

# **BULLYING & HARASSMENT AT WORK: WHAT IT IS, WHY YOU CAN'T AFFORD IT AND WHAT TO DO ABOUT IT**

**Elizabeth Devine  
Principal & Solicitor  
DEVINE LAW AT WORK**

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## 1. INTRODUCTION

From the roads to car parks, to schools and to workplaces, bullying and harassment is a feature of Australian life. The bullying and harassment which occurs regularly within Australian workplaces is symptomatic of the aggressive culture in which we live. You, me and the next person have probably all experienced some form of bullying or harassment in our work lives and, if we have not yet experienced it, we are likely to at a future time.

While there is nothing new or surprising about bullying and harassment in the workplace, it has experienced a significant increase in its profile in the past decade. This has been influenced not only by changes in societal attitudes to what is and is not acceptable behaviour but also by key legislation, including anti-discrimination legislation and occupational health and safety legislation.

We all pay a very high price for bullying and harassment in the society generally and in the workplace specifically. The financial and other costs to individuals the subject of bullying and other forms of harassment and their employers, let alone the broader community, can be debilitating. With recent research estimating that the cost to the Australian economy of bullying and harassment at work to be close to \$15 billion<sup>1</sup> each year, not including certain 'hidden costs', no individual or organisation can afford to put off addressing the issue any longer.

One of the 'hidden costs' are the costs associated with a broad range of legal action which can result from bullying and harassment in the workplace, including: claims under occupational health and safety legislation; claims under anti-discrimination legislation; unfair dismissal claims; workers compensation claims; and, breach of contract claims.

Given the significant costs to the individual, employers and to the economy caused by bullying and harassment, what is most surprising about bullying and harassment at work is not that it exists but that it is so widely tolerated. This tolerance arises either directly on the part of people who do not understand what all the fuss is about, or indirectly by inertia within an organisation.

The purpose of this paper is to assist you and those you advise to be informed about the legal and business issues which arise from bullying and harassment at work and to enable you to take active steps to address those issues. The paper begins by putting the issue of bullying and harassment at work in a legal framework and then explains how to identify bullying and harassment at work. Several key decisions, which illustrate the high price to be paid by employees and employers alike as a consequence of not only bullying and

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<sup>1</sup> Productivity Commission draft report *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety*, January 2010, available online at [www.pc.gov.au](http://www.pc.gov.au)



harassment but a failure to adequately respond when issues arise, are then examined. Having highlighted the key issues and consequences arising from bullying and harassment and work, you are then given practical guidance about how to prevent and respond effectively to bullying and harassment in your workplace and the workplace(s) of those you advise.

## 2. WORKPLACE HARASSMENT – AN OVERVIEW

### 2.1 Principles

In broad terms, workplace harassment is a term which refers to all forms of conduct within a workplace which humiliates, offends or intimidates. This includes bullying, sexual harassment and other behaviours.

From a practical perspective, the laws which prohibit workplace harassment rest on the following simple principles:

- that all workers are entitled to attend work without being subject to risks to their health, safety or welfare;
- that all workers are entitled to attend work without being subject to unwanted and unwelcome conduct towards them personally or within the work environment;

In other words, workers should be free to come to work and get on with their work without unnecessary or damaging interference.

### 2.2 The legal framework

There are four key areas of the law which apply to workplace harassment:

- the common law** – in particular breach of contractual duty (e.g. promise to ensure the health and safety of an employee);
- industrial legislation** – in particular the prohibitions against unfair dismissal (for eligible employees only) and unlawful termination;
- anti-discrimination legislation** – some forms of workplace harassment are specifically prohibited (e.g. sexual harassment) ; and
- occupational health and safety law** – the employers' obligation to ensure that each employee has a healthy and safe workplace.

In addition to these sources of relevant law, certain types of harassment which can arise both in the workplace and outside of it may also be prohibited under **criminal law**.



For the purposes of this paper, our focus will be on occupational health and safety law and anti-discrimination legislation.

### 3. BULLYING

#### 3.1 What is bullying?

The only statutory definition of bullying in Australian law is found in section 55A of the South Australian *Occupational Health, Safety and Welfare Act 1986*:

*“...bullying is behaviour –*

*“(a) that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimize, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and*

*“(b) that creates a risk to health or safety”.*

All other Australian jurisdictions rely on guidance notes or code of practice to define bullying and the various definitions used are as follows (source p.285 of the Productivity Commission Report referred to in more detail below):

|                          |   |
|--------------------------|---|
| <b>Commonwealth</b>      | Repeated unreasonable behaviour directed towards a person or group of persons at a workplace which creates a risk to health and safety (Guidance Note)  |
| <b>New South Wales</b>   | Repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety (Guidance Note)  |
| <b>Victoria</b>          | Repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety (Guidance Note)  |
| <b>Queensland</b>        | Repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person’s employer or a co-worker or group of co-workers of the person that: (a) is unwelcome and unsolicited; (b) the person considers to be offensive, intimidating, humiliating or threatening; (c) a reasonable person would consider to be offensive, humiliating, intimidating or threatening (Code of Practice) |
| <b>Western Australia</b> | Repeated unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety (Code of Practice)  |
| <b>Tasmania</b>          | Behaviour which goes beyond a one-off disagreement and increases in intensity and becomes harmful or offensive to   |



|                           |   |
|---------------------------|---|
|                           | someone (Guidance Note)   |
| <b>Northern Territory</b> | Repeated unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety (Guidance Note) |
| <b>ACT</b>                | Repeated unreasonable behaviour directed towards a person or group of persons at a workplace, which creates a risk to health and safety (Guidance Note)   |

The common theme among these definitions is that the behaviour is repeated and unreasonable and creates a risk to health and safety.

Further, unlike sexual harassment, there is no specific law which prohibits bullying – nevertheless it is prohibited under a range of laws indirectly.

The absence of a specific legal definition and even a specific legal prohibition means that employers and employees alike are often unclear about whether certain conduct amounts to bullying or not.

A “bully” is defined in the Concise Oxford Dictionary as “a person who uses strength or power to coerce others by fear”.

Workcover NSW defines bullying as “*repeated unreasonable behaviour towards a worker or group of workers that creates a risk to health and safety*”: Preventing and Responding to Bullying at Work, Edition 3, June 2009 (available online at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)).

This definition of bullying has a clear OHS focus. While it is entirely valid for the purposes of OHS, it is arguable that bullying may include conduct which does not necessarily pose a risk to health and safety but otherwise causes harm and/or a breach of a contractual term or relevant law.

### **3.2 Types of bullying**

Examples of what *may* constitute workplace bullying include:

- verbal abuse;
- put-downs and insults and spreading rumours;
- teasing;
- unreasonable or inappropriate criticism;
- threats and intimidation;



- private or public humiliation;
- exclusion - by other employees or from training and other work opportunities;
- unreasonable demands on work performance (e.g. unreasonable deadlines);
- too much work or too little work;
- giving an employee work that it is demeaning (having regard to their relative seniority and skills);
- giving an employee work that is beyond their skills and experience;
- changing work rosters deliberately to inconvenience or cause hardship to an employee;
- too much supervision;
- withholding support or information from employees which prevents them from performing adequately.

### **3.3 What is *not* bullying**

Bullying does *not* include:

- reasonable and lawful directions given by a business owner/manager to an employee;
- performance appraisal which is conducted on an objective basis;
- disciplinary procedure which are conducted in a fair and objective manner;
- disciplinary action which is taken following objective assessment and a fair procedure;
- a single incident – subject to the specific circumstances of the case.

The important matters to keep in mind are:

- employers are entitled to give lawful directions;
- employees are obliged to comply with lawful directions;
- whether or not conduct amounts to bullying will depend on the circumstances.



### 3.4 Who engages in bullying and harassment?

Potentially anyone working in or visiting a workplace can engage in bullying and other forms of harassment. This can include:

- business owners;
- directors;
- managers and supervisors;
- co-workers;
- clients and customers;
- suppliers;
- visitors to the workplace.

Bullying and other forms of workplace harassment may arise as a result of the conduct of a single individual or a group or as a consequence of the workplace culture and work environment.

To amount to work related bullying or harassment, the harassment will ordinarily need to arise within the workplace. However there may be circumstances in which conduct outside the workplace will amount to workplace harassment – particularly in circumstances where there is a direct link between the parties to the harassment and the workplace. For example, where but for the working relationship of the parties to the harassment there would be no contact between them.

### 3.5 Risk factors

In its joint publication with WorkSafe Victoria, *Preventing and Responding to Bullying at Work*, Edition 3, June 2009 (available online at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)), Workcover NSW identifies the following risk factors in relation to bullying in the workplace (at page 8):

- Organisational change** – in particular, significant technological change; restructuring/downsizing; change in work methods; outsourcing; change in supervisor/manager.
- Negative leadership styles** – in particular **autocratic leadership** (e.g. strict and directive style, where employees are not involved in decision making and flexibility is not valued) and **laissez-faire leadership** (e.g. inadequate/insufficient supervision).
- Lack of appropriate workplace systems** – such as the lack of resources, training and role definition, as well as uncertainty about job roles, poor rostering, unreasonable performance measures and time frames.



- **Poor workplace relationships** – such a high levels of criticism and negative interaction, negative relationships between supervisors and workers, interpersonal conflict, exclusion of some workers.
  
- **Workforce characteristics** – vulnerable workers, including young workers, new workers, apprentices, injured workers and workers on return to work plans, piece workers, workers in a minority (e.g. because of ethnicity, religion, disability, gender, sexual preference).

Workcover NSW has developed a *Bullying Risk Indicator* and *Employer Checklist* as aids to identifying and managing risk of bullying in the workplace. Further, they have recommended ways to control the bullying risk factors outlined above in section 3.4 of their publication *Preventing and Responding to Bullying at Work*, Edition 3, June 2009.

All of this material is available online at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)

The view that bullying is a **symptom of organisational issues** has also been expressed by Comcare in its 2007 publication *Bullying in the Workplace: A Guide to Prevention for Managers and Supervisors* (available online at [www.comcare.gov.au](http://www.comcare.gov.au)).

### Case Study

In this real life case a female middle manager in a small community organisation experienced significant difficulty in managing a new employee. The new employee was significantly older than the manager and refused to follow directions given by her. The new employee appeared to take the view that she should be ‘running her own show’.

The manager, who had limited managerial skills, sought the assistance of her manager who also appeared to have limited managerial skills and who simply put the issue back on to the middle manager. As a consequence, the middle manager insisted on the new employee complying with her directions. The result of this was that the new employee bypassed the middle manager and complained to the senior manager, alleging that the middle manager had been bullying her.

The senior manager took the new employee’s side and did not demonstrate any impartiality in responding to the concerns raised by the middle manager. The senior manager appeared to blame the middle manager for the situation which, objectively, had been caused by the new employee’s uncooperative and forceful attitude.

Despite the middle manager also lodging a complaint against the new employee, the employer chose to only investigate the complaint lodged by the new employee. A very flawed investigation was conducted by an external party and the middle manager was blamed for the issues which existed between her and the new employee. She was then subjected to daily meetings in which she had to listen to the ‘feelings’ of the new



employee and was prevented from responding or otherwise asserting her own position in the matter.

Over a matter of months the middle manager became the ‘problem’ within the organisation and she experienced damage to her health and welfare. The senior manager’s antagonism towards the middle manager influenced the view of the highest levels of management and soon the steps were taken to contrive a basis for terminating the middle manager’s employment.

Intervention by Devine Law at Work resulted in the employment of the middle manager coming to an end on terms which were acceptable to her.

This case is a clear example of how a lack of system and inadequate managerial practices can not only contribute to but also exacerbate the effects of bullying within a workplace. It is also a clear example of how bullies can co-opt others within a group or organisation into also engaging in bullying conduct. In this case, the employer aided and abetted the bully in causing significant distress to the middle manager.

## 4. SEXUAL HARASSMENT

### 4.1 What is sexual harassment?

Sexual harassment is the most form of work related harassment in Australia. Unlike bullying, it is specifically defined and prohibited under the terms of Federal and State anti-discrimination legislation.

Under section 28A of the *Sex Discrimination Act 1984* (SDA), sexual harassment is defined as follows:

*“...a person sexually harasses another person (the person harassed) if:*

*“(a) the person makes an unwelcome 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 the same provision, “conduct of a sexual nature” is defined as including “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”.



Sexual harassment is prohibited in employment by section 28B of the SDA. This provides that it is unlawful for a person to sexually harass:

- an employee of the person;
- or a person who is seeking to become an employee of the person;
- a fellow employee or a person seeking employment with the same employer;
- a commission agent or contract worker; or
- a person who is seeking to become a commission agent or contract worker of the person;
- a fellow commission worker or fellow contract worker;
- where the person is a partner in a partnership, a fellow partner or a person seeking to become a partner;
- another workplace participant.

“*Workplace*” means “*a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant*”: section 28B, SDA.

“*Workplace participant*” means any of the following: an employer or employee; a commission agent or contract worker; or, a partner in a partnership.

Sexual harassment may be ongoing conduct or a single incident.

## 4.2 Types of sexual harassment

There are two main types of sexual harassment which occur in the workplace. These are:

- harassment accompanied by an employment threat or benefit*, for example where a supervisor coerces an employee into submitting to their advances in order for some benefit to be given (e.g. a pay rise);
- where a hostile work environment is created*, this arises from relentless and continuing unwelcome sexual conduct that interferes with an employees work performance or that creates an intimidated, hostile, abusive or offensive work environment<sup>2</sup>.

The following conduct may constitute sexual harassment:

- offensive letters, faxes, telephone messages or email messages;
- displaying pornographic posters, cartoons or calendars;

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<sup>2</sup> *Hall v Sheiban Pty Ltd* (1989) 85 ALR 503, a decision of the Full Bench of the Federal Court of Australia was the first to establish the notion of a hostile work environment.



- sexual propositions or gestures;
- physical contact of a sexual nature;
- sexually related language or jokes;
- gender based insults;
- unwanted invitations;
- attempts at sexual intercourse or some other overt sexual connection;
- kissing, touching or pinching.

Other actions which may amount to sexual harassment include:

- intrusive questions at an employment interview;
- unwelcome remarks or insinuations about a person's sex life or personal life;
- suggestive comments about a person's appearance or body;
- sexually explicit conversations;
- proposals of marriage;
- declarations of love; and
- offensive telephone calls.

The **essential elements** of sexual harassment are:

- the behaviour must be unwelcome;
- it must be of a sexual nature; and
- the person harassed must feel offended, humiliated or intimidated and it is reasonable in the circumstances that they react this way.

Whether the behaviour is unwelcome is a subjective question and will depend on the response of the particular individual alleging sexual harassment. The harasser's motives are not relevant in determining whether their behaviour is unwelcome.



There will often need to be some indication by the person allegedly being harassed that the conduct of the harasser is unwelcome. However, a complaint of sexual harassment will not fail to be substantiated just because a person being harassed did not directly inform the harasser that their conduct was unwelcome.

Conduct of a 'sexual' nature has been found to include harassment which, while not overtly sexual is gender related. However, sexual harassment is not limited to interaction between people of different genders. If the harassment is sexual in nature then a person may complain about the conduct of a person of the same gender.

The **reasonableness** of the response of the person allegedly being harassed is determined objectively. It is irrelevant that the behaviour may not offend others or has been an accepted feature of the workplace.

Sexual interaction or flirtation which is based on mutual attraction or friendship is not sexual harassment because it is not unwelcome. If the behaviour is invited, consensual or reciprocated it is not unlawful.

#### **4.3 Sexual harassment legislation – more than 20 years on**

The *Sex Discrimination Act* was introduced in 1984. In 2003, the Human Rights and Equal Opportunity Commission (“HREOC”) reviewed all complaints of sexual harassment in employment which were finalised in 2002. That review led to the preparation of the report “*A Bad Business: Review of sexual harassment in employment complaints 2002*”<sup>3</sup> (“Bad Business Report”). The key findings<sup>4</sup> of this review included that:

- the majority of complaints were made by women about the alleged conduct of men;
- most complaints involved **multiple forms of harassing behaviours**;
- the majority of complaints involved harassment which had arisen within the first 12 months of the complainant’s employment;
- the majority of individual respondents were in a more senior position in the workplace than the complainant;
- harassment is an issue for all sizes of business;
- at the time the complaint was made to HREOC only 7% of complainants were still working for the organisation where the alleged harassment took place;

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<sup>3</sup> This report can be accessed online at [www.hreoc.gov.au](http://www.hreoc.gov.au)

<sup>4</sup> *ibid*



- financial compensation awarded ranged from \$500 to \$200,000 and was most often ordered against employers rather than the individual harasser;
- the most prevalent form of sexual harassment is verbal harassment, with physical intimacy the next most frequently complained of form of harassment, followed by general bullying behaviour, propositioning for sex and sexual physical behaviour;

In 2003 HREOC conducted further research as a consequence of the findings of the Bad Business Report, which resulted in the report “20 Years On: The Challenges Continue”. This research was in the form of a telephone survey conducted by the Gallup Organisation. The key findings<sup>5</sup> of the survey were:

- 28% of interviewees said that they had personally experienced sexual harassment at some time in an area of public life – 41% of woman and 14% of men;
- 18% of interviewees said that they had personally experienced sexual harassment in the workplace at some time – 28% of women and 7% of men;
- 14% of interviewees said that they had witnessed sexual harassment in the workplace in the last five years – 87% of these took some sort of action in response to what they witnessed;
- 94% of the sexual harassment experienced involved crude or offensive behaviour;
- 85% of the sexual harassment experienced involved unwanted sexual attention;
- 43% of the sexual harassment experienced involved sexist behaviours;
- 20% of the sexual harassment experienced involved sexual assault;
- 19% of the sexual harassment experienced involved sexual coercion;
- 62% of the sexual harassment experienced involved physical harassment;
- 15% of the interviewees who had experienced workplace sexual harassment in the last five years said that it was a one-off incident;
- 50% of the interviewees who had experienced workplace sexual harassment in the last five years said that it continued for up to six months;

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<sup>5</sup> This report can be accessed online at [www.hreoc.gov.au](http://www.hreoc.gov.au)



- 35% of interviewees who had experienced workplace sexual harassment said that the harasser was a boss, employer, supervisor or manager or other person in a more senior position;
- 48% of the interviewees who had experienced workplace sexual harassment said that the harasser was a co-worker;
- 16% of the interviewees who had experienced workplace sexual harassment said that the harasser was a client, customer or other person associated with the workplace;
- the age of the target of the harassment is predominantly under 45 years;
- the age of the harasser was predominantly over 30 years of age;
- 79% of harassers were male, 21% were female;
- sexual harassment is prevalent across all employer sizes and is widely spread across industries;
- 32% of the interviewees who had experienced workplace sexual harassment said that they had made a formal report or complaint about the sexual harassment – most reported it to their manager/supervisor or boss or employer;
- only 1% of interviewees who had experienced workplace sexual harassment said that they had made a complaint to HREOC or to a State/Territory anti-discrimination agency;
- of those who neither reported the sexual harassment to their employer to an anti-discrimination agency:
  - 32% said that they did not think the harassment was serious enough to warrant reporting;
  - 26% said that they took care of the problem themselves;
  - almost half expressed a lack of faith in the grievance process as one of the reasons for not reporting the sexual harassment.

While there is no doubt that the prevalence of sexual harassment has decreased since the introduction of the SDA, it still remains quite prevalent in the Australian workplace. HREOC's research suggests strongly that employees who are the subject of sexual harassment in the workplace have little faith in either the internal grievance procedure or the remedies available to them through the anti-discrimination agencies, Tribunals and Courts. What this means for employers is that while the risk of legal action may be



limited, particularly legal action brought under anti-discrimination legislation, the consequences of sexual harassment may still be in evidence but be more subtle in form. For example, in the areas of turnover, absenteeism, presenteeism and workers compensation claims.

## 5. THE HIGH PRICE OF BULLYING AND HARASSMENT

A very high price can be paid by both the individual the subject of bullying and other forms of harassment and the organisation s/he works in as a consequence of the bullying and harassment.

In its 2007 publication *Bullying in the Workplace: A Guide to Prevention for Managers and Supervisors* (available online at [www.comcare.gov.au](http://www.comcare.gov.au)) Comcare noted at page 10 that the price for the individual can include the following:

- distress, anxiety, panic attacks and sleep disturbance;
- impaired concentration or ability to make decisions;
- loss of self-esteem and confidence, a sense of isolation or withdrawal from the workplace;
- physical illness, including digestive problems, skin conditions, headaches and musculoskeletal disorders;
- injury or increased risk of injury, particularly psychological injury;
- reduced work performance;
- incapacity for work leading to workers compensation claims;
- loss of employment;
- deteriorating relationships and reduction in quality of life;
- depression and risk of suicide.

In its recent draft report *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety*, released in January 2010, the Productivity Commission (and available online at [www.pc.gov.au](http://www.pc.gov.au)):

- noted research that 350,000 people in Australia experience long term bullying, while **2.5 million Australians experience some aspect of bullying during their working lives** (p.279);



- noted research that estimated **the total cost to the economy of workplace stress, including bullying and harassment, was about \$14.82 billion a year** – a cost which does not include hidden costs such as restaffing and reskilling (p.279);
- identified the following **costs to employers resulting from workplace bullying**:
  - staff turnover;
  - litigation;
  - long-term absences;
  - potential workers compensation claims;
  - early retirement costs;
  - counselling costs;
  - investigation costs (p.280)

and noted that:

*“Along with the direct and indirect costs associated with bullying, there are also behavioural costs which include declining morale, motivation and productivity of workers affected by bullying which can lead to either absenteeism, presenteeism or higher staff turnover. The reputation of the organisation responsible for allowing bullying to take place will also suffer as the result of any publicity associated with court action. Apart from the costs borne by employers, there are also the costs experienced by victims of bullying which can include: isolation and withdrawal; fear of dismissal or loss of job promotion opportunities; stress and anxiety; low self esteem; reduced productivity; and, a number of physical and mental health symptoms” (p,280)*

- psychosocial hazards such as bullying and harassment in the workplace are not given the same attention in OHS legislation and by inspectors as managing physical hazards such as hazardous substances, manual handling and working at heights, adding to uncertainty on the part of businesses about their obligations and what steps they need to take to address the risks of bullying and harassment (p.277);
- workplace stress claims, including bullying and harassment, tend to be more costly than other claims for less serious physical injuries (p. 277);
- while employers in all Australian jurisdictions for OHS legislation have a general duty of care to ensure the health, safety and welfare of employees, only Queensland and Western Australia have developed specific codes of practice on detection and



management of bullying, providing employers in those states with greater certainty, while the other jurisdictions have only developed guidance material (p.277);

- Queensland has inspectors who specialize in addressing psychosocial hazards (p.277):
- South Australia is the only jurisdiction to include clauses specifically referring to inappropriate behaviours (p.277);
- Queensland, Western Australia and South Australia have all experienced significant declines in claims relating to bullying and harassment in the past five years, with significant costs savings for employers (p.277).

### CASE STUDY

This real life case involved a mature professional woman who had worked for her employer for around 10 years in a central business role. She was popular among contacts in the industry and this caused tension with the head of the organisation to whom she directly reported, a person who was also high profile in the industry. The supervisor bullied the employee over many years, in particular through exclusion and public criticism. The employee responded to this conduct by working harder and harder in order to, hopefully, one day win her supervisor over. The matter came to a head after the supervisor, without explanation and without discussion with the employee, suddenly withdrew an opportunity for the employee to participate in a high profile event which she had spent many years organising. The employee became aware of the supervisor's decision through a third party who, having informed her of the decision, immediately indicated that he would deny the conversation.

As a consequence of the supervisor's conduct the employee had a mental breakdown and remains incapable of working 12 months later. Having made a workers compensation claim, the employer's insurer conducted a thorough investigation and accepted liability for the claim.

After six months on workers compensation the employee's income reduced down to a level with which she struggles to meet bills, causing her further stress. The employer has refused to engage in discussions with the employee in an effort to resolve the issues between the parties.

This case study is an example of how sustained bullying conduct can cause significant psychological damage to an employee and how the costs to both the employee and employer can be enormous. It is also a regrettable example of how, despite all the evidence to the contrary, a workplace can deny the existence of a bullying culture and can continue to deny recognition of the dignity of the individual employee, thereby causing further harm to the employee and increasing the risk of time consuming and costly



litigation.

## 6. KEY DECISIONS

### 6.1 Overview

There are a broad range of potential legal actions which can arise from bullying and other forms of workplace harassment. These include but are not limited to:

- prosecutions under OHS legislation;
- breach of contract claims;
- claims brought under anti-discrimination legislation.

For the purposes of these paper, I have outlined below some key decisions in recent years which highlight the issues associated with and high price that can be paid when an employer does not effectively address issues of bullying and other forms of workplace harassment.

### 6.2 **Inspector Gregory Maddaford v Graham Gerard Coleman & Anor (2004) NSWIR Commission 317**

To date there has only been one successful prosecution under NSW OHS legislation arising from an incident of workplace harassment.

This matter involved an “initiation” of a 16 year old employee at a timber joinery and shop fitting business. This incident took place over a thirty minute period and involved the following:

- the employee was called to the upstairs area of the factory, ostensibly to move cabinets;
- he was then grabbed by five of his fellow workers and then wrapped in cling wrap, picked up and placed face up on a wheeled work trolley and secured to the trolley using more cling wrap;
- his shoes and bumbag were removed and filled with saw dust;
- when the employee asked to be freed from the cling wrap and trolley, one of the offenders placed a Stanley knife at the end of the table and said words to the effect: “*if you can reach it, you can cut yourself free*”;



- the trolley was then pushed from side to side and spun around and saw dust was thrown over the employee, down his pants and his shirt;
- wood glue was then squirted into his shoes, over his body and in his mouth;
- a handful of saw dust was then pushed into the employees mouth and a fire hose was also squirted into his mouth;
- the employee, an asthmatic, choked, coughed and experienced difficulty breathing;
- the employee was only released when a contractor intervened and cut the employee free, despite being told by the offending workers not to do so.

The incident took place one hour before the Company's Christmas Party, a function which the employee attended. The Managing Director was informed on the same day that an initiation had taken place, however the timing of that report could not be determined. The Factory Foreman had been told a day or two before the incident that an initiation ceremony was going to take place on a new employee, however no action was taken to ensure that the initiation did not take place.

The employee attended the Christmas party and then took annual leave during the annual shutdown. He returned to work in mid January for a few days and then ceased attending work. His employer wrote to him a few days later and notified him that they considered that he had abandoned his employment.

The incident was not investigated by the Company until February and until Workcover had attended the workplace. No disciplinary action was taken against the five employees who had subjected the employee to the assault.

At the time of the incident the Company did not have a policy or procedure concerning workplace harassment.

Workcover prosecuted two directors of the Company and the five employees who were responsible for the assault on the employee.

The matter was heard by the Chief Industrial Magistrate ("CIM") who found that both the Company and the two directors had breached the OHS Act. A penalty of \$24,000 was imposed on the Company and a penalty of \$1000 was imposed on each of the two directors.

The CIM's decision was appealed by both Workcover and the two directors of the Company to the Full Bench of the Industrial Court of NSW. The Full Bench subsequently heard the appeal and determined that the penalty imposed on each the directors was manifestly inadequate, increasing the penalty to \$9000 for one of the



directors and to \$12,000 to the other director (who had received advance warning of the planned “initiation” and took no action to prevent it from taking place).

For the purposes of this paper, the greatest significance of this decision lies with the observations of the Full Bench concerning: how it perceives the issue of workplace violence in relation to health and safety at work; and, the key principles it applied in determining the appropriate penalty for any breach.

At paragraph 30 of its decision, the Full Bench made a clear statement about its view of the place of workplace violence in relation to occupational health and safety:

*“...issues of violence and bullying in the workplace require sober and serious consideration. It is imperative in our view that the jurisprudence of this Court is unambiguous in its condemnation of such conduct...It must be made abundantly clear that safeguarding health and safety in the workplace extends to protecting employees from bullying and violence from other employees”.*

In determining whether the penalty imposed by the CIM was adequate, the Full Bench had regard to the objective seriousness of the offence and the need for deterrence. In respect of the latter, the Full Bench observed that this included the importance of compelling attention to occupational health and safety issues. At paragraph 81 of its decision, the Full Bench said:

*“In our view, given that workplace bullying is usually a clandestine activity, there is a significant potential for employers to either deny its existence or ignore its occurrence. In those circumstances, there is a need for this Court to impose sentences which compel attention to occupational health and safety. Accordingly, issues of general deterrence are significant in determination of penalty in the present matter”.*

Further, the Full Bench emphasised that deterrence should be a matter of significant weight in the sentencing process where the relevant offence is difficult to detect. At paragraph 83 of its decision, the Full Bench said:

*“We have little doubt that bullying is, unfortunately, prevalent in many workplaces. The nature of bullying is such that it is usually covert and not disclosed by either the offender or the victim. It is not surprising, therefore, that breaches of the Act relating to bullying and violence in the workplace would fall within the category of breaches that are difficult to detect and are rarely reported. Having regard to the comments of the Full Bench in Capral Aluminium and having regard also to the seriousness of the respondent’s breach, we find issues of deterrence must loom large in our consideration as to penalty”.*

In addition to general deterrence, the Full Bench also placed great weight on the issue of specific deterrence adopting quite a different position to the CIM. The Full Bench noted



that employers: “*must adopt an approach to safety that is proactive, not reactive*” (at paragraph 86). The Full Bench noted that but for the prosecution there was nothing to indicate that the Company or its directors would have been proactive in an endeavour to detect or eliminate risks to health and safety at the workplace relating to bullying and violence (at paragraph 86).

The Full Bench also held that:

- the **degree of foreseeability of a risk** is a significant factor to be taken into account when assessing the level of culpability of the defendant (refer paragraph 87);
- it will be a **serious offence where there is obvious or foreseeable risk** to safety against which appropriate measures were not taken, even though such measures were available and feasible (refer paragraph 88);
- conduct which has a foreseen consequence involves a higher level of criminality or culpability (refer paragraph 90).

The Full Bench held that in this case the risk was not only foreseeable, it was foreseen and that:

*“(i)t is well settled that the existence of a foreseeable risk of injury will necessarily result in the offence being more serious in nature... The fact that the risk to safety as particularized in a given prosecution has actually been foreseen by a defendant will...have the effect of further aggravating the nature and seriousness of an offence under the Act. This observation must, of course, be tempered by a recognition of all the circumstances of the particular case”* (at paragraph 89).

As the only Full Bench decision in relation to a prosecution for workplace harassment under NSW OHS legislation, this decision provides significant guidance to employers and employees and their advisers regarding how workplace harassment is viewed by the Industrial Court of NSW. It must be acknowledged that this matter involved a particularly violent and sustained physical assault and it is yet to be seen whether or not Workcover would choose to bring a prosecution for a form of workplace harassment that did not have such a physical form and, if it did, what view the CIM or the Industrial Court of NSW would take. Nevertheless, the decision should leave employers in no doubt that workplace violence and bullying is seen by the Industrial Court as fitting squarely within the category of breach of their obligations under NSW OHS legislation.

The decision left employers in no doubt that the Industrial Court of NSW sees that workplace violence and bullying (in particular that which can lead to serious injury):



- is a risk which is reasonably foreseeable and as such makes any breach a more serious offence;
- is a risk that can be eliminated or controlled by “simple and feasible measures” and that the failure to implement these measures will make any breach a more serious offence;
- is a matter which requires the Industrial Court of NSW to consider both general and specific deterrence when determining sentence.

## **6.2 WorkSafe Victoria v Map Foundation Pty Limited t/as Café Vamp & Ors (Magistrates Court of Victoria, 8 February 2010)**

At the time of writing, this decision had not been published. The information which appears below is sourced from the WorkSafe Victoria website and media reports.

On 8 February 2010 Magistrate Lauritsen of the Magistrates Court of Victoria handed down a particularly significant decision concerning breach of OHS legislation as a consequence of bullying. This matter involved a case in which a 19 year old female employee of Café Vamp, Ms Brodie Panlock had committed suicide as a consequence of relentless bullying by workmates which was knowingly permitted by her employer.

The key facts were that:

- Ms Panlock commenced employment as a waitress at Café Vamp in Hawthorn, Melbourne in early 2005;
- she was subsequently was subjected to persistent physical and emotional bullying by three workmates at Café Vamp – Nicholas Smallwood (the Manager of the Café), Rhys McAlpine and Gabriel Toomey;
- the bullying took place six days a week for more than a year;
- the bullying included:
  - being held down by workmates;
  - having fish oil poured into her bag;
  - being drenched in chocolate sauce;
  - being told repeatedly that she was worthless;
  - being teased in 2006 about a failed suicide attempt;



- having rat poison left in her pay envelope;
- being spat upon and called names, such as “*fat*” and “*ugly*”;
- Ms Panlock committed suicide in September 2006;
- in 2008 there was a coronial inquest into the death of Ms Panlock;
- evidence about the bullying of Ms Panlock at her workplace was given at the coronial inquest by another workmate;
- at the conclusion of the coronial inquest the Coroner, Mr Peter White:
  - found that Ms Panlock was “*emotionally vulnerable*” after joining the Café because of low self-esteem, age and inexperience;
  - noted that Ms Panlock had become “*infatuated*” with Nicholas Smallwood and they had had an intermittent intimate relationship for 15 months until her death;
  - found that Ms Panlock had been treated in an “*extremely aggressive and intimidating*” manner;
  - found that Mr Smallwood and Mr McAlpine had been “*relentless in their efforts to demean her*”;
  - concluded that on the night Ms Panlock committed suicide she had felt what she considered to be an “*unbearable level of humiliation*” as a consequence of an “*almost daily routine of inappropriate pressure at work*”;
- the prosecution by Worksafe Victoria was brought against the corporate entity (Map Foundation Pty Ltd), the director of Map Foundation Pty Ltd and three individual employees;
- each of the defendants pleaded guilty to the charges brought against them;
- Magistrate Lauritsen accepted the pleas of guilty and concluded that the pleas indicated remorse on the part of the defendants;
- Map Foundation Pty Ltd was convicted on two charges of failing to provide and maintain a safe working environment and was fined \$110,000 on each charge;
- Marc Da Cruz, the director of Map Foundation Pty Ltd was convicted of two charges and fined \$15,000 for each fine;



- Nicholas Smallwood, an employee of Map Foundation Pty Ltd was convicted on a charge of failing to take reasonable care for the health and safety of persons and fined \$45,000;
- Rhys McAlpine, an employee of Map Foundation Pty Ltd was convicted on a charge of failing to take reasonable care for the health and safety of persons and fined \$30,000;
- Gabriel Toomey, an employee of Map Foundation Pty Ltd was convicted on a charge of failing to take reasonable care for the health and safety of persons and fined \$10,000.

On 9 February 2010 Worksafe Victoria reported that:

*“Magistrate Lauritsen said the working environment at Hawthorn’s Café Vamp was poisonous and the persistent bullying of Ms Panlock was in the worst category, yet nothing was done to stop it”.*

This is essentially a ‘textbook’ example of many of the common features of bullying cases, including: bullying conduct by one person which spread to others; bullying conduct by a person of influence over the person the subject of the bullying; a person who was vulnerable within the working environment; and, an employer who failed to act. While many would question why Ms Panlock would remain in an environment which caused her so much harm, ultimately leading to her death, the very vulnerability which led to her being targeted by her workmates may have been the same reason why she did not have the skills to remove herself from the situation, a reality which was exacerbated by the effects of the conduct towards her. Ultimately, the employer, the manager and the other employees all had quite clear obligations under OHS legislation to ensure the health, safety and welfare of Ms Panlock and they quite clearly breached those obligations in the most serious manner imaginable.

### **6.3 Nikolas v Goldman Sachs J B Were Services Pty Ltd [2006] FCA 784**

This decision was handed down by Justice Wilcox, then of the Federal Court of Australia in mid-2006. This was a complex case in which a number of claims were made by the applicant. These included: an unlawful termination claim (on two different grounds); two breach of contract claims; and a breach of trade practices legislation claim. Of these five distinct claims, only one was successful. The successful claim related to a breach of contract.

In brief, when Mr Nikolich accepted an offer of employment he was provided with a large document entitled “Working With Us” (“WWU”). This included a statement that the employer would *“take every practicable step to provide and maintain a safe and healthy work environment”*. Mr Nikolich lodged a grievance concerning the conduct



of his supervisor, claiming that he had been the subject of unfair treatment (including bullying). The HR manager who received the complaint took immediate steps to discuss the complaint with Mr Nikolich but did not then take steps to investigate the matters the subject of the complaint. Two months after the complaint was lodged the HR Manager met with Mr Nikolich, a meeting which was primarily a counselling session about the stress he was experiencing rather than a discussion about the matters the subject of the complaint. The investigation was not completed until 4 months after the grievance was lodged. Mr Nikolich did not receive written notification of the outcome of the investigation until another month after that.

Upon receiving the notification, Mr Nikolich asked that the matter be referred to more senior personnel than the HR manager. In turn, these more senior personnel did very little. In the meantime, Mr Nikolich was diagnosed with suffering from a major depressive disorder, which worsened over the following 11 months, during which time he took extended periods of leave. Ultimately his employment was terminated by the employer on the ground that he either did not intend to return to work or was not able to do so.

Justice Wilcox described the employer's handling of the complaint as "extremely inept". His Honour observed that: "*Instead of responding to a plea for justice, (the HR Manager and another senior manager), no doubt with good intentions, treated him as the problem. This response was inappropriate*". He noted that the HR Manager "*missed the main point of the complaint*".

The ultimately successful claim of breach of contract turned on the question of whether or not the WWU document bound not only Mr Nikolich but also his employer. It was submitted by the employer that the WWU was simply a manifestation of the employer's right to issue reasonable and lawful directions. In considering this question, Wilcox J had regard to the decision of the Full Federal Court in *Riverwood International Australia Pty Ltd v McCormick* (2000) 179 ALR 193, in which it was recognised that it was an implied term in an employer's policy that the employer would act with due regard for the purposes of the contract of employment and "*so it could not act capriciously and arguably could not act unfairly towards (the employee)*". Wilcox J found that the express promises made in the WWU should be regarded as express terms in the employment contract between it and Mr Nikolich and that, as a consequence, the employer incurred contractually binding obligations **in relation to the subject matter** with which the WWU dealt. Wilcox J found that the employer behaved in a way which was inconsistent with the promise it had made to take every practicable step to provide and maintain a safe and healthy work environment. He found that the employer's conduct in response to the complaint exacerbated the stress that Mr Nikolich was already suffering as a consequence of his supervisor's conduct towards him.

In assessing damages, Wilcox J found that the medical evidence suggested that the psychological problems Mr Nikolich experienced stemmed more from the way in which he was treated than from the decision of his supervisor that he originally complained about. While His Honour acknowledged that ordinarily damages are not awarded for



disappointment or distress, he noted that there could be exceptions to the rule, referring to a case in which damages were awarded to a cruise passenger because the very nature of the contract was to provide enjoyment and relaxation. His Honour said it was arguable that Mr Nikolich's case came within the principle acknowledged in that case, because the very object of the WWU provisions concerning OHS, was "*peace of mind*", however he did not reach a final view on that matter. Instead, he found that Mr Nikolich was entitled to recover damages for psychiatric illness arising from a breach of contract. In response to the employer's submission that damages for psychiatric illness are not recoverable because they are too remote, His Honour noted that the High Court had found that there must be a **serious possibility of damage** occurring for damages to be awarded and that it is sufficient, for damages to be awarded, if the parties contemplate the kind or type of loss or damage suffered. Having regard to the particular content of the WWU, His Honour said that:

*"It must be taken to have been within the contemplation of the parties that, if the obligations were not fulfilled, the particular employee to whom the obligations were owed might become upset, stressed and disturbed. It is notorious that stress and disturbance of mind may lead to a psychological disability"*.

He proceeded to award damages of \$515,869, consisting of past economic loss (equivalent to 2 years earnings), future economic loss (equivalent to 6 months at 100% and 6 months at 50%, representing part time work), future economic loss (only payable if an award was not filed), interest and costs.

With the exception of his findings in relation to costs, all of the findings of Wilcox J in this matter were upheld on appeal to the Full Court of Appeal of the Federal Court: *Goldman Sachs JB Were v Nikolich* [2007] FCAFC 10 (7 August 2007).

#### **6.4 Poniatowska v Hickinbotham [2009] FCA 680**

Compared to the compensation and penalties which can be ordered in other employment law related jurisdictions, in particular occupational health and safety and breach of contract, discrimination law has often been seen as the least costly jurisdiction by employers. However in recent years there has been a growing trend towards more substantial decisions. The recent decision of the Federal Court in *Poniatowska v Hickinbotham* [2009] FCA 680 confirms that trend; with damages of \$466,000 awarded to an applicant who made a claim of sex discrimination and sexual harassment.

This case is essentially a text book example of what *not* to do when either responding to a harassment complaint or considering termination of a 'troublesome' employee, this decision is a sobering wake up call for all employers who are either reluctant to act or unsure of what to do in response to harassment complaints.

Ms Poniatowska was employed by Employment Services Australia (ESA), as a building consultant selling house and land packages on behalf of Hickinbotham Homes, between 3



January 2005 and February 2006.

Ms Poniatowska's employment was terminated in February 2006 following three warnings due to "unsatisfactory performance" - the first warning was issued in November 2005 and the second and third warnings were issued in December 2005.

Following the termination of her employment Ms Poniatowska commenced unfair dismissal proceedings, later withdrawing that action in May 2006 following an unsuccessful conciliation conference, ostensibly because she had gained new employment. She later resigned from that job due to health problems.

In August 2006 Ms Poniatowska lodged a complaint with the Human Rights and Equal Opportunity Commission (HREOC), alleging sexual harassment, racial discrimination and sex discrimination. The bases of the complaint were a series of incidents which occurred in the first six months of Ms Poniatowska's employment by ESA:

- Ms Poniatowska alleged that in April 2005 Mr A Hickinbotham commented to her in the workplace and in the presence of others, that she had "*two good assets*" while staring at her breasts (the **April 2005 allegation**). Ms Poniatowska did not lodge a complaint concerning this allegation during the period of her employment.
- Ms Poniatowska alleged that in May 2005 Mr Mark Flynn, a sales consultant, sent her three unsolicited emails and a number of SMS text messages inviting her to have a sexual relationship with him (the **May 2005 allegation**). She reported this to her supervisor, Ms Sharrad, who allegedly responded by saying "*what do you expect with a face like yours?*". No action was taken in response to the complaint.
- Ms Poniatowska alleged that in June 2005 she was rostered to work with Mr Remo Lotito, despite her request to not work with him, and her supervisor (Ms Sharrad) said to her, in the presence of others, that: "*I told Remo not to f\*\*\* my consultants*" (the **June 2005 allegation**). Ms Poniatowska claimed that her subsequent complaint was inadequately investigated. It was not addressed until early August 2009, after further allegations had come to light (see below). Ms Sharrad did not dispute the allegation, saying that she had said "*I have already told him (Mr Lotito) not to go f\*\*\*ing my women*" as a "joke". Ms Sharrad later apologised to Ms Poniatowska for the conduct.
- Ms Poniatowska alleged that in June 2005 Mr Lotito sent her a coarse MMS picture message on her mobile telephone which showed a woman performing oral sex on a man and a text message "*U have 2 b better*" and in June and July 2005 Mr Lotito pestered her on a number of occasions by telephone to have sex with her (the **Lotito allegations**). Ms Poniatowska did not formally complain to her employer about this conduct, but mentioned it to a colleague who reported it to Ms Sharrad. It soon became well known around the workplace that Mr



- Lotito had sent the MMS image to Ms Poniatowska, causing her embarrassment.
- Ms Sharrad reported the Lotito allegations to Mr Hickinbotham who then took steps to arrange a meeting with Mr Lotito and Ms Poniatowska. While the initial steps taken in response to the matter were prompt, the investigation then stalled. When Ms Poniatowska enquired of Ms Sharrad about the status of the investigation, Ms Sharrad said it was continuing and expressed concern for Mr Lotito and the impact of the allegations on his marriage.
  - On 26 August 2005 Ms Sharrad arranged a meeting between herself, Mr Lotito and Ms Poniatowska. The purpose of the meeting was to ask Ms Poniatowska questions, which had been prepared by Mr M Hickinbotham, to elicit confirmation that the Lotito allegations had not affected Ms Poniatowska's performance, sales or her personally. Ms Sharrad was to abandon the meeting if the answers were not favourable. Once acceptable answers were provided by Ms Poniatowska, Mr Lotito was asked to apologise and he did so. He was then treated "warmly and sympathetically" by Ms Sharrad, however Ms Poniatowska was not.
  - Ms Poniatowska alleged that in August 2005 Ms Sharrad asked her to enter into a sexual relationship with a man from another building company so that the Hickinbotham Group could secure a land deal with that Company (the **August 2005 allegation**).
  - Ms Poniatowska alleged that in September 2005 Mr M Hickinbotham kissed her "strongly on the mouth" on the dance floor at a function being conducted by her employer (the **September 2005 allegation**).
  - Ms Poniatowska also alleged that, as a result of the alleged harassment and discrimination and how ESA responded to it; she was isolated, received suggestive looks and was excluded from conversations.

As a result of reason of the embarrassment Ms Poniatowska experienced in the workplace and the agitation caused to her by the warnings she received, Ms Poniatowska suffered symptoms of depression, insomnia, dizziness, difficulty in concentration, shortness of breath and palpitations, anxiety and some loss of motivation.

Ms Poniatowska claimed that her work performance deteriorated due to the way in which she was treated in response to her complaints and the change of attitude from other employees. Further, she alleged that her employment was terminated in February 2006 as a consequence of the alleged conduct and that the warnings she received in the months preceding the dismissal arose either as a result of fabricating or taking advantage of deficiencies in her work performance.



Coarse language, sometimes with sexual connotations, was “normal office banter” in the workplace.

Ms Poniatowska was diagnosed with anxiety and depression with an adjustment disorder in 2006 by her own treating psychiatrist. A doctor appointed by the Hickinbotham Group to assess Ms Poniatowska diagnosed a major depressive disorder, but expressed concerns about her reliability as a historian. He noted that if the allegations she had made were correct, then the disorder could flow from her employment.

ESA did not have any policy as to how to make or respond to a complaint of sexual harassment and discrimination.

The allegations made by Ms Poniatowska were vigorously disputed by each of the respondents - the action brought before the Federal Court by Ms Poniatowska was brought against seven respondents (Mr Alan Hickinbotham, Mr Michael Hickinbotham, Mr Flynn, Ms Sharrad, Mr Lotito, Hickinbotham Homes and ESA).

## **Findings**

His Honour. Mansfield J, found that:

- the May 2005 and Lotito allegations amounted to sexual harassment, however the June 2005 allegation did not;
- the investigation into the June 2005 allegation (involving Ms Sharrad) was unsatisfactory and may explain why Ms Poniatowska was reluctant to lodge a complaint about the Lotito allegations;
- the events the subject of the April 2005, August 2005 and September 2005 allegations either did not occur or did not occur in the form or manner alleged by Ms Poniatowska; the warnings issued to Ms Poniatowska and the termination of her employment were not due to poor performance - His Honour observed that the lack of systems (including policies and review of performance) made it hard for ESA to support its alleged concerns over Ms Poniatowska’s performance; and, that there was a causal connection between the complaints of sexual harassment made by Ms Poniatowska and the eventual termination of her employment;
- since early 2006 Ms Poniatowska had suffered from an adjustment disorder with mixed anxiety and depression as a result of the unlawful discrimination of ESA;
- Ms Poniatowska had been unable to work for most of the period from September 2006 to the date of the decision and was likely to recover over a period of six months to two years.



- His Honour noted that the complaints regarding the May 2005 allegation, the June 2005 allegation and the Lotito allegations did not involve any documented investigation or any documented reprimand. This approach contrasted with the disciplinary action taken against Ms Poniatowska in relation to alleged poor performance.
  
- In relation to the Lotito allegations, His Honour also noted that: no real steps were made by the employer to keep the matter confidential; no formal record of the complaint was made; no support was offered to Ms Poniatowska; no notice was given to staff about the inappropriateness of the conduct, either in relation to Mr Lotito's specific conduct or in relation to workplace harassment; no warning was given to Mr Lotito; no formal record of the matter was kept; and Mr M Hickinbotham accepted Mr Lotito's version of events (that he had sent the MMS image inadvertently) without actually investigating and testing that account. Mansfield J observed at [164]:

*“The way the Lotito allegations were dealt with, and including the way Mr Lotito himself was dealt with as a result of his conduct, contrasts with the way Ms P was dealt with in the events leading up to her suspension and termination. The contrast is dramatic. Moreover, I consider that the way Mr Lotito's conduct was addressed once it came to the attention of Mr M Hickinbotham and the way Ms Poniatowska was treated in that process indicates an attitude to her on the part of the Hickinbotham Group which has some relevance to my later findings about the reasons for her termination. She was clearly the victim of Mr Lotito's inappropriate conduct, but **the way she was treated suggests that she was not regarded as the victim but as a problem presenter to be managed**” (emphasis added).*

His Honour noted that Mr Hickinbotham's loyalty to his staff led him to not pay as much attention to Ms Poniatowska's complaints as was warranted. In his decision, Mansfield J repeatedly mentioned the combination of a “robust work environment” and lack of systems as factors which influenced the inadequate response of Ms Poniatowska's employer to her complaints. At the conclusion of his decision, His Honour said at [361]:

*“To an extent, the conduct which I have found to have contravened the Sex Discrimination Act, and consequently to have been unlawful discrimination contrary to the HREOC Act, was partly as a **result of the inadequacy of systems for managing complaints of sexual harassment in the workplace on the part of ESA, and perhaps an inappropriately robust work environment**”.*

His Honour noted that it appeared that Mr Hickinbotham did not appreciate the dangers associated with a “robust work environment”.



Mansfield J decided that it was not necessary to either determine whether or not there was an implied duty of trust and confidence in the employment contract or, if it was implied, if it had been breached.

## **Outcome**

The Court found that: the May 2005 and the Lotito allegations both amounted to sexual harassment; ESA's conduct leading to termination of employment of Ms Poniatowska amounted to sex discrimination; and, the June 2005 allegations did not amount to sexual harassment.

As a consequence of these findings, the Court awarded Ms Poniatowska **\$466,000** in compensation, including \$30,000 in interest: \$90,000 for pain and suffering; \$200,000 for past economic loss; \$140,000 for future economic loss; and \$3000 for future medical expenses). The orders were made against ESA.

The Court also awarded costs in favour of Ms Poniatowska.

ESA subsequently lodged an appeal against the decision. At the time of writing a decision has not been handed down in relation to the appeal.

## **7. PREVENTING AND RESPONDING TO BULLYING AND OTHER FORMS OF WORKPLACE HARASSMENT**

### **7.1 Overview**

There is no business or other organisation which can afford the financial and other costs associated with workplace conflict. To be blunt, employers who choose conflict over resolution, including the choice to deny or suppress it, actively choose to have a less effective workplace and to be less profitable.

The workplace, as with most things in life, is a work in progress. There is nothing that we, as advisers or managers, can do to make a workplace perfect. However, we can play an instrumental role in ensuring that the workplace we work in or advise about improves on an ongoing basis.

We can do a great deal to ensure that the risks associated with workplace conflict generally and both bullying and sexual harassment specifically, are minimised. Below I have outlined some of the barriers to effective management of workplace conflict, an important starting point for consideration of this issue, as well as the essential ingredients that I believe any workplace which is serious about minimising the risks and maximizing the opportunities associated with workplace conflict should have.



## **7.2 Barriers to eliminating/controlling the risk of bullying and other forms of workplace harassment**

In my view, the barriers to effective management of workplace conflict first needs to be recognized in order for useful strategies to be developed. There are many of these barriers, just some include:

- differing values and beliefs throughout and within each part of the business/organisation – “it’s just a prank”;
- a lack of clarity within the organisation about its approach to workplace harassment;
- the workplace culture – for example, one that is endemically aggressive and one that promotes a “don’t dob” culture;
- a lack of awareness that workplace harassment is and can be a problem;
- low prioritisation of so called “soft” problems;
- the absence of deterrence provided by successful prosecutions – if it is not a priority for the regulator why should it be a priority for employers?;
- a lack of awareness of why workplace conflict can be bad for business;
- a “bandaid” approach to the problem, in particular a view that the imposition of policies and procedures that ban the behaviour will be sufficient;
- a lack of systems;
- a lack of awareness of what workplace conflict is and what can be done to both minimise and respond to it.

## **7.3 The Essentials**

Each workplace needs to develop its own strategies for eliminating or controlling the risk of workplace harassment in accordance with the particular circumstances of the workplace, in particular the triggers of workplace harassment and the barriers to its elimination and control.



In my view these strategies should include, at a minimum, the following:

- a starting point (principle) that workplace harassment is not tolerated within the workplace – if this cannot be established (in substance as well as form) then other strategies will be undermined;
- a clear commitment by all leaders and all levels of management to the elimination/control of workplace harassment – if they do not know why it is important and do not embrace it, then all other strategies will be undermined;
- data from all levels of management and employees concerning the perception of the risk or existence of workplace harassment, the amount of turnover, the extent of absenteeism and the number of workers compensation claims;
- an assessment of the financial cost, actual and potential, to the business of workplace harassment;
- an audit conducted by a person independent of the business who is expert in assessing the risks of and existence of workplace harassment and its triggers;
- informed and regular risk assessment;
- ongoing consultation with all levels of management and employees;
- the education of *all* levels of management and all employees on the topic of workplace harassment – in the form which is meaningful to those people (not a one size fits all approach);
- managers who have an eagle eye for and are well trained in the early warning signs of bullying, sexual harassment and other forms of workplace harassment;
- a clear and relevant policy and procedure addressing the identification and management of bullying and sexual harassment in the workplace;
- an integrated workplace system which minimizes the risk of conflict and maximises the opportunity to find out if there are any problems – this includes not only policies and procedures but also a close review of how people are managed/supervised, what is expected of employees and whether this is clearly communicated to them, the system of rewards (e.g. is internal competitiveness valued more highly than collaboration?), the work environment and monitoring of morale and absenteeism;
- a system of recording and reviewing all incidents;



- the development of a workplace culture which is open to the receiving of complaints – I always tell my clients that complaints are a great opportunity to get information;
- recruitment of managers and other employees with high level skills in communication and conflict resolution and the development of the same skills in managers already employed by the business/organisation;
- the express inclusion in every contract of every employee of a requirement that the employee eliminate/control the risk of workplace harassment – with particular emphasis in the contract of the CEO and all managers and supervisors;
- making the requirement to report any knowledge of workplace harassment or threatened workplace harassment a condition of employment, with the failure to comply posing the risk of disciplinary action;
- regular and relevant training for all staff concerning how to identify bullying and sexual harassment, why it is not tolerated and what to do in response to it;
- regular and effective review of the risk management system developed by the employer in relation to all forms of workplace harassment, including bullying and sexual harassment.

#### **7.4 Responding to complaints/grievances of bullying and sexual harassment**

In my view, the key rules which apply when an employer is responding to an allegation of bullying, sexual harassment or other forms of workplace harassment are:

- the employer should take the matter seriously and respond in a timely manner;
- the employer should treat both the alleged victim and alleged offender with impartiality;
- any investigation of the allegation should be confidential and objective;
- the process to be followed should be clearly communicated to all parties;
- the investigator should be someone who is acceptable to both the complainant and the defendant, that is someone who is considered objective (this may need to be someone from another site of the same business or someone entirely independent of the business);
- the complainant and the defendant should be informed of the process of the investigation and be kept informed of its progress;



- the burden of proof should rest with the complainant;
- the investigator should take notes using the complainant's own words, have an outline of the complaint plus a step-by-step account;
- the investigator should inform the defendant of the name of the complainant;
- the investigator should give the defendant ample opportunity to answer the allegations made against him/her, whether verbally or in writing;
- the investigator should gather additional information from any other relevant person;
- the investigator should consider all of the relevant information and form an opinion regarding whether "on the balance of probabilities" the complaint has been substantiated;
- the investigator should write a report outlining the information that s/he has relied upon and the conclusion that s/he has formed, together with recommendations which are agreed upon at senior management level;
- the outcome of the investigation should be documented;
- management should inform both parties of the outcome of the investigation and what recommendations have been made;
- management should implement changes immediately to prevent the incident from recurring;
- management should ensure that the complainant is not victimised.

### **Case Study**

In this real life case, a young man was summarily dismissed as a consequence of punching and knocking out a workmate at work one day. The dismissal took place with little discussion with the employee and no attempt was made to understand what had happened.

The young man subsequently lodged an unfair dismissal claim. As the conciliation conference in relation to the unfair dismissal claim proceeded it became clear that the young man had himself been the subject of sustained physical and psychological bullying by the man he had punched and knocked out over a period of six months. He had sought assistance from the human resources department and other managers, however they had not been interested.



Having attempted to obtain assistance from management, the employee tried to not let the workmate get to him. However one day he ‘lost his cool’ and punched and knocked out the other workmate. He was dismissed but had no opportunity to explain what had happened. No disciplinary action was taken at any time against the workmate.

Not surprisingly, the matter quickly settled, although the employer initially took some persuading that their action in dismissing the employee was unfair in all the circumstances.

This case is a good example of the need to keep an open mind when responding to even quite objectively serious incidents in the workplace.

## 8. FURTHER INFORMATION

For further information on this topic, please refer to:

- Workcover NSW – [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)
- WorkSafe Victoria – [www.worksafe.vic.gov.au](http://www.worksafe.vic.gov.au)
- SafeWork South Australia – [www.safework.sa.gov.au](http://www.safework.sa.gov.au)
- Comcare – [www.comcare.gov.au](http://www.comcare.gov.au)
- Australian Human Rights Commission – [www.hreoc.gov.au](http://www.hreoc.gov.au)
- Productivity Commission – [www.pc.gov.au](http://www.pc.gov.au)
- “Working with Monsters” by John Clarke, Random House Australia, 2005

### **Elizabeth Devine**

Principal, Solicitor & Workplace Relations Consultant  
DEVINE LAW AT WORK

Tel: (02) 8985 7312

[elizabeth@devinelaw.com.au](mailto:elizabeth@devinelaw.com.au)

[www.devinelaw.com.au](http://www.devinelaw.com.au)