



Corrosive Leadership (Or Bullying by Another Name): A Corollary of the Corporatised Academy?

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The literature reveals that the incidence of bullying is increasing in corporate workplaces everywhere. While the data is scant, it suggests that bullying in universities is also on the increase. Interviews with Australian academics support this finding. It is argued that the trend has to be understood in light of the pathology of corporatisation, which is designed to make academics do more with less. The focus on productivity parallels the harassment to which workers in the private sector may be subjected in the hope that they will work harder and maximise profits. Avenues of redress are considered which show that dignitary harms remain inchoate as legal harms. While common law and anti-discrimination legislation regimes may occasionally offer a remedy to targeted individuals, it is averred that these avenues are incapable of addressing the causative political factors that induce corrosive leadership.

Preliminary Note

The article draws on work research conducted for two projects: M Thornton, 'The Neo-liberal Legal Academy' (ARC Discovery Grant, 2002), and M Thornton and J Fisher, 'Gender Equity in the Academy' (Faculty Grant, Business and Law, Victoria University, 2001). Eighty-five semi-structured interviews were conducted in 25 Australian universities with a random selection of academics, but with an eye to achieving parity in terms of junior and senior staff, as well as gender. The interviews were taped and transcribed. Undertakings of confidentiality through university ethics committees preclude identifying the respondents.

The interviews were designed to elicit academics' perceptions of recent changes within academic workplace cultures, rather than to investigate bullying per se. A significant number of respondents alluded to the emergence of corrosive styles of leadership. It is notable that those who referred specifically to bullying were invariably women. While it is not suggested that universities were formerly workplace nirvanas, it appears that an environment has been created which would seem to foster bullying practices.

The Corporatist Context

Workplace change has resulted in downsizing and increased workloads so that everyone is expected to do more with less. Not only has the global transformation of corporate workplaces led to insecurity, frustration and stress, but surviving corrosive leadership has also proven to be a correlative hazard. A recent ACTU study found that the single most common source of workplace stress is bullying, and bossy and intimidating behaviour from

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employers.¹ The ILO has found that complaints of bullying represent the fastest growing complaints of workers worldwide, with women especially at risk.² The titles of books that have emerged are revealing: *Bully in Sight*;³ *Bullyproof yourself at Work*;⁴ *Never work for a Jerk!*;⁵ *Corporate Hyenas at Work*;⁶ and the highly evocative, *When Smart People work for Dumb Bosses*.⁷ Bullying has been described as a 'new truth' about contemporary workplaces.⁸

We inhabit an age in which the market and the relentless pursuit of profits have become dominant imperatives. The corporation is the typical structure through which profit-making activities are conducted. While corporations formerly carried with them a notion of public good, typically associated with charitable or eleemosynary institutions, corporations today are likely to denote associations that have been incorporated primarily to facilitate profit-making in the interests of shareholders.⁹ A university is an example of the older type of public corporation, constituted to serve some good purpose. Thus, if we look to university Acts of Incorporation, we are likely to see reference among their objects to phrases that accord with the idea of public good, such as the 'promotion, advancement and transmission of knowledge'.¹⁰ The Acts make no reference to entrepreneurialism or profit-making, values that have become central to the educational market in which universities now operate. Hence, a conflation is occurring between the university as corporation for the public good and the university as corporation for profit-making. Even though it may be averred that private enterprise corporations include a quasi-public element

1 ACTU, OHS Unit, *Stop Stress at Work* (Draft for Discussion), October 2000 <<http://www.workstress.net/downloads/aussiessressguide.doc>> (accessed 30 July 2004).

2 'When Working becomes Hazardous' in (1998) 26 *World of Work: The Magazine of the ILO*, <www.ilo.org/public/english/bureau/inf/magazine/26/violence.htm> (accessed 30 July 2004); V Di Martino, 'Violence at the Workplace: The Global Challenge', paper presented at the International Conference on Work Trauma, Johannesburg, 8–9 November 2000 <<http://www.ilo.org/public/english/protection/safework/violence/violwk.violwk.htm>> (accessed 30 July 2004); B Litwin, 'Analysis and Application: A Conceptual Framework for a Multi-Factor, Multi-Level Analysis of the Origins of Workplace Violence' (2002) 8 *ILSA J Int'l & Comp L* 825.

3 T Field, *Bully in Sight: How to predict, resist, challenge and combat Workplace Bullying*, Success Unlimited, Didcot, Oxfordshire, UK, 1996.

4 G Namie and R Namie, *Bullyproof Yourself at Work!: Personal Strategies to Recognise and Stop the Hurt from Harassment*, DoubleDoc Press, Benicia, Calif, 1999.

5 P King, *Never Work for a Jerk!*, F Watts, New York, 1987.

6 S Marais-Steinman and M Herman, *Corporate Hyenas at Work*, Kagiso Publishers (now Maskew Miller & Longman), Pretoria, 1997.

7 W Lundin and K Lundin, *When Smart People Work for Dumb Bosses: How to Survive in a Crazy and Dysfunctional Workplace*, McGraw-Hill, New York, 1998.

8 C Hatcher and P McCarthy, 'Workplace Bullying: In Pursuit of Truth in the Bully-Victim-Professional Practice Triangle' (2002) 29 *Aust J Communication* 45.

9 Corporations are regulated by federal legislation, viz, Corporations Law 1990 (Cth). For a thoroughgoing and original analysis of corporate law, see S Berns and P Baron, *Company Law and Governance: An Australian Perspective*, Oxford University Press, Melbourne, 1998.

10 Eg, Victoria University of Technology Act 1990 (Vic) s 6. Cf La Trobe University Act 1964 (Vic) s 5(a)(i); University of Newcastle Act 1989 (NSW) s 6(1); University of New England Act 1993 (NSW) s 6(1); University of New South Wales Act 1989 (NSW) s 6(1); University of Sydney Act 1989 (NSW) s 6(1); University of Technology, Sydney, Act 1989 (NSW) s 6(1); University of Western Sydney Act 1997 (NSW) s 8(1); University of Wollongong Act 1989 (NSW) s 6(1).

(such as the good of the economy), the primary beneficiaries are private shareholders. The governance of public universities in Australia is currently in disarray, in part because of the trend in favour of corporatisation.¹¹ Not only are there no shareholders within public universities to whom senior management is accountable, the proportion of academic stakeholders, the closest approximation on university councils, have been significantly reduced.¹² It would appear that the rubric of 'commercial-in-confidence' is able to be used increasingly as a means of immunising university activities from scrutiny.

While the term *corporatisation* is somewhat opaque in view of its multiple meanings, I am using it to refer to the application of business practices to public institutions to make them more like private corporations. The transformation accords with the contemporary neo-liberal political agenda, which includes the privatisation of public goods, deregulation, globalisation and a preoccupation with profit-making. The privatising imperative has resulted in governments everywhere sloughing off responsibility for public education and shifting responsibility to users or 'consumers', that is, students. At the same time, the expansion of universities has been an important plank of the agenda of nation states in creating the global 'new knowledge' economy.¹³ Despite the Federal Government's expansion of the Australian higher education sector, including a massive increase in students, universities have not been funded to a commensurate degree, which has forced them down the entrepreneurial path. The privatising and marketising imperatives are dramatically altering the culture of universities as they assume the lean and mean mantle induced by competition policy.¹⁴ Universities are now expected to play a greater role in serving community (read business and professional) interests.¹⁵ This servicing role underpins the new knowledge economy.

As the official rhetoric began to change, it is notable that university managerial practices also changed so as to comport more closely with the private corporatised template. Collegiality and peer review, imperfect though they might be in practice, are distinguishing features of working life in the academy, but they have been significantly eroded in recent years in favour of a new style of top-down managerialism that allows little space for the voices

11 This proposition is clearly illustrated by the valuable study of the University of Melbourne's dalliance with the market that has been carried out by the former Premier of Victoria, John Cain, and John Hewitt. See J Cain and J Hewitt, *Off Course: From Public Place to Marketplace at Melbourne University*, Scribe Publications, Melbourne, 2004.

12 See S Marginson and M Considine, *The Enterprise University: Power, Governance and Reinvention in Australia*, Cambridge University Press, Cambridge, 2000, pp 100–1.

13 J L Lyotard, *The Post Modern Condition: A Report on Knowledge*, Manchester University Press, Manchester, 1984.

14 For an excellent study of the transformation of Australian universities, see Marginson and Considine, above n 12. See also M Thornton, 'Among the Ruins: Law in the Neo-Liberal Academy' (2001) 20 *Windsor Yearbook of Access to Justice* 3; M Thornton, 'The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy' (2001) 8 *International J Legal Profession* 37; M Thornton, 'Inhabiting a Political Economy of Uncertainty: Academic Life in the 21st Century', Occasional Paper No 2, Institute of Postcolonial Studies, Melbourne, 2002.

15 Department of Education, Employment, Training and Youth Affairs, *Learning for Life: Review of Higher Education Financing and Policy*, AGPS, Canberra, 1998 (*West Committee Report*).

of academics to be heard.¹⁶ It has been established that the loss of control over the nature of the working environment can result in a decline in workplace satisfaction and an increase in stress.¹⁷ This loss of voice has also led to a weakening of academic disciplines and disciplinary cultures, which has occurred through restructuring and the creation of interdisciplinary mega-units. The 'shift from collegiality and democracy to executive power' is a central tenet of Marginson and Considine's thesis regarding the transformation of Australian universities.¹⁸ The weakening of collegiality is somewhat paradoxical in light of the increasingly vociferous rhetoric lauding 'transparency' and 'accountability'.

Following the demise of the binary system in the late 1980s,¹⁹ and with the support of what was then the Department of Employment, Education and Training (DEET) (now the Department of Education, Science and Technology (DEST)), most universities turned away from the appointment of Vice-Chancellors as academic leaders to an imagined understanding of them as modern corporate managers who would whip their institutions into shape. In order to maximise productivity, the new managerialism, which has been authorised by the state, utilises technologies of surveillance, accountability and audit to an unprecedented extent.²⁰

I do not wish to appear nostalgic for the academy of yesteryear, which was often a bastion of masculinist privilege and homosociality, but to suggest that the top-down, authoritarian and over-controlled workplaces, which many universities have become, create the conditions that enable a corrosive managerial culture to thrive.²¹ Authoritarian organisations run on the misuse of power: blame, threats and the fear of being shamed. The relentless quest for money, success and status in a highly competitive, marketised environment has induced a resiling from the civility conventionally associated with universities.²² The construction of 'winners' and 'losers' through competition induces conflict and the propensity for individuals to commit irrational acts.²³ Workplace bullying, therefore, may not be merely the aberrant act of a few

16 Eg, T Coady, 'Universities and Ideals of Inquiry' in T Coady (Ed), *Why Universities Matter*, Allen & Unwin, Sydney, 2000, p 20; Cain and Hewitt, above n 11, p 89 et passim; Thornton, 'Among the Ruins', above n 14.

17 Litwin, above n 2, at 846.

18 Marginson and Considine, above n 12, p 10.

19 The Dawkins reforms integrated colleges of advanced education and universities within a unified system of higher education in 1987.

20 No Australian academic is immune from audits of teaching quality and research productivity. See, eg, Coady, above n 16, p 17; E McWilliam, 'Changing the Academic Subject', *Studies in Higher Education* (forthcoming). More generally, see M Power, *The Audit Society: Rituals of Verification*, OUP, 1997; C Shore and S Wright, 'Audit Culture and Anthropology: Neo-Liberalism in British Higher Education' (1999) 5 *J Royal Anthropological Institute* 559.

21 My findings are supported by the observations of others. See, for example, J Bessant, 'Women in Academia and Opaque Violence' (1998) 39 *Melbourne Studies in Education* 41; J Bessant, 'The Bad Behaviour Syndrome', HES, *The Australian*, 23 July 2003, p 35; B Hocking, 'Culture protects harassers', Letter to Editor, HES, *The Australian*, 6 August 2003, p 25; C Adams, 'Action, not policies, stops bullies', Letter to Editor, HES, *The Australian*, 6 August 2003, p 25.

22 On the corporate workplace more generally, see L Wright and M Smye, *Corporate Abuse: How 'Lean and Mean' robs People and Profits*, Macmillan, New York, 1996, p 49.

23 Litwin, above n 2, at 848.

individuals, but a political corollary of corporatisation.

The Morphology of Bullying

Bullying, also known as workplace violence, harassment, emotional abuse and work rage, refers to any unfavourable or offensive conduct on the part of a person or persons, which has the effect of creating a hostile workplace environment. Bullying includes a wide range of insulting, demeaning or intimidating behaviour that lowers the self-esteem or self-confidence of an employee. The Victorian Occupational Health and Safety Guidance Note, *The Prevention of Bullying and Violence at Work*, endorses a broad definition: 'Workplace bullying is repeated, unreasonable behaviour directed towards an employee or group of employees, that creates a risk to health and safety.'²⁴

In one sense, bullying does not really need to be defined for us at all, unlike the more complex concept of discrimination, to which I shall return, for we all learned about bullying in childhood. Indeed, the very term 'bully' has connotations of childish and immature behaviour.²⁵ As children, many adults experienced the pinches, punches and relentless hair-pulling by little demons unable to accept difference or vulnerability, or who simply enjoyed the sense of power that tormenting others gave them. In the workplace, the tormenting is less likely to be physical than psychological. Maturation has led to cognisance of the ramifications of a criminal prosecution for assault. Now, the bully cleverly skirts the boundaries of criminality and the focus of workplace bullying tends to be on verbal abuse — shouting, insults, unwarranted criticism and put-downs — often for the purpose of displaying power in front of others:

In meetings, he would call me names, usually 'Idiot', and stuff like that . . . I went in and saw him and I said to him, 'You know, I am really not happy with the way you handle me in meetings and the way you call me names and I want that to stop. If you have got some issues with my performance, I would really like for you to call me into your office and in the privacy of your office I want you to tell me what you think I am doing wrong. I want to be able to fix it and I don't want you to say it in front of my colleagues in a meeting, it is just not appropriate.' And he said, 'No, no, I haven't got any issues with you, you are one of my most organised staff members.' So, when it was one-on-one, there was never an issue. It was always grandstanding. He really only wanted to abuse me when there was an audience. You could almost see that he was really enjoying it. You could see a little bit of a smile. You got the impression that he was quite having fun. It was making him feel like the big man (Academic A).

Bullying can also include marginalising behaviour, such as ignoring the targeted person at meetings or declining to respond to messages, as well as material detriment. Bassman suggests that dependency is the common thread

24 <<http://ohsrep.org.au/hazards/bullying.html>> (accessed 30 July 2004). Other organisational websites, such as that of the NTEU, include more comprehensive definitions: see <<http://www.nteu.org.au/freestyler/gui/files/file3be9dbb1941bf.doc>> (accessed 30 July 2004). See also CCH, *Australian & New Zealand Equal Opportunity Law and Practice*, looseleaf service, at ¶12,502.

25 J Wyatt and C Hare, *Work Abuse: How to Recognize and Survive It*, Schenkman Books, Rochester, Vt, 1997, p 51.

in abusive relationships, because the abuser invariably controls resources.²⁶ Hence, bullies are likely to be of institutionally superior status,²⁷ although they can also be co-workers or subordinates whose activities are condoned by senior management.²⁸

The gendered nature of institutional superiority and 'power over' suggests a gendered correlation between the identity of the bully and bullied.²⁹ Despite the high rate of complaints from women,³⁰ the data is inconclusive regarding the proposition that bullying is a gender issue.³¹ Corporate authority can nevertheless combine with masculinity in very effective ways to police the gender profile of the academy and the boundaries of knowledge, and it does not take very much to transmute a bona fide exercise of authority into an abuse of power. It is apparent that it is not just the way that authoritative positions continue to be masculinised, but the way that entrenched cultures of masculinity have been resistant to change within the academy:

It's a very boisy culture. The boys run everything and throw any leftovers out for anyone who happens to be hanging around on the edges . . . the boys' club culture is a major problem for women (Academic B).

I think I get the impression that there is this real blokey culture that really permeates this university . . . There is hardly a day that goes by when you are not reminded of the fact that you are really at the bottom of the shit-heap and you are really not a very worthwhile member (Academic C).

It was a boys' network that was very strong . . . it is a male environment, a masculine environment . . . It makes me very sad and annoyed that so many women are leaving this department because of bullying and basically that is what it is with other high profile women looking unhappy (Academic D).

These experiences are not exceptional, and it has been suggested that issues of gender and racial conflict can be expected to increase as women and minorities increase their visibility within the workforce.³²

As children, we were expected to put up with verbal abuse: 'Sticks and

26 E S Bassman, *Abuse in the Workplace: Management Remedies and Bottom Line Impact*, Quorum Books, Westport Ct & London, 1992, p 43.

27 D C Yamada, 'The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection' (2000) 88 *Georgetown L Jnl* 475 at 483.

28 In an Australia-wide phone-in conducted by the Australian Services Union in 1996, almost half of the respondents reported that the bullying was conducted with the knowledge of higher management. J Mayes and C Whiting, 'Bullying: Female Workers' Experience' in P McCarthy, M Sheehan, S Wilkie and W Wilkie (Eds), *Bullying: Causes, Costs and Cures*, Beyond Bullying Association, Nathan Qld, 1998, pp 145–6.

29 Mayes and Whiting, *ibid*, pp 144–6.

30 Eg, L Keashly and K Jagatic, 'US Perspectives on Workplace Bullying' in S Einarsen, H Hoel, D Zapf and C L Cooper, *Bullying and Emotional Abuse in the Workplace*, Taylor and Francis, London and New York, 2003, pp 48, 50, 52; G S Friedman and J Q Whitman, 'The European Transformation of Harassment Law: Discrimination Versus Dignity' (2003) 9 *Columb J Eur L* 241 at 250–1; C Rayner, H Hoel and C L Cooper, *Workplace Bullying: What we Know, Who is to Blame, and What we can we Do?*, Taylor & Francis, London & New York, 2002, pp 28–9, 70–1; T Field, 'Staffroom Bullying' (2002) *Times Educational Supplement*, 21 June 2002, p 15.

31 D Zapf, S Einarsen, H Hoel and M Vartia, 'Empirical Findings on Bullying in the Workplace' in Einarsen et al, above n 30, pp 112–13.

32 Litwin, above n 2 at 835.

stones will break my bones, but names will never hurt me.' Today, there is a greater understanding of psychological violence and its effects.³³ The individualised pathology suggests that the primary purpose of bullying is to hide inadequacy.³⁴ Thus, managers who are themselves mediocre scholars may target more successful academics who threaten the image of superiority they seek to project. My research confirms the finding that the resentment is likely to be most acute in the case of talented and ostensibly successful women.³⁵ Subsequent successes by the targets, who believe that they will gain the approbation of the bullying supervisor by doing more, may succeed only in stimulating retributive action. Even if one targeted person leaves the workplace disillusioned, other individuals with similar characteristics may be targeted. This is the phenomenon of the 'serial bully', described by Field as a type of 'psychopathic manager'. Either male or female, he or she possesses the characteristics of glibness, hypocrisy, insensitivity, insecurity and immaturity, and tends to move from target to target.³⁶

Those who are subject to bullying often feel that they have no choice but to leave the institution because of the wretchedness induced by such conduct:³⁷

He is dreadful. I was around when he harassed one of my female colleagues to the point where she resigned and left, and she was one of the best teachers I have ever come across. She was fantastic; gave so much to the students and was marvellous, but he just took a dislike to her, thought she didn't do enough research and just made her life a misery through harassment and she left. That is fairly typical of the way he behaves. He tends not to be challenged by people in the department. I mean there are a few of us who constantly challenge him, but I guess . . . because he bullies people, most academics would be of the view that if I keep my head down and shut up, I will be all right (Academic E).

Even if a choice is made to stay, bullying can lead to the target being constructed as incompetent, resulting in disciplinary proceedings, redundancy or even dismissal.³⁸ In isolation, a single insult might appear trivial, but it is the cumulative effect that is so devastating. Far from being easily shaken off, the literature shows that bullying can induce lasting trauma, for it can rob a person of self-confidence and self-worth. Wyatt and Hare highlight the devastating effect of this hitherto largely unacknowledged harm:

33 J Turnbull and B Paterson (Eds), *Aggression and Violence: Approaches to Effective Management*, Macmillan, London, 1999, p 80. Anti-discrimination jurisprudence has played an important role in recognising psychological harm arising from workplace harassment.

34 T Field 'Bullying: The Generic Form of Workplace Harassment' in *Those Who Can, Do. Those Who Can't, Bully* <<http://www.successunlimited.co.uk>> (accessed 30 July 2004); Yamada, above n 27, at 482.

35 Sheehan also mentions this phenomenon. M Sheehan, 'Restructuring: Rhetoric Versus Reality', in McCarthy et al, above n 28, p 159.

36 T Field, 'The Serial Bully', in Field, above n 34.

37 B Martin, *The Whistleblower's Handbook: How to be an Effective Resister*, Jon Carpenter, Charlbury UK & Envirobook, Sydney, 1999, p 113.

38 For an illustration in the academy, see *Vasarhelyi v New School for Social Research* 230 AD 2d 658 (NY Appeal Div 1996).

It's like child abuse not too many years ago; being emotionally harmed at work is just as common and silently condoned as beatings in childhood used to be.³⁹

This change in social consciousness supports the view that society is experiencing a 'diminishing tolerance for psychic pain'.⁴⁰ Moreover, it is apparent that bullying can no longer be brushed off because the cost to institutions and the community is enormous.⁴¹ For individuals, bullying can induce stress, insomnia, depression and suicide, as well as cause high blood pressure, heart attack and stroke.⁴²

The Corporatist Paradox

Academics are accustomed to being pressured to 'publish or perish', but a stressful authoritarian workplace that hounds and harasses staff to do more while simultaneously reducing resources and support services can lead to a lowering of morale, as well as a decline in creative energy and productivity, the very qualities that managers purport to be promoting. This is the paradox of contemporary corporatism within universities.

In accordance with the corporatist image, the Vice-Chancellor has become the CEO of the university. He — and the culture is one that remains antipathetic towards the conjunction of the feminine and authority — sits at the apex of what has become a rigid pyramidal structure. [He] is supported by one or more deputy vice-chancellors and a bevy of pro-vice-chancellors. This group of senior managers, rarely seen by the rank and file, is nevertheless able to induce a sense of domination of the entire organisation.⁴³ At middle management level in most institutions, a new layer of control has appeared in the form of mega-deans, who manage mega-faculties, then deans of faculties and/or schools, heads of department, as well as heads of disciplines and sub-disciplines. There are also senior academics, who direct research centres and act as supervisors/appraisers of individual staff, whose role is also to encourage greater productivity, particularly in terms of research output and grant income. The network of relationships that criss-crosses the university is reminiscent of subinfeudation, for every person owes fealty to someone above who, in turn, has a duty towards those below. It is this element of control that contains the seeds of invidiousness, for both supervisor and supervisee can be

39 Wyatt and Hare, above n 25, p 252.

40 Friedman and Whitman, above n 30, at 269.

41 A Tidwell, 'The Role of Workplace Conflict in Occupational Health and Safety' (1998) 14 *J Occupational Health & Safety — Australia and New Zealand* 587 at 589; H Hoel, S Einarsen and C L Cooper, 'Organisational Effects of Bullying' in Einarsen et al, above n 30; Litwin, above n 2, at 840–1; Mayes and Whiting, above n 28, pp 149–51.

42 Eg, S Einarsen and E G Mikkelsen, 'Individual Effects of Exposure to Bullying at Work' in Einarsen et al, above n 30; <<http://ohsrep.org.au/hazards/bullying.html>> (accessed 30 July 2004); <<http://www.nteu.org.au/freestyler/gui/files/file3be9dbb1941bf.doc>> (accessed 30 July 2004).

43 Marginson and Considine, above n 12, esp pp 68–95; Coady, above n 16, p 20. Cf H Clark, J Chandler and J Barry, 'For a Moment We See Ourselves as Puppets Indeed: MANagement and Higher Education in Britain', 15th Standing Conference on Organisational Symbolism, *The Empty Space*, 9–12 July 1997, Warsaw <<http://it.pl/scos/chandlerclarkbarry.htm>> (accessed 18 January 2001).

humiliated and shamed by the process, even if unconsciously.⁴⁴

The significant rewards offered to managers have contributed to their construction as the new élite within universities, replacing professors. Senior and middle line managers are now likely to receive salary loadings, cars, superior travel allowances and corporate credit cards, packages far in excess of normal academic entitlements.⁴⁵ In accordance with the new top-down focus, departmental heads and deans are now generally appointed by senior management rather than elected by their peers, a clear instance of the contraction of collegiality. As a result, their allegiance is more likely to be to senior management than members of the school, faculty or wider academic community, or even their own discipline.⁴⁶ In an endeavour to separate themselves from the managed, managers have emerged as a separate caste, engaged in an enterprise that is distinct from the academic aims of the university.⁴⁷ The insignia of status, together with the lure of further benefits, including contract renewal, productivity payments, titles and awards, encourages middle level managers to place increased pressure on academics 'at the coalface'. In the process, managers themselves become the victims of stress when their units are unable to meet performance targets, which may make them 'abusive, intolerant and dictatorial'.⁴⁸

Workaholism has become a cultural norm of corporations all over the world and has attracted the epithet 'job engorgement'.⁴⁹ The change in working conditions may reflect the increasing global demands for productivity and competition,⁵⁰ the pressures of which are clearly impacting upon universities.⁵¹ In the past, the primary role of university managers was to facilitate and support the academic enterprises of teaching and research, as determined by academics themselves. The new breed of managers is outcome-oriented in accordance with the university's mission, whereby they seek to maximise the productivity of staff, for there is now a direct correlation between a university's quantifiable achievements and its funding base. Hence, in the hope of enhancing its image within the 'market', there is pressure to generate more research money, publish more, teach more students, and generally work harder. The new style university managers have little respect for the traditional lines of demarcation between matters academic and matters administrative.⁵² They may even take it on themselves to vet course content

44 Wyatt and Hare, above n 25, esp pp 190–1.

45 Frank Stilwell, 'Markets in Merit ... Or Merit in Markets?' (2003) 46 *Australian Universities Rev* 13.

46 Marginson and Considine, above n 12, p 94; Cain and Hewitt, above n 11, p 58.

47 S Aronowitz, *The Knowledge Factory: Dismantling the Corporate University and Creating True Higher Learning*, Beacon Press, Boston, 2000, p 165; A B Cabal, *The University as an Institution Today*, UNESCO & IDRC, Paris & Ottawa, 1993.

48 Bassman, above n 26, p 138.

49 Ibid, p 77.

50 Litwin, above n 2, p 842; Rayner et al, above n 30, pp 6–7.

51 The change has been so dramatic that commentators have questioned whether the idea of the Australian university, as formerly understood, may have come to an end. Eg, S Cooper, J Hinkson and G Sharp, *Scholars and Entrepreneurs: The Universities in Crisis*, Arena Publications, North Carlton, 2002; Coady (Ed), above n 16.

52 Cain and Hewitt's study of the University of Melbourne is illuminating in this regard. See Cain and Hewitt, above n 11, p 89 et passim.

and determine research priorities, factors that have the potential to circumscribe academic freedom — as well as to raise hackles.

Recently devised codes of conduct are also likely to inhibit academic freedom. On their face, such codes appear benign, with references to fairness, respect for rights and the non-discrimination principle, but the threat of initiating disciplinary proceedings against those who question university policy illustrates how such codes can be used as a sword rather than a shield. Codes of conduct, furthermore, are designed to deal with the conduct of employees rather than broader institutional ethical issues.⁵³ Their gaze is directed downwards, never upwards, so that there is no way of capturing and formally interrogating the cultural context of restructuring, downsizing and profit-making in which corporatist bullying appears to flourish.

The concept of management has been significantly expanded within the contemporary corporatised university.⁵⁴ What was formerly called 'administration' was undertaken largely by academics, usually on a rotating basis, supported by a small cluster of permanent administrators at the centre and a sprinkling throughout departments and faculties. The pervasive rhetoric of 'managing', in conjunction with a proliferation of managers at all levels, signifies the changed mindset in which academic autonomy and freedom have become passé. Within an economically rationalist environment, these values have been jettisoned, along with collegiality and robust intellectual debate, because they lack use value within the market.⁵⁵

But how do we tell the difference between managing and bullying in an authoritarian institution where the primary organisational aim is to effect mass education with inadequate resources? As Finn J points out, 'it is not workplace harassment for managers to manage'.⁵⁶ On its face, the proposition that managers should manage appears to be eminently reasonable; we know that scarce resources have to be used sparingly. However, Finn J goes on to allude to a distinction between offensive and inoffensive management decisions, but we are given no assistance in understanding where one ends and the other begins. In fact, the two are thoroughly imbricated because of the historic privileging of employer prerogative and, with the exception of the most egregious and violent conduct, it is impossible to untangle them. After all, according to the law of employment, it is for employers to tell employees what to do. Academics, who are not accustomed to being told what to do, and certainly not how to do it, are now likely to find themselves being directed by administrators to satisfy the relentless demands of accountability and administrivia.

The norms of collegiality, consultation and academic freedom sit uneasily with the currently favoured top-down style of management. Academic resistance may encourage managers to employ authoritarian tactics in order to satisfy the dictates of those further up the line. The new, often ill-trained managers, who may be our erstwhile colleagues and unit administrators, are

53 Cf Bassman, above n 26, p 69.

54 Marginson and Considine, above n 12; Cain and Hewitt, above n 11, p 55; Coady, above n 16, p 15 ff.

55 B Readings, *The University in Ruins*, Harvard University Press, Cambridge, Mass, 1996, p 175.

56 *Kelson v Forward* (1995) 60 FCR 39 at 56; (1995) EOC ¶92-762 (FCA) at 78,644.

expected to understand instinctively the limits of their authority. Neither Finn J, nor anyone else for that matter, can draw clear lines around managerialist norms when they are deliberately left permeable. Paul McCarthy suggests that this permeability exists so that the brutality of restructuring can be effectively masked by the positive rhetoric of managerialism.⁵⁷

Corporatism facilitates bullying in ways that transcend the pathology of the aberrant bullying individual, just as sexism, racism, homophobia, ableism and ageism transcend the individualised pathology of discrimination favoured by liberal legalism.⁵⁸ The distinguishing characteristics of Field's psychopathic manager merge with those of line managers in the new style corporatised university. As one Vice-Chancellor is reported to have said, the job of a university manager was to 'kick heads'. This 'job description' succinctly captures the conflation between managing and bullying. It also resonates with a finding by US researchers, which 'implies that harassment is viewed as functional by management, and perhaps necessary, to achieve productivity and acceptable performance from employees'.⁵⁹

Corporatism signifies the instability and volatility of academic workplaces where tenure is no longer a guarantee of security. Indeed, the tendency of universities, as with other corporate employers, is to favour an increasing proportion of flexible workers — casual, contract, sessional and part-time.⁶⁰ Not only are contingent workers likely to be treated as depersonalised and disposable,⁶¹ but the uncertainty they embody infects the entire work unit and enables the arbitrary exercise of managerial power over people's lives. Tenured workers are by no means immune. Redundancies and terminations are a fact of life in the corporatised workplace, but these acts in themselves do not formally qualify as bullying, unless shown to be retributive. Nevertheless, fear of redundancy is likely to frustrate reciprocal action:

Without the sanctions imposed by power relations, subordinates would be tempted to return a blow with a blow, an insult with an insult, a whipping with a whipping, a humiliation with a humiliation.⁶²

In the contemporary academy, 'insubordination' is more likely to involve daring to question university policy than aiming blows at a head of

57 P McCarthy, 'When the Mask Slips: Inappropriate Coercion in Organisations undergoing Restructuring' in P McCarthy, M Sheehan and W Wilkie (Eds), *Bullying: From Backyard to Boardroom*, Millennium Books, Alexandria, NSW, 1996, p 50. See also Sheehan, above n 35, for an account of the ways in which organisation cultures change as a result of restructuring.

58 M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, p 8.

59 Keashley and Jagatic, above n 30, p 51.

60 P Bassett and H Marshall, 'Women Working as Casual Academics: A Marginalised Group' (1998) 4 *J Aust and NZ Academy of Management* 10; J Blackmore and J Sachs, 'Managing Equity Work in the Performative University' (2003) 18 *Aust Feminist Studies* 141 at 146. For a comprehensive and percipient analysis of the contingent workforce more broadly, see R Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15 *AJLL* 209.

61 Yamada, above n 27, at 491; Bassett and Marshall, above n 60, at 14.

62 J C Scott, *Domination and the Arts of Resistance: Hidden Transcripts*, Yale University Press, New Haven & London, 1990, p 38.

department.⁶³ The decision to cut off an academic's email in retaliation for communicating an impliedly critical view of policy to staff, as occurred in one Australian institution,⁶⁴ can be conceptualised either as an act of bullying or as 'management's exercise of its collective will to enforce workplace discipline under the contract of employment'.⁶⁵ The polarity in characterisation highlights the definitional dilemma, for there is never going to be consensus as to what conduct is impugned.

This example also makes clear that neither the individualised pathology nor corporatisation can solely explain the phenomenon of the bullying manager. Regard must be paid to the 'interactive analysis of both individual and social risk factors'.⁶⁶ Hence, managers who are otherwise civil may unconsciously evince bullying behaviour when operating in an authoritarian and hierarchical culture in which corrosive leadership is applauded and mistaken for good management. As 'senior management is the role model for the rest of the organization',⁶⁷ its approbation of bullying as a controlling mechanism fixes the stamp of approval to it:

I did actually see the VC at work a few times and his management style is quite vicious, bullying, insulting, and I saw the head in a different light. In one session where the VC was being very openly critical of the head in front of the group of people around, he actually shuffled a bit and looked really insecure, and was on the other end of it. And I thought, 'Well, that is where he is learning that behaviour and his personality is obviously quite amenable to it anyway. But they learn that is the way to behave and if you want to get on here, you have to copy that style' (Academic F).

There is also a gendered character to the authoritarian leader, who has been described as a 'John Wayne in pinstripes'.⁶⁸ The masculinist character of management does not mean that women are excluded outright from its ranks, but they are not altogether welcome either, certainly not at the level of senior management, which often espouses the most macho style.⁶⁹ The hierarchical ordering underscores the phenomenon of the 'glass ceiling' that operates to

63 Retributive action frequently arises from instances questioning policies and passing standards for full fee-paying students. The dismissal of Associate Professor Ted Steele by the University of Wollongong following allegations of 'soft marking' has become something of a *cause celebre*. See B Martin, 'Dilemmas of Defending Dissent: The Dismissal of Ted Steele from the University of Wollongong' (2002) 45 *Aust Universities Rev* 7. On the issue more generally, see also Commonwealth of Australia (Senate Employment, Workplace Relations, Small Business and Education References Committee), *Universities in Crisis*, The Senate, Parliament House, Canberra, 2001, pp 150–60.

64 A Patience, 'Beyond the Silencing Academy' in P James (Ed), *Burning Down the House: The Bonfire of the Universities*, Association for the Public University in association with Arena Publications, North Carlton, 2000, pp 41–2.

65 M Ironside and R Seifert, 'Tackling Bullying in the Workplace' in Einarsen et al, above n 30, p 384.

66 Di Martino, above n 2, p 3.

67 Bassman, above n 26, p 165.

68 P Thompson and D McHugh, *Work Organisations: A Critical Introduction*, 2nd ed, Macmillan Business, London, 1995, p 202.

69 Clark, Chandler and Barry, above n 43, at 5. Cf Scott, above n 62; M Sheehan, 'Case Studies in Organisational Restructuring' in McCarthy et al, above n 57, p 78; Blackmore and Sachs, above n 60.

bar women from senior management.⁷⁰ Women may in fact be favoured at the lowest managerial level, as departmental heads, where they have comparatively little power and are expected to devote themselves to dealing with everyday relational problems, or 'putting out fires', rather than creating policy. In this way, the feminine is effectively coöpted by corporatisation — to give it a more acceptable face and disguise its harsh capabilities. Women line managers at the lower echelons may find that they are treated as tokens and given little support:

And contrary to actually being supportive, he was positively unsupportive and aggressive, intimidatory, mainly about things like the resources on his floor. He obviously felt much aggrieved that I had a most pleasant, rather large office compared to his own, and every time he would come over he would start ranting and raving about my department having such palatial offices. Well, I had nothing to do with the design and occupation of the floor and, when I objected to it, he then switched the subject and started saying, 'It is up to you to get your people into research; we have got to get our research output up.' He sort of switched his aggression from one point to another and, at that point, he would be pointing his finger at me. This was about three weeks into my position as head, which I thought was very unfair. Well, I got very angry, and I was very upset and I was not sleeping at night. Very stressed and it had the impact on me that I did not want to see him at all. So, instead of going to talk to him about issues in the school, I would avoid him and try to work around him and then of course at senior staff meetings I did not feel like speaking . . . It [the style of management] has had the obvious result that there are no women in those positions now (Academic G).

Generally, staff will not give of their best in an authoritarian workplace where they are over-managed and undervalued. They will resist, and there are pockets of resistance everywhere.⁷¹ The typical response of academics to a bullying culture, if they elect to stay, is to 'disengage'.⁷² That is, in order to remain on the pay roll, they will satisfy minimal obligations in respect of teaching and research, but withdraw from the life of the university as much as possible and devote more time to family or other activities. The stress associated with their working lives is thereby reduced. Their withdrawal, however, permits an expansion of the ambit of managerial control as well as contributing to the evisceration of collegiality. The weakened sense of collectivism also serves to undermine attempts at resistance when other disfavoured colleagues become the targets of bullying. While discomfited, the majority will avert their faces out of fear, for those who speak out could also be targeted, but it is their silence that allows the bullying to thrive. Furthermore, the corporatised university is one that favours and rewards those who are deferential towards authority. Such a reward system is characteristic of any managerial hierarchy, but timidity does not augur well for creative thought or for Australia's future as the 'knowledge nation'. Mediocrity, an

70 J Baxter and E O Wright, 'The Glass Ceiling Hypothesis: A Comparative Study of the United States, Sweden, and Australia' (2000) 14 *Gender & Society* 275; L V Still, *Glass Ceilings and Sticky Floors: Barriers to the Careers of Women in the Australian Finance Industry*, report prepared for the Human Rights and Equal Opportunity Commission and Westpac, HREOC, Sydney, 1997.

71 Clark, Chandler and Barry, above n 43, at 5.

72 Yamada, above n 27, at 483.

unthreatening orthodoxy and a predetermined epistemological standpoint follow from not rocking the boat.

Of course, naming managerial conduct as 'bullying' is a form of resistance too. The ugly word encapsulates the resentment and feeling of anomie that besets those who are targeted. Paul McCarthy percipiently describes bullying complaints as a new 'signifier of distress'.⁷³ Naming the behaviour enables targets to strike back at management for having destroyed their self-worth. McCarthy nevertheless cautions us against getting caught up in the bully/victim binary and losing sight of the broader political context in which it is embedded.⁷⁴

The erosion of a collegial enterprise in which academics and unit heads once shared power in favour of top-down managerialism represents the loss of something worthwhile. Acceptance of the values of the marketplace would appear to be a crucial indicium of systemic bullying. The findings of Ironside and Seifert that the corporatisation of the public sector engendered bullying behaviour in the United Kingdom support this view:

As management in the public services has become more like management in the private sector, this illustrates our argument that bullying is endemic in the labour management practices associated with making a profit.⁷⁵

Furthermore, Wyatt and Hare estimate from their 20 year experience with more than 1000 work groups in the United States that only 1 in 20 is fully supportive of its members in enabling them to do the job that they were hired to do.⁷⁶ Thus, as universities move away from a collegial to a corporatised model, a surfeit of managers given to over-control because of obsession with entrepreneurialism and income generation contributes to the development of dysfunctional and lacklustre disciplinary units. Within such workplaces, academics count the days until retirement or a redundancy payout.

While not focusing specifically on universities, Wyatt and Hare suggest that the pervasive workplace dilemma can be corrected by permitting workers to share power with managers.⁷⁷ Ironically this is the very essence of the collegial model that universities are so enthusiastically jettisoning. How do we reclaim shared power when university managers have become 'addicted to an image of their superiority'?⁷⁸ As the causative factors inhere deep within the neo-liberal imperative and the psychic heart of corporatism, zealous crusaders have little hope of recapturing an imagined ideal of collegiality.

Wyatt and Hare nevertheless accept that most workplaces are abusive and there is little possibility of changing them. Instead, they suggest, individuals should focus on changing themselves in order to be able to survive better. They emphasise the importance of being able to distance the self psychologically through the methods of 'empowered awareness' and 'strategic

⁷³ P McCarthy, 'A Postmodern Experience' in Einarsen et al, above n 30.

⁷⁴ Ibid, p 242.

⁷⁵ Ironside and Seifert, above n 65, p 386. Stuart Rees goes further in suggesting a linkage between being greedy and being a bully. S Rees, 'Greed and Bullying' in S Rees and G Rodley (Eds), *The Human Costs of Managerialism: Advocating the Recovery of Humanity*, Pluto, Leichhardt, 1995.

⁷⁶ Wyatt and Hare, above n 25, at p 48.

⁷⁷ Ibid, p 88. Cf Rees and Rodley, above n 75.

⁷⁸ Ibid, p 97.

utilisation'.⁷⁹ 'Empowered awareness' focuses on the development of a reflexive approach. Instead of being consumed by a Nietzschean notion of *ressentiment*,⁸⁰ Wyatt and Hare recommend that the targeted person should aim to become knowledgeable of the self and the ramifications of bullying. 'Strategic utilisation' involves taking action, including aligning one's interests with others to achieve one's goals.

Uncertain Avenues of Redress

Informal mechanisms

Wyatt and Hare's understanding of 'empowered awareness' can succeed in making targets feel better because it enables them to see that the bullying is not their fault. The idea of self-knowledge and self-discipline is also meant to extend to managers within what has been called 'therapeutic authority'.⁸¹ 'Strategic utilisation' is more problematic, particularly when the conduct is legitimised by corporatist structures, as I have argued. How should the targeted individual respond? When there is no obvious reason for the bullying behaviour, the normal response would be to approach the perpetrator and seek an explanation. The bully will sometimes back down, but confrontation can be counter-productive and retributive.

Complaining to the bully's supervisor is the next step. After all, the target occupies the moral high ground. How could anyone justify the shouting, the false accusations and the thoroughly unprofessional behaviour, regardless of the target's performance? A senior manager might have 'a word' with the bully but it is more likely to be the target than the bully who has to 'exit' the workplace or face being labelled a troublemaker and malcontent for having complained. It is particularly difficult for women who, all too often, are cast in the subject position of complainants because they are more likely to occupy managed and vulnerable positions. The 'complaining woman' comports with another negative social stereotype.

In any case, as Brian Martin points out in his handbook on whistle blowing, a grievant will rarely receive justice from senior management, as the hierarchical ordering of the institution will be challenged by the lodging of a complaint.⁸² When it comes to the crunch, protection of the status quo will almost certainly be deemed more important than the self-worth and reputation of an individual academic who, in an age of downsizing, is viewed as dispensable and replaceable with a cheaper contingent worker. The concern is that if one complaint is taken seriously, it could invite further complaints, which in turn, could jeopardise the entire managerial edifice.⁸³ Upholding managerial prerogative by either rejecting or trivialising the complaint is the likely scenario. However, if the evidence is extreme and unequivocal through the adduction of proof, some action will be necessary to avoid impugning the

⁷⁹ Ibid, p 163 ff.

⁸⁰ *Ressentiment* refers to the desire on the part of the harassed person to retaliate by inflicting pain. See F Nietzsche, *On the Genealogy of Morals*, Vintage Books, New York, 1969.

⁸¹ Hatcher and McCarthy, above n 8.

⁸² Martin, above n 37.

⁸³ Cf ibid, p 52.

fairness of the internal procedures, even if a high profile academic is involved.⁸⁴

In accordance with contemporary risk management policy, in-house grievance mechanisms have been established in most universities in order to foreclose the possibility of complaints being lodged with external agencies. Discord must be kept out of the public eye as it weakens the power of the dominant.⁸⁵ This is crucial in the case of a university anxious to capitalise on its 'brand name' in a competitive market. Complaints may be mediated by a university ombudsman or grievance officer 'in-house', although a more formal process may be established, particularly if the union is prepared to take up the matter.⁸⁶

For the most part, workplace bullying is inchoate as a legal harm, despite the dramatic increase in its reportage, if not its incidence. To date, bullying has been understood largely as a managerial rather than a legal problem.⁸⁷ This is leaving aside overt behaviour, such as battery or sexual assault, which may be subject to the criminal law. Employer prerogative has conventionally taken precedence over the individual rights of workers, although recognition of individual rights was a central plank of the social liberal initiatives of the twentieth century. While there has been an attempt to reassert employer prerogative under neo-liberalism, as can be seen with the new managerialism and the growth in contingent employment, as well as the weakening of unionism, employees are nevertheless unlikely to return meekly to the position of workers of the eighteenth century, when they were the literal servants of the employer.

Common law

More substantial remedies may be available to individuals through a range of common law causes of action, as well as specific industrial statutes, which govern the employment relationship, such as the Workplace Relations Act 1996 (Cth).⁸⁸ Common law actions include breach of contract, breach of statutory duty and tort. First, the contract of employment includes an implied term that the employer will provide a workplace that is safe and does not threaten the health of the worker.⁸⁹ Secondly, a specific statutory duty to provide a safe workplace is imposed on employers under occupational health

84 Few targets will have resorted to the extensive taping and transcription of conversations and meetings to prove their case, as did a Queensland Legal Aid manager, who was allegedly bullied by her CEO: 'In such situations I felt unprotected because whatever was discussed in those meetings could be denied or misinterpreted and the word of a senior executive or the CEO would be accepted over mine.' H Thomas, 'Wired for Sound and Fury', *Courier Mail*, 7 February 2004, p 35.

85 Scott, above n 62, p 56.

86 Eg, *Re University of Calgary and University of Calgary Faculty Assn* (1999) 60 CLAS 13. In this case, a group of professors successfully established that they were harassed and had their academic freedom breached by their dean who had cancelled their courses because they refused to change to the mode of assessment favoured by the dean.

87 Yamada, above n 27, at 492. It might also be noted that, until recently, much of the scholarly literature has emphasised the positive dimensions of workplace conflict. See Tidwell, above n 41, at 588.

88 In *White v Caterpillar of Australia Ltd* (2002) EOC ¶93-184 (AIRC), the termination of the applicant's employment for bullying and threatening co-workers was upheld.

89 For discussion of the type of implied rights and duties arising from the contract of

and safety legislation.⁹⁰ While this legislation itself does not create rights for individual employees, it may be invoked to support a common law action. Damages actions at common law under this head have been declining in importance because of the difficulty of proving fault, a factor that has given rise to 'no-fault' compensation schemes.⁹¹ Provided that a nexus with the workplace can be established, the university may be held liable for stress-related illness under the relevant scheme. Thirdly, a tort action grounded in negligence can be instituted against a university that has breached a duty of care. The underlying principle of negligence is that if a university, through its senior officers, knew or ought to have known about the bullying behaviour, but failed to take action, the institution could be found to be vicariously liable.

It may be that the populist bullying discourse is moderating some of the familiar judicial reluctance towards recognition of dignitary harms. In *New South Wales v Jeffery*,⁹² a workplace bullying case, albeit not in a university, was successfully grounded in negligence on this principle.⁹³ The plaintiff, a project officer with the Police and Community Youth Clubs NSW, had been subjected to a long period of harassment and abuse by his supervisor, a sergeant in the Police Service. The requisite degree of harm was demonstrated:

The evidence clearly establishes that the Sergeant's bullying tactics had an adverse psychological effect upon the plaintiff. From being a happy outgoing person he became stressed and anxious.⁹⁴

The State was found to be 'clearly vicariously liable' for his conduct, even though the plaintiff was too afraid to make a formal complaint when he was employed. His inaction did not preclude a finding that the duty of care to

employment, see eg M J Pittard and R B Naughton, *Australian Labour Law: Cases and Materials*, LexisNexis Butterworths, Sydney, 2003.

90 Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth); Occupational Health and Safety Act 2000 (Cth); Occupational Health and Safety Act 1985 (Vic); Workplace Health and Safety Act 1995 (Qld); Occupational Health, Safety and Welfare Act 1986 (SA); Occupational Safety and Health Act 1984 (WA); Workplace Health and Safety Act 1995 (Tas); Work Health Act 1986 (NT); Occupational Health and Safety Act 1989 (ACT). For a comparative international study, see N Gunningham and R Johnstone, *Regulating Workplace Safety: System and Sanctions*, Oxford University Press, Oxford, 1999.

91 B Creighton and A Stewart, *Labour Law: An Introduction*, 3rd ed, Federation Press, Sydney, 2000, pp 439–42. A national scheme regulating occupational health and safety is currently under consideration. The retention, limitation or removal of common law damages is one of the specific issues to be addressed. See Productivity Commission, *National Workers' Compensation and Occupational Health & Safety Frameworks*, Issues Paper, April 2003, <<http://www.pc.gov.au/inquiry/workerscomp/index.html>> (accessed 30 July 2004).

92 (2000) Aust Torts Reps 81–580.

93 Cf *Waters v Commissioner of Police* [2000] 4 All ER 934; [2000] 1 WLR 1607 (HL) in which the plaintiff grounded her action in breach of contract and statutory duty, as well as negligence. While the case was limited to considering whether the claim should be struck out, the House of Lords acknowledged the responsibility of the employer to provide a safe workplace from the bullying of fellow officers. The plaintiff had been allegedly raped by a fellow officer while they were both off duty. When she complained, she was ostracised, harassed, victimised and threatened by her colleagues for having violated the taboo against complaining about a fellow officer.

94 *Jeffery*, above n 92, at [2] per Foster AJA.

provide a reasonably safe workplace had been breached:

there would have been sufficient awareness of what was going on in the unit, reasonably to raise suspicions in superior officers that a situation existed, which would warrant investigation and subsequent correction.⁹⁵

The approach in *Jeffery* puts paid to the notion that an employer can evade liability by claiming that an employee was 'out on a frolic of [his] own' when performing an unauthorised act in the course of employment. The finding that constructive knowledge of the bullying sufficed to ground the liability of the employer should give universities pause, particularly if, perchance, a manager with the reputation of being a bully has either been appointed or had [his] conduct tacitly approved by performance appraisals.

Anti-discrimination legislation

Unless actual physical harm can be demonstrated, the demeaning dimension of most workplace bullying remains legally equivocal, although it may be captured by anti-discrimination legislation. Discrimination, in fact, is frequently a sub-set of bullying. However, to have recourse to anti-discrimination legislation, a person must be able to show that he or she was bullied *because* of his or her sex — or race — or disability — or sexuality — or other trait that constitutes a proscribed ground. To be regularly referred to as a 'stupid wog bitch' is an example of bullying that may be linked to both sex and race discrimination,⁹⁶ but if the crucial nexus with a proscribed ground cannot be established, anti-discrimination legislation has no jurisdiction.

Most anti-discrimination legislation expressly proscribes sexual harassment, which is a particular kind of bullying. Indeed, sexual harassment at work is likely to have more to do with sex discrimination than sexual desire, because the harassment commonly arises from a wish to maintain masculine mastery in areas of work where the entry of women is viewed as threatening:

To a significant extent, when a woman is harassed at work, her harassment needs to be seen as part of a discriminatory backlash: a last-ditch effort by men to preserve the playgrounds of male power from female competitors.⁹⁷

The academy, where men have traditionally had a monopoly, is a significant arena of contest, as is apparent from the antipathy towards feminist scholarship and the raising of issues disproportionately impacting on

⁹⁵ Ibid, at [9] per Foster AJA.

⁹⁶ *Djokic v Sinclair* (1994) EOC ¶ 92-643 (HREOC).

⁹⁷ R Ehrenreich, 'Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment' (1999) 88 *Georgetown L Jnl* 1 at 16. Equal opportunity reports are replete with cases involving the harassment of women who are regarded as interlopers for entering traditionally male preserves. See, eg, *Horne v Press Clough Joint Venture* (1994) EOC ¶92-556 (WA EOT); *Hopper v Mt Isa Mines* (1997) EOC ¶92-879 (Qld ADT); *Dunn-Dyer v ANZ* (1997) EOC ¶92-897 (HREOC). *McKenna v State of Victoria* (1998) EOC ¶92-927 (Vic ADT) is illustrative. The complainant was a police officer who was found to have been subjected to sustained discrimination, sexual harassment and victimisation which caused her to withdraw from the force (aff'd on appeal, *State of Victoria v McKenna* (2000) ¶EOC 93-080).

women.⁹⁸ So long as women are docile, purvey orthodox phallogocentric knowledge, and remain in junior positions, they are tolerated, but as soon as they challenge the masculinist monopoly on authority, they are vulnerable to harassment as a means of containment or retribution. My research establishes that they may be refused promotion, study leave, research grants and access to resources generally; they, like disfavoured and sexualised men, may be given onerous teaching loads outside their areas of expertise; their specialist courses may be abolished; they may be subject to increased surveillance; they may also be vulnerable to taunts and other types of harassing behaviour in the hope that they will leave.⁹⁹ Empirical studies support the view that women academics experience significantly higher rates of harassment than men.¹⁰⁰

The Sex Discrimination Act 1984 (Cth) s 28A contains a two-pronged definition of sexual harassment. The first refers explicitly to sexual conduct that is unwelcome, which is usually understood as referring to sexual overtures. The second involves circumstances in which the person harassed would be 'offended, humiliated or intimidated'.¹⁰¹ If the *sexual* element is not present, the harassing conduct in itself is unlikely to constitute sexual harassment, even when it is perpetrated by a person in a position of authority against a person of the opposite sex.¹⁰² Thus, the Human Rights and Equal Opportunity Commission held that a male manager poking a female assistant manager in the chest and telling her that she had to do what she was told did not amount to sexual harassment.¹⁰³ In contrast, the employer of a male school principal who shook a packet of Ratsak in the female complainant's face, saying that he would 'get a rat', was held liable because he had also engaged

98 Eg, Blackmore and Sachs, above n 60; H Bannerji, L Carty, K Dehli, S Heald and K McKenna, *Unsettling Relations: The University as a Site of Feminist Struggles*, Women's Press, Toronto, 1991.

99 Continental Europe uses the term 'mobbing' to refer to bullying, which is particularly apt in the case of the harassment of an outsider. The term derives from Konrad Lorenz' work on animal ethology and refers to the way a herd of animals or a flock of birds unite to attack a newcomer until it leaves. See Einarsen et al, above n 30, pp 4–5; Friedman and Whitman, above n 30, at 247. Bessant, 'Women in Academia and Opaque Violence', above n 21, employs the term 'opaque violence' to refer to the 'pervasive, subtle and enduring' practices perpetrated against (mostly) women in the academy. See also M Thornton, *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press, Melbourne, 1996, pp 106–29.

100 Eg, J A Richman, K M Rospenda, S J Nawyn et al, 'Sexual Harassment and Generalized Workplace Abuse among University Employees: Prevalence and Mental Health Correlates' (1999) 89 *American J Public Health* 358.

101 Cf Anti-Discrimination Act 1977 (NSW) s 22A; Equal Opportunity Act 1995 (Vic) s 85; Anti-Discrimination Act 1991 (ACT) s 58; Anti-Discrimination Act 1992 (NT) s 22(2). For critique, see J Morgan, 'Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners' in M Thornton (Ed), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, 1995.

102 M Thornton, 'Sexual Harassment losing Sight of Sex Discrimination' (2002) 26 *MULR* 422.

103 *Malone v Pike* (1997) EOC ¶92-868 (HREOC). See also *Hosemans v Crea's Glenara Motel Pty Ltd* (2000) EOC ¶93-062 (HREOC) in which the commission found that a complainant who was called a 'stupid bitch' and told that she had a 'fat arse' had been subject to personal abuse rather than sexual harassment. The finding that the harassment was not sexual underscores the way the legislation individualises acts of sex discrimination so that they are separated from sexism. See Thornton, above n 58, p 8 et passim.

in other more explicitly sexual conduct.¹⁰⁴ Poking in the chest, engaging in verbal abuse and shaking Ratsak in a person's face may satisfy the requirements of sex discrimination, but only if such conduct can be shown to be less favourable *on the ground of sex*, which is always context-dependent and contestable.

The legal requirement for sexual harassment focuses on the *effect* on the employee, not the *intention* of the manager.¹⁰⁵ Thus, it is not a defence for managers to claim that they had no intention of inflicting harm, because they were seeking to exhort greater productivity. Similarly, the effects test prevents a respondent from claiming that a complainant ought to have put up with abusive conduct. In *W v Abrop*,¹⁰⁶ the Human Rights and Equal Opportunity Commission described as 'hopelessly misconceived' a submission that the complainant, who left her place of employment and suffered depression as a result of the sexual harassment, ought to have been able to put up with it because she was a young single mother who was 'no wilting lily' (read 'sexually experienced').

In view of the perceived difficulty posed by the *sexual* element in sexual harassment, the NSW Equal Opportunity Tribunal developed the concept of sex-based or sexist harassment in *Hill v Water Resources Commission*.¹⁰⁷ This complaint dealt with an allegation of sustained harassment by a woman supervisor in the NSW Public Service. The conduct included a range of petty acts of intimidation, including breathing down the phone, displaying offensive literature, and threatening to kill the woman's goldfish. The tribunal found that this conduct met the test of sex discrimination, as a comparable man would not have been treated in the same way. This case is of interest also because the abuse was perpetrated by subordinates and co-workers, for whose acts the employer was found to be vicariously liable because several senior managers had failed to take action. The undermining to which the complainant was subjected is typical of bullying stories, including those that emanate from the academy. The complainant in *Hill* was a woman supervisor who was bullied by male staff for having entered what was regarded as a male domain. Had the bullying co-workers been of the same sex, it would have been harder, if not impossible, for the complainant to make out a case of sex discrimination.

It is not unusual for complainants to be subjected to retaliatory treatment by employers for having lodged a complaint with an external agency,¹⁰⁸ which is why victimisation, another variation on the bullying theme, is generally expressly proscribed by anti-discrimination legislation.¹⁰⁹ In *Zimmerman v Federal Credit Union*,¹¹⁰ a US trial court's decision to award the very substantial sum of USD730,000 for retaliation and workplace bullying was

104 *Gray v Victoria* (1999) EOC ¶92-996 (VCAT).

105 But see Anti-Discrimination Act 1991 (Qld).

106 *W v Abrop* (1996) EOC ¶92-858 (HREOC).

107 (1985) ¶EOC 92-127 (NSW EOT).

108 Eg, *Hill*, above n 107; *McKenna*, above n 97.

109 Sex Discrimination Act 1984 (Cth) s 94; Disability Discrimination Act 1994 (Cth) s 42; Anti-Discrimination Act 1977 (NSW) s 50; Equal Opportunity Act 1995 (Vic) ss 96-97; Anti-Discrimination Act 1991 (Qld) ss 129-131; Equal Opportunity Act 1984 (SA) s 86; Equal Opportunity Act 1984 (WA) s 67; Anti-Discrimination Act 1998 (Tas) s 18(1); Discrimination Act 1991 (ACT) s 68; Anti-Discrimination Act 1992 (NT) s 23.

110 121 F Supp 2d 133; 2000 US Dist LEXIS 17107; W L Pfaffenbach, 'Verdict for Workplace

affirmed on appeal, even though the plaintiff's earlier claim relating to pregnancy discrimination, was rejected by the jury.

Australian anti-discrimination law took its cue from the Anglo-American model. It is primarily concerned with combating less favourable treatment on the basis of sex, race or other impugned characteristic. As I have nevertheless suggested, violations to the dignity of the worker that cannot be causally linked to a specified characteristic or attribute of a person, are not legally cognisable within any of the Australian statutory regimes.

Recognising Dignitary Harm

In the case of bullying conduct not caught by the discrimination rubric, Rosa Ehrenreich argues for the development of a new tort of dignitary harm.¹¹¹ Dignitary harm would encompass 'dignity, autonomy, personhood and personality, selfhood, privacy, decency, respect, and so on'.¹¹² Ehrenreich suggests that a broader understanding of harassment than sexual harassment would move away from the essentialised notion of sexualised harm in which the harassment is wrong because women are women, to one that recognises the wrong because they are human beings. The harm, not the sex of the person, would then become the relevant touchstone, although Ehrenreich acknowledges that the 'harm of sexual harassment is in many ways a quintessential dignitary harm'.¹¹³ This proposal, emanating from the United States, would require judges to take the initiative in a way that sits uneasily with the Anglo-Australian legal culture where judicial deference towards the legislature is the norm. The common law possesses the potential for radical inventiveness, but judges rarely invoke it.

More acceptable would be a new statutory cause of action, possibly along the lines proposed by Yamada, also writing from a US perspective, which he calls 'intentional infliction of a hostile work environment'.¹¹⁴ Such an action could minimise, if not obviate, some of the more difficult dimensions of causation and proof that reside in common law actions. Yamada argues that there would be a powerful economic incentive for employers to rid their workplaces of abusive employees and develop strong in-house preventive measures.¹¹⁵ A substantial damages award against one corporate employer would undoubtedly have a salutary effect. Sexual harassment has been proscribed as a discriminatory harm for less than two decades and is now taken more seriously by corporate employers because of concern about damages, although fear of adverse publicity cannot be gainsaid.

While sexual harassment has undoubtedly always been a corollary of employment for women, it required politicisation for the phenomenon to be named and proscribed. Bullying is not a new phenomenon either, but its recent politicisation has similarly led to it being named and understood as a workplace problem. While appealing as a statement of disapprobation by the

"Bullying" is upheld: Bias Claim Fails, but Plaintiff gets \$730K' (2000) 29 *Massachusetts Lawyers Weekly* 731. \$400,000 of the total damages was awarded for punitive damages.

111 Ehrenreich, above n 97.

112 Ibid, at 26.

113 Ibid, at 27.

114 Yamada, above n 27, at 524 ff.

115 Ibid, at 528.

state, statutory legal proscription is problematic in the current political climate. First, we inhabit a 'post-political' age in which collective action has receded with the contraction of civil society. Secondly, neo-liberalism has acted as a powerful inhibitor of workers' rights. The ascendancy of managerialism is not a propitious time for creating new rights. In an age in which we see powerful alliances effected between government and the market, no government is likely to accede to lobbying from an eviscerated union movement to enact legislation that directly challenges recently re-asserted employer prerogatives.

This is exactly what happened in Britain where a Dignity of Work Bill, designed to provide employees with a remedy for bullying, was blocked in the House of Commons in 1997. The Bill appears to have suffered a similar fate a second time around in 2002, after being re-introduced and passed by the House of Lords.¹¹⁶ It may nevertheless be that there would be more community support for a proscription of bullying than was initially the case for sexual harassment, because the latter is frequently confused with sexual desire or consensual sex. The empathy of the high proportion of people who have experienced bullying in the workplace at some stage of their lives could help the case for proscription.¹¹⁷ Although normalisation may have blunted understanding of the phenomenon, the bullying discourse has become clearly audible over the last decade. The economic rationalist objection in terms of the cost to public health and industry has also become louder. It is worth noting too that continental Europe is moving away from an understanding of sexual harassment as a dimension of sex discrimination law, as I have outlined, to a broader understanding of harassment law that focuses on moral harassment or dignitary harm to all workers, regardless of their sex.¹¹⁸

The presupposition underpinning the inchoate idea of bullying as a legally cognisable harm is that every person should have a right to be free from abusive treatment in the workplace. The individualised approach of liberal legalism, nevertheless, tends to downplay the political effects of corporatisation. Indeed, the history of labour law over the past century underscores the social ambivalence about regulating workplaces that were long accepted as private spaces where employer prerogative prevailed. While significant changes were effected by the social liberal initiatives of the twentieth century, *fin de siècle* neo-liberalism began to see a significant resiling from those developments, including enterprise bargaining instead of industry-based national awards, the rescission of affirmative action legislation, contracting out, casualisation, punitive treatment of unionists, and so on. Neo-liberal workplaces have sought to strengthen the 'public transcript' that employers issue as the official story, or their 'self-portrait',¹¹⁹ through the

116 <<http://www.freedomtocare.org>> (accessed 30 July 2004). The text of the Bill is available at <<http://www.parliament.the-stationery-office.co.uk>> (accessed 30 July 2004).

117 The figure has been estimated to be as high as one in four. C Rayner, 'Workplace Bullying: Do Something!' (1998) 14 *J Occupational Health and Safety — Aust & NZ* 581. ACTU and other surveys suggest a figure of around 50%: <<http://www.actu.asn.au/public/resources/bullying.html>> (accessed 30 July 2004); <<http://ohsrep.org.au/hazards/bullying.html>> (accessed 30 July 2004).

118 Friedman and Whitman, above n 30.

119 Scott, above n 62.

discourses of economic rationality and workplace flexibility. The likely result is that individual complainants, in proving their cases, would be caught by the new norms of the corporatised academy, in which corrosive leadership is enmeshed.

The Risks of Adversarialism

Occupying a tenured position in a university is a benefit that is not easily surrendered in an uncertain labour market, particularly as many academics may be unable to move smoothly into work that offers a comparable degree of creativity and personal satisfaction. In view of the high stakes, the targets of academic workplace bullying may consider it worthwhile to pursue their rights down a legal path. Adversarialism, however, is the underlying presupposition of legal action. To be locked in a lengthy legal battle with university management does not augur well for one's future within the organisation.¹²⁰ Nevertheless, the desire by the wronged person to have an authoritative body declare that they were in the right provides a powerful incentive to proceed. It may therefore be considered worthwhile to complain to an external agency, even if only to be able to leave the workplace on one's own terms with a modicum of dignity. However, reaching that point through a legal avenue is fraught. Not only do individual complainants have to carry the burden of proof, but also the entire managerial edifice is likely to collude against them.¹²¹ It is not just the instant case that the university cares about, but also the prospective effect of a 'win' for the employee, which could spawn more claims. While the hypothetical case of *Academic X v University Y* has the potential to mould the sparse bullying jurisprudence, individual targets need courage and a large dose of altruism to engage in what could turn out to be an even more scarifying experience than the impugned conduct itself.

Conclusion

While the bullying phenomenon does not lend itself to 'robust conclusions with regard to causality',¹²² I have postulated that the reason why the incidence of bullying in universities is becoming more pronounced may be correlated with the move to corporatisation. The perception on the part of managers that they are the new élite whose role is to increase productivity and maximise limited resources through constant surveillance and auditing has contributed to the normalisation of a corrosive form of leadership.

Di Martino suggests that we tackle the causes, rather than the effects of violence at work by developing a preventive, systemic and targeted approach.¹²³ This is all very well in theory, but it would require rolling back

¹²⁰ *Waters v Commissioner of Police* [2000] 4 All ER 934; [2000] 1 WLR 1607 reached the House of Lords on a point of law 12 years after the alleged assault occurred. The plaintiff then faced the gruelling experience of a trial, with the possibility of a further round of appeals.

¹²¹ Bassman, above n 26, p 48. I have written about this phenomenon in my study of anti-discrimination legislation. See Thornton, above n 58, p 180 ff.

¹²² H Hoel and D Salin, 'Organisational Antecedents of Workplace Bullying' in Einarsen et al, above n 30, p 215.

¹²³ Di Martino, above n 2, at 8.

the corporatist phenomenon and reinstating principles of collegiality to allow a range of voices to be heard. I am sceptical about such a rollback, at least in the short term. Not only is it apparent that governments are expecting universities themselves to assume greater responsibility for their operating costs,¹²⁴ the new managerialism has created a class of powerful players with a substantial investment in its retention. Thus, while initiatives, such as the development of codes of practice by occupational health and safety bodies and unions, are contributing to the emergence of a new public discourse,¹²⁵ such codes are incapable of addressing the factors that have contributed to the political economy of the corporatist university. Educative and prophylactic measures are highly desirable, but they can go only so far in an unstable and uncertain climate, where students are customers and academics are productive units, whose value is assessed primarily in terms of the competitive dollars they generate. Powerful line managers, whose role it is to exhort greater productivity from these unruly units,¹²⁶ have made themselves indispensable in the transformation of universities as producers and facilitators of the new economy. Hence, the corporatised university, with its over-zealous managerialism, competition for resources and eviscerated notion of academic freedom, is likely to represent an ongoing source of grievance about workplace aggression. A formal avenue of redress will have to be devised to placate this dissonance. However, rather than relying on a traditional model of linear causality, which focuses on linking 'victim' and wrongdoer, a new remedial model would be better off addressing the political environment that has engendered the harm. A single-minded focus on psychopathic managers absolves corporations, including universities, from responsibility for the fear, the insecurity and the relentless pressure to be evermore productive that the market message induces.

124 Hon B Nelson, Minister for Education, Science and Training, *Our Universities: Backing Australia's Future*, Commonwealth of Australia, Canberra, 2003.

125 Most Australian jurisdictions are beginning to formulate codes of practice and guidelines for dealing with workplace bullying under the umbrella of occupational health and safety legislation. The first example was Division of Workplace Health and Safety (Qld), *Workplace Bullying: An Employer's Guide*, a discussion of which occurs in P McCarthy and M Barker, 'Workplace Bullying Risk Audit' (2000) 16 *J Occupational Health and Safety*—Aust & NZ 409. See also Victorian WorkCover Authority, *Issues Paper*, Melbourne, 2001, which includes a discussion of national and international developments.

126 One university manager interviewed by Marginson and Considine, above n 12, p 133, likened the job of marshalling the research effort of academics to trying to get 'butterflies to fly in formation', a metaphor that encapsulates something of the dissonant perspectives of the managers and the managed in the corporatised academy.