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Workplace Bullying: Reducing the risk

Bullying in the workplace is becoming an increasingly significant issue for employers to deal with. There are two broad categories of bullying that employers are regularly confronted with: bullying between employees and alleged bullying of an employee by the employer. Both require careful management and both can result in serious (and costly) consequences for employers. This paper seeks to set out the steps that employers can take to reduce their exposure.

1. Historically, there have been limited remedies available for victims of bullying in the workplace.
2. The now repealed *Occupational Health Safety and Welfare Act* 1986 (SA) provided limited recourse.
3. Section 55A of the 1986 *OHS Act* provided a mechanism whereby victims of bullying could make a complaint to a Safe Work Inspector who in turn could refer the matter to the Industrial Commission for conciliation or mediation.
4. That is where these applications effectively ended. The Industrial Commission was not given any power to make orders resolving the disputes. If the parties were unable to resolve the matter by way of conciliation and mediation nothing further could be done.
5. There was (and still is) potential for a prosecution under the current State OHS legislation (the *Work Health and Safety Act 2012*). Those prosecutions are brought in the Industrial Court by Safe Work Inspectors. Some of you may be familiar with these. They almost always involve industrial accidents resulting in serious physical injuries.
6. I am not aware of a prosecution under the 1986 Act having ever been brought in a bullying case. It seems that Safework SA is about to change all that and I will talk more about that later.
7. Like prosecutions under OHS legislation, successful negligence claims for work injury have historically been limited to physical injuries. They usually arise from an industrial accident or from prolonged exposure to an unsafe system of work. Additionally, workers in SA have been limited to bringing common law claims against third parties and not against their employer. That is about to change: though the change might be illusory. More on that later.
8. The most common forum where bullying complaints are ventilated has always been the workers compensation jurisdiction.
9. Properly advised, a person should only bring a WorkCover “stress” claim for bullying and harassment where they have no choice but to. That is for example, where they are incapacitated for work and have no or insufficient sick leave or they have incurred substantial medical

expenses. The workers compensation jurisdiction does not provide for compensatory damages (e.g. for hurt or distress) to be paid to an injured worker. The closest it gets to that is a lump sum payment for permanent impairment, but they are specifically excluded in cases of psychological injury.

10. There are two broad categories of workplace bullying that might result in a stress claim. Firstly, bullying and harassment from co-workers. The second type is bullying (or at least perceived bullying) from management.
11. The second category involves consideration of whether managerial actions amount to "*reasonable administrative action take in a reasonable manner*". That concept will be discussed in more detail in the context of the new anti-bullying laws.
12. The last few years has seen an apparent shift in community attitude towards bullying: both generally and in the workplace. There have been publicised cases about the effects of cyber bullying.
13. There have also been publicised cases of initiation ceremonies in the Military and, relevantly, apprentices in the workplace. Whereas once these might have been brushed off as a rite of passage, they are now generally considered to be acts of bullying.
14. The move toward legislative change appears to have been triggered by the case of *Brodie Panlock* who was subjected to relentless and vicious bullying while working at a cafe in Melbourne. The perpetrators were convicted and fined under provisions of the Victoria OHS Act but none faced serious criminal charges.
15. The case resulted in amendments to the Victorian *Crimes Act* which made bullying a serious criminal offence carrying much tougher sanctions. No legislative changes were made, however, providing victims with access to compensatory or injunctive relief.
16. Another case from Melbourne received attention in the media last year.
17. It is the case of *Swan v Monash Law Co-Operative*.
18. That case involved a worker who was subject to persistent bullying from her immediate supervisor while working at the Monash University Bookshop.
19. The bullying was compounded by the work environment. It was situated in a basement where only the worker and her boss worked.
20. The bullying included occasions where the Manager flung a book and a calculator at the worker in response to the way she had answered the telephone.
21. The worker was forced to eat bananas outside of the office after the Manager banned them from the workplace. On other occasions the worker was forced to memorise booklists, to complete meaningless tasks and subjected to tirades that sometimes left her in tears.

22. The worker had a break down and then sued her employer.
23. In the Victorian Supreme Court Judgment handed down in June last year, the worker was awarded about $600,000 in damages, including an award of $300,000 in pain and suffering.
24. While the publicity involving cases of bullying suggest a change in community attitudes, it is questionable whether the heightened media coverage reflects an epidemic in bullying and harassment across Australian workplaces. That has not been my experience in private practice. I am also not aware of any empirical evidence that suggests an increase in the instance of workplace bullying.
25. Perhaps in response to the Brodie case, media hype or perceived public opposition to workplace bullying, a Federal House of Representatives Standing Committee was established to report on the subject.
26. That resulted in a report titled *"Workplace Bullying: We just want it to stop" which was* published in October 2012.
27. The report was the catalyst for amendments to the Commonwealth *Fair Work Act* which commenced on 1 January 2014 and have provided the Federal Fair Work Commission with jurisdiction to hear bullying complaints.
28. It is a preventative jurisdiction. It does not provide victims of bullying with recourse to compensation or damages with respect to the bullying giving rise to the complaint.
29. There is also no provision for perpetrators to be fined or otherwise sanctioned for the bullying that gives rise to the complaint.
30. The orders that can be made following a successful application to the Commission are designed to stop further bullying.

Who can apply for a bullying order?

31. The Act provides Section 789FC(1) that a worker who "*reasonably believes that they have been bullied*" can apply for an order.

Who then is a worker?

32. That is broadly defined.
33. A worker is a person:

"*Who performs work in any capacity, including as the employee, a contractor, a sub-contractor, an out worker, an apprentice, a trainee, a student gaining work experience or a volunteer*".

34. Organisations wholly comprised of volunteers are not covered by the new law. Organisations that employee people and engage volunteers from time to time are covered. It follows that persons who perform volunteer work for organisation that also pay people will be covered.

When is a worker bullied at work?

35. The New Law provides that a person is bullied at work where an individual or a group of individuals:

"repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member and that behaviour creates a risk to health and safety"

36. The new law specifically excludes *"reasonable management action carried out in a reasonable manner"* from the definition of "bullying" (S789FD(2)).
37. This is an objective test familiar to the workers compensation jurisdiction. It commonly arises in the context of performance management.
38. Employers are commonly faced with the situation where a worker goes off on stress leave after performance management or disciplinary proceedings are commenced. In many cases the employer's action is entirely justified. In some of those cases the worker might be genuinely stressed, albeit as the author of their own misfortune. In other of those cases the worker might claim that they have been bullied to deflect the reasonable action being taken.
39. One view of the New Law is that it enables workers who are the subject of performance management to get a hearing (albeit an informal one) from the Fair Work Commission. It might further be said that the New Laws place a legislative fetter on the exercise of managerial discretion.
40. There are of course some instances where unreasonable performance management action is taken and a worker can make out a case for bullying.
41. Each case needs to assessed on its merits.
42. I return then to the process of an Application to the FWC for an anti-bullying order.

Response from FWC

- FWC must deal with an application within 14 days (S789FE(1))

- It can conduct a conference or hold a hearing.
- Where it is satisfied that a worker has been bullied and there is a risk that the worker will continue to be bullied, the FWC may make any Order it considers appropriate (other than an Order requiring payment of a pecuniary amount) to prevent the worker from being bullied.

Examples of Orders that can be made

- Stop bullying behaviour
- The employer to regularly monitor behaviours
- Compliance with bullying policy
- Provide information and additional support and training to workers
- Review employers' workplace bullying policy
- Interpersonal mediation
- Separation of the direct parties

43. These examples are not prescribed in the legislation. They are set out in the parliament's Explanatory Memoranda to the Act. The range and extent of the orders that might be made remains to be seen.

Factors the FWC must take into account when making Orders

- The final or interim outcomes arising out of an investigation into the matter undertaken by another person or body
- Any procedure available to the worker to resolve grievances or disputes; and
- Any outcomes of that procedure arising from that procedure
- Any other matters that the FWC considers relevant.

Remedies for contravention of an Order

- Section 789FG of the Act provides that a person not contravene a term of a bullying Order.

- That section is a civil remedy provision.
- A *"person affected by the contravention, an industrial association or a Fair Work Inspector can bring a Court application for a breach of a bullying Order"* (s 539).
- Here the Federal Circuit Court or the Federal Court can order a pecuniary penalty to a maximum of $10,200 (s539(2))
- The Court can otherwise make the following Orders:
  - Orders granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention
  - An Order awarding compensation for loss that a person has suffered because of the contravention
- An Order for compensation would be limited to the loss arising from a breach of the FWC bullying Order (e.g. further bullying).

Other available remedies

WHS Prosecutions

44. I have recently become aware that Safework SA is investigating a second possible prosecution under the WHS Act in a bullying case.
45. Such a prosecution would be for a charge of failing to comply with a health & safety duty as defined by the Act. The primary duty is for an employer to ensure, so far as is reasonably practicable, the health and safety of their employees.
46. The circumstances where a successful prosecution might be brought in bullying case have traditionally thought to be limited: for example, cases of extreme bullying, usually involving physical assaults, where the employer was either an active participant or was complicit in the behaviour.
47. Employers must now be aware that Safework SA is looking to find employers liable for bullying where the employer played no active part but where it might be said that the employer *allowed* the bullying to occur. For example, by failing to have in place policies prohibiting bullying or, failing to (regularly) educate staff about those policies. Another example might be where an employer fails to properly deal with a complaint of bullying by an employee and the bullying

continues. That could give rise to a civil claim against the employer (discussed below). It could also result in a WHS Act prosecution.

48. Most of you no doubt do not need reminding of the increased penalties that now apply to breaches of the WHS Act: up to $300,000 for individuals and $3 million for body corporates.

WorkCover claims

49. As discussed earlier, historically the worker's compensation jurisdiction has been the most commonly visited by workers claiming to have been bullied. In our view, that is likely to continue.
50. Even in the Tribunal, people do not bring claims for "*bullying and harassment*". What they bring are claims for psychiatric injury arising out of or in the course of their employment.
51. Under the current Act, to succeed in such a claim the worker must establish:

51.1 That they have suffered a psychiatric injury.

51.2 That the injury arose out of or in the course of their employment.

51.3 That the employment was a *substantial* cause of the injury.

51.4 That the injury did not "*wholly or predominantly*" arise from reasonable administrative action.

52. The test prescribed by the *WorkCover Act* for psychiatric injury therefore allows for there to be multiple causes of a person's psychiatric injury. That is, both work and non-work related causes.
53. The key is that employment has to be a substantial (but not only) cause, and
54. If work is a substantial cause, the injury must not wholly or predominantly be the result of reasonable administrative action.
55. Any lawyer experienced in WorkCover claims (either acting for workers or employers) will tell you that establishing that a work-related psychiatric disability was wholly or predominantly the result of reasonable administrative action is very difficult.
56. The majority of injured workers who establish that their employment was a substantial cause of their injury are able to then get over the hurdle of reasonable administrative action. That is usually because somewhere along the line of what can be a long history of events, involving emails, meetings and informal conversations, the worker is able to show that the employer acted unreasonably at some point. Quite often, the employer can do everything right with a difficult employee over a long period of time, but in a moment of weakness, or pure exasperation, say or do something wrong creating the *substantial cause* needed to base a claim.
57. There has been some subtle, but potentially critical, changes to the test for establishing a Stress claim under the Return to Work Act.
58. The new test can summarised as follows:

58.1 That they have suffered a psychiatric injury.

58.2 That the injury arose out of or in the course of their employment

58.3 The employment was *the significant* contributing cause of the injury

58.4 The injury did not arise wholly or predominantly from reasonable administrative action.

59. The change from employment being *a substantial cause* to *the significant cause* may well make it more difficult for workers to successfully bring stress claims. A similar change to the Comcare Act certainly has. It will depend on what interpretation the SA Worker's Compensation Tribunal gives to the wording of the section.

Common Law Claims

60. From 1 July 2015 there will be a limited right for a worker to sue their employer for workplace injury. The new Return to Work Act provides for common law claims against employers in case where a worker has suffered a whole person impairment exceeding 30%. Such seriously injured workers will have to elect between taking a common law claim or staying on WorkCover. Given that the Act also provides for ongoing weekly payments for seriously injured workers, it is unlikely that a worker would risk that for the uncertainty of a common law claim.

61. As discussed earlier, industrial negligence cases usually arise from physical injuries caused by an unsafe system of work. It is not too hard to establish that an employer has been negligent in those circumstances.

62. It has again historically been difficult to establish negligence against an employer in a bullying case unless:

62.1 The employer themselves is the perpetrator. In the case of a small business that would mean the proprietor. In a large organisation it would mean senior management or the board of management

62.2 The employer is aware of bullying but encourages or merely allows the behaviour to continue.

63. The second scenario is illustrated by the *Monash Uni Bookstore* case referred to earlier. There, the plaintiff had made complaints about her supervisor's behaviour to the employer's board of management. The board did not act on those complaints and the bullying continued. If the worker had not made those complaints, her claim for negligence against the employer would have failed.

64. Employers must be aware however, that just like in WHS Act prosecutions, the scope for establishing civil liability against employers is widening in the sense that the courts will expect much more from employers in bullying cases in line with the way that community attitudes have developed in recent times. It is not hard to envision a plaintiff establishing negligence against

their employer in a case where a person has been bullied by a co-worker and the employer did not have appropriate policies & procedures in place. This is of course subject to the hurdles in the new Return to Work Act regarding common law claims.

Adverse Action Claims

65. This is a complex jurisdiction established under the Commonwealth *Fair Work Act* in 2009. They could be the subject of a whole session themselves and I will not attempt to cover them here.
66. In short, Adverse Action (or General Protections) Claims provide access to damages for a breach of a *workplace right*.
67. For present purposes, you can assume that the right to apply to the FWC for an anti-bullying order is a workplace right.
68. Now, an employer cannot take *adverse action* against a worker for exercising or planning to exercise a workplace right.
69. *Adverse action* includes discrimination or, most commonly, the termination of employment.
70. Adopting the most common example, if a person is sacked *because* they apply for an anti-bullying order, they will be entitled to damages. Such damages are unrestricted and could run into the tens of thousands of dollars.

What Employers need to do

- Review bullying policies and procedures
  - Require complaints to be in writing by the person bringing the complaint (i.e. not anonymously or from third parties)
  - Ensure that employees are informed of the consequences of bringing a false complaint
  - Educate Staff to and apply your Bullying policy
- Engage an independent party to investigate complaints of bullying in the workplace.
- Be patient & *keep your cool* with the difficult employee

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Closing remarks

71. The number of applications to the Federal Commission for anti-bullying Orders have been a small fraction of the numbers which were anticipated. That is, given the Federal House of Representatives *"workplace bullying: we just want it to stop"* report and the Drake International survey of bullying in the workplace upon which the Parliamentary report was partly based. This fact rather suggests that the Drake survey and the Parliamentary report greatly exaggerated the extent of the problem. Some commentators might therefore suggest that the legislation is a remedy looking for a problem. Having said that, workplace bullying when it occurs is severely distressing to employees at the receiving end of it to whom statistics indicating the general prevalence of workplace bullying are not of much relevance.

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