

How to make a claim to stop workplace bullying: for national system employees

Information Kit

Advice Line 1300 130 956 or 9227 0111



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

This information kit is current as at 1 July 2018.

How to use this kit

This kit is designed to help you make a legal claim to stop bullying that is happening to you in your workplace.

This information kit should be read together with our fact sheet – “Workplace bullying: for national system employees”. You may want to read the fact sheet first because it explains the laws on workplace bullying for national system employees. The fact sheet also has other suggestions for dealing with workplace bullying which you can try before making a legal claim.

When to use this kit

A claim to stop workplace bullying can be made to the Fair Work Commission (**FWC**) if:

- while you are at work, an individual or group of individuals repeatedly behaves unreasonably towards you or a group of workers of which you are a member;
- the behaviour creates a risk to health and safety;
- the behaviour is not reasonable management action that is carried out in a reasonable manner; and
- there is a risk that you will continue to be bullied at work by the individual or group.

See our fact sheet for more information on each of these matters.

If there is a risk of violence or physical assault you should call the police. These are criminal offences.

The FWC can make any order it considers appropriate (other than an order to pay money) to prevent you from being bullied further at work by the individual or group. Read on to find out more about the kinds of orders the FWC can make.

Who can make a claim?

You can make a claim to the FWC if you are a “worker” and also work for a national system employer.

Members of the Defence Force cannot make a claim. The FWC may also refuse to hear a claim if it might involve matters that relate to Australia’s defence or national security.

A “worker” is an individual who carries out work in any capacity for a person conducting a business or undertaking and includes:

- an employee, including an employee of a labour hire company who has been assigned to work in the person’s business or undertaking;
- a contractor or subcontractor (or an employee of a contractor or subcontractor);
- an outworker;
- an apprentice or trainee;
- a work experience student; and
- a volunteer, except for volunteers at a volunteer association which has no employees.

To find out whether you work for a national system employer, you can call Wageline on 1300 655 266. You can also read our fact sheet – “National system employee or state system employee: which one are you?”

When to make a claim

There is no specific time period in which you must make a claim. However, there are some factors which will affect the timing of when to make a claim. For example, the FWC can only make an order if:

- the bullying behaviour has been repeated and has become a risk to health and safety; and
- there is still a risk that the worker will continue to be bullied by the same individual or group.

This means you cannot make a claim if you are no longer working in the workplace where the bullying behaviour took place. It also means you cannot make a claim if you have experienced the bullying behaviour only once. You must be able to show that the behaviour was repeated.

How to make a claim

To make a claim you must complete a **Form F72 – Application**. This form can be found here: <https://www.fwc.gov.au/content/rules-form/application-order-stop-bullying>

If there are any reasons why your matter should be dealt with urgently, you should include them on your form.

The Form F72 should be lodged with the FWC together with the filing fee of \$71.90. Forms can be lodged by email, facsimile, express post or in person at one of the FWC's offices. Contact details for the FWC's Perth office are at the end of this kit.

If paying the filing fee will cause you serious financial hardship, you can apply to the FWC for the filing fee to be waived. The form for doing this can be found here: <https://www.fwc.gov.au/content/rules-form/waiver-application-fee>. Your application to have the filing fee waived must be lodged at the same time you lodge your Form 72 application.

What happens after you lodge your application?

The FWC must start to deal with your application within 14 days after it is lodged. This can be by making inquiries or asking parties to provide further information. The FWC does not conduct investigations into allegations of workplace bullying.

The flow chart on the next page shows the FWC process for dealing with an application.

Please be aware that this claim has only been available since 1 January 2014. This kit may be updated as more information and experiences become available.

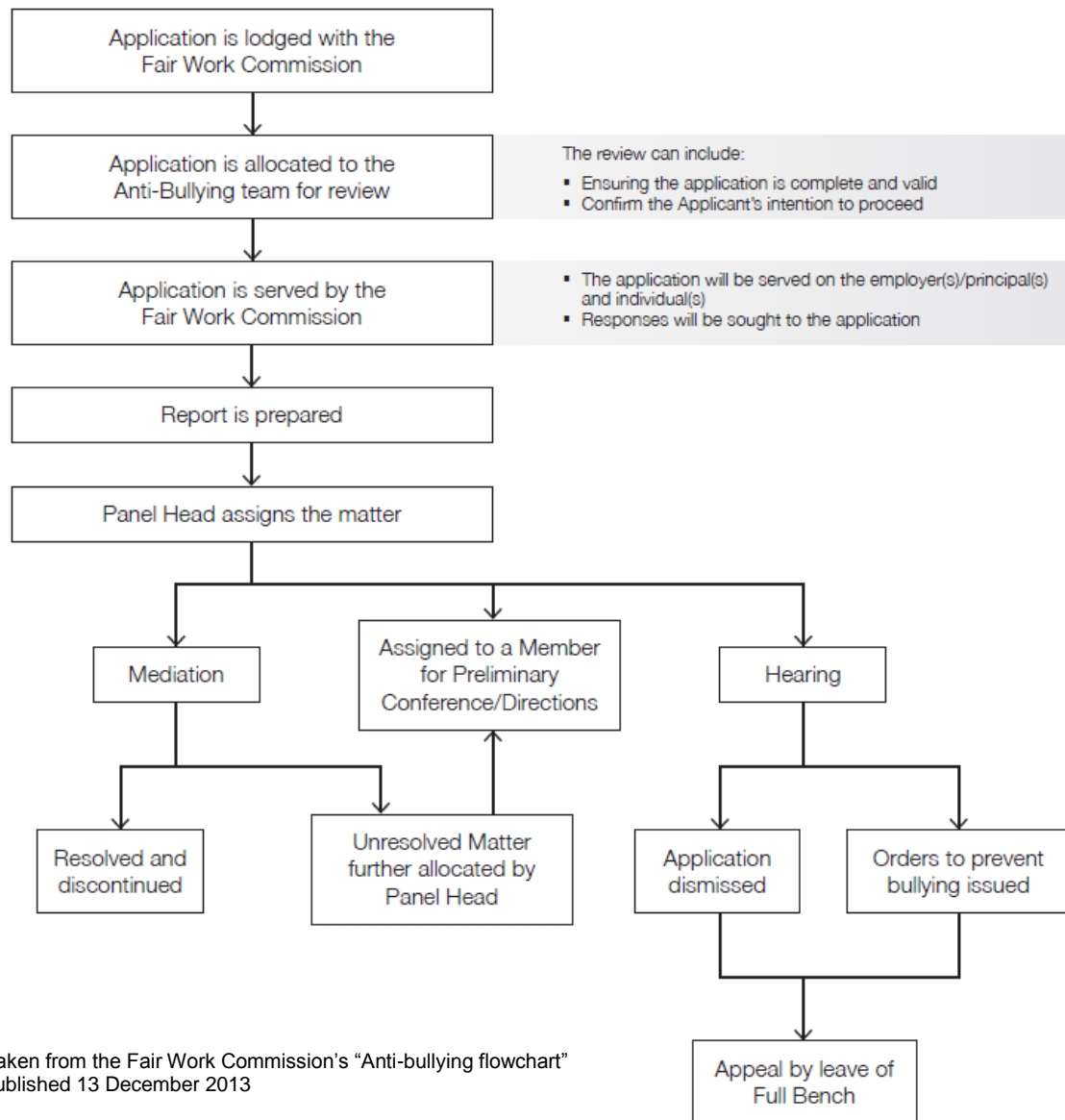
After gathering information about the application from all parties, the FWC will decide how to deal with the matter. If the FWC considers that an application has no reasonable prospects of succeeding it may be dealt with (and may be dismissed) early in the process.

Sometimes, the FWC can also refer matters to a work health and safety regulator. In Western Australia, that regulator is WorkSafe.

Otherwise, the FWC can decide to deal with the matter by mediation, conference or hearing. If this happens, the FWC will send you a written notice informing you of the date and time to appear before it – this is called a Notice of Listing.

If you can't attend on the date or at the time stated in the Notice, you can ask for your matter to be postponed (or adjourned). As soon as you know that you won't be able to attend, you should write to the FWC to request an adjournment and explain your reasons for being unavailable. The FWC will only adjourn a matter for good reasons.

The Process



What if you need an interpreter or other assistance?

The FWC can arrange for an interpreter to assist you at your mediation, conference or hearing at no cost to you. However, you must tell them as early as possible that you will need an interpreter and the language you require.

You can also request other assistance from the FWC if you need it to participate (eg. a hearing loop) and they will try to accommodate your request.

All of this can be done on your Form 72 application or by contacting the FWC after your application has been lodged.

Can you have a lawyer or other person to assist you?

Anyone can help you prepare and lodge your application with the FWC.

But, except in certain cases, you will need permission from the FWC if you want a lawyer or paid agent to represent you at your mediation, conference or hearing. Permission may be granted if it would help the matter to be dealt with more efficiently or if it would be unfair not to allow you to be represented.

You do not need the FWC's permission if you wish to be represented by a lawyer or paid agent who is:

- an employee or officer of an organisation, a peak council or a bargaining representative that is representing you (eg. a union officer); or
- a bargaining representative.

Mediation

If the FWC considers that mediation is appropriate, the parties will be invited to attend mediation to help them to resolve the issues themselves. Mediation is an informal, confidential, voluntary process. It can be in person, by telephone or by video conference. The FWC encourages mediations by telephone to make them as quick and convenient as possible.

How can you prepare for mediation?

Some things you can do to prepare for mediation include:

- know your case – refresh your memory about what happened. It can be useful to prepare a short summary of events to refer to during the mediation if you need to;
- locate all relevant documents (eg. diary notes, letters or emails with your employer about the bullying behaviour, any formal written complaints etc);
- seek legal advice if possible (our Advice Line contact details are at the end of this kit); and
- during the mediation, behave in a polite and courteous manner.

What happens at mediation?

The mediation is usually conducted by a Commission Member or by one of the FWC's anti-bullying mediators. They are independent and will not take sides.

At the start of the mediation, the mediator will usually explain their role and how the mediation will be run. After that:

- the mediator will allow each party to briefly outline their position, including what happened, relevant facts and what they want;
- the mediator may then allow or ask questions;
- the mediator may then talk separately with each of the parties to identify possible options to resolve the matter;
- the mediator will then try and help the parties to reach an outcome – for example, the mediator might identify common ground or suggest possible solutions.

If the parties reach an agreement, the mediator can help to record the agreement in writing.

If the parties do not reach an agreement, the matter will go to a conference or hearing.

Conferences and hearings

Conferences and hearings take place before Commission Members.

A conference is less formal than a hearing and usually takes place in private. The Member may make a decision about the application at a conference or may ask the parties to provide further information before making a decision. They can also arrange for the matter to go to a hearing.

A hearing in anti-bullying matters will be open to the public unless specific orders have been made for it to take place in private. Hearings are formal proceedings.

At the conference and/or hearing you should be prepared to answer questions about the alleged bullying and provide support for the orders you are asking for. If you do not attend a conference or hearing when required, the FWC can still make orders.

If you are successful, what orders can you ask for?

Each person's situation will be different and you should think about your specific circumstances and those of your workplace when asking for orders. The FWC is not limited to making the orders you ask for, but it will likely take them into consideration.

The FWC can make any order it considers appropriate to prevent you from being bullied. However, it cannot make an order that you be paid money. It also cannot order reinstatement. The FWC's focus is on resolving the matter and enabling normal working relationships to resume.

In making an order, the FWC must take into account (if it is aware of them):

- any outcomes of an investigation into the alleged bullying carried out by someone else;

(eg. the course or findings of an investigation into the alleged bullying by a workplace health and safety regulator)

- any procedures available to you to resolve the grievances or disputes and any outcomes from those procedures;

(eg. whether dispute resolution or bullying complaint procedures are available to you under your award, agreement or employer's policy and if you have used them)

and

- any matters that the FWC considers relevant.

Some possible orders include:

- requiring the individuals or group of individuals to stop the specified behaviour;
- regular monitoring of behaviour by an employer;
- compliance with an employer's anti-bullying policy;
- requiring information and additional support and training to be given to workers, and
- a review of the employer's workplace bullying policy.

If you don't agree with a decision, what can you do?

If you don't agree with a decision, you can apply to the FWC to appeal it. You must be able to convince the FWC that it should grant permission for your appeal (for example, because your appeal is in the public interest) and that there was an error in the original decision.

The first step is to lodge an application to appeal (called a Notice of Appeal) with the FWC within 21 days of the date of the decision. This form can be found here: <https://www.fwc.gov.au/content/rules-form/notice-appeal>.

Other documents must then be prepared, lodged and served within short, specified timeframes. The requirements for these documents can be technical and rather formal. If you want to appeal a decision, we recommend you get legal advice first.

Who pays for costs?

You cannot usually ask for another party to pay your costs.

However, you can apply to the FWC for orders that another party pay some or all of your costs if:

- the other party responded to your application vexatiously or without reasonable cause; or
- it should have been reasonably obvious to the other party that their response to your application had no reasonable prospect of success.

You must lodge your application for costs within 14 days after the FWC has finished dealing with your matter. The form for doing this can be found here: <https://www.fwc.gov.au/content/rules-form/application-costs>.

What if the bullying still doesn't stop after orders have been made?

If the FWC makes an order and it is breached, the person breaching the order can be required to pay up to a maximum of 60 penalty units (currently \$12,600 for individuals and \$63,000 for corporations) as a civil penalty. This amount may be paid to the Commonwealth, a particular organisation or a particular person (including you).

A separate application for these orders must be made to the Federal Court, the Federal Circuit Court or an eligible State or Territory court (in WA, the District Court of Western Australia or Magistrates Court of Western Australia). Again, you should get legal advice before applying for these orders.

Workplace health and safety laws

Workplace bullying can also breach workplace health and safety laws. As mentioned earlier, the FWC can refer matters to a work health and safety regulator such as WorkCover or WorkSafe. You can make a claim with the FWC to stop workplace bullying at the same time that a claim is made under workplace health and safety laws. In some circumstances, the FWC can share relevant information about alleged bullying with a work health and safety regulator.

More Information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111

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Fair Work Commission

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111 St George's Terrace
Perth 6000

Tel 1300 799 675

Web www.fwc.gov.au

Email perth@fwc.gov.au

Wageline

Tel 1300 655 266

Web www.commerce.wa.gov.au/labour-relations/contact-wageline

WorkCover

Tel 1300 794 744

Web www.workcover.wa.gov.au

WorkSafe

Tel 1300 307 877

Web www.commerce.wa.gov.au/worksafe