

TASMANIA
LAW REFORM
INSTITUTE

Bullying

FINAL REPORT NO. 22

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Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the state government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the government, the community, the University and the Institute itself. The Institute's Director is Ms Terese Henning. The members of the Board of the Institute are Ms Terese Henning (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Stephen Estcourt (appointed by the Honourable Chief Justice of Tasmania), Dr Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative), Mr Rohan Foon (appointed by the Law Society of Tasmania) and Ms Kim Baumeler (appointed at the invitation of the Institute Board).

Acknowledgments

This Final Report was prepared for the Board by Ms Claire Jago, with some final edits being done by Ms Emilie McDonnell. The Issues Paper that preceded it was also prepared for the Board by Ms Jago. Supervisory Assistance was provided by the Institute's former Director, Prof Kate Warner and current Director, Ms Terese Henning. The community consultation on the Issues Paper was kick-started by a launch and forum organised by Ms Jago. Valuable feedback was provided by Prof Kate Warner, Ms Terese Henning, Executive Officer, Dr Helen Cockburn and TLRI Board members. Bruce Newey edited and formatted the final version of the Report.

Background to this Report

The publication of this Final Report is made following consultation with the public. The consultation was performed by the release of an Issues Paper on this topic in May 2015. The Issues Paper considered the capacity of Tasmanian laws to address the issue of bullying and cyberbullying, legislative approaches of other jurisdictions aimed at addressing the problem of bullying and cyberbullying and options for any necessary reform. The Issues Paper noted that there are complexities when using the law to deal with bullying, including that: bullying is a complex social problem; bullying can manifest in a number of ways; bullying is difficult to define; and bullying often involves young people. The Issues Paper argued that a patchwork of laws are potentially enlivened by bullying behaviour. They are sometimes difficult to recognise and enforce. The Issues Paper canvassed a number of possible options for reform, including: reform of the criminal law through amendments to the crime of stalking or the creation of a specific offence of bullying; reform of the civil law by the creation of a civil offence of bullying, creation of 'stop bullying orders' or extension of the powers of the Anti-Discrimination Commissioner; and regulations for education providers.

The following people and organisations responded to the Issues Paper:

Andrew Walter

Angels Hope

Ann Hamilton

Challenge Bullying

Graham Gourlay

Kees Lugten

Kelly Sims

Kyle Smith

Mark Morrissey – Commissioner for Children

Michelle Stuart

Mr D G Coates SC – Director of Public Prosecutions

Mr D L Hine – Commissioner of Police

Robin Banks – Tasmanian Anti-Discrimination Commissioner

The Law Society of Tasmania

TILES – Tasmanian Institute of Law Enforcement Studies

Unions Tasmania

YNOT – Youth Network of Tasmania

Three anonymous submissions were also received. The names and contact information of these respondents was provided to the Institute.

The Institute also held a public forum to discuss the Issues Paper, participated in meetings at Launceston College and with the Tasmanian Anti-Discrimination Commissioner to discuss the Issues Paper and met with the Office of the Executive Director of Human Resources at the University of Tasmania.

In the preparation of this report, detailed consideration has been given to all responses. The Institute thanks those who took the time and effort to respond to the consultation.

List of Recommendations

<p>Recommendation 1 (proposed changes in italics)</p>	<p>It is desirable to develop a criminal justice response to bullying by extending s 192 of the <i>Criminal Code</i> to cover common bullying behaviours.</p> <p>Section 192 should be retitled “Stalking and Bullying” in order to indicate clearly that s 192 covers bullying behaviour, to communicate the law’s denunciation of this behaviour and to educate victims, perpetrators and the community about the seriousness with which the law views such conduct.</p> <p>In order to better cover bullying behaviours, the amendments should extend the fault element and conduct elements. An amended s 192 could read:</p> <p>Stalking and Bullying</p> <p>(1) A person who, with intent to cause another person physical or mental harm <i>or extreme humiliation, or to harm himself or herself physically</i>, or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:</p> <ul style="list-style-type: none">(a) following the other person or a third person;(b) keeping the other person or a third person under surveillance;(c) loitering outside the residence or workplace of the other person or a third person;(d) loitering outside a place that the other person or a third person frequents;(e) entering or interfering with the property of the other person or a third person;(f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;(g) publishing or transmitting offensive material by electronic or other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;(h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;(i) contacting the other person or a third person by postal, telephonic, electronic or any other means of communication;(j) <i>making threats to the other person;</i>(k) <i>using abusive or offensive words to or in the presence of the other person;</i>(l) <i>performing abusive or offensive acts in the presence of the other person;</i>(m) <i>directing abusive or offensive acts towards the other person;</i>(n) acting in another way that could reasonably be expected to cause the other person <i>extreme humiliation or to harm himself or herself physically</i> or to be apprehensive or fearful.
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	<p>is guilty of a crime.</p> <p>Charge:</p> <p>Stalking and Bullying</p> <p>(2) For the purposes of subsection (1) -</p> <p>(a) a person pursues a course of conduct if the conduct is sustained or the conduct occurs on more than one occasion; and</p> <p>(b) if the conduct occurs on more than one occasion, it is immaterial whether the actions that make up the conduct on one of those occasions are the same as, or different from, the actions that make up the conduct on another of those occasions.</p> <p>(3) A person who pursues a course of conduct of a kind referred to in subsection (1) and so causes another person physical or mental harm <i>or extreme humiliation, or to harm himself or herself physically</i>, or to be apprehensive or fearful is taken to have the requisite intent under that subsection if at the relevant time the person knew, or ought to have known, that pursuing the course of conduct would, or would be likely to, cause the other person physical or mental harm <i>or extreme humiliation, or to harm himself or herself physically</i>, or to be apprehensive or fearful.</p> <p>(4) Subsection (3) does not apply to a person who, in good faith, pursues a course of conduct referred to in subsection (1) in the course of performing official duties to –</p> <p>(a) enforce the criminal law; or</p> <p>(b) administer an Act; or</p> <p>(c) enforce a law imposing a pecuniary penalty; or</p> <p>(d) execute a warrant; or</p> <p>(e) protect the public revenue.</p> <p>(5) <i>In this section –</i></p> <p><i>“mental harm” includes –</i></p> <p>(a) <i>psychological harm; and</i></p> <p>(b) <i>suicidal thoughts.</i></p>
<p>Recommendation 2</p>	<p>In view of the fact that under s 192 of the <i>Criminal Code</i> an alleged offender is able to elect to be dealt with summarily, it is unnecessary to create a separate summary offence of ‘Bullying’ in addition to extending s 192 of the <i>Criminal Code</i>.</p>
<p>Recommendation 3</p>	<p>It is not desirable to create a tort of ‘Bullying’.</p>
<p>Recommendation 4</p>	<p>It is desirable to amend the definition of stalking in s 106A(1) of the <i>Justices Act 1959</i> (Tas) to include amendments made to s 192 of the <i>Criminal Code</i> in order to facilitate applications for restraint orders on the basis of bullying. To indicate clearly that s 106A(1) covers bullying behaviour, the terminology in s 106A(1) should be amended to replace the definition of ‘stalking’ with a definition of ‘bullying and stalking’.</p> <p>In view of the amendment to s 106A(1), s 106B(1)(d) should be amended to</p>

	<p>replace the reference to stalking with a reference to bullying and stalking.</p> <p>If the current Tasmanian stalking provision in s 192 of the <i>Criminal Code</i> is not amended to cover a wider range of bullying, the <i>Justices Act 1959</i> (Tas) should nevertheless be amended to allow restraint orders to be used against bullying. In this situation, the definition of stalking in s 106A(1) should be amended to incorporate threats, abusive or offensive words or behaviour, behaviour intended to cause or which does cause extreme humiliation or results in the victim self-harming.</p>
<p>Recommendation 5</p>	<p>It is desirable to develop a second-tier, civil framework that institutes a mediated and restorative justice response to bullying. This could be accomplished within existing civil justice frameworks by expressly incorporating a mediation procedure into the restraint order process under Part XA of the <i>Justices Act 1959</i> (Tas) and/or by extending the functions of the Anti-Discrimination Commissioner. If the first option is preferred, Part XA of the <i>Justices Act</i> should be amended to make express provision for appropriate cases to be referred to mediation in accordance with s 5 of the <i>Alternative Dispute Resolution Act 2001</i> (Tas). This will make it clear to applicants that a mediated approach rather than a purely adversarial approach is available to them under the restraint order process.</p> <p>Additionally, Part XA should contain express provision to the effect that referral for mediation is to be considered by Magistrates when dealing with applications for bullying restraint orders.</p> <p>If the functions of the Anti-Discrimination Commissioner were to be extended, it would be necessary to introduce a new provision into the <i>Anti-Discrimination Act 1998</i> (Tas) that addresses bullying and that is not restricted to the s 22 areas of activity. Nevertheless, the provision would be required to address bullying in terms that accord with the Commissioner’s jurisdiction and that maintain the notion of bullying as legislated elsewhere. Such a provision might read:</p> <p style="text-align: center;">Bullying and Harassment</p> <p>A person must not engage in a course of conduct which humiliates, intimidates, insults or ridicules another person on any ground where the conduct:</p> <ul style="list-style-type: none"> (a) denigrates or injures the person; and (b) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner <p>in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be humiliated, insulted or ridiculed.</p>
<p>Recommendation 6</p>	<p>It is desirable to grant jurisdiction to the Tasmanian Industrial Commission to deal with bullying complaints from workers who are not able to use the Fair Work jurisdiction, and it is desirable that this jurisdiction mirrors the anti-bullying provisions contained in Pt 6-4B of the <i>Fair Work Act 2009</i> (Cth).</p> <p>It is also desirable that measures for dealing with bullying in state legislation address the limitations identified in the <i>Fair Work Act 2009</i> (Cth), specifically the fact that the Act precludes the making of orders requiring the payment of a financial remedy, and the fact that resolution is not</p>

List of Recommendations

	available if a worker has left the workplace. Consideration should be given to allowing workplace bystanders as well as the bullied victim to initiate an application for an order to stop the bullying.
Recommendation 7	<p>It is desirable that a duty to prevent bullying, so far as is reasonably practicable, be imposed on employers to encourage them to implement effective anti-bullying policies and procedures. This duty could be included within Division 2 or Division 3 of Part 2 of the <i>Work Health and Safety Act 2012</i> (Tas), or it could be enacted in separate legislation.</p> <p>An example is:</p> <p>Duty of care – bullying</p> <p>(1) A person conducting a business or undertaking must, so far as is reasonably practicable, prevent workplace bullying.</p> <p>(2) Workplace bullying occurs if:</p> <p>(a) an individual; or</p> <p>(b) a group of individuals;</p> <p>repeatedly behaves unreasonably towards a worker or a group of workers and that behaviour creates a risk to health and safety.</p> <p>(3) For the purposes of subsection (2), ‘repeatedly’ means behaviour that is sustained or occurs on more than one occasion.</p>
Recommendation 8	It is desirable that employers include in their anti-bullying policies and procedures a process by which bystanders can report bullying within the workplace and provisions that protect employees who report or intervene from reprisal. Consideration should be given to training employees and management personnel about their role as bystanders in preventing and responding to workplace bullying.
Recommendation 9	It is desirable to impose legislative requirements on educational institutions, mandating their implementation of anti-bullying policies and procedures. The legislative requirements should cover at least and address in detail: prevention, support, investigation, response, reporting and evaluation. These requirements should apply to both government and non-government schools.
Recommendation 10	It is desirable that the Department of Education establish a Bullying Working Group to develop the legislative requirements to be placed on schools and to devise a template of anti-bullying policies and procedures for schools to use.
Recommendation 11	Anti-bullying policies and procedures in schools should differentiate between bullying, harassment and violence and respond to them in different ways. It is desirable that non-punitive and restorative approaches be adopted in relation to most cases of bullying. Policies should address the best interests of all children involved, whether those children are involved as victims, participants or bystanders.
Recommendation 12	It is desirable that anti-bullying policies and procedures contain a timeline for the timely investigation and resolution of bullying complaints.
Recommendation 13	It is desirable that anti-bullying policies and procedures address the role of student bystanders by containing a process by which students can report

	bullying, how these reports will be responded to and provisions that protect students who report or intervene. Consideration should be given to the consequences for students who fail to report instances of bullying.
Recommendation 14	It is desirable that resources like the Victorian Education Department Bully Stoppers and eSmart programs be developed and made available to Tasmanian schools.
Recommendation 15	It is desirable for the Department of Education to encourage schools to utilise the education and classroom resources and guidance made available by the Office of the Children's eSafety Commissioner, including engaging a certified online safety provider.

Part 1

Introduction

1.1 Background

1.1.1 This Report is concerned with the use of legal frameworks to address bullying. The effectiveness of Tasmania's laws in dealing with bullying (including cyberbullying) has been the subject of significant community concern. Recent instances of suicides attributed to bullying appear to have strengthened the community desire to ensure that the law is able to deter and sanction bullying behaviour and that it is responsive to bullying that occurs through new technologies. A petition with 4575 signatures was presented to the Tasmanian Attorney-General calling for an urgent review of anti-bullying laws in 2013,¹ and a petition containing nearly 50,000 signatures was presented to Senator Eric Abetz in support of the introduction of federal cyberbullying laws in August 2014.²

Definitional issues

1.1.2 'Bullying' is difficult to define and is particularly difficult to define for use in a legal framework. The specificity required of a legal definition does, however, depend on the nature of the prescriptive or coercive measure with which the definition is concerned. A requirement that schools address bullying in a particular way, for example, may include a broader or more flexible definition than a criminal offence, which requires specific and certain definitions so that the boundaries of criminal responsibility are clearly identifiable.

1.1.3 Any law attempting to deal with bullying must take account of the different types of intent that may accompany the behaviour, the different forms that bullying may take and the range of harms that may be experienced by the victim.

1.1.4 'Bullying' can vary widely in form and severity.³ It can consist of an extremely wide range of behaviours, including social exclusion, name-calling, cyber-harassment, gesturing, physical contact, the spreading of rumours, teasing, publishing materials relating to the victim and masquerading as the victim online. It can permeate almost any social environment, and can be perpetrated and/or experienced by anyone. The same 'bullying' behaviour that has little or no effect on one individual may be incredibly damaging to another.

1.1.5 A submission from the Tasmanian Institute of Law Enforcement Studies (TILES) noted that issues of vulnerability are crucial in consideration of bullying, and that it is unreasonable to base an approach to bullying solely on a victim's capacity to identify it.⁴ TILES argued that although some people may 'shrug' off bullying behaviour or take action to make it stop, more vulnerable victims might refrain from doing anything. Neither response involves any form of therapeutic social justice.⁵

¹ Tasmanian Parliament, Review of Tasmania's Stalking Laws (Chloe's Law) (20th November 2013) House of Assembly E-Petitions <<http://www.parliament.tas.gov.au/EPetitions/House/ClosedEPetition.aspx?PetNum=47&IIndex=-1>>.

² See Matt Smith, 'Senator Eric Abetz Pledges Action on Bullies after Receiving 49,000-name Petition', *The Mercury* (online) 7 September 2014 <<http://www.themercury.com.au/news/tasmania/senator-eric-abetz-pledges-action-on-bullies-after-receiving-49000name-petition/story-fnj4f7k1-1227050114149>>.

³ Ken Rigby, *New Perspectives on Bullying* (Jessica Kingsley Publishers, 2002) 41-2.

⁴ Tasmanian Institute of Law Enforcement Studies (TILES), Submission to Tasmania Law Reform Institute, *Bullying*, 28 August 2015, 5.

⁵ *Ibid* 5.

1.1.6 Bullying is generally considered to involve intentional acts that are repeated (or at least sustained) and some form of power imbalance, whether this imbalance is pre-existing or is a product of the bullying.⁶

1.1.7 A number of submissions to the Issues Paper dealt with the difficulties involved in defining bullying. Responses noted that:

- The focus should be on behaviour that is negative and unacceptable to the person who experiences it, rather than tinkering with definitions.⁷
- A legal definition of ‘bullying’ would need to be sufficiently wide so as not to exclude specific types of behaviour,⁸ but also sufficiently clear to establish legal liability.⁹
- Bullying could be characterised as ‘behaviour that offends, humiliates, intimidates, insults or ridicules another person in a manner in which a reasonable person would anticipate that the victim would feel offended, humiliated, insulted or ridiculed in the circumstances’.¹⁰
- The difficulty in defining bullying and the wide range of behaviours that are comprised in the term ‘bullying’ make it difficult to assess the current legal frameworks potentially available to address bullying.¹¹
- Bullying is not consistently defined across government and industry documentation. A consolidation effort would help reconcile these meanings and inform a more uniform policy direction by all areas of government.¹²
- In relation to workplace bullying, the term ‘bullying’ is overused and poorly understood and moving away from the term ‘bullying’ and replacing it with ‘moral harassment’ may improve understanding in workplaces and the community more broadly of what ‘workplace bullying’ actually is.¹³

1.1.8 TILES submitted that the fact that discussions about bullying have previously been confined to underage and school groups has contributed to an underestimation of bullying as abusive behaviour outside the school context.¹⁴ TILES noted further that even after it was realised that bullying is not limited by location or age, the strong stereotype that bullying is ‘just for kids’ or ‘testing the boundaries’ has prevailed.¹⁵

Problems with using the law to address bullying

1.1.9 A range of problems arise when trying to use the law to deal with bullying, including:

- The claimed high rate of bullying amongst young people and questions about the appropriateness of a legal response when a significant percentage of bullying is perpetrated by

⁶ See generally, Susan Goldsmid and Pauline Howie, ‘Bullying by Definition: An Examination of Definitional Components of Bullying’ (2014) 19(2) *Emotional and Behavioural Difficulties* 210, 211; Alastair Nicholson, Submission to Australian Government, Department of Communications, *Enhancing Online Safety for Children*, March 2014, 8.

⁷ Graham Gourlay, Submission to Tasmania Law Reform Institute, *Bullying*, 30 July 2015, 1.

⁸ The Law Society of Tasmania, Submission to Tasmania Law Reform Institute, *Bullying*, 19 August 2015, 12.

⁹ *Ibid* 17.

¹⁰ Tasmanian Anti-Discrimination Commissioner, Submission to Tasmanian Law Reform Institute, *Bullying*, August 2015, 23.

¹¹ Office of the Director of Public Prosecutions, Submission to Tasmania Law Reform Institute, *Bullying*, 27 July 2015, 1.

¹² TILES, above n 4, 2.

¹³ Unions Tasmania, Submission to Tasmania Law Reform Institute, *Bullying*, August 2015, 13-14.

¹⁴ TILES, above n 4, 1.

¹⁵ *Ibid* 1-2.

young people — particularly given society’s desire to avoid introducing young people to the formal legal system where possible;

- The many forms of bullying and the great variation in severity;
- The difficulty defining what ‘bullying’ actually includes;
- That bullying generally arises out of a pre-existing social relationship. Often it may be desirable to maintain an ongoing relationship in some form between victim and perpetrator and sometimes organisations like schools, workplaces or internet service providers may be best placed to deal with bullying;
- Other than cyberbullying, which can leave an electronic trail, it may often be difficult to find evidence to prove that bullying has taken place, which creates difficulties in establishing that the law has been broken.

1.1.10 Responses to the Issues Paper identified a number of other problems when trying to use the law to deal with bullying, including that:

- Legal frameworks that rely on the victim of bullying to initiate the process may not be able to address the problem of bullying, as victims may not have the emotional strength and/or resources to pursue an action.¹⁶
- Adversarial legal processes can make targets of bullying behaviour feel twice bullied — first by the bullying behaviour and second by the process designed to address the bullying.¹⁷
- Bullying in the workplace is often perpetrated by someone with authority over the target of the behaviour.¹⁸ Managers (or those who hold positions of responsibility for others) were identified in 65% of workplace bullying complaints to Challenge Bullying as being the main perpetrators.¹⁹
- Around 20% of bullied children have been identified as ‘bully-victims’, meaning that they have both bullied others and been bullied.²⁰

1.1.11 Moreover, as noted by the Commissioner for Children, Mark Morrissey, categorising children as either ‘perpetrators’ or ‘victims’ in the context of bullying is not in the best interests of the child.²¹ The Commissioner explained that legal, and particularly criminal justice, responses to bullying raise a number of concerns including:²²

- The introduction of children to the criminal justice system and the resulting stigma attaching to young offenders;
- The difficulty the legal system may have in accommodating or defining the complexities of bullying between children and the highly individualised nature of occasions of bullying within interpersonal relationships;
- The need for support for victims and participants in bullying behaviour to rebuild relationships and prevent future occurrences;
- The potential oversimplification of bullying and its causes; and
- The need for broader educational and social responses rather than punitive responses.

¹⁶ Ann Hamilton, Submission to Tasmania Law Reform Institute, *Bullying*, 2015, 1.

¹⁷ Challenge Bullying, Submission to Tasmania Law Reform Institute, *Bullying*, August 2015, 8.

¹⁸ Kelly Sims, Submission to Tasmania Law Reform Institute, *Bullying*, 20 May 2015.

¹⁹ Challenge Bullying, above n 17, 4.

²⁰ YNOT, Submission to Tasmania Law Reform Institute, *Bullying*, July 2015, 4.

²¹ Commissioner for Children, Submission to Tasmania Law Reform Institute, *Bullying*, 20 July 2015, 3.

²² *Ibid.*

1.1.12 Similarly, the Director of Public Prosecutions noted that, other than in extreme cases, prosecuting anyone under the age of 18 would not be appropriate at first instance, and that it would be more appropriate for the behaviour to be dealt with by the school or by way of a caution.²³ Tasmania Police were also concerned that if the criminal law is used to deal with bullying, children may be the subjects of the majority of complaints.²⁴

Bystanders

1.1.13 Bullying often occurs in the presence of ‘bystanders’, third party observers who are neither the bully nor the bullied.²⁵ Bystanders are a significant factor in the problem of bullying because their actions, and sometimes their inactions, can contribute to the escalation or diminution of bullying.²⁶ In some ways, this contribution makes bystanders participants in bullying behaviour.²⁷ Although bystanders have the potential to decrease bullying by changing the power dynamics in which it occurs,²⁸ they are often reluctant to intervene when they observe bullying.²⁹

1.1.14 Some respondents to the Issues Paper emphasised the need to encourage and facilitate bystander intervention and reporting, including by giving bystanders the ability to initiate an investigation or prosecution.³⁰ Bystander intervention and the empowerment of bystanders was also raised in a public forum hosted by the Law Reform Institute, and the role of bystanders in educating young people about what is acceptable behaviour and how to deal with bullying was raised in a meeting held at Launceston College.

1.1.15 The Tasmanian Anti-Discrimination Commissioner considered the importance of increased bystander involvement in preventing abuse and harassment, noting that the behaviour that we walk past is the behaviour we accept, and that it is up to all members of the community to stand up for those who are being bullied or harassed.³¹

1.1.16 In her submission, the Anti-Discrimination Commissioner stated that in 2014-15, 4633 people received information or training delivered by her office aimed at increasing awareness and developing more effective internal responses to bullying and harassment.³² The Commissioner explained that the training delivered by her office has a ‘bottom up’ approach, which focuses as much on the role of bystander intervention in anti-social behaviour (where appropriate) as it does on enabling the target of the conduct to pursue an end to the behaviour.³³ The Commissioner noted that what often limits this kind of ‘bottom up’ approach is the failure of the organisations in which bullying is taking place to adopt policies and procedures that provide effective regulation, including safe and transparent arrangements to address bullying behaviours at an early stage or to address instances of bullying as

²³ Office of the Director of Public Prosecutions, above n 11, 1.

²⁴ Commissioner of Police, Submission to Tasmania Law Reform Institute, *Bullying*, 4 August 2015, 1.

²⁵ Megan Paull, Maryam Omari, Peter Standen, ‘Where is a Bystander not a Bystander? A Typology of the Roles of Bystanders in Workplace Bullying’ (2012) 50(3) *Asia Pacific Journal of Human Resources* 351, 363; see also Ken Rigby and Bruce Johnson, ‘Student Bystanders in Australian Schools’ (2005) 23(2) *Pastoral Care in Education* 10, 12.

²⁶ Paull, Omari, and Standen, above n 25, 361.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ It has been estimated that bystanders are present in about 85% of bullying cases but that bystander intervention only occurs in between 10%–20% of instances of bullying. Bystanders are less likely to intervene where: there are other witnesses; they are fearful of the bully; they have negative/apathetic attitudes towards the victim; see Marie-Louise Obermann, ‘Moral Disengagement among Bystanders to School Bullying’ (2011) 10(3) *Journal of School Violence* 239, 240. Awareness-raising and education programs may limit the reluctance of bystanders to intervene, as may culture change programs within organisations: see Paull, Omari, and Standen, above n 25, 363.

³⁰ Hamilton, above n 16, 1.

³¹ Tasmanian Anti-Discrimination Commissioner, above n 10, 43.

³² *Ibid.* 11.

³³ *Ibid.*

they arise.³⁴ The Office of the Anti-Discrimination Commissioner recently changed its name to Equal Opportunity Tasmania to reflect better the work undertaken by the office. The name change does not affect the functions of the Anti-Discrimination Commissioner or the work of the office.

³⁴ Tasmanian Anti-Discrimination Commissioner, above n 10, 11-12.

Part 2

Need for Reform

2.1 Conclusions on current framework

2.1.1 While there are no specific bullying laws in Tasmania, some bullying behaviours are covered by existing legislation, depending on where the behaviour occurs, the attributes of the victim and the type of behaviour.

Criminal framework

2.1.2 Some bullying may engage existing criminal offences. The Tasmanian offences of ‘stalking’,³⁵ ‘assault’,³⁶ ‘public annoyance’,³⁷ ‘observation or recording in breach of privacy’³⁸ and ‘publishing or distributing prohibited visual recording’³⁹ may be enlivened by some bullying behaviours. ‘Written threat to murder’⁴⁰ and ‘sending letters threatening to burn or destroy’⁴¹ may also be made out by some instances of bullying, but the scope of these last two provisions is so narrow that they are not a means to address bullying generally. In the catalogue of existing criminal offences, stalking is arguably the most applicable to bullying behaviour.

Stalking

2.1.3 The offence of stalking is set down in s 192 of the *Criminal Code* (Tas). It provides:

192. Stalking

- (1) A person who, with intent to cause another person physical or mental harm or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:
 - (a) following the other person or a third person;
 - (b) keeping the other person or a third person under surveillance;
 - (c) loitering outside the residence or workplace of the other person or a third person;
 - (d) loitering outside a place that the other person or a third person frequents;
 - (e) entering or interfering with the property of the other person or a third person;
 - (f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;

³⁵ *Criminal Code* (Tas) s 192.

³⁶ *Ibid* s 184.

³⁷ *Police Offences Act 1935* (Tas) s 13.

³⁸ *Ibid* s 13A.

³⁹ *Ibid* s 13B.

⁴⁰ *Criminal Code* (Tas) s 162.

⁴¹ *Ibid* s 276.

- (g) publishing or transmitting offensive material by electronic or any other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;
- (h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;
- (i) contacting the other person or a third person by postal, telephonic, electronic or any other means of communication;
- (j) acting in another way that could reasonably be expected to cause the other person to be apprehensive or fearful –

is guilty of a crime.

Charge: Stalking.

- (2) For the purposes of subsection (1) –
 - (a) a person pursues a course of conduct if the conduct is sustained or the conduct occurs on more than one occasion; and
 - (b) if the conduct occurs on more than one occasion, it is immaterial whether the actions that make up the conduct on one of those occasions are the same as, or different from, the actions that make up the conduct on another of those occasions.
- (3) A person who pursues a course of conduct of a kind referred to in subsection (1) and so causes another person physical or mental harm or to be apprehensive or fearful is taken to have the requisite intent under that subsection if at the relevant time the person knew, or ought to have known, that pursuing the course of conduct would, or would be likely to, cause the other person physical or mental harm or to be apprehensive or fearful.
- (4) Subsection (3) does not apply to a person who, in good faith, pursues a course of conduct of a kind referred to in subsection (1) in the course of performing official duties to –
 - (a) enforce the criminal law; or
 - (b) administer an Act; or
 - (c) enforce a law imposing a pecuniary penalty; or
 - (d) execute a warrant; or
 - (e) protect the public revenue.

‘Stalking’ requires a ‘course of conduct’. For behaviour to establish a ‘course of conduct’, it must either occur on more than one occasion or be sustained. Whether or not a course of conduct is sustained is a question of fact. The behaviours that can amount to a ‘course of conduct’ are set out in s 192(1) of the *Criminal Code*. Cyber activity is within the ambit of s 192.

2.1.4 The mental element of stalking is an intent to cause another person physical or mental harm or to be apprehensive or fearful. Where this intent cannot be proven, it may be deemed to exist under s 192(3) if actual harm, fear or apprehension was caused and the perpetrator knew or ought to have known that such a consequence would occur or would be likely to occur.

2.1.5 Potential problems with the applicability of s 192 (‘stalking’) to bullying include:

- Uncertainty as to the parameters of harm, particularly mental harm, covered by the section.⁴²

⁴² In *RR v The Queen* [2013] VSCA 147 [69] (Ashley JA), the Victorian Court of Appeal considered s 21A of the *Crimes Act 1958* (Vic) in its previous form, which did not define mental harm. The Court held that ‘mental harm’ should be given its ordinary English usage and did not require a medically diagnosed or diagnosable condition, although the court was not required to determine whether ‘mere embarrassment’ was sufficient. This interpretation may be persuasive in Tasmania.

- Uncertainty regarding whether ‘apprehension or fear’ is to be given a broad interpretation to include things like fear of harm to reputation and embarrassment,⁴³ or a narrow interpretation relating only to personal safety or the safety of others.
- It is not entirely clear whether verbal, face-to-face bullying (such as name-calling, humiliation and harassment) and physical bullying are covered by any of the paragraphs of s 192(1).

2.1.6 In his response to the Issues Paper, the Director of Prosecutions submitted that stalking contrary to s 192 of the *Criminal Code* already covers a range of behaviour which would include serious bullying where the perpetrator knew or ought to have known that his or her behaviour could cause the other person physical or mental harm or to be apprehensive or fearful.⁴⁴

Assault

2.1.7 Another offence that may be used to sanction bullying behaviour is ‘assault’. Depending on the circumstances, less serious assaults can be charged under the *Police Offences Act 1935* (Tas),⁴⁵ and more serious assaults can be charged under the *Criminal Code*.⁴⁶

2.1.8 Section 182 of the *Criminal Code* defines ‘assault’. Essentially, an ‘assault’ is:

- The intentional application of force to another person, whether direct or indirect;
- An attempt to apply force to another person;
- A threat by any gesture to apply force to the person of another; or
- The act of depriving another person of his or her liberty.

2.1.9 Although some instances of bullying behaviour may establish an assault, ultimately the offence presents too many problems and is too narrow to provide an effective framework to address bullying:

- ‘Assault’ can only be established where there has been threatened (accompanied by a gesture), attempted or actual physical contact, or deprivation of liberty. The narrow operation of the offence means that, while there is potential for an instance of physical bullying to be charged as an assault, verbal bullying and cyberbullying are not covered.⁴⁷
- Where the bullying is physical, there may be difficulties in distinguishing assault as a form of bullying from ‘playful’ conduct, perhaps contributing to reluctance to prosecute.
- The offence of assault does not capture the repeated or sustained nature of bullying. Although multiple counts of assault may be charged, it is a ‘single instance offence’, meaning that each instance of behaviour is viewed independently. An instance of physical bullying — considered in isolation from the course of bullying conduct — may appear trivial, and there may be reluctance to prosecute such a complaint.

⁴³ There is a lack of Tasmanian authority on this point, but consider the South Australian case of *Police v Gabrielson* [2011] SASC 39, in which s 19AA of the *Criminal Law Consolidation Act 1935* (SA) (‘unlawful stalking’) was considered. An appeal against a finding of no case to answer was successful on the grounds that intention to cause apprehension or fear was not limited to personal safety but could relate to reputation or embarrassment.

⁴⁴ Office of the Director of Public Prosecutions, above n 11, 2.

⁴⁵ *Police Offences Act 1935* (Tas) s 35.

⁴⁶ *Criminal Code* (Tas) ss 182, 184.

⁴⁷ Other than in very narrow circumstances where the verbal bullying is threatened physical contact accompanied by a physical gesture.

Other criminal offences

2.1.10 Section 13 of the *Police Offences Act* prohibits public annoyance. For the section to be enlivened, the behaviour must occur in a public place. Although ‘public place’ is defined broadly and includes a very wide range of areas,⁴⁸ the very nature of cyberbullying suggests that such behaviour is unlikely to be caught by this provision. Moreover, covert bullying and other bullying that does not entail an element of public disturbance, even when perpetrated in a public place, is also arguably not covered by s 13.

2.1.11 Section 13A(1) of the *Police Offences Act* prohibits the non-consensual observation or visual recording of another person in circumstances where a reasonable person would expect to be afforded privacy, and where the person is either in a private place or engaging in a private act. Section 13B(1) prohibits publication or distribution of a prohibited visual recording of another person. While ss 13A and 13B of the *Police Offences Act* may be engaged by some instances of cyberbullying — specifically where a victim has been filmed and then humiliated by the publication of the recording — they are too narrow to constitute an effective way of addressing bullying.

Cyberbullying framework

2.1.12 There are currently legal frameworks that address the problem of cyberbullying, rather than bullying more generally. Most notably, the Commonwealth offence of ‘using a carriage service to menace, harass or cause offence’ captures some serious forms of cyberbullying,⁴⁹ and the *Enhancing Online Safety for Children Act 2015* (Cth) encourages social media providers to self-regulate more effectively and may result in voluntary or enforced removal of some cyberbullying material.

2.1.13 In order to establish the Commonwealth offence of ‘using a carriage service to menace, harass or cause offence’, it must be shown that:⁵⁰

- The offender intentionally used a carriage service; and
- The offender was at least reckless in using the service in a way that a reasonable person would regard as menacing, harassing or offensive.

2.1.14 The *Enhancing Online Safety for Children Act 2015* (Cth) established⁵¹ a Children’s eSafety Commissioner and a complaints system for cyberbullying targeted at an Australian child. It also introduced a two-tiered system for the removal of cyberbullying material targeted at an Australian child from large social media services.

2.1.15 The Office of the Children’s eSafety Commissioner (the Office) was set up on the 1 July 2015 to help resolve cyberbullying issues for people under 18, provide online safety information and education and investigate illegal online content including child sexual abuse material. The Office operates a comprehensive complaints system to assist children who experience serious cyberbullying, including working with social media providers to remove serious cyberbullying material and the complainant’s school, parents or the police to help stop the cyberbullying. The Office runs an Outreach program as part of its national leadership role for online safety initiatives. The program trains students, parents and teachers about online safety through the provision of web based and face-to-face presentations and a range of education and classroom resources. The Office has responsibility for certifying providers of online safety programs to help ensure programs are likely to be effective. A Voluntary Certification Scheme has been created to provide schools with the option of face-to-face

⁴⁸ ‘Public place’ is defined broadly and inclusively in *Police Offences Act 1935* (Tas) s 3.

⁴⁹ *Criminal Code Act 1995* (Cth) s 474.17.

⁵⁰ *Ibid* ss 474.17, 5.6(1), 5.6(2).

⁵¹ *Enhancing Online Safety for Children Act 2015* (Cth) s 3.

internet safety awareness presentations from a wide choice of online safety providers, certified by the Office.

2.1.16 One of the central features of the Office is a two-tiered scheme for regulating social media services which operates as follows:

- Tier One: A social media service may apply to the Commissioner to be declared a tier one service. The Commissioner will be required to make this declaration if the service complies with online safety requirements such as specifying terms of use prohibiting cyberbullying material, provision of a complaints scheme including removal processes and the designation of a contact person with whom the Commissioner can deal.⁵² There are no direct enforcement measures relating to tier one services, although the Commissioner can request the removal of cyberbullying material targeted at an Australian child within 48 hours and repeated failure to comply over a 12-month period may result in the revocation of tier one status.⁵³
- Tier Two: The Commissioner can recommend to the Minister for Communications that a 'large social media service' that is not a tier one social media service be declared a tier two service.⁵⁴ Where the social media service provider is a tier two service, the Commissioner will have the power to require removal of cyberbullying material targeted at an Australian child within 48 hours and failure to comply may attract a civil penalty or a formal warning.⁵⁵ The Commissioner may also publish a notice on the Office's website to that effect.⁵⁶
- End-User Notice: The Commissioner may give a notice to a person posting cyberbullying material (the end-user) to remove the material, refrain from posting material targeting the child or apologise for posting the material.⁵⁷ The Commissioner may issue formal warnings for non-compliance with the requirements set out in the notice and seek injunctions.⁵⁸

2.1.17 The Office of the Children's eSafety Commissioner has stated that good relationships are critical to the successful operation of the system.⁵⁹ The strength of the Office's good working relationships with its social media partners has allowed the effective removal of cyberbullying material targeted at a child in advance of expected timeframes.⁶⁰

2.1.18 Although welcoming the *Enhancing Online Safety for Children Act* and its provision for an eSafety Commissioner, the Tasmanian Anti-Discrimination Commissioner noted that restricting the behaviour covered by the Act to that which involves technology and limiting the jurisdiction of the eSafety Commissioner to cyberbullying directed at children limits the reach of these mechanisms as ways of dealing with bullying behaviours.⁶¹

⁵² *Enhancing Online Safety for Children Act 2015* (Cth) ss 21, 23.

⁵³ *Ibid* ss 25, 29.

⁵⁴ *Ibid* ss 30, 31.

⁵⁵ *Ibid* ss 35, 36, 37.

⁵⁶ *Ibid* s 40.

⁵⁷ *Ibid* s 42.

⁵⁸ *Ibid* ss 43, 44, 48.

⁵⁹ Office of the Children's eSafety Commissioner, Submission to Tasmania Law Reform Institute, *Bullying*, November 2015, 3.

⁶⁰ *Ibid*.

⁶¹ Tasmanian Anti-Discrimination Commissioner, above n 10, 25.

Civil frameworks

Anti-discrimination law

2.1.19 Section 17(1) of the *Anti-Discrimination Act 1998* (Tas) prohibits conduct which offends, humiliates, insults or ridicules another person on the basis of attributes set down in s 16, in circumstances in which a reasonable person would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed. The s 16 protected attributes are race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities and disability.

2.1.20 The *Anti-Discrimination Act* applies to discrimination and other prohibited conduct by or against a person engaged in or undertaking any activity in connection with, employment; education and training; the provision of facilities, goods and services; accommodation; membership and activities of clubs; the administration of any law of the state or any state program; awards, enterprise agreements or industrial agreements.⁶²

2.1.21 In her response to the Issues Paper, the Anti-Discrimination Commissioner noted that discrimination law offers broad protection against behaviours that constitute bullying but also that it is not exclusive or comprehensive.⁶³ Tasmanian discrimination law protects individuals from discrimination and related conduct on the basis of a defined set of personal characteristics, and subject to specified exceptions, the *Anti-Discrimination Act 1998* (Tas) applies to discrimination and related conduct by or against a person engaged in or undertaking any action in connection with a range of specified areas of activity.⁶⁴ Bullying occurring in any of these areas of activity that is related to any protected attribute is likely to be unlawful and subject to the complaint provisions of the *Anti-Discrimination Act*.⁶⁵

2.1.22 Section 104 of the *Anti-Discrimination Act* also provides that an organisation is to take reasonable steps to ensure that none of its members, officers, employees or agents engage in discrimination or prohibited conduct, and where an organisation does not comply with these requirements it is liable for any contravention of the Act committed by these individuals.⁶⁶

Restraint orders

2.1.23 Restraint orders may be a useful way to address some serious bullying by facilitating early intervention and preventing very severe harm from eventuating. Part XA of the *Justices Act 1959* (Tas) deals with restraint orders. Section 106B provides the conditions under which a restraint order may be imposed. A restraint order may be imposed where a person has:

- (a) caused personal injury or damage to property; or
- (b) threatened to cause personal injury or damage to property; or
- (c) behaved in a provocative or offensive manner and the behaviour is such as is likely to lead to a breach of the peace;

and, unless restrained, that person is likely to behave in a similar manner or carry out the threat; or

⁶² Other than inciting hatred, which also applies in any other area or in connection with any other activity; *Anti-Discrimination Act 1998* (Tas) s 22.

⁶³ Tasmanian Anti-Discrimination Commissioner, above n 10, 1.

⁶⁴ Ibid 4.

⁶⁵ Ibid 6.

⁶⁶ Ibid 8.

- (d) stalked the person for whose benefit the application is made or caused the person for whose benefit the application is made to feel apprehensive or fearful through the stalking of a third person.

2.1.24 ‘Stalking’ under s 106B(1)(d) of the *Justices Act* may cover some forms of bullying, including cyberbullying. The definition of ‘stalking’ in the *Justices Act* aligns closely with the offence of ‘stalking’ in s 192 of the *Criminal Code*, meaning that there are similar uncertainties about the application of restraint orders based on stalking to bullying as there are with the application of the crime of stalking to bullying. Some bullying causes damage to property or psychological harm, and may be captured by s 106B(1)(a). Similarly, bullying constituted by some forms of threats to personal injury or damage to property may fulfil the requirements of s 106B(1)(b).

Other civil frameworks

2.1.25 Non-legislative or partly non-legislative civil actions may also be enlivened by some bullying behaviours. For example, negligence, intentional infliction of personal injury, defamation and breach of confidence have all been suggested as potentially enlivened by some bullying behaviours. The time and high financial costs associated with these actions (as well as the very high threshold of mental harm required by some, and very limited scope of others) mean that they are not efficient or effective means of dealing with bullying.

Workplace bullying framework

2.1.26 There are legal avenues specifically designed to address workplace bullying, although more general criminal offences and civil actions may also be enlivened by some workplace bullying behaviours.

2.1.27 Part 6-4B of the *Fair Work Act 2009* (Cth) addresses workplace bullying by providing a process through which a worker may apply for an order to stop bullying.⁶⁷ The Act defines a worker as *bullied at work* if:⁶⁸

- the worker is at work in a ‘constitutionally-covered business’;⁶⁹ and
- 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
- the behaviour creates a risk to health and safety.

2.1.28 A worker who reasonably believes that he or she has been bullied at work may apply to the Fair Work Commission for an order to stop the bullying.⁷⁰ The Fair Work Commission must begin dealing with such an application within 14 days of the application being made.⁷¹ Where the Fair Work Commission is satisfied that a worker has been bullied at work and that there is a risk that the worker will continue to be bullied at work, it may make any order it considers appropriate to prevent the

⁶⁷ Part 6-4B was inserted in response to a 2012 Parliamentary Inquiry into workplace bullying and 2013 Government report, Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: ‘We Just Want it to Stop’* (2012): see Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2906 (Bill Shorten, Minister for Employment and Workplace Relations).

⁶⁸ *Fair Work Act 2009* (Cth) s 789FD(1).

⁶⁹ A ‘constitutionally-covered business’ is defined in s 789FD(3) of the Act. It includes constitutional corporations (ie, foreign corporations or trading or financial corporations within Australia) as well as Commonwealth authorities and businesses operating principally in a territory or Commonwealth place.

⁷⁰ *Fair Work Act 2009* (Cth) s 789FC(1).

⁷¹ *Ibid* s 789FE(1).

worker from being bullied at work (other than an order requiring the payment of a pecuniary amount).⁷² It is a civil offence to contravene an order to stop bullying.⁷³

2.1.29 The application of the *Fair Work Act 2009* (Cth) was extended beyond constitutionally-covered businesses by a referral of state power to the Commonwealth under the *Industrial Relations (Commonwealth Powers) Act 2009* (Tas), but the following matters were excluded from the reference:⁷⁴

- (a) matters relating to Ministers, Members of Parliament, judicial officers or members of tribunals established by or under a law of the State; or
- (b) matters relating to public sector employees, or officers within the meaning of the *State Service Act 2000*; or
- (c) matters relating to persons engaged as a member of the personal staff of a Minister or Member of Parliament; or
- (d) matters relating to officers appointed under section 3, or sessional or temporary employees appointed under section 4, of the *Parliamentary Privilege Act 1898*; or
- (e) matters relating to persons appointed under the *Governor of Tasmania Act 1982*; or
- (f) matters relating to –
 - (i) police officers; or
 - (ii) ancillary constables, or trainees, or junior constables, within the meaning of the *Police Service Act 2003*.

2.1.30 Legal recourse for workplace bullying may also be found in the *Work Health and Safety Act 2012* (Tas). WorkSafe administers work health and safety laws in Tasmania. The *Work Health and Safety Act* is part of a set of uniform occupational safety laws that were brought into effect across Australia to ensure that workers across jurisdictions have equal protections and standards. The *Work Health and Safety Act* does not contain specific anti-bullying provisions but workplace bullying can be treated in the same way as other health and safety issues under the Act.

Educational framework

2.1.31 International legislative responses to the problem of bullying have commonly focused on the responsibilities of schools when dealing with bullying. Legislation in Tasmania does not currently impose any requirements on schools to have a specific anti-bullying policy, or to deal with the reporting, investigation and resolution of bullying in any particular way. Internationally, some jurisdictions' educational regulations cover cyberbullying outside of school hours and school grounds where students are involved.⁷⁵

Conclusions on current frameworks

2.1.32 It can be seen that there is no overarching legal framework covering bullying in Tasmania and not all common bullying behaviours are caught by the current laws. Moreover, the piecemeal assortment of legal avenues which may potentially be pursued in response to claims of bullying means that it can be difficult to recognise and enforce legal rights and difficult to understand and abide by legal responsibilities. The patchwork of laws that are potentially relevant to bullying behaviour raise

⁷² Ibid s 789FF(1).

⁷³ Ibid ss 789FG, 539 item 38 (attracting 60 penalty units).

⁷⁴ *Industrial Relations (Commonwealth Powers) Act 2009* (Tas) s 6.

⁷⁵ See, eg, New Jersey's 'Anti-Bullying Bill of Rights', which applies to bullying that occurs off school grounds in cases in which a school employee is made aware of the action: NJ Stat Ann 18A: 37-15.3.

questions about the accessibility and clarity of the law and consequently about its human rights compliance.⁷⁶

2.1.33 The Tasmanian Anti-Discrimination Commissioner noted the potential human rights implications of bullying,⁷⁷ submitting that human rights violated by bullying may include:⁷⁸

- The right to be free from cruel, inhuman or degrading treatment or punishment (Article 7 of the *International Covenant on Civil and Political Rights*);
- The right to the highest attainable standard of physical and mental health (Article 12 of the *International Covenant on Economic, Social and Cultural Rights*);
- The right to work and have a fair and safe workplace (Articles 6 & 7 of the *International Covenant on Economic, Social and Cultural Rights*);
- The right to freedom of opinion and expression (Articles 18 & 19 of the *International Covenant on Civil and Political Rights*); and
- The right to privacy and the protection against attacks upon honour or reputation (Article 17 of the *International Covenant on Civil and Political Rights*).

Bullying behaviours may also breach the right to security of the person (Article 9 of the *International Covenant on Civil and Political Rights*), the right to life, (Article 6) and the right to freedom from torture (Article 7).

2.1.34 The Anti-Discrimination Commissioner noted that, taken together, these rights establish an expectation that all people will be treated with dignity and respect.⁷⁹ They may also create the expectation that the government will implement measures to protect people from bullying. Certainly, international human rights jurisprudence establishes that the right to security of the person imposes obligations on the state to investigate threats to a person and to implement reasonable and appropriate measures to protect people against threats to their personal security.⁸⁰

Question 1 of the Issues Paper:

Do you think that the current legal frameworks available to address bullying are adequate? Why or why not?

2.1.35 Eleven submissions directly responded to Question 1 of the Issues Paper. Of these, nine indicated that the current legal frameworks do not adequately address bullying.

2.1.36 These submissions contained observations that:

- Current legal frameworks are inadequate because they do not effectively prevent or provide remedies for systematic bullying, and the current legal frameworks do not manage school bullying.⁸¹

⁷⁶ Where domestic laws are uncertain, inaccessible or unpredictable in their application, they may fail to comply with human rights principles and requirements.

⁷⁷ Tasmanian Anti-Discrimination Commissioner, above n 10, 39.

⁷⁸ Ibid 39.

⁷⁹ Ibid.

⁸⁰ See *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171, Article 9 (entered into force 23 March 1976); Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 106, 247; *Jayawardene v Sri Lanka* (UNHCR, 26 July 2002 UN Doc CCPR/C/75/D/916/2000); *Delgado Paez v Colombo* (UNHCR, UN Doc CCPR/C/39/D/195/1985, 1990). Bullying behaviour may also infringe other human rights, including the right to life, the right to freedom from torture and the right to be treated with dignity.

⁸¹ Angels Hope, Submission to Tasmania Law Reform Institute, *Bullying*, 2015, 1.

- There is no avenue of justice available to victims, and that victims remain unprotected, vulnerable and unwell.⁸²
- Empowering people about their rights and responsibilities is an important strategy but individuals must also have the right to effective and timely legal protection and redress when they suffer significant harm. Existing legal and regulatory frameworks must provide a sharper focus on addressing bullying and harassment, and authorities need to take matters much more seriously.⁸³
- Victims of bullying should not have to attempt to classify their bullying experience into the mechanism that best fits; rather there should be a reactive and cohesive legislative framework with some form of administrator (such as an Anti-Bullying Commissioner).⁸⁴
- The current approach to bullying is scattered across multiple pieces of legislation and policy; it is too confusing to address bullying effectively and visibly, and current provisions are not well suited to addressing the high level of anonymity facilitated by cyberbullying.⁸⁵

2.1.37 One respondent organisation, YNOT, did not support a change to current laws when dealing with young people involved in bullying, instead preferring a focus on how to apply, utilise and educate them more effectively about current laws.⁸⁶

2.1.38 Focussing on the criminal law, the Director of Public Prosecutions, Daryl Coates, noted the difficulty in defining the wide range of behaviours that can be comprised in ‘bullying’, and that some bullying behaviour is better dealt with through methods such as the development of better policies at educational institutes and workplaces than through the criminal law.⁸⁷ The Director submitted that stalking under s 192 of the *Criminal Code* already covers a wide range of behaviour, including serious bullying.⁸⁸

2.1.39 Challenge Bullying, whose submission focussed on workplace bullying, noted that the Fair Work and Equal Opportunity Tasmania processes are dominated by lawyers, and that the unintended consequence of the current system is that victims are bullied again during the process that was designed to address their initial unfair treatment.⁸⁹

2.2 Is a legal response to bullying justified?

2.2.1 Although it is difficult to find data relating to the overall incidence of bullying in Tasmania, it has been suggested that Australia is experiencing an upsurge of bullying across the board, including in primary schools, high schools, families, workplaces, commercial and political environments and in the community.⁹⁰ Recent data on bullying amongst young people reports that around 20% of Australian minors experience cyberbullying each year, and that around 27% of Australian students in years four to nine are affected by some form of bullying every week or more often.⁹¹ The 2012 Australian Workplace Barometer (SafeWork) reported that 6.8% of respondents to their project had

⁸² Andrew Walter, Submission to Tasmania Law Reform Institute, *Bullying*, 2015, 1.

⁸³ Tasmanian Anti-Discrimination Commissioner, above n 10, 13.

⁸⁴ The Law Society of Tasmania, above n 8.

⁸⁵ TILES, above n 4, 5-6.

⁸⁶ YNOT, above n 20, 5.

⁸⁷ Office of the Director of Public Prosecutions, above n 11, 1.

⁸⁸ *Ibid* 2.

⁸⁹ Challenge Bullying, above n 17, 8.

⁹⁰ Graham Martin, ‘Editorial: On Bullying in Australia’ (2010) 9(1) *Advances in Mental Health* 2, 5.

⁹¹ Donna Cross et al, ‘Australian Covert Bullying Prevalence Study’ (Report, Child Health Promotion Research Centre, Edith Cowan University, May 2009) xxi.

been bullied at work in the previous six months.⁹² The Workplace Barometer report identified the difficulty in interpreting bullying statistics due to variances across jurisdictions in definitions and methods of collecting data. It noted that in Australia, reported workplace bullying statistics vary from 3.5% to 21.5% of workers.⁹³

2.2.2 There is however, some evidence suggesting that bullying, at least among school children, may actually be decreasing.⁹⁴ Bullying is most frequently studied in the school environment,⁹⁵ but this suggested decrease may hold true for bullying more generally. It is possible that the perceived prevalence of bullying may be influenced by the uptake of anti-bullying programs, increased public awareness of the harmfulness of bullying and the emergence of new forms of bullying.⁹⁶

2.2.3 Even if evidence suggesting a potential decrease in the prevalence of bullying is accepted, bullying remains a substantial problem in the community. The harm caused by bullying can be very victim-specific as the consequences of different types of bullying vary widely depending on the victim.⁹⁷ In relation to mental harm in particular, the same bullying behaviour that causes very serious harm in one victim may be almost entirely ‘brushed off’ by another.

2.2.4 Given the serious harm that can be caused by bullying, a social response alone may be insufficient and a legal response may be justified. The law has an important declaratory and deterrent function and rendering behaviour ‘unlawful’ provides a clear statement of society’s unwillingness to accept the behaviour.⁹⁸ Recognition of the wrongfulness of the behaviour and provision of accessible legal avenues for resolution of the problem may also be beneficial to victims.⁹⁹

Question 2 of the Issues Paper:

Do you think that legislative reform is necessary to address the problem of bullying?

2.2.5 Ten respondents directly answered Issues Paper, Question 2. Nine of these submissions provided qualified support for legislative reform. Responses noted:

- That the focus of Work Health and Safety Laws (despite defining health as including psychological health) is physical health, and the provisions for notifiable incidents, rights of entry and inspection are consequently not adequate to deal with bullying that causes damage to psychological health.¹⁰⁰
- For educative purposes and to increase its accessibility and application, s 192 of the *Criminal Code* could be retitled ‘stalking or bullying’. The mental element of ‘extreme humiliation’ could be added to ‘causing another person physical or mental harm or to be apprehensive or

⁹² Maureen Dollard et al, ‘The Australian Workplace Barometer: Report on Psychosocial Safety Climate and Worker Health in Australia’ (Report prepared for SafeWork Australia, December 2012) 60 <<http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/748/The-Australian-Workplace-Barometer-report.pdf>>.

⁹³ Ibid 60.

⁹⁴ Ken Rigby and Peter Smith, ‘Is School Bullying Really on the Rise?’ (2011) 14(4) *Social Psychology of Education* 441, 451.

⁹⁵ Although bullying may occur in almost any context where people interact, schools have been the most frequently studied bullying environment: Kenneth W Merrell et al, ‘How Effective Are School Bullying Intervention Programs? A Meta-Analysis of Intervention Research’ (2008) 23(1) *School Psychology Quarterly* 26, 27.

⁹⁶ Rigby and Smith, above n 94, 452.

⁹⁷ Rigby, above n 3, 41.

⁹⁸ See New Zealand Law Commission, *Harmful Digital Communications: the Adequacy of the Current Sanctions and Remedies*, Ministerial Briefing Paper (2012), 98.

⁹⁹ Ibid.

¹⁰⁰ Hamilton, above n 16, 1.

fearful'.¹⁰¹ This would eliminate some uncertainty around the threshold of mental or emotional damage required for the offence, allowing severe bullying where no actual 'mental harm' was suffered to be punishable.

- Legislative reform is necessary to provide a more uniform approach to bullying.¹⁰²
- Legislative reform is needed because the current approaches are patchy and fail to provide comprehensive protection against the harms of bullying, and the current approaches are poorly understood as mechanisms to address serious bullying behaviour and have little educative effect.¹⁰³
- Classifying bullying by whether it is conducted online or offline, in school or out of school, or is directed at adults or children leads to the development of artificial boundaries and increases the likelihood of responsibility shifting and avoidance.¹⁰⁴
- Legislative reform is necessary to address the problem of bullying in society, but it is not the only method through which reform should occur.¹⁰⁵

2.2.6 One respondent organisation, YNOT, submitted that legislative reform that takes a punitive approach is not the most effective method of intervention for young people, and that legislative reform will not effectively change the bullying behaviour that it is designed to target.¹⁰⁶ Instead, YNOT preferred working with young people, parents, carers, schools, police and key stakeholders towards a cultural and behavioural shift in understanding what bullying is, its effects, current legal consequences and suitable avenues to deal with bullying.¹⁰⁷

2.2.7 The Commissioner for Children submitted that bullying requires a community-wide collaborative approach, which focuses on 'tolerance, knowledge and empowerment rather than punitive measures'.¹⁰⁸

2.2.8 Some submissions detailed personal stories of bullying, which were not addressed under the current legal frameworks. In particular, there were three anonymous submissions dealing with workplace bullying and the failure of workplaces and WorkSafe to investigate.

Question 21 of the Issues Paper:

If reform is desired, should a tiered response be implemented or is only one type of response necessary? If a tiered response is preferred, how should the tiers be structured? Should a tiered response be embodied in one legislative provision or should it be located in different pieces of legislation depending on the type of bullying, its location and who is involved?

2.2.9 Respondents favoured a tiered approach to legal reform to address bullying. The Tasmanian Anti-Discrimination Commissioner submitted that the broad ranging nature of what constitutes bullying makes a single response difficult and responsibility for addressing it must be borne by a range of stakeholders.¹⁰⁹ Given the breadth of behaviour covered by bullying, it is unlikely that a

¹⁰¹ Office of the Director of Public Prosecutions, above n 11, 3.

¹⁰² Angels Hope, above n 81, 1.

¹⁰³ Tasmanian Anti-Discrimination Commissioner, above n 10, 13-14.

¹⁰⁴ Ibid 26.

¹⁰⁵ Law Society of Tasmania, above n 8, 2.

¹⁰⁶ YNOT, above n 20, 7.

¹⁰⁷ Ibid.

¹⁰⁸ Commissioner for Children, above n 21, 2, citing Bullying, Young People and the Law Symposium, 18 July 2013.

¹⁰⁹ Tasmanian Anti-Discrimination Commissioner, above n 10, 1.

single response to bullying will be effective in all situations.¹¹⁰ The Commissioner further noted that:¹¹¹

- (1) dealing with bullying at a local level or within the organisation in which it occurs, including by setting up processes for receiving and dealing with reports of bullying behaviour seriously and establishing programs to protect victims from further abuse, must be a priority;
- (2) there is a need for a more structured civil-law response aimed at addressing ongoing or persistent behaviour or behaviour that has a severe and/or continuing effect on the victim;
- (3) in some circumstances there may be a need for a criminal justice response.

2.2.10 The Law Society of Tasmania also submitted that a tiered approach should be adopted in addressing the problem of bullying.¹¹² The Society noted that the types of bullying that can occur are wide ranging and that the types of bullying that should be considered include physical bullying, social exclusion, intimidation, cyberbullying and verbal abuse.¹¹³ The Society further submitted that it is necessary for a legal definition of 'bullying' to be sufficiently wide to cover bullying behaviours and that a tiered response could prevent 'minor' examples of bullying being litigated by allowing these cases to be mediated or resolved out of court.¹¹⁴

¹¹⁰ Ibid 3.

¹¹¹ Ibid 4.

¹¹² The Law Society of Tasmania, above n 8, 12.

¹¹³ Ibid 12.

¹¹⁴ Ibid.

Part 3

Options for Reform

3.1 Introduction

3.1.1 The options for reform that were discussed in the Issues Paper, in order of decreasing punitiveness, are:

- A criminal law response through the extension of the offence of stalking or the creation of a specific criminal offence of bullying or both;
- A civil law response through the creation of a civil cause of action of bullying, the right to apply for stop bullying orders or the extension of the Anti-Discrimination Commissioner's functions;
- Imposition of anti-bullying requirements on schools.

3.1.2 Respondents to the Issues Paper favoured a tiered approach to legal reform to address bullying. It is the view of the Institute that the recommendations in this report establish a three-tiered approach that decreases in punitiveness, which is sufficiently wide to accommodate a range of bullying behaviours and diversity amongst individual cases. The three-tiered approach allows for:

- Severe cases of bullying to be dealt with by the criminal law;
- Less severe cases or those that present poor prospects of proof beyond reasonable doubt to be dealt with by the civil law, including a mediated response through the Anti-Discrimination Commissioner or the Magistrates Court, and a statutory duty of care on employers to prevent bullying; and
- An education-based regulatory response through the imposition of anti-bullying requirements on educational institutions, mandating their implementation of anti-bullying policies and procedures.

3.2 Structure of reform

Question 5 of the Issues Paper:

If reform is necessary, what kinds of bullying do you think a legal response should address?

3.2.1 Perhaps reflecting the wide-ranging behaviours that can amount to bullying, submissions generally favoured defining bullying broadly or including a wide range of behaviours in a legal response. Submissions suggested that:

- All types, forms and methods of bullying should be addressed by a legal response regardless of whether the bullying is overt or covert, including bullying that is in person at any public or private place and bullying that occurs via telecommunications or postal networks.¹¹⁵
- Racism and bullying based on cultural differences, physical abuse, mental abuse, threats and property damage should be addressed.¹¹⁶

¹¹⁵ Andrew Walter, above n 82, 1-2.

¹¹⁶ Kyle Smith, Submission to Tasmania Law Reform Institute, *Bullying*, 2015, 2.

- All victims of all forms of bullying should be free to seek legal redress.¹¹⁷

3.2.2 The Anti-Discrimination Commissioner suggested that bullying could be characterised as ‘behaviour that offends, humiliates, intimidates, insults or ridicules another person in a manner in which a reasonable person would anticipate that the victim would feel offended, humiliated, insulted or ridiculed in the circumstances’.¹¹⁸ This proposed definition includes a subjective and objective test of the behaviour:

- (1) the conduct must offend, humiliate, intimidate, insult or ridicule a person;
- (2) the conduct must be such that a reasonable person would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed in all the circumstances.¹¹⁹

3.2.3 The Anti-Discrimination Commissioner noted that this approach enables the law to protect against behaviour that is beyond ‘hurt feelings’ or ‘dislike’, and to address actions that involve acting on or expressing negative or derogatory views in a way that causes significant harm to the victim.¹²⁰

Question 6 of the Issues Paper:

In any legislative response to bullying, should cyberbullying be dealt with as a discrete practice or as one form of more general bullying?

3.2.4 Nine respondents directly answered Issues Paper Question 6. These responses unanimously submitted that cyberbullying should *not* be treated as a discrete practice; cyberbullying is only one form of bullying, and bullying occurs using a variety of means.

3.2.5 The Anti-Discrimination Commissioner noted that the effect of any immunities granted to social media platforms and internet service providers may need to be considered in the creation of a response to bullying to ensure that it is capable of covering all forms of bullying.¹²¹ TILES noted that, while cyberbullying is a form of more general bullying, legislative responses also need to deal with the ‘cyber’ component of bullying.¹²²

3.3 Criminal justice response

Is a criminal justice response to bullying appropriate?

3.3.1 The imposition of criminal liability is the most punitive response to bullying. The criminal law is censuring and stigmatising and can result in the deprivation of liberty.¹²³ The potentially harsh consequences associated with the enforcement of the criminal law suggest that it should be reserved for serious wrongdoing that cannot be dealt with in another way.¹²⁴ At a basic level, in order to justify a criminal justice response to bullying, the behaviour should be shown to be harmful and the criminal law should be shown to be able to make a contribution to dealing with the problem that other responses cannot make.

¹¹⁷ Anonymous, name and address provided to the Institute.

¹¹⁸ Tasmanian Anti-Discrimination Commissioner, above n 10, 23.

¹¹⁹ Ibid 24.

¹²⁰ Ibid.

¹²¹ Ibid 25, referring to the *Broadcasting Services Act 1992* (Cth) s 91.

¹²² TILES, above n 4, 6.

¹²³ Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 13.

¹²⁴ Ibid 15.

Question 7 of the Issues Paper:

Do you think that a criminal justice response to bullying is appropriate? Why or why not?

3.3.2 Nine respondents answered the Issues Paper Question 7. Seven of these respondents expressed at least a qualified opinion that a criminal justice response to bullying can be appropriate.

3.3.3 Some respondents who indicated that a criminal justice response may be appropriate observed that:

- A criminal justice response is only appropriate where the behaviour is very serious;¹²⁵
- A criminal justice response may not be appropriate where minors are involved;¹²⁶
- The criminal law may be effective where intransigent perpetrators are involved and to clearly communicate that bullying behaviours are not socially acceptable;¹²⁷
- A therapeutic jurisprudence approach is the appropriate model for the majority of bully/victim situations.¹²⁸

3.3.4 In his submission, the Director of Public Prosecutions noted that a criminal justice response to bullying is only appropriate in very serious cases.¹²⁹ The Director submitted that current offences, particularly the offences of stalking and assault, can cover a wide range of behaviours that constitute ‘bullying’.¹³⁰ He further noted that there are dangers associated with criminalising a wider range of behaviour, and that some bullying behaviours are better dealt with through methods such as the development of better policies at educational institutions and workplaces.¹³¹ The Director submitted that stalking contrary to s 192 of the *Criminal Code* already includes some extreme bullying, including cyberbullying or a combination of bullying over the internet and by other means provided the perpetrator ought to have known such conduct would cause the victim physical or mental harm or to be apprehensive or fearful.¹³²

3.3.5 The Law Society of Tasmania expressed no concluded view on whether a criminal law response to bullying is appropriate, expressing concern about the potential effects of a criminal law response on young people and noting the desirability of ensuring that serious bullying behaviours are adequately defined.¹³³ The Law Society is of the view that many of the currently available sentencing options may provide appropriate responses to bullying behaviours.¹³⁴ For example, the Society submitted that where there is evidence to suggest that bullying behaviours have been generated by the bully’s mental health problems, giving the bully the option to be included in the mental health list in the Magistrates Court could be an appropriate way to address the cause of the behaviour and prevent its recurrence.¹³⁵

3.3.6 YNOT submitted that a criminal justice response is not appropriate for young people involved in bullying behaviour. Its reasons for this view are:

¹²⁵ Office of the Director of Public Prosecutions, above n 11, 4; Walter, above n 82, 3.

¹²⁶ Anonymous (address and name provided to the Institute); see also Commissioner for Children, above n 21, 3.

¹²⁷ Smith, above n 116, 2; Anonymous (name and contact details provided to the Institute).

¹²⁸ Angels Hope, above n 81, 2.

¹²⁹ Office of the Director of Public Prosecutions, above n 11, 4.

¹³⁰ Ibid 1.

¹³¹ Ibid.

¹³² Ibid 2.

¹³³ Law Society of Tasmania, above n 8, 14-15.

¹³⁴ Ibid 15.

¹³⁵ Ibid.

- The co-morbidity between bullying and other childhood disorders and links between bullying behaviour and possible behavioural, emotional, social or psychological problems experienced by young people.¹³⁶
- The problems experienced by bullies and those bullied extend into adulthood. There is a correlation between young people's involvement in bullying and depression later in life, and an association between childhood bullying and bipolar disorder, and alcohol, nicotine and marijuana use. Childhood bullying is also noted as a significant predictor for anti-social behaviour and criminal offending.¹³⁷
- The complexities of bullying, including the fact that around 20% of bullied young people can be identified as 'bully-victims' (meaning that they both engage in bullying and are victims of bullying).¹³⁸
- The fact that the region of the brain that controls reasoning is still developing into adulthood.¹³⁹
- The effects and deficiencies of a criminal law response, such as the creation of a new subset of offenders, its inability to address the underlying causes of bullying, and the fact that punishing offenders is not the most effective way to stop bullying behaviour.¹⁴⁰

3.3.7 While the Commissioner for Children noted a number of concerns about criminal justice responses to bullying between children, he stated that there may be instances where a criminal justice response is appropriate and that wherever possible a restorative justice approach should be preferred when dealing with bullying between children.¹⁴¹

3.3.8 Tasmania Police noted that although the use of the criminal law may have a deterrent effect, it also creates an expectation of a police response which law enforcement agencies may not be sufficiently resourced to address.¹⁴²

3.3.9 Challenge Bullying, focussing on workplace bullying, noted that criminalising bullying would mean that proof to the criminal standard that criminal conduct had taken place would be required and that it may often be hard to meet that standard, especially if bullying is indirect in nature.¹⁴³ Further, Challenge Bullying stated that most people who behave inappropriately and cause harm to others do not understand the harm they are causing, believe they are behaving like others in the workplace or do not realise their lack of interpersonal skills is affecting others. For these people, a possible criminal charge could affect their whole life, not just their work life.¹⁴⁴ Challenge Bullying submitted that threatening people with criminal penalties would not make workplaces safer but would greatly reduce the probability of a resolution. Challenge Bullying noted that criminalising bullying would ignore the

¹³⁶ YNOT, above n 20, 8 citing Jodie Lodge, 'Children Who Bully at School' (Child Family Community Australia Paper No. 27, Australian Institute of Family Studies, 2014).

¹³⁷ YNOT, above n 20, 8 citing Australian Institute of Family Studies, 'School bullying goes unnoticed by teachers and parents' (Media Release, 23 July 2014 <<https://aifs.gov.au/media-releases/school-bullying-goes-unnoticed-teachers-and-parents>>) and Lodge, above n 136.

¹³⁸ YNOT, above n 20, 8 citing Australian Institute of Family Studies, above n 137 and Lodge, above n 136.

¹³⁹ YNOT, above n 20, 8 citing Ken Rigby (2015), Ken Rigby.net, retrieved from <<http://www.kenrigby.net/>>.

¹⁴⁰ YNOT, above n 20, 8 citing F Thompson and P K Smith, 'The Use and Effectiveness of Anti-Bullying Strategies in School' (Goldsmiths, University of London (Ref: DFE-RR098), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/182421/DFE-RR098.pdf>).

¹⁴¹ Commissioner for Children, above n 21, 3.

¹⁴² Tasmania Police, Submission to Tasmania Law Reform Institute, *Bullying*, 4 August 2015, 2.

¹⁴³ Challenge Bullying, above n 17, 9.

¹⁴⁴ Ibid 10.

cultural nature of bullying, place the focus on individuals and remove accountability from employers.¹⁴⁵

3.3.10 In relation to workplace bullying, Unions Tasmania noted that ‘moral harassment’ or ‘bullying’ is a ‘social scourge’ and that enactment of anti-bullying criminal and civil laws will better protect victims of harassment and act as a deterrent to such behaviour.¹⁴⁶

What form should a criminal justice response take?

3.3.11 If a criminal justice response to bullying can be justified, this response could take a number of forms. The Issues Paper considered the options of amending the offence of stalking in s 192 of the *Criminal Code* and creating a specific and separate offence of bullying.

3.3.12 In other jurisdictions, stalking provisions have been suggested as a means of addressing serious bullying. Accordingly, one option for a criminal law response to bullying is to amend s 192 of the *Criminal Code* (‘stalking’) to extend its application to bullying behaviours. If the stalking provision is amended in this way, it could be retitled to make it clear that it is the intention of the amendments to extend the application of the provision to bullying and to ensure that the provision is easily identified as covering bullying. Retitling s 192 in this way may improve awareness of and accessibility of the provision, and maximise the educative and deterrent benefits potentially resulting from this amendment.

3.3.13 Another possible criminal justice response to bullying is the creation of a specific offence of ‘bullying’. Tasmania would be the first state in Australia to create such an offence. The wide range of intentions, behaviours and consequences that could fall within this offence (some of which are less objectively serious than others) and the prevalence of bullying amongst young people suggest that any offence of bullying should be summary rather than indictable.¹⁴⁷ Crimes triable summarily attract lower maximum penalties than indictable offences.¹⁴⁸ Law enforcement agencies may be unwilling to prosecute a more serious (indictable) offence of bullying.

Question 8 of the Issues Paper:

If you think that a criminal justice response is justified, do you prefer amendment of the stalking provision or the creation of a separate offence or bullying? Why?

3.3.14 Eight respondents to the Issues Paper directly answered Issues Paper Question 8. Four of these responses favoured the creation of a specific offence of bullying. Three submissions supported an extension of the current stalking laws.¹⁴⁹ One submission considered the benefits of both an extension of the stalking provision and the creation of a specific offence.¹⁵⁰

Stalking

Question 9 of the Issues Paper:

If you prefer amendment of the stalking provision, how should the provision be amended?

¹⁴⁵ Ibid.

¹⁴⁶ Unions Tasmania, above n 13, 15.

¹⁴⁷ A summary offence can be heard by a magistrate, attracts lower maximum penalties and is generally considered to be less serious than an indictable offence.

¹⁴⁸ See *Sentencing Act 1997* (Tas) s 13.

¹⁴⁹ Angels Hope, above n 81, 2; Smith, above n 116, 2; TILES, above n 4, 6 (note that TILES also considered that the creation of a separate offence for bullying may be necessary to ensure that all aspects of the behaviour are responded to).

¹⁵⁰ Tasmanian Anti-Discrimination Commissioner, above n 10, 27-8.

3.3.15 The Director of Public Prosecutions noted that s 192 ('stalking') already covers some extreme forms of bullying, including cyberbullying and bullying that occurs through a variety of means.¹⁵¹ He submitted that it is not desirable to criminalise saying hurtful or unpleasant things unless what is said is so extreme as to warrant application of the criminal law, and that it is better to deal with bullying in other ways such as through the development of employment and school policies or by referring cases to the Anti-Discrimination Commissioner.¹⁵²

3.3.16 The Director further stated, however, that, for educative purposes, the title of 'stalking' could be changed to 'stalking or bullying', and that the mental element of 'extreme humiliation' could perhaps be added to 'causing another person physical or mental harm or to be apprehensive fearful'.¹⁵³

3.3.17 The Anti-Discrimination Commissioner noted that:

- Strengthened stalking provisions should apply to the most serious cases of bullying across all environments;
- Because it is a course of conduct offence, stalking would not apply to situations where a one-off incident makes a person disgruntled;
- Clarifying the reach of the stalking provision would provide a clear trigger for serious forms of bullying to attract the imposition of a restraint order, as s 106B of the *Justices Act 1959* (Tas) provides for the imposition of a restraint order in circumstances where a magistrate is satisfied that a person has or is being stalked,¹⁵⁴ and
- Since s 7 of the *Family Violence Act 2004* (Tas) includes 'stalking' within the definition of family violence, any proposal to redefine the definition of stalking will have a flow on effect to behaviours that are encompassed within family violence law.¹⁵⁵

3.3.18 The Anti-Discrimination Commissioner also noted that the current stalking provision is not suited to dealing with behaviour that may amount to persistent unwanted attention but does not meet the threshold test of causing the victim to experience physical or mental harm or be apprehensive or fearful.¹⁵⁶ The Commissioner submitted that to address bullying the stalking provision needs to deal with the making of threats, the use of abusive or intimidating words or the performing of offensive or abusive acts in situations where the perpetrator would reasonably expect that these actions would cause physical, psychological or mental harm to the victim (including self-harm).¹⁵⁷

3.3.19 The Anti-Discrimination Commissioner nominated the amendments made to Victoria's stalking provision as providing precedent for potential amendments to stalking in Tasmania.¹⁵⁸ This would involve:

- Expanding the prohibited conduct to include threats of abusive or insulting words or acts;
- Including actions that are aimed at inducing or causing the victim to harm him/herself; and
- Expanding the prescribed mental element of harm to include psychological harm or encouraging the victim to engage in suicidal thoughts.

¹⁵¹ Office of the Director of Public Prosecutions, above n 11, 2.

¹⁵² *Ibid* 3.

¹⁵³ *Ibid*.

¹⁵⁴ Tasmanian Anti-Discrimination Commissioner, above n 10, 28.

¹⁵⁵ *Ibid* 32.

¹⁵⁶ *Ibid* 27.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid* 28.

3.3.20 The Law Society noted that a potential amendment of the stalking provision is (proposed changes in italics):¹⁵⁹

- (1) A person who with intent to cause another person physical or mental harm or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:

...

(k) Persistent contact with a third person where it has been expressly communicated on a previous occasion to cease that type of communication.

...

- (4) *The following apply to subsection (1)(k):*

“Persistent” is defined as being on more than one occasion.

“Contact” is defined as being either fact to face, oral or digital contact

“Expressly communicated” is defined as an act which is oral or written, this includes via digital means.

3.3.21 TILES submitted that specific attention should be given to the creation of false social media accounts and hate pages, and that special consideration is needed regarding behaviours that are so relentless and harmful that victims take their own lives.¹⁶⁰

Creation of an offence of ‘bullying’

Question 10 of the Issues Paper:

If you prefer the creation of an offence of bullying:

- (a) What kinds of behaviour should be included in the offence?
- (b) What kind of consequences should be intended or caused (eg, should the offence be established where an offender has intended to cause serious emotional distress or should a higher threshold be required)?
- (c) What form should the mental element take?

3.3.22 The Law Society submitted that the primary goals of legislating a criminal justice response should be deterrence and community condemnation of bullying behaviours, and that the creation of a new offence specifically targeted at bullying serves these goals most effectively.¹⁶¹ Similarly, the Anti-Discrimination Commissioner noted that the creation of an offence of bullying or harassment under the *Police Offences Act 1935* (Tas) has the capacity to provide for significant deterrence in serious instances of bullying and that a separate offence may offer flexibility to specify a broad range of behaviours, as well as remedies, conditions and exceptions.¹⁶²

3.3.23 The Anti-Discrimination Commissioner also noted that a specific offence may be a useful mechanism for structuring a progressive response to bullying, based in the first instance on alternative dispute resolution processes and escalating to more severe sanctions if the behaviour is of a more serious nature or the alternative dispute resolution processes do not achieve an agreed outcome.¹⁶³

3.3.24 Submissions addressing what kind of behaviour should be encompassed in an offence of bullying suggested that it should cover:

¹⁵⁹ The Law Society of Tasmania, above n 8, 16.

¹⁶⁰ TILES, above n 4, 6.

¹⁶¹ The Law Society of Tasmania, above n 8, 15.

¹⁶² Tasmanian Anti-Discrimination Commissioner, above n 10, 29.

¹⁶³ *Ibid* 29.

- All forms of overt, covert and cyberbullying, including verbal, physical, emotional, relationship, sexual, health and disability related bullying. Examples given included: interference with property, deception, belittling, breach of privacy, singling out and making fun of the target.¹⁶⁴
- Any behaviour which causes the victim an unreasonable and unnecessary apprehension of fear or psychological damage including racist conduct, physical abuse, mental abuse, abuse based on cultural differences, threats, property damage etc.¹⁶⁵
- Any behaviour that, without just cause, undermines the integrity of the victim, particularly, but not limited to, within the environment in which it occurs. Tests such as repetition and impact could be used to exclude misinterpreted behaviour. Because not all bullying is repeated, care would need to be taken to ensure that a lack of repetition does not provide a loophole for bullies.¹⁶⁶
- Existing criminal offences identified as potentially enlivened by bullying, and adding common bullying behaviours intended to cause significant harm — on a continuum.¹⁶⁷
- Prohibition of behaviours that offend, humiliate, intimidate, insult or ridicule another person in a manner in which a reasonable person would anticipate the victim would feel offended, humiliated, insulted or ridiculed in the circumstances and where the victim has been seriously harmed or the behaviour was intended to cause serious harm to the victim or the perpetrator was reckless or indifferent to the potential to cause such harm.¹⁶⁸
- An aggressive act, perpetrated physically, verbally or by means of the internet, directly or indirectly. It should at least encompass bullying at school, bullying in the workplace, cyberbullying, single or repeated verbal aggression, single or repeated physical aggression.¹⁶⁹

3.3.25 The Tasmanian Anti-Discrimination Commissioner noted that, given increasing concern about the privacy implications of behaviour that may be considered bullying or harassment, consideration could be given to amending the *Police Offences Act 1935* (Tas) or otherwise introducing a new statute to capture instances of serious bullying that involve activities aimed at humiliating or intimidating victims, including serious breaches of privacy.¹⁷⁰ Tasmania Police also stated that there are potential gaps in the current criminal law regarding the distribution, or threatened distribution, of intimate images or multimedia files, which have recently been labelled as ‘sexting’ or ‘revenge porn’.¹⁷¹

3.3.26 Two respondents submitted that a mental element of the kind in Tasmania’s current stalking laws is an appropriate mental element for a new offence of bullying.¹⁷² That is, an offender either has an intent to cause harm, or actually causes harm and knew or ought to have known that harm would be likely to occur.

3.3.27 Other responses focussed on the intent of the perpetrator or consequences to the victim. In this regard various suggestions were made with regard to the mental element for a bullying offence including that:

¹⁶⁴ Walter, above n 82, 4-5.

¹⁶⁵ Smith, above n 116, 3.

¹⁶⁶ Anonymous, name and contact details provided to the Institute.

¹⁶⁷ Anonymous, name and contact details provided to the Institute.

¹⁶⁸ Tasmanian Anti-Discrimination Commissioner, above n 10, 29.

¹⁶⁹ The Law Society of Tasmania, above n 8, 16-17.

¹⁷⁰ Tasmanian Anti-Discrimination Commissioner, above n 10, 31.

¹⁷¹ Tasmania Police, above n 142, 2.

¹⁷² Tasmanian Anti-Discrimination Commissioner, above n 10, 32; The Law Society of Tasmania, above n 8, 17.

- The perpetrator purposefully, deliberately or intentionally caused, or was objectively careless as to whether the victim suffered emotional distress or mental or physical harm.¹⁷³
- The perpetrator was at least negligent in failing to consider the harm that was caused to the victim.¹⁷⁴
- The perpetrator had actual intent to harm.¹⁷⁵
- It ought to be sufficient to establish that the behaviour was harmful to the victim.¹⁷⁶

3.3.28 Tasmania Police did not support the creation of an offence of bullying, noting that criminal sanctions should only apply to the most significant bullying behaviours and that these behaviours are captured by existing state laws.¹⁷⁷

Recommendations

3.3.29 While it is clear that bullying occurs on a spectrum, it is also clear that bullying can cause very serious harm and that in some cases the bully may actually intend to cause this harm. It is the view of the Institute that some forms of serious bullying justify a criminal justice response and that the current criminal framework does not adequately address bullying behaviours. In the Institute's opinion, there are problems with the applicability of current criminal offences to bullying. Further, the patchwork of offences that may potentially be enlivened by bullying behaviours are not understood by victims, perpetrators or the community more generally to prohibit 'bullying', meaning that the educative and deterrent benefits of current provisions are minimal.

Stalking

3.3.30 The application of Tasmania's current stalking provision in the context of bullying presents particular problems, notably:

- Uncertainty as to the parameters of harm, particularly mental harm. It is uncertain whether the current wording of the provision covers a victim's self-harm that is caused or induced by the offender's behaviour. There is also uncertainty regarding whether 'apprehension or fear' includes things like harm to reputation and embarrassment.
- Uncertainty as to whether some common forms of bullying, such as verbal, face-to-face bullying and physical bullying, fall within s 192.

3.3.31 Following the death of 19-year-old Brodie Panlock after a sustained period of serious workplace bullying, the Victorian stalking provision, contained in s 21A of the *Crimes Act 1958* (Vic), was amended in four ways to address serious bullying:¹⁷⁸

- Threats and abusive or offensive words or acts were included in the actions able to establish a 'course of conduct', which is an essential element of the offence;
- The description of 'course of conduct' was broadened to include conduct that could reasonably be expected to cause the victim to harm himself or herself physically;
- It was made clear that intention to cause the victim to harm himself or herself physically could satisfy the fault element;

¹⁷³ Walter, above n 82, 5.

¹⁷⁴ Smith, above n 116, 3.

¹⁷⁵ Anonymous, name and contact details provided to the Institute.

¹⁷⁶ Anonymous, name and contact details provided to the Institute.

¹⁷⁷ Tasmania Police, above n 142, 1.

¹⁷⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 April 2011, 1019-20 (Robert Clark, Attorney-General).

- ‘Mental harm’ was inclusively defined by reference to psychological harm and causing a victim to engage in suicidal thoughts.

3.3.32 Amending the Tasmanian provision to extend and clarify its application to certain examples of bullying behaviour offers a relatively straightforward avenue for reform. It would also permit the use of restraint orders in cases of bullying if the definition of stalking in s 106A(1) of the *Justices Act 1959* (Tas) was similarly amended.

3.3.33 Following Victoria’s lead, Tasmania’s stalking provision could be amended to make clear that intention to cause the victim to harm himself or herself physically could satisfy the fault element of s 192 and that ‘mental harm’ includes psychological harm and causing a victim to engage in suicidal thoughts. In addition, including ‘extreme humiliation’ in the fault element could strengthen the applicability of Tasmania’s stalking provision to bullying.

3.3.34 Incorporating all of those suggestions, s 192(1) could read:

- (1) A person who, with intent to cause another person physical or mental harm or extreme humiliation, or to harm himself or herself physically, or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions....”

...

- (5) In this section –

“mental harm” includes –

- (a) psychological harm; and
- (b) suicidal thoughts.

3.3.35 Inclusion of additional conduct elements in s 192(1) is arguably also necessary to cover common bullying behaviours. Amending the Tasmanian stalking provision to include threats or abusive or offensive words or acts, as were included in the Victorian amendments, extends the provision’s coverage of common bullying behaviours. It would also arguably be useful to widen paragraph (j) to allow developing or unique bullying behaviours to fall within the provision. An amended Tasmanian stalking provision that implemented these recommendations could read (proposed changes in italics):

- (1) A person who, with intent to cause another person physical or mental harm *or extreme humiliation, or to harm himself or herself physically*, or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:
 - (a) following the other person or a third person;
 - (b) keeping the other person or a third person under surveillance;
 - (c) loitering outside the residence or workplace of the other person or a third person;
 - (d) loitering outside a place that the other person or a third person frequents;
 - (e) entering or interfering with the property of the other person or a third person;
 - (f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;
 - (g) publishing or transmitting offensive material by electronic or other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;
 - (h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;

- (i) contacting the other person or a third person by postal telephonic, electronic or any other means of communication;
- (j) *making threats to the other person;*
- (k) *using abusive or offensive words to or in the presence of the other person;*
- (l) *performing abusive or offensive acts in the presence of the other person;*
- (m) *directing abusive or offensive acts towards the other person;*
- (n) acting in another way that could reasonably be expected to cause the other person *extreme humiliation or to harm himself or herself physically* or to be apprehensive or fearful.

...

3.3.36 It is the view of the Institute that any amendments to the stalking provision to ensure that it covers bullying behaviours more thoroughly should include the retitling of the offence as “Stalking and Bullying” in order to indicate clearly that s 192 covers bullying behaviour, to communicate the law’s denunciation of this behaviour and to educate victims, perpetrators and the community about the seriousness with which the law views such conduct.

Recommendation 1:

It is desirable to develop a criminal justice response to bullying by extending s 192 of the *Criminal Code* to cover common bullying behaviours. Section 192 should be retitled “Stalking and Bullying” in light of this amendment.

In order to cover bullying behaviours adequately, the amendments should extend the fault element and conduct elements. An amended s 192 could read:

Stalking and Bullying

- (1) A person who, with intent to cause another person physical or mental harm *or extreme humiliation, or to harm himself or herself physically*, or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:
 - (a) following the other person or a third person;
 - (b) keeping the other person or a third person under surveillance;
 - (c) loitering outside the residence or workplace of the other person or a third person;
 - (d) loitering outside a place that the other person or a third person frequents;
 - (e) entering or interfering with the property of the other person or a third person;
 - (f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;
 - (g) publishing or transmitting offensive material by electronic or other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;
 - (h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;
 - (i) contacting the other person or a third person by postal telephonic, electronic or any other means of communication;
 - (j) *making threats to the other person;*
 - (k) *using abusive or offensive words to or in the presence of the other person;*

- (l) *performing abusive or offensive acts in the presence of the other person;*
- (m) *directing abusive or offensive acts towards the other person;*
- (n) acting in another way that could reasonably be expected to cause the other person *extreme humiliation or to harm himself or herself physically* or to be apprehensive or fearful.

is guilty of a crime.

Charge:

Stalking and Bullying

- (2) For the purposes of subsection (1) –
 - (a) a person pursues a course of conduct if the conduct is sustained or the conduct occurs on more than one occasion; and
 - (b) if the conduct occurs on more than one occasion, it is immaterial whether the actions that make up the conduct on one of those occasions are the same as, or different from, the actions that make up the conduct on another of those occasions.
- (3) A person who pursues a course of conduct of a kind referred to in subsection (1) and so causes another person physical or mental harm *or extreme humiliation, or to harm himself or herself physically*, or to be apprehensive or fearful is taken to have the requisite intent under that subsection if at the relevant time the person knew, or ought to have known, that pursuing the course of conduct would, or would be likely to, cause the other person physical or mental harm *or extreme humiliation, or to harm himself or herself physically*, or to be apprehensive or fearful.
- (4) Subsection (3) does not apply to a person who, in good faith, pursues a course of conduct referred to in subsection (1) in the course of performing official duties to –
 - (a) enforce the criminal law; or
 - (b) administer an Act; or
 - (c) enforce a law imposing a pecuniary penalty; or
 - (d) execute a warrant; or
 - (e) protect the public revenue.
- (5) *In this section –*
 - “mental harm” includes –*
 - (a) *psychological harm; and*
 - (b) *suicidal thoughts.*

A separate criminal offence of ‘bullying’

3.3.37 Responding to bullying by both extending the scope of the stalking provision and creating a new offence of ‘bullying’ may be an overly punitive reform. Depending on the differences between the two offences, responding in this way may risk over-criminalisation and further confuse community understanding of bullying and the criminal law. On the other hand, these risks may arguably not arise if a new offence of ‘bullying’ in the *Polices Offences Act* is created that is similar to a modified stalking provision.¹⁷⁹

¹⁷⁹ Consider that both the *Criminal Code* and the *Police Offences Act* contain the offence of assault.

3.3.38 The benefits of a summary offence of ‘bullying’ that mirrors an amended stalking provision, contained within the *Police Offences Act*, include deterrence, education, potentially lower prosecutorial reluctance than a *Code* offence and potentially less stigma attaching to a conviction than would attach to a conviction for a *Code* offence.

3.3.39 Arguably, however, the creation of a new provision is not necessary in addition to wide-reaching amendments to the offence of ‘stalking’. This is because a defendant on a stalking charge can elect to be tried in the Magistrates Court.¹⁸⁰ Responses to the Issues Paper generally supported the view that a criminal justice response to bullying should be the top of a tiered response (targeted at the most intransigent and persistent offenders). Consequently, amending s 192 enables bullying to be dealt with as both an indictable and a summary offence. This accords with the tiered approach supported by respondents to the Issues Paper.

Recommendation 2:

In view of the fact that under s 192 of the *Criminal Code* an alleged offender is able to elect to be dealt with summarily, it is not desirable to create a specific summary offence of ‘Bullying’ in addition to extending s 192 of the *Criminal Code*.

3.4 Civil law responses

3.4.1 Civil law sanctions are considered to be less objectively serious than those imposed by the criminal law as they do not have as strong a censuring or stigmatising effect. Civil law sanctions are less punitive and are generally limited to damages or injunctive relief.

Civil action of ‘bullying’

3.4.2 Bullying could be made a civil wrong, enabling a victim to bring an action against a bully for ‘bullying’. If such an approach is adopted, the remedies available must be determined. The primary remedy for an action of this type is likely to be compensatory damages for harm caused by the behaviour, although a wide range of remedies including apologies or orders to prevent future bullying could potentially be available. If desired, evidence of consensus-based solutions through processes like conciliation or mediation could be required before any action is commenced.

3.4.3 It should be noted that civil actions can be expensive and time consuming. The rate of use of a civil action against bullying may be low given both the cost of civil litigation and the ongoing burdens of commencing and then running a civil case as opposed to making a complaint to the police regarding a criminal offence.

Question 11 of the Issues Paper:

Do you think that bullying should be a civil wrong?

3.4.4 Seven respondents answered Issues Paper Question 11; six of these respondents expressed at least qualified support for this option.

3.4.5 The Tasmanian Anti-Discrimination Commissioner submitted that there is a strong case for refining the state’s civil law framework to address bullying behaviours that do not meet the threshold for criminalisation, noting that enquiries received by her office suggest that the threshold associated with bringing a criminal action of bullying may often be considered too high for the police to act.¹⁸¹

¹⁸⁰ *Justices Act 1959* (Tas) s 72(1)(a). A defendant tried for stalking in the Magistrates Court will be liable to a lower maximum penalty than if tried in the Supreme Court: *Sentencing Act 1997* (Tas) s 13.

¹⁸¹ Tasmanian Anti-Discrimination Commissioner, above n 10, 33.

The Commissioner noted that a civil law response to bullying enables a focus on restorative justice approaches and that a civil law response provides victims with the power to initiate the procedure and the capacity to be proactive in prevention and systemic change.¹⁸²

3.4.6 The Anti-Discrimination Commissioner also noted, however, that while the introduction of a tort of harassment would enable a victim of bullying to bring an action against a person identified as a bully in order to seek compensatory damages for the harm caused, and possibly also an apology and other forms of reparation, the cost, complexity and length associated with civil litigation may make it difficult for individuals to pursue such an approach.¹⁸³

3.4.7 The Law Society of Tasmania submitted that a new civil action of bullying may be an appropriate response to the problem of bullying, although problems with this approach include:¹⁸⁴

- The difficulty of defining precisely what conduct should constitute a civil wrong.
- The cost of civil litigation, which is likely to be a significant deterrent to many victims of bullying commencing actions.
- Time concerns — civil actions rarely produce a ‘quick’ result and may not be the most obvious choice for victims of bullying if the behaviour requires urgent resolution.
- The effect the litigation process may have on a potentially already vulnerable plaintiff and his or her mental health.
- That a primary consideration for any person bringing an action for ‘bullying’ will be whether the potential defendant has the financial capacity to satisfy a judgement or settlement.¹⁸⁵

3.4.8 The Law Society noted, however, that possible solutions may be to create a ‘no costs jurisdiction’ to solve the issue for litigants who are fearful of the risk of a costs order being awarded if they are unsuccessful and to limit the right to bring an action for bullying to those plaintiffs who have already pursued other avenues such as mediation or similar processes.¹⁸⁶ The Society also noted that another possible solution to the problems with a civil action is to create an independent ‘Anti-Bullying Commission’ or extend the role of Equal Opportunity Tasmania.¹⁸⁷

Question 12 of the Issues Paper:

If bullying should constitute a civil wrong, what kind of behaviour should the new cause of action proscribe?

3.4.9 Responses to the question about what kind of behaviour should be proscribed in a civil action included:

- Bullying behaviours that include verbal and physical abuse and that are perceived to cause psychological and physiological harm.¹⁸⁸
- All forms and methods of overt, covert and cyber bullying, including verbal, physical, emotional/relational, sexual and disability related bullying. Further, negligence of people in

¹⁸² Ibid.

¹⁸³ Ibid 33-4.

¹⁸⁴ Law Society of Tasmania, above n 8, 17-18.

¹⁸⁵ Ibid 18.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Angels Hope, above n 81, 3.

positions of responsibility should be within the action, as should a requirement for these people to undertake anti-bullying training and accreditation.¹⁸⁹

- Any behaviour that, without just cause, undermines the integrity of the victim, particularly but not limited to, within the environment in which it occurs.¹⁹⁰
- Intentional and repeated acts designed to hurt or cause fear, intimidation or distress. Serious social exclusion, name-calling, cyberbullying, harassment, gesturing, rumours and teasing with intention to harm.¹⁹¹
- Whilst a range of behaviours amounting to bullying are capable of being identified, care is required to retain sufficient flexibility to capture all actions which have a detrimental effect on victims. The focus should be on identifying the effect on the individual, rather than attempting to enumerate a series of proscribed behaviours.¹⁹²

3.4.10 The Law Society noted that Fair Work Australia has provided examples of what bullying may include such as:

- Aggressive or intimidating conduct;
- Belittling or humiliating comments;
- Spreading malicious rumours;
- Teasing, practical jokes or ‘initiation ceremonies’;
- Exclusion from work-related events;
- Unreasonable work expectations, including too much or too little work, or work below or beyond a worker’s skill level;
- Displaying offensive material; and
- Pressure to behave in an inappropriate manner.

3.4.11 The Law Society noted that state anti-bullying legislation should also encompass other types of bullying such as physical bullying, cyberbullying and verbal abuse, but that the best approach when defining ‘bullying’ in the relevant legislation may not be to delineate the types of behaviour included in the definition to avoid exclusion of new or unique types of bullying.¹⁹³

3.4.12 In relation to workplace bullying, Unions Tasmania noted that there are gaps and limitations in existing civil remedies for persons subjected to ‘moral harassment’ (workplace bullying), and recommended the enactment of a new tort to provide civil remedies, including damages, for people subjected to ‘moral harassment’.¹⁹⁴

Question 13 of the Issues Paper:

Is a criminal justice response also justified or should the civil action be the most severe legal response to ‘bullying’?

¹⁸⁹ Walter, above n 82, 6.

¹⁹⁰ Anonymous, name and contact details provided to the Institute.

¹⁹¹ Anonymous, name and contact details provided to the Institute.

¹⁹² Tasmanian Anti-Discrimination Commissioner, above n 10, 34.

¹⁹³ Law Society of Tasmania, above n 8, 18-19.

¹⁹⁴ Unions Tasmania, above n 13, 19.

3.4.13 Seven respondents answered Question 13. Six of these responses indicated that a criminal justice response could also be justified. The other respondent, the Law Society of Tasmania, had no concluded view as to whether there should be a criminal justice response to bullying.¹⁹⁵

Recommendations

3.4.14 The criminal law sits at the top of the regulatory pyramid, with a strict burden of proof and sometimes very severe consequences. It is the view of the Institute that the civil law provides an appropriate mechanism of redress for those instances where bullying cannot be proved beyond a reasonable doubt or where the behaviour itself, while still very serious, falls short of what the community and the law considers ‘criminal’. The civil law can also facilitate a strong restorative justice approach, which many submissions to the Issues Paper indicated was appropriate for dealing with bullying, and may be able to compensate the victim or change the behaviour of the bully. It is the view of the Institute that a civil response to bullying is appropriate.

3.4.15 One respondent to the Issues Paper indicated that care should be taken to define bullying consistently, as the lack of clarity where bullying is defined in legislation contributes to a blurring of the lines as to whether one form of behaviour consists of bullying or something else.¹⁹⁶ On the other hand, a slightly different definition within a civil response as compared to a criminal justice response may serve the community’s apparent desire to criminalise only the most serious behaviour, while still responding to serious, but not quite ‘criminal’, bullying in other ways.

What form should a civil response take?

3.4.16 Civil litigation through a tort of bullying may clearly communicate to victims, perpetrators and the community that bullying behaviours are not acceptable as well as providing an avenue through which victims can receive compensation for the damage that the bullying has caused. The problems associated with this kind of response, however, arguably outweigh its benefits. An adversarial and litigious approach through the creation of a tort of bullying may cause further harm to victims of bullying. There are also significant time and financial costs associated with civil litigation, which may present a significant barrier to justice and deter victims of bullying from using this framework. Further, where a plaintiff is successful, not all perpetrators would have the financial capacity to satisfy judgement.

Recommendation 3:

It is not desirable to create a tort of ‘Bullying’.

Stop bullying orders

3.4.17 In the case of bullying, which is a repeated or sustained course or pattern of behaviour and which often arises in the context of enduring social relationships, the preferred remedy is often simply for the bullying to stop.¹⁹⁷ One option for reform is to provide a civil framework for a ‘bullying intervention order’ or ‘stop bullying order’, through amendment to the current restraint order scheme,¹⁹⁸ the introduction of a new provision in Part XA of the *Justices Act 1959* (Tas) or through other legislation.

¹⁹⁵ Law Society of Tasmania, above n 8, 19, 14.

¹⁹⁶ TILES, above n 4, 2.

¹⁹⁷ See generally, Standing Committee on Education and Employment, above n 67, 95, although the statistics relate specifically to workplace bullying.

¹⁹⁸ *Justices Act 1959* (Tas) s 106B.

3.4.18 Facilitating early intervention could prevent more serious harm eventuating for the victim and also support the bully to change his or her behaviour. Where continuation of the relationship between bully and victim is desirable or unavoidable or where a restorative approach is most appropriate, preference could be given to orders that include restorative justice measures (such as mediation).

Question 14 of the Issues Paper:

Do you think that it should be possible to apply for a ‘bullying intervention order’?

3.4.19 Eight respondents answered Issues Paper Question 14. All of these respondents expressed qualified support for such orders.

3.4.20 It was noted that a benefit of bullying intervention orders is that they are able to be adapted to individual circumstances,¹⁹⁹ and that in severe cases, bullying intervention orders would demonstrate to bullies and to the community that such behaviour is not acceptable.²⁰⁰

Question 15 of the Issues Paper:

If so, what considerations do you think should be taken into account in making an order and in the conditions that can be imposed under an order?

3.4.21 Both the Law Society of Tasmania and the Tasmanian Anti-Discrimination Commissioner suggested that it may be valuable to link applications for a ‘bullying intervention order’ to a requirement that processes aimed at resolving the dispute be undertaken prior to the application being granted.²⁰¹

3.4.22 The Law Society also considered who might have authority to implement and enforce the order, noting that inserting a new provision in the *Justices Act 1959* (Tas) to extend the scope of the restraint order scheme to bullying is not the only option and that other options include the establishment of an independent body to deal with bullying claims or expansion of the jurisdiction of Equal Opportunity Tasmania and the functions of the Anti-Discrimination Commissioner.²⁰² It would be necessary to ensure that the appropriate body had sufficient powers to enforce a bullying intervention order.²⁰³ The Society also submitted that those who grant ‘bullying intervention orders’ would need to take into account the practicality of their enforcement.²⁰⁴

3.4.23 The Tasmanian Anti-Discrimination Commissioner was not inclined to support the suggestion that the behaviour required for the imposition of a ‘bullying intervention order’ should constitute ‘repeated unreasonable behaviour’, as prescribed in the *Fair Work Act*, because this may result in too narrow a focus. A magistrate hearing an application should be able to form a judgment about whether, in all the circumstances, the behaviour warrants the imposition of an order to prevent future occurrence.²⁰⁵

3.4.24 TILES noted that, because of the anonymity of some cyberbullies, some victims of bullying may not be able to identify who the respondent is or their relationship to the respondent and that consideration needs to be given to the identification of online perpetrators so that an order is applicable to both online and offline forms of communication.²⁰⁶

¹⁹⁹ Anonymous, name and address provided to the Institute.

²⁰⁰ Angels Hope, above n 81, 3.

²⁰¹ Tasmanian Anti-Discrimination Commissioner, above n 10, 35; Law Society of Tasmania, above n 8, 20.

²⁰² Law Society of Tasmania, above n 8, 19.

²⁰³ Ibid.

²⁰⁴ Ibid 20.

²⁰⁵ Tasmanian Anti-Discrimination Commissioner, above n 10, 35.

²⁰⁶ TILES, above n 4, 7.

3.4.25 Two respondents noted that the applicant's health, wellbeing and safety should be of the utmost importance.²⁰⁷ Another respondent submitted that the period of bullying, whether the applicant had asked for the bullying to stop and any other action taken to resolve the bullying should be taken into account in making an order.²⁰⁸

3.4.26 Responses to the Issues Paper supported the position that, in many instances, the victim of bullying just wants the behaviour to stop. In this respect, the ability to apply for a restraint or 'stop bullying order' may be particularly beneficial as a relatively quick avenue designed to end the bullying conduct. Respondents who directly answered whether or not it should be possible to apply for a 'bullying intervention' or restraint order for bullying unanimously supported this option.

3.4.27 The Institute is of the view that a victim of serious bullying should be able to apply for an order designed to stop the behaviour. The Institute's preferred way to effect this reform is to implement the suggested amendments to the offence of stalking in s 192 of the *Criminal Code* and amend the definition of 'stalking' in s 106A(1) of the *Justices Act 1959* (Tas) to align with the amendments to s 192.²⁰⁹

3.4.28 If the current Tasmanian stalking provision is not amended to cover a wider range of bullying, the Institute is of the view that the *Justices Act 1959* (Tas) should nevertheless be amended to allow restraint orders to be used against bullying. In this situation, the definition of stalking within the *Justices Act 1959* (Tas) should be amended to incorporate threats, abusive or offensive words or behaviour, behaviour intended to cause or which does cause extreme humiliation or results in the victim self-harming.²¹⁰ The *Youth Justice Act 1997* (Tas) does not require an amendment as s 161 gives the court jurisdiction to hear and determine an application for a restraint order.

3.4.29 The Institute favours the use of the *Justices Act 1959* (Tas) as the mechanism for bullying restraint orders, as this framework allows the use of existing powers rather than the creation of a new body or the extension of the functions of an existing body.

Recommendation 4:

It is desirable to amend the definition of stalking in s 106A(1) of the *Justices Act 1959* (Tas) to align with amendments made to s 192 of the *Criminal Code* in order to facilitate applications for restraint orders on the basis of bullying. To indicate clearly that s 106A(1) covers bullying behaviour, the terminology in s 106A(1) should be amended to replace the definition of 'stalking' with a definition of 'bullying and stalking'.

In view of the amendment to s 106A(1), s 106B(1)(d) should be amended to replace the reference to stalking with a reference to bullying and stalking.

If the current Tasmanian stalking provision in s 192 of the *Criminal Code* is not amended to cover a wider range of bullying, the *Justices Act 1959* (Tas) should nevertheless be amended to allow restraint orders to be used against bullying. In this situation, the definition of stalking within the *Justices Act 1959* (Tas) should be amended to incorporate threats, abusive or offensive words or behaviour, behaviour intended to cause or which does cause extreme humiliation or results in the victim self-harming.

Extension of the functions of the Anti-Discrimination Commissioner

3.4.30 It may be possible to extend the functions of the Anti-Discrimination Commissioner to include the investigation and resolution of bullying behaviours that are not of such a serious nature as

²⁰⁷ Angels Hope, above n 81, 4; Walter, above n 82, 7.

²⁰⁸ Smith, above n 116, 4.

²⁰⁹ See above at [3.3.30]-[3.3.36] for suggested amendments to stalking.

²¹⁰ Ibid.

to warrant criminal sanction. Although it is possible to extend the *Anti-Discrimination Act 1998* (Tas) to include general bullying behaviours, care would have to be taken so as not to undermine the attribute focus of the Act and dilute community understanding of, and the distinct character of, anti-discrimination law. Accordingly, if the jurisdiction of the Anti-Discrimination Commissioner were to be extended it may be appropriate to do this by enacting separate legislation.

3.4.31 In some cases it may be desirable to involve third parties in the resolution process, not only to address the causes and contexts of bullying but also to prevent the Anti-Discrimination Commissioner from being inundated with complaints of bullying that would require significant additional funds to address. This might be achieved by requiring that, where the Anti-Discrimination Commissioner receives a complaint of bullying, the Commissioner is to notify a relevant third party who is to attempt to resolve the complaint.

3.4.32 Involvement of third parties may be most appropriate in location or environment related cases, such as those involving bullying at schools, in the workplace, at sports clubs, at the university or other higher education facilities, or in government and non-government organisations. Depending on the circumstances, relevant third parties could include WorkSafe, schools, sports clubs and non-profit organisations with a stakeholder interest in the complaint. Where the third party is unable to address the bullying, she or he would refer it to the Commissioner for investigation. Where the third party is able to resolve the complaint, she or he would notify the Commissioner of the outcome. Where the case is not one that is amenable to the involvement of a third party, the Commissioner would have the power to deal with the complaint without referral.

Question 16 of the Issues Paper:

Do you think that the Anti-Discrimination Commissioner's functions should be extended to deal with bullying? If so:

- (a) how should the prohibition on bullying be described?
- (b) should victims be required to establish that they have been bullied or should the onus to disprove bullying rest with the alleged bullies?

3.4.33 Eight respondents answered Issues Paper Question 16. Seven of these submissions provided at least qualified support for an extension of the Anti-Discrimination Commissioner's functions.

3.4.34 The Anti-Discrimination Commissioner provided a detailed response outlining her current role, the link between bullying and discrimination law, and ways in which the *Anti-Discrimination Act* could be amended to include bullying behaviours. The Anti-Discrimination Commissioner noted that:

- It is important that the understanding of discrimination is retained in Tasmanian discrimination law,²¹¹ and that the integrity of the *Anti-Discrimination Act 1998* (Tas) is maintained with any extension of the jurisdiction linked to the objectives of the Act.²¹²
- Much bullying is attribute-based. For example, people with a disability are at higher risk of being bullied than people without a disability. Attribute-based bullying, however, is different to other forms of bullying because of the need to challenge and change underlying attitudes and overriding prejudices. Where attribute-based bullying is involved, the attack is not just on the individual but also on his or her community and others 'like them'.²¹³
- Bullying is not confined to any demographic, age or social group and can result from disagreement about the way a person dresses, envy, a history of inter-family dispute, fear for one's own position, and the perpetrator's own experiences of what is permissible in the way

²¹¹ Tasmanian Anti-Discrimination Commissioner, above n 10, 36.

²¹² Ibid 38.

²¹³ Ibid 36.

that he or she treats others. In circumstances such as these, the protections under the *Anti-Discrimination Act 1998* (Tas) will not always be available.²¹⁴

- Much of what might be called ‘bullying’ takes place outside of the areas of activity identified in s 22 of the *Anti-Discrimination Act 1998* (Tas).²¹⁵

3.4.35 The Anti-Discrimination Commissioner submitted that broader protections against prohibited conduct in Tasmanian discrimination law may provide an avenue for the protection of vulnerable groups and people, and that linking bullying with the violation of human rights as outlined in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* would provide a foundation on which expansion of the Anti-Discrimination Commissioner’s jurisdiction may be conceived.²¹⁶

3.4.36 The Anti-Discrimination Commissioner noted that there are several options for extending the coverage of the *Anti-Discrimination Act 1998* (Tas) in the context of bullying and provided the following examples:

- Amendment of s 17 of the *Anti-Discrimination Act 1998* (Tas) to capture a broader range of behaviours.²¹⁷
 - One option for amendment is to provide that:

A person must not engage in conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in s 16 (e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) *or any other comparable grounds* in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.
 - An alternative option is to insert a new paragraph into s 17:
 - (1) A person must not engage in conduct which offends, humiliates, intimidates, insults or ridicules another person:
 - (a) on the basis of an attribute referred to in s 16 (e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j); or
 - (b) on any other ground where the conduct:
 - (i) undermines human dignity; or
 - (ii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to the behaviour identified in subsection (i);

in circumstances in which a reasonable person, having regard to all the circumstances would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.
 - The heading of s 17 could be amended to ‘prohibition of bullying and harassment’ to further assist in clarifying the changed intent of the provision. Section 17, however, is still subject to the requirement that the behaviours occurred within an area of activity as outlined in s 22 of the *Anti-Discrimination Act*.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid 39.

²¹⁷ Ibid 41.

- Introduction of a specific stand-alone provision in Part 4 Division 2 of the *Anti-Discrimination Act 1998* (Tas), which applies to bullying and harassment without the restrictions of ss 16 and 22 of the Act.²¹⁸

Bullying and Harassment

A person must not engage in conduct which offends, humiliates, intimidates, insults or ridicules another person on any ground where the conduct:

- (a) undermines human dignity; or
- (b) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner.

in circumstances in which a reasonable person, having regard to all the circumstances would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

- An amendment would also be required to s 22(1) to exempt bullying and harassment from the restrictions associated with the areas of activity defined in the Act, and effective legislative amendments would be needed to ensure that organisations have a clear duty to work actively to prevent and respond to bullying and that the Commissioner has authority to require actions be taken by organisations to comply with this duty.

3.4.37 The Anti-Discrimination Commissioner submitted that the procedures for resolving complaints under the *Anti-Discrimination Act*, which are underpinned by restorative justice principles, are sufficiently flexible to be adapted to a broad range of bullying behaviours.²¹⁹ The Commissioner also noted that an expansion of the jurisdiction would involve considerable additional work by her office and additional resources would be required.²²⁰ The Law Society also stated that an extension of the Anti-Discrimination Commissioner's jurisdiction would require additional resourcing.²²¹

3.4.38 The Law Society expressed some concern with regard to the time taken to deal with discrimination complaints, noting that, although there is now an emphasis on seeking to resolve complaints early, in many instances an early conference between the parties does not occur until 10-12 weeks after the complaint has been made, and that the time taken to progress a complaint through an investigation by Equal Opportunity Tasmania is generally between 8-12 months and that delays of a further 12 months for a hearing of the Anti-Discrimination Tribunal to conclude are not uncommon.²²²

3.4.39 The Law Society of Tasmania also noted that a discrimination complaint is currently the only situation where compensation may be awarded for workplace bullying.²²³ The Society submitted however, that awards of damages in cases involving 'bullying' in Tasmania are generally very modest. The Society referred to a 2011 'workplace bullying' case before the Anti-Discrimination Tribunal, where the behaviour resulted in the complainant resigning from employment, becoming depressed and contemplating suicide. The Tribunal Member was satisfied that the discriminatory conduct was serious and sustained and had a significant effect both emotionally and financially on the complainant, and assessed compensation at \$3000.²²⁴

²¹⁸ Ibid 41-2.

²¹⁹ Ibid 42.

²²⁰ Ibid.

²²¹ Law Society of Tasmania, above n 8, 21.

²²² Ibid 10.

²²³ Ibid.

²²⁴ Ibid 10-11, referring to *Plancke v Glyde* [2011] TASADT 6.

Question 17 of the Issues Paper:

How should third parties be involved in the resolution process?

3.4.40 Submissions often indicated that third parties should be involved in the resolution process, perhaps reflecting the understanding that bullying is a complex social problem rather than an individual perpetrator/victim problem. Responses in this regard suggested that:

- It is unadvisable to place the onus entirely on the victim as the responsibility to tackle bullying sits at a societal level and not solely with the victim.²²⁵
- In the school context, parents, teachers and counsellors skilled in conflict resolution may have a role to play in the resolution of incidents of bullying.²²⁶
- With regard to bullying amongst children, while children are undoubtedly actors in the events, the adults who are responsible for their care play a crucial role in both preventing and reacting to bullying.²²⁷
- Depending on the situation, workplaces and mediation should be involved in the resolution process.²²⁸
- A key component of any effective response to bullying needs to include the capacity for third parties to report abusive behaviour and, in some cases, assist in the resolution process,²²⁹ and that a useful legislative reform would be to strengthen the protections against victimisation by empowering the Commissioner to take action against a person or organisation where victimisation or retaliation is identified.²³⁰
- Third parties ought to be involved in dealing with the effects of bullying and in a rehabilitative manner.²³¹ Where there is a significant power imbalance, an incident may go unreported and an inquisitorial system may be well suited to resolving incidents of bullying.²³²
- It is particularly important to understand the complexity of bullying as a cultural issue so that those experiencing it realise that bullying is not personal so much as an organisational failure.²³³

A mediated civil justice response to bullying

3.4.41 It is the Institute's view that a mediated and restorative justice response should be developed to provide an appropriate civil framework to deal with bullying in addition to the recommended criminal justice framework. This will enable a tiered and individualised approach to bullying to be implemented. It also recognises the fact that many people, for a variety of reasons, need or wish to be able to maintain social relationships with people who engage in bullying conduct towards them. They want the bullying behaviour to stop but do not wish it to be dealt with according to the criminal law or in an adversarial manner. Within the existing civil framework there are two ways that a mediation option might be made available:

²²⁵ TILES, above n 4, 7.

²²⁶ Angels Hope, above n 81, 4.

²²⁷ Commissioner for Children, above n 21, 3.

²²⁸ Smith, above n 116, 5.

²²⁹ Tasmanian Anti-Discrimination Commissioner, above n 10, 42.

²³⁰ Ibid 43.

²³¹ Law Society of Tasmania, above n 8, 21.

²³² Ibid 21-2.

²³³ Challenge Bullying, above n 17, 14.

- Expressly incorporating a mediation procedure into the restraint order process under Part XA of the *Justices Act 1959* (Tas). In this regard, Part XA might be amended to make express provision for appropriate cases to be referred to mediation. This would make it clear to people who have been bullied that a mediated process rather than a purely adversarial approach is available to them under the restraint order process; and/or
- Extending the functions of the Anti-Discrimination Commissioner.

3.4.42 *Mediated response in the Magistrates Court through restraint orders*: This approach entails an amendment to the current restraint order scheme in Part XA of the *Justices Act 1959* (Tas) to allow affected persons to apply for restraint orders to stop bullying in accordance with Recommendation 4 above. Referral to mediation is currently available to magistrates when dealing with applications for restraint orders. Pursuant to s 5 of the *Alternative Dispute Resolution Act 2001* (Tas), the court or magistrate may refer a matter arising in proceedings before it for mediation or neutral evaluation if deemed appropriate in the circumstances. However, to people who are being bullied and who may wish to engage in mediation, it is not immediately apparent that this might be achieved via the restraint order process. Referral to mediation is enabled under separate legislation and the restraint order scheme itself has all the hallmarks of adversarialism. Accordingly if restraint orders are to be more generally understood as incorporating mediation, then this should be made manifest in Part XA and provision made there for referral to mediation.

3.4.43 Arguments in support of the restraint order approach include that:

- It is beneficial to utilise the existing powers within the *Justices Act 1959* (Tas) and *Alternative Dispute Resolution Act 2001* (Tas) rather than to create a new body or to extend the functions of an existing body;
- In appropriate circumstances, the bullying matter can be referred to mediation by the Magistrate (including when presiding in the Youth Justice Division); and
- The court process itself and court-connected mediation is usually conducted in a timely manner.

3.4.44 The following concerns were expressed regarding the restraint order approach:

- Restraint orders may not be readily identified or recognised as involving a mediation process;
- Restraint orders are perceived as being severe and adversarial rather than involving a restorative justice approach; and
- Victims of bullying may not want to apply to the Magistrates Court for a restraint order given the adversarial nature of such orders and potential damage to the victim's relations with others, their workplace or institution. This, combined with lack of awareness of the mediation processes associated with restraint orders, may discourage schools, workplaces or other relevant bodies from recommending that a victim of bullying apply for such an order.

3.4.45 Before reliance on the mediated response available in respect of restraint orders can be considered to supply the mediated and restorative justice response to bullying recommended by the Institute, the following reforms should be implemented to Part XA of the *Justices Act 1959* (Tas):

- Part XA should be amended to include express provision to the effect that the restraint order process can involve referral for mediation. This would assist in raising awareness that the restraint order regime incorporates the possibility of a mediated response and a restorative justice approach; and
- Part XA should be amended to include express provision that referral for mediation is to be considered by Magistrates when dealing with applications for bullying restraint orders.

3.4.46 *Extending the functions of the Anti-Discrimination Commissioner*: While there is no real precedent for this option, the Anti-Discrimination Commissioner provided a very considered submission with detailed suggestions for the extension of the Anti-Discrimination Commissioner's jurisdiction that are consistent with the integrity of the *Anti-Discrimination Act 1998* (Tas).

3.4.47 Should this option be considered appropriate, rather than extending s 17 of the *Anti-Discrimination Act*, the Institute suggests that a new provision be enacted specifically to address bullying and harassment. This provision should not contain the restrictions of s 22. While there are similarities between the conduct prohibited by s 17 and bullying, bullying is not always attribute-based and the creation of a separate provision arguably protects the attribute-based character of s 17 while also making clear provision for bullying to be brought under the aegis of the Anti-Discrimination Commissioner. Nevertheless, such a provision would also be required to address bullying in terms that both accord with the Commissioner's overall jurisdiction and that maintain the notion of bullying as legislated elsewhere.

3.4.48 If this option is pursued, the Institute's preferred amendment to the Act that would implement these requirements would be:

Bullying and Harassment

A person must not engage in a course of conduct which humiliates, intimidates, insults or ridicules another person on any ground where the conduct:

- (a) denigrates or injures the person; and
- (b) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be, humiliated, intimidated, insulted or ridiculed.

3.4.49 Arguments in support of extending the functions of the Anti-Discrimination Commissioner include that:

- The procedures for resolving complaints under the *Anti-Discrimination Act 1998* (Tas) are underpinned by restorative justice principles, which are arguably better able to address the causes and harmful consequences of bullying than a more punitive or adversarial model;
- It is beneficial to utilise existing procedures and infrastructure rather than creating an entirely new body to deal with bullying;
- The Anti-Discrimination Commissioner operates separately from the court system, which allows bullied victims to avoid adversarial and confrontational processes inherent to the court system; and
- The Anti-Discrimination Commissioner is well-known and recognised by members of the public, workplaces and institutions as a body capable of providing mediation and restorative justice solutions.

3.4.50 The following concerns were expressed by some members of the Institute Board regarding the extension of the Anti-Discrimination Commissioner's functions:

- The ability of Equal Opportunity Tasmania to deal with and resolve complaints within short timeframes, which may make it impractical for, or unattractive to, victims of bullying seeking timely solutions;
- Should mediation through the Anti-Discrimination Commissioner fail to resolve the issue, unless the applicant is prepared to withdraw the complaint (which is likely to be an

unsatisfactory outcome) they will, in any case, be reliant on adversarial processes, including a referral to the Anti-Discrimination Tribunal or litigation; and

- The focus of mediation conducted by Equal Opportunity Tasmania is, in many cases, directed towards compensation for the bullied victim rather than healing the relationship between the parties.

3.4.51 If the functions of the Anti-Discrimination Commissioner were extended, a new individuated process to deal with bullying should be established that specifically addresses the limitations of the current process including:

- Mandated short timeframes for resolving bullying complaints; and
- A requirement that the parties have first attempted to resolve the bullying either themselves or, where appropriate, through the workplace, school or other relevant and appropriate body.

The Institute acknowledges that extending the jurisdiction of the Anti-Discrimination Commissioner in the manner envisaged here will require additional resourcing of Equal Opportunity Tasmania.

3.4.52 It is also important that moves to extend the Commissioner's functions are accompanied by the creation of a duty of care, which explicitly requires organisations to foster an anti-bullying culture and to respond to allegations of bullying in an appropriate way. The Commissioner should also be vested with the authority to require organisations to comply with this duty.²³⁴ The imposition of such a duty of care backed by meaningful sanctions for breach may be an effective tool in bringing about cultural change.

Recommendation 5:

It is desirable to develop a second-tier, civil framework that institutes a mediated and restorative justice response to bullying. This could be accomplished within existing civil justice frameworks by expressly incorporating a mediation procedure into the restraint order process under Part XA of the *Justices Act 1959* (Tas) and/or by extending the functions of the Anti-Discrimination Commissioner. If the first option is preferred, Part XA of the *Justices Act* should be amended to make express provision for appropriate cases to be referred to be mediation in accordance with s 5 of the *Alternative Dispute Resolution Act 2001* (Tas). This will make it clear to applicants that a mediated approach rather than a purely adversarial approach is available to them under the restraint order process.

Additionally, Part XA should contain express provision to the effect that referral for mediation is to be considered by Magistrates when dealing with applications for bullying restraint orders.

If the functions of the Anti-Discrimination Commissioner were to be extended, it would be necessary to introduce a new provision into the *Anti-Discrimination Act 1998* (Tas) that addresses bullying and that is not restricted to the s 22 areas of activity. Nevertheless, the provision would be required to address bullying in terms that accord with the Commissioner's jurisdiction and that maintain the notion of bullying as legislated elsewhere. Such a provision might read:

Bullying and Harassment

A person must not engage in a course of conduct which humiliates, intimidates, insults or ridicules another person on any ground where the conduct:

- (a) denigrates or injures the person; and
- (b) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be humiliated, insulted or ridiculed.

²³⁴ Tasmanian Anti-Discrimination Commissioner, above n 10, 42.

3.5 Workplace bullying

3.5.1 Although options for reform with respect to workplace bullying were not discussed in great detail in the Issues Paper, workplace bullying commanded significant attention in the responses. Some submissions addressed current problems in dealing with workplace bullying in great detail, and others recounted personal experiences with workplace bullying.

Question 3 of the Issues Paper:

Do you think that the current avenues to address workplace bullying in Tasmania are sufficient? Why or why not?

Question 4 of the Issues Paper:

Should Tasmanian legislation be amended to include anti-bullying provisions that mirror the *Fair Work Act 2009* (Cth) procedures?

3.5.2 No responses to the Issues Paper indicated that the avenues currently available to address workplace bullying are sufficient.

3.5.3 Submissions noted that:

- There needs to be a process by which a bystander may report bullying within the workplace, with such a report triggering an investigation by workplace health and safety investigators.²³⁵
- The current avenues are insufficient for Tasmanian Public Service employees who are not covered by the *Fair Work Act 2009* (Cth).²³⁶
- It remains unclear how complaints of bullying that do not fall within the jurisdiction of the Tasmanian Anti-Discrimination Commissioner or that of Fair Work Australia are to be addressed.²³⁷
- Workplace bullying accounts for one of the highest rates of enquiry to Equal Opportunity Tasmania.²³⁸ There are many cases where an employee suffers well beyond what should be tolerated and when he or she can no longer tolerate the behaviour, resignation or withdrawal from the job is perceived by him or her to be the only option.²³⁹
- The piecemeal approach in different laws potentially able to address workplace bullying in Tasmania is unsatisfactory as it does not address, in any consistent centralised manner, the wide variety of ways antisocial behaviour and bullying can occur in the workplace.²⁴⁰
- In a 2012 Workplace Bullying Institute online survey, *The Toll of Workplace Bullying on Employee Health*, 71% of the 516 respondents reported having been treated by a doctor for work-related symptoms and 63% reported seeing a mental health professional.²⁴¹
- Challenge Bullying's client statistics show that 77% of people experiencing bullying made complaints (using their own workplace mechanisms, Equal Opportunity Tasmania, Fair Work, their union or WorkSafe Tasmania), and 58% of these people said that the outcome of the complaint was poor or very poor.²⁴²

²³⁵ Hamilton, above n 16, 1.

²³⁶ Anonymous, name and contact details provided to Institute.

²³⁷ Tasmanian Anti-Discrimination Commissioner, above n 10, 19.

²³⁸ Ibid 15.

²³⁹ Ibid 16.

²⁴⁰ Unions Tasmania, above n 13, 4.

²⁴¹ Ibid 3.

²⁴² Challenge Bullying, above n 17, 3.

- There is very little that can be done about workplace bullying in the current legal system, and this dearth of legal protection contributes to the acceptance of bullying as common practice and is a contributing factor in the culture of workplace bullying.²⁴³
- More people are reporting workplace bullying because there is a greater awareness of the effect of bullying and what bullying is, not because bullying has necessarily increased.²⁴⁴
- Many workplaces do not have appropriate processes or procedures in place or do not understand that bullying is a cultural issue rather than a problem between individuals. Workplaces are not addressing the problem of workplace bullying effectively and are more likely to react to bullying after a complaint is made than adopt a preventative cultural approach that eliminates or reduces the psychosocial hazards that lead to conflict.²⁴⁵
- Challenge Bullying's statistics show that 25% of Tasmanian workplaces effectively addressed bullying complaints. Effective responses included: taking complaints seriously and acting on them immediately; focussing on prevention rather than reaction; training all staff in early intervention and developing a focus on building respectful workplace cultures; and putting appropriate processes and procedures in place.²⁴⁶
- The preferred remedies for people who have been bullied in the workplace are: (1) for the inappropriate behaviour to stop; (2) for the person or persons causing the harm to understand how and in what way their behaviour caused harm; and (3) for the workplace to prevent it happening to others.²⁴⁷
- A workers' compensation claim may provide for reimbursement for time off work as well as medical costs associated with medical conditions or injuries (including 'psychological injuries') arising out of or in the course of employment. However, the focus of such a claim is on ascertaining whether a worker should be compensated for costs arising from their injuries not on addressing the cause of a claim for workers' compensation.²⁴⁸
- Workplace bullying can cause extensive health problems for employees; it can also detrimentally affect the employer and other workers, clients, customers, business associates, families and friends.²⁴⁹

3.5.4 Respondents detailed their own experiences with workplace bullying, including termination of employment after whistleblowing for bullying,²⁵⁰ and severe bullying which was not addressed by the workplace and caused serious mental harm that was then exacerbated by a protracted and opaque WorkSafe investigation.²⁵¹ The Anti-Discrimination Commissioner also provided a number of examples of the types of workplace bullying issues that are raised with her office.²⁵²

3.5.5 A number of responses highlighted potential limitations with WorkSafe's ability to deal with bullying:

- Challenge Bullying noted that it would be beneficial to strengthen and expand the existing Workplace Health and Safety law to ensure that employers adhere to their duty of care to create and maintain a safe workplace. Expanding the law to include psychosocial hazard

²⁴³ Anonymous, name and email address provided to institute.

²⁴⁴ Challenge Bullying, above n 17, 3.

²⁴⁵ Ibid 4.

²⁴⁶ Ibid.

²⁴⁷ Ibid 5.

²⁴⁸ Law Society of Tasmania, above n 8, 11.

²⁴⁹ Unions Tasmania, above n 13, 3.

²⁵⁰ Anonymous, name and contact details provided to institute.

²⁵¹ Anonymous, name and contact details provided to institute.

²⁵² Tasmanian Anti-Discrimination Commissioner, above n 10, 15-20.

reduction with greater consequences for employers who do not take adequate steps to prevent or deal with this problem may prove effective.²⁵³

- The Tasmanian Anti-Discrimination Commissioner stated that existing enforcement mechanisms in the *Work Health and Safety Act 2012* (Tas) rely on prosecution of breaches of workplace health and safety law. These enforcement mechanisms may be suited to dealing with situations where physical hazards are present, but it is widely recognised that they are largely unsuited to dealing with workplace bullying and the number of prosecutions for bullying remains low.²⁵⁴ Several factors contribute to the unsuitability of existing mechanisms, including the standard of proof required for prosecution and the lack of resources available to address workplace bullying complaints.²⁵⁵
- The Tasmanian Anti-Discrimination Commissioner observed that WorkSafe Tasmania's role is restricted to determining whether the employer has failed to meet its responsibilities under the *Work Health and Safety Act 2012* (Tas). It has no role in mediating disputes, nor can it award damages or provide any other form of remedy to a person who has been bullied.²⁵⁶
- The Law Society submitted that, as with other workplace health and safety regulators interstate, prosecutions for bullying complaints are uncommon.²⁵⁷ Although WorkSafe is taking a positive approach towards providing information to employers and employees in relation to workplace bullying, its role as an investigator and prosecutor is less clear and may not provide an accessible avenue for redress in bullying cases.²⁵⁸ Further, the focus is on dealing with the reasons that a complaint was made, not on the individual who has made the complaint, and a complainant cannot exert any control over how a complaint progresses or what outcomes are sought and any proceedings which may flow from the complaint do not result in awards of compensation for the complainant.²⁵⁹
- An anonymous submission argued that WorkSafe should be required to reveal the number of bullying complaints made, where they are being made, and the results of the investigations and prosecutions in order to increase transparency of its operations and processes.²⁶⁰

3.5.6 A number of responses also highlighted potential limitations with the anti-bullying provisions under the *Fair Work Act*, including that:

- The bullied victim must initiate the application for an order to stop the bullying.²⁶¹
- Victims of bullying may find the process adversarial and damaging.²⁶²
- Section 789FF of the *Fair Work Act* specifically excludes the ability to make an order requiring the payment of a financial remedy, which places considerable constraints on the ability to penalise businesses or employees engaging in bullying conduct.²⁶³
- Resolution is not available if a worker has left the workplace.²⁶⁴

²⁵³ Challenge Bullying, above n 17, 10.

²⁵⁴ Tasmanian Anti-Discrimination Commissioner, above n 10, 18, citing WorkCover Tasmania, *Tasmanian workplace bullying prevention strategy* (draft, November 2014).

²⁵⁵ Tasmanian Anti-Discrimination Commissioner, above n 10, 18.

²⁵⁶ Ibid 20.

²⁵⁷ Law Society of Tasmania, above n 8, 6.

²⁵⁸ Ibid 9.

²⁵⁹ Ibid 6.

²⁶⁰ Anonymous, name and address provided to Institute.

²⁶¹ Hamilton, above n 16, 1.

²⁶² Challenge Bullying, above n 17, 8-9.

²⁶³ Tasmanian Anti-Discrimination Commissioner, above n 10, 21-2.

²⁶⁴ Ibid 22.

3.5.7 The Law Society of Tasmania considered Fair Work's anti-bullying jurisdiction in some detail. The Society noted that:

- It was anticipated that 3500 applications to the Fair Work Commission's anti-bullying jurisdiction would be filed annually but that in 2014 there were only 701 applications made, and in the period January 2015 – March 2015 only 173 applications were filed.²⁶⁵
- During 2014 there were approximately 7000 telephone queries and the Fair Work Commission website received over 180 000 hits.²⁶⁶
- The experience of practitioners in the anti-bullying jurisdiction is that the procedures and process operate reasonably well. The Fair Work Commission must start to deal with an application within 14 days of receiving an application and there is a strong focus on case management of applications and efforts to resolve applications quickly.²⁶⁷
- Of the matters dealt with by Fair Work Commission members in 2014, 15% were dismissed for lack of jurisdiction or merit, 40% were resolved and 44% were closed without a formal result (including complaint withdrawals and where the applicant was satisfied with the response provided to the application).²⁶⁸
- State government employees are not covered by the Fair Work legislation, and the Tasmanian government is the largest single employer in Tasmania. Research indicates that bullying in the State Service was twice as common compared to the private sector.²⁶⁹

3.5.8 Some submissions suggested a framework for reform of workplace bullying laws.

3.5.9 Graham Gourlay, a PhD candidate testing an approach to preventing workplace bullying, suggested implementation of:

- (1) Legal sanctions in cases involving the repetition of a harmful or negative act that has been drawn to the attention of the source;
- (2) Authorisation and support for an employer to screen out from employment, or to place on conditional probation, a person who fails to meet a prescribed standard on a psychological test for aggression and/or empathy;
- (3) Legal sanctions for employers who: (i) fail to equip and continuously enable their employees to feel safe and able to speak up about any unacceptable, negative, harmful behaviours they experience; and (ii) fail to provide regular opportunities for their employees to speak up and be supported by their colleagues;
- (4) Legal sanctions for employers who do not provide reasonable resources, autonomy and authority to any workgroup experiencing an unacceptable pattern or level of unacceptable behaviours to enable the workgroup to engage the resources it requires to address and resolve the problem; and
- (5) Legal sanctions against anyone who retaliates against those who speak up appropriately in their workgroup about unacceptable behaviour they have experienced.²⁷⁰

3.5.10 The Anti-Discrimination Commissioner noted that many of the enquiries received by her office relate to the perceived failure of employers to take bullying behaviours seriously or to provide

²⁶⁵ Law Society of Tasmania, above n 8, 3.

²⁶⁶ Ibid.

²⁶⁷ Ibid 4.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Gourlay, above n 7, 2.

appropriate support for employees who are the victims of such behaviour,²⁷¹ and submitted that a legislated provision should exist to require workplaces to deal with bullying in a systematic and timely manner and to establish transparent complaints procedures to enable WorkSafe Tasmania to intervene in bullying disputes where they are unable to be resolved internally.²⁷²

3.5.11 The Anti-Discrimination Commissioner submitted that a dispute resolution procedure similar to that within the *Fair Work Act 2009* (Cth) should be contained in the *Work Health and Safety Act 2012* (Tas), and that the provisions should provide WorkSafe with the authority to engage in a process for making legally enforceable agreements and to refer the matter for determination where a dispute is unable to be resolved or a mutually agreed outcome is not achieved.²⁷³ The Commissioner also noted that individuals who consider that they have been bullied in the workplace require access to dispute-resolution mechanisms that are quick, efficient and cost effective, and that it is important that the parties have confidence that dispute-resolution mechanisms are fair, impartial, transparent and independent.²⁷⁴

3.5.12 The Law Society of Tasmania recommended that consideration be given to the Tasmanian Industrial Commission being granted jurisdiction to deal with bullying complaints for workers not able to access the Fair Work anti-bullying jurisdiction.²⁷⁵

3.5.13 Challenge Bullying noted that options for extending existing legislative frameworks to improve enforcement mechanisms do not get to the heart of the problem, which is that workplace bullying is a cultural issue.²⁷⁶ The response to bullying is often an individual one, and overly adversarial and blaming; consequently, the response only addresses the immediate complaint or conflict rather than looking to cultural practices and asking what accepted behaviours led to the problem.²⁷⁷

3.5.14 Challenge Bullying noted that both the Fair Work Commission and Equal Opportunity Tasmania are dominated by lawyers, and that what is ‘fair and just’ can be affected by who has the better resources.²⁷⁸ Challenge Bullying noted that it can be very intimidating for an already vulnerable person to be met at an office by lawyers who speak in a language that the lay person finds difficult to understand.²⁷⁹ Challenge Bullying identified a number of problems with the use of legal responses to address workplace bullying, including that:

- Being listened to and believed is vitally important to people experiencing bullying as this validation can partially counteract their feeling of powerlessness. Complainants who go through a formal complaint process routinely feel disbelieved and unheard.²⁸⁰
- Bullying is a subjective experience that often occurs covertly and claims about the cause and level of psychiatric injury can be disputed, allowing organisations to use negative tactics as a means of protecting their reputation, which can cause further damage to the complainant.²⁸¹
- Both the Fair Work Commission and Equal Opportunity Tasmania are under-resourced and the waiting periods for matters to be dealt with are lengthy. People who make complaints to

²⁷¹ Tasmanian Anti-Discrimination Commissioner, above n 10, 17.

²⁷² Ibid 16.

²⁷³ Ibid 20.

²⁷⁴ Ibid 18.

²⁷⁵ Law Society of Tasmania, above n 8, 11-12.

²⁷⁶ Challenge Bullying, above n 17, 7.

²⁷⁷ Ibid.

²⁷⁸ Ibid 8.

²⁷⁹ Ibid.

²⁸⁰ Ibid 9.

²⁸¹ Ibid.

either of these bodies cannot move on with their lives while the legal proceedings are on foot and this adds to their trauma and exacerbates their mental health issues.²⁸²

- Victimisation in the workplace may result from the making a formal complaint.²⁸³

3.5.15 Challenge Bullying submitted that a whole of culture response is the most effective way to build the capacity of workplaces to reduce the risk of bullying, and that this may include:²⁸⁴

- Recruitment strategies;
- Exit interviews;
- Comprehensive induction processes (that focus on appropriate and expected workplace behaviour as well as what appropriate and expected workplace behaviour looks like);
- Role modelling top-down;
- Regularly reviewed (and publicised) behaviour and grievance policies that are easily accessible in electronic and hard copy form;
- Codes of conduct;
- Regular cultural surveys and mapping to check health culture;
- Mandatory awareness training for all employees which includes workplace bullying, harassment, discrimination and mental health;
- Appointment of workplace behaviour Contact Officers, Health and Safety Representatives and WHS Committees to facilitate employer to employee consultation.
- Leadership training.
- Demonstration by workplaces that they have taken all steps that are reasonably practicable to eliminate risks to health and safety.

Recommendations

3.5.16 In many ways workplace bullying will be able to be addressed within the reforms of general application that are suggested. For example, particularly severe workplace bullying may fall within an amended criminal offence of ‘stalking and bullying’. Where the workplace bullying is serious but does not warrant criminal punishment or cannot be proven beyond a reasonable doubt, a victim may have recourse through a new ‘bullying and harassment’ provision under the *Anti-Discrimination Act 1998* (Tas). With respect to the *Anti-Discrimination Act 1998* (Tas), some submissions noted that it is not clear where a bullied worker who does not fall under *Fair Work Act 2009* (Cth) or the current *Anti-Discrimination Act 1998* (Tas) is able to go. Removing the attribute barrier for victims of bullying under the *Anti-Discrimination Act 1998* (Tas) may be particularly helpful in this regard.

3.5.17 Nevertheless, it is the view of the Institute that the weight of responses to the Issues Paper regarding workplace bullying suggests that further workplace specific measures are necessary.

3.5.18 With respect to facilitating cultural change within workplaces, consideration should be given to funding workplace bullying specialists to deliver education and training to employers and within workplaces, and to devising templates for effective workplace bullying policies and procedures that workplaces can implement. Anti-bullying training should include educating employees and management personnel about their role as bystanders and the effect of their response or non-response to bullying on the workplace, victim and participant.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid 12-13.

3.5.19 Consideration should also be given to placing an express duty of care on people conducting a business or undertaking to, as far as reasonably practicable, prevent bullying within the workplace. Such a duty could be imposed through an amendment to the *Work Health and Safety Act 2012* (Tas) or through other legislation, and the duty could be enforced by WorkSafe Tasmania. This duty would encourage workplaces to implement effective anti-bullying policies and procedures. An express duty to, as far as reasonably practicable, prevent bullying would avoid the problems encountered when attempting to apply traditional workplace health and safety laws to psychosocial hazards. This duty would treat workplace bullying as a cultural issue, with the workplace responsible for taking preventative measures and effectively addressing bullying when it does arise.

3.5.20 Using the language of the *Work Health and Safety Act 2012* (Tas) and applying a similar definition of workplace bullying as in s 789FD of the *Fair Work Act 2009* (Cth), a duty to prevent bullying could read:

Duty of care – bullying

- (1) A person conducting a business or undertaking must, so far as is reasonably practicable, prevent workplace bullying.
- (2) Workplace bullying occurs if:
 - (a) an individual; or
 - (b) a group of individuals;repeatedly behaves unreasonably towards a worker or a group of workers and that behaviour creates a risk to health and safety.
- (3) For the purposes of subsection (2), ‘repeatedly’ means behaviour that is sustained or occurs on more than one occasion.

3.5.21 Workplace anti-bullying policies and procedures should contain a process by which bystanders can intervene or report instances of bullying behaviour in the workplace, with such a report triggering an investigation by workplace health and safety investigators. The procedure should outline the consequences that will apply for failure of a bystander to report workplace bullying and contain provisions protecting those who do report or intervene from reprisal such as termination of employment.

3.5.22 With respect to ensuring that all workers have access to the kind of anti-bullying processes that are contained in the *Fair Work Act 2009* (Cth) (in particular state public sector employees), the Law Society of Tasmania recommended that consideration be given to the Tasmanian Industrial Commission being granted jurisdiction to deal with bullying complaints from workers who are not able to use the Fair Work jurisdiction.²⁸⁵ The Anti-Discrimination Commissioner submitted that dispute resolution procedures for bullying similar to those contained in the *Fair Work Act 2009* (Cth) should be included in the *Work Health and Safety Act 2012* (Tas).²⁸⁶

Recommendation 6:

It is desirable to grant jurisdiction to the Tasmanian Industrial Commission to deal with bullying complaints from workers who are not able to use the Fair Work jurisdiction, and it is desirable that this jurisdiction mirrors the anti-bullying provisions contained in Pt 6-4B of the *Fair Work Act 2009* (Cth).

²⁸⁵ Law Society of Tasmania, above n 8, 11.

²⁸⁶ Tasmanian Anti-Discrimination Commissioner, above n 10, 20.

It is also desirable that measures for dealing with bullying in state legislation address the limitations identified in the *Fair Work Act 2009* (Cth), specifically the fact that the Act precludes the making of orders requiring the payment of a financial remedy, and the fact that resolution is not available if a worker has left the workplace. Consideration should be given to allowing workplace bystanders as well as the bullied victim to initiate an application for an order to stop the bullying.

Recommendation 7:

It is desirable that a duty to prevent bullying, so far as is reasonably practicable, be imposed on employers to encourage them to implement effective anti-bullying policies and procedures. This duty could be included within Division 2 or Division 3 of Part 2 of the *Work Health and Safety Act 2012* (Tas), or it could be enacted in separate legislation.

An example is:

Duty of care – bullying

- (1) A person conducting a business or undertaking must, so far as is reasonably practicable, prevent workplace bullying.
- (2) Workplace bullying occurs if:
 - (a) an individual; or
 - (b) a group of individuals;

repeatedly behaves unreasonably towards a worker or a group of workers and that behaviour creates a risk to health and safety.
- (3) For the purposes of subsection (2), ‘repeatedly’ means behaviour that is sustained or occurs on more than one occasion.

Recommendation 8

It is desirable that employers include in their anti-bullying policies and procedures a process by which bystanders can report bullying within the workplace and provisions that protect employees who report or intervene from reprisal. Consideration should be given to training employees and management personnel about their role as bystanders in preventing and responding to workplace bullying.

3.6 School regulation

3.6.1 Schools can play an important role in addressing bullying. Intervention to prevent bullying in schools can have far-reaching social implications, as children who bully at school are more likely to become workplace bullies and more likely to fall into adult criminal offending than their non-bullying peers.²⁸⁷ One option for reform is to legislate to require schools to have some form of anti-bullying policy or procedure. This is an approach that has been adopted in a number of other jurisdictions and examples from some of these are included in the following discussion as a guide to how a Tasmanian directive might be fashioned.

3.6.2 Most Tasmanian schools already have some form of anti-bullying policy, either specifically addressing bullying or contained within a more general policy on anti-social behaviour. These policies are sometimes published on school websites and are usually available on request. Considerable variability exists, however, in the standards of behaviour they prescribe and the dispute resolution mechanisms they stipulate. Further, as there are no uniform requirements, it is difficult to compare approaches to determine the types of situations in which bullying is most problematic and which policies and procedures are likely to offer the most effective solution.

²⁸⁷ See Lodge, above n 136, 5; Ken Rigby, ‘Addressing Bullying in Schools: Theory and Practice’ (Trends and Issues in Crime and Criminal Justice No. 259, Australian Institute of Criminology, June 2003) 1.

3.6.3 A school owes a duty of care to provide a safe school environment. A school that knows or ought to know that a student is being bullied and that fails to take reasonable steps to address the bullying *may* be liable in negligence. This duty is constrained: ‘safe’ means ‘free of a foreseeable risk of harm’ and the duty is only one to take reasonable care.²⁸⁸ Negligence in Tasmania is covered by both the *Civil Liability Act 2002* (Tas) and the common law. While this action is potentially a way to address some instances of very severe bullying in schools, it is available in very limited situations. The time and potentially high cost factors associated with an action in negligence also mean that it is rarely a feasible response to bullying.

3.6.4 In 2010, an out-of-court settlement of \$290 000 was reported to have been paid by the Victorian Education Department for bullying and harassment suffered by a 17-year-old girl over an 18 month period at Kerang Technical High School.²⁸⁹ As a result of the bullying, the girl suffered depression, agoraphobia and eating disorders and required psychological treatment. In the 2009 case, *Gregory v State of New South Wales*,²⁹⁰ Mr Gregory was awarded damages for mental harm suffered due to bullying and other mistreatment by fellow students at Farrer Memorial Agricultural High School and damages for economic loss due to diminished earning capacity after graduation from the school.

3.6.5 In order to establish an action in negligence, the plaintiff must show that:

- The defendant owed the plaintiff a duty of care;
- The defendant breached that duty of care; and
- Personal injury or property damage was suffered by the plaintiff as a result of the breach.

3.6.6 Even where there has been serious bullying and severe damage, it does not necessarily follow that a school has breached its duty of care. Where the damage claimed is mental harm, the mental harm must be a recognised psychiatric illness.²⁹¹ There is no duty to take care not to cause another person mental harm unless a reasonable person should have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness if reasonable care were not taken.²⁹² This requirement of very serious harm means that an action in negligence cannot facilitate early intervention to prevent or minimise damage. It also excludes a large amount of even very severe bullying from an action.

Question 18 of the Issues Paper:

Do you think that schools should be required by law to have anti-bullying policies and procedures? Why or why not?

3.6.7 Eight respondents answered Issues Paper Question 18. These respondents unanimously supported the enactment of legislated requirements for schools to address bullying. Reporting requirements were also widely supported, with six of the eight responses expressing support for such a requirement.

Question 19 of the Issues Paper:

If yes, how prescriptive should the requirements be? For example, should they stipulate minimum standards in relation to investigative and disciplinary measures within schools and reporting obligations between schools, or should they instead merely require the formulation of statements of principles or targets?

²⁸⁸ See *NSW v Lepore* (2003) 212 CLR 511, 552 (Gaudron J).

²⁸⁹ Farrah Tomazin, ‘Bullied Teenager Gets \$290,000 in Settlement’, *The Age* (Melbourne), 11 March 2010; See also *Oyston v St Patrick’s College (No 2)* [2013] NSWCA 310 where the College was found to have breached its duty of care by failing to implement in practice the steps contained in its anti-bullying policies.

²⁹⁰ [2009] NSWSC 559 (19 June 2009) (Fullerton J).

²⁹¹ *Civil Liability Act 2002* (Tas) ss 33, 35.

²⁹² *Ibid* s 34.

Question 20 of the Issues Paper:

Should the policies and procedures be uniform between schools, or should schools have discretion to create their own within set requirements?

3.6.8 YNOT was supportive of policies that prescriptively stipulate the minimum standards for schools in relation to investigative and disciplinary measures, but noted that these requirements must be within the context of adequate resources, support and training.²⁹³ YNOT supports whole of school preventative strategies that target the culture within the school, deal proactively with bullying behaviour and strengthen the resilience of all students.²⁹⁴ YNOT submitted that schools need training and funding to implement research-based strategies that bring a genuine sense of justice and empowerment, support growth for children who are bullied, recognise the risks and vulnerabilities in relation to bullying and implement restorative measures that lead to changes in the behaviour of children who bully.²⁹⁵

3.6.9 Citing the Australian Institute of Family Studies,²⁹⁶ YNOT submitted that teacher responsiveness is fundamental to reducing school bullying, and that there is a need for increased training of teachers and parents, particularly around ensuring that bullying interventions are effectively targeted at those children most at risk of bullying victimisation.²⁹⁷

3.6.10 YNOT noted that, for effective anti-bullying policies to be implemented, schools need to be adequately supported and resourced through the development, implementation and evaluation of these policies and that there may be opportunities to use current resources available to schools, such as through the federally-funded school youth workers and chaplain program or the utilisation of Youth Health Nurses who are being introduced to many schools across the state.²⁹⁸ YNOT also made the alternative suggestion that a specific person be tasked within schools to oversee the implementation of anti-bullying procedures at a student level.²⁹⁹ Such a person might have the designated role of a Welfare Head Teacher.

3.6.11 YNOT expressed some disquiet about the use of suspension orders to deal with students who bully indicating that while this may be a necessary disciplinary strategy in some cases, a restorative approach is often needed to address bullying. Accordingly, if a young person is suspended for bullying, school policies and procedures need to incorporate appropriate re-integration programs.³⁰⁰

3.6.12 The Tasmanian Anti-Discrimination Commissioner observed that whilst information contained within the Department of Education's *Student Behaviour Procedure* document refers to other policy frameworks, no reference is made to bullying nor is there a focus on responses to unacceptable behaviour beyond detention, suspension, exclusion, expulsion or prohibition of students.³⁰¹ The Anti-Discrimination Commissioner noted that figures distributed by the Attorney-General in June 2015 indicate that there were 6646 suspensions from Tasmanian schools in 2014,

²⁹³ YNOT, above n 20, 11.

²⁹⁴ Ibid 13.

²⁹⁵ Ibid 11.

²⁹⁶ Australian Institute of Family Studies (2014), above n 137.

²⁹⁷ YNOT, above n 20, 11.

²⁹⁸ Ibid 12.

²⁹⁹ Ibid.

³⁰⁰ Ibid 13.

³⁰¹ Tasmanian Anti-Discrimination Commissioner, above n 10, 44, citing Department of Education, '*Student behaviour procedure*' available at <<https://www.education.tas.gov.au/documentcentre/Documents/Student-Behaviour-procedure.pdf>>.

involving 2842 students (4.6% of students) with an average number of suspensions per suspended student being 2.3 and the average duration of suspension being 3.1 days.³⁰²

3.6.13 The Commissioner for Children also submitted that recourse to the disciplinary procedures (such as exclusion and suspension) set out in the *Education Act 1994* (Tas) to deal with cases of bullying can have detrimental effects on children and their learning, resulting in lower academic achievement and disengagement, and that these procedures may not address or prevent future bullying behaviour. The Commissioner recommended that suspension be used as a measure of last resort.³⁰³ Like YNOT, the Commissioner supported a restorative justice approach and treatment of bullying as a symptom of underlying problems that presents an opportunity for therapeutic support.³⁰⁴

3.6.14 Angels Hope submitted that the imposition of legal requirements on schools to implement anti-bullying policies and procedures would enable clear, evidence-based, consistent approaches to be adopted throughout the education system.³⁰⁵ The organisation submitted that uniform polices should apply state-wide, with schools given discretion to supplement the mandated policies and procedures with approaches to secondary prevention.³⁰⁶ Angels Hope submitted that the state should appoint a Tasmanian Child and Adolescent Psychiatrist Adviser, who would report directly to the Premier.³⁰⁷ This person would:³⁰⁸

- Closely monitor the bullying interventions made in each school;
- Periodically receive findings from schools, for review by the government and for monitoring of the implementation of the policies and procedures;
- Establish pathways of communication among schools, and between schools and the Child and Adolescent Psychiatrist Adviser;
- Establish training programs for schools and for other relevant parties;
- Facilitate feedback between schools; and
- Identify issues of concern and advise the Education Minister and/or the Premier.

3.6.15 Angels Hope noted that any legal requirements devised for schools should be highly prescriptive, include reporting obligations, and the duty to share information between schools when bullying participants transfer.³⁰⁹ A response to the Issues Paper from Andrew Walter, similarly submitted that the requirements on schools should be uniform, broad, comprehensive and stringent, include investigative and disciplinary measures as well as mandatory reporting obligations.³¹⁰ Mr Walter also submitted that the creation of an Educational Integrity Commission or Office may be warranted to deal with school-related bullying.³¹¹

3.6.16 The Tasmanian Anti-Discrimination Commissioner noted that while there is some evidence that levels of bullying in schools may be falling, Australia still has among the highest incidence of bullying in schools globally and studies suggest that for many students telling the teacher about what

³⁰² Tasmanian Anti-Discrimination Commissioner, above n 10, 44, citing Tasmania, *Parliamentary Debates*, Legislative Council, Tuesday 23 June 2015.

³⁰³ Commissioner for Children, above n 21, 3.

³⁰⁴ *Ibid.*

³⁰⁵ Angels Hope, above n 81, 4.

³⁰⁶ *Ibid* 6.

³⁰⁷ *Ibid* 5.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid* 5-6.

³¹⁰ Walter, above n 82, 10-11.

³¹¹ *Ibid* 8.

is happening is not sufficient to cause cessation of the bullying.³¹² The Commissioner noted that enquiries received by her office suggest that many students believe complaints of bullying are not being appropriately addressed within schools and other educational institutions and that little is done to prevent the behaviour from escalating.³¹³

3.6.17 The Anti-Discrimination Commissioner noted the need to establish well-publicised policies and procedures that are consistent across school settings, including provision for bullying incidents to be recorded and reported each year.³¹⁴ The Commissioner also noted the need to consider the perpetrator and provide assistance to him or her to address the issues that have caused the bullying behaviours.³¹⁵

3.6.18 The Anti-Discrimination Commissioner also emphasised in her submission the need for a whole-of-school approach to bullying.³¹⁶ She noted that ‘no blame’ approaches, which involve the development of a shared responsibility for solving problems, appear to be highly successful.³¹⁷ Angels Hope also noted that European studies have demonstrated the effectiveness of school-wide bullying prevention programs.³¹⁸

3.6.19 The Law Society of Tasmania also submitted that schools, including primary, secondary and tertiary institutions, should be required by law to have an Anti-Bullying Policy and Procedure.³¹⁹ The Society also indicated that reporting between schools should be undertaken if victims or bullies transfer schools.³²⁰ The Society noted that a uniform Anti-Bullying Procedure and Policy would take the guesswork out of what the anti-bullying policy is and what the procedures are for either preventing bullying or dealing with bullying.³²¹ Ideally, the Society submitted, a uniform Anti-Bullying Procedure and Policy would have two substantive parts: a proactive policy and procedure and a responsive policy and procedure.³²²

3.6.20 One respondent highlighted the approach taken to bullying, in educational institutions in Scandinavian countries.³²³

3.6.21 Sweden has a Child and School Student Representative.³²⁴ Along with the Equality Ombudsman, the Child and School Student Representative deals with degrading treatment, discrimination and harassment of children and students.³²⁵ The Child and School Student Representative can investigate complaints of degrading treatment and represent students and children in court.³²⁶

³¹² Tasmanian Anti-Discrimination Commissioner, above n 10, 45, citing Ken Rigby, ‘What can schools do about cases of bullying?’ (2011) 29(4) *Pastoral Care in Education* 275.

³¹³ Tasmanian Anti-Discrimination Commissioner, above n 10, 45.

³¹⁴ Ibid 48, citing a 2010 report prepared by Dr Ken Rigby for the Queensland Government, *Report: Enhancing responses to bullying in Queensland schools* (February 2010) <<http://apo.org.au/files/related-content-files/enhancing-responses-to-bullying-qld-schools.pdf>>.

³¹⁵ Tasmanian Anti-Discrimination Commissioner, above n 10, 48.

³¹⁶ Ibid 49.

³¹⁷ Ibid 48.

³¹⁸ Angels Hope, above n 81, 6.

³¹⁹ Law Society of Tasmania, above n 8, 22-3.

³²⁰ Ibid 23.

³²¹ Ibid 24.

³²² Law Society of Tasmania, Submission to Tasmania Law Reform Institute, *Bullying*, 19 August 2015, 24.

³²³ Kees Lugten, Submission to Tasmania Law Reform Institute, *Bullying*.

³²⁴ Swedish Institute, *Education in Sweden* (2015) <<https://sweden.se/society/education-in-sweden/>>.

³²⁵ The Child and School Student Representative, *About the Child and School Student Representative* (12 December 2011) <<http://www.skolinspektionen.se/en/BEO/English-Engelska/About-BEO-/>>.

³²⁶ Ibid.

3.6.22 In response to the high profile suicides of three adolescent boys in Norway in 1983, the Norwegian Ministry of Education began a national campaign to reduce bullying in schools, as a result of which the Olweus Bullying Prevention Program was developed.³²⁷ In late 2000, the Department of Education and Research and the Department of Children and Family Affairs decided to offer the Olweus Bullying Prevention Program on a large-scale basis to all Norwegian comprehensive schools (grades 1-10).³²⁸

3.6.23 The primary goals of the Olweus Bullying Prevention Program are to:³²⁹

- Reduce existing bullying problems among students;
- Prevent the development of new bullying problems;
- Achieve better peer relations at school.

3.6.24 The components of the Olweus Bullying Prevention Program are:³³⁰

- School level components:
 - Establish a Bullying Prevention Coordinating Committee (BPCC);
 - Conduct training for the BPCC and all staff;
 - Administer the Olweus Bullying Questionnaire (Grades 3-12);
 - Hold staff discussion group meetings;
 - Introduce school rules against bullying;
 - Review and refining the school's supervisory system;
 - Hold a school-wide kick-off event to launch the program;
 - Involve parents.
- Classroom-level components:
 - Post and enforce school-wide rules against bullying;
 - Hold regular (weekly) class meetings to discuss bullying and related topics;
 - Hold class-level meetings with students' parents.
- Individual-level components:
 - Supervise students' activities;
 - Ensure that all staff intervene on the spot when bullying is observed;
 - Meet with students involved in bullying (hold separate meetings with those who are bullied and those who bully);
 - Develop individual intervention plans for students involved in bullying, as needed.
- Community-level components:
 - Involve community members on the Bullying Prevention Coordinating Committee;
 - Develop school-community partnerships to support the school's program;

³²⁷ Susan P Limber, 'Development, Evaluation, and Future Directions of the Olweus Bullying Prevention Program' 10(1) (2011) *Journal of School Violence* 71, 71.

³²⁸ Dan Olweus and Susan P Limber, 'Bullying in school: Evaluation and dissemination of the Olweus Bullying Prevention Program' (2010) 80(1) *American Journal of Orthopsychiatry* 124, 127.

³²⁹ *Ibid* 126.

³³⁰ *Ibid* 127.

- Help to spread anti-bullying measures and principles of best practice in the community.

Recommendations

3.6.25 It is a matter of concern that enquiries to Equal Opportunity Tasmania suggest that many students believe complaints of bullying are not being addressed within schools and that little is done to prevent escalation of bullying behaviour.³³¹ Further, Australia has amongst the highest incidence of bullying in schools globally and studies suggest that often telling the teacher what is happening does not stop bullying behaviours.³³² It is the view of the Institute that the apparent prevalence of bullying in schools, the harm bullying can cause and the consequences of school-based bullying for students' ability to learn and for future health and behavioural problems are sufficient to justify reform in this area.

3.6.26 The Institute supports the imposition of legislative requirements on educational institutions, mandating anti-bullying policies and procedures. Schools should be required to comply with the legislated framework, which should apply to all schools, whether state or non-government. Strong anti-bullying policies should be implemented to address bullying. In determining what these policies should be, attention must be given to the best interests of all children involved whether those children are involved as victims, participants or bystanders.³³³ Submissions to the Issues Paper tended to favour quite stringent requirements, rather than broad policy statements.

3.6.27 If an educational institution complies with the recommended regulatory regime by implementing and monitoring anti-bullying policies and procedures it should follow that the institution has discharged its duty of care. If a school fails to implement in practice the procedures outlined in its anti-bullying policies the school will have failed in its duty to take reasonable steps to protect students from bullying and could be found liable in negligence.

3.6.28 Additional funding would be required to ensure that educational institutions are able to implement mandatory anti-bullying policy and procedures effectively, especially if this necessitates ongoing teacher training and/or the creation of an expert teaching position tasked with responsibility for overseeing the implementation.

3.6.29 While it may be beneficial to apply these requirements to all educational institutions (including tertiary and vocational institutions) the different attendance requirements, staff structures, student interaction, and student ages and levels of responsibility suggest that policies and procedures that are effective at a primary, secondary and college level may not be effective in tertiary and vocational institutions.

3.6.30 With respect to the substance of the requirements, consideration could be given to requirements imposed by, and policies of, other jurisdictions. It may also be beneficial for the Department of Education to establish a Working Group to devise appropriate requirements to be placed on schools in the Tasmanian context.

3.6.31 Anti-bullying policies and procedures should support student bystanders who report instances of bullying or intervene directly to encourage a culture where students do not stand idly by when bullying occurs. Students should be encouraged to report to someone in authority or someone they trust, such as a teacher or school counsellor, or if the bullying occurs online, also to the social media provider. Anti-bullying policies should contain a process by which students can report bullying, information on how these reports will be responded to and provisions that protect students that report or intervene. Consideration should be given to including the consequences for students that fail to

³³¹ Tasmanian Anti-Discrimination Commissioner, above n 10, 45.

³³² Ibid citing Rigby, above n 312, 275.

³³³ Commissioner for Children, above n 21, 2.

report instances of bullying. Anti-bullying programs should feature a bystander component where students are educated about their role as bystanders and how they can support victims of bullying, particularly cyberbullying.

3.6.32 In its submission to the Issues Paper, YNOT discussed anti-bullying policies in New South Wales (NSW), the Australian Capital Territory (ACT) and Victoria.³³⁴

- The NSW ‘Bullying: Preventing and Responding to Student Bullying in Schools Policy’ sets requirements for preventing and responding to student bullying in government schools in NSW.³³⁵ All NSW government schools are required to have anti-bullying plans as part of their school discipline policy.³³⁶ The policy includes requirements that:³³⁷
 - *Principals* ensure that their school implements an Anti-Bullying Plan that includes strategies for:
 - Maintaining a climate of respectful relationships where bullying is less likely to occur;
 - Developing and implementing programs for bullying prevention and embedding anti-bullying messages into each curriculum area in every year;
 - Developing and implementing early intervention support for students who are identified at or after enrolment as having experienced bullying or engaged in bullying behaviour;
 - Responding to incidents of bullying that have been reported to the school quickly and effectively;
 - Developing and publicising clear procedures for reporting incidents of bullying to the school;
 - Providing support to any student who has been affected by, engaged in or witnessed bullying behaviour;
 - Monitoring and evaluating the effectiveness of the Plan; and
 - Reporting annually to the school community on the effectiveness of the Plan.
 - *Principals* ensure that there are procedures for: contacting the Child Wellbeing Unit or Community Services where appropriate; contacting police youth liaison officers and school liaison police officers where appropriate; contacting appropriate support services such as Kids Helpline; providing information on departmental appeal procedures and the Complaints Handling Policy. The Plan must be promoted and widely available within the school community and published on any school website, and must be reviewed with the school community at least every three years.
 - *School staff* respect and support students; model and promote appropriate behaviour; have knowledge of the school and departmental policies relating to bullying behaviour; respond in a timely manner to incidents of bullying according to the school’s Anti-Bullying Plan. Teachers also have a responsibility to provide a curriculum that supports students to develop an understanding of bullying and its impact on individuals and the broader community.

³³⁴ YNOT, above n 20, 12.

³³⁵ New South Wales Department of Education, *Bullying: Preventing and Responding to Student Bullying in Schools Policy* (2011) <https://www.det.nsw.edu.au/policies/student_serv/discipline/bullying/PD20100415.shtml>.

³³⁶ Australian Government Office of the Children’s eSafety Commissioner, *National and State Education Department Policies* <<https://esafety.gov.au/education-resources/school-policies/national-and-state-education-department-policies>>.

³³⁷ New South Wales Department of Education, above n 335.

- *Students* behave appropriately, respecting individual differences and diversity; behave as responsible students on-line; follow the school Anti-Bullying Plan; behave as responsible bystanders; and report incidents of bullying according to their school Anti-Bullying Plan.
- *Parents and caregivers* support their children to become responsible citizens, to develop responsible online behaviour, and to develop positive responses to incidents of bullying consistent with the school Anti-Bullying Plan; be aware of the school Anti-Bullying Plan and assist their children in understanding bullying behaviour; report incidents of school related bullying behaviour to the school; and work collaboratively with the school to resolve incidents of bullying when they occur.
- *All members of the school community* model and promote positive relationships that accept individual differences and diversity within the school community; support the school's Anti-Bullying Plan through words and actions; and work collaboratively with the school to resolve incidents of bullying when they occur.
- The ACT's 'Countering Bullying, Harassment and Violence in ACT Public Schools' policy states that public schools must develop procedures to counter bullying, harassment and violence.³³⁸ The school procedures must include specific strategies for reporting, intervening, accessing help and support and professional learning.³³⁹ A statistical record of incidents of bullying, harassment and violence must be kept by schools.³⁴⁰
 - It is noted that schools should differentiate between acts of bullying, harassment and violence and respond to each in different ways. For example, bullying typically requires non-punitive and restorative approaches; conflict typically requires mediation; violence requires responses as set out in the school's behaviour management plan; harassment requires responses as set out in the school's behaviour management plan.³⁴¹
- YNOT also noted that it has been suggested that the Victorian Education Department has the best bullying and cyberbullying resources in Australia, with their Bully Stoppers and eSmart programs.³⁴² Bully Stoppers provides tools and resources including online learning courses, advice sheets, lesson plans and podcasts that have been developed by bullying experts for students, parents, teachers and principals.³⁴³ Bully Stoppers also invites schools to apply for grants to address bullying.³⁴⁴ Victorian schools are not required to participate in the program.³⁴⁵ The Victorian Government has also made eSmart Schools available to every government school and some Catholic and independent schools at no charge.³⁴⁶ eSmart Schools supports schools to ensure that they are reducing students' exposure to cyber-risks.³⁴⁷

³³⁸ ACT Government Department of Education and Training, *Countering Bullying, Harassment and Violence in ACT Public Schools* <http://www.det.act.gov.au/__data/assets/pdf_file/0004/17608/Countering_Bullying_and_Harassment_updated.pdf>.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² YNOT, above n 20, 12 citing J Topsfield, 'What can schools do about bullying?' *The Sydney Morning Herald* (online) 21 September 2014, <<http://www.smh.com.au/national/education/what-can-schools-do-about-bullying-20140918-10itn1>>.

³⁴³ National Centre Against Bullying, *Bully Stoppers* <<http://www.ncab.org.au/bullystoppers/>>.

³⁴⁴ Victoria State Government Education and Training, *Bully Stoppers Grants Program* (25 June 2015) <<http://www.education.vic.gov.au/about/programs/bullystoppers/pages/pringrants.aspx>>.

³⁴⁵ National Centre Against Bullying, above n 343.

³⁴⁶ Victoria State Government Education and Training, *Helping Schools Improve Cybersafety and deal with Cyberbullying* (28 November 2013) <<http://www.education.vic.gov.au/about/programs/bullystoppers/pages/esmart.aspx>>.

³⁴⁷ Ibid.

3.6.33 A Tasmanian anti-bullying policy and procedure could also incorporate some of the elements of New Jersey’s ‘Anti-Bullying Bill of Rights’, which contains:

- A requirement that each school district adopt an anti-bullying policy containing minimum obligations, including:³⁴⁸
 - The prohibition of ‘harassment, intimidation or bullying’ and a definition of ‘harassment, intimidation or bullying’ no less inclusive than the legislatively prescribed definition;
 - Specification of the consequences and appropriate remedial action for a person who commits an act of ‘harassment, intimidation or bullying’;
 - A procedure for reporting an act of ‘harassment, intimidation or bullying’;
 - A statement of how the policy is to be publicised and a requirement that a link to the policy be prominently posted on the home page of the school’s website and that the policy be distributed annually to parents and guardians who have children enrolled in the school district;
 - A requirement that the contact details of the district’s anti-bullying coordinator be listed on the home page of each school district and school website and that the contact details of the school’s anti-bullying specialist be listed on the homepage of each school’s website.
 - A timeline for the investigation and resolution of bullying,³⁴⁹
 - A requirement that schools adopt an educational program for bullying prevention,³⁵⁰
 - A requirement that schools appoint an ‘anti-bullying specialist’ to lead investigations, address incidents of bullying and work with the district anti-bullying coordinator’.³⁵¹

3.6.34 The Institute is of the view that at least the following areas should be covered in a Tasmanian anti-bullying policy and procedure:

- *Prevention*: Schools could be required to publish their anti-bullying policy and procedure on the home page of their website (if the school has a website) and the policy and procedure should also be available in hard copy at the school. Consideration could be given to whether the policy should be displayed in each classroom. Educational institutions could also be required to publicise the anti-bullying measures at least once a year to the school community, including parents/guardians, students and all staff. Students, staff and the wider school community should be educated about bullying and made aware of the policies and procedures in place to deal with bullying behaviour, including resources on cyberbullying available from the Children’s eSafety Commissioner. Where possible, the entire school community should be involved in the implementation of the policy and procedure.
- *Support*: Frameworks need to be in place to support victims of bullying as well as students who are bullying and bystanders that report or intervene in instances of bullying. Consideration should be given to the establishment of a Welfare Head Teacher role in schools to oversee the implementation and operation of the anti-bullying measures and support students who are involved in bullying whether as victims, participants or bystanders. Consideration should also be given to providing anti-bullying training to staff.
- *Investigation*: Schools should be required to investigate complaints of bullying according to prescribed procedures to improve responsiveness to bullying and to communicate that

³⁴⁸ NJ Stat Ann § 18A:37-15.

³⁴⁹ See NJ Stat Ann § 18A:37-15b (5),(6),(7).

³⁵⁰ NJ Stat Ann § 18A:37-17a.

³⁵¹ NJ Stat Ann § 18A:37-20.

bullying is not acceptable behaviour. Mandatory timelines for investigation should be implemented to ensure that investigation of alleged bullying is timely. The role of bystanders in any bullying incident should be investigated and reporting procedures developed for bystanders. Consideration should also be given to developing referral points to third parties, including the Children’s eSafety Commissioner for the effective removal of cyberbullying material from social media sites.

- *Response:* Some submissions to the Issues Paper tended to favour restorative justice approaches to dealing with incidents of bullying in schools, and it was noted that suspension and exclusion may not be effective in most instances of bullying. Restorative justice approaches to individual instances of bullying in schools should be included in an anti-bullying procedure, in addition to more punitive responses like suspension. Restorative justice approaches should generally be the first instance response, in particular peer mediation.
- *Reporting:* Reporting (for example requiring schools to document the number of bullying complaints, bullying incidences and resolutions) would increase transparency and demonstrate that bullying is taken seriously by schools. These statistics should be published annually. Some respondents to the Issues Paper were also of the view that where a participant in bullying behaviour changes schools, information on the bullying should be provided to the new school. If this student information is to be transferred between schools, it should only be used to improve behavioural outcomes and facilitate early intervention rather than used in assessing the student’s acceptance into a new school.
- *Evaluation:* The effectiveness of the anti-bullying policy and procedures should be monitored and evaluated regularly. Reporting obligations would allow comparisons of the successes of different schools.

3.6.35 Angels Hope submitted that the state government should appoint a Tasmanian Child and Adolescent Psychiatrist adviser to monitor the bullying interventions made within each school. Consideration could be given to the development of such a role to enhance communication between schools and between schools and government. This role might be allocated to the Children’s Commissioner and adequately resourced.

3.6.36 Schools should be required to implement anti-bullying policies and procedures that meet minimum standards. This requirement should apply to both state and non-government schools perhaps as a pre-condition for registration as a school. Currently, in determining an application for registration as a school, the Schools Registration Board must take into account the matters set out in s 53(1) of the *Education Act 1994* (Tas). The registration process applies to both state and non-government schools alike. It would be a simple step to include as an additional factor to be considered, whether the institution proposes to implement anti-bullying policies and procedures as required by the department.

3.6.37 In implementing anti-bullying policies and procedures, schools should be encouraged to utilise existing resources and guidance made available by the Office of the Children’s eSafety Commissioner. To be able to respond appropriately to cyberbullying, schools should make use of the education and classroom resources provided by the Office and the voluntary certification scheme by hosting Internet Safety Awareness presentations from certified online safety providers.³⁵² Australian schools can apply for grant funding to engage a certified online safety provider.

Recommendation 9:

It is desirable to impose legislative requirements on educational institutions, mandating their implementation of anti-bullying policies and procedures. At a minimum, the legislative requirements should address in detail: prevention, support, investigation, response, reporting and evaluation. These requirements should apply to both government and non-government schools.

³⁵² Office of the Children’s eSafety Commissioner, *Education Resources* <<https://www.esafety.gov.au/education-resources>>.

Recommendation 10:

It is desirable that the Department of Education establish a Bullying Working Group to develop the legislative requirements to be placed on schools and to devise a template of anti-bullying policies and procedures for schools to use.

Recommendation 11:

Anti-bullying policies and procedures in schools should differentiate between bullying, harassment and violence and respond to them in different ways. It is desirable that non-punitive and restorative approaches be adopted in relation to most cases of bullying. Policies should address the best interests of all children involved, whether those children are involved as victims, participants or bystanders.

Recommendation 12:

It is desirable that anti-bullying policies and procedures contain a timeline for the timely investigation and resolution of bullying complaints.

Recommendation 13:

It is desirable that anti-bullying policies and procedures address the role of student bystanders by containing a process by which students can report bullying, how these reports will be responded to and provisions that protect students who report or intervene. Consideration should be given to the consequences for students who fail to report instances of bullying.

Recommendation 14:

It is desirable that resources like the Victorian Education Department Bully Stoppers and eSmart programs be developed and made available to Tasmanian schools.

Recommendation 15:

It is desirable for the Department of Education to encourage schools to utilise the education and classroom resources and guidance made available by the Office of the Children's eSafety Commissioner, including engaging a certified online safety provider.