

BULLYING IN THE WORKPLACE

Since 1 January 2014 workers who have been bullied at work can make an application to the Fair Work Commission (FWC) for orders to stop the bullying under section 789FF of the *Fair Work Act 2009* (Cth).

In the past, the only practical avenues for bullied workers to address bullying, was under work health and safety or workers compensation legislations. These avenues are typically long-winded and are designed principally to penalise or compensate rather than address the bullying directly.

The anti-bullying laws offer workers a practical, affordable and speedy mechanism to deal with workplace bullying. Additionally, an employee can also file a WorkCover claim if they have suffered an injury in the workplace.

What is bullying?

S 789FD of the Fair Work Act states that:

A *worker* is bullied if, *while at work*:

- an individual or group of individuals **repeatedly** behaves **unreasonably** towards the worker or group of workers; **and**
- The behaviour creates a **health and safety risk**.

Who can make an application?

Under section 789FC(1) of the *Fair Work Act*, a **worker** who **reasonably believes** that they have been **bullied at work** may apply to the FWC for an order to '*stop the bullying*'.

Worker

The definition of worker has been extended to have the same meaning as under the *Work Health and Safety Act 2011* (Cth). It includes an individual who performs work in any capacity, this will include an employee and also:

- Contractors
- Sub-contractors
- Outworkers
- Apprentices
- Trainees
- Students gaining work experience
- Volunteers

It is important to note that the bullying behaviour does not have to be carried out by a fellow worker or group of fellow workers. For example, a client that bullies a worker at work comes within the definition of bullying.

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This information applies only in New South Wales.

Fact sheet updated 15.03.2018

Reasonable belief

There are two elements that must be satisfied to demonstrate that the applicant 'reasonably believes' they are subject to bullying:

- a) The worker must actually and genuinely hold the belief that they have been bullied at work; and
- b) The applicant's belief must be reasonable in the sense that objectively speaking there must be something to support it or some other rational basis for the holding of the belief. This will be determined by the FWC on a case by case basis.

While at work

This does not require the bullying behaviour to occur in the physical workplace, but when the worker is performing the work, at any time or location, and when they are engaged in activities authorised or permitted by their employer. Therefore, as long as the bullying behaviour is sufficiently connected with work, it can take place elsewhere, for example where an employee receives a telephone call from a supervisor at home and outside their working hours, off-site work functions and conferences, and even in social media.

What is bullying behaviour?

To establish bullying behaviour, the conduct must:

- a) Be repeated;
- b) Be unreasonable; and
- c) Create a risk to health and safety.

Repeatedly

There must be repeated unreasonable behaviour toward the worker. Generally, this must be persistent to be considered 'repeated behaviour', however, there is no specific number of incidents required. It is also not necessary that the same specific behaviour be repeated.

This does not mean that single incidents of workplace bullying should be ignored. Employers have an obligation to ensure the health, safety and welfare of employees and others at the workplace. All incidences of workplace bullying should be reported to your employer. Additionally, physical and sexual assault should be referred to the police as soon as possible.

Unreasonable

Unreasonable behaviour is to be interpreted as behaviour that a reasonable person, looking at the circumstances, may see as unreasonable.

This can include behaviours such as:

- Actual or threatened physical attacks;
- Aggressive or intimidating conduct;
- Belittling or humiliating comments;
- Spreading malicious rumours;
- Teasing, practical jokes, or 'initiation ceremonies';
- Exclusion from work-related events;
- constant and unjustified threats of dismissal;
- inappropriate remarks about a person's lifestyle or family;
- interfering with a person's belongings or work equipment;
- Unreasonable work expectations, including too much or too little work, work below or beyond a worker's skill level or withholding information or isolating an individual that prevents them from working;
- Pressure to behave in an inappropriate manner.

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Health and safety risk

Means the possibility of danger to health and safety. Actual danger is not required. There must be a causal connection between the risk to health and safety and the bullying behaviour. This means that you must be able to demonstrate that the risk was caused by the behaviour. The behaviour does not have to be the only cause of the risk, as long as it is substantial cause of the risk.

Reasonable Management action is not bullying

Reasonable management action is excluded from the definition of bullying. However, for such management action to be excluded it must be reasonable action to take in the circumstances and undertaken in a reasonable manner in regard to those circumstances.

Some examples of management action include:

- Performance appraisals
- Ongoing meetings to address underperformance
- Counselling or disciplining a worker for misconduct
- Investigating alleged misconduct
- Modifying a worker's duties
- Refusing a worker permission to return to work due to a medical condition
- Denying a worker a benefit in relation to their employment

Remember, reasonable management action undertaken unreasonably is not automatically excluded from the bullying definition.

Things you can do if you are being bullied in the workplace.

Some practical things you can do before applying to the FWC include:

1. Diarising all incidents of workplace bullying. Specifically note the date of the incident, what time it took place, who was involved, what happened and what was said.
 2. Where appropriate and safe to do so, talk to the bully and your employer about their behaviour. The bully may not be aware that their behaviour is offensive and therefore could resolve the matter.
 3. Report the bullying behaviour in writing to your employer, supervisor, HR department or other superior as appropriate to the circumstances. You should include your notes about the incidences. This also shows your attempts to resolve the issue.
 4. If your attempts fail, get further advice about your legal options. You can get help from your union, the FWC and South West Sydney Legal Centre.
- If necessary report the bullying behaviour to a Federal, State or Territory Health and Safety Regulator. In NSW this would be the [WorkCover Authority of NSW](#): ph: 8260 5877
 - Note: keep copies of all correspondence

Applying to the FWC for orders to stop bullying

Before the FWC can make orders the worker must prove that:

- The subject employer is a constitutionally covered business. Broadly, this includes:
 - A constitutional corporation (usually a PTY LTD organisation). This may include certain not-for-profit corporations
 - The Commonwealth
 - A Commonwealth authority
- Broadly this excludes:
 - State & local governments
 - State and local government agencies
 - A wholly 'volunteer association' that does not employ anyone
- The worker has been bullied at work.
- There is a risk that the worker will continue to be bullied at work. If the worker is no longer working with the employer, then there would not usually be a risk that they will continue to be bullied at work.

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There is no timeframe or 'limitation period' in which to lodge your claim. You will need to fill out [Form F72](#) and lodge it with FWC, with the filing fee of \$70.60. The FWC will then determine if you are eligible to proceed with the claim. If the FWC decides to proceed they will send a copy of your application to your employer and any individuals named and then will attempt to resolve the issue. This could either proceed with a mediation or a hearing, where orders can be made.

What orders can the Fair Work Commission make?

The Fair Work Commission can make orders it considers appropriate to prevent the worker from being bullied at work.

This gives the FWC a great deal of scope and flexibility to deal with bullying.

The focus of the orders is on resolving the matter and enabling normal working relationships to resume.

The Fair Work Commission cannot make orders for fines, penalties or compensation. However, the Federal Court, Federal Circuit Court or an eligible State or Territory Court can impose fines and penalties for non-compliance with bullying orders.

What should organisations do in response to this new legislation?

The Productivity Commission estimated that workplace bullying costs the Australian economy between \$6 billion and \$36 billion dollars annually. This includes indirect costs such as absenteeism, labour turnover, loss of productivity, compensation payouts and legal costs.

Workplace bullying not only affects workers, it impacts on an organisation's ability to operate efficiently.

The human and economic damage is immense, in some cases even resulting in suicide. It is in everyone's interests to address workplace bullying.

Employers are encouraged to:

- Build and engender a workplace culture that values respect and healthy work relationships. Of course cultures are built from the top down.
- Develop and implement policies and processes that encourage and facilitate reporting of bullying behaviour
- Adopt an early intervention strategy to bullying complaints
- Offer appropriate support structures

Employers have an overriding duty of care to provide a safe workplace. All too often, a failure to reply promptly and appropriately to bullying complaints results in situations escalating and exposing employers to much more significant and stringent financial and punitive ramifications.

South West Sydney Legal Centre can assist you with any questions or concerns.

Free Phone Advice 9601 7777

Tuesdays: 12.30pm to 2.00pm

Tuesdays: 4.00pm to 6.00pm

Thursdays: 12.30pm to 2.00pm

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