



Express law

fast track information for clients

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New anti-bullying measures to commence on 1 January 2014

The anti-bullying measures introduced into the *Fair Work Act 2009* (FW Act) by the *Fair Work Amendment Act 2013* will commence operation on 1 January 2014. The Fair Work Commission has recently published a summary of its proposed case management model (Case Management Summary), proposed amendments to the Commission Rules and draft application and response forms for use in matters commenced under the new anti-bullying provisions.

Anti-bullying measures

Who can commence an anti-bullying application?

From 1 January 2014 a worker at a constitutionally-covered business (which includes the Commonwealth or a Commonwealth authority) who has been bullied at work will be able to apply to the Commission for an order to stop the bullying.

The definition of 'Worker' is broader than that of 'employee' and has the same meaning as in the *Work Health and Safety Act 2011* (WHS Act) but does not include a member of the Defence Force. The Commission will have the power to dismiss an application if it might involve matters that relate to Australia's defence or national security or covert or international operations of the Australian Federal Police. The new provisions do not require or permit a person to take or refrain from taking action if to do so would, or could reasonably be expected to, prejudice such matters. The Chief of the Defence Force, the Director-General of Security and the Director-General of the Australian Secret Intelligence Service (ASIS) each have certain powers to declare that these provisions (or particular provisions of the FW Act) do not apply to certain types of work.

What sort of bullying does the Fair Work Act cover?

A worker is bullied at work if, while at work, 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: s 789FD(1). Examples of such behaviour might be:

- racist or sexist vilification or harassment
- threatening and intimidating behaviour
- abusive and insulting behaviour
- social ostracism
- demeaning and denigrating behaviour
- oppressive and unreasonable management behaviour
- physical assault.

However, reasonable management action carried out in a reasonable manner does not constitute bullying: s 789FD(2). Depending on the circumstances, reasonable management action could consist of:

- performance appraisals
- ongoing meetings to address underperformance
- investigating, counselling or disciplining an employee for misconduct
- transferring or redeploying a worker.

This action would need to be reasonable in all of the circumstances and must be carried out in a reasonable manner. This may be analogous to the 'reasonable administrative action' exception that applies to workplace injuries under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). However, it seems likely that the concept of 'management action' under the FW Act may encompass a range of action by employers that is broader than 'reasonable administrative action' under the SRC Act.

Whether 'reasonable management action' is taken in a reasonable manner will be a question of fact, to be determined in all of the circumstances. This exception will no doubt become important when a worker alleges that they are being bullied by conduct that the employer considers to be reasonable performance management or reasonable disciplinary action. In such cases it will be important for employers to carefully consider and plan a strategy of action that will enable them to demonstrate that any action taken was reasonable and was reasonably undertaken.

How will the Commission deal with an anti-bullying application?

The Commission will serve a copy of any application on the employer and then on other persons named in the application as persons allegedly engaging in bullying of the applicant.

The Commission is required to start dealing with any application within 14 days after the application is made. This does not necessarily mean that the application will be listed for hearing or conference within that period. The Commission may instead take other steps, including contacting the applicant, the employer or other parties to the application, to obtain further information.

The Commission's Case Management Summary provides that in all cases relevant parties (including the employer) will be notified of the application and be given an opportunity to be heard before any substantive hearings are conducted. All materials filed with the application that are relied upon will also be made available to all parties (subject to any required privacy redactions) before any hearing.

The Commission may decide to conduct a conference before a member or an employee of the Commission. This conference would be held in private: s 368(2). The Commission may conduct a mediation or conciliation (in private), at which the Commission will identify the issues in dispute and attempt to reach an agreement with all the parties to resolve the matter.

Applications that are not resolved by mediation or conciliation will be heard by a member of the Commission. The Commission can require any person to attend the Commission or to provide written or oral submissions or copies of documents. It may take evidence under oath or affirmation. If the matter does not otherwise resolve, the Commission will determine the matter at a hearing.

The Commission may dismiss an application for an order to stop bullying if it:

- is not made in accordance with the FW Act
- is frivolous or vexatious or has no reasonable prospect of success (s 587(1)) or

- the Commission considers that the application might involve matters that relate to Australia's defence or national security or an existing or future covert or international AFP operation: s 789FE(2).
- The draft employer response form to an anti-bullying application published by the Commission invites the employer to set out the basis of any jurisdictional objection. The Commission's Case Management Summary suggests that, where an application is likely to be beyond the Commission's jurisdiction, the Commission should hear and determine any jurisdictional objection as a preliminary issue.

What orders may the Commission make?

If the Commission is satisfied that:

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

it may make any order it considers appropriate to prevent the worker from being bullied at work by the individual or group (other than an order requiring payment of a pecuniary amount).

For example, the Commission might make an order requiring:

- a person (or a group) to stop specified behaviour
- regular monitoring of behaviour by an employer
- compliance with the employer's workplace bullying policy
- the provision of information and additional support and training to workers
- a review of the employer's workplace bullying policy.

The draft application form published by the Commission invites the applicant to indicate what remedy or remedies they are seeking.

In framing any order, the Commission must take into account any outcomes arising from an investigation into the matter by another person or body, to the extent that it is aware of any such outcome.

Other possible action in response to alleged bullying

A worker who makes an application to the Commission is not precluded from taking action under workplace health and safety legislation – for example, they may make a complaint to Comcare under the WHS Act.

Implications for agencies

There are already sound legal, policy and management reasons for public sector agencies to actively seek to prevent bullying in the workplace. The Commission's new anti-bullying jurisdiction provides a further reason for agencies to do so, as well as a new forum where agencies may be able to resolve particular cases.

Employers should consider reviewing their policies and practices to ensure early detection, intervention and support. It is also important to ensure that employers are making appropriate use of management tools, including counselling, warnings, directions and action for breach of the APS Code of Conduct. The guidance material published by the Commission makes it clear that one of the key considerations for the Commission in any anti-bullying application will be the extent to which an agency has appropriate anti-bullying policies and has followed those policies.

Anti-bullying training

AGS will be delivering a half-day training course covering all aspects of the new anti-bullying provisions in late January 2014. The course will cover important concepts and issues including how to:

- accurately identify workplace bullying under the new provisions
- ensure that you have appropriate anti-bullying policies and procedures in place so that your agency can prepare for and use the Commission's anti-bullying process
- ensure that you are equipped to satisfactorily respond to anti-bullying applications in the Commission.

Further details will be provided soon.

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