increases as the lawyer transitions from 'an independent moral agent' to 'an employee with circumscribed responsibility [and] organizational loyalty'.⁹¹ One implication of this is that 'law firm cultures and structures can not only precipitate, but also needlessly amplify unethical behaviour'.⁹²

There is evidence that certain workplace cultures can 'set the scene' for bullying behaviours.⁹³ Aspects of organisations that are implicated in this process include a lack of appropriate ethical or other infrastructure, power differentials and insecurity, organisational chaos,⁹⁴ and corporatised workplaces that lack collegiality.⁹⁵ In addition to the general organisational characteristics that might lead to bullying behaviours, there may also be factors, peculiar to legal practice, that amplify the risks of unethical behaviour including bullying. In 2010, Edith Cowan University and the Law Society of Western Australia issued a report about the prevalence of workplace bullying in the Western Australian legal profession.⁹⁶ The *Towards Dignity and Respect at Work Report* suggests that the culture of the legal profession may be one that provides fertile ground for bullying behaviours.⁹⁷

89 Parker et al, above n 60, 165.

90 See, eg, Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press, 2002); Kath Hall, 'The Psychology of Corporate Dishonesty' (2006) 19 *Australian Journal of Corporate Law* 268; Kish-Gephart, Harrison and Klebe Treviño, above n 57; Zygmunt Bauman, *Modernity and the Holocaust* (Cornell University Press, 1989); Elina Riivari et al, 'The Ethical Culture of Organisations and Organisational Innovativeness' (2012) 15 *European Journal Of Innovation Management* 310, 326.

91 Deborah L Rhode, 'Ethical Perspectives on Legal Practice' (1984) 37 *Stanford Law Review* 589, 590.

92 Parker et al, above n 60, 163.

93 Vega and Comer, above n 10, 107; Hutchinson, above n 7.

94 Hodson, Roscigno and Lopez, above n 7, 383.

95 Thornton, 'Corrosive Leadership', above n 7, 164–5; Saab Fortney, above n 49, 839–40; *Towards Dignity and Respect at Work Report*, above n 5.

96 *Towards Dignity and Respect at Work Report*, above n 5. It was based on a survey of Law Society members (2688 surveys were dispatched, with 327 (12 per cent) responses and 71 stories collected from survey respondents).

97 *Ibid* 9.

In this regard, the organisation of working time may be identified as one of the key relevant aspects of the culture of modern law firms. In a study conducted in Victoria less than a decade ago, the working time patterns of those in legal practice was described as ‘the elephant in the room’.⁹⁸ Paradoxically, given that membership of a profession implies strong control over one’s working life, the study concluded that for solicitors the ‘rigid and demanding’ long hours culture of legal practice was ‘hostile to employee choice and employee-oriented flexibility’.⁹⁹ Unsurprisingly, it also concluded that this was a highly gendered system, which was based on assumptions that workers could conform to a traditional norm devoid of familial and other external ties.¹⁰⁰ Most significantly, it identified the billable hours framework as no longer simply a method for charging clients, but as a tool for the management and control of solicitors through the imposition of targets, close time recording and performance monitoring.¹⁰¹ According to the report’s authors, the drive for profits and commercial imperatives of modern legal practice explain the resilience of the billing system.¹⁰² Young and newly graduated lawyers are subject to extraordinary workload expectations.¹⁰³ It is little wonder that there are now numerous stories in publications targeted at young lawyers that claim the system is unsustainable.¹⁰⁴

98 See Iain Campbell, Jenny Malone and Sara Charlesworth, ‘“The Elephant in the Room”: Working-Time Patterns of Solicitors in Private Practice in Melbourne’ (Working Paper No 43, Centre for Employment and Labour Relations Law, May 2008). See also Iain Campbell and Sara Charlesworth, ‘Salaried Lawyers and Billable Hours: a New Perspective from the Sociology of Work’ (2012) 19 *International Journal of the Legal Profession* 89.

99 Campbell, Malone and Charlesworth, above n 98, 39.

100 See *ibid*, especially 39–40. See also Thornton, ‘Hypercompetitiveness or a Balanced Life?’, above n 4; Margaret Thornton, *Dissonance and Distrust: Women and the Legal Profession* (Oxford University Press, 1996).

101 See Campbell, Malone and Charlesworth, above n 98, especially 23–32. See also Bagust, above n 9, 189–90.

102 Campbell, Malone and Charlesworth, above n 98, 32–9.

103 See, eg, Schmidt, above n 84.

104 See, eg, Justin Whealing, ‘Rage against the Billing Machine’, *Lawyers Weekly* (online), 3 May 2013 <<http://www.lawyersweekly.com.au/news/rage-against-the-billing-machine>>; Justin Whealing, ‘Exclusive: Another Large Firm Lawyer Ditches Timesheets’, *Lawyers Weekly* (online), 21 March 2014 <<http://www.lawyersweekly.com.au/news/exclusive-another-large-firm-lawyer-ditches-timesh>>; Leane Mezrani, ‘Six-Minute Units Don’t Belong in Modern Legal Practice’, *Lawyers Weekly* (online), 19 May 2014 <<http://www.lawyersweekly.com.au/appointments/six-minute-units-don-t-belong-in-modern-practice>>; Justin Whealing, ‘They Have the Key, and We Reveal Their Secrets’, *Lawyers Weekly* (online), 30 May 2014 <<http://www.lawyersweekly.com.au/news/they-have-the-key-and-we-reveal-their-secrets>>. Some of these reports also suggest timesheets are a contributing factor to the high rates of depression in the legal profession: Stephanie Quine, ‘In between the Timesheets’, *Lawyers Weekly* (online), 23 April 2013 <<http://www.lawyersweekly.com.au/news/in-between-the-timesheets>>.

D Commercialisation and Insecurity

Parker and Aitken have argued that two key features of the modern law firm are commercialisation and managerialism.¹⁰⁵ Commercialisation drives the firm to rely heavily on practices that promote profits through time billing and promotion of effective profit earners. In doing this, the firm has all the competitive elements of a high-pressure workplace where competition for promotion and success is hard fought and hard won.¹⁰⁶ Within law firms, the ability to comply with, or exceed these, firm expectations is determinative of success in the ‘tournament’ for promotion to partnership.¹⁰⁷ A lawyer participating is subject to ‘an endless competition to improve or protect one’s relative standing in the firm’.¹⁰⁸ The relative success of individual lawyers in this quest is expressed in the tags, ‘finders’, ‘minders’, ‘binders’ and ‘grinders’.¹⁰⁹

At the same time, managerialism reduces the personal autonomy of individual lawyers as they are placed into specialised work groups where work is fragmented and hierarchical structures dictate the ‘ways things are done’.¹¹⁰ ‘This can degrade individual lawyers’ sense of professional autonomy and their capacity to take responsibility for their own work’.¹¹¹ As individual lawyers become part of a firm and meet (or even fail to meet) expectations, the firm’s culture is highly determinative of their perceptions of practice and professionalism. As Kirkland argues, the ‘environments within which we practice law shape our understandings of what it means to be ethical and professional’.¹¹²

E Ethical Infrastructures

In 1998, Ted Schneyer introduced the term ‘ethical infrastructure’ to encompass formal systems and structures that could encourage compliance with the professional conduct rules in the face of limited disciplinary activity.¹¹³ Parker et al put a more expansive concept forward in 2006 when they considered the role that formal and informal infrastructure could play in supporting and encouraging ethical behaviour within large law firms.¹¹⁴ This more expansive notion defines ethical infrastructure as ‘formal and informal management

105 Christine Parker and Lyn Aitken, ‘The Queensland “Workplace Culture Check”: Learning from Reflection on Ethics inside Law Firms’ (2011) 24 *Georgetown Journal of Legal Ethics* 399, 402.

106 Mark Galanter and William Henderson, ‘The Elastic Tournament: A Second Transformation of the Big Law Firm’ (2008) 60 *Stanford Law Review* 1867, 1877–8.

107 Ibid.

108 Ibid 1928.

109 Kimberly Kirkland, ‘Ethics in Large Law Firms: The Principle of Pragmatism’ (2005) 35 *University of Memphis Law Review* 631, 665.

110 Parker and Aitken, above n 105, 403.

111 Ibid.

112 Kirkland, above n 109, 632.

113 Ted Schneyer, ‘A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms’ (1998) 39 *South Texas Law Review* 245, 246.

114 Parker et al, above n 60, 160.

policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour'.¹¹⁵

Schneyer as also argued that the existing system of regulating individual practitioners and relying on a complaints-based system is inadequate.¹¹⁶ It is also exceptional. 'Regulation of both individual business people and whole firms is, of course, the standard approach in other areas of business regulation such as environmental, health and safety, discrimination, and consumer protection'.¹¹⁷ There are strong reasons for regulating individual practitioners in the area of bullying. These include the need to encourage individual responsibility and the diversity of practice settings. However, the 'bad barrel' analysis suggests that this alone is not sufficient. The complex interrelationship between work culture and practices and bullying means that firm level regulation should be part of the picture.

There is also some reason to hope that regulatory initiatives could lead to improvements in the ethical infrastructure of firms. The work of the Queensland Legal Services Commissioner to develop and inculcate professional standards in incorporated law firms appears to have led firms to reflect on and improve their ethical infrastructure.¹¹⁸ A similar programme implemented in New South Wales dramatically reduced client complaints.¹¹⁹

In essence, these programmes make 'legal practitioner directors' responsible for ensuring 'appropriate management systems' are in place.¹²⁰ The systems themselves aim to 'ensure that the firm develops and maintains an ethical infrastructure'.¹²¹ In order to secure compliance all firms conduct internal audits against 10 objectives associated with ethical legal practice.¹²² These ten areas 'relate to a large extent to areas that had already proved problematic for New South Wales lawyers, as evidenced by client complaints'.¹²³ This process is also supported by external audits carried out by the regulator.¹²⁴

Data collected in 2008 from New South Wales incorporated firms showed statistically significant improvements in firm ethical performance measured by the rate of client complaints.¹²⁵ After self-assessment these firms attracted one

115 Ibid 160.

116 Ted Schneyer, 'Professional Discipline for Law Firms' (1991) 77 *Cornell Law Review* 1, 4–6.

117 Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37 *Journal of Law and Society* 466, 470.

118 John Briton and Scott McLean, 'Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era' (2008) 11 *Legal Ethics* 241.

119 Parker, Gordon and Mark, above n 117, 471.

120 Briton and McLean, above n 118, 244.

121 Ibid 246.

122 Ibid 247–8.

123 Parker, Gordon and Mark, above n 117, 471.

124 Briton and McLean, above n 118, 247.

125 Parker, Gordon and Mark, above n 117, 485–6.

third fewer complaints than could have been expected had they not undertaken the process.¹²⁶ Parker, Gordon and Mark point out that these

findings suggest that the OLSC's [Office of the Legal Services Commissioner's] self-assessment process may well be guiding, encouraging, and requiring many practitioners consciously and systematically to think through practice management issues, including ethics management, for the very first time.¹²⁷

This study indicates that turning the attention of practitioners to the ethical standards in place within their firm can be productive.

There is also a case to be made that conscious creation of appropriate ethical infrastructure to deter bullying can be effective. Vega and Comer argue that anti-bullying policies and top-down demonstrated commitment to 'civil work practices' can be useful interventions.¹²⁸ The *Towards Dignity and Respect at Work Report* found that the bullying of legal practitioners was reported less often where the firm had a bullying policy.¹²⁹ As Omari and Paull explain, this could mean that 'such policies act as a deterrent, or that the climate or culture in the firm is reflected in its policies'.¹³⁰

The work of the Legal Services Commissioners in the incorporated sphere and the literature about addressing bullying both suggest that meaningful reform can be achieved. Regulating at a firm level and enlisting the firms themselves to improve their ethical infrastructure could be a useful strategy in the context of workplace bullying.

IV EXISTING REGULATION OF WORK RELATIONS

Parallel to the recognition of the significance of the issue of bullying in the context of the legal profession, awareness of the problem of bullying, including at workplaces generally, has increased in recent years. Community intolerance of, and repugnance to, bullying of any type have no doubt engendered an environment where those who are its victims are increasingly prepared to stand up and utilise any available legal means to stop it or to seek redress for its damaging consequences. In some jurisdictions (eg, Victoria), the issue of bullying has provoked such community outrage that the criminal law has been amended to clarify its availability and relevance in extreme cases.¹³¹ However, the criminal law is a necessarily blunt instrument and, with the higher standard of

126 Ibid 488.

127 Ibid 495.

128 Vega and Comer, above n 10, 107–8.

129 *Towards Dignity and Respect at Work Report*, above n 5, 16.

130 Omari and Paull, above n 9, 152.

131 *Crimes Amendment (Bullying) Act 2011* (Vic) amending the *Crimes Act 1958* (Vic) by inserting new provisions relating to stalking: ss 21A(2)(da)–(dd), and amending s 21A(2)(g)(i)–(ii). It is clear that other aspects of the criminal law have the potential to be used in relation to bullying: eg, *Crimes Act 1914* (Cth) in relation to cyber-bullying.

proof required for a successful prosecution, is not always available or even appropriate as a response to bullying at work.

The problem of bullying at work has therefore placed the spotlight on the wide range of other regulatory responses that may be brought to bear in dealing with the issue. Under work, health and safety legislation there is a general duty on a wide range of actors to take reasonable care to prevent adverse impacts to the health and safety of those in the workplace.¹³² In the past, only South Australian legislation had specific provisions focussing on ensuring there was a process for the resolution of disputes over bullying,¹³³ although guidelines and codes were developed in other states. As part of the recent project to harmonise work, health and safety law in Australia, a code of practice in relation to bullying is currently being developed.¹³⁴ If approved under the model uniform legislation, the code may be tendered as evidence of non-compliance with the general duty under the legislation or in relation to the nature of the risks posed to health and safety.¹³⁵

From the stand point of the individual worker, there are various other statutory provisions relevant to bullying at work. At one end of the spectrum there are provisions for seeking redress in relation to the harm that has occurred when bullying is either ignored or not dealt with appropriately in the workplace. Under workers' compensation legislation employing businesses have responsibilities for injured workers, although commonly such legislation imposes

132 *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (ACT) s 28; *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 28; *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA) s 28; *Occupational Health and Safety Act 2004* (Vic) s 25; *Occupational Safety and Health Act 1984* (WA). See generally Richard Johnstone and Michael Tooma, *Work Health and Safety Regulation in Australia: The Model Act* (Federation Press, 2012).

133 *Occupational Health, Safety and Welfare Act 1986* (SA) s 55A.

134 See Safe Work Australia, *Preventing and Responding to Workplace Bullying: Draft Code of Practice* (May 2013) <<http://www.safeworkaustralia.gov.au/sites/SWA/model-whs-laws/public-comment/Documents/Bullying%20public%20comment/DRAFT-COP-Preventing-Responding-Workplace-Bullying.pdf>>. The draft code was originally released in 2011. Public comment on the most recent draft closed on 15 July 2013. All information regarding matters related to the development of the code, including comments from the legal professions' representative bodies, can be found on the website of Safe Work Australia: Safe Work Australia, *Public Comment for the Draft Model Work Health and Safety Code of Practice Preventing and Responding to Workplace Bullying* <<http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/public-comment/pages/whs-cop-bullying-comment>>.

135 See *Work Health and Safety Act 2011* (Cth) ss 4, 18, 274–5.

limits on the recompense available to injured workers in relation to psychological harm.¹³⁶

It is also possible in most states, alongside those regimes for workers, to institute claims against employers at common law where they have been injured at work including from bullying.¹³⁷ In most instances, action in tort claiming negligence of the employer will be relevant. The recent successes of a number of workers who have recovered significant sums of money for the damage caused to them by bullying should make all businesses pause and ensure they take swift and effective measures to eradicate it from the workplace.¹³⁸ However, actions for breach of contract are also possible, notably breach of the implied duty to protect the health and safety of the worker.¹³⁹ In circumstances where an employer has not adhered to its own policies and those policies are, say, incorporated into the contract of employment, then the damages may also be significant.¹⁴⁰

Where bullying takes the form of, or is accompanied by, prohibited discriminatory harassment, action under anti-discrimination legislation may also

136 *Safety Rehabilitation and Compensation Act 1988* (Cth); *Workers' Compensation Act 1951* (ACT) s 4(2); *Workers' Compensation Act 1987* (NSW) s 11A; *Workers Rehabilitation and Compensation Act 2008* (NT) s 3; *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 32(5); *Workers Rehabilitation and Compensation Act 1986* (SA) s 30A; *Workers Rehabilitation and Compensation Act 1988* (Tas) s 25(1A); *Workers Compensation Act 1958* (Vic) Pt 7, Div 2, ss 325–7; *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Workers' Compensation and Injury Management Act 1981* (WA) s 5.

137 Common law actions are not available to those covered by workers' compensation in SA, although there are current proposals to amend the law in this respect. In some other states, limits on common law actions are imposed, relating to, eg, the severity of the injury sustained: see, eg, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) Pt 7, Div 2, ss 325–7); or the calculation of damages: see, eg, *Workers' Compensation and Rehabilitation Act 2003* (Qld) Ch 5, Pt 8, 'Civil Liability', s 306P 'Calculation of General Damages'; *Workers Compensation and Rehabilitation Regulations 2003* (Qld) sch 9.

138 See, eg, *Naidu v Group 4 Securitas Pty Ltd* (2005) EOC 93-408, affirmed in *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 (\$1,946,189); *Bailey v Peakhurst Bowling and Recreation Club* [2009] NSWDC 284 (\$507,550); *Sneddon v Speaker, Legislative Assembly* (2011) 208 IR 255 (\$438,614); *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64 (\$237,770); *Swan v Monash Law Book Co-operative* (2013) 235 IR 63 (\$592,554).

139 In the past, breach of an implied term of mutual trust and confidence has also been argued, but the decision by the High Court in *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356 now makes it clear that no such duty exists in Australian law. However, the breach of a duty to care for the health and safety of employees has always been the more appropriate to utilise in the case of workplace bullying: see Joellen Riley, 'Siblings but Not Twins: Making Sense of "Mutual Trust" and "Good Faith" in Employment Contracts' (2012) 36 *Melbourne University Law Review* 521, especially pt IV.

140 On the incorporation of policies in contracts of employment, see *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193; *Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62 ('*Nikolich*'). However, even in *Nikolich* the court held that the harassment and bullying aspects of the policies were aspirational rather than binding in nature. In *Bau v Victoria* [2009] VSCA 107 the plaintiff also failed to establish that bullying policies were incorporated into their contract.

be available to a wide range of workers.¹⁴¹ Adverse action against an employee including, say, discrimination accompanying bullying which is taken ‘because of’ a proscribed reason,¹⁴² including because a complaint of bullying has been made, may also prompt litigation under the ‘general protections’ provisions of the *Fair Work Act*.¹⁴³

In recent times it has also been seen that dismissing a worker who bullies, rather than dealing proactively and appropriately with the problem, is not always the simple solution it might first appear to be. All too often the problem of bullying in the workplace is one of the elements evident in cases where a claim of unfair dismissal has been instituted under the *Fair Work Act*.¹⁴⁴ Any situation where an employee complains that they are the victim of bullying at work, or takes inappropriate retaliatory action in response to bullying, and then finds themselves dismissed, may bring such an action. Where a perpetrator of bullying is dismissed, a range of factors, such as the employee’s employment history, the employer’s compliance with policies and fair procedures in investigating and ultimately dealing with the incidents (and perhaps other similar issues), may all be considered in assessing its fairness.

In certain circumstances, victims of bullying may take a number of the above causes of action concurrently. However, given the damaging effects of bullying at work, it is obviously far more important to prevent it altogether or, failing that, to stop it in its early stages before the damage is severe. This is the aim of the new *Fair Work Act* amendments,¹⁴⁵ giving the FWC power to make a wide range of orders to deal with the problem. The new jurisdiction is preventative. As noted above, in many respects the anti-bullying provisions of the *Fair Work Act* are quite broad and address a very wide range of bullying actions.¹⁴⁶ Where a worker ‘reasonably believes’ they have been bullied at work, section 789FC(1) enables them to apply to the FWC for an order under section 789FF. Where the FWC is satisfied that the bullying has occurred and there is a risk of it continuing, it is

141 Most anti-discrimination statutes include provisions relating to harassment and victimisation: see *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

142 On the interpretation of ‘because of’, see *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500.

143 See *Fair Work Act 2009* (Cth), pt 3-1. But see *Stevenson v Airservices Australia* (2012) 218 IR 210; *Daw v Schneider Electric (Australia) Pty Ltd* (2013) 280 FLR 361 where the adverse action was found not to be a result of bullying.

144 *Fair Work Act* pt 3-2.

145 *Fair Work Amendment Act 2013* (Cth) inserting a new pt 6-4B in the *Fair Work Act*. See also discussion above in text accompanying fn 14.

146 See above Part II. Conduct that took place prior to the commencement of the legislation, on 1 January 2014, may also be relied upon to demonstrate bullying behaviour: *Ms Kathleen McInnes* [2014] FWCFB 1440.

empowered to make any order, other than for a pecuniary penalty, that it considers appropriate to prevent the behaviour from continuing. Under section 789FF(2), the terms of such orders will be determined only after the Commission has taken into account matters such as the outcomes of any investigation, the grievance procedure available at the workplace, the outcomes of any such procedure, or other relevant matters. Thus, in practice, generally the worker might be expected to have brought the matter first to the attention of the employer at the workplace, providing an opportunity for it to be dealt with internally prior to making an application to the FWC.

While the procedure followed by the FWC in relation to applications regarding bullying is its ordinary one,¹⁴⁷ such applications must be dealt with promptly, within 14 days.¹⁴⁸ The intent is to provide a quick and speedy response, eradicating the behaviour and not waiting until the consequences are so dire that workers lose their jobs or are irreparably damaged. This does mean, however, that if an applicant leaves the workplace, or is dismissed, there is no longer jurisdiction to deal with an application.¹⁴⁹

These new anti-bullying provisions of the *Fair Work* legislation are broadly aligned with the model *Work Health and Safety Act 2011* (Cth) in terms of the definition of ‘the bullying at work of a worker’.¹⁵⁰ Applications may be made by those who fall within the category of ‘worker’, rather than being restricted to those within the more limited category of ‘employee’. The classification of ‘worker’ has the same meaning as it does under the *Work Health and Safety Act 2011* (Cth), and so extends to one who performs ‘work in any capacity’ including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience, or a volunteer.¹⁵¹ One might also add ‘partner’ or ‘barrister’.

When the legislation was first introduced there was considerable concern at the breadth of the provisions, with commentators fearing that the FWC would be swamped by applications rendering the jurisdiction unworkable.¹⁵² To date that

147 For instance, the FWC may inform itself in relation to the matter in any way it deems appropriate (s 590); it may then convene a conference in private (s 592); or hold a hearing in public (s 593), or in private if it deems it appropriate to do so (s 593(3)(a)). In such cases and because applications in the anti-bullying jurisdiction relate to ongoing work relations, the FWC may refer anonymously to the names of parties and individuals in its reports: see *Ms SB* [2014] FWC 2104, [2] (Commissioner Hampton).

148 *Fair Work Act 2009* (Cth) s 789FE.

149 See *Mitchell Shaw v Australia and New Zealand Banking Group Ltd* [2014] FWC 3408, where the FWC dismissed an application on the basis that, as the applicant had been unfairly dismissed, there was no risk that he would continue to be bullied, such that there would be no reason for the FWC to make an order under pt 6-4B.

150 *Fair Work Act* s 798FD(1).

151 See *Fair Work Act* s 789FC(2) and the note accompanying it.

152 FWC General Manager, Bernadette O’Neill, indicated to a Senate estimates hearing in June 2013 that the FWC was anticipating around 3500 applications per year: Evidence to Education, Employment and Workplace Relations Legislation Committee, Parliament of Australia, Canberra, 3 June 2013, 116 (Bernadette O’Neill).

has not occurred.¹⁵³ In part this is because there are also significant limitations built into the ability to access the jurisdiction. Applications may be brought, for example, only by the victim of the bullying. Others, such as witnesses or trade union representatives, are not able to initiate action. The absence of monetary compensation may also be a factor in the limited number of applications for anti-bullying orders.¹⁵⁴ Furthermore, while the class of worker who can access the jurisdiction is quite broad (wider than employee), the legislation does not specify the person against whom an application can be brought. Rather, the legislation is stated to apply only to people at a limited range of workplaces, that is to workplaces which are ‘a constitutionally covered business’ as defined in the *Fair Work Act*:

If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:

- (a) the person is:
 - (i) a constitutional corporation; or
 - (ii) the Commonwealth; or
 - (iii) a Commonwealth authority; or
 - (iv) a body corporate incorporated in a Territory; or
- (b) the business or undertaking is conducted principally in a Territory or a Commonwealth place;

then the business is a constitutionally covered business.¹⁵⁵

This section makes it clear that the constitutional underpinning of the anti-bullying jurisdiction is not identical to other parts of the *Fair Work Act*.¹⁵⁶ Nor is it the same as the model *Work Health and Safety* legislation, which expressly provides that partnerships and unincorporated associations are a ‘person conduct[ing] a business or undertaking’.¹⁵⁷ Thus, although the definition of ‘worker’ is broader than, say, ‘employee’, it is only bullying behaviour in certain types of businesses which falls within the jurisdiction. In the private sector,

153 Fair Work Commission, ‘Fair Work Commission Releases First Anti-bullying Quarterly Report’ (Media Release, 23 April 2014) <<http://www.fwc.gov.au/documents/documents/media/releases/23-Apr-2014.pdf>>. See also Jonathan Marc Hamberger, ‘The New Anti-bullying Provisions and the Growth of Individual Employment Rights’ (Keynote address delivered at the 22nd Labour Law Conference, University of Sydney, 25 August 2014).

154 See comments of David Miller, National Workplace Legal Services Manager for AIG, as reported in ‘First Bullying Decision Defines “Reasonable Management Action”’, *Workplace Express* (online), 13 May 2014 <https://www.workplaceexpress.com.au/nl06_news_print.php?selkey=52306>.

155 See *Fair Work Act* s 789FD(1)(a), (3).

156 In relation to all states, except WA, there has been a reference of power which constitutionally underpins the *Fair Work Act* and means that it covers all private sector employees, although not those employed by state governments (except in Victoria) and not local government employees (eg, in NSW, Queensland and SA): see Andrew Lynch, ‘The *Fair Work Act* and the Referrals Power – Keeping the States in the Game’ (2011) 24 *Australian Journal of Labour Law* 1. See also *Ms SW* [2014] FWC 3288, where Commissioner Hampton ruled that there was no jurisdiction for the FWC to determine the anti-bullying application from a school teacher employed by the WA government.

157 See *Work Health and Safety Act 2011 (Cth)* s 5(2).

businesses that are not incorporated, for example those which operate as partnerships or as unincorporated sole traders, are thus not subject to the bullying at work provisions of the *Fair Work Act*.¹⁵⁸

A Legal Regulation and the Problem of Bullying in the Legal Profession

From the above outline of the range of legal regulation that may be applicable to situations of bullying at work, it can be seen that a number of questions may arise in relation to the legal profession. In particular, many of the legislative provisions may in fact not be relevant to the problems of bullying in the legal profession. This is because of the definitional restrictions on the type of worker or workplace that fall within the scope of the legislation.¹⁵⁹ In some instances it is only those who fall within the category of ‘employee’ or ‘deemed employees’ who are protected or bound by the legislation. Self-evidently, barristers do not fall into this group. Likewise some solicitors may not be employees. This is the case for equity partners, although in relation to other solicitors further exposition of the legal arrangements underpinning their work relations will need to be examined. Many salaried partners may in fact be employed through a service company, the directors of which are likely to be one or more of the equity partners. In relation to the new *Fair Work Act* bullying jurisdiction, many lawyers will not be working at a constitutionally covered business, for example where they are working for a firm organised as a partnership, or for state governments, or as a barrister. However, others, such as those working either in the private sector where the law firm is incorporated or as in-house corporate counsel, or those in the public sectors who are working for the Commonwealth or in a territory, will be eligible to access the new jurisdiction. In summary, the application of statutes relevant to bullying presents a patchwork effect in relation to the legal profession.

Nonetheless, given the evidence of bullying in the legal profession, it is perhaps unsurprising that, in recent years, there has been a number of cases where the issues of bullying and/or discrimination or harassment in the

158 On the complex jurisdictional issues, see *Applicant v Respondents* [2014] FWC 4198. See also *Arnold Balthazaar v Department of Human Services (Cth)* [2014] FWC 2076, [22] (Watson V-P).

159 Thus workers’ compensation legislation and unfair dismissal laws apply only to employees and deemed employees. In addition, a salary cap (currently around \$130,000) precludes high-income earners not covered by either an award or enterprise agreement from the protection of unfair dismissal laws. Anti-discrimination legislation usually applies to a wider group of workers, while work health and safety laws are applicable to most workers, and non-workers too. Adverse action provisions are applicable to employees and to some independent contractors. The *Fair Work Act* anti-bullying provisions apply to a wide group of workers but are restricted to certain types of workplaces.

profession have been brought to prominence in the courts.¹⁶⁰ Although some quite high profile cases have been settled on a confidential basis prior to open court hearing, they inevitably (and whether or not justifiably) invite comment or speculation and involve some reputational damage, not only for the particular individuals or firms involved, but also for the profession more generally.¹⁶¹ Little wonder that there has been some general reluctance to discuss the issue with the media.¹⁶²

However, the indications from the already decided cases are that proving negligence in relation to workplace bullying may not always be easy for those in the profession. In *Brown v Maurice Blackburn Cashman*,¹⁶³ the appellant, who was a salaried partner, argued that the respondent firm, Maurice Blackburn Cashman ('MBC'), breached its duty of care to her when she developed a psychiatric injury caused by instances of inappropriate and bullying behaviour by a female solicitor who worked in the same section of the firm. The bullying behaviour was argued to include that within two weeks of her giving birth earlier than expected on 22 December and going on maternity leave, her co-worker and others asked that she attend to incomplete file notes; her co-worker subsequently reporting to the managing partner that the file notes had not been completed, which resulted in her being asked to return to the office less than a month later to complete them; the refusal of her co-worker to undertake necessary work on some files in the final days of her maternity leave, and suggesting that the files be couriered to her so she could work on them at home; an email from her co-

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- 160 See, eg, *Barton v Baker Johnson Lawyers* [2003] QIRC 349 (dismissal of bullied legal secretary); *DalGLISH v MDRN Pty Ltd* [2014] FCCA 1138 (solicitor arguing breach of contract/adverse action/sexual harassment); *Grant v Office of Public Prosecutions (Vic)* [2014] FCCA 17; *Grant v Office of Public Prosecutions (Vic) [No 2]* [2014] FCCA 991 (adverse action/dismissal because of disability); *GLS v PLP* [2013] VCAT 221 (sexual harassment of law graduate completing placement at firm, compensation of \$100,000 awarded). In relation to latter cases, see also *Legal Services Commissioner v PLP (Legal Practice)* [2014] VCAT 793 (practising certificate of the same solicitor was cancelled and he was disqualified from practice for eight months; issue of further certificate to be subject to provision of medical evidence, and to prohibition against supervising either female law student or graduate for two years). However, on appeal in *PLP v McGarvie* [2014] VSCA 253 (Nettle JA and Sloss AJA), the disqualification period was reduced to two months and the restricted supervision period reduced to one year. The Court reasoning appeared to be that there were errors in fixing the penalty as the \$100,000 compensation order was already significant and the impact of the disqualification on a suburban sole practitioner would be too severe.
- 161 See, eg, Justin Whealing, 'Exclusive: Lawyer Sues Firm for Bullying and Sexual Harassment', *Lawyers Weekly* (online), 26 February 2014 <<http://www.lawyersweekly.com.au/news/exclusive-lawyer-sues-firm-for-bullying-and-sexual>>; Justin Whealing, 'Harassment Case Set for Court', *Lawyers Weekly* (online), 6 March 2014 <<http://www.lawyersweekly.com.au/news/harassment-case-set-for-court>>; Justin Whealing, 'Harassment Case Settles', *Lawyers Weekly* (online), 9 May 2014 <<http://www.lawyersweekly.com.au/news/harassment-case-settles>>.
- 162 See, eg, Leanne Mezrani, 'MPs Go to Ground on Bullying', *Lawyers Weekly* (online), 27 May 2013 <<http://www.lawyersweekly.com.au/news/mps-go-to-ground-on-bullying>>; Leanne Mezrani, 'The B Word', *Lawyers Weekly* (online), 3 June 2013 <<http://www.lawyersweekly.com.au/features/the-b-word>>.
- 163 [2012] VCC 647, *affd Brown Appeal* [2013] VSCA 122.

worker who pointed out her own workload stress and lack of work–life balance and told Ms Brown that she would ‘have to get used to managing kids – with or without support – like all working mothers. This is the real world’;¹⁶⁴ the promotion of her co-worker to the position of salaried solicitor and communications within the firm that Ms Brown considered treated her co-worker as the more senior of the two; a conversation in which her co-worker indicated that the firm was playing the two of them off against each other so that one of them would have to leave, which Ms Brown took as ‘a declaration of war’; disputes between the co-worker and Ms Brown over billing; and a situation where Ms Brown and her co-worker did not speak to each other for weeks. Ms Brown failed in her appeal against the decision of Judge Carmody in the County Court of Victoria, the Full Court of the Supreme Court upholding the earlier decision that she had not been bullied. Given this, until she actually complained to her manager about the negative effect on her health of workplace issues in late October, the duty of care for her health and safety was not engaged because it was not reasonably foreseeable that she might suffer psychiatric injury simply as a result of undertaking her work. In all the circumstances of the case, it was held that MBC did not breach its duty to her.

The judgments in Ms Brown’s cases highlight several aspects of the workplace culture of the legal profession. First, in determining that there was no bullying, the judges showed a readiness to ‘normalise’ much of the behaviour about which Ms Brown complained. The request for her to attend the firm’s offices to complete file notes a couple of weeks after giving birth and while on maternity leave was determined to be ‘reasonable’;¹⁶⁵ an email from the co-worker to Ms Brown, and also forwarded to the managing partner, which was admitted to be ‘inconsiderate’, contain things that were ‘untrue’ and ‘exaggerated’, and include ‘expressions of strong emotions and anger’, was characterised as ‘a cry for help’ and not sent ‘with the intention of creating a crisis’.¹⁶⁶ Other emails regarding a failure to hold a meeting were held to be ‘a classic storm in a teacup’.¹⁶⁷ When there was pressure to perform even when on maternity leave, the statement by her co-worker that ‘if the appellant did not do any work there would be a costs order made the following week’ was seen as ‘one of fact and not as one of intimidation’.¹⁶⁸ In addition, the fact that there were ‘substantial periods of peace’ during the period in which the bullying was claimed to have occurred was seen as a contra-indication of the requirement that bullying be systematic or repeated unreasonable behaviour, although there was also acknowledgement that in some cases several instances

164 Cited in *Brown Appeal* [2013] VSCA 122, [58] (Osborn JA).

165 *Ibid*, [36]–[37] (Osborn JA); *Brown v Maurice Blackburn Cashman* [2012] VCC 647, [175] (Judge Carmody).

166 *Brown Appeal* [2013] VSCA 122, [59]–[66] (Osborn JA).

167 *Ibid* [72]–[75] (Osborn JA).

168 *Ibid* [65] (Osborn JA).

could collectively amount to bullying.¹⁶⁹ The trial judge, in making findings regarding the credibility of the appellant, summarised the matters alleged to constitute bullying behaviour as ‘trivial interoffice and interpersonal conflicts’.¹⁷⁰ Intriguingly, in dealing with the issue of foreseeability, the judges also appeared to discount somewhat the vulnerability of Ms Brown because the alleged perpetrator of the bullying was, at least for some of the time, more junior in the workplace hierarchy and thus not seen as being in a position to exercise any power.¹⁷¹

Secondly, there is much in the judgments in the *Brown* litigation that highlights the high stress environment in which lawyers often work. Indeed, as Osborn JA commented, it is an ‘obvious fact that ... employees in the litigation departments of law firms such as MBC will suffer from stress in performing their work’.¹⁷² In the family law area of the firm, where Brown and her co-worker worked, there was a strong focus on driving greater profits and pressure to seek more clients with more complex and expensive needs. In this environment, Brown and her co-worker had a work relationship that became more and more competitive and less and less collegial: the promotion of the one who highlighted the other’s failure to complete file notes, the refusal or inability to take on extra files during Brown’s maternity leave, (mis)perceptions of their respective places in the hierarchy of the firm, and insecurity as to the intentions of the partners regarding their retention in the firm, all fuelled their stress. Clearly, for both Brown and her female co-worker, the impossibility of achieving any acceptable work–life balance under the pressure of workloads was also a major contributor to their stress.

In coming to their conclusions, the judges in the *Brown* litigation applied principles from the High Court’s decision in *Koehler v Cerebos (Australia) Ltd*,¹⁷³ which indicate that while an employer owes a duty to take all steps to provide a safe system of work, the nature of this duty in a particular case depends on the nature and extent of the work and the indications of psychiatric injury given by the worker to the employer. In short, the law assumes that employees can do their job, and accepts that some jobs are stressful.¹⁷⁴ As McHugh, Gummow, Hayne and Heydon JJ said in *Koehler v Cerebos*:

169 Ibid [186]–[187] (Osborn JA). See also *Swan v Monash Law Book Co-Operative* (2013) 235 IR 63, 84–8 [86]–[87], 90–1 [94] (Dixon J).

170 *Brown Appeal* [2013] VSCA 122, [152] (Osborn JA).

171 Ibid [168] (Osborn JA).

172 Ibid [166].

173 (2005) 222 CLR 44. In this case, the High Court found that the worker complained about overwork, but did not indicate specifically that her health was being compromised by it. See David Rolph, ‘No Worries? Employers’ Duty of Care for Negligently Inflicted Stress’ (2005) 18 *Australian Journal of Labour Law* 344.

174 See also *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 477 (Spigelman CJ); *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64, [28] (Henry J); *Swan v Monash Law Book Co-operative* (2013) 235 IR 63, 100 [155] (Dixon J).

It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a much further and larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work.¹⁷⁵

The law thus makes a clear distinction between situations where psychiatric injury is caused by work overload or the accepted stresses of the particular workplace and that caused by bullying or harassment, which by definition must be unreasonable.¹⁷⁶ In so making this distinction, the connection between the stressful workplace culture and unreasonable bullying behaviours risks not simply being blurred, but erased altogether.¹⁷⁷

B Legal Professional Regulation

It has been noted earlier that the regulation of the profession is largely built on the understanding that ethical problems arise when individual practitioners stray. As Briton and MacLean indicate, this provides ‘a means of identifying and dealing with “bad egg” lawyers, but leave[s] incubator law firms off-limits’.¹⁷⁸ A further problem may arise as the profession drives the disciplinary process.¹⁷⁹ This means that if levels of toleration of bullying are high it is likely that this will feed through into the regulatory procedures.

Despite these difficulties there is some evidence that the profession is beginning to recognise the significance of workplace bullying. The *Model Rules of Professional Conduct and Practice* were originally promulgated by the Law Council of Australia in 1997 with ‘a view to ensuring greater uniformity in the regulation of legal practitioners throughout Australia’.¹⁸⁰ In the most recent version, the *Australian Solicitors’ Conduct Rules*, the rules are thematically dominated by a client service ideal.¹⁸¹ A second theme is provided by the need to articulate duties to the court.

The issue of treatment of fellow practitioners has shifted from the point where the rules stated only that ‘practitioners should act with honesty, fairness and courtesy’,¹⁸² to identifying workplace bullying as problematic behaviour. The resulting suggested rule has been incorporated into the conduct rules in several jurisdictions:

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

175 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 57 [35].

176 See *Swan v Monash Law Book Co-operative* (2013) 235 IR 63, 100 [155] (Dixon J).

177 See *ibid* for an example of a case where there is an acknowledgement that at times of stress, the bullying of the manager was intensified. See also *Barton v Baker Johnson Lawyers* [2003] QIRC 349.

178 Briton and McLean, above n 118, 242.

179 See text accompanying fn 53.

180 Law Council of Australia, *Model Rules of Professional Conduct and Practice*, above n 61, 1.

181 Law Council of Australia, *Australian Solicitors’ Conduct Rules* (June 2011) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AustralianSolicitorsConductRules.pdf>> rr 7–16.

182 Law Council of Australia, *Model Rules of Professional Conduct and Practice*, above n 61, 28.

- 42.1.1 discrimination;
- 42.1.2 sexual harassment; or
- 42.1.3 workplace bullying.¹⁸³

The explicit labelling of workplace bullying as a conduct issue is an important step. However, without further work, such as that employed by the New South Wales and Queensland Legal Services Commissioners in the context of incorporated legal practices,¹⁸⁴ to address the connection of workplace bullying to the ‘way lawyers work’, it is likely to have a limited effect.

V CONCLUDING REMARKS

While it has been said that bullying does not lend itself to ‘robust conclusions with regard to causality’,¹⁸⁵ there is nonetheless abundant evidence that there is an association between the occurrence of workplace bullying; certain elements both of workplace organisation, including organisational change, lack of support from managers, or lack of support from colleagues, and of work characteristics such as high job demands, low job control, job insecurity, and fatigue from long hours; and work-related stress.¹⁸⁶ This analysis of the working life of legal practitioners suggests that these factors are present in the context of law firm practice. It may also be the case that they emerge in other legal practice settings.

In addition, as we have argued, there are a number of aspects of legal practice and regulation that may make bullying behaviours less visible and more readily tolerated. As commercialisation and managerialism have come to the fore, there appears to be some evidence that these affect the way legal practitioners understand professional ethical practice.¹⁸⁷ Professionalism has

183 Law Council of Australia, *Australian Solicitors’ Conduct Rules*, above n 180. See, eg, Queensland Law Society, *Australian Solicitors Conduct Rules* (1 June 2012) <http://ethics.qls.com.au/sites/all/files/u108/QLS_Australian_Solicitors_Conduct_Rules_2012.pdf>; Law Society of New South Wales, *New South Wales Professional Conduct and Practice Rules 2013 (Solicitors’ Rules)* (2013) <<http://www.law.society.com.au/cs/groups/public/documents/internetcontent/803185.pdf>>; Law Society of South Australia, *Australian Solicitors’ Conduct Rules* (1 July 2014) <http://www.lawsocietysa.asn.au/pdf/ASCR_010714.pdf>; South Australian Bar Association, *Barristers’ Conduct Rules* (2013) r 117 <<http://www.sabar.org.au/assets/Forms--Guidelines/Barristers-Conduct-Rules-As-At-14-November-2013.pdf>>.

184 See discussion above in n 118 and text accompanying.

185 See Thornton, above n 7, 183, citing H Hoel and D Salin, ‘Organisational Antecedents of Workplace Bullying’ in Einarsen et al (eds), *Bullying and Emotional Abuse in the Workplace* (Taylor and Francis, 2003) 215; Denise Salin and Helge Hoel, ‘Organisational Causes of Workplace Bullying’ in Einarsen et al (eds), *Bullying and Harassment in the Workplace: Developments in Theory, Research and Practice* (CRC Press, 2nd ed 2010) 227.

186 See, eg, Safe Work Australia, ‘The Relationship between Work Characteristics, Wellbeing, Depression and Workplace Bullying’ (Report, June 2013). See also Productivity Commission, above n 41, ch 11, especially 280–85; *NARS Report*, above n 2.

187 Parker and Aitken above n 105, 402–3.

come to be identified with client service and efficiency.¹⁸⁸ These laudable goals can trump concerns about worker wellbeing and lead to a ready acceptance of problematic behaviours performed by particularly productive workers. In addition, the continuing homage paid to lawyer independence may contribute by discouraging intervention even where bullying behaviours are widely known.

Feeding into this process is the tendency for firms to be organised as work groups with a degree of autonomy and a hierarchical structure. Empirical evidence that lawyers working within these groups take their ethical cues from the evident norms of practice suggests that they may be powerful contributors to attitudes to, and acceptance of, bullying. It is also plausible that the modelling of bullying behaviours by a few members of the judiciary may feed into this. The effect of these elements is to create an environment where bullying behaviours may be normalised to the point that they are not seen as problematic.

In Part IV it was demonstrated that the ordinary legal regime governing workplaces, while comprising a number of regulatory approaches aimed at addressing workplace bullying, presents at best a patchwork in its application to the legal profession. Furthermore, as Ms Brown's case reveals, there may be a degree of judicial tolerance for, or normalising of, problematic behaviours in the legal context, erasing bullying in a focus on work.¹⁸⁹

Despite this litany of problems, the picture is not entirely bleak. The initiative employed in incorporated practices in New South Wales and Queensland described above in Part III provides an interesting model. This approach, focussing on law firm regulation that seeks to improve ethical infrastructures, provides the most promising option and the greatest challenge for the legal profession. This kind of approach has the potential to provide a response to the difficulties experienced by many lawyers which addresses the 'barrel' aspects of the workplace bullying problem.

In this context, the regulation of the profession by the profession assumes a particular significance. Indeed the incorporation of provisions relating to bullying in various conduct rules,¹⁹⁰ the increased focus on workplace bullying generally, and the evidence of real problems within the profession identify this as a particularly propitious moment in time. However, no doubt there remains much work to be done to realise this opportunity.

188 Hamilton and Monson, above n 59. See also Thornton, 'Hypercompetitiveness or a Balanced Life?', above n 4.

189 *Brown* [2012] VCC 647 affd *Brown Appeal* [2013] VSCA 122.

190 See above n 183.