

## Fact Sheet – Workplace bullying: national system employees

From **1 January 2014**, national system employees can apply to the Fair Work Commission (**FWC**) for orders to stop workplace bullying. These laws are part of the *Fair Work Act 2009* (Cth) (**FW Act**).

FWC can only make an order if there is a risk that the employee will continue to be bullied at work. So if you are no longer employed at the workplace where the bullying took place, or if there is no risk that the bullying conduct will continue, orders cannot be made. FWC does not have the power to award compensation (ie. money) or reinstatement.

A national system employee can apply for other orders (under the FW Act or other laws) at the same time that they apply for orders to stop the bullying. Some of the more common claims which you can also make are mentioned later in this fact sheet.

If you experience workplace bullying and you are a state system employee, please read ELC fact sheet “Workplace bullying: state system employees”. If you are unsure whether you are a national system employee or state system employee, you can read ELC fact sheet “National system employee or state system employee: which one are you?”

### 1. What is workplace bullying?

Under the FW Act, workplace bullying is when:

- an individual (or group) **repeatedly** behaves **unreasonably** towards a worker (or group of workers) **at work; and**
- the behaviour creates a **risk to health and safety**.

The definition specifically says that reasonable management action that is carried out in a reasonable manner is not bullying.

Because the laws have only recently been introduced at the time this fact sheet was prepared, there aren't yet any decisions which clearly explain what kinds of behaviour will be considered “workplace bullying” or how the laws will be applied. This fact sheet will be updated as appropriate once decisions are issued.

#### 1.1 Repeated behaviour

Generally, the bullying must be persistent for it to be considered “repeated behaviour”. It does not matter what form the bullying takes as long as the employee can establish a pattern of bullying. It is not necessary for the same specific kind of behaviour to be repeated.

However, this does not mean that a single incident of workplace bullying should be ignored. Employers have an obligation to ensure the health, safety and welfare of employees and any other person at the workplace. You should report all cases of workplace bullying to your employer.

Physical and sexual assault are criminal matters and should be referred to the police as soon as possible.

## 1.2 Unreasonable behaviour

Unreasonable behaviour is behaviour that a reasonable person, looking at all the circumstances, would consider unwarranted. Some examples are given below.

## 1.3 Risk to health and safety

Bullying has a negative effect on the health and safety of employees and others at the workplace. There only needs to be a risk to health and safety, meaning a *possibility of danger* to health and safety. An actual danger to health and safety does not need to be present.

The bullying behaviour must also **create** the risk to health and safety. 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 was a substantial cause of the risk viewed in a common sense and practical way.

## 2. Some examples of workplace bullying

Workplace bullying can be verbal abuse or physical violence, but it may also take more subtle forms, such as via emails or telephone text messages. It can be carried out by an individual or by a group. For example, group bullying can occur where a number of workers together carry out bullying behaviour against a manager or supervisor.

Workplace bullying can occur between workers and other workers, managers, supervisors, customers or clients, students, volunteers, contractors or visitors.

Obvious examples of workplace bullying include:

- abusive, insulting or offensive language;
- actual or threatened physical attacks;
- language or behaviour that causes fear or humiliation or which demeans another person;
- teasing or frequently making someone the target of practical jokes;
- constant and unjustified threats of dismissal;
- inappropriate remarks about a person's lifestyle or family; or
- interfering with a person's belongings or work equipment.

Sometimes the bullying is not so obvious. However the following behaviour can also be workplace bullying:

- withholding information or isolating a person in a way that prevents them from fulfilling their work duties;
- unreasonably overloading a person with work;
- making a person do work that is unrelated to their job or beyond their skill level; or
- treating a person unfairly in relation to their entitlements, such as leave or reasonable training.

## **2.1 Reasonable management action carried out in a reasonable manner**

Examples of management action are:

- performance appraisals;
- ongoing meetings to address underperformance;
- counselling or disciplining a worker for misconduct;
- modifying a worker's duties including by transferring or re-deploying the worker;
- investigating alleged misconduct;
- denying a worker a benefit in relation to their employment;
- refusing an employee permission to return to work due to a medical condition.

The management action must be reasonable and it must also be carried out in a reasonable way. The actual management action taken must have been reasonable – it does not matter if it could have been undertaken in a manner which was more reasonable or more acceptable.

In deciding whether management action was reasonable, the following may be taken into consideration:

- the particular circumstances of the individual involved;
- whether anything should have prompted a simple inquiry to uncover further circumstances;
- whether established policies or procedures were followed; and
- whether any investigations were carried out in a timely manner.

## **3. What are the effects of bullying?**

Individual reactions to bullying may vary, but potential health effects of bullying include:

- high stress levels;
- anxiety;
- depression;
- aggression;
- loss of self-esteem and ability to perform work;
- personality and character change;
- ill-health or fatigue;
- physical injury; and
- in extreme cases, risk of suicide.

## **4. Practical things to do if you are being bullied**

This section provides some suggestions to assist you in dealing with workplace bullying.

### **Step 1: Diarise all incidents of workplace bullying**

Although it may have been an upsetting experience, it is a good idea to keep detailed written notes if you experience workplace bullying. Keeping a written record can help to show that the bullying behaviour took place, and that it was repeated.

Specifically, you should note:

- the date of the conversation or incident of bullying;
- what time the incident took place;
- who was involved;

- what happened – what the dispute was about; and
- what was said – the actual conversation.

You should be aware that WorkSafe – the WA government authority that handles workplace health and safety – will usually only investigate allegations of workplace bullying if written records have been kept.

### **Step 2: Verbally notify the bully and your employer about their inappropriate conduct**

After you have made a written record of the bullying incident, you should tell the bully that their conduct is inappropriate and must stop. This is an important step because, sometimes, the bully may not realise that their behaviour is offensive.

If the bully is a co-worker (rather than your employer) you should also notify your employer of the bullying behaviour. You should then wait to see if the employer takes steps to address the problem. If the bullying stops, you may not need to take any further action.

You should also make written records about these conversations.

### **Step 3: Notify your employer in writing about the workplace bullying**

If the bullying continues or if your employer does not take any steps in response to your complaint, you should notify the employer about the bullying in writing. Your written records will help demonstrate specific incidents, rather than merely alleging general bullying conduct. Your letter should also make specific references to any verbal conversations you had with the bully directly to try and resolve the problem.

Notifying the employer in writing will be written proof of your attempts to resolve the dispute. At the end of this fact sheet is a sample letter to give you an idea of what to include.

### **Make sure you keep copies of all correspondence**

It is important that you keep dated copies of all correspondence which you send and receive. If the bullying cannot be resolved through discussions, the correspondence will be useful to give other parties a summary of what happened. It also demonstrates your efforts to resolve the problem and will assist you if you decide to pursue further action against your employer.

### **Step 4: If your attempts at negotiation fail, get further advice about other legal options**

A few of the more common legal options you might have are mentioned below. But not all of these may be available. It will depend on your own circumstances. If you are thinking about making a claim, you should get further advice on the legal options which are available to you.

Some of the places you can contact for advice include:

- your union for assistance;
- the Employment Law Centre of WA Advice Line;

- one of the agencies listed in the 'Further Information' section of this document.

## **5. Applying to the FWC for orders to stop bullying**

If you believe that you have been bullied at work, you can apply to the FWC for an order to stop bullying.

There is no timeframe or "limitation period" within which you must lodge your claim. However, if a large amount of time has passed since bullying behaviour occurred, it is more likely that FWC will decide there is no risk of the bullying continuing, and as a result your claim might be unsuccessful.

To make your application, you need to fill out Form F72 and lodge it with FWC. The filing fee is \$71.90. You can find the form by going to [www.fwc.gov.au](http://www.fwc.gov.au) and clicking on "forms". If you are not sure how to lodge your claim you should ask the FWC registry staff by calling 1300 799 675.

After you have lodged your claim, FWC will work out whether you are eligible to proceed further. They will look at jurisdictional issues, like whether or not you are a national system employee, as well as considering whether or not the incidents or behaviour you have described amount to the definition of "bullying" under the law. They may contact you for further information before making this decision.

Because FWC may decide that you cannot proceed with your claim, you may wish to keep your application confidential at this stage and not tell your employer that you have made the claim. Your employer will only be made aware of the claim if FWC decides that it will proceed further.

If FWC decides that the claim will proceed further, they will send a copy of your application to your employer and any individuals you have named as being involved in the bullying. Your employer and any other relevant individuals will be asked to respond to your application.

FWC will then decide how to try and resolve the issue. They may schedule a mediation, which involves an independent third party trying to bring everyone involved to a common agreement on how to resolve the issue. Normally you, your employer and anyone you have named as being involved in the bullying will participate in mediation. It might be in person or over the telephone.

If mediation fails, or if FWC believe that mediation is unlikely to succeed, a hearing may be scheduled. This is a more formal process which involves parties giving evidence and an FWC Member making a binding decision on whether bullying has occurred. If it is decided that bullying has occurred, the Member will then decide if orders are necessary to stop the bullying, and if so, what type of orders.

A number of different type of orders can be made. Generally, these orders will involve your employer or someone who has been bullying you being ordered to do something or to stop doing something so that the bullying stops. FWC cannot make an order for compensation (money).

At the end of this fact sheet there is a flow chart which shows the FWC process for dealing with an application to stop bullying.

## **6. Other types of legal protections against bullying behaviour**

### **6.1 Bullying under the Equal Opportunity Act 1984 (WA)**

If the nature of the bullying or inappropriate behaviour involves discrimination on one or more of the following grounds, you might be able to make a discrimination claim against your employer:

- sex, marital status or pregnancy;
- gender history;
- family responsibility or family status;
- sexual orientation;
- race;
- religious or political conviction;
- impairment; or
- age.

The Equal Opportunity Commission of Western Australia (**EOC**) handles claims of discrimination based on these grounds. A claim for discrimination with the EOC can *only* be made on one of the grounds listed above.

### **6.2 Bullying under the Occupational Safety and Health Act (WA)**

Bullying has a negative effect on the health and safety of employees and others at a workplace. This presents a hazard in the workplace and is unlawful under the OSH Act.

Under the OSH Act, an employer has a duty to provide and maintain a working environment in which employees are not exposed to hazards. Large penalties may be issued against employers who fail to observe the provisions of the OSH Act. Employees also have obligations under the OSH Act to work in a safe manner and not to endanger themselves or others.

### **6.3 Freedom of association and union activity**

The FW Act protects employees against bullying which happens because the person chooses to engage, or not engage, in industrial activity or chooses to join, or not join, an industrial association such as a union.

### **6.4 Coercion and undue influence**

Under the FW Act, an employer must not coerce a person into exercising, or not exercising, a workplace right. Employers are also prohibited from coercing an employee to exercise or not exercise a workplace right in a particular way. An employer must not exert undue influence on a person to enter, or not enter, into agreements that would affect the person's working conditions or entitlements.

### **6.5 Workers' compensation**

Workers' compensation protects injured workers by providing for loss of earning capacity, payment of medical expenses and vocational rehabilitation to assist employees to remain in or return to work.



If you have an injury or illness at work, you might want to think about making an application to WorkCover for workers' compensation. Anxiety or stress as a result of workplace bullying can sometimes be considered an illness or injury for the purposes of workers' compensation claims.

The Employment Law Centre of WA does not advise on workers' compensation. You should contact WorkCover for information.

## **7. Forced resignation: “constructive dismissal”**

There are some legal claims that you can only make if you have been dismissed from your employment. A dismissal is where your employer ends your employment. Usually if you resign you will not be eligible to bring a claim which requires you to have been dismissed.

But sometimes, your employer's actions might leave you feeling like you have no other choice but to resign. In these situations, a court will say that a forced resignation was a dismissal which means that you will be eligible to make those claims. In these situations, your resignation is called a “constructive dismissal”.

In some cases, workplace bullying can make you feel like you have no other choice but to resign. If you resign because of workplace bullying, it is possible that you may still be able to bring a legal claim which requires you to have been dismissed. But you should be aware that constructive dismissal is not an easy argument to establish. If you resign and you don't succeed in arguing that you were constructively dismissed, you may have limited options as to what you can do.

We strongly suggest that, if possible, you seek legal advice before resigning because of bullying behaviour. For more information, you can read our fact sheet “Constructive dismissal: when you are forced to resign”.

## **8. Further information**

### **The Employment Law Centre of WA (Inc)**

Advice Line 1300 130 956 or 08 9227 0111  
Web [www.elcwa.org.au](http://www.elcwa.org.au)

### **Equal Opportunity Commission**

Tel 1800 198 149 / 08 9216 3900  
Web [www.eoc.wa.gov.au](http://www.eoc.wa.gov.au)

### **Fair Work Commission**

Address Level 16, 111 St George's Terrace, Perth 6000  
Tel 1300 799 675  
Web [www.fwc.gov.au](http://www.fwc.gov.au)  
Email [perth@fwc.gov.au](mailto:perth@fwc.gov.au)

### **Unions WA**

Tel 08 9328 7877  
Web [www.unionswa.com.au](http://www.unionswa.com.au)

**Wageline**

Information Service 1300 655 266  
Web [www.dmirs.wa.gov.au/wageline](http://www.dmirs.wa.gov.au/wageline)

**WorkCover WA**

Advisory Service 1300 794 744  
TTY (hearing impaired) 08 9388 5537  
Web [www.workcover.wa.gov.au](http://www.workcover.wa.gov.au)

**WorkSafe**

Tel 1300 307 877 or 08 6251 2200  
Web [www.commerce.wa.gov.au/worksafe](http://www.commerce.wa.gov.au/worksafe)

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\*Information includes any and all data, documents, pages and images.



Your Name  
Address line 1  
Address line 2

Your Employer  
Address line 1  
Address line 2

Date

Dear [Mr or Ms Employer],

**Incidents of workplace bullying**

I wish to formally inform you that I have experienced bullying while working at your company, [insert company name].

The following are specific incidents of bullying I wish to bring to your attention. These examples come from detailed written records I have kept for my own reference.

[Refer to your written records and include some examples from those records]

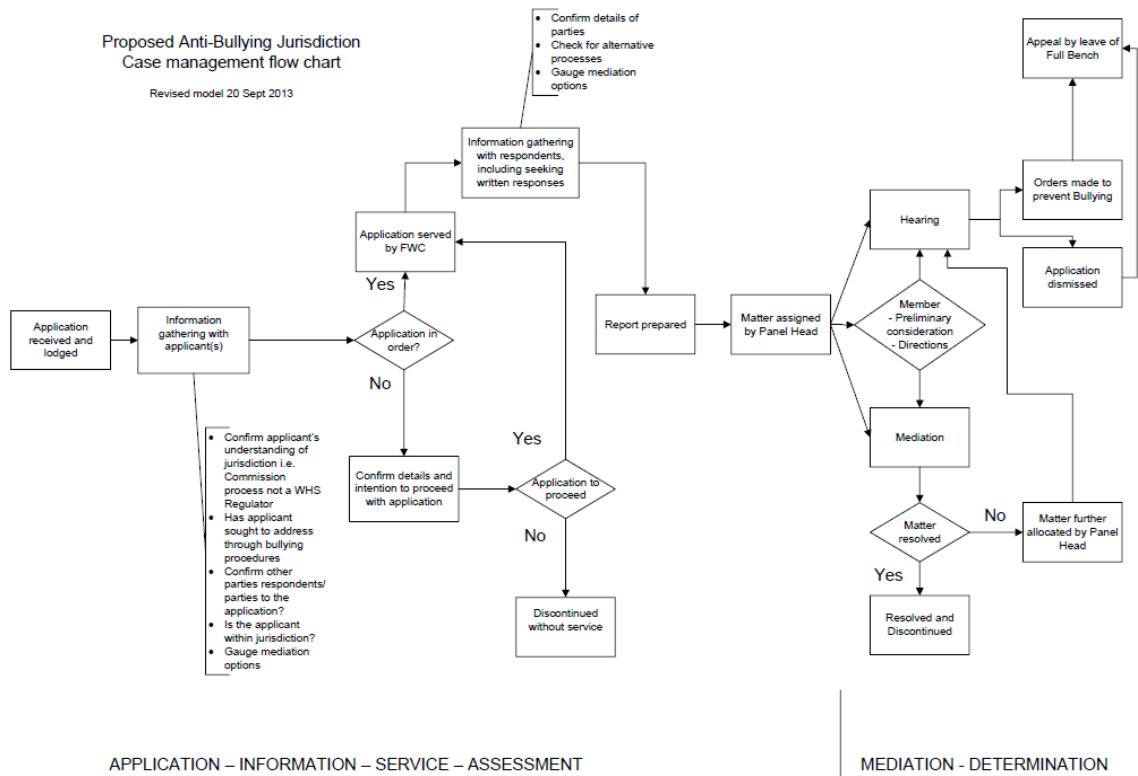
I also confirm our meeting on [insert date and time of when you verbally notified your employer about the bullying], where I verbally told you about the workplace bullying and asked for your support and assistance in stopping it. Since that meeting, the bullying has not stopped.

I find this conduct to be unacceptable. On top of that, it is [insert impact of conduct on you – eg. upsetting, stressful, distressing, etc]. I would like to discuss this matter with you further in the presence of a witness. If the bullying conduct does not stop, I intend to get legal advice on the matter.

Yours sincerely,

[Your name]

## 5—Anti-bullying application process flow chart



Extracted from the Fair Work Commission's "Anti-bullying case management model" as at 20 November 2013