# The Secret Silent Spaces of Workplace Violence: Focus on Bullying (and Harassment)

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**Abstract:** Any form of workplace abuse, be it bullying, sexual or non-sexual harassment, or other forms of workplace violence, represents a significant problem for both workers and organisations. The reality that worker complaints of such abuse are often silenced, frequently for long periods of time, has recently been spotlighted by the #MeToo movement. In this article we focus particularly on workplace bullying (some definitions include harassment). We explore how potential, and actual, complaints of such abuse may silenced—both before complaints are ever made, and also at different points along the complaint or dispute resolution process. We investigate how definitional and naming issues, worker ignorance and incapacity, workplace investigations, (alternative) dispute resolution and the legal pathways available to targets of workplace bullying and harassment may act to silence complaints. We also provide some practical suggestions for the targets of workplace abuse.

**Keywords:** bullying; harassment; workplace abuse; violence; silencing; naming; reporting

## 1. Introduction

If there is any doubt about the existence, endemic nature of, and silencing of workplace violence, perhaps one of the best contemporary illustrations of its omnipotence is that evidenced by #MeToo. While this movement began in 2006–2007,[1] it finally 'went viral' in late 2017, when a number of female actors spoke-up about often chronic (sexual) harassment experienced at work, typically at the hands of powerful older men. #MeToo's grounding sentiment and driving force though is even older:

> This reckoning appears to have sprung up overnight. But it has actually been simmering for years, decades, centuries. Women have had it with bosses and co-workers who not only cross boundaries but don't even seem to know that boundaries exist. They've had it with the fear of retaliation, of being blackballed, of being fired from a job they can't afford to lose. They've had it with the code of going along to get along. They've had it with men who use their power to take what they want ... (Zacharek et al. 2017)

While targets (and others) may have early opportunities to voice concerns about unacceptable and inappropriate behaviours directed towards themselves or others at work,[2] they often choose to remain silent, particularly in respect bullying and harassment and other forms of workplace violence.[3] They remain silent in the face of horrendous conduct. They do not speak-up. Why? As

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[1]  The movement was started by black activist Tarana Burke while working with young girls in America who were survivors of sexual violence: #MeToo: Ten years before it was a hashtag, it began as one woman's search for safety (ABC News online n.d.).

[2]  (House of Representatives Standing Committee on Education and Employment 2012, p. 76).

[3]  Ibid, pp. 75–76. We define workplace abuse to include bullying, sexual harassment and non-sexual harassment and other forms of workplace violence.

illustrated in Figure 1 below, in this article, we respond to that question by focusing on workplace bullying and examining some of these potential sites of silencing. In this way, we explore some of the potential contributors to not speaking-up, complaining and/or reporting. While there is no internationally agreed definition of workplace bullying, Einarsen's definition, which incorporates mobbing, emotional abuse, harassment, mistreatment and victimisation as part of the bullying phenomenon, is utilised here:

> The systematic persecution of a colleague, subordinate or superior, which, if continued, may cause severe social, psychological and psychosomatic problems for the victim. (Einarsen 1999, p. 16)
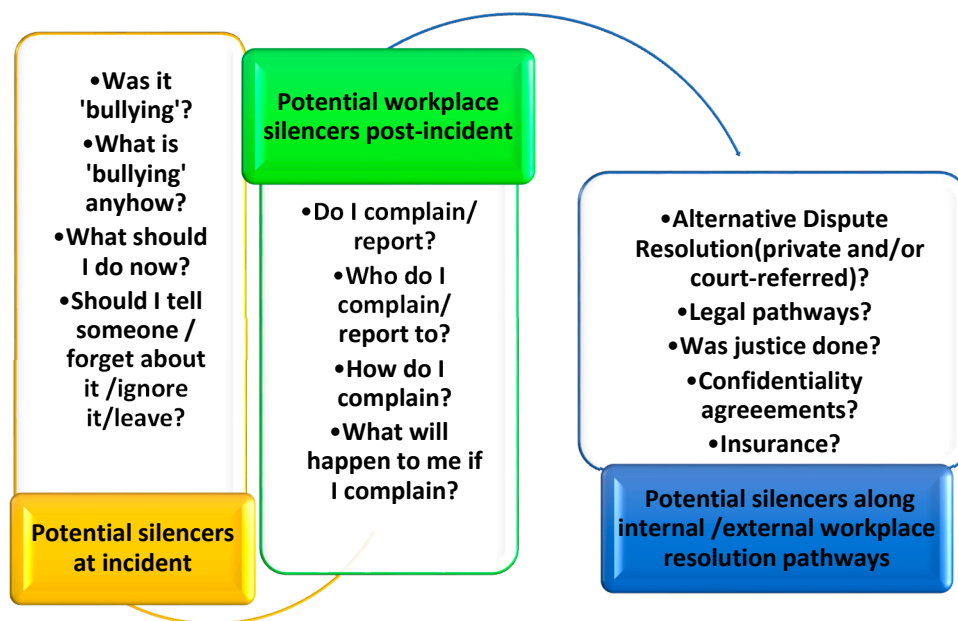


**Figure 1.** Workplace Bullying Abuse Incident Stages–Decision-making questions that may lead to silence.

Silencing is a major issue as illustrated by the disparity between the alleged epidemic incidence of workplace bullying in Australia,[4] the low reporting of such behaviour (Easteal and Hampton 2011), and the (relatively) few Australian court and tribunal cases which have been heard and decided (Ballard and Easteal 2014).

Figure 1 above suggests that as an initial step, a worker must transform their adverse workplace experience into some form of a problem, controversy, or 'dispute' (Hoffmann 2003). That is, the wronged party must first realise that a problem in fact exists (that is, they must, for example, be able to 'name' the experience as bullying or harassment) (Ballard and Easteal 2018a). The target must then attribute this problem to another person (e.g., blame the alleged perpetrator) and bring it to their attention (Hoffmann 2003, p. 693) or to the attention of another person or entity, such as the employer/organisation. Rather than reporting the offending behaviour, the target may decide that the best strategy may be to remain quiet, find another job, and/or leave the organisation. While some decisions to quit (or stay) are based on a sort of expected-benefit rationale, others are driven by more intuitive or routinised decision-making processes (Harman et al. 2007, pp. 51–52). These decisions may be influenced by a range of 'shocks' or precipitating events (for example, a fight with the boss,

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[4]　Workplace bullying is increasingly referred to as a silent epidemic. See (Williams 2011; Hanley et al. 2008).

an unexpected windfall, or an unanticipated job offer) and by an employee's degree of 'embeddedness'[5] within an organisation.[6] Choosing 'exit' over complaint though is not always an option which is open to the worker. Some people may choose to stay (and remain silent), because of loyalty to the organisation, for fear they would be unable to find a comparable position (or indeed any position) elsewhere, or because they may be reluctant to 'sacrifice' employment benefits accrued over a lengthy period of service with the organisation (which may also be understood as a form of 'entrapment' and 'embeddedness').[7]

If the target desires a legal or other remedy they will need to file some sort of claim or grievance, which may theoretically become a (legal) *dispute* if the other party rejects it.[8] To become a formal grievance that can be addressed by an organisation's official grievance policy or procedure, a dispute must essentially be made 'public'.[9] For some, making such an issue or concern public, offends their sense of privacy and dignity, fearing it may signal to the world that they cannot properly manage their working (public) life. Such a perception may facilitate their silence.

We now look at each decision-making stage more closely commencing with 'Something Happens' in which we examine the potential silences arising from both naming/definitional issues and the ignorance/incapacity of bullying targets. In the next section (Breaking the Silence in the Workplace) the possible silences associated with workplace investigations and worker's compensation insurance are considered. Then in the 'Silence of the Legal Pathways' we look at the ways in which the available causes of action and alternative dispute resolution (ADR) can also silence targets. Finally, we highlight possible ways to foster voice in organisations and offer some practical tips for targets of workplace bullying and harassment.

## 2. Stage 1—Something Happens

### 2.1. Silence Due to Naming/Definitional Issues

Discussing, complaining about, or remedying phenomena that have no shared or understood name or meaning presents significant difficulties. Although bullies have always existed, once a phenomenon, such as 'workplace bullying', 'harassment', 'abuse' or 'violence' is named, it is more easily talked and thought about (and acted upon). There are multiple synonyms for 'bullying' both in Australia and internationally (Ballard and Easteal 2018a, pp. 18–19, 8). This becomes problematic, particularly when trying to determine the incidence/prevalence of the (alleged) workplace abuse or in developing strategies to remedy it. If the problem is not defined consistently across workplaces, organisations, cultures, legislatures, or case law, it is difficult to truly understand the nature or extent of the problem or to adequately address it.

Despite the explosion of research around workplace bullying, particularly since the 1970s, there is (still) no universally accepted understanding of 'workplace bullying'.[10] In some languages there is not even a linguistic term of describe the phenomenon or to convey its various behavioural aspects.[11] Nevertheless, as suggested by Einarsen's definition above, the phenomenon is typically understood as encompassing a wide spectrum of actions, ranging from lower-level workplace aggression and incivility, unreasonable work practices and inappropriate behaviours—some of which may be used as tactics to disguise and mask sadistic behaviours[12], such as sexual assault and homicide.

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5   'Embeddedness' can be likened to 'a net or web in which an individual can become stuck': (Mitchell et al. 2001, pp. 1102, 1104).
6   (Harman et al. 2007, p. 53). See also (Mitchell et al. 2001; Ibid, p. 1104).
7   (Berthelsen et al. 2011, pp. 178–80; Harman et al. 2007, pp. 51, 53; Rusbult and Farrell 1983, pp. 429, 431; Mitchell et al. 2001, pp. 1102, 1105).
8   Ibid.
9   Ibid.
10  (Margevičiūtė 2017, pp. 205, 207; Wrench 2013, p. 323).
11  Ibid at p. 209.
12  For example, joking and initiation rites (Mayhew et al. 2004, pp. 117–18).

Using the 'wrong' words to describe social problems may not only distort perceptions, but also can affect the decisions made by leaders (such as law and policy makers) to address those problems (Burke 2017, p. 27). Decision-makers' and employers' interpretations of concepts like 'reasonable' behaviour take place in socio-legal arenas in which so-called *objective* standards are, in reality, neither neutral nor inevitable.

*2.2. The Silence of Ignorance and Incapacity*

We suggest there is a silencing associated with the failure to conceive of conduct as being an act of bullying in the first place, and also with a target's capacity to deal with it (even if it is in fact understood as a problem). We label this as the silence of ignorance and incapacity. Workplace abuses, such as bullying and harassment, can be associated with debilitating emotional, psychological and physical illness and injuries, which can render a target partially or completely incapable of complaint. In addition, other forms of harm can arise even when a target does not perceive certain behaviour as a 'problem' or as 'bullying'. This lack of insight or perception, can, like mental and physical illness and injury, make any action to challenge the offending behaviour problematic. To illustrate this, if bullying manifests as the inequitable allocation of work, shifts, or overtime, or the denial of a promotion, training opportunities, or relevant job information, the target experiences a measurable harm. This harm may be by way of economic or status loss or a fall in work performance and it can occur even though the offending conduct is never understood by the affected individual as 'bullying' (Wrench 2013, pp. 322, 327; Jalloh 2015, pp. 1237, 1242; Unison 2013, p. 5). Such 'ignorance' may be more likely to harm minorities; as Brake observes 'since perceiving and acknowledging discrimination [and arguably also bullying and harassment] is a prerequisite for engaging in any form of considered resistance to it, stigmatised social groups are less inclined to challenge systemic discrimination, thereby silently facilitating it' (Brake 2005, pp. 18, 25).

An incapacity to either 'take on' the bully/perpetrator/abuser or to report the behaviour can both be exacerbated by, and contribute to the physical and psychological problems that are correlates of being victimised. These include: fear, stress, and depression, shock, despair, anger, apathy, helplessness, insomnia, chronic fatigue, sadness, shame, guilt, anxiety, distrust, disgust, disbelief, powerlessness, irrecoverable loss of self-esteem, post-traumatic stress disorder (PTSD), phobias, and various cardiac and musculo-skeletal problems (Nielsen and Einarsen 2012, p. 310; Cortina and Magley 2003, p. 247). It is known too that the damage caused by bullying (for example, reduced social status and confidence) 'can continue, even after the bullying has ended' (Peterson 2018; Olweus 1993). Targets of prolonged bullying may have more severe stress reactions than women who have been raped or train drivers confronted with 'death by train' (Mayhew et al. 2004, pp. 117–18).

Difficulties in both complaining about and addressing bullying and harassment may be further intensified if a target self-medicates with drugs and alcohol, or if their social support networks collapse as a sequela to the workplace abuse (Einarsen et al. 2015, p. 21). Also, workers who endure mistreatment in silence, may experience the highest levels of psychological and physical harm (Salin et al. 2014, p. 1191). So, in effect there is a potential 'double whammy' with a person who is unable to complain on account of some mental, emotional or physical incapacity, being more likely to suffer further harm *because* they cannot or do not complain.

Incapacity may also be worsened if the organisation/employer colludes in the bullying or acts as a perpetrator by creating oppressive, hostile, or toxic environments. This includes the organisation (or more particularly, its representatives or managers) scheduling targets for (unnecessary) medical and psychiatric assessments, subjecting targets to (dubious and undeserved) performance management plans, alleging breaches of the organisation's values or code of conduct (and then undertaking questionable workplace investigations), and terminating targets for redundancy (Hoel 2013; Stacey 2013) or for (alleged) poor work performance or misconduct.

Such activities do not inevitably equate with bullying but importantly, they *may*. Problematic management activities might also intensify *after* an employee has complained about bullying.[13] Where such activities *appear* (on their face) to be a legitimate exercise of an organisation's power, it may be difficult for a target to even conceptualise the behaviour as bullying, let alone to formulate a plan for complaining about it. In these ways and others which will be looked at next, organisations can both perpetrate and silence workplace abuse.

### 3. Stage 2—Breaking the Silence in the Workplace

While many targets do try and tackle bullying with various coping strategies, few manage to stop the conduct without outside help (Hogh et al. 2011, pp. 267, 273; Martino et al. 2003, pp. 117–18). Even where a worker is able to name what has occurred as 'bullying' or 'harassment' and does speak-up, they may subsequently be 'silenced' by a range of factors that typically only come into play after they have made a complaint. Such factors may include workplace investigations and adverse conduct on the part of worker's compensation insurers and rehabilitation providers as discussed below.

Additionally, as alluded to above, targets may be subject to work-related victimisation (WRV) on account of reporting. WRV may include intentional reprisals in the form of termination, involuntary transfer, demotion, poor performance appraisals, and/or the deprivation of jobs perks and overtime opportunities (Cortina and Magley 2003, pp. 247–48). Targets may also be subject to social retaliation victimisation (SRV) including intentional social reprisals by peers, subordinates, and managers (Cortina and Magley 2003, pp. 247–48). Such reprisals are often less tangible and formal than WRV. SRV can include (further) harassment, name-calling, ostracism, blaming, threats, and the 'silent treatment' (Cortina and Magley 2003, pp. 247–48).

Retaliation, the 'fastest growing discrimination claim,'[14] is what Brake calls *powerful medicine* which acts to suppress complaints and preserve the status quo of the social order (Brake 2005, p. 20); though abused workers have also been known to retaliate against their supervisors.[15] Brake argues that fear of retaliation is [emphasis added]:

> . . . *the leading reason why people stay silent instead of voicing their concerns about* [things like] *bias and discrimination*. When challengers are *brave enough to overcome their fears of speaking out, retaliation often steps in to punish the challenger and restore the social norms in question*. To a large extent, the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation. (Brake 2005, p. 20)

When (voice) strategies fail and employees fear or experience possibly retaliatory actions, they may reach-out to a union, or take long-term sick (or personal) leave, after which they often resign, 'wash their hands of the situation' and take their talents elsewhere (Lutgen-Sandvik 2005, iii); sometimes never to return to paid employment.[16] They may also find themselves terminated from their employment[17] as illustrated in a 2014 survey conducted by the (US) Workplace Bullying Institute, which found that 19 per cent of targets were forced out, fired (13 per cent), transferred (13 per cent), or resigned their

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13  See for example the Australian anti-bullying case of *Lynette Bayly* [2017] FWC 1886 (5 April 2017) where an executive director claimed that her employer only levelled misconduct allegations against her in response to a bullying complaint she made against other executives early in 2017.

14  This is a cause of action where an employee alleges the employer has made a detrimental job decision in response to the employee's having made a discrimination complaint or 'protected expression': (Sherwyn et al. 2006, pp. 350, 353).

15  Though high levels of employee 'conscientiousness' and 'agreeableness' mitigate the relation between abusive supervision and employee retaliation: (Lian et al. 2014, pp. 116, 122).

16  *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* [2007] NSWCA 377 (21 December 2007) [284], [303]; *Morabito v Comcare* [2013] AATA 450 (2 July 2013) [33], [40]; (Vickers 2009, p. 259).

17  Ibid, p. 118.

employment (29 per cent). By comparison only 10 per cent of perpetrators were terminated while just 5 per cent resigned.[18]

### 3.1. Workplace Investigations

Where allegations of workplace abuse are made to an organisation, the organisation is generally bound to conduct some form of workplace investigation. In the Australian Capital Territory (ACT) Public Service for example, a centralised Professional Standards Unit (PSU) is responsible for conducting or overseeing all investigations into 'inappropriate' workplace behaviour. All ACT Government investigation functions were consolidated at the end of 2015 in a bid to improve timeliness, increase consistency and quality, and ensure independence and fairness (Condon 2018, p. 1).

In 2017, of 85 matters referred to the PSU, 11 (or almost 8 per cent) resulted in findings of unsubstantiated allegations. The investigation process is an adversarial one which pigeon-holes the complainant as the 'victim' and the respondent as the (alleged) 'offender'. It tries to deter poor behaviour through punishment, though such behaviour is often engaged in by more than one party and can be linked to an entrenched culture of poor behaviour (Condon 2018, p. 1).

Workplace investigations (and alternative dispute resolution (ADR) as discussed below) may be conceptualised as part of the resolution process. By violating procedural fairness norms, workplace investigations may carry significant risks for employers if improperly conducted. They may be compromised by, for example, bias and pre-determined outcomes. Such risks are greater where the investigator is not truly independent or is an employee and also where are no (or inadequate) workplace policies (Ballard and Easteal 2018b). Workplace investigations have the capacity to silence the targets of workplace abuse and other complaints of workplace misconduct. They may also undermine fair and just workplaces and result in unfair and disputed outcomes which may end in litigation (Ballard and Easteal 2018b). For instance Ballard and Easteal (2018b) research which included the views of a small sample of workplace investigators found that:

> [I]nvestigations could be compromised due to the inexperience, lack of time and lack of qualifications and understanding of the rules of evidence, procedural fairness culminating in the investigator not adopting a neutral mind-set, but setting out to 'prove' the allegation]. (Ballard and Easteal 2018b)

Several respondents reported that 'influencing' (e.g., being told of the organisation's desired investigation outcome) may commence before the investigation—at the time of tendering for a workplace investigation, during the process, and afterwards (Ballard and Easteal 2018b).

Where a target is subjected to a prejudged workplace investigation or is otherwise aggrieved about the process, they will not always not have the capacity or resources to complain about or challenge the process or outcome. This too is a form of silencing.

### 3.2. Silence Due to Insurers

Another potential source of silence in relation to reporting (or reported) workplace abuse are the actions of insurers (Holley et al. 2015, pp. 85, 93), including through requiring medical assessments, evidence and reports (often construed as *expert* and/or *independent* reports) in respect of targets in worker's compensation and similar claims. Such assessments (which may deter targets from claiming in the first place or encourage them to later discontinue a claim) may be conducted at the behest of respondent (employer) parties (workers typically cannot afford their own *expert* reports). Given this, such reports are often, unsurprisingly, supportive of both the employer and the role of worker's compensation insurers and rehabilitation practitioners (whose adverse treatment of an injured worker

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18　Namie (2004) and Harvey et al. (2006, p. 4) also found that the prognosis for targets is typically worse than that of bullies: Eighty-two per cent lose their jobs—44 per cent involuntarily and 38 per cent by 'choice'.

may facilitate secondary psychological injuries) (Holley et al. 2015, p. 94). Insurers may decline compensation for injuries purportedly attributable to workplace abuse; often with spurious reasoning (Holley et al. 2015, p. 93). This strategy forces the target to either seek a review of that decision or to simply walk away in silence.

Insurers may also mandate multiple assessments of injured workers in a process designed to ultimately procure a 'favourable' report for the insurer (for example one recommending minimal treatment) (Holley et al. 2015, p. 93). In addition, they may require attendance at medical appointments at short notice, often at inconvenient locations, with the threat of suspending weekly compensation payments should the worker not attend (Holley et al. 2015, p. 93). 'Rehabilitation' providers may also silence targets through a range of potentially intimidating tactics, such as pressuring recuperating workers to ignore the treating doctor's advice and return to work (Holley et al. 2015, p. 94). Employers and rehabilitation providers have also been known to accompany targets/applicants/plaintiffs to their medical appointments and attempt to direct medical practitioners in respect of their assessment of the worker (We Are Union OHS Reps n.d.).

## 4. Stage 3—Silence of Legal Pathways

In Australia, the targets of workplace bullying—or to be more precise, typically the lawyers of the targets—must generally 'shop around' or try to 'fit a square peg through one of a variety of differently shaped holes' in order to identify a sustainable course of action, or cause of action (Ash and Scott 2013; Bible 2012, pp. 32, 37). Navigating the negotiation and litigation jungle that is workplace bullying requires 'cutting the cloth to fit the suit' (Ballard and Easteal 2014). The ways in which lawyers perceive the (in)adequacies of each potential remedy affect the tailoring. As Weissbourd and Mertz point out, the law engages in 'routine creativity' in categorising particular events as legal types, even in the most ordinary and uncontested cases (Merry 1990, pp. 1, 4).

If no appropriate cause of action can be applied to the particular circumstances there may simply be no applicable remedy or relief. Even though there are many potential remedies for workplace abuse, not all are suitable or applicable to every factual scenario. As such, the available remedies (or rather the lack of them) may have the potential to silence targets. For example, seeking remedy by way of an anti-bullying order under the *Fair Work Act 2009* (Cth) (the FW Act) is restricted to those who are covered by the national regime; still employed by the relevant organisation; subjected to 'repeated' acts of bullying; and who have complied with the necessary procedural requirements to gain access to the jurisdiction (Ballard and Easteal 2016a). While workers may take the preliminary step of making an anti-bullying application, they often fail to follow-through with their application, despite repeated contacted attempts by the Fair Work Commission (FWC) (Ballard and Easteal 2016a),—effectively they are 'self-silenced'.

Furthermore, inaction (and silence) under this and other legal regimens may have economic or financial correlations. Private lawyers are not always affordable and legal aid/community legal service lawyers are not necessarily available to assist with employment disputes. Discontinuing or failing to persist with an application may therefore be linked to the inability of targets to obtain legal assistance or to targets' learning that parties to relevant actions under the FW Act (e.g., applications for anti-bullying orders or remedy for unfair dismissal, breach of the general protections, or unlawful termination) are generally required to cover their own costs, including legal fees. In addition, there is no jurisdiction for the Fair Work Commission (FWC) to award financial compensation in respect of anti-bullying applications.[19] And, it is little known, even within Australia's legal community, that financial settlements and employment separation are sometimes negotiated in the context of anti-bullying applications.[20]

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[19] This is not to say though that within the confines of a confidential mediation or conciliation, such deals are not done.
[20] In the legal practitioner author's experience. See also, (Hamberger and Dean 2018).

With respect to the unfair dismissal regime, only those targets who have worked for the employer for the requisite period of time and who meet other criteria, such as award coverage or income threshold, are eligible to make an unfair dismissal application.[21] There are similar barriers with respect to the other available causes of action under the FW Act and also in respect of evidentiary requirements. For example, targets of workplace bullying, like complainants of other types of adverse action, including unlawful discrimination, may have difficulty establishing they were subject to unlawful conduct (Allen 2009). Where the complainant bears the onus of proof (as they typically do under Australian anti-discrimination law), they may not have ready access to the evidence needed to discharge this burden.[22] Inability to obtain such evidence may be due to the employer blocking access to the workplace or to work emails and other relevant documentation.

*ADR and Silencing*

Like workplace investigations, alternative dispute resolution (ADR) has the potential to silence targets and to undermine attempts to resolve workplace bullying and provide satisfactory redress. ADR may also conceal potential future and ongoing harm to the target, including by denying them later redress (apart from those areas that cannot be 'contracted out of', even in a confidential settlement agreement).[23]

ADR's limitations are important to acknowledge as most employment disputes typically involve some type of ADR process. As reported by the Commonwealth Attorney General:

> . . . not everyone with a dispute goes to court . . . [there are] other, less formal pathways that are used every day to resolve disputes. Most people resolve their disputes themselves. Others seek assistance from an independent third person or body . . . There are many ways to resolve disputes outside of the courts . . . [24]

Worker concerns in respect of ADR in the context of bullying matters include: Unequal bargaining power in negotiating settlement; concerns about mediator impartiality; insufficient opportunity to be heard and/or for fact-finding; and unjust outcomes (Ballard and Easteal 2016b).

Even with 'settled' matters (which non-parties might equate with a successful process and outcome), some targets express dissatisfaction with both process and outcome, sometimes believing there were unintended benefits for the perpetrators. Targets may feel anger, betrayal, and frustration at the process by the requirement to sign confidential deeds of release or 'gag orders', which prevent them from discussing what happened, or the way in which the dispute was finally resolved (Sourdin 2010). We suggest that aligned with this is a silence, which may be said to compromise the rule of law—open and transparent justice, and precedent-setting.

## 5. Ways of Allowing More Voice

Standard operating procedures, behavioural norms, values, rules of conduct, taboos, key personalities, and the daily climate or civility of an organisation are each relevant in creating positive cultures (Harvey et al. 2006, pp. 5–6). As Lachman et al. observe though, no one solution exists for the complex social problem of negative human interaction within an organisational culture.[25]

An ethical culture requires leaders to have the moral courage to address disruptive behaviour, regardless of who is violating the desired code of conduct.[26]

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[21] Section 382 of the *Fair Work Act 2009* (Cth).
[22] Note that in general protections matters, there is typically a reverse onus of proof.
[23] In Australia, these generally includes the right to make a worker's compensation claim and to pursue statutory superannuation entitlements.
[24] (Australian Government, Attorney-General's Department 2012, p. 2).
[25] (Lachman 2014, p. 57; Harvey et al. 2006; ibid. p. 8).
[26] (Lachman 2014; ibid. p. 58).

The role of senior managers in leading the [cultural] change process cannot be over-emphasised. Leading by example is key if employees are going to change their own behaviour. (Suff and Streber 2006, p. 27)

Therefore, organisations should be recruiting (protecting and retaining) individuals who are 'citizens of the firm'—those who are optimistic, innovative, change agents who can safely and effectively guide other employees through technological change and organisation restructuring (Harvey et al. 2006, p. 2); these are times, which typically present a greater risk of workplace bullying (Liefooghe and Mac Davey 2001, p. 376).

*5.1. Changing Workplace Practices*

In addition to addressing any deficiencies in leadership, organisations also need to address deficiencies in work design and organisational morality—where the substandard treatment of individuals is tolerated (or perhaps worse, expected) (Liefooghe and Mac Davey 2001, p. 376; Harvey et al. 2006, pp. 43, 6). One way of increasing the awareness of any organisational problem is to encourage the reporting of complaints. Such a reporting process must be formal, non-judgemental (Harvey et al. 2006, p. 8); supportive, fair, just, respectful, ethical, and available to both targets and witnesses. Organisations must also be prepared to support targets (and alleged perpetrators) before, during and after bullying events, including by providing programs that demonstrate their options in response to bullying, and with review mechanisms that can be used without fear of retaliation (Harvey et al. 2006, p. 9).

Support also needs to be provided to alleged perpetrators (and others) including through additional training, awareness-raising, coaching, and counselling (Harvey et al. 2006, p. 8). Should these measures fail, putting appropriate mechanisms in place to terminate chronic bullies from the organisations may be necessary (Harvey et al. 2006, p. 8). Investing in employee and managerial capacity to deal with relationship issues where they may lead to behavioural problems at work will help provide both workers and management with the resources they need to tackle the problem (Harvey et al. 2006, p. 8). Doing so can enhance commitment and loyalty to the organisation [emphasis added]:

A senior manager (who was the subject of multiple complaints from staff) once told me that in his 25 years of working for the organization[*sic*], the *coaching he received as a result of the complaints that had been made against him was the greatest thing the organization [sic] had ever done for him—it had completely changed the way he managed and communicated with his staff*. He felt as though the organization[*sic*] had invested in him. (Harvey et al. 2006, p. 8)

Borgald and Theixos argue that empathy can be taught and learned, ergo empathy training is a 'better (more just, more inclusive, and likely more beneficial) response to bullying' (Borgwald and Theixos 2013, pp. 154, 156). (Alleged) perpetrators (like (alleged) targets) experience anxiety consequent to the possible rejection by their community and so a process of 'inclusion allows perpetrators to experience increased desires to perceive themselves as acceptable people' (Borgwald and Theixos 2013, p. 154).

*5.2. Changing Workplace Policies*

Implementing appropriate workplace policies (and following them) could contribute to better workplace cultures. A 'dignity at work' policy for example, may be a first step in deterring aberrant behaviour, such as bullying and harassment, and dealing with specific incidents of bad conduct. For a policy to be effective it needs to 'promote the positive behaviours that can encourage a culture of dignity and respect at work' (Suff and Streber 2006, p. 27). Sound workplace policies (clear statements of the standards of behaviour expected by the organisation) can help to tackle bullying through

prevention, and so employers are advised 'to develop workplace bullying policies that articulate commitments to promoting a workplace that does not tolerate bullying'.[27]

Merely introducing a bullying/harassment policy though is not enough to eliminate inappropriate behaviour; 'an organisation's approach needs to be integrated within the range of its people processes and systems in order to be effective' (Suff and Streber 2006, p. 27).

And there are counter arguments to zero-tolerance approaches. Some see such policies as potentially intrusive, punitive, counter-productive, ineffective in reducing bullying and violence, possibly leading to a surge in covert bullying, and possibly harming both targets and perpetrators.[28] Further, naming behaviours as 'bullying' may deflect an organisation's legal responsibility for a safe and equitable environment onto an individual or a group of individuals, blaming them and making liable for the unlawful conduct.[29]

### 5.3. Improving Workplace Investigations

Investigative processes can be expensive, time-consuming, traumatic and disruptive to the workplace (Condon 2018, p. 2). While they may sometimes be a necessary component of the solution, and can indicate the root cause, they are not the answer to resolving workplace issues or changing challenging workplace behaviour, particularly those that are relationship-based (Condon 2018, p. 2). As Condon observes:

> There is no one magic formula for dealing with workplace issues but restorative or remedial approaches support a practical approach and give staff an element of control in the process and, more importantly, the solution to the issue. Some of the things we encourage work areas to try are empowering staff or managers to address the issues themselves or a more structured intervention, like a facilitated discussion, mediation or coaching. Sometimes it is necessary to work with the broader team dynamics or culture. (Condon 2018, p. 2)

The aims of an investigation/misconduct process should be to identify and correct poor behaviour, develop positive working relationships, resolve conflict at the lowest possible level and only escalate to a misconduct process when necessary (that is when the behaviour is serious, repeated or continued, or there is a serious power imbalance between the parties) (Condon 2018, pp. 2–3).

> If I had a dollar for every time a HR area told me, 'Well we tried to do mediation but one of the parties (usually the complainant) wasn't open to it, so now we're going to refer it for investigation'. How is that fair on the employee who was prepared to work on ways to fix the issue? . . . At the moment, on occasion we allow people to inappropriately use or hijack the misconduct or discipline process rather than be personally accountable for their relationships and behaviour in the workplace. Where relationship deterioration between staff is the root cause of behavioural problems, punitive processes are not going to resolve the issues and could, in fact, have the opposite effect. (Condon 2018, p. 3)

### 5.4. Improving the Anti-Bullying Regime

It does appear that the FWC is taking a steady, incremental, and even-handed approach to the development and oversight of the anti-bullying jurisdiction. As evidenced by its track record with respect to other types of applications, which may also involve workplace bullying (for example, unfair dismissals and general protections matters), the FWC has also been able to resolve the majority of anti-bullying applications matters without proceeding to hearing.

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27　(House of Representatives Standing Committee on Education and Employment 2012, pp. 57, 70).
28　(Borgwald and Theixos 2013, pp. 149–50, 153; Stein 2003, p. 787). For instance, including because of the impact of the 'bully label' which creates a whole new category of stigmatised 'other': The bully.
29　(Stein 2003; ibid, p. 789).

While the jurisdiction has not elicited the flood of applications that were anticipated at the outset, generally receiving only around 700 applications each year, it must be said that the FWC has efficiently handled those matters that did come its way. The Applicant in the first order made under in the jurisdiction: *Applicant v Respondent* (AB2014/1052); applied to the FWC to revoke its earlier order just before Christmas in 2014. She wrote:

> Since our last meeting there has been a negligible amount of conflict between A and myself, and I have felt comfortable approaching my supervisor, B, with any concerns that I have. The past year of intervention from Fair Work has been very positive and helpful and I am very grateful for the support that has been given to me by Senior Deputy President Drake. I think that the New Year is an appropriate time to lift the orders and that it is in the best interest of everyone involved to do so.[30]

It is likely that more bullying matters might be resolved if the parties engaged constructively with the process rather than seeking to obstruct it through various tactics, such as stalling or making jurisdictional and other objections to the process. If the parties did engage positively (in keeping with the way the regime clearly intends that they do) the ultimate possibility that the FWC might make an anti-bullying order could be short-circuited early in proceedings.[31] This would increase the likelihood of improved and ongoing working relationships. The employee's 'reasonable belief' that he or she has been bullied (whether or not the employer shares this view and whether or not this view is true or well-founded) could be acknowledged by the respondent employer and addressed. Mediations (if held) and preliminary conferences could be better utilised by the parties to try and resolve the issue and seek an agreed way forward without the FWC needing to proceed to hearing, determination and possibly an order (with the accompanying publicity).

The jurisdiction is designed to resolve matters expeditiously so as to preserve the working relationships between the parties without having to proceed to the 'last resort': Issuing an anti-bullying order. While the paucity of orders issued since 2014 might be seen by some as evidence of a deficiency, it could also be characterised as a marker of success. In other words, the regime is doing exactly what it was designed to do. The FWC manages applications expeditiously with the goal of keeping the targets of bullying employed and at work; resolving the bullying without needing to use its iron fist to crack down and issue orders.

Where relationships have irretrievably broken down, and the employment comes to an end as a consequence, targets have other causes of action available to them. Where money does change hands in the context of a confidential anti-bullying ADR process and settlement, it would not be expected that the target would then return to work; rather any offer of payment would generally be made in the context of the worker agreeing to resign their employment. This is inconsistent with the anti-bullying jurisdiction's stated goals of keeping the worker at worker.

*5.5. Improving ADR*

Concerns about just outcomes in respect of bullying and harassment complaints subject to an ADR process were raised in Ballard and Easteal's work, which concluded that better outcomes are possible:

> The idea of success is broadened where targets feel that they have been given voice and achieved a measure of justice. This prospect seems enhanced by legal representation helping to balance a landscape skewed by power imbalances, by the psychological and physical effects of bullying, and by the target's perception of mediator bias. (Ballard and Easteal 2016b, p. 109)

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30　*Applicant* [2014] FWC 9184. On 16 December 2014 the FWC, in response to the Applicant's submission, revoked its orders of 10 September 2014.

31　Of course, as in other matters, the mediation of bullying disputes will not be appropriate in all cases, and the compulsory mediation of anti-bullying disputes may be problematic for many targets.

Another issue with ADR mentioned earlier is the confidentiality and non-disclosure nature of the settlement agreements. These might be obviated by legislative reform. For example, in the US, Arizona has legislation pending that would void non-disclosure agreements targets that ensure their silence. (Zacharek et al. 2017). We note that pro-employer advocates might argue that this would discourage settlement because employers would not want to pay money to targets if they could not do so under a veil of secrecy. However, where a matter does proceed to hearing and is determined, the monetary awards are publicly available. Similar public disclosure of agreements reached through ADR would alleviate some of the concerns around lack of transparency and precedent, but could also be a catalyst to those organisations that have been 'caught with their pants down' to do something constructive about the conduct, which led to the proceedings under the spotlight.

*5.6. Legislative Protection from Retaliation*

Brake argues that legal scholarship has paid insufficient attention to 'the ways people are punished for challenging inequality and the law's response to these challenges' (Brake 2005, p. 19). and that addressing retaliation is typically only regarded as an afterthought and as a relatively small part of the overall scheme for enforcing substantive legal protections (Brake 2005, p. 19). Legislative recognition of the act of retaliation itself, as a form of discrimination, would push the boundaries of the 'dominant understandings of discrimination in useful and productive ways' (Brake 2005, p. 21–22).

Under this proposal, the target/s of retaliation claimant need not establish that she was treated worse because she was a woman, because he was homosexual, or because of being Muslim, rather the argument would be that the targets were penalised for challenging sexist practices, sexual orientation or religious bias (Brake 2005, p. 21–22).

In Australia there are a number of legislative protections against victimisation or retaliation, including at Sections 104–6 of the *Work Health and Safety Act 2011* (Cth),[32] section 10 of the *Public Interest Disclosure Act 2013* (Cth), Sections 340–42 of the *Fair Work Act 2009* (Cth), and section 50 of the *Anti-Discrimination Act 1977* (NSW). In order to be successful in a victimisation complaint under the anti-discrimination law in NSW, a person must be able to establish some detriment that breaches the legislation.

The benefits of such protective provisions are highlighted by *James v Department of Justice, Corrective Services* NSW [2017] NSWCATAD 238, a case heard in the NSW Civil and Administrative Tribunal (NCAT). Ms James made a complaint of bullying and sexual harassment (assault) in employment against a senior manager and was subsequently transferred, allegedly for 'safety' reasons, to another workplace for the duration of the investigation into her allegations. When the investigation concluded that the allegations were not substantiated, Ms James was not returned to her original workplace. She then made a further complaint to the Anti-Discrimination Board of NSW alleging that her treatment 'during and after the investigation, in being relocated to a different workplace and not returned, was detrimental conduct amounting to victimisation' (Mattson 2017). When the matter did not settle at conciliation, Ms James asked that it be referred to the NCAT. The tribunal determined, on the balance of probabilities, that Ms James was not returned to her workplace *because of the complaint* and therefore that she had been victimised, noting that no intent to victimise was needed. She was awarded $20,000 in general damages in view of her diminished workplace status, loss of career enjoyment and quality of life, lost chances for promotion, and ongoing and significant distress.[33]

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[32]　These provisions proscribes prohibited conduct for a discriminatory reason, for example terminating a complainant's employment because they raised or proposed to raise an issue or concern about work health and safety.

[33]　(Anti-Discrimination Board of NSW 2017).

## 6. Practical Tips for Targets

Any form of workplace violence can be a difficult and traumatic experience for the target of that abuse. If a worker suspects they are experiencing bullying and/or harassment, in the first instance they should obtain further information about the sort of conduct that does (and does not) constitute bullying.[34] They should also review any applicable enterprise agreement, employment contract, or workplace bullying policy to see what steps if any are prescribed for them to follow (Safe Work Australia 2018).

Additionally, it is helpful to discuss any concerns about workplace conduct with their general practitioner at the earliest opportunity, and, where appropriate to seek referral to a psychologist for counselling. Many Australian employers also have Employee Assistance Programs that provide free access to counselling support and related services for workers who are experiencing difficulties at work and/or outside of work. In addition, organisations, such as Lifeline or Beyond Blue, can provide assistance to targets of workplace bullying and harassment (Safe Work Australia 2018).

It is useful for targets to document all relevant incidents by date, keeping a diary or record of what happened and any witnesses (Australian Human Rights Commission 2011). Developing a chronology of events may also be helpful (NSW Government Justice Law Access n.d.), as may keeping copies of any relevant work emails or other documents which evidence the bullying conduct. Targets should also consider discussing the situation with their union representative and/or a lawyer or another trusted individual at any early stage for both legal and psychological support. As a general rule, the sooner the offending behaviour is addressed, the more likely it is that harm and long term adverse consequences can be minimised.[35] As Caponecchia and Wyatt observe:

> Addressing a report of alleged workplace bullying early will hopefully result in less formal procedures being undertaken, which can minimise the impact of the situation on all parties. (Caponecchia and Wyatt 2011, p. 111)

## 7. Conclusions

As we have seen, complaints may be silenced in many ways at different points in the workplace violence/abuse to resolution process. In different ways and to differing extents these silencing mechanisms contribute to the gap between the claimed prevalence of the abuse and the number of cases formally disposed of by a court or tribunal.

Targets are the most researched component within the bullying scenario (Rayner 1999; Beale and Hoel 2010). The predominant individualised focus has, in turn, influenced the mechanisms which organisations have used to counter workplace bullying, often through (post-occurrence) interventions rather than by preventative approaches (Berlingieri 2015, p. 342), such as changing the workplace culture. Valid and reliable methods to assess the (true) extent and nature of workplace bullying are important for developing and implementing effective intervention strategies to prevent workplace bullying, and also to influence legal and policy-related issues (Nielsen et al. 2010, p. 956); yet there has been little consistency in approach.[36] This is an issue which governments, organisations, and employers need to consider seriously to address the problem, by nipping it in the bud (Nielsen et al. 2010, p. 967).

Targets cannot complain about abuse if they do not perceive a problem. Therefore, the education of workers and organisations about what bullying is (and is not) and appropriate ways to seek redress is crucial, as is the development of organisational cultures, practices and processes which eliminate

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[34] See for example, (Interagency Roundtable on Workplace Bullying 2005).

[35] This observation is based on the legal practitioner author's experience but is also supported by the approach underpinning Australia's anti-bullying jurisdiction.

[36] See for example, (Purpora et al. 2012, p. 306), where the authors note that 'horizontal violence' has been defined and measured differently across different studies.

the occurrence of bullying in the first place. As Peterson observed, it is better to render those in your care *competent* rather than to *protect* them (Peterson 2018, p. 47). This is not about developing a zero tolerance approach, but rather facilitating ways for inappropriate conduct and misconduct to be identified and dealt with in a way which both minimises harm and undercuts those great facilitators of employee/worker silence: Fear of retribution, retaliation and revenge. To this end perhaps we should take up Brake's suggestion and legislate to make 'retaliation' itself a protected attribute, rather than simply, a cause of action that only comes into play when targets have first exercised their statutory rights to make a formal complaint about some form of adverse unlawful workplace conduct (e.g., sexual harassment or discrimination).

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