

Workplace Bullying

My Rights & What Can I Do About It?

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Impacts of Workplace Bullying

- ▶ In 2012 a Productivity Commission report found that workplace bullying costs the Australian economy between \$6 billion and \$36 billion every year.
- ▶ Effects of workplace bullying can include:
 - Mental (eg stress)
 - Physical (eg injuries)
 - Loss of productivity
 - Loss of morale

The Previous Law on Workplace Bullying

- ▶ Until the changes to the Fair Work Act came into effect on 1 January, 2014 there was no separate legislation in Australia that specifically covered workplace bullying.
- ▶ Employees were required to 'shop around' and adapt other causes of action to suit their needs.
- ▶ There are pros/cons for each possible avenue, but nothing that suits 100%.

The Previous Law on Workplace Bullying

Under the old system, you could apply using:

- ▶ Anti-discrimination law;
- ▶ Criminal law;
- ▶ Trade practices law;
- ▶ Common Law (breach of contract, negligence etc);
- ▶ Industrial law (unfair dismissal).

The Previous Law on Workplace Bullying

Bullying Conduct: repeated, unreasonable behaviour directed towards a worker that creates a risk to health and safety					
WHS laws	Workers Compensation laws	Fair Work Act (prior to 2013 amendments)	Anti-Discrimination laws	Civil liability legislation and/or common law of negligence	Criminal law
No need for the bullying to have caused an 'injury' or 'disease'	Only applicable if bullying caused an 'injury' or 'disease'	Could only raise bullying in context of general provisions or unfair dismissal claims etc. hence was usually reactive (i.e. worker forced to resign or had been dismissed)	Provides an individual right to sue and seek compensation	Provides an individual right to sue and seek compensation	Police may prosecute
Generally regulator will only intervene once internal complaint mechanisms exhausted.	Provides an individual right to sue if injury serious enough	No requirement to finalise internal complaint mechanisms	No need for any 'injury' to have resulted from bullying but worker must fit within one of the protected categories i.e. the bullying was based on race, gender, disability etc.	May be possible to run parallel claims (e.g. workers compensation).	Significant variance between states and territories
Only regulator may prosecute	Not available if injury caused by 'reasonable management action'	No requirement to finalise internal complaint mechanisms	Interaction with workers compensation laws complex, but generally any amount awarded in one proceeding deducted from award in other proceeding	Use of electronic equipment, Commonwealth laws may be applicable	
No individual right to sue provided	Varialtion between states and territories re application of pre-existing employees	Whilst a range of orders available, reinstatement generally not available and compensation usually paid to compensate for loss of employment	Can be run parallel to other claims (e.g. unfair dismissal)		May provide 'victims of crime' compensation
	Generally no need to go through internal mechanisms first				

The New System

- ▶ There is now specific legislation which deals with Workplace Bullying
- ▶ Came into effect January 1, 2014
- ▶ *Fair Work Act 2009* Cth.(2013 amendments)
- ▶ FWA jurisdiction
- ▶ Apply to the Fair Work Commission

Who's Covered?

- ▶ Anyone who works for a 'constitutionally covered business', including:
 - constitutional corporations (eg. Pty Ltd and Ltd businesses)
 - the Australian Government and its agencies
 - sole traders, partnerships and trustees in ACT and NT
 - incorporated volunteer associations that have at least 1 employee.
- ▶ 'Worker' includes employees, contractors, outworkers, apprentices, trainees, work experience students and volunteers.

Who's *not* Covered?

- ▶ Local Government employees
- ▶ State Government employees
- ▶ Defence Force personnel
- ▶ Volunteers for wholly volunteer-run organisations

If you are in one of these categories, the old system still applies for you.

What is Workplace Bullying?

Fair Work Act s 789FD:

- (1) A worker is bullied at work if:
- (a) while the worker is **at work** in a constitutionally-covered business:
 - (i) an individual; or
 - (ii) a group of individuals;**repeatedly behaves unreasonably** towards the worker, or a group of workers of which the worker is a member; and
 - (b) that behaviour creates a **risk to health and safety**.

(2) To avoid doubt, subsection (1) **does not apply to reasonable management action carried out in a reasonable manner**.

Also, section 789FF(1)(b)(ii) requires that:

there is a risk that **the worker will continue to be bullied** at work by the individual or group

When are you 'At Work'?

- ▶ Not actually defined in the legislation
- ▶ 'arising out of or in the course of employment'
- ▶ Has been found to include:
 - Lunch breaks
 - Working from home
 - Work trips outside normal working hours
 - Travel to or from work

'Repeatedly'

- ▶ The behaviour has to be **persistent**
- ▶ There is no set number of incidents, but it **has to happen more than once**
- ▶ It doesn't have to be the same behaviour each time
- ▶ One-off instances of insensitivity or rudeness **don't** count

'Unreasonable Behaviour'

- ▶ Examples given by the FWC include:
 - aggressive or intimidating conduct
 - belittling or humiliating comments
 - spreading malicious rumours
 - teasing, practical jokes or 'initiation ceremonies'
 - exclusion from work-related events
 - unreasonable work expectations, including too much or too little work, or work below or beyond a worker's skill level
 - displaying offensive material
 - pressure to behave in an inappropriate manner.

- ▶ The test:

Would a reasonable person in the same circumstance see it as unreasonable?

'Risk to Health & Safety'

- ▶ Risk = 'exposure to the *chance* of injury or loss'
- ▶ There doesn't have to be actual danger– just the *possibility* of danger
- ▶ Must be able to show that the risk was *directly caused* by the behaviour

Tip: It's also a good idea to put in a Workers Compensation claim at the same time.

Continued Risk

There must be a risk that the bullying will be ongoing

If an employee has already ceased working (ie quit or been fired) they cannot make a claim for Workplace Bullying under the new system.

They may be able to make a claim for unfair dismissal, general protections, or unlawful termination.

'Reasonable Management Action Carried out in a Reasonable Manner'

Under the new system, you are *not* protected from workplace bullying if your employer can show that:

1. The behaviour was a management action, **and**
2. It was reasonable for that management action to be taken, **and**
3. The management action was carried out in a reasonable manner.

What is a 'management action'?

- ▶ Not defined in the legislation
- ▶ Similar cases under WHS legislation have held that 'the action must be more than simply day-to-day operational instructions that are part and parcel of the work performed'.
- ▶ Examples:
 - Investigating or disciplining a worker for misconduct
 - Performance appraisals
 - Changes to duties including transfer or re-deployment

When is it 'reasonable'?

- ▶ The action must be **lawful**, and **not 'irrational, absurd or ridiculous'**
- ▶ The key question is whether the action was reasonable, not whether it could have been *more* reasonable

What is a 'reasonable manner'?

- ▶ What is reasonable depends on the facts of each case
- ▶ The test: Would a reasonable person in the same circumstances have felt that this was reasonable?
- ▶ Issues taken into consideration:
 - What were the specific circumstances?
 - Were policies & procedures followed?
 - What was the impact on the employee?
 - Any other relevant information

How Do I Make a Claim?

- ▶ There is no time limit for making a claim
- 1. The worker lodges an application with the Fair Work Commission in their state
- 2. The FWC must start processing the application within **14 days**
- 3. The FWC sends a copy of the application to the employer and requests a response
- 4. The FWC sends a copy of the application to the individual/s accused, and gives them time to respond
- 5. Once all of the responses are in the FWC anti-bullying team makes a report to the Panel Head
- 6. The Panel Head decides whether the matter will go to the Commission, and for what purpose (mediation or determination)

What Powers Does the Commission Have?

- ▶ **To gather evidence by:**
 - holding hearings or conferences
 - requiring a person to attend
 - requiring written or oral statements
 - requesting documents
 - conducting its own enquiries/research
- ▶ **To maintain confidentiality by:**
 - Holding all or part of a hearing in private
 - Ordering that details not be published
- ▶ **To refer the matter to Work Health & Safety regulators for further investigation**
- ▶ **To dismiss applications if:**
 - The application doesn't comply with the Act
 - The application is frivolous or vexatious
 - The application has no reasonable prospects of success
 - The application compromises national security, or classified Defence or Police operations

What are the Outcomes?

- ▶ The Commission has the power to order:
 - That the behaviour stop
 - That the employer monitors behaviour
 - That existing anti-bullying policies be followed
 - A review of an existing anti-bullying policy
 - That extra support and training be provided to employees
- ▶ The Commission CANNOT
 - Make an order for compensation or financial penalties

What Will it Cost?

- ▶ Generally, each party pays their own costs

But...

- ▶ The Commission has the power to order that one party pays another's costs if:
 - The application is vexatious, or made without reasonable cause
 - There is no reasonable chance of success
- ▶ If you feel this applies, you have **14 days** from the time the Commission makes its decision to apply for a costs order.

Can I Appeal?

- ▶ Yes, but you must apply to the Commission for permission
- ▶ You have **21 days** to apply
- ▶ The Commission will decide whether the appeal is in the public interest
- ▶ Grounds for appeal:
 - Error of Law
 - Error of Fact

What Happens if an Order is Breached?

- ▶ You can apply to the Federal Circuit Court for a 'civil remedy provision'
- ▶ Fines are up to \$51,000 for corporations, and up to \$10,200 for an individual
- ▶ Be aware: The money does not come to you (it goes to the Fair Work Ombudsman)
- ▶ You have **6 years** to apply

Role-Playing Exercise

Where Can I Get Help?

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Your Union