



## Legal Experts

# BULLIES IN THEIR MIDST – EMPLOYERS’ OBLIGATIONS AND RISKS

In June 2011, the Victorian Crimes Amendment (Bullying) Bill 2011 received royal assent and resulted in a number of small but crucial amendments to the Victorian Crimes Act 1958. The Amendment Bill (known as “Brodie’s Law”) was drafted following the suicide of a Victorian employee who had been the victim of systemic workplace bullying. This tragic incident led to the successful prosecution of the employer, a director and several co-workers, resulting in fines totalling \$335,000.

Brodie’s Law does not attempt to transform the Crimes Act into quasi-industrial legislation, nor does it specifically criminalise workplace bullying. Rather, it operates to extend the definition of stalking to include behaviour such as making threats to the victim, engaging in abusive acts, or acting in ways that could reasonably be expected to cause the victim to engage in self-harm. By contrast, the Fair Work Act 2009 (“FW Act”) does not contain any provisions that deal specifically and solely with bullying, and so far, no other state has yet contemplated similar legislation to Brodie’s Law. However, non-Victorian employers should not interpret this to mean that non-specific bullying is un-actionable; employers operating across state borders should note that Brodie’s Law applies to acts committed in Victoria or to acts committed whilst the victim was in Victoria. Furthermore, bullying allegations can form the factual basis of a number of claims and prosecutions in other jurisdictions including the following:

1. Workers Compensation – an employee who suffers a work injury and is unable to perform duties may claim statutory entitlements such as weekly compensation, reimbursement for medical expenses, and lump sum compensation for permanent disability. While certain exclusions apply to psychological injuries, such claims nevertheless have a significant impact on an employer’s insurance.
2. Adverse Action / Discrimination – any potentially harassing conduct perceived to be undertaken for an unlawful or discriminatory reason may result in an adverse action or discrimination claim; the former imposing a reverse evidentiary onus on the employer and the latter exposing an employer to vicarious liability in relation to employees. Either claim may be made whilst the employment is still on foot.
3. Unfair Dismissal – if an employee resigns as a result of perceived bullying conduct, that employee may bring Unfair Dismissal

proceedings against the employer. If the employee can establish that he/she was constructively dismissed due to the conduct and is unable to obtain future employment, compensation may be awarded up to the value of 26 weeks’ wages.

4. OH&S Prosecutions – while current state-based legislation applies, it is intended that the model Work Health and Safety Act 2011 will come into effect in all states and territories (excluding WA) on 1 January 2012. The Act imposes due diligence obligations on employers and ‘officers’ to ensure compliance with health and safety obligations. Prosecutions may be instituted where an employer, a person in control of a business or undertaking, an officer or employee fails to comply with a positive health and safety duty and exposes an individual to a risk of death or serious injury or illness. Under the model Act, even the objectively least serious offences carry penalties of up to \$100,000 for an individual or \$500,000 for a corporation.
5. Breach of Contract – sustained bullying and harassing conduct may entitle an employee to consider the employer as having repudiated the employment contract and to seek damages for the breach. Such claims may be founded on an employer’s non-compliance with contractual bullying policies or grievances procedures, or alternatively may be grounded upon a breach of the implied contractual term of mutual trust and confidence.

Complaints of workplace bullying are often made in the wake of employee dissatisfaction with performance management, which is not independently actionable under the FW Act. However, employers should be aware that such complaints and inquiries regarding available grievance resolution procedures may comprise ‘workplace rights’ under the FW Act. Employers cannot victimise an employee for making such a complaint or inquiry and doing so may entitle the employee to relief under the FW Act’s adverse action provisions. Accordingly, employers should take seriously any bullying complaints made by employees and undertake appropriate investigations into such allegations. Investigations should be transparent and impartial, and any subsequent action should demonstrate procedural fairness towards all relevant parties.



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