Bullying and Harassment in the Workplace

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Bullying and Harassment in the Workplace

Introduction

Harassment in the workplace, and in particular sexual harassment, has remained a significant issue, despite the application of legislation covering these issues for many years. In addition, there are now moves to regulate inappropriate conduct in the workplace more generally, though efforts to identify such conduct as a form of bullying. The intention of this briefing is to indicate what legal avenues apply to controlling inappropriate workplace conduct, and what are the emerging issues in this area. There are also significant issues regarding corporate and individual liability for such conduct, and there have been a number of important recent developments in this area. Particular attention will be paid to how liability arises in the context, and how employers should manage their response to these issues.

Bullying and harassment as significant compliance issues

There are many reasons why employers should take bullying and harassment seriously in terms of legal compliance. Harassment in the workplace context is clearly unlawful under anti-discrimination legislation, and there are an increasing number of complaints made about such conduct. The number of complaints does not represent a full picture of the incidences of sexual harassment in the workplace, as much conduct goes unreported. There is also increasing interest in the use of other legal avenues to cover harassment issues, such as occupational health and safety, the common law, and workers’ compensation. Bullying is now also been considered in terms of a number of different forms of legal regulation.

Another primary concern for employers is the level of damages that have been awarded of late in harassment and bullying cases. The level of compensation awarded in sexual harassment complaints has increased significantly over the years, with recent awards of compensation reaching sums such as $120,000. There has also been a number of bullying cases that have been dealt with through common law claims that have involved significant awards of damages.

Bullying and harassment have significant consequences for individuals that are subject to the conduct, including financial, health and self-esteem problems in some circumstances. A person may leave a place of employment because she or he can no longer tolerate some form of bullying or harassing conduct, but may feel unable to discuss the reason for leaving. This can have significant implications for seeking other employment, particular if the person is reluctant to use someone from that place of employment for future job references.

There are then other issues that are often referred to as the “hidden costs” of bullying and harassment. As far as an organisation is concerned, there are significant institutional costs in terms of the management down-time involved in managing such issues, cost to morale, turnover of good staff and associated legal costs. Increasingly, organisations are also concerned with the damage to corporate reputation that may result from adverse media exposure.

Harassment in the Workplace

Most issues of harassment in the workplace are dealt with under anti-discrimination legislation. The general prohibition of direct discrimination is sufficiently broad to cover conduct that amounts to harassment. Therefore, if a woman is subject to harassing conduct in circumstances where she can show that a man in the same circumstances would not have been subject to that conduct, then direct discrimination on the basis of sex could be established. Both federal and state anti-discrimination legislation now contain a specific prohibition outlawing sexual harassment, which obviates the need to rely on the general prohibition of direct discrimination. The Disability Discrimination Act 1992 (Cth) also contains a specific prohibition of harassment on the basis of disability in the contexts of employment, education and the provision of goods and services. As the phrase “to harass” is not defined in the disability legislation, the prevailing view is that it will be interpreted in a similar manner to the provisions dealing with sexual harassment.

Where there is not a specific provision prohibiting harassment in anti-discrimination legislation, a person subject to harassment on the basis of any relevant attribute covered by anti-discrimination legislation could make a complaint. For example, if a person is subject to harassment on the basis of their sexuality, in New South Wales that person could bring a complaint of direct discrimination on the grounds of homosexuality. In the case of Daniels v Hunter Water Board an electrician was subject to adverse conduct in the workplace because he was thought to be gay. The conduct took the form of name calling, allocation of an unreasonable share of undesirable jobs, less access to overtime, and subjecting him to a range of practical jokes and prank calls. His perceived homosexuality was based on his trendy haircut, his interest in jazz ballet classes and modelling, and his earing. The conduct in question was persistent over a significant period of time so as to be seen as a campaign of harassment. The Tribunal found that he was subject to less favourable treatment on the grounds of his perceived homosexuality as he could establish that a person who was not thought to be homosexual would not have been treated in this way.

The most common type of harassment complaint made in the workplace context is that of sexual harassment, which will now be examined.

Sexual harassment

In essence, sexual harassment is unwelcomed conduct that is of a sexual nature and is such that a reasonable person would find it offensive, humiliating or intimidating. The definition in the Sex Discrimination Act 1984 (Cth) is as follows:

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"For the purposes of this Division, a person sexually harasses another person (the 'person harassed') if:

(a) the person makes an unwelcomed sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

In this section:

'conduct of a sexual nature' includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing."

In essence, the 3 key elements are:

- unwelcome
- some form of sexual conduct
- an assessment of the reasonableness in the circumstances

We will look at each of these issues in turn.

**Unwelcomeness**

The issue of unwelcomeness can generally be described as conduct that is not solicited or not requested. However, one needs to be aware of the power dynamics involved, including that a victim is not obliged to tell the harasser of the unwelcome nature of the conduct in question. Silence on the part of a "victim" does not amount to consent to the conduct in question, and an alleged harasser must “take his or her victim as he or she finds them”. The perennial difficulty in this area is where a person may go along with particular conduct, or tolerate it because they feel that they have no opportunity to object or that they will suffer some adverse conduct if they do object.

A recent case example shows the fine line that exists with respect to unwelcome conduct. In the case of *Horman v Distribution Group Limited*, the applicant had complained about inappropriate comments made by her fellow workers, and some physical approaches such as texta writing on her body, pulling of her bra straps, and touching her on the buttocks. She alleged this was unwelcome conduct within the definition of sexual harassment in the *Sex Discrimination Act*, and that her employer was vicariously liable.

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3 [2001] FMCA 52.
The respondent called evidence from a considerable number of witnesses to try and establish that the complainant had participated in, initiated or encouraged certain behaviour of a sexual nature. However, ultimately the Court found that this did not prevent other behaviour directed towards her being unwelcome and constituting harassment.

The Judge went on to state:

“That everyone was entitled to draw a line somewhere, and those activities crossed that line. I also found that subjectively the applicant found these actions unwelcome. I did that by reference to the letter which was written contemporaneously with the activities and which I found represented her state of mind at the time. I rejected the argument put by the respondent which was in effect that the applicant’s conduct was such as to exclude her altogether from being hurt or humiliated by what occurred in this workplace.”

This is an important warning for employers not to rely on apparent toleration of inappropriate conduct to justify inaction on the employer’s part.

**Conduct of a sexual**

The conduct must be of a sexual nature. The legislative definition includes:

- sexual advances
- request for sexual favours
- other conduct of a sexual nature

If the conduct does not have a sexual aspect to it, it is not necessarily sexual harassment, although it may constitute some other form of conduct, such as sex-based harassment, or a form of discrimination under some other ground. Often to establish sexual harassment, one looks for a pattern of behaviour over a period of time. However it is possible to establish sexual harassment by a single act where it is sufficiently serious in the circumstances.

Examples of conduct that constitutes sexual harassment include:

- smutty jokes or sexually explicit comments
- taunting a person with constant talk about sex or sexual activities
- repeated requests for outings or drinks, especially after prior refusal
- requesting sex in return for job promotion
- continually staring or leering at a person
- offensive telephone calls
- persistent questions about a person’s sex life
- posters, cartoons, graffiti or messages of a sexually explicit nature
• suggestions about a person’s sexual morality
• down-loading, storing or distributing explicit or pornographic material

In a number of recent cases the type of conduct that is alleged to constitute sexual harassment has overlapped with other areas of regulation such as the appropriate use of internet and e-mail facilities in the workplace. There has been a range of cases where the conduct in question took the form of down-loading pornographic material, or sending sexually explicit e-mails.\(^4\) In these cases the conduct was found to constitute breach of EEO and Harassment polices or other codes of conduct in the workplace so as to warrant termination of employment.

**Reasonableness**

There is a qualifying aspect to the definition that necessitated that the conduct in question is considered in terms of reasonableness. The test is whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated, having regard to all the circumstances. It is not a defence to say that this sort of behaviour is tolerated in a particular industry, or it goes with the territory. It is a question of objectively ascertaining whether the conduct was such that a reasonable bystander would have thought the person harassed might be offended, humiliated or intimidated.

**Liability for harassing conduct**

Liability for harassing conduct may be established on a number of different bases. Firstly, the person engaging in the conduct may be personally liable. Secondly, accessory provisions may catch those that assist or help the actual perpetrator.

The liability of an employer may arise in a number of different ways. Where the employer is an individual, the alleged conduct may be the conduct of the employer himself or herself. Where the employer is a corporation, it is possible to establish personal or vicarious liability in a number of different ways. Because a corporate employer must act through others, the employer is personally liable for the conduct of senior staff and managers, or where any of these persons knew what was going on and did not respond. An employer is also vicariously liable for the conduct of its employees and agents, subject to the defence of having taken all reasonable steps to prevent the conduct, discussed below.

**Permitting Harassment**

There is increasing interest in forms of accessory or secondary liability, particularly that of “permitting” discrimination. The exact perimeters of this form of liability have not been tested. However, it has been considered in cases involving the conduct of unions, and more recently the conduct of an employment agency.

In the case of *Elliott v Nanda & Commonwealth*[^5], the then Commonwealth Employment Service that referred a young woman for employment was found to be liable for the sexual harassment she experienced in that work placement. The Court interpreted the accessory liability provisions in the *Sex Discrimination Act* of causing, instructing, inducing, aiding or permitting sexual harassment, as only applying to conduct that constitutes sex discrimination. This means it does not operate where the conduct is only proscribed by the specific sexual harassment provisions. The harassment in this case was caught not only by the specific provisions, but also by the general provisions dealing with sex discrimination and therefore the accessory provisions applied.

The notion of “permitting” was found to include tolerating or affording an opportunity for something to occur.

The Federal Court found that a person may permit such conduct where they:

> "knowingly place the victim of the unlawful conduct in a situation where there is a real or something more than a remote possibility that the unlawful conduct will occur".

Th Court went on to indicate that:

> "This is certainly so in circumstances where the permitter can require the person to put in place measures designed to influence, if not control, the person's conduct or the conduct of that person's employees. An employment agent may place an employee with an employer and knows or has reasonable grounds for believing that there is a material chance (being something more than a remote chance) that the employee will be at risk of being discriminated against on the grounds of sex. If the agency takes no steps to influence or control the employer’s conduct... then it may have ‘permitted’ any subsequent unlawful conduct by the employer by way of discrimination on the grounds of sex.”

The Federal Court did highlight that an agency in these circumstances would have to approach with some care the extent to which it could re-publish any prior complaints it had received. However, the fact that there might be some practical problems did not mean that there was no permitting of the conduct.

The Court also stated:

> “There is no reason apparent to me why an employment agency, to whom several complaints had been made about sexual harassment by one of the employees it serviced could not either terminate the service or inform the employer that the agency would tell, as a condition of maintaining the service, potential employees that complaints had been made and the nature of the complaints or at least require the employer to put in place measures at the workplace to stop or at least influence the potential unlawful conduct. Such measures could include requiring the employer (a natural person) to read material about what constitutes discrimination on the grounds of sex, and in particular, sexual harassment and commit himself or herself to a protocol designed to stop such conduct. If the contravening conduct

[^5]: [2000] FCA 418
Along similar lines, in the case of *Rice v Nolan*, a claim based around liability for permitting sexual harassment was determined. In that case an employee brought a claim of harassment against the Managing Director of a company who was the perpetrator of the alleged sexual harassment. A claim was also brought against the Chairman of Directors of the company, who was the beneficial owner of most of the share capital of the company. This person did not have any responsibility for the day to day operations of the company, lived interstate, and rarely visited the place of work.

The liability of this Director was upheld by the Commission on the basis of permitting the harassment. He took no adequate steps to ensure that there was no sexual harassment continuing in the workplace, despite a number of complaints and warnings concerning other events. He simply took the word of the alleged perpetrator, without any investigation on his part, thereby putting the health, safety and wellbeing of the complainant, amongst others, at risk. The fact that he chose not to take any interest in the particular workplace did not absolve him from responsibility. Nor did the fact that he played no actual managerial role in the company, or have any control over the daily activities. The Commission found that the frequency and similarity of complaints made, should have brought home to him the possibility of harassment. This brought him within the reach of s105 of the *Sex Discrimination Act*.

**The Reach of Vicarious Liability**

An important consideration in the context of sexual harassment is the extent to which employers may have a defence to vicarious liability. An employer that can show that he or she has taken all reasonable steps to prevent or eliminate the harassment will not be taken to be vicariously liable for that conduct. The defence does not arise where personal liability has been established on the part of the employer.

Factors that will be taken into account in determining whether an employer has taken all reasonable steps include:

- having relevant policies and procedures in place
- regular training of staff
- monitoring compliance
- making clear the sanctions for breach
- establishing avenues for complaints
- making it very clear that conduct will not be tolerated

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The Federal Court made it very clear in a case last year that all employers, regardless of the size of the organisation, need to have in place relevant policy documents. In the case of *Gilroy v Angelov* the Federal Court stated that:

“It may be more difficult for a small employer, with few employees, to put in place a satisfactory sexual harassment regime than for a large employer with skilled human resource personnel and formal training procedures. But the Act does not distinguish between large and small employers, and the decided cases show that many sexual harassment claims concern small businesses, often with only a handful of employees. A damages award against such an employer may have devastating financial consequences; so there is every reason for such an employer to be careful to prevent claims arising.”

In a recent case this message was re-enforced with an emphasis on pro-active implementation. In *Carroll v Zielke* the Tribunal stated:

“A policy, if in existence, has to be applied. It should be supported with printed material, and orientation for new employees, a complaints process, and training. None of this was in place at Ms Carroll’s place of work. All this is within the reach of even the smallest business, and free advice and resources are available from employee bodies, trade unions and Government agencies.”

A question that sometimes arises with respect to vicarious liability, is what are the outer limits of an employer’s vicarious liability as it is based on acts done “in connection with employment.” For example, if the harassment occurs between co-workers, but in a context that has only an indirect relationship to the workplace. Where social activities have a clear connection to the workplace such as Christmas parties, work related conferences, and travel for work related purposes, it is fairly clear that vicarious liability may be established. The answer is less clear where the conduct might be more remotely connected to the workplace.

In her book *Discrimination Law and Practice*, Chris Ronalds states:

“An employer will only be vicariously liable for the sexual harassment of an employee where it can be demonstrated that the acts occurred during the course of employment and was directly and relevantly related to it. An employer will not automatically be liable for all acts of harassment which occur between employees. If employees engage in social interactions away from the workplace and which the employer played no role in organising, then it is unlikely that the employer would be liable. If there was no direct connection with the workplace and there was no subsequent link back to the workplace, such as any detriment if the harasser was rebuffed, then any liability of the employer would be clouded with uncertainty. If it occurred at a work event such as a Christmas function organised and paid for by

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7 [2000] FCA 1775
8 [2001] NSW ADT 146
the employer and occurring during usual work hours, then liability for the employer would be more likely.”

An employee’s out of work time behaviour or conduct is not subject to an employer’s control, except in limited circumstances.

In the case of McManus v Scott-Charlton 11Justice Finn concluded that it was lawful for an employer to give an employee directions to prevent a repetition of privately engaged sexual harassment of a co-employee where:

“(1) The harassment can reasonably be said to be a consequence of the relationship of the parties as co-employees (ie it is employment related); and

(2) The harassment has had and continues to have substantial and adverse affects on workplace relations, workplace performance and/or the efficient, equitable and proper conduct of the employer’s business because of the proximity of the harasser and the harassed person in the workplace.”

In that case, the lawfulness of the direction by the employer not to engage in harassment outside work hours was dependent on the fact that the employee’s out of work conduct had demonstrated a substantial and adverse affect on the employer’s business.

In a case involving fighting by an employee outside the workplace context, Vice President Ross stated that:

“An employer does not have an unfettered right to sit in judgment on the out of work behaviour of their employees. An employee is entitled to a private life. The circumstances in which an employee may be validly terminated because of the conduct outside work are limited.”12

An employer’s potential vicarious liability for harassment as well as the ability to take disciplinary action will depend on the extent of the work nexus.

**Bullying in the workplace**

**What is bullying?**

The exact parameters of what conduct is said to constitute bullying will need to be worked out over time. One issue that needs to be kept in the forefront of this debate is that to have a definitive legislative response, it must be clear what the conduct in question is. Conduct involving intimidation or threat could clearly be termed bullying. In other circumstances, it may be more difficult to draw the limit between bullying and other workplace interactions.

In terms of defining workplace bullying, it has been stated:

11 (1996) 140 ALR 625 at 636.

“Workplace bullying is a term that covers a multitude of behaviours. Basically it is a broad description covering both overt harassment, such as verbal abuse, hostility, rages, tirades and covert harassment such as sabotage, isolation and undermining an individual’s position. The common ground is that a person has been treated less favourably and has suffered an injury due to behaviour that is beyond normal disciplinary action or appropriate workplace interaction.”13

The Victorian WorkCover Authority has released an Issues Paper in March 2001 entitled “Code of Practice for Prevention of Workplace Bullying”. In the Issues Paper they identify an increase in bullying behaviour, as well as a greater willingness amongst victims to report bullying and/or take legal action against it. They refer to a number of landmark cases where there has been substantial compensation to employees who suffered injury as a result of bullying. The position adopted in the Issues Paper is that occupational health and safety is the most appropriate framework for regulating occupational bullying, because of the essentially pro-active and preventative approach of the legislation.

The issues paper defines workplace bullying as:

“aggressive behaviour that intimidates, humiliates and/or undermines a person or group. Bullying is not a one-off situation; it is behaviour that is repeated over time.

Examples of bullying at work include: yelling; screaming; abusive language; continually criticising someone; isolating or ignoring the worker; putting workers under unnecessary pressure with over work and impossible deadlines; and sabotaging someone’s work or their ability to do their job by not providing them with vital information and resources.”14

The issues paper states:

“Critical comments which are objective and indicate observable performance deficiencies do not constitute workplace bullying.”

The paper goes on to indicate that:

“By contrast, comments unrelated to actual performance that are used to embarrass or humiliate the employee may constitute bullying, especially when they occur in conjunction with other bullying behaviour.”

The paper also acknowledges that employers have fundamental legal rights in relation to their capacity to control and direct work done in their organisation.

The Queensland Government has established a taskforce to examine the issues of workplace bullying, and to develop strategies to help prevent workplace bullying.

The terms of reference of the workplace bullying taskforce are as follows:


14 See page 2.
1. examine the extent and characteristic of bullying in the workplace;

2. identify groups of workers at risk;

3. consider strategies to increase awareness about workplace bullying amongst the community, employers, as well as workers at risk;

4. consider the protection afforded to employers under the current regulatory arrangements;

5. recommend strategies to:
   - provide for an accessible process for review of cases of workplace violence and bullying
   - address appropriate remedies, deterrents and penalties
   - improve education and compliance

6. recommend any new legislative and administrative initiatives to help eliminate workplace bullying; and

7. consider strategies for partnering between the Department of Industrial Relations and other agencies, with the view to providing a whole-of-Government response to workplace bullying.

**Legal Responses to Bullying**

It is difficult to determine an appropriate legal response without a clear idea as to what actually constitutes “bullying”. However, assuming some form of bullying is established we will consider what legal responses could apply.

**Common law**

There are general obligations imposed on employers to provide a safe workplace for employees. The failure to satisfy these obligations can result in a common law action, such as one based on negligence. Alternatively, the failure to provide a workplace free from bullying may be considered to be a breach of the implied term in the contract of employment, that an employer will not destroy or damage the trust or confidence in that employment relationship.

In terms of establishing negligence, an employer is under a duty to exercise reasonable care to avoid unnecessary foreseeable risks of injury to an employee. Where an employee can establish that an employer unreasonably fails to take measures, which would have protected the plaintiff, a common law action may lie.

There have been a number of cases where employees have recovered common law damages for conduct that amounted to bullying. In the case of *Blenner–Hassett v Murray Goulburn Co-Operative Pty Limited & Ors*,\(^\text{15}\) a case was brought based on negligence and under

\(^\text{15}\) County Court Victoria, 10 March 1999.
occupational health and safety legislation. The conduct in question involved a number of pranks of a sexual nature as part of an initiation routine. In that case the Judge stated:

“I am further satisfied that the company had no practices in place to ensure that the types of behaviour which occurred were either monitored or governed. I am satisfied the perpetrators were fully aware of the practices and never gave them a second thought. It was customary and part of initiation into a set of values which we might now regard as singularly abhorrent.”

In the case of Arnold v Midwestern Radio Limited, an employee brought an action in negligence where she was subject to aggressive, bullying, abusive, derogatory and sarcastic conduct by her manager. As a result, she developed a serious psychological injury. The employer was found not to have provided a safe system of work for the employee, and it was found to be reasonably foreseeable that abusive conduct of the manager would result in such a condition in the employee. The employee was awarded a significant amount of damages in this common law action, however, that matter went on appeal, and was reversed by the Court of Appeal. Initially the Court had found on the basis of the medical evidence, that a psychiatric illness was reasonably foreseeable as a consequence of the manager’s behaviour, and that the employer breached its duty to take reasonable care to avoid risk of injury to her, and to ensure that she had a safe system of work. On appeal, the Court of Appeal did not accept that the medical evidence relied upon by the plaintiff was sufficiently clear to establish that the “abusive, threatening and unacceptable conduct of the manager caused the plaintiff to suffer a major depressive disorder.”

**Occupational health and safety issues**

The most relevant legal regime for dealing with bullying issues appears to be occupation health and safety regulation. It poses far less hurdles then trying to have a specific offence or prohibition of “bullying” per se.

The Victorian WorkCover Authority Issues Paper identifies bullying at work as constituting an occupational health and safety hazard, as does violence at work. Under occupational health and safety legislation, employers have a responsibility to ensure the health and safety of employees, which is relevant to bullying issues. The preventative aspect of occupational health and safety is also relevant.

Conduct that amounts to bullying, may potentially be caught by an employer’s obligation to ensure the health and safety of workers. The Occupational Health & Safety Act 2000 (NSW) imposes broad duties on an employer to ensure health and safety.

The recently enacted occupational health and safety legislation in New South Wales imposes new obligations with respect to risk management and consultation with employees. The pro-active obligation to identify hazards in the workplace and respond appropriately, that underlies this new statutory scheme, has particular relevance to this type of conduct.

The first step in the risk management approach requires employers to undertake a risk identification. Particular hazards are identified in the legislative scheme to which an

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16 [1999] EOC 92-965

employer should have regard, including the potential for workplace violence. However, other issues such as bullying are also clearly relevant. Once risk identification has been undertaken, a risk assessment should evaluate the likelihood and severity of any consequence in the workplace, in order that steps can be taken to eliminate or control the risks. In applying this sort of approach to bullying, it is important that employers ascertain from current practices what is the risk of bullying incidences in their workplace, evaluate the likelihood, identify the factors contributing to any risk, identify the necessary action to deal with it, and respond appropriately.

The other significant change brought about by new occupational health and safety legislation in New South Wales is the duty to consult with employees “to enable employees to contribute to the making of decisions affecting their health, safety and welfare at work.” The Act sets out various mechanisms for consultation to be established, and the circumstances in which these should take place. The risk of workplace bullying as an occupational health and safety issue arising in a workplace, should also be raised through relevant consultation procedures.

Application of anti-discrimination legislation

As discussed, in the context of sexual harassment, bullying may be an act of discrimination or a specific act of harassment. However, to come within the terms of anti-discrimination legislation, the conduct in question must be as a consequence of a relevant attribute or ground covered by anti-discrimination legislation.

A case such as McKenna v State of Victoria, involving a female police officer, was based on both harassment and discrimination. In addition to the specific acts of harassment, there was evidence of a hostile towards her based on her sex, which was found to be a form of sex discrimination. This conduct might otherwise have been described as a form of bullying. Similarly in the case of Daniels v Hunter Water Board, discussed earlier, the treatment of that person was a form of discrimination directed to him because of his perceived sexuality. It too could have been seen as bullying. Where the bullying treatment is motivated by an attribute or characteristic covered by anti-discrimination legislation then the anti-discrimination context offers an individual mechanism for redress. This could operate in conjunction with the structural response offered by other forms of regulation such as occupational health and safety legislation.

Constructive dismissal

Many employers are aware of the obligations that arise under unfair dismissal provisions in Federal and State legislation that have an application where there has been a termination of employment. An important issue to keep in mind is that conduct in the workplace that may constitute bullying, could in some circumstances come within the termination regime as a form of constructive dismissal.

Constructive dismissal arises in the circumstances where a person’s work conditions are such that they feel they have no other option available to them but to leave their employment.

19 (2000) EOC 93-080
There have been a number of cases that have dealt with instances where such a resignation can constitute a termination for the purposes of unfair dismissal legislation. An example of bullying in the dismissal context is a case of *Dillon v Arnotts Biscuits Limited* where a woman subject to bullying was found to be constructively dismissed.

**Criminal law**

There may be circumstances where the bullying amounts to criminal conduct such as that involving assault or the threat of assault.

**Workers’ compensation**

There may also be liability for any injuries suffered as a consequence of bullying under workers’ compensation legislation.

**Risk management strategies to deal with bullying and harassment**

Problems of bullying and harassment should be dealt with like any other industrial hazard or risk management issue. Mechanisms that many employers already use to deal with discrimination and harassment issues may be adopted and adapted to deal with bullying. Employers need to identify what the problem is, and what is the best solution for their organisation. This includes the establishment of best practice compliance mechanisms and a pro-active management of compliance issues. Employers should have appropriate policy documentation in place, regularly train staff on what is acceptable workplace conduct, and have dispute resolution mechanisms available to employees. Employers should also regularly assess compliance in this area, and modify where appropriate.

The principle issues to take into account are:

- having the appropriate policies in place
- ensuring that policies are effectively communicated to all within the workplace
- have designated contact persons
- regular updating and induction of new staff
- ensure any allegations of bullying are taken seriously and appropriately investigated
- follow through with sanctions for breach of established polices where appropriate
- regularly review compliance

**Conclusion**

Mechanism that employer have had in place for some time to deal with discrimination and harassment issues in the workplace can to a large degree be extended to take account of many of the issues that arise in the case of bullying. Bullying issues should also be brought to light

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as part of any risk assessment in terms of occupational health and safety obligations. There remains a question of where one draws the line between bullying that warrants legal intervention, and other interactions in the workplace. Ultimately the best approach to dealing with bullying and harassment issues is to create a workplace and corporate culture where conduct inappropriate for the workplace is clearly not tolerated.