

Workplace Bullying & the Fair Work Commission

Peggy Cheong,
President,
Law Society Northern Territory



As most of the local profession knows, my practice lies in the defendant insurance area. In particular, a large part of my work is in the workers compensation jurisdiction. I have been practicing in this area for most of my life as a solicitor in the Northern Territory. More and more, I see trends developing in the types of injuries; the way employers and insurers respond to workers' injuries and their claims, as well as government responses to such changes by way of legislative amendments to the governing statutes.

More recently, what is becoming more and more common are work related stress claims for psychological or psychiatric injuries arising out of or in the course of a worker's employment due to factors, occurrences and other people at the workplace. Management of people, in particular employees in any workplace is difficult. Even the most highly trained managers are likely to find an employee difficult to manage from time to time.

Actions by employers and their managers in the workplace may be closely scrutinised, and what occurs in one work environment will not be acceptable in another work environment. Workplace interactions between fellow employees, and between employees and their managers and supervisors who may be in conflict or who may have some level of personality clash can often lead to accusations of bullying and harassment that may then

ultimately lead to a claim for a work related injury.

More and more work related physical injuries are 'easier' to manage than mental / psychiatric injuries both in terms of workplace issues as well as in the compensation arena. Although workers compensation is a topic that dominates most of my working days, the Federal Government has recently legislated on a national level to try and deal with workplace bullying behaviour.

The Federal Government recently announced that it will legislate (if not already completed as at the date of this article), to give the Fair Work Commission (FWC) the power to deal with workplace bullying complaints. If implemented, this will significantly change the existing legislative and regulatory framework dealing with workplace bullying. It will make a significant difference to the way employers and employees contend with workplace bullying issues. The following information and details are extracted from an Article written by Mr Brett Feltham, a partner at Hunt & Hunt in Sydney.

The proposed changes are related to the Federal Government's response to a federal parliamentary committee's report on workplace bullying and the recommendations that the committee made in October 2012. The Committee recommended that workers who are subjected to workplace bullying be given specific rights to seek redress through an adjudicative

process. The Federal Government has sought to provide such redress by way of a right of recourse to the FWC.

The Federal Government proposes to provide such recourse by way of amendment to the *Fair Work Act* (Cth) (2009). The amendments include:

- Defining *workplace bullying, harassment or victimisation* as "repeated, unreasonable behaviours directed towards a worker or a group of workers that creates a risk to health and safety";
- Clarification that bullying does not include reasonable management practices, including performance management conducted in a reasonable manner;
- The reasonable management practices exclusion above is consistent with the exclusions to compensable stress claims contained in some States and Territory workers compensation legislation;
- Allows a worker affected by workplace bullying to apply to the FWC to deal with the complaint;
- Requires the FWC to deal with such applications as a matter of priority, which includes listing the matter for consideration within 14 days;
- Enables the FWC to make orders it considers appropriate

to remedy or prevent the bullying from recurring if it considers appropriate;

- FWC may make orders that include requiring the employer to do, or refrain from doing certain things, orders relating to the employee or other employees at the workplace, and/or publishing of the orders to assist in preventing further bullying at the workplace;
- The amendments also provide for a civil penalty of up to \$33,000 for failure by an employer to comply with an order of the FWC; and
- Permits the FWC to refer a bullying complaint to a State or Territory based work health and safety regulator for investigation and appropriate action, if it considers such referral necessary.

The actual logistics and procedures in relation to how an application or complaint is to be brought before the FWC are still unclear. The Federal Government remains silent on whether workers will have to file this type of application with the FWC within a defined time period and what processes the FWC will be required to undertake to "deal" with an application.

In addition, there is no indication as to whether an employer that is subject to a bullying complaint will be required to participate in such a process and the time frame for the employer's responses, bearing in mind the object that any such application is to be dealt with as a matter of priority, with a relatively short time frame of 14 days. It may be that the Federal Government intends for the FWC to formulate its own rules and procedures in relation to the timing and documentation necessary for a worker to make a complaint / application, as well as prescribing the time and manner in which the employer or other employee(s) may respond to such a complaint.

The above amendments mean that employers will be subjected to further legislation that provides for a new type of workplace claim by employees. The changes may also provide disgruntled employees with another avenue to pursue speculative bullying claims against their employers, possibly without seeking to have allegations dealt with through their employer's internal bullying policies and procedures.

Concerns have been expressed by some employer organisations that the proposed new cause of action will mix health and safety issues with industrial relations issues and that these are better kept separate and may potentially lead to more complicated / complex actions that will be more difficult to resolve.

It is clear that the Federal Government is looking more closely into the effect and possible remedies for workplace bullying. The amendments will empower the FWC to deal with workplace bullying issues and will provide affected workers with an additional avenue to ventilate their complaints and to redress their concerns.

Employers nationwide would be well advised to ensure that they keep up-to-date with the progress and implementation of the amendments and how the FWC intends to deal procedurally with such matters. Employers may need to re-examine their internal practices and policies relating to bullying to consider whether any changes need to be made to minimise risks in light of the proposed new legislative framework

Recently, Joe Catanzariti, the Vice President of the FWC visited Darwin and I had the opportunity to speak to him briefly in relation to the Federal Government's amendments to the *Fair Work Act* (Cth) (2009) to widen the FWC powers and responsibilities to deal with workplace bullying. Mr Catanzariti indicated that the FWC is working through the proposed

amendments and envisages that these will come into force in early 2014. He also indicated that on the next occasion when he returns to Darwin, he would be happy to provide a CPD for the local profession and other interested parties as to how the FWC considers the amendments will be implemented and the likely effect of those provisions as they are applied to practice in real situations. The Law Society will continue to liaise with Vice President Catanzariti to ensure that he does not miss out on providing this interesting CPD in Darwin.

In relation to the current FWC in Darwin, I understand that to date approximately 12 members of the FWC sit in rotation in Darwin to deal with matters before the Commission in the Northern Territory. Vice President Catanzariti has implemented some changes to this rotating circuit. He has proposed that the matters before the FWC in Darwin, be dealt with between four members of the Commission who will sit in Darwin on a rotational basis. Vice President Catanzariti is one of the sitting members in the Northern Territory. The purpose of having the Darwin FWC circuit dealt with by four members should then provide more familiarity with hearings and consistency in decisions of FWC matters in the Territory.

Interesting times are ahead in relation to the further powers that the FWC will have with respect to workplace bullying. This jurisdiction of the FWC in this area will no doubt continue to develop with time and we will all have to wait and see how it evolves and whether or not the legislative intent of the Federal Government in proceeding with these amendments ultimately meets its goal in dealing more effectively and quickly with workplace bullying issues. ●