



BULLYING & HARASSMENT AT WORK: WHAT IS UNLAWFUL AND WHAT CAN BE DONE?

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Today's outline

1. Bullying

1. Anti-bullying jurisdictions
2. Process of a complaint
3. Interaction with OHS laws
4. Cases
5. Strengths & weaknesses

2. Harassment

1. Prohibition under discrimination laws
2. Strategy
3. Action under the Fair Work Act

A note on jurisdictions

Fair Work Act 2009 (Cth)

- National system employers & their employees
- Generally: private sector employees & Commonwealth government employees

Industrial Relations Act 2016 (Qld)

- Employer who is not a national system employer
- Generally: Queensland government & council employees

Bullying at work

Anti-bullying jurisdiction – *Fair Work Act 2009*

s.789FC – Application for an FWC order to stop bullying

- (1) A worker who reasonably believes that he or she has been bullied or sexually harassed at work may apply to the FWC for an order under section 789FF.
- (2) For the purposes of this Part, worker has the same meaning as in the Work Health and Safety Act 2011, but does not include a member of the Defence Force.

Who is a worker?

- an employee
- a contractor or subcontractor
- employee of a labour hire company
- an outworker
- an apprentice or trainee
- a student gaining work experience
- a volunteer (exceptions apply)

Anti-bullying jurisdiction – *Fair Work Act 2009*

s.789FD – When is a worker *bullied at work*?

(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,

a) 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.

Anti-bullying jurisdiction – *Fair Work Act 2009*

Elements of bullying

- (1) Perpetrated against a worker
- (2) At work
- (3) At a constitutionally covered business (FW Act only)
- (4) Repeated
- (5) Unreasonable behaviour
- (6) Which creates a risk to health and safety
- (7) Not reasonable management action carried out in a reasonable way
- (8) Risk of ongoing bullying

Anti-bullying jurisdiction – *Fair Work Act 2009*

Reasonable management action

- **Examples of management action:**
 - Performance appraisals
 - Directing and controlling an employee's work
 - Disciplining a worker for misconduct
 - Investigating alleged misconduct
- **Management action does not have to be ideal or perfect to be reasonable**
- **The action must be both reasonable AND carried out in a reasonable manner**

Process

- 1. File application for an order to stop bullying**
 - In Fair Work Commission: Form F72
 - In Queensland Industrial Relations Commission: Form 82
- 2. Commission must commence dealing with the application within 14 days**
- 3. Commission may set the matter down for a conciliation conference**
 - Often compulsory
 - Confidential
- 4. Hearing or arbitration**
- 5. Orders**

Process

Orders

s.789FF – FWC may make orders to stop bullying

If the FWC is satisfied that:

- (a) the worker has been bullied at work by an individual or group, and
- (b) there is a risk that the worker will continue to be bullied at work,

then the FWC may make any order it considers appropriate to prevent the worker from being bullied at work by the individual or group.

- **The FWC cannot order payment of a pecuniary amount**
- **The FWC must consider any investigation into the matter and any procedures available to the worker to resolve grievances or disputes**

Interaction with WHS laws

- The bullying laws are designed to work alongside existing WHS laws
- Ordinarily, a person cannot commence proceedings under the *Work Health and Safety Act 2011* (Cth) if that person is making an application or has made an application in relation to the same matter under another Commonwealth or State law
- However, the Fair Work Act provides that this prohibition in the WHS Act does not apply in relation to applications made under the bullying laws

Cases

- ***Lacey and Kandelaars v Murrays Australia Pty Limited; Cullen* [2017] FWC 3136**
 - Bullying included manager raising his voice, hiding in buses to frighten the applicants, being overly critical, and unlawful directions.
 - Held: manager had bullied applicants, but no ongoing risk of bullying
- ***Burbeck v Alice Springs Town Council; Georgina Davison; Skye Price; Clare Fisher* [2017] FWC 4988**
 - Applicant alleged bullying including employer's failure to consider applicant's grievances, and unreasonably refusing annual leave
 - Held: ongoing risk of bullying, in part due to conduct of applicant
 - Ordered both parties to undertake positive communication training
- ***Application by Ms A* [2018] FWC 4147**
 - Alleged bullying by sending excessive emails and being unnecessarily critical of work
 - Held: issues raised in emails were reasonable, but tone and frequency of emails was not

Strengths & weaknesses

Strengths

- Available to most workers
- Aimed at stopping or reducing risk of bullying
- Dealt with quickly
 - Can be effective early intervention mechanism
- FWC has flexibility in dealing with an application
- No 'time limits'

Weaknesses

- No compensation available
- No penalties unless an order is contravened
- No finding that bullying occurred until hearing
- Must be ongoing risk of bullying

Harassment

Prohibition of harassment

Anti-Discrimination Act 1991 (Qld)

s.118 – Sexual harassment

A person must not sexually harass another person

- Prohibits sexual harassment in all circumstances

Prohibition of harassment

s.119 – Meaning of sexual harassment

Sexual harassment happens if a person:

- (a) subjects another person to an unsolicited act of physical intimacy; or
- (b) makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person; or
- (c) makes a remark with sexual connotations relating to the other person; or
- (d) engages in any other unwelcome conduct of a sexual nature in relation to the other person;

and the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so—

- (e) with the intention of offending, humiliating or intimidating the other person; or
- (f) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

Prohibition of harassment

Sex Discrimination Act 1984 (Cth)

s.28B – Sexual harassment

Prohibits sexual harassment and harassment on the ground of sex in the following employment relationships:

- Employers/prospective employers and employees/prospective employees
- Person conducting a business or undertaking and workers or prospective workers
- Fellow workers or prospective workers
- A person and an employee or employer
- Both within those relationships and in connection with work

Prohibition of harassment

Sex Discrimination Act 1984 (Cth)

s.28A – Meaning of sexual harassment

(1) A person sexually harasses another person if:

- a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

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

Prohibition of harassment

Conduct of a sexual nature

- Objective test
- Certain conduct may on its own not amount to conduct of a sexual nature.
- However it may do so if it forms part of a broader pattern of inappropriate sexual conduct
- 'Of a sexual nature' must take its meaning from context
- It is accepted that a one-off incident can amount to sexual harassment, as well as on-going behaviour
- Conduct that was first 'welcome' may, by reason of subsequent events, later be regarded as 'unwelcome'

Prohibition of harassment

Examples of conduct of a sexual nature

- An employee was sexually harassed by a co-worker looking frequently at her breasts, making advances and related comments about her breasts – *Noble v Baldwin* [2011] FMCA 283
- An employee was subjected to sexual banter when she was asked repeatedly by a fellow employee 'how's your love life' and subjected to other comments such as about her boyfriend and his sexual prowess - *San v Dirluck Pty Ltd* (2005) 222 ALR 91
- An employee received repeated requests for a romantic relationship with her supervisor over a prolonged period. On a work trip, she came back to her hotel room to find him laying on her bed in his underwear – *Hill v Hughes* [2019] FCCA 1267
- Receipt of sexually explicit emails and text messages from a colleague containing requests for sexual relations and receipt of sexually explicit text messages and phone calls - *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92

Prohibition of harassment

Meaning of ‘unwelcome’

By ‘unwelcome’, I take it that the advance, request or conduct was not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive

Spender J in *Aldridge v Booth* (1988) 80 ALR 1 at [5]

In the context of conduct which is directed (intentionally or not) by one person to another or others, “unwelcome” simply means conduct that is disagreeable to the person to whom it was directed.

Bromberg J in *Ewin v Vergara* (No 3) [2013] FCA 1311 at [27]

The requirement that the impugned conduct be unwelcome raises a subjective test and looks to the reaction (whether articulated or not) of the person who has been subjected to the conduct.

Mansfield J in *Kraus v Menzie* [2012] FCA 3 at [22]

Prohibition of harassment

‘Reasonable person’ test

- An objective consideration which is to be answered by reference to what a reasonable person would have anticipated in all of the circumstances

What the person who perpetrated the conduct anticipated or otherwise perceived would be the reaction of the person harassed, is not relevant – Poniatowska at [289]

- All relevant circumstances should be taken into account when applying this test

Prohibition of harassment

Connection to work

Federal jurisdiction

- Requires employment relationship or connection to work

Vicarious liability

- Employers can be liable for employees who sexually harass
- Complainant must prove that:
 - There is a relationship of employment or agency
 - The harassment occurred “in the course of work”
- Employer must prove: that, on the balance of probabilities, they took (all) reasonable steps to prevent the alleged acts taking place

Prohibition of harassment

Sex Discrimination Act 1984 (Cth)

s.28AA – Meaning of harassment on the ground of sex

(1) A person harasses another person non the ground of sex if:

a) by reason of:

- i. the sex of the person harassed;
- ii. a characteristic that appertains generally to persons of the sex of the person harassed; or
- iii. a characteristic that is generally imputed to persons of the sex of the person harassed;

the person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and

b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Claim process

1. Complaint to Queensland Human Rights Commission

- Made under *Anti-Discrimination Act 1991* (Qld) – Queensland legislation
- Allege sexual harassment & sex discrimination
- Must be made within 12 months of conduct occurring

2. Complaint to Australian Human Rights Commission

- Made under *Sex Discrimination Act 1984* – Federal legislation
- Allege sexual harassment, harassment on ground of sex, sex discrimination
- Must be made within 24 months of conduct occurring

Remedies

- **Damages**
 - Economic loss (past and future loss)
 - Expense, or loss of income, suffered by the complainant because of the respondent's unlawful conduct and is capable of reasonably precise mathematical calculation.
 - Non-economic loss (i.e. 'general damages')
 - Compensation for hurt, humiliation and distress;
 - Not capable of reasonably precise mathematical calculation.
 - Aggravated Damages
- **Non-monetary**
 - Training / program to eliminate unlawful discrimination
- **Interlocutory relief**

Damages

- ***Ewin v Vergara (No 3)* [2013] FCA 1311**
- ***Richardson v Oracle Corp (Australia) Pty Ltd* [2014] FCAFC 82**

“[96] I begin by observing that, in the context of damages for personal injury, there is reason to believe that community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before.”

“[118] While the sum of \$18,000 was not out of step with past awards in cases of this kind, this amount was none the less manifestly inadequate. It was out of step with the general standards prevailing in the community regarding the monetary value of the loss and damage of the kind Ms Richardson sustained. ”

- ***Hill v Hughes* [2019] FCCA 1267**
- ***Golding v Sippel and The Laundry Chute Pty Ltd* [2021] ICQ 14**

Jurisdictional strategy

	Federal - AHRC	State - QHRC
Commission	AHRC	QHRC
Legislation	<i>Sex Discrimination Act 1984 (Cth)</i>	<i>Anti Discrimination Act 1991 (Qld)</i>
Time limit	24 months	12 months
Next steps if not resolved at conciliation	Federal Circuit Court or Federal Court (lodge application within 60 days of termination notice)	Queensland Industrial QIRC (request a referral of the complaint to the QIRC within 28 days)
Costs	The Federal Circuit Court is a costs jurisdiction.	The QIRC is prima facie a no costs jurisdiction

Issues in practice

- **Will the complainant be victimised?**
- **Will the complainant be believed?**
- **Will the complainant have to face or talk to the harasser?**
- **What evidence does the complainant need?**
- **How strict are the time limits?**

Action under *Fair Work Act 2009*

s.789FC – Application for an FWC order to stop bullying or sexual harassment

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s.789FD – When is a worker *sexually harassed at work*?

- (2A) A worker is ***sexually harassed at work*** if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker.



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