



Bullying jurisdiction
strategies: an analysis of
Acas' experience and its
application in the Australian
context

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Executive summary

The Fair Work Amendment Bill 2013, passed by the Senate in June 2013, provides the Fair Work Commission (FWC) with a new jurisdiction to hear applications by workers who allege they have been bullied at work. The proposed bullying schedule will take effect from January 1 2014. The FWC commissioned Employment Research Australia (ERA) to conduct research which examines the approaches used by the UK Advisory, Conciliation and Arbitration Service (Acas) in dealing with bullying and harassment issues and complaints and considers how such approaches might be applied in the Australian context. The research design included analysis of Acas research, management information and guidance documents, along with interviews with Acas advisers.

In providing advice and guidance in relation to bullying and harassment, Acas recommends the use of informal approaches to dealing with bullying and harassment issues in the first instance, if feasible in the circumstances. If this does not yield results, it advocates the use of formalised processes within the workplace. Where formal processes fail to yield a satisfactory resolution, Acas may assist the parties via its pre-claim conciliation (PCC) or conciliation functions (in cases of unfair constructive dismissal or harassment due to a protected characteristic). Alternatively, the case may go to an employment tribunal.

Acas services that provide assistance in relation to bullying and harassment matters include their national **helpline**, which receives significant numbers of calls in relation to bullying and harassment, primarily from employees. Helpline advisers provide advice on the (informal/formal) options available to callers in resolving bullying issues and they make assessments as to whether cases are suitable for PCC. Acas' **website** includes content relating to bullying and harassment in the form of downloadable guides for employers and employees, summaries of research relating to bullying and short articles providing advice on the management of specific bullying issues. Acas' plain-English **employer and employee guides** on bullying and harassment are downloaded/ordered in large volumes. The employer guide stresses the benefits of organisations embedding bullying procedures and policies, while the employee guide principally provides advice on routes to resolution. Acas' free **PCC and conciliation** processes are conducted by telephone, and are of short duration, typically yielding financial settlements. In the majority of cases, PCC and conciliation occurs after the claimant has left their job.

Acas provides **training** on bullying and harassment for managers, employees and their representatives via free online-learning courses and charged-for, tailored workplace training, open access training and certificated training for workplace mediators. Training focuses on equipping participants with the knowledge and skills to identify bullying behaviours and respond confidently when they occur. Acas' **in-depth advisory services** include advisory calls and visits, and workplace projects. Workplace projects are commissioned and conducted jointly by managers, employees and representatives and many involve Acas working with these parties to improve workplace cultures and relationships. Both training and advisory services provide in-depth assistance for organisations in relation to the development and implementation of tailored bullying and harassment procedures, policies and workplace assistance programmes.

Acas provides charged-for **mediation** for bullying and harassment cases relating to interpersonal disputes but will not mediate in cases of severe bullying requiring disciplinary action. Mediation is conducted as joint meetings, at the workplace, with largely unrepresented parties (typically employees and their immediate manager). Settlements may be verbal agreements and are wholly confidential to the parties involved. Mediation is primarily commissioned by employers to repair relationships and is conducted either instead of, or after, use of formal procedures. The evidence on whether Acas mediation is successful in resolving relationship problems is mixed, although settlement rates are high. One study found that managers were reluctant participants in mediation and felt that

mediation was not successful in addressing employees' performance issues. Employees, meanwhile, thought that mediation did not lead to improvements in management behaviour. Despite this, mediation was deemed to be an effective means of enabling individuals to continue to work together and stay in the organisation.

Acas' engagement strategy, in promoting linkages with other bodies in respect of workplace bullying and harassment, primarily involves working with intergovernmental agencies/regulators and employer/employee peak bodies. Acas works with these organisations to ensure consistent messages are conveyed about best practice in preventing and resolving bullying and harassment disputes.

Key lessons drawn from Acas' experience for the FWC relate to: the value of producing guidance material advising use of "informal" resolution approaches, and failing that, formal procedures; the possible reluctance of individuals to make bullying applications to the FWC while in work; and in regard to how mediation in bullying and harassment cases may be more successful where face to face mediation is used, where both parties are committed to repairing the relationship, where settlements remain wholly confidential and where mediators have deep knowledge of employment practice and regulation.

Orders to prevent bullying might include directions for: mediation, the development of bullying and harassment/grievance and discipline/or transparent performance management policies and procedures; counselling; training; transfer of the bully/harasser; written warnings; an apology; employer monitoring of the relationship; and the establishment of workplace structures to provide early warning of bullying incidents and provide support to those being bullied.

Acas plays a novel role within dispute resolution systems internationally in terms of its independent status and the breadth of services it provides. There is no corresponding organisation in the Australian context and as such there is no obvious body that might provide Acas-type functions in respect of bullying and harassment. It may be that a number of Australian organisations or agencies provide services based on Acas' functions. Services might include practical guidance documents for employers and employees, web information and resources, a dedicated telephone helpline or "live chat" advice service, mediation, and online, open-access and workplace training focused on developing and embedding procedures and practices for resolving bullying. In some cases Australian regulatory bodies currently provide functions such as guidance documents and training in respect of bullying and harassment. There is, however, less scope for provision of in-depth advisory services of the nature provided by Acas in the present context.

There is potential for the FWC to engage with a range of organisations in facilitating the effective operation of the new bullying jurisdiction. The FWC may work with:

- the FWO, to clarify processes and develop "joined up" functions;
- peak employer and employee organisations, to build awareness of the regulations and encourage them to conduct education campaigns with their members;
- trade unions, encouraging them to educate delegates about new provisions;
- inter-governmental partners, to develop consistent messages, information and advice regarding regulation pertaining to bullying and harassment;
- non-governmental bodies providing advice to unrepresented workers and employers, to build awareness of the regulations and provide guidance on expectations around how the process might work; and
- organisations that provide advice to SMEs, to provide guidance on the regulations.

Introduction: The proposed Australian framework and research purpose

The Fair Work Amendment Bill 2013, passed by the Senate in June 2013, provides the Fair Work Commission (FWC) with a new jurisdiction to hear applications by workers who allege they have been bullied at work. The proposed bullying schedule will take effect from January 1 2014. The Bill vests power in the FWC to make any order (other than pecuniary) it considers appropriate to prevent bullying. Before an order can be made, a worker must have made an application to the FWC under new section 789FC and the FWC must be satisfied that the worker has been bullied at work by an individual or group of individuals and that there is a risk that the worker will continue to be bullied. The Fair Work Bill provides that a worker is bullied at work if, while the worker is engaged by a constitutionally-covered business, another individual, or group of individuals, repeatedly behaves unreasonably towards the worker and that behaviour creates a risk to health and safety.

The FWC must begin dealing with a bullying at work application within 14 days. Section 590 of the Fair Work Act provides the FWC with flexibility to inform itself as it considers appropriate in relation to an application for an order to stop the bullying. This may include contacting the employer or other parties to the application, conducting a conference or holding a formal hearing. In the course of dealing with a matter, the FWC may make a recommendation to the parties or express an opinion.

Orders could apply to co-workers and visitors to the workplace and might involve: stopping a group or individuals from continuing the bullying conduct; monitoring conduct; requiring compliance with the employer's workplace bullying policy; requiring the employer to review their workplace bullying policy; and directing the employer to provide information and extra support and training to workers. Orders cannot provide for reinstatement or compensation. The explanatory memorandum notes that to provide for any compliance action being taken by the employer or an OHS regulator, the FWC will also have to take into account before making an order: results of any investigation of the bullying; procedures available to the worker to resolve grievances or disputes; outcomes from any such procedures to resolve grievances or disputes; and any other matters.

In most countries, workplace bullying and harassment complaints unrelated to discrimination are principally dealt with by Workplace Health and Safety (WHS) regulators. The FWC occupies a novel position in that it is one of the first national workplace relations tribunals charged with dealing with workplace bullying complaints. This provides the FWC with the opportunity to carve out a new role in dealing with this jurisdiction, but it also means that there are few models, internationally, that the FWC might look to for guidance. One of the few exemplars that might provide guidance is the UK system, and in particular, the Advisory, Conciliation and Arbitration Service (Acas).

In June 2013 the FWC commissioned Employment Research Australia to conduct research to gain a greater understanding of the nature of Acas' role in dealing with and preventing workplace bullying. The research process involved gaining insights into "lessons learned" from Acas' experience in relation to "what works" and what might be done to avoid potential pitfalls. In evaluating the Acas experience, the Commission sought recommendations relating to how the Acas "model" of dealing with bullying complaints might be applied within the framework set out in the Fair Work Amendment Bill 2013.

Research questions and design

The research was guided by the following questions:

1. What approaches are used by Acas in dealing with and preventing bullying complaints and what lessons can be learned from use of these approaches?
2. In dealing with workplace bullying, what is Acas' broader engagement strategy in promoting linkages with
 - peak employer and employee bodies
 - bodies representing, or dealing with bullying complaints for, self-represented employees and employers
 - employees and employers directly?
3. How might the Acas "approach" be applied within the proposed legislative framework as set out in the Fair Work Amendment Bill 2013?

Research was conducted over two phases: an initial project scoping and planning phase to assess the information sources available, and an analysis and reporting phase. The scoping phase established that there was little publicly-available material relating to Acas' engagement with stakeholder bodies or "lessons learned" by Acas in dealing with and preventing workplace bullying. Consequently the second phase involved telephone interviews conducted with two senior Acas advisers of considerable experience in dealing with bullying and harassment (one with a national role, the other in a regional office). These interviews discussed Acas' operations in dealing with workplace bullying and harassment and its stakeholder engagement strategies. Interviews ran for 50 minutes and were digitally recorded and transcribed. Data was also drawn from analysis of publicly available information sources such as: research reports, guidance documents and website material detailing Acas' functions; Acts and regulations; material from the websites of Australian and UK regulatory bodies dealing with bullying complaints; and from academic articles.

The data drawn from interviews and documents was analysed and reported thematically. This was then reviewed by researchers in the course of developing recommendations in relation to approaches that might be taken by the FWC to prevent and deal with and prevent workplace bullying complaints.

Acas' role in preventing and handling workplace bullying

This section of the paper describes the legal framework applying to bullying and harassment in the UK. It provides an overview of Acas' prescribed approach to handling bullying and harassment issues and then describes how bullying and harassment are dealt with by Acas in respect of each of its service areas.

Acas' role within the UK legal framework applying to bullying and harassment

Established in 1976, Acas is state-funded but independent of Government. Its impartial status is ensured by a governance arrangement which involves a tripartite council comprising representatives of employers and employees, as well as independents (Dix *et al* 2013). Acas provides a wide range of functions with the aim of improving organisations and working life through better employment relations. As well as resolving collective and individual disputes, Dix *et al* note that Acas seeks to prevent conflict and promote best practice through services and outputs including publications, a website offering guidance and toolkits, statutory Codes of Practice, management and employee training programmes, and in-depth consultancy with organizations and employee representatives.

Acas' activities in relation to the prevention and resolution of bullying and harassment claims will be detailed in respect of each of these service areas in the latter half of this section of the report.

There is no specific legal provision protecting employees from bullying in the UK. Instead, a range of statutes are relied upon to deal with bullying. The Employment Rights Act 1996 enables an employee to claim unfair constructive dismissal if the employer has failed to maintain trust and confidence and has breached their employment contract. Bullying may be a feature of claims brought under constructive dismissal and other jurisdictions.

The employer's duty of care under the Health and Safety at Work Act 1974 may also apply to cases of alleged bullying. If the employer has breached the duty to protect the employee's health and safety work (for example by failing to protect against bullying), the employee could be in a position to bring a civil action for damages against the employer. Under the Management of Health and Safety at Work Regulations 1999, employers have a duty to carry out an assessment of the risks to employees' health and safety, and to take preventative measures to deal with these. In the worst cases, the perpetrator of bullying behaviour could be criminally liable under the Public Order Act 1997 or the Protection from Harassment Act 1997, although Suff and Strebler (2006:6) note that in reality there are relatively few prosecutions for workplace bullying under these laws. In addition, employers are subject to vicarious liability in the case of employees who commit bullying and harassment and can be pursued for failing to cease or protect against bullying and harassment, unless reasonable steps have been taken to prevent it (Acas 2006).

Acas advisers stated that in their (considerable) experience, they had not heard or known of anyone that had taken a bullying and harassment case using health and safety legislation as a lever. Bullying and harassment cases were almost entirely taken through the Employment Tribunal (under The Employment Rights Act or Equality Act 2010). The health and safety laws were described as only tangential to this activity and were instead used as the framework for the employer's duty of care to provide a safe workplace, including ensuring workers' mental and emotional wellbeing. Where Acas deals with bullying and harassment issues in workplaces, advisers emphasise to employers that there is "legal backing" for duty of care under health and safety legislation. The health and safety legislation was described by one adviser as providing a structure or means of validation for employers when developing policies and procedures to protect their employees from unnecessary stress.

The UK Health and Safety Executive (HSE) identifies bullying and harassment as one cause of stress at work. HSE defines stress as "the adverse reaction a person has to excessive pressure or other types of demand placed upon them". HSE provides guidance to employers to the effect that looking after the health of employees includes "taking steps to make sure that employees do not suffer stress-related illness as a result of work".¹ From 2005 onwards a major area of the HSE's work centred on promoting activities which reduce stress at the workplace. Many of the resources developed by the HSE during this program of work focus on the identification of six primary workplace stressors, these being demands, support, control, role, relationships and change. Bullying is highlighted as a factor causing workplace stress within relationships (see HSE 2009). The HSE has developed a free-to-download "stress assessment" diagnostic survey tool for employers to measure employees' responses against the different stressors. An algorithm has been used in developing the tool such that if an individual completing the survey is being bullied, this is identified as a "red flag".

The HSE's role in regard to bullying and harassment includes workplace inspections which are triggered by worker complaints and are carried out in the course of targeted campaigns (with large workplaces most commonly subject to inspections). When inspecting workplaces, HSE inspectors identify traditional risks to health and safety, for example manual handling or hazardous materials

risks, while also examining workplace policies in respect of stress and the provision of a stress-free workplace (including bullying as a possible factor within this).

Much of Acas' activity is targeted at preventing and dealing with both bullying *and* harassment and these phrases are often used interchangeably to denote the same behaviours. However in an employment law context, harassment only applies to behaviours that are covered by the various strands of anti-discrimination legislation, most prominently the Equality Act 2010, which defines harassment as "unwanted conduct related to a relevant protected characteristic,"ⁱⁱ which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual". In such cases the recipient of harassment has a "protected characteristic" and is treated unfairly because of that characteristic. Harassment may amount to discrimination under the Equality Act 2010 or unfair constructive dismissal under the Employment Rights Act 1996 and can be dealt with in an employment tribunal.

Unlike harassment, bullying has no such legal recourse. There is no law against being bullied and the law does not offer access to tribunals for cases of bullying. It is not possible to make a direct complaint to an Employment Tribunal about bullying as it is not related to a protected characteristic. If bullying occurs at the workplace then an employee can resign and claim "constructive dismissal" on the grounds of breach of contract. Generally, if a bullying complaint is raised at the workplace, it is expected that it will be dealt with using informal means or grievance or disciplinary procedures (although an Acas adviser noted that employers are generally reluctant to deal with bullying issues). There is no legal compulsion for an organisation to have grievance or disciplinary procedures in place but an employment tribunal will take into consideration the application of the Acas Code of Practice on Discipline and Grievance if they are called upon to deal with an issue at that workplace.ⁱⁱⁱ The Acas Code suggests that organisations may wish to develop specific procedures for dealing with bullying and harassment issues (Acas 2009:2).

While no strict legal definition of bullying applies in the UK, Acas classes bullying as repeated or persistent behaviour that is: "offensive, intimidating, malicious or insulting behaviour; an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient" (Acas 2010a:1). Acas' stance is that it is for each individual to determine what behaviour is acceptable to them and what they find offensive or bullying behaviour: the key factor is the effect on the individual recipient, not the intention of the "bully". The Acas guide for employers on bullying and harassment at work (Acas 2010a:1) notes:

"... those making a complaint usually define what they mean by bullying or harassment – something has happened to them that is unwelcome, unwarranted and causes a detrimental effect. If employees complain they are being bullied or harassed, then they have a grievance which must be dealt with regardless of whether or not their complaint accords with a standard definition."

Acas advisers noted that bullying and harassment was one of the few areas of employment practice in which a statutory code of practice did not exist. Leading up to the passage of the Equality Act 2010 there was support from some quarters for the development of a code of practice but this did not eventuate. Acas advisers stressed the difficulty of developing a code given the "perceptual" nature of bullying and harassment, in that the behaviours constituting bullying and harassment are defined by the person being bullied.

Acas' prescribed approach to dealing with bullying and harassment

Consistent with the aims of the Fair Work Amendment Bill, Acas advocates the earliest possible resolution of bullying and harassment issues at the workplace level to avoid escalation (a “nip it in the bud” approach). Acas recommends the use of informal approaches to dealing with bullying and harassment issues at as low a level as possible and without recourse to formal procedures, if feasible in the circumstances. If this does not yield results, formalised processes may be used. Acas guidance recommends that those making complaints should have the discretion to decide whether they want the complaint dealt with formally or informally. This “informal/formal” approach to dealing with bullying is also advocated by other UK organisations providing guidance on dealing with bullying, including the Equality and Human Rights Commission, and the Andrea Adams Trust (<http://www.andreadadamsconsultancy.com/>).

Informal approaches include informal discussion, counselling, coaching, HR or staff welfare providers dealing with the complaint, or mediation. As the Acas bullying and harassment guide for employers (2010a:8) notes,

Sometimes people are not aware that their behaviour is unwelcome and an informal discussion can lead to greater understanding and an agreement that the behaviour will cease. It may be that the individual will choose to do this themselves, or they may need support from personnel, a manager, an employee representative, or a counsellor.

Advisers described how the advice given to those who contact Acas for assistance is that sometimes “a quiet word” is as or more effective in dealing with bullying than formalised processes. Use of an organisation’s formalised process to deal with bullying might in itself cause an escalation in behaviour as those accused of bullying may feel under threat and act defensively. However use of informal processes (“talking the issues through”) allows those involved to “acknowledge the situation that got them there, but now move forward with relationships reasonably intact and free from fear that “I’m going to have a disciplinary because I might have bullied you unintentionally.” Use of low-level, informal means allows for early intervention in resolving issues and avoids bullying incidents being “highlighted in lights” throughout an organisation. Mediation was said by Acas advisers to straddle both informal and formal approaches, reflecting Saundry *et al’s* (2011) suggested “two-speed approach” to using mediation to resolve bullying and harassment issues which is discussed later in this section.

Where informal resolution is not possible, the employer may conduct an investigation into the complaint. The Acas guide for employers on bullying and harassment at work (Acas 2010a) recommends that managers’ first response to a bullying complaint should involve prompt, objective and independent investigation of the complaint. Having gathered all the evidence, employers should then ask themselves “Could what has taken place be reasonably considered to have caused offence?”. If the complaint is upheld the employer may decide that the matter is a disciplinary issue which needs to be dealt with formally at the appropriate level of the organisation’s disciplinary procedure.

Acas guidance documents stress the benefits of providing counselling in cases where investigation shows no cause for disciplinary action, or where doubt is cast on the validity of the complaint. Counselling may resolve the issue or help support the person accused, as well as the complainant, by providing a confidential means of resolving the complaint without need for any further or formal action. Some organisations are able to train staff from within to provide counselling, others may contract with a specialist counselling service or employee assistance programmes.

Acas’ guide for employers on bullying and harassment at work directs readers to the Acas Code of Practice on disciplinary and grievance procedures, which sets out principles for handling disciplinary

and grievance situations in the workplace. In cases which appear to involve serious misconduct and there is reason to separate the parties, a short period of suspension of the alleged bully/harasser may need to be considered while the case is being investigated. Acas advises that this should be with pay unless the contract of employment provides for suspension without pay in such circumstances. A suspension without pay should be exceptional as this in itself may amount to disciplinary penalties. Acas advises employers to not transfer the person making the complaint unless they ask for such a move (as the complainant may later claim unfair constructive dismissal).

Counselling or training may take the place of a penalty, but where a penalty is to be imposed Acas advises that all the circumstances should be considered, including: the employee's disciplinary and general record; whether the organisation's procedure points to the likely penalty; action taken in previous cases; any explanations and circumstances to be considered; and whether the penalty is reasonable. Written warnings or suspension or transfer of the bully/harasser are examples of disciplinary penalties that might be imposed in a proven case. Where bullying or harassment amounts to gross misconduct, dismissal without notice may be appropriate. Beyond penalties being issued, the complainant might resign and claim constructive unfair dismissal on the grounds of breach of contract, which would result in the case being conciliated by Acas or going to an employment tribunal. However where the parties continue working together, Acas guidance notes that internal or external mediation may help resolve the relationship issue and enable the parties to work together better in the future.

The following sections set out Acas' approach to dealing with bullying and harassment with respect to each of the following service areas or functions that it provides:

- Helpline advice and support
- Website information and guidance products
- Conciliation and pre-claim conciliation in constructive dismissal cases
- Training and in-depth assistance
- Mediation

Helpline advice and support

Acas operates a national telephone helpline service that provides confidential, impartial advice. A key aim of the helpline is to reduce the number of problems going to employment tribunals. It receives just under one million calls annually from employers, employees and representatives on a range of subjects (Acas 2013). Employees comprise the largest proportion of callers (around half of all callers), and the main call subject area is discipline, dismissal and grievances, with over one in four callers ringing to seek information and advice on these topics (York and Fettiplace 2012). Dix *et al* (2013) provide a more granulated analysis of call patterns, showing that around one call every two and a half minutes relates in some way to bullying and harassment. In 2009/10, this amounted to 80,000 (eight per cent of) calls. Around four in five of these calls are from employees or employee representatives.^{iv} Acas also provides a dedicated, confidential "Equality Direct" telephone helpline (staffed by Acas national helpline staff) which advises on all aspects of equality issues in the workplace including harassment on the basis of discrimination. This helpline received 2,200 calls in the 2011/12 year.

When receiving calls relating to alleged bullying, the advice and information provided by helpline advisers is dependent on the specifics of the call. Nevertheless the key message given to all callers in regard to bullying is that there is no law against bullying and so there is a need to consider a number of different ways of tackling it. Consistent with Acas' prescribed approach detailed earlier, helpline staff advise that - taking into account the severity of the bullying and the emotional strength of the

individual being bullied - a first step may be for the caller to raise the issue informally with the perpetrator and/or seek advice on how to deal with it from the trade union (if a member) or from fair treatment advisers or other employee representatives, where present. If these approaches fail to yield a result that the caller is happy with, they are advised that they have the option of raising it under their organisation's grievance procedure. If the employer does not take the bullying and harassment seriously and the issue remains unresolved despite a grievance being triggered, and the caller finds that remaining in the workplace is untenable, they are advised that they may leave the job and claim constructive dismissal.

Where the bullying is not severe in nature, helpline advisers inform callers that Acas offers a mediation service. In doing so, advisers note that mediation is a charged-for service and so would require the caller asking their employer to pay for mediation. The employer and caller would then need to approach Acas jointly and both parties in the bullying case would have to agree to take part in mediation before Acas can agree to provide mediation services.

Where *employers* call the helpline for advice on resolving bullying and harassment problems, helpline staff provide information on the range of services (described next) that Acas provides, including training and in-depth advice.

Website information and guidance products

The Acas website

In the 2011/2012 year the Acas website received more than 4.5 million visits (Acas 2013). The website includes content relating to bullying and harassment in the form of downloadable guides for employers and employees, summaries of research relating to bullying and short articles providing advice on the management of specific bullying issues, such as cyber-bullying. Most of this content directs readers to information about Acas training on bullying and harassment.

The websites of other bodies with a role in providing advice on bullying and harassment, such as the Health and Safety Executive and Citizens Advice Bureaux, also contain webpages providing information on bullying and harassment and these pages provide links to the Acas website.

Bullying and harassment guidance products

Dix *et al* (2013) report that in the financial year 2009/2010, 20,000 free advice leaflets were ordered on the subject of bullying and harassment, with employees as the predominant customer. Acas provides two plain-English guides on bullying and harassment: one directed at managers and employers (Acas 2010a) and the other at employees (Acas 2010b). Both are primarily accessed via the Acas website, free to download.

The guide for managers and employers offers practical advice to help managers and employers prevent bullying and harassment and to deal with any cases that occur. A key focus of the publication is on encouraging organisations to formalise standards in terms of both bullying and harassment and grievance and disciplinary policies and procedures. The guide provides guidelines for and checklists of elements that might be included in a bullying and harassment policy (pp 5-6) and recommends that staff be involved in development of the policy. It also emphasises the need for managers to produce an organisational statement, communicated to all staff, about the standards of behaviour expected and for managers to let employees know that complaints of bullying and harassment, or information from staff relating to such complaints, will be dealt with fairly, confidentially and sensitively.

The Acas guide for employees advises employees to inform their union or staff representative of the bullying problem, or seek advice from external sources (Acas, Citizens Advice Bureaux, or specialised bullying telephone/internet helplines) or internal sources (a line or personnel manager, or workplace-affiliated counsellor). It suggests that employees tell the alleged perpetrator that what they are doing is causing them distress, or ask someone else to do so on their behalf. If employees decide to make a formal complaint they are advised to ask their union representative or other adviser to assist them in stating the grievance clearly. Once an investigation has been conducted the guide suggests that the employee and their employer may wish to consider mediation or counselling in resolving the dispute. Alternatively, disciplinary action may be taken against the bully/harasser. The guide states clearly that if the employee leaves the organisation and makes a claim to an employment tribunal, the tribunal will expect the employee to have tried to resolve the problem with the organisation and submit any records they have kept in considering a claim. The guide promotes the use of mediation to resolve disciplinary and grievance issues. This guide is also available to a wider audience, free-to-download, via the central UK government information portal (www.gov.uk) "bullying at work" page.

Conciliation and pre-claim conciliation in constructive dismissal cases

In the 2011/12 year Acas dealt with 72,000 individual conciliation claims (Acas 2013). The primary jurisdiction in which Acas provides conciliation is unfair dismissal. In 2011/12, Acas conciliated in 40,580 unfair dismissal cases (56 per cent of all individual conciliation cases). Another 30 per cent of individual conciliation cases were taken under the Equality Act jurisdictions (disability, sex, race, age, religion, belief or sexual orientation discrimination) (Acas 2013). An Acas adviser noted that while these cases are categorised by jurisdiction rather than by "type" of discriminatory behaviour, discrimination claims often included harassment claims.

Acas has a legal duty to offer free, voluntary conciliation where a complaint about employment rights has been made to an employment tribunal, and a power to provide conciliation where a claim could be made, but has not yet been made. Once a case has been referred by the Employment Tribunal Service to Acas, an Acas individual conciliator seeks to obtain a resolution of the matter by liaising between the applicant and the workplace, thus precluding the need for the case to be heard by the employment tribunal. In nearly all cases the conciliator will deal with the parties by telephone and only rarely face to face. Purcell (2010) notes that less than 5 per cent of conciliation cases involve a face to face meeting with the conciliator and even here it may not be that there will be a face to face meeting with the parties together. The conciliation process used by Acas most closely resembles facilitative mediation.

Acas' role is to help find a solution that both sides find acceptable. Conciliators do not impose solutions, but assist the parties to settle their differences on their own terms. Acas distinguishes conciliation from mediation on the basis that the processes used are essentially the same, but conciliation "tends to be used if an employee is making a specific complaint against their employer". Acas stresses that conciliation is independent of the Employment Tribunal Service and is confidential and thus cannot be used as evidence at a tribunal hearing. If agreement is reached it is normal for the case to be withdrawn from the tribunal and registered as "settled". Professor John Purcell, former Acas Strategic Academic Adviser, notes that the Acas conciliator is required to seek reengagement or reinstatement of an applicant, if relevant, but that this is rarely achieved. He adds,

It is very rare for a tribunal to order reinstatement, preferring a financial award as compensation, or for Acas conciliation to achieve this type of resolution even though they are

required to attempt it. In effect conciliation operates in the shadow of the tribunal system searching for agreement on levels of compensation rather than reinstatement (Purcell 2010).

An Acas adviser made the observation that employers are disposed towards conciliation as it is free of charge, but also because many are “terrified” of having to appear before the Employment Tribunal due to the time, cost and reputational risk of doing so (all three of which, according to this adviser, appeared to be “inflated” in employers’ minds).

Acas also provides early or pre-claim conciliation (PCC), handling close to 24,000 PCC cases in 2011/2012 (Acas 2013). This included 11,215 unfair dismissal cases (47 per cent of all PCC cases) with another 12 per cent in discrimination jurisdictions (a smaller proportion than the 30 per cent of discrimination conciliations handled by Acas). Callers to the Acas helpline are steered towards PCC based on the assessment of the helpline adviser that the issue discussed is suitable for PCC. For Acas to provide PCC, the conciliator must judge that the case is likely to go to a Tribunal unless settled or withdrawn. A pre-condition is that the parties have already tried to resolve the problem in question without external help, for instance by making use of workplace discipline, grievance or appeal procedures, and have not, at the time of contact with Acas, made an employment tribunal claim. The aim of this service is to resolve workplace disputes quickly and with minimal formality before they escalate into litigation, thus avoiding the employment tribunal system. If the parties can agree a basis for settlement, the conciliator will also offer to help them to record the terms in a binding written agreement. Cases resolved in pre-claim conciliation take, on average, less than four weeks to reach a conclusion.

The Enterprise and Regulatory Reform Bill became an Act of Parliament in April 2013 and will result in PCC being replaced by a new Acas Early Conciliation service, to be introduced in early 2014. From early 2014, those considering making an employment tribunal claim will need to contact Acas first. Acas will then offer Early Conciliation to try to resolve the dispute quickly and cost effectively. Cases that are not resolved through Acas’ Early Conciliation service may still go to tribunal, and in such cases Acas will continue to have a role in providing conciliation. An Acas adviser speculated that the shift to Early Conciliation may lead to an increase in bullying and harassment cases coming to Acas as people may be more inclined to fill in a relatively simple Acas register form (leading to Early Conciliation) whereas they may subsequently have been deterred from putting in a tribunal claim by the detail and length of the tribunal claim form.

The great majority of Acas conciliation and PCC work occurs in cases where the applicant has left their job and is seeking a financial settlement. This includes cases where applicants claim harassment related to a protected characteristic. In very rare cases, the applicant claiming harassment on the basis of a protected characteristic will have remained in their job but is considering submitting a claim to the tribunal. In such cases Acas would look at the circumstances of the case very carefully and may suggest that mediation would provide a better means of resolution. While it is rare for employees to take a claim while still working for their employer, most claims of this nature are made by workers in the public sector. An Acas adviser noted a weakness of the UK system is that conciliation is very much focused on a financial outcome, but in cases of harassment where the applicant is still in their job, resolution of workplace issues should be the primary goal of any process.

In “occasional” cases of bullying and harassment related to a protected characteristic where the case has been conciliated post-claim, the settlement may include non-financial penalties as well as a financial settlement. The former may include an agreement that the perpetrator be moved to a different department, sent on an equal opportunities awareness course, or attends an Acas training course. The settlement might also include direction that the organisation reviews its policy and

procedures, puts in place appropriate organisation-wide training, or that the parties go to mediation (conducted by any provider – not necessarily Acas).

In occasional circumstances conciliators recommend to the parties in conciliations involving bullying and harassment problems that they might consider using other Acas services such as workplace training or in-depth assistance. The approach taken is that the conciliator obtains their email address to send them material describing the services, and might say to the employer “You’ve obviously had some difficulties here, if you think it’d be useful for someone to come and talk to you about in-company training, we can send someone round”.

Training and in-depth assistance

Acas provides training and in-depth assistance to organisations using a variety of modes of contact, described in this section. Figures quoted from Acas’ 2011/12 annual report are provided to give an indication of Acas’ reach in terms of dealing with bullying and harassment issues within each service area. It should be noted however that these figures under-represent the extent of Acas activity on bullying and harassment issues. While each instance of contact between Acas and organisations may address a range of topics of concern to employers (eg bullying and harassment, absenteeism, discipline and grievance handling) an Acas intervention is coded to only one (primary) area topic (for example, discipline and grievance handling). Acas’ training and in-depth assistance functions include the following:

- Tailored, charged-for **workplace training** is designed by Acas advisers in consultation with workplace managers and employee representatives to reflect the needs of each workplace. Acas’ workplace training sessions can involve training in the development and use of bullying and harassment procedures for managers, employees and employee representatives. Acas also conducts training for employee representatives with designated roles as workplace bullying and harassment officers (as with fair treatment advisers in the Mersey Ambulance case study profiled later in this section). Acas **open access training** comprises charged-for, off the shelf public events provided by each of Acas’ 11 regional offices, with bullying and harassment sessions regularly scheduled.

In the 2011/12 year Acas delivered 82 bullying and harassment workplace and open access training sessions to 2,079 delegates (mainly workplace training). Acas open access and workplace training courses addressing other topics – for example, “having difficult conversations”, “toxic workplaces – how to tackle them”, dignity at work, or equality and diversity - also cover strategies pertaining to dealing with bullying and harassment.

- Acas provides charged-for **training for workplace mediators** who may deal with bullying issues in the workplace through their Certificate in Internal Workplace Mediation (CIWM). Demand for this five-day training course has been steady since its introduction in 2004: in 2011/12 Acas delivered 13 in-company CIWM courses and ran 30 open-access courses, training a total of 254 delegates. CIWM training delegates are in most cases employees trained by Acas to act as internal mediators in their own workplace in addition to their day jobs. The role played by Acas-trained workplace mediators is described in Latreille (2011). Acas advisers noted that organisations are increasingly considering the provision of in-house mediation as an alternative to formalised discipline and grievance procedures due to the high cost of dealing with workplace problems through formalised procedures.

- **Online learning** (located on the Acas website – free of charge and confidential to use): Acas provides a suite of ten e-learning training courses designed primarily for use by “managers, supervisors and anyone responsible for improving business or operational performance”. As well as providing a training course specifically focused on bullying and harassment, other courses provide guidance for managers dealing with workplace bullying and harassment, including those relating to discipline and grievance handling, equality and diversity, performance management, conflict resolution and managing people. The course content incorporates “theory” and practical case studies and allows users to test their knowledge through interactive questions and a test on completion. Users are able to re-visit the course at a later time and to share the course within their organisation by forwarding the weblink to colleagues.
- **In-depth advisory telephone calls** delivered by Acas advisers to employers to talk about any problems or issues the employer wishes to discuss. In the 2011/12 year, 40 of 2,378 calls (2 per cent of all) were categorised as primarily addressing bullying and harassment issues.
- **In-depth advisory meetings** where Acas advisers visit organisations to advise managers on employment related-matters that are raised. In the 2011/12 year, 27 of 1,001 visits (3 per cent of all visits) were categorised as primarily addressing bullying and harassment issues.
- **Business support exercises or “workplace projects”** (formerly called advisory projects). Acas conducted 234 of these in-depth consultative projects in the 2011/2012 year, around half of which were charged for. A small number of these were primarily categorised as bullying and harassment in 2011/12 (9 of 234 - 4 per cent). However, many of the workplace projects conducted by Acas address bullying and harassment under another “banner”. It is rare for Acas to be approached to conduct a project to specifically address bullying and harassment issues. In most cases, organisations approach Acas for assistance on the basis of other issues relating to, for example, a problematic workplace culture or poor working relationships, and bullying and harassment will be one aspect or manifestation of this. Workplace projects are always commissioned and conducted jointly with managers and employees and/or their representatives. Acas advisers use techniques such as joint working groups, workshops and focus groups of management and employees/employee representatives; diagnostic exercises; employee surveys; and participant training (Dix and Oxenbridge 2004). Case study data indicate that Acas interventions in relation to bullying harassment often involve a combination of workplace project and workplace training activities where it is clear during the workplace project that training is required to build the capabilities of employees or management.

Service user characteristics and “routes in” to Acas’ training and in-depth advisory services

Most organisations seeking Acas’ assistance in training or workplace project functions do so as a result of having had an adviser come to the workplace during an in-depth advisory visit. In many cases, the in-depth advisory visit itself will be triggered by the employer making a call to the Acas helpline, with the helpline adviser then offering for a senior adviser to visit the employer at the workplace to discuss issues. In-depth advisory visits are also advertised on the Acas website.

There is a great deal of cross-promotion of Acas services by Acas staff. At the completion of workplace projects or training courses Acas advisers suggest that participants may wish to commission Acas to conduct training in relation to specific problem areas identified during the workplace project or may wish Acas to provide training for other parts of their organisation. It is Acas’ standard practice for trainers conducting open access and workplace training courses to publicise Acas’ in-depth advisory

services by saying to participants, “If you think it’d be helpful for me to pop out and see you, or a colleague to see you, for more in-depth advice, we can do that.”

Advisers also noted that there is a high volume of “hits” on the Acas website directing users to information relating to Acas’ training services. The primary route in to workplace and open-access training for most (72 per cent of) training delegates is online channels such as the Acas website (Acas 2013). Other routes in include work done by Acas advisers to publicise these services throughout their extensive regional networks. Acas regional offices run a number of seminars and coordinate forums of HR and business practitioners under different thematic areas (for example, Equality and Diversity) and these networking fora are used to convey information about Acas’ services in relation to tackling bullying and harassment problems. Acas advisers speculated that employers involved in conciliations or “nasty tribunal cases” might also commission Acas to conduct training to tackle specific problem areas highlighted in conciliations. The employment tribunal has the power to direct the parties to undertake training or review their policies under the Equality Act but advisers noted that they had never, in their professional lives, encountered an organisation that had been directed to undertake such activities, adding that this power of the tribunal will be repealed in October 2013.

Acas’ workplace project and training functions are provided to a high proportion of repeat customers, which may be due to the high levels of satisfaction reported with these Acas services (Acas 2013). Most of Acas’ training customers in respect of bullying and harassment are medium to large employers. Acas is less likely to conduct training for the largest employers, which tend to have in-house training capability, or for smaller employers, who are less inclined to provide training *per se*. For the most part, employers are motivated to seek Acas training having developed an awareness of problems in the organisation and realising that they require guidance in how to deal with the problems identified. An Acas adviser noted that bullying and harassment problems may be identified as a result of the employer using the HSE diagnostic tool and having a bullying “red flag” appear. Acas had been asked to conduct a great deal of training in these circumstances when the HSE’s stress campaign and resources were first launched, however less training was triggered from use of the HSE’s diagnostic tools nowadays.

In other cases, Acas training is triggered by employers running employee engagement surveys which indicate low scores in relation to commonly-asked employee survey questions such as “Do you feel you are treated with respect at the workplace?” or, “Have you experienced bullying in the last 12 months?”. An adviser noted that in many cases, the employer would have been aware of bullying and harassment occurring prior to its identification through survey data, but might have been reluctant to tackle it. Often the results of such diagnostic exercises can provide a more immediate impetus for employers to do deal with the issue.

Other indicators not directly related to bullying and harassment may provide the stimulus for employers to commission Acas training or in-depth assistance and in the course of an Acas intervention, bullying and harassment might be identified as organisational problems requiring resolution. Such indicators identified by advisers might include high levels of turnover, grievances and absenteeism and low morale. In other cases, the impetus for Acas’ involvement might be a realisation that the organisation’s bullying and harassment policies are non-existent or outdated, particularly in light of ongoing legislative changes in relation to protected characteristics. Acas’ role in such cases principally involves providing assistance in reviewing/developing new policies and then training managers and representatives in the revised/new policies and procedures.

Acas' approach in providing workplace training and in-depth assistance on bullying and harassment issues

Acas' approach in working with organisations on issues relating to bullying and harassment through workplace projects and training encompasses the following principles and activities;

- providing organisations with a knowledge framework around which they can build legally coherent, clear policies and structures for dealing with bullying and harassment;
- assisting organisations to identify and specify behaviours that could constitute bullying and harassment in their organisation (“what bullying means and what it looks like”). The challenge for organisations in defining bullying lies in bullying and harassment being largely perceptual, in that individuals determine whether certain behaviours have violated their dignity, humiliated them, undermined or belittled them. Bullying behaviours are also nuanced according to the characteristics of the organisation and the sector it operates in. The key issue is making sure that employees understand “where the line lies” between, say, banter and bullying.
- Providing managers and others with the skills and confidence to deal with bullying when it occurs. This can include exploring strategies for empowering individuals and giving them the confidence to raise issues with the perpetrator or seek help from workplace representatives in the first instance; providing frontline managers with the confidence to make the right decisions and to successfully use informal approaches in seeking to resolving bullying problems; clarifying the circumstances where third party interventions (mediation, counsellors, independent investigators) might be used; and providing guidance on the use of more formal approaches (disciplinary and grievance procedures, conciliation, an employment tribunal, or the High Court).

According to an Acas adviser, the countervailing need of organisations in seeking Acas' help is in obtaining guidance on “what to do” when bullying occurs. While most bullying and harassment training in the UK marketplace focused on *defining* bullying, Acas' training focuses on *dealing* with bullying. This adviser observed that even where organisations have superior bullying and harassment policies and have trained staff in, and built strong awareness of, policies, bullying and harassment will still occur. It is therefore critical that organisations are able to deal with bullying speedily and effectively.

Kwaw *et al* (2011), in their evaluation of the impact of Acas open access training, highlight the practical nature of Acas training in bullying and harassment in terms of its outcomes. They found that 100 per cent of delegates attending Acas bullying and harassment training had either revised or planned to revise bullying and harassment policies. Broken down further, delegates were found to have made the following changes to their organisation as a result of the training:

- 22 per cent introduced one or more new policy
- 40 per cent reviewed one or more policy or practice
- 30 per cent revised one or more policy or practice
- 37 per cent planned to introduce one or more new policy or practice
- 33 per cent revised any area of practice relating to the issues addressed in the training

The following case studies (abridged from those on Acas' website) describe Acas interventions focused on assisting organisations to develop policies and practices to prevent and resolve bullying and harassment issues:

Acas workplace project and training at Mersey Regional Ambulance Service NHS Trust

Through its workplace project and workplace training functions, Acas assisted the Mersey Regional Ambulance Service NHS Trust to develop a new bullying and harassment policy and train staff in how to use the new procedures. The starting point for Acas was their assistance in helping the Trust to resolve a collective bullying dispute. Following this, Acas conducted workshops of large numbers of employees to identify issues around bullying and harassment at the Trust and to identify the shortcomings of the existing policy. A joint working party was then established of managers, union representatives and interested employees who drafted a new “Dignity at Work” bullying and harassment policy. The working party also designed strategies for raising awareness of the policy throughout the workforce and for appointing “fair treatment advisors” from within the workforce.

Next, seminars were held for senior managers and senior union representatives to discuss bullying and explain the new procedures and ten fair treatment advisors were recruited from within the workforce. Through its workforce training function, Acas trained 70 managers, fair treatment advisors, and trade union representatives in the new procedures. The fair treatment advisors have subsequently played a crucial role by educating staff about the procedures and providing them with support and advice in the event of bullying or harassment incidents. The new policy allows those subject to bullying or harassment to seek to resolve the problem informally and early, with the benefit that problems do not escalate and require formal resolution (Acas 2003).

Acas bullying and harassment workplace training at Swale NHS Primary Care Trust

The process of revising its bullying and harassment policy to incorporate new regulations led Swale NHS Primary Care Trust (PCT) to commission Acas to train staff to build awareness of the new policy and encourage its use. Acas trainers worked with the Trust’s HR staff to develop and refine the content of the training sessions. Training was attended by 64 managers and employees. The training was open to all staff, although it was mandatory for all managers to attend. A key impact of the training was that managers were now aware of their responsibilities and more confident in dealing with bullying and harassment issues. They dealt with bullying and harassment complaints actively and “early”, in a procedurally fair and correct way, before they became larger-scale problems leading to disciplinary action or Employment Tribunal cases (Acas 2006a).

Where Acas works with organisations to develop or revise bullying and harassment policies and procedures, it instills the importance of a number of steps or principles to be followed. These include:

- Emphasising the need for fair treatment: Employees may be reluctant to come forward if they feel that they may be treated unsympathetically or are likely to be confronted aggressively by the person whose behaviour they are complaining about.
- Recognition of a possible problem: A crucial first step - it sends a positive message to anyone in the organisation who may be being bullied or harassed that the organisation has recognised that there is a problem and something is going to be done.
- Identifying intolerable behaviour: policies should include basic information about what constitutes bullying and harassment. Anonymised specific examples may be used to send out an informal warning that certain behaviours will not be tolerated.
- The need for the organisation to set out the responsibilities of all organisational stakeholders in respect of the bullying and harassment policy: this may include employers/senior

managers/supervisors, individuals, trade union representatives, customers and external contractors, and contact/welfare officers.

- Providing guidance for all: for example, regular reminders to all staff about the standards of behaviour expected, which make it easier for all individuals to be fully aware of their responsibilities to others.

Dix *et al* (2013) summarise Acas' objectives in dealing with bullying and harassment as that of training managers in the early identification of behaviours which are offensive and unwanted, and equipping them in both policy and practice terms to respond to allegations using informal or established discipline and grievance procedures. Dix *et al* note that by offering training to affected parties, the opportunity is presented for a collective response to behaviours. The training provided by Acas in relation to bullying and harassment focuses on the responsibilities and roles of all parties in the workplace, along with providing participants with an understanding of the legal obligations. Dix *et al* note: "So whilst one of the outcomes of Acas intervention may be a new policy on bullying and harassment, it is the *joint working* to achieve a shared policy, and the shared learning that forms the heart of the approach."

Likewise, an Acas adviser agreed that the most effective strategies for the resolution of bullying and harassment issues are developed by and tailored to the staff and management of individual workplaces. Workplaces are different culturally and strategies for dealing with bullying and harassment need to fit with organisational cultures. As this adviser noted "The sorts of behaviour that go down on a building site are going to be different from the behaviours that would go down in a building society."

This adviser described examples of work done in assisting organisations to develop strategies for dealing with bullying in the form of intervention or resolution "packages". The example was given of an organisation that developed a yellow card/red card system analogous to that used in football. Acas worked with managers and employees to define behaviours that constituted a yellow card warning, or a red card penalty. This allowed staff to say to one another, "I think we're moving into a yellow card situation here", that is, crossing the line between acceptable and unacceptable behaviour. In doing so it allowed individuals such as managers to have the confidence to warn those displaying bully behaviours that "This is an area where some people might begin to feel uncomfortable". Advisers stressed that the phrases "bullying" and "harassment" were often unpalatable to the individuals they worked with (described below). Strategies such as the yellow card/red card approach allowed individuals and managers to identify and prevent further bullying issues using their own language that did not directly identify actions as bullying and harassment. This served to: soften a potentially challenging conversation; give managers and others greater confidence in calling out bullying behaviours; and defuse the potential for defensive behaviour from those identified as having used bullying behaviours.

A key **lesson learned by Acas in the provision of workplace training** relates to "branding". It was noted that there was significant "discomfort" around the use of the term bullying and harassment. Organisations were less likely to commission Acas to conduct training on bullying and harassment (presumably because this is an admission that bullying and harassment is occurring in the workplace). They were more likely to favour and to commission training on the topic of "Dignity at work" or "Equality and diversity at work" (each having a substantial focus on bullying and harassment).

Acas Equality Services

Acas has an Equality Services function that provides advice and consultancy services on diversity in employment. Although it is described as a separate service in Acas information products, it is mainstreamed within other Acas services. The goal of Equality Services is to assist organisations to develop and embed equality policies and practices and provide supporting activities such as training and monitoring. Acas has a dedicated Equality Direct helpline number (albeit staffed by national helpline advisers) which provides advice on equality issues such as discrimination. Equality Direct provides the following services:

- Conducting diagnostic sessions
- Assisting organisations in developing policies and procedures
- Board briefings
- In-depth advisory meetings, calls and workplace projects
- Workplace and open access training courses

Mediation

The Gibbons Review of Dispute Resolution in Britain (Gibbons, 2007) advocated greater use of alternative dispute resolution processes and in particular, mediation, in the resolution of workplace disputes. Despite the growth in interest in workplace mediation generated by the Gibbons Report, Acas' provision of in-workplace mediation services has remained fairly low, at around 250 individual mediation assignments per year over the last three years (Acas 2013). Acas advisers described the reason for the low volume of Acas mediations. First, Acas' is obliged to allow "the market" – that is, the growing number of trained mediators operating in the UK – to provide mediation services. If Acas was to provide publicly funded mediation on a broader scale it would be "skewing the marketplace" and taking too large a share of the market. As a consequence, Acas does not promote its mediation services and mediation is conducted as a "sideline". Acas does however promote its training for in-house mediators (the CIWM) which in essence "supplies the market" with mediators, some of whom complete the training, leave their employer, and go on to become consultant mediation providers. Second, Acas' mediation is more expensive than other competing services. Acas' mediation fees are fixed by the Treasury at £835 per day, while most sole traders supplying mediation services charge around £450 per day.

Further, the high calibre of the service provided by Acas, in terms of the thorough process used, can lead to a charge out rate that is higher than that of competitors. Acas mediation is conducted by pairs of senior staff members (experienced conciliators or advisers), and occasionally, teams of mediators, and Acas allows up to two days for each mediation (up to one day of preparatory discussions with the parties and up to one day of joint meetings with the parties). Mediators aim to have the parties in the same room, together, throughout the process, although both shuttle and face to face mediation techniques can be used. Dix *et al* (2013) note that in Acas mediation cases any agreement comes from the parties, not the mediator; the mediator does not judge or say who is right. Mediators do not require the parties to commit the agreement to paper if they do not wish to. The agreement is entirely confidential and the employer is not told what has been agreed by the parties. With the parties' permission, the mediator is able to inform the employer that an agreement has been reached, but will provide the employer with no other information.

Acas (2013:16) notes that mediation is most commonly used in cases where "... disputes between individual employees and their employers, or between individual colleagues or groups of colleagues, do not lead to actual or potential claims to employment tribunals and are not appropriate to (Acas') statutory conciliation services." Purcell (2010) notes that workplace mediation is most commonly used by Acas and other third party organisations in the case of in-employment disputes (as opposed

to post-employment disputes), such as those relating to accusations of bullying and harassment. Those commissioning Acas mediation tend to be predominantly HR, personnel or general managers (Acas 2011b, 2012) who typically ring the Acas helpline in cases where, according to an adviser, they have “two members of staff who are falling out, (and say) ‘I cannot get them to see sense and we need to mend this relationship’ ”.

Two surveys of mediations conducted by Acas over the 2010-2012 period find that the majority of mediations involved a dispute where one individual or group had authority over the counterparty (primarily employees and their line managers), and that in the main, mediations are entered into by the employer due to concerns about the impact of a dispute on workplace climate and staff absenteeism (Acas 2011b, 2012).

Percentages from the 2012 report are indicated in brackets in the following paragraphs, but it should be noted that these proportions are consistent across both surveys. Most of those commissioning mediations felt that had the mediation not taken place, there was a high risk of a negative impact on wider working relationships (74 per cent) and staff absenteeism (64 per cent), while 35 per cent felt there was a high risk of an Employment Tribunal case resulting from the issue. Most mediation occurred after formal grievance procedures had been used. The mediations took place face to face, most commonly at the workplace (in 60 per cent of cases) or Acas’ premises (21 per cent). The vast majority of participants (95 per cent) were not accompanied during the mediation process and of these the majority (61 per cent) were content to not be accompanied.

Participants in the 2012 Acas survey held mixed views as to whether the underlying issues had not been resolved following the mediation process. Only 19 per cent felt the issue had been completely resolved, 40 per cent reported that the issue had been partly resolved and the largest group, 41 per cent, stated it had not at all been resolved. Those who felt that the timing of the mediation was too late were less likely to feel that the issue had been completely or partly resolved. These views contrast with other indicators of success referred to by Acas advisers. Advisers noted that settlements are reached in around 80 per cent of cases, with research indicating that these settlements are sustainable and participants are highly satisfied with the service provided by Acas.

Mediation in cases of bullying

There is no publicly available data relating to the proportion of Acas mediations that address bullying issues, although an Acas adviser noted that “the word bullying probably comes up in almost all of them”. Acas’ position on the use of mediation in resolving bullying and harassment disputes appears to be that mediation is suitable for dealing with bullying and harassment problems, but only in certain circumstances (CIPD/Acas 2013; Dix *et al* 2013; Latreille 2011; Saundry *et al* 2011). An adviser noted that if, after initial conversations with the parties, it was clear that the case involved what they classed as serious or severe bullying, Acas deem mediation to be inappropriate and will advise the parties to go through formal or other resolution channels. In such cases the priority is for the organisation to deal with the alleged perpetrator.

The Acas guide for employers on workplace bullying and harassment (Acas 2010a) advises that mediation in the context of bullying and harassment is most likely to be successful if both parties:

- understand what mediation involves;
- enter into the process voluntarily; and
- are seeking to repair the working relationship.

The guide cautions that mediation can be a good way of dealing with bullying, discrimination or harassment situations but that this will depend upon the nature of any allegations. In some cases the individual and/or the organisation may view the allegations to be of such a nature that formal processes of investigation and possible disciplinary action are the only course of action. This coheres with Saundry *et al's* (2011) observation that mediation is often seen as suitable for interpersonal disputes or employee grievances but less appropriate for disciplinary issues, particularly those where there has allegedly been an infringement of employment rights.

Acas advisers, when asked explicitly about **lessons learned** in the provision of workplace mediation in cases involving bullying and harassment, noted the importance of using mediation techniques such as taking out provocative language and reframing techniques. A critical lesson, however, was that mediation was not appropriate where the case was clearly “a one sided, protagonist and victim situation”.

Duncan Lewis, former Acas Professor of Workplace Futures Acas (Acas 2006b) further advises in an Acas Policy Paper that mediation will not be appropriate for all alleged bullying cases as it is a voluntary process and it may be that one or both parties in a bullying and harassment case will not agree to its use. Nor is it appropriate if the alleged bullying incident is of a serious nature. He notes that mediation can be particularly useful if the alleged bully is not aware of the impact of their actions or that their behaviour constitutes bullying. Mediation may also be useful in smoothing relationships in the aftermath of an investigation, for example, where the allegation has not been proven. It is emphasised that even if the investigation does not find evidence of inappropriate behaviour on the part of the alleged perpetrator, the impact on the individuals concerned – particularly the person that has been falsely accused – can be far-reaching. He notes (p 12),

While the behaviour may not be categorised as bullying or harassment, it is still important to get to the bottom of the reasons for the difference. Otherwise, there could be a far-reaching impact on the working relationships of the individuals concerned and the rest of the team. Support also needs to be available to the person who has been falsely accused. Again, mediation could be a powerful approach to help resolve differences and restore the employment relationship.

Latreille (2011) conducted case study research for Acas of eight organisations with in-house mediation schemes which were recruited from Acas survey research and workplace projects/training. Views were commonly expressed by interviewees in case study organisations that interpersonal and communication difficulties often lay behind perceptions of bullying/harassment (for example, in relation to management style), and were thus amenable to mediation; but again that more serious issues, where the evidence was more clear-cut that actual discrimination or bullying had taken place, were not considered suited to mediation. It was felt that such instances should instead be dealt with through recourse to formal processes.

A recent guide to workplace mediation as a means of resolving disputes for employers that was produced jointly by the Chartered Institute for Personnel Development and Acas (CIPD/Acas 2013:12) also notes that perceived bullying and harassment issues are particularly suited to mediation but need to be judged “on a case-by-case basis, as serious cases of bullying and harassment, and clear cases of discrimination, may need to be dealt with by more formal procedures”. The guide helpfully sets out the range of circumstances under which mediation may not be successfully used (p 11):

Mediation **may not** be suitable if:

- used as a first resort – because people should be encouraged to speak to each other and talk to their manager before they seek a solution via mediation

- it is used by a manager to avoid their managerial responsibilities
- a decision about right or wrong is needed, for example where there is possible criminal activity
- the individual bringing a discrimination or harassment case wants it investigated
- someone has learning difficulties that would impair their ability to make an informed choice
- an individual is particularly vulnerable
- the parties do not have the power to settle the issue
- one side is completely intransigent and using mediation will only raise unrealistic expectations of a positive outcome.

This report quotes from a Ministry of Justice publication relating to employment tribunal statistics which succinctly describes the benefits of using mediation but also notes the critical role played by mediators in discerning when more formal procedures should be used (p 12):

Sometimes certain behaviours can be perceived as discrimination, harassment or bullying, when that is not how they were intended. Mediation can be a good way to help the “victim” see the other person’s perspective and help the other side see how their behaviour is affecting their colleagues. This is a difficult area and it is a judgement call for the mediators to make if it becomes clear during mediation that discrimination, harassment, bullying or poor treatment is going on. They would have to consider stopping the mediation. They would not normally do anything about the misconduct themselves due to the confidentiality agreed before the mediation, but they can advise the parties accordingly.

The CIPD/Acas guide suggests that mediation works best in workplaces where formalised policies for dealing with bullying and harassment are well-established, as mediation is “likely to sit naturally within the organisation’s approach to people management” (p 18). It provides examples of organisations that have written their mediation scheme or processes into bullying and harassment policies, profiling an in-depth case study of the use of mediation in resolving a case of perceived bullying (pp 30-31).

Dix *et al* (2013) are highly positive about the potential for mediation to resolve bullying and harassment disputes. Referencing Acas-commissioned research involving case studies of mediations used to deal with bullying and harassment cases, they argue that mediation can provide an open environment encouraging participation, in comparison to the more adversarial nature of grievance and disciplinary hearings. Moreover the mediation process gave the opportunity to consider the attitudes, motivations and feelings of the individual and the opposing party.

Saundry *et al*'s (2013) study for Acas of 25 participants in workplace mediation cases (15 of which were mediated by Acas) provides detailed insights into the types of challenges faced when using mediation processes to deal with bullying and harassment incidents. The mediation cases profiled included a number involving allegations of bullying and harassment in which mediations had been conducted at various points after an initial bullying complaint was made (these included, for example: post grievance; as last step prior to formal procedure; and after complaint, long into dispute). This report provides valuable lessons for the FWC on the conditions under which mediation may be most successfully used in bullying and harassment cases. Key findings (taken directly from the report) include:

- In around one-fifth of all cases studied, mediation was used because the alleged perpetrator had a history of bullying and harassment behaviour within the organisation but formal complaints procedures and processes were either not thought to be appropriate or had failed to produce a conclusive result.

- Although mediation is a voluntary process, many managers were reluctant participants (as in Sergeant's (2005) study of Acas mediation in SMEs).
- Participants cast doubt on whether mediations provide for sustainable resolution of bullying issues. Most line managers had little expectation that mediation would deal with what they saw as the underlying problem – the performance and/or capability of the other disputant. This was partly related to the stage at which mediation occurred but also related to the suitability of the process for examining managerial evaluations of capability or conduct. Managers felt frustrated that the discussion tended to focus around the complaint about their behaviour rather than the underlying performance issues of the complainant.
- At the same time, most of the respondents who had brought complaints against line managers were sceptical as to whether their managers' behaviour had fundamentally changed. As Saundry *et al* (2011:34) note, "there is a danger that in cases that involve bullying, harassment or discrimination that an apparent settlement through mediation can mask the continuation of behaviours that are unacceptable and require more formal action."
- In some cases, parties admitted to reaching an agreement in mediation in the full knowledge that matters had not been resolved – here participants had gone on to pursue a grievance at a later stage or had simply left the organisation. While in most cases mediation led to an agreement between the parties, the extent to which these represented sustainable resolutions was much less clear. A number broke down relatively quickly with suggestions that parties were simply going through the motions in order to complete the process.
- The authors conclude that those respondents who looked to mediation to provide a source of justice and/or closure were generally disappointed. Furthermore, there was little evidence that the mediations had broader organisational effects – this was partly due to confidentiality which provided something of a barrier to organisational learning. But there was also a sense that senior management too often saw mediation as a pragmatic way to dispose of difficult issues and had little longer-term interest as long as the dispute did not resurface.

Saundry *et al* note that mediation was not often used as a means of early dispute resolution, despite most interviewees reflecting that mediation would be more effective if used at an earlier point in the dispute, when parties were perhaps more open to compromise. Even where it was used prior to the onset of formal procedures, it tended to occur only after both sides had developed quite entrenched positions. It was generally seen as a last resort – when managers or HR practitioners had exhausted all other possibilities. These findings lead Saundry *et al* to raise the possibility of a "two-speed" mediation process: a light touch informal discussion facilitated by individuals with mediation skills, deployed quickly to nip emerging disputes in the bud; alongside an extended, more formal mediation process reserved for more difficult and complex disputes.

The findings cause Saundry *et al* to conclude that to expect deep underlying conflicts to be resolved through mediation is unrealistic. They state "In some cases, finding a pragmatic way of individuals being able to work together or at least stay in the organisation may be the best that can be achieved" (pp 35-36). Despite the findings of the research indicating that mediation may often not resolve the issues at the heart of bullying and harassment, like Dix *et al* (2013) they argue that the benefits of mediation can extend beyond a settlement: even where there is little chance of a sustained resolution, the simple fact that individuals have an opportunity to voice their concerns and exert some control over their situation can help to maintain the employment relationship. For complainants, even those who were sceptical of the process, mediation offered a relatively safe environment in which they could have their say which they perhaps felt had been suppressed within conventional grievance or disciplinary procedures.

Conciliation versus mediation in bullying and harassment cases

Acas advisers were asked to reflect on the distinctive benefits of both mediation and conciliation in dealing with bullying and harassment issues in the UK context. They noted that their conciliation service is more widely used by organisations than mediation because mediation is charged for while conciliation and PCC are provided free of charge. Conciliation was viewed as having advantages for applicants as it allowed them to receive a financial settlement. There is no cap on awards at tribunal for Equality Act claims and this had led individuals to believe that they may be eligible for substantial financial awards, thus providing the impetus for seeking conciliation.

A key benefit of using conciliation for Acas related to issues of cost and resourcing. It costs significantly less to conduct conciliation than mediation, as conciliation is generally conducted via telephone, quickly (conciliators' conversations with each party are short, at less than 45 minutes each). It was also suggested that the conduct of face to face mediations took a toll on Acas staff. An adviser noted, "For the individuals doing mediation the satisfaction is huge, but it's an intense and exhausting process". However the satisfaction attached to conducting conciliations was viewed as significantly less, with an adviser noting that conciliators are unable to "... get their teeth into a complex and subtle case of a broken relationship". This was due to the time constraints inherent in the conciliation process and the focus on arriving at a settlement quickly ("we've got to get this settlement, what would it take?"). It was felt that this inability to deal with underlying relationship issues served to frustrate conciliators.

In comparing the two functions, Acas mediation was described as a "Rolls Royce" service, in which customers were provided with

... focussed, skilled input from mediators for a considerable period of time, really digging down and understanding their concerns, behavioural issues, emotional impact, developing strategies for change in a way that conciliation – conciliation's all about keeping it out of the tribunal and mediation is about really repairing relationships.

As another adviser noted,

Conciliation is more about trying to resolve the details of the divorce without having to go to the High Court. Whereas mediation is very much about going to Relate (marriage guidance counsellors) to keep the relationship going.

Acas' engagement strategies in relation to bullying and harassment

At a national level, Acas works with other government bodies such as the Equality and Human Rights Commission, the Government Equalities Office (which is responsible for equality strategy and legislation across government) and other parts of government in the process of converting legislation and changes to legislation into products and services for use in workplaces. An example given was Acas' current work with parties ahead of the repeal, under the Equality Act 2010, of procedural elements relating to third party harassment provisions in October 2013. This has involved Acas working with government bodies and the social partners (employer and employee peak bodies) to develop clear and consistent messages for Acas and other organisations to deliver in relation to employer good practice around third party harassment. This engagement with government bodies

can often lead to Acas conducting large-scale projects around equality and diversity issues (including bullying and harassment) within individual government bodies, for example the Royal Air Force.

Acas also maintains active linkages with other organisations that provide information on bullying and harassment to employees or employers by working with centralised government information websites (such as www.gov.uk) to enhance the employment advice on their websites (Acas 2013).^v

Acas' engagement with peak employer and employee bodies

The Acas Council includes members from the key social partner organisations: the Confederation of Business and Industry (CBI) and the Trades Union Congress (TUC). In addition, Acas officers work closely with the CBI and TUC at both national and regional levels. At a national level this work involves liaising with them to ensure that consistent messages are being delivered by all parties in relation to equality issues that adhere to the processes and advice advocated by Acas guidance documents and advisers. Relationships with the CBI and TUC at regional level often do not involve joint work in relation to bullying and harassment issues specifically, but there is a broader dialogue between these parties about how to encourage “good workplace behaviour”.

Examples of Acas' work with other peak organisations include the following:

- Acas conducted and published joint studies on the use of mediation in bullying and harassment and other cases in conjunction with the Chartered Institute of Personnel Development (the Australian equivalent would be AHRI) (see CIPD/Acas 2008; 2013).
- The Dignity At Work partnership (www.dignityatwork.org): this initiative took place over several years leading up to 2007. It was funded by the Department for Business, Enterprise and Regulatory Reform (BERR - now BIS – Acas' funding body) and was steered by Acas, the HSE, the TUC, BERR, with a number of large employers, employer peaks and trade unions as partners. The website describes the aims of the project as “provid(ing) advice and guidance for anyone suffering from workplace bullying or harassment. We are also looking to spur on cultural change, to develop a code of conduct where respect for individuals is regarded as integral to the behaviour of employees and managers.” The partnership commissioned research and formulated guidance resources for trade unions, HR managers and “leaders”. There was an ambition among those involved for Acas to develop a statutory code of practice around bullying and harassment, however this did not eventuate.

Acas' engagement with bodies representing, or dealing with bullying complaints for, self-represented employees and employers

Little data was available on Acas' engagement with bodies representing or dealing with bullying complaints for self-represented employees and employers. Hudson *et al* (2007:47) in their study for Acas on unrepresented claimants' and employers' views on Acas' conciliation in race discrimination claims, note that in the “individual rights climate”, the importance to employees and agency workers of long-standing organisations with an advice role, such as Citizens Advice Bureau and the Commission for Racial Equality (now EHRC), has arguably grown. Acas offices have local links with CABx offices and CABx staff frequently ring Acas' helpline for information in providing advice to their clients. Acas also works closely with the EHRC on a wide range of matters within the equality agenda.

A further source of advice for unrepresented parties is legal advice centres, however it was not possible to assess whether Acas worked with these centres or their peak body. Whilst not specifically

related to bullying and harassment, Acas have however recently launched training sessions for those representing disputing parties in employment tribunal judicial mediation and/or in Acas conciliation and/or mediation, which are aimed at trade union representatives and solicitors.^{vi}

Acas' engagement with employees and employers directly

Acas' primary means of engagement with employees and employers is through its website and helpline, profiled earlier. Its guidance products also refer individuals to alternative sources of advice which give an indication of the types of bodies that self-represented parties may contact for assistance. The Acas guide on bullying and harassment at work for employees (Acas 2010) directs employees to the Acas helpline, trade unions, legal advisers, Citizens Advice Bureaux and the EHRC. The employer guide directs employers to the EHRC, but also to the Employee Assistance Professional Association (EAPA) for information on Employee Assistance Programmes.

More broadly, Acas is seeking to build its profile among potential users – both employees and employers - via social media (Twitter and LinkedIn). The Acas 2011/12 Annual report notes “Our LinkedIn group has become a “go to” place for HR managers to get information and advice.” This LinkedIn group is very active with HR professionals and others posting questions regularly about all aspects of employee relations practice and regulation. This provides a means for Acas to answer queries and provide information about best practice in regard to issues such as bullying and harassment and in doing so, disseminating this information to a broad community of practitioners.

At a regional level, some Acas offices run regular equality and diversity forums, attended mainly by HR specialists and some trade union officers, which involve discussion and information sessions about all aspects of equality and diversity. There is, however, no equivalent national practitioner user group within Acas.

Acas' engagement with other regulators dealing with bullying and harassment complaints

Acas works closely with the EHRC and the HSE. As noted earlier, from 2005, the HSE has developed tools and resources relating to workplace stress. Several staff across Acas worked closely with the HSE to develop the tools and one Acas staff member was seconded to the HSE for 12 months. This role involved helping the HSE to develop tools and a knowledge base relating to engagement on health and safety issues in the workplace (and workplace stress within this) and how this correlates to broader employee engagement. Acas staff have since used HSE diagnostic and other tools when working with employers on a frequent basis.

Application of Acas' strategies within the proposed Australian legislative framework

This final section of the paper reviews lessons drawn from Acas' experience of dealing with bullying and harassment that may assist the FWC in defining its role and processes within the new jurisdiction. It then suggests elements that may be included in orders and canvasses the range of functions or services that the FWC might provide. The report concludes with a discussion of strategies for stakeholder engagement and areas for further investigation.

Acas' experience of dealing with bullying and harassment: implications for the FWC

Key lessons include:

The importance of issuing guidance advising that individuals pursue informal resolution, and failing that, use formal workplace procedures: Acas, the social partners and other bodies dealing with bullying and harassment have worked together to communicate a consistent message around the benefits of using informal means to deal with bullying, quickly. The CIPD/Acas guide to mediation in workplace disputes also notes that mediation may not be suitable if it is used as a "first resort", as people should attempt to resolve the issue by speaking to each other before they resort to mediation. Where informal resolution is not possible, or where bullying is of a more serious nature, UK bodies including Acas advise that formal disciplinary and grievance procedures should be used. If guidance/information of a similar nature was issued in the Australian context this might reduce the FWC's mediation workload, particularly in regard to those cases of alleged bullying where the protagonist is unaware that their behaviour is experienced by the other party as bullying. This aligns with Saundry *et al's* (2011) findings that mediation in bullying and harassment cases was often used as a "last resort" after exhausting formal procedures (but that this represented problems in terms of the parties' positions becoming more entrenched as time went on). In the Australian context, guidance setting out the informal and formal routes to resolution might also encourage organisations that do not have formal procedures in place – both disciplinary and grievance and bullying and harassment procedures – to develop these, again reducing the volume of cases reaching the FWC.

Individuals may be reluctant to make applications to the FWC while in work: Acas is called upon to conciliate relatively few claims of harassment related to protected characteristics that are taken by individuals who have remained in employment. These cases are the closest comparator to the cases that the FWC will be handling (that is, a formal claim made by an individual still in employment). Further research may establish why few "in-work" claims are made (see "Areas for further investigation"). In the absence of this information it might be speculated that the low numbers of claims taken while in employment may be due to the reluctance of employees to "rock the boat" in cases where they feel vulnerable. If so, this may also be a factor deterring individuals from taking claims to the FWC in the Australian context.

Reducing applicants' administrative burden: there was some indication from an Acas adviser that long, detailed claim forms deter applicants from taking claims to tribunal, but that they were more inclined to complete shorter Acas register forms that set out the nature of the complaint briefly. This is an issue for consideration in respect of unrepresented applicants who may be unable to complete an FWC application form in cases where literacy skills are an issue. The FWC might offer assistance in completing the form, via telephone, or work with legal advice centres or other advisory bodies to facilitate their role in assisting applicants.

Lessons in relation to mediation

The process prescribed by UK bodies is similar in nature to the FWC's current thinking on how the Australian jurisdiction might operate, in that where bullying is identified as a serious case (or in the Australian context, an imminent risk to health and safety), it is recommended that the case is dealt with through formal processes. In the UK, this may constitute discipline and grievance procedures, and in Australia, an FWC hearing. Key lessons from mediation around bullying and harassment conducted by Acas relate to the following issues:

Telephone or face to face mediation: offering telephone mediation to claimants might make them more amenable to taking a complaint in cases where they are reluctant to be in same room as alleged perpetrator. However, the Acas experience suggests that mediation works best when conducted "face to face" by mediators with the parties in the room. An Acas adviser could foresee problems with conducting mediation by telephone, explaining:

Because mediation is about rescuing and improving an existing relationship, the subtleties around any relationship are not just what you say but how you say it and all of the body language. It would be difficult for the mediator to fully get the sense of that over the telephone and even more difficult to convey and extract and reframe the key points and re-present them to the other party over the phone. I don't think you could do any harm doing it that way, but I think your success rate (in getting a settlement) would be reduced.

Refusal of one party to participate in mediation: Acas' experience indicates that it is common for one party (typically the alleged bully) to refuse to participate in mediation and that managers in particular were reluctant to participate. In the Australian context, refusal to participate in mediation will result in the case going straight to a hearing. Thus the spectre of having to go to a hearing may convince the reluctant party to come to the table. Alternatively it may lead the reluctant party's senior managers to pressure them to participate in mediation so that the organisation might avoid the "reputational risk", time and costs attached to hearings. In such cases, it might be assumed that the reluctant party will remain an unwilling participant in any mediation conducted, which has been found by Acas to be a factor preventing effective resolution of bullying and harassment cases using mediation.

Confidentiality/formality of settlements: It is Acas' practice to keep mediation settlements confidential to the parties involved. Use of similar practices by the FWC may provide greater reassurance to the parties considering mediation and render them more likely to agree to mediation as opposed to opting out of resolution processes entirely or going to a hearing. Acas does not require the parties to commit the settlement in writing. This may have implications for the FWC in terms of whether written or verbal agreements will be required, and whether the formal nature of a written agreement might be another factor that deters complainants or protagonists from engaging in the mediation process.

Representation in mediation: Acas surveys of mediation participants (Acas 2011b; 2012) find that 94-95 per cent are unrepresented. It would be useful to explore the reasons for this with Acas, however it might be assumed (in the absence of definitive information) that it is Acas' standard practice for parties in mediation to be unrepresented. Some thought might be given to the impact, in the Australian context, of parties in mediation being represented. Representation may for example, increase the likelihood of "interference" by third party representatives during the process, causing the primary parties to feel that they do not "own" the settlement.

Mediation may not stop bullying behaviour: Some of the research produced for Acas in relation to Acas-mediated cases found that mediation did not produce sustainable settlements in disputes where the protagonist had a history of bullying behaviours. In such cases the complainant was likely to exit the organisation post-mediation. If in the Australian context it became clear during mediation that protagonists have a history of bullying, it may be deemed more appropriate for a hearing to be conducted. In such cases, where the severity of the bullying is uncovered during mediation, a subsequent hearing would allow for appropriate orders may be made, including awareness training for the protagonist.

Mediation vs conciliation - resourcing: While the new regulations aim to provide "a quick and cost-effective remedy to individuals", the speed and cost-effectiveness of resolution processes may also be a consideration for the Commission in providing services. It was noted by Acas advisers that

conciliation, delivered by telephone and comprising short conversations with the parties, can be a quicker and less resource intensive process than mediation. This is because it was felt that mediation should always be conducted “face to face” with the parties, and by at least two Acas mediators (as noted above).

The provision of mediation services by “associates”: Acas has no need to employ the services of associates as mediators because the volume of Acas mediation cases is relatively low and can be handled adequately by existing staff. An Acas adviser noted however that they receive a large number of requests from trained mediators offering to provide mediation on Acas’ behalf. The adviser noted that if associates were to be engaged by Acas, they would “have to do a lot of quality control” to ensure the processes and techniques that they used were consistent with those used by Acas mediators. While noting that some mediation skills are generic and can be applied across a range of dispute matters, the adviser agreed that it was important that associate mediators had a deep knowledge of the legal framework in relation to both bullying, and employment regulatory frameworks more generally. This was particularly important in cases where the mediator was required to assess whether the case was appropriate for mediation and then explain the nuances of this to the parties, and was required to provide them with information on other routes for resolution within the regulatory context.

What might be included in orders

The Explanatory Memorandum of the Fair Work Amendment Bill states that the FWC may make an order requiring:

- the individual or group of individuals to stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer’s workplace bullying policy;
- the provision of information and additional support and training to workers;
- review of the employer’s workplace bullying policy.

In making these directions, more specific elements that might be included in orders will depend on the nature and details of the case. They might include:

- Directing the parties to engage in voluntary mediation to improve ongoing working relationships (where the bullying is not of a serious nature and both parties are willing to engage in the process)
- Where the employer does not have a bullying and harassment policy in place, direction to develop a policy addressing elements prescribed in the Acas guide for employers on bullying and harassment (Acas 2010a:pp5-6)
- Counselling for the complainant and the accused
- Disciplinary penalties such as suspension or transfer of the bully/harasser; the requirement to attend a behaviour change or awareness course, or in the case of bullying around protected attributes, an equal opportunities awareness course; or, a written warning for the duration of employment where the alternative would be dismissals
- Directing the employer to provide training around bullying procedures for managers, employees, and employee representatives
- Compliance with an employer’s workplace bullying policy may involve directing the parties to take the claim through the organisation’s disciplinary and grievance procedures, where these exist

- An apology and an undertaking on the part of the protagonist that bullying and harassment will not occur again
- An undertaking by the employer to monitor the relationship between the complainant and alleged bully/harasser
- Re-crediting entitlements lost due to the bullying (that have not already been compensated), such as leave taken
- The establishment of procedures or structures that enable employees to receive advice and representation and to alert senior managers to incidences of bullying, for example, workplace 'fair treatment' representatives or workplace health and safety representatives
- Saundry et al (2011) highlight the high degree to which performance management and bullying issues were conflated in bullying and harassment mediation. In cases where this is an issue, orders could recommend that the organisation develop clearer, more transparent and formalised performance management processes, with managers trained in use of the processes, to prevent future bullying and harassment problems from emerging.

Acas functions that might be provided in the Australian context

A number of functions provided by Acas in dealing with workplace bullying and harassment may be used in the Australian context. However, in saying that, two important points of difference between the Australian and UK systems should be noted. The first relates to pivotal differences between the FWC and Acas in terms of their governance structures and relationship with government. While the FWC is a government tribunal, Acas is independent of government. At a practical level, this may serve to make Acas' role in providing services such as conciliation and mediation more palatable to each party as it is seen as impartial. By contrast, the FWC's tribunal status may for example, result in a reluctance among the parties to engage in mediation in relation to bullying and harassment complaints as they may view mediation as a *de facto* hearing.

The second point of difference is that Acas delivers a range of services that are not provided by a similar independent organisation in Australia, key examples being in-depth assistance and joint workplace training. It is difficult to determine who might provide such functions in the Australian context. In Australia there is a "gap" in terms of the provision of the type of services it provides (largely free of charge, in-depth, involving joint working, and focused on improving management capability in regard to managing employees). In the UK Acas is a known and respected brand, having been in operation since 1974. Acas' approach is on encouraging organisations to formalise standards in terms of developing bullying and harassment/grievance and disciplinary policies and procedures, and then ensuring that they are embedded by "training them in". Guidance documents are able to convey the importance of developing sound procedures and policies and provide advice on what they might contain. However, Acas' experience indicates that "hands on" assistance from experienced facilitators during the process of developing and embedding tailored workplace procedures and practices is critical if organisations are to be effective in preventing and resolving bullying issues. Employers in the UK, particularly those of medium to large size, have responded positively to the services Acas provides and demand for Acas' assistance remains steady. As noted, it is difficult to identify organisations that might provide similar hands-on assistance in the Australian context.

Acas advisers noted that employers are often reluctant to tackle bullying issues in the workplace. On the one hand, the fact that the new jurisdiction provides a specified legal route for bullying may mean that Australian employers will be amenable to the type of pre-emptive or early intervention services that Acas provides to prevent or quickly deal with bullying, if this means that they are less likely to find themselves in an FWC hearing. However the fact that orders are non-pecuniary in nature may

mean that there is less incentive to engage in pre-emptive work among those employers who are unconcerned about appearing at the Commission.

With these caveats in place, there may be scope for certain of Acas' functions to be provided in the Australian context. As to which organisations might provide these functions, this may be a matter of negotiation between the FWC and other organisations, as discussed in the following section. If these functions are provided by a range of organisations, as is likely given the current multi-agency interest in workplace bullying, a matter of importance emphasised by Acas advisers is the need for consistent messages and approaches across the range of service areas provided by agencies.

Lessons and possible outcomes relating to how the FWC might provide mediation have been discussed in previous sections. A key point to make in regard to mediation is that the historically low use of workplace-related mediation in Australia might cause those used to dealing with issues via conciliation or more formal procedures to view mediation with some suspicion. In addition, the limited use of mediation to date means that those representing parties in bullying and harassment mediation might require information and training to build their base knowledge of mediation processes and principles.

Other functions that may be developed with FWC involvement include the following:

Guidance documents

There is significant material available that could be modified and used as the basis of guides for employees and employers in relation to workplace bullying and harassment. These include the Acas and CIPD/Acas guides referenced in this report, as well as Australian-produced guides such as the document produced by the South Australia Interagency Roundtable on Bullying titled "Dealing with workplace bullying: A practical guide for employees" (Government of South Australia 2012). Guidance documents could either be located on the FWO, FWC, AHRC, and workplace health and safety regulator websites, or these websites could direct visitors to the "central" website on which the documents are located (eg the FWO or FWC websites). As noted in previous sections, Acas advisers stressed the importance of such guidance material setting out informal and formal routes for resolution of bullying and harassment issues, and any Australian guides produced might do the same. Any guidance documents developed could be publicised as part of an education campaign when the new jurisdiction comes into effect in January 2014.

Web information

Acas research (unpublished) indicates that the internet is increasingly becoming the first port of call for individuals seeking work-related advice in the UK, particularly among groups such as young workers. The FWC or FWO websites might provide webpages providing practical advice on "what to do if you think you are being bullied", contact numbers for further advice, and guidance documents for employees and employers. The informal "plain English" tone of the AHRC's workplace bullying webpages might be used in conveying this information. In addition the websites of other bodies – for example Safe Work Australia, state and territory Workplace Health and Safety regulators, legal advice centres, or organisations such as Jobwatch and Working Women's Centres might provide links to FWC or FWO information pages.

Telephone helpline and live chat

While the FWO and FWC enquiry and infolines can provide information on the options open to bullying claimants, the FWC might also consider developing a dedicated "bullying helpline", similar to the Equality Direct helpline run by Acas. The sensitive nature of bullying complaints may mean that complainants will be more willing to talk to someone that they consider to be experienced in dealing with bullying issues (even if the call goes through to general FWC enquiry line staff). In addition, Acas

research (unpublished) indicates that young workers, a group prone to bullying, are reluctant to call telephone helplines. A “live chat” service may be more likely to be accessed by this group via smartphones.

Training for managers, employees and employee representatives in the prevention and resolution of bullying and harassment

This could be provided in an online learning format, possibly within the suite of e-learning resources currently being developed by the FWO. The FWO website currently offers an e-learning course for workers that teaches them how to have “difficult conversations in the workplace”. This may provide advice to employees who have been bullied and wish to raise the matter informally with their manager (who may be the protagonist) or another manager. Workplace and open access training is currently provided by WHS regulators (such as WorkSafe ACT). The content of training provided by WHS regulators has not been examined as part of this research but could be the focus of further investigation. It might be assumed that the content of this training differs from that provided by Acas as it is focused on risk management and health and safety procedures rather than employment relations practice and procedures. As noted earlier, there may be an unmet need in the market for Acas-style training which in some cases involves employees or their representatives working with managers to develop policies and practices, thereby leading to greater ownership of resolution strategies and buy-in to the workplace-specific policies developed. Organisations such as AHRI advertise training in bullying and harassment which is provided by independent consultancies, but this appears to differ from the Acas training in focusing primarily on what bullying is, rather than what should be done to resolve problems. Orders issued by the FWC may include a requirement that protagonists or employers receive training. Such training should optimally be tailored workplace training rather than online training, focused on issues relevant to the workplace in which bullying has occurred.

Indepth advisory services (calls, visits, workplace projects)

As noted above, there is a “gap” in the Australian context in terms of the absence of a specific organisation dedicated to providing impartial, in-depth assistance to employers in relation to employment matters. Employers seeking in-depth assistance generally obtain this from the many consultancies, large and small, who work with paying organisations to establish new structures or assist in organisational change programmes. In terms of government-funded bodies, Enterprise Connect comes closest to providing an impartial advisory function, but does not advise businesses on any issues relating to employee relations or employment practices. Employer peak bodies also provide guidance to members on their legal obligations but this is less likely to be impartial or in-depth. Acas’ experience would suggest that where orders require organisations to develop new, or revise existing bullying and harassment procedures that are fit for purpose and reflect the characteristics and cultures of these organisations, this may require in-depth assistance from a third party, rather than employers simply downloading a template bullying and harassment policy from a peak body or consultancy website and distributing it among staff.

Strategies for stakeholder engagement

Acas advisers stressed the value of working closely with other bodies providing bullying and harassment guidance and resolution to ensure the provision of consistent guidance relating to best practice in dealing with workplace bullying and harassment. Acas works jointly with the social

partners (employer and employee peak bodies), intergovernmental agencies such as the HSE and EHRC, and at a local level, with bodies that are the first port of call for unrepresented workers such as the Citizens' Advice Bureaux.

If a similar approach was to be adopted by the FWC it might be expected that they would work closely with comparable organisations. Specific strategies might include:

- Working with the FWO to develop "joined up" functions: The FWO can investigate bullying and harassment issues in the workplace related to protected characteristics and assist in cases where employees are being disadvantaged because they have complained about bullying and harassment at work. FWC might work with the FWO to set out clear roles for each agency and to develop information materials explaining their roles within the new jurisdiction.
- Working with peak organisations to build awareness of the new regulations and encouraging them to conduct education campaigns on the regulations among their constituencies. Education campaigns might promote the need for organisations to have robust bullying and harassment policies and procedures and to ensure these procedures are embedded – or risk being taken to the tribunal. Peak bodies can offer assistance and advice to members on developing these policies. Other strategies might include the development of a community of practice around bullying and harassment/dignity at work/effective workplaces through the medium of an FWC or FWO LinkedIn group for HR professionals or others with an interest in best practice in respect of these topics. Key peak bodies the FWC may work with in this capacity include the ACTU, Ai Group, ACCI, Australian Public Service Commission, ABI, AHRI, Australian Institute of Management, COSBOA, and sector-specific peaks – particularly those in sectors where bullying is prevalent.
- Working with trade unions, encouraging them to educate delegates about new provisions or perhaps (where favoured by employers) foster the establishment of workplace dignity at work representative structures.
- Working with inter-governmental partners to develop consistent messages and "joined up" information and advice regarding all regulation pertaining to bullying and harassment. This might involve the FWC working with these bodies to develop material for website information pages and pamphlets on what bullying is, the new regulations and how to contact the FWC. Engagement with intergovernmental bodies might include activities to ensure that the advisors working on infolines provided by the FWO, FWC, AHRC and health and safety regulators' receive consistent training in directing queries to the FWC or appropriate agency. These bodies might also share management information relating to the characteristics of callers and volume of calls/website hits relating to bullying they receive, allowing the FWC and other organisations to tailor the tone and format of bullying-related services according to the characteristics of those seeking information. The FWC may seek engagement with the FWO, AHRC, WHS regulators, and state and territory equal opportunities, industrial relations or other state-level agencies to this end.
- Working with WHS regulators to establish practice in cases where the FWC finds evidence of a workplace culture of bullying and refers the case to regulators. This might involve work to ensure that any action taken by the WHS regulator considers the potential for both diagnostic evaluation of problem areas in regard to workplace climate, practice and wellbeing, and remedial work (similar to Acas in-depth assistance) where a poor culture and management practice are identified.

- Working with non-governmental bodies that provide advice to unrepresented workers and employers to build awareness of the new regulations and provide guidance on FWC expectations around how the process might work – eg in respect of completing application forms, preparing statements etc. This might also include work with trade unions around best practice in representing employees at mediation and hearings. In doing so the FWC may work with organisations such as ReachOut, legal advice centres, and trade unions.
- It may be that the majority of applicants will be located in SMEs, as larger organisations are more likely to have the requisite HR capacity to deal with bullying issues using formalised discipline and grievance/bullying and harassment procedures. Consequently, information campaigns may be specifically targeted to SMEs: for example aimed at those organisations providing SMEs with advice in relation to employment issues (legal helplines, HR consultancies, payroll bureaux, book-keepers and less commonly in the case of micro small businesses, peak bodies).

Areas for further investigation

This exploratory research highlights a range of areas for further research or consideration. Additional avenues for research include the following:

- Research on practices and procedures used in relation to bullying and harassment in Australian workplaces. This could take the form of qualitative interviews conducted with representatives of peak organisations such as AHRI, Ai Group etc. The FWC’s AWIRS-type survey may also offer information, if questions of this nature are included in the survey design. Investigation of the extent to which organisations have bullying and harassment procedures in place, for example, may give an indication of the extent to which bullying and harassment claimants are likely to go through these processes to resolve issues in the first instance. Such research may also give insights into the characteristics of applicants from enterprises without procedures (presumably micro SMEs). It would also be beneficial to undertake case studies of best practice bullying and harassment procedures in action, in Australian organisations, to better understand “what works” at enterprise level. This would provide an evidence base to improve the advice, tools and support offered to individuals and workplaces. In doing so it might allow for better understanding of the role that can be played by dignity at work or fair treatment representatives in workplaces to encourage and facilitate early informal settlement.
- Research assessing the nature of training on bullying harassment provided by organisations such as workplace health and safety regulators, AHRI, and other peak bodies and corporate training providers. This would provide the FWC with insights into the content and format of training, in the context of the potential for orders to include directions to employers to provide training for managers and/or employees.
- Further research on “lessons learned” in terms of mediation and conciliation practice in bullying cases: Research of this nature could involve qualitative interviews with mediators from the FWO, LEADR, Co-Solve, Schneider and conciliators from the AHRC to gain insights into individual mediation approaches that are most and least successful in the context of bullying and harassment disputes. Such research would provide lessons relating to issues that the FWC may confront in dealing with bullying and harassment mediation and potentially, insights into organisational receptiveness to mediation or possible cultural barriers pertaining to its use. Additional interviews with Acas advisers may also yield greater insights into lessons

learned in respect of conciliation in protected characteristics cases where the applicant remains in work. This group is the closest comparator within Acas in respect of the cases the FWC will handle. This research could examine why there are such low numbers of applicants taking discrimination conciliation claims while in employment. It is unknown whether, for example, this is due to reluctance among individuals to take a claim; or because matters of this nature are more likely to be resolved through in-house procedures; or because they have been resolved by the burgeoning army of non-Acas consultant mediators or in-house mediators in UK workplaces. Research of this nature may provide an indication of the extent to which individuals may be willing to take bullying and harassment claims to the FWC in the first place.

- Consideration might be given to producing a single national guidance document such as a Code of Practice on bullying and harassment prevention and handling which uses an employment framework rather than a narrower risk/hazard framework as exemplified by the Safe Work Code of Practice: Preventing and Responding to Workplace Bullying. Such a code would inform Australian workplace employment practice and policy on matters of bullying, as well as providing a source of consistent advice for employees and employers.

Useful resources for the FWC

- It might be of use for FWC staff to read Saundry *et al* (2011) as this provides detailed insights into mediation practice in bullying and harassment and other interpersonal disputes.
- The ESRC-funded “Reframing Resolution - Managing Conflict and Resolving Individual Employment Disputes in the Contemporary Workplace” project also offers a wealth of material on dispute resolution in the form of papers, presentations and podcasts (<http://www.esrc.ac.uk/my-esrc/grants/ES.J022276.1/read>). It includes research presentations and podcasts by Charlie Irvine, Richard Saundry and Ralph Fevre which examine different elements of dispute resolution in relation to bullying and harassment, including the use of mediation and analysis of the 2007 Fair Treatment at Work Survey.
- Other research of use may be that conducted by Lisa Bingham into the role and factors associated with the involvement of representatives (trade union and lawyers) in workplace mediation in the US Postal service.
- Professor Duncan Lewis of Plymouth University is conducting ESRC-funded research looking at bullying and harassment of lesbian, gay, bisexual, transgender individuals which may provide relevant insights to the FWC (duncan.lewis@plymouth.ac.uk).

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ⁱ <http://www.hse.gov.uk/stress/furtheradvice/bullyingharassment.htm> (accessed 9 July 2013)

ⁱⁱ Characteristics protected from harassment are: age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, pregnancy and maternity, marriage and civil partnership.

ⁱⁱⁱ The Acas Code of Practice 1: Disciplinary and Grievance Procedures (Acas 2009) is a statutory document. It 'provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace'. While a failure to follow the Code does not, in itself, make a person or organisation liable to proceedings, Purcell (2010) notes that the Code of practice has quasi legal authority since employment tribunals are required have regard to the advice therein in determining whether the company or the applicant met the procedural standards set out in dealing with the issue. The provisions in the Acas Code come into play as soon as an employee raises a grievance with their employer or an employer raises an issue of misconduct or poor performance with an employee. The Acas Code of Practice is accompanied by a non-statutory guide providing more detailed advice and guidance for employers and employees (Acas (2011) "Discipline and Grievances at Work: The Acas Guide")

^{iv} Estimates are based on call volumes for 12 months from Acas management information, and the pattern of call and caller types from the report of the *2009 Acas Helpline Evaluation* (Thornton and Fitzgerald, 2010).

^v See <https://www.gov.uk/browse/working>

^{vi} See <http://www.acas.org.uk/index.aspx?articleid=3807>