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‘GO WITHIN OR GO WITHOUT’
LEGAL RESPONSES TO BULLYING

By Allison Ballard, Legal Practitioner and Sessional Academic at the University of Canberra

Introduction
Bullying is a significant but often hidden problem in our schools and our workplaces. This ‘invisibility’ has led to bullying being described as a ‘silent epidemic’. Whether it happens at school, at work, or online, bullying is a harmful and insidious social problem, which has the potential to wreak deathly havoc on the lives of its targets and their friends and families, as well as on those who witness it (often referred to in the bullying literature as ‘bystanders’).

In this article we are going to look first at what bullying is, then briefly at some of the harms caused by bullying, and finally at some of the legal and other responses that may be used in attempts to remedy the bullying problem. There is no single legal approach to workplace bullying: often it is a matter of trying to fit the specific circumstances of the case to the available causes of action – or ‘cutting the cloth to fit the suit’. Just as each incidence of bullying is largely unique, so too are the strategies best used to defeat it. And rather than a single cause of action, targets may use a multi-pronged approach, for example negligence and breach of contract.

What is bullying?
From a legal perspective, one of the key difficulties around the phenomenon of bullying is that there is no universally accepted or agreed definition of bullying. Bullying is defined differently in Europe, in the United States of America (USA), and in (and within) Australia. The concept of group bullying behaviour (for example ‘mobbing’) is essentially a European construct, while the characterisation of bullying as workplace violence is more typically American. In Australia, workplace bullying is typically referred to as ‘bullying and (non-sexual) harassment’ and sometimes simply as ‘harassment’. Since sexual harassment and discrimination can also form part of the bullying and harassment spectrum, it is useful to consider these as potential elements when trying to frame a legal action to challenge bullying.

While ‘workplace bullying’ and (non-sexual) ‘harassment’ may be viewed as two distinct concepts, some researchers use these terms interchangeably. Still others use different names and labels to encompass a range of negative workplace behaviours, some of which may be construed as bullying. Alternative terms include workplace incivility, mobbing, workplace abuse, workplace violence, workplace victimisation, counter-productive workplace behaviours (CWB), psychological terror, power harassment, and workplace aggression. Some researchers suggest that bullying is group behaviour, while others speak of the behaviour as being the action of a single perpetrator. In Australia, bullying is seen to incorporate both group and individual behaviours. There are many Australian cases of bullying by multiple perpetrators; the 2010 Café Vamp Case (or Map Foundation case) being a good example. From a legal perspective, the group bullying phenomenon needs be tempered by the fact that naming both organisations and workers as respondents may reflect a strategic legal approach which acknowledges that organisations generally have deeper pockets than individual bully perpetrators. In Swan v Monash Law Book Co-operative [2013] VSC 326 the bullied employee was awarded almost $600,000 in damages after her employer failed over a five year period to protect her from bullying, harassment and intimidation solely at the hands of her supervisor.

Section 55A (1) of the Occupational Health, Safety and Welfare Act 1986 (SA) (repealed) defined ‘bullying’ as behaviour that is repeated, systematic and directed towards an employee or group of employees that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten and which creates a risk to health and safety.
regime introduced by an amendment to the Fair Work Act 2009 (Cth) (the FW Act) when the new jurisdiction came into effect on 1 January 2014. The definition of bullying used at section 789FD of the FW Act is as follows:

**When is a worker bullied at work?**

1. A worker is bullied at work if:
   a. while the worker is at work in a constitutionally covered business:
      i. an individual or
      ii. a group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
   b. that behaviour creates a risk to health and safety.

2. To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

3. If a person conducts a business or undertaking (within the meaning of the Work Health and Safety Act 2011) and either:
   a. the person is:
      i. a constitutional corporation or
      ii. the Commonwealth or
      iii. a Commonwealth authority or
      iv. a body corporate incorporated in a Territory; or
   b. the business or undertaking is conducted principally in a Territory or Commonwealth place; then the business or undertaking is a constitutionally-covered business.

While, this definition is perhaps a good start, it only refers to anti-bullying applications bought under the FW Act, and not to other common law or other legal actions in respect of bullying. There are a number of problems with this definition but over time it will be fleshed out by case law.13

It is likely that the lack of a comprehensive definition contributes to the invisibility of, and silence around, workplace bullying – if you don’t know what bullying is and if you don’t know that you have been bullied, it is difficult for you to even begin to think about taking any action, including legal action, to try and remedy the problem. It’s a bit like that old philosophical thought experiment – if a tree falls in the forest and no one is there, does it still make a sound? Similarly, if you don’t know you have been bullied, have you been bullied?

### Student activities

1. Explain the following terms as used in the context of this article:
   a. silent epidemic
   b. insidious social problem
   c. bullying bystanders
   d. cutting the cloth to fit the suit.

2. Explain the differences between the definition of bullying in the USA, Europe and Australia.

3. Write a definition of bullying that you think covers the different aspects of it.

4. Choose two of the alternative terms for bullying and make up a scenario that could apply to each term.

5. Read the definitions given under the Occupational Health, Safety and Welfare Act 1986 (SA) and the Fair Work Act 2009 (Cth). Do you think your definition is clear and concise, adequate or misleading? Discuss.

6. Do you agree with the statement that ‘It is likely that the lack of a comprehensive definition contributes to the invisibility of, and silence around, workplace bullying’? Discuss.

### Behavioural manifestations of bullying

In the absence of an agreed definition, it is helpful to think about bullying in terms of the sorts of behaviours that may amount to bullying (remembering that one needs to consider both the context and factual circumstances of these behaviours).14 This approach may also help ‘targets’ recognise that they have been or are being bullied, or conversely, that they have not and are not being bullied. It may also help ‘perpetrators’ and organisations to understand that they are engaging in, or facilitating workplace abuse. It is not uncommon for alleged perpetrators to have absolutely no insight into the fact that their behaviour has been experienced as bullying by others. When such perception about their behaviour is bought to perpetrator’s attention, they may be, in turn, shocked and remorseful.15

Bullying behaviours occupy a spectrum of ‘violent’ behaviours ranging from ostensibly trivial
actions, to more extreme and serious criminal offences such as rape and murder. Einarsen (1999) described mobbing, emotional abuse, harassment, mistreatment, and victimisation as being part of the bullying phenomenon; bullying is ‘systematic persecution of a colleague, subordinate or superior, which, if continued, may cause severe social, psychological and psychosomatic problems for the victim.’

Behavioural manifestations of workplace bullying and harassment may be direct or indirect, or subtle and covert. Bullying and harassment behaviours may include, but are not limited to:

- excluding (for example by social isolation and exclusion from relevant meetings, or by silence or hostility in response to friendly attempts to engage in conversation)
- marginalising (for example by ignoring or withholding the information, knowledge or experience needed to do the job; by unfairly reassigning work responsibilities or giving menial tasks; or by ‘demoting’)
- obstructing (for example deliberately creating obstacles to effective work performance)
- criticising (for example unfair, undeserved and destructive criticism of work product and performance)
- intimidating and threatening (for example yelling, verbal abuse, making direct or indirect threats in relation to termination, demotion, physical safety, etc.)
- stealing and destroying (for example destruction or theft of personal property or work product, ideas, plagiarising, damage to reputation, health and well-being)
- gossiping and rumour-mongering (for example spreading false, misleading, defamatory, offensive or damaging information by way of direct speech, telephone calls, email, video, text message, social media, etc.)
- humiliating or ridiculing (for example by copying emails that are critical of someone to others that do not need to know, by hinting that the worker should resign or move jobs or employers, by putting them down in front of colleagues or friends)
- posting (for example sending offensive mail or emails, posting offensive material on social media, putting up offensive posters)
- micromanaging (for example extremely close supervisory oversight of everything an employee does – their work, the time they arrive for and leave work, the breaks they take, who they speak to, etc.)

At the worst end of the spectrum, behaviours such as physical and sexual assault, rape, wounding, suicide, manslaughter and murder may also be manifestations of bullying.

In the context of employment, the behaviours listed above would typically be engaged in by individual co-workers (managers, peers, subordinates). Organisations (or their representatives) may also engage in bullying by doing things like making targets undergo unnecessary medical and psychiatric assessments, putting targets on performance management plans, alleging breaches of the organisation’s code of conduct, terminating targets, and selecting targets for redundancy. These actions may constitute actual workplace abuse or they may represent an escalation or first manifestation of bullying after targets formally or informally complain about workplace abuse or after a worker’s compensation claim is made on account of bullying or some other workplace injury.

Student activities

7. Why could it be helpful to think of bullying as behaviours that may amount to bullying?

8. Choose three of the bullying and harassment behaviours that are listed and discuss why, in your opinion, each one is or is not bullying.

9. Explain two ways that organisations may engage in bullying behaviour.

The harmful consequences of bullying

Bullying has many potentially serious and adverse consequences for targets, bystanders, perpetrators, organisations, and society. These harms can be psychological, physiological, economic, social and societal. Targets of workplace abuse are often completely traumatised by what has happened to them; they frequently suffer from mental illnesses such as depression, anxiety, and post-traumatic stress as a consequence of, and in attempting to resolve the situation and seek justice. Seeking resolution through the law takes time, courage and fortitude – and it is not a path for the fainthearted. That said, taking steps to seek resolution or make the bullying stop are
better alternatives than allowing the situation to escalate to a point where targets become physically or psychologically unwell, self-harm, or suicide to avoid the shame and pain of bullying, or where the negative actions of perpetrators are allowed to go unchecked.

What to do? Legal and other remedies

Depending on the circumstances, context (for example work, social, school), and the jurisdiction, there may be a range of legal and other avenues open to people who have been bullied to challenge the bullying behaviour. A summary of these options is provided in Table A below. Most organisations have anti-bullying and discrimination policies and dispute resolution procedures, which allow targets and bystanders to make complaints about bullying and harassment. People may also choose to leave the organisation or change jobs within an organisation in order to escape the bullying. If these sorts of non-legal approaches are ineffective, there are a range of legal actions that may be considered, depending on the particular circumstances of the case. As identified by Ballard and Easteal (2014) and discussed below, possible legal actions are sourced from many areas of law including industrial law, discrimination law, contract law, work health and safety law, criminal law, and worker’s compensation law. Other areas of law which may have application in this area include consumer law, administrative law, and defamation.

National industrial relations’ remedies

From a national perspective, possibly the most significant recent change in options to address workplace bullying is that afforded by the anti-bullying regime under the FW Act which commenced on 1 July 2014. This regime captures most (but not all) Australian workers. Ballard and Easteal (2016) looked at the first 15 months of the new jurisdictions and concluded that it was a useful adjunct to other remedies, but unlikely to supplant them. In order to make an anti-bullying application, a worker must still be employed in the organisation in which the bullying is alleged to have occurred (there must be a risk that the bullying behaviour will continue). Where a worker has left employment because they could no longer tolerate the situation (as many do) they cannot make an application. Important also is that there is no legislative provision for financial compensation under this regime, whose goal is to keep the bullied worker at work and to make the bullying stop. Other causes of action under the FW Act that may have application to workplace bullying, include unfair dismissal, general protections (adverse action), discrimination, and breach of enterprise agreements. Similar legal avenues under state and territory legislation may also be available to workers not captured by the federal industrial relations jurisdiction.

Anti-discrimination remedies

Discrimination-related actions may also be available under state, territory and Commonwealth anti-discrimination laws in cases where the bullying occurs in relation to a protected attribute such as sex, disability, race, religion, pregnancy, sexual orientation, or family or caring responsibilities and others. In such cases, the target may make a complaint to the relevant tribunal, for example the Australian Human Rights Commission (AHRC), or the NSW Anti-Discrimination Tribunal. Such complaints do not usually incur an application fee but if not resolved at the tribunal level, may need to be referred to another tribunal or court for resolution. For example, if a discrimination complaint addressed to the ACT Human Rights Commission is not resolved by the Commission, it may be taken to the ACT Civil and Administrative Tribunal and thereafter to court. A complaint made to AHRC will need to be taken to the Federal Court of Australia or the Federal Circuit Court of Australia if not resolved by the AHRC.

Work health and safety and worker’s compensation remedies

Other possible remedies include making a complaint under the relevant work health and safety legislation. This usually involves the target making a complaint to an authority such as WorkCover or WorkSafe, following which the authority may investigate the complaint and prosecute the alleged perpetrators. This was the approach taken in the Café Vamp Case where the coroner recommended that WorkSafe Victoria examined the evidence in the case, and in consultation with its legal advisors, take appropriate action against the person/s named in the coronial report. Subsequently, the victims’ three male work colleagues were fined between $10,000 and $45,000 each and had convictions recorded. Café Vamp’s owner, Marc Luis Da Cruz, was - fined $220,000 for failing to provide a safe workplace.

Workers who suffer a bullying-related injury or illness may also make a worker’s compensation application in relation to the injury. The requirements for a successful worker’s compensation claim vary
across jurisdictions and there are often considerable obstacles, particularly where the claim is for psychological injury. Nevertheless, his may be a useful claim, particularly in cases where the worker is so incapacitated that they are no longer able to work or return to work. Unfortunately, anecdotal evidence suggests that where such claims are made, the worker may suffer further bullying at the hands of the insurers, rehabilitation providers and on return to work, particularly where they are on graduated return to work programs.

**Other civil law remedies**

There are a number of other possible civil remedies for workplace bullying. These include, but are not limited to, breach of contract, defamation, negligence, administrative and consumer law.

**Criminal law remedies**

Targets might also consider criminal law actions in relation to any offence which is created by bullying. These might include criminal prosecution for stalking, assault, rape, trespass, misuse of a carriage service, murder, unlawful death and other similar behaviours.

**Conclusion**

Bullying and harassment is in epidemic proportions in our schools and workplaces and online. There are a number of legal (and non-legal) ways to challenge and remedy this sort of behaviour. Determining the best approach requires careful consideration of all the factual circumstances and the context of each case – there is no universally agreed approach that guarantees a successful complaint, claim or cause of actions. Consideration needs to be given to things such as whether the target of the bullying is still being subject to that behaviour, whether they are still employed at a given workplace or attending a given school, whether they wish to remain in employment with the relevant organisation or not. The target needs to think carefully about what they hope to achieve as a result of making a complaint or starting legal proceedings in relation to bullying. If the desired outcome is clear, carefully mapping the path to reach that outcome is more likely to achieve a successful result.

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**Student activities**

10. Explain some possible harmful consequences of bullying.
11. What non-legal actions could a person take to avoid bullying?
12. List three areas of law that may provide remedies for a person who has suffered bullying.
13. Explain two problems for a victim of bullying if he or she is wanting to seek a remedy through the FW Act.
14. Explain an anti-discrimination remedy that may be available. What problem may occur if it is not resolved?
15. Where can complaints under work safe and health legislation be taken? Explain what occurred in the Café Vamp Case.
16. In what circumstances may a worker’s compensation claim be appropriate?
17. List three civil law remedies that could be used in a situation of workplace bullying.
18. List three criminal law remedies that could be used in a situation of workplace bullying.
19. Do you agree with the concluding statement ‘If the desired outcome is clear, carefully mapping the path to reach that outcome is more likely to achieve a successful result’? Discuss.
20. Investigate two cases mentioned in Table A below and explain what occurred in each case.
Reference


7. Leymann, n4 above at 67.


9. Suzy Fox, Paul Spector, and Don Miles ‘Counterproductive Work Behaviour (CWB) in Response to Job Stressors and Organisational Justice: Some Mediator and Moderator Tests for Autonomy and Emotions’ (2001) 59 Journal of Vocational Behaviour 291-309, Fox et al at state at 292 that CWB (which may include aggression, theft, or passive acts such as purposely failing to follow instructions or doing work incorrectly) ‘is intended to have a detrimental effect on organisations and their members’ Spector and Fox also consider that CWB is ‘an umbrella term that subsumes, in part or whole, similar constructs concerning harmful behaviour at work’; Paul Spector and Suzy Fox ‘Theorising about the deviant citizen: An attributional explanation of the interplay of organisational citizenship and counterproductive work behaviour’ (2010) 30 Human Resource Management Review 132-143 at 133. But James E Bartlett and Michelle E Bartlett ‘Workplace Bullying: An Integrative Literature Review’ (2011) 13:69 Advances in Developing Human Resources 69-84 suggest that workplace bullying is different to other forms of CWB.


13. See for example, the discussion in Ballard, A.J & Eastal, Australia’s National Anti-Bullying Jurisdiction: Paper Tiger or Velvet Glove, 15 February 2016, Laws.

14. To this end, Leymann developed a typology of activities to describe mainly hostile activities in northern European countries called the Leymann Inventory of Psychological Terror or LIPT-questionnaire in 1990; Heinz Leymann ‘The Content and Development of Mobbing at Work’(1996) 5(2) European Journal of Work and Organizational Psychology 165-184 at 171.

15. In the author’s experience as a legal practitioner working with targets and alleged perpetrators of bullying.


17. Legislative Instrument Work Health and Safety (Preventing and Responding to Bullying) Code of Practice 2012 (No 1) (ACT) at page 3.


19. Leyman, n4 above at 165-184 at 167.


21. Leyman, n4 above at 167.

22. Ibid

23. Ibid

24. Work Health and Safety (Preventing and Responding to Bullying) Code of Practice 2012 (No 1).


29. See Helge Hoel ‘Do formal organisational investigations of bullying complaints deliver justice?’ (Paper presented at the 9th Conference of the International Association of Workplace Bullying and Harassment, University of Milan, June 2011); Harriet Stacey ‘Workplace bullying or reasonable management action? Case analysis of externally investigated complaints of workplace bullying in Australia’ (Paper presented at the 9th Conference of the International Association of Workplace Bullying and Harassment, University of Milan, June 2013).


31. Jane Faure-Brac, ‘A slow poison: Behind the alarming statistics on workplace bullying are personal stories or grief and hardship, revealed during a parliamentary inquiry’ (2012) 24 About The House 20-24; ‘(Bullying) is a type of social and psychological assault at the workplace, which can lead to profound legal, social, economic, and psychological consequences for the individual’ (Heinz Leymann, ‘The Content and Development of Mobbing at Work’, European Journal of Work and Organizational Psychology (1996), 5(2), 165-184 at 172).


33. Ibid.

34. Ballard and Eastal, n13 above.

35. For example, the Work Health and Safety Act 2011 (Cth), the Work Health and Safety Act 2011 (NSW), Occupational Health and Safety Act 2004 (VIC) and comparable legislation in other jurisdictions.


37. Coroner Peter White’s report, n6 above.

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<td>Non-Legal Pathways</td>
<td>Policies, procedures, and code of conduct</td>
<td>Carroll v Karingal Inc [2016] FWC 3709 (unfair dismissal application by alleged perpetrator terminated for breach of code of conduct and WHS and Bullying &amp; Harassment policies - unsuccessful)</td>
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<td></td>
<td>Alternative dispute resolution techniques such as private mediation</td>
<td>Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 338 (discrimination on grounds of political opinion with adverse actions of redeploying, suspending and terminating established)</td>
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<td>Suspension or termination of alleged bully or target</td>
<td>Carroll v Karingal Inc [2016] FWC 3709 (unfair dismissal application by alleged perpetrator terminated for breach of code of conduct and WHS and Bullying &amp; Harassment policies - unsuccessful)</td>
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<tr>
<td></td>
<td>Workplace investigation of complaints</td>
<td>Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 338 (discrimination on grounds of political opinion with adverse actions of redeploying, suspending and terminating established)</td>
</tr>
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<td></td>
<td>Transfer or redeployment to another role or department of bully or target</td>
<td>Carroll v Karingal Inc [2016] FWC 3709 (unfair dismissal application by alleged perpetrator terminated for breach of code of conduct and WHS and Bullying &amp; Harassment policies - unsuccessful)</td>
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<td>Organisational sabotage Exit the organisation</td>
<td>Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 338 (discrimination on grounds of political opinion with adverse actions of redeploying, suspending and terminating established)</td>
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<td>Disclose concerns to media, politicians, etc.</td>
<td>Carroll v Karingal Inc [2016] FWC 3709 (unfair dismissal application by alleged perpetrator terminated for breach of code of conduct and WHS and Bullying &amp; Harassment policies - unsuccessful)</td>
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<td>Legal Pathways</td>
<td>Anti-bullying application</td>
<td>Raine [2016] FWC 3437 (anti-bullying application unsuccessful as applicant's employment not on foot)</td>
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<td>Discrimination application</td>
<td>Kassis v Republic of Lebanon [2014] FCCA 155 (applicant terminated following complaint of bullying and harassment because of her sex and marital status - successful)</td>
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<td></td>
<td>Unfair dismissal/constructive dismissal application</td>
<td>Salloum v Jayco Unit Trust T/A Jayco Caravan Manufacturing [2016] FWC 3746 (unfair dismissal application by alleged perpetrator terminated for bullying - unsuccessful)</td>
</tr>
</tbody>
</table>

### Case Examples

**Human Rights & Discrimination Law**
- Discrimination complaint based on protected attribute e.g. sex, race, religion, etc. (unsuccessful)

**Industrial Law**
- Anti-bullying application (unsuccessful)

**Work Health & Safety Law**
- Bullying complaint to government work safe regulators
  - Map Foundation Pty Ltd case, 08/02/2010, Victorian WorkCover Authority, Magistrates’ Court (three perpetrators convicted and fined and employing organisation fined)

**Worker’s Compensation**
- Worker’s compensation claim for injury suffered on account of bullying (unsuccessful)

**Defamation**
- Statutory action in defamation/inclusion of defamatory-type conduct in other causes of action (unsuccessful)

- Gregory v New South Wales [2009] NSWSC 559 ($470,000 in damages paid to Year 12 bullied by name-calling (‘sterile’, ‘Taggot’, ‘paedophile’ and ‘Nazi’) peers who banned him from entering the common room Lisa Eskinazi v Victoria (unreported, VCC, 20 June 2003), (target who was called names like ‘hooker’, ‘whore’ and ‘fat pig’ was awarded compensation)39
<table>
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<th>Category</th>
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<td>Consumer Law</td>
<td>• Misleading and deceptive conduct&lt;br&gt;Unconscionable conduct&lt;br&gt;Henderson v McSharer [2015] FCA 396 (28 April 2015) (unconscionable conduct and tort of deceit established - loss and damage established)</td>
</tr>
<tr>
<td>Contract Law</td>
<td>• Breach of contract/policy etc.&lt;br&gt;Goldman Sachs JB Were Services Pty Limited v Nikolich [2007] FCAFC 120 (applicant claimed breach of contract after suffering psychological injury - successful)</td>
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<td>Torts</td>
<td>• Negligence&lt;br&gt;• Duty of Care&lt;br&gt;• False Imprisonment&lt;br&gt;• Trespass&lt;br&gt;• Assault&lt;br&gt;• Battery&lt;br&gt;Naidu v Group 4 Securitas Pty Ltd and Anor [2005] NSWSC 618 (successful negligence and breach of contract claim by target)&lt;br&gt;Swan v Monash Law Book Co-operative [2013] VSC 326 (successful negligence and breach of duty of care claim by target)</td>
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<tr>
<td>Administrative Law</td>
<td>• Review of decisions for lack of procedural fairness/natural justice etc.&lt;br&gt;Laws v Australian Broadcasting Tribunal [1990] HCA 3; (1990) 170 CLR 70</td>
</tr>
<tr>
<td>Criminal Law</td>
<td>• Prosecution for relevant criminal offence&lt;br&gt;• Application for victims of crime compensation&lt;br&gt;• Restraining orders&lt;br&gt;Clarke v State of New South Wales [2015] NSWCA 27</td>
</tr>
</tbody>
</table>
Abstract: Sexual harassment law in Australia has been subject to increasing interest and attention, particularly by the news media. With sexual harassment still commonly experienced in Australian workplaces, it is important for employers and employees alike to be aware of their legal rights and obligations.

Introduction
There has been a growing interest in sexual harassment law in Australia. Media coverage of high profile cases, such as Fraser Kirk v David Jones & Ors (2010), NSD 964/2010, has made employers and employees alike more aware of this issue. However, the media focus on the more sensational aspects of sexual harassment cases has meant that information about the legal elements has been obscured or misleading. This article will discuss sexual harassment in the workplace, Australian sexual harassment legislation and the way the news media has portrayed high profile cases.

What is sexual harassment in the workplace?
Sexual harassment in the workplace is defined in most Australian legislation as ‘unwelcome conduct of a sexual nature’. For example, it can include uninvited physical contact or gestures, unwelcome sexual advances, sexual comments or innuendo, displays of pornographic material or questions or insinuations about a person’s private life. The key aspect here is ‘unwelcome’. The definition does not capture voluntary and mutual personal relationships.

Sexual harassment is an example of discrimination in the workplace, and is defined in Commonwealth, state and territory legislation.

Commonwealth legal definition
Sexual harassment is defined in section 28A of the Sex Discrimination Act 1984 (Cth):

28A Meaning of sexual harassment

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

(a) 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 the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed

(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct

(c) any disability of the person harassed

(d) any other relevant circumstance.

(2) 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 determining whether or not conduct is unwelcome, consideration is given to the particular personal circumstances of the person being harassed.
Definition in ACT legislation

There are similar definitions in state and territory discrimination legislation. For example, section 58 of the Discrimination Act 1991 (ACT) defines ‘sexual harassment as:

58 Meaning of sexual harassment for pt 5

(1) In this part:

sexual harassment—a person subjects someone else to sexual harassment if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated.

(2) In this section:

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

Obligations on employers – vicarious liability

Employers have a responsibility to take sexual harassment in the workplace seriously. Employers may be held responsible for the actions of employees committed in the course of their employment. This is known as ‘vicarious liability’. The Sex Discrimination Act states that an employer may be liable for the conduct of employees ‘unless it is established that the person took all reasonable steps to prevent the employee or agent’ from committing the acts.¹

What are ‘reasonable steps’?

Examples of ‘reasonable steps’ include developing and implementing a sexual harassment policy and conducting appropriate staff education and training. The Australian Human Rights Commission recommends that employers: ‘Have an appropriate sexual harassment policy, train employees on how to identify and deal with sexual harassment, put in place an internal procedure to deal with complaints and take appropriate remedial action if and when sexual harassment occurs’.²

Sexual harassment legislation imposes the same obligations to take reasonable steps on small and large organisations. However, the issue of the size of the employer has been raised in some cases. In Gilroy v Angelov [2000] FCA 1775, Wilcox J commented:

‘It may be more difficult for a small employer, with few employees, to put into place a satisfactory sexual harassment regime than for a large employer with skilled human resources 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.³

In this case, the judge commented that although it may seem more difficult for a small business to take reasonable steps to prevent sexual harassment in the workplace, sexual harassment should be taken seriously by all employers regardless of their size.

Student activities

1. Describe the meaning of sexual harassment in the workplace in one sentence.
2. Make up two situations that could constitute workplace sexual harassment.
3. Explain the meaning of vicarious liability in the context of workplace sexual harassment.
4. Explain two reasonable steps employers could take to show they are not liable for sexual harassment that takes place in their workplace.
5. Does the size of the employing company make any difference in a sexual harassment claim? Explain the reason for your answer. To what extent do you agree with this viewpoint?
How common is sexual harassment?

Very common. In ‘Working without fear: results of the sexual harassment national telephone survey 2012’, the Australian Human Rights Commission found that ‘just over one in five (21%) of people in Australia had been sexually harassed since the age of 15’. The survey found that ‘One-third of women (33%) have been sexually harassed since the age of 15 compared to fewer than one in ten (9%) of men’.

Credibility in sexual harassment cases

Sexual harassment is a civil claim. To be successful, the person bringing the claim must prove on the balance of probabilities that sexual harassment occurred. To meet this standard, the person must be seen by the Court to be credible.

Recent research on sexual harassment cases suggests that the following attributes may mean the person bringing the claim is seen as more credible:

- youth
- ‘fighting back’
- prompt reporting
- consistency and confidence in delivering evidence in the witness box.

Although often not directly relevant to the case at hand, researchers have found that judges in sexual harassment cases have made comments about the private life and relationships of the person bringing the claim. In many of these cases, the person’s private life was discussed in court not to determine whether the behaviour was unwelcome, but to test the credibility of the person’s story.

These factors can present problems for people who don’t fall into the ‘ideal’ image of a complainant in a sexual harassment case. There are also many reasons why a person may not fit the ideal image. The person experiencing sexual harassment may feel too intimidated or traumatised to make a prompt complaint about the behaviour. The person may also lack confidence and be unable to pinpoint individual details of events while giving evidence for similar reasons.

Why study the media?

The news media is a powerful communication tool. The media can help shape public perception of legal issues, as it can often be a person’s main source of information about their rights and responsibilities. The media also has the power to reinforce or transform public opinion and policy responses on the issue of sexual harassment.

Student activities

6. How prevalent is sexual harassment in the workplace?
7. Why is it important for employers to be aware of sexual harassment law?
8. Explain reasons why women should be vigilant about the possibility of sexual harassment in the workplace.
9. Why is the credibility of the person making the complaint important in sexual harassment cases? Explain why there is a problem with one of the criteria used to judge credibility.
10. Why would the private life of the complainant be discussed in court?
11. How do the media play an important role in relation to sexual harassment cases?

Case study – high profile sexual harassment cases

High profile cases

Publicist Kristy Fraser-Kirk’s sexual harassment claim against David Jones and its CEO, Mark McInnes, received considerable media attention in 2010. The case put sexual harassment law into the national spotlight. Ms Fraser-Kirk made a complaint of sexual harassment against Mr McInnes, alleging that he made sexual comments to her and touched her without her consent. Ms Fraser-Kirk’s legal claim also alleged that when she reported the behaviour to her employer, David Jones, her complaint was not taken seriously. Ms Fraser-Kirk claimed $37 million in punitive damages against David Jones. The case eventually settled out of court for an undisclosed amount.

Much of the media coverage focused on the more ‘sensational’ aspects of the case, with detailed descriptions of the behavior complained of, assessments of the credibility of Ms Fraser-Kirk and attention to the size of the damages claim. There were some inaccuracies in the reporting of the legal issues. ‘Punitive’ damages are different from ‘compensatory’ damages. The purpose of compensatory damages is to restore the person to their original position before the harassing
behaviour occurred. The purpose of punitive damages is to punish the employer or the harasser for wrongdoing. Some articles did not make this distinction, such as Miranda Devine’s Sydney Morning Herald opinion piece ‘Nobody died so why is she demanding a king’s ransom?’, which presented Fraser-Kirk as ‘another litigious, gold-digging high umbrage woman egged on by lawyers using feminism to advance a personal cause.’ Although Ms Fraser-Kirk herself met many of the criteria above for a ‘credible complainant’, including her youth, a consistent story and prompt reporting, media perceptions of her credibility were affected by other factors, including the size of the amount claimed.

A similar focus on monetary amounts was seen in coverage of Susan Spiteri’s sexual harassment complaint against IBM, with headlines reading ‘IBM saleswoman in $1.1 million legal claim’ and ‘Woman sues IBM for $1.1m – sex pest legal fight’ rather than drawing attention to Ms Spiteri’s claims of workplace bullying and a failure by IBM to maintain a safe workplace.

This approach to reporting, while entertaining for readers, may present a misleading picture of the seriousness of sexual harassment and the legal aspects of the claim.

### Student activities

12. Give a brief summary of two cases referred to in this article.

13. Discuss the role of the media in sexual harassment cases in the workplace.

### Reference

5. Ibid
7. Ibid.
8. Ibid.
10. Ibid.
11. Miranda Devine (2010) ‘Nobody died, so why is she demanding a king’s ransom?’, Sydney Morning Herald, 5 August, p15
Further reading

- Australian Human Rights Commission - ‘Sexual harassment - information for employers'

- Australian Human Rights Commission 2012 'Working without fear: Results of the 2012 sexual harassment national telephone survey',
Victoria could become the first Australian state to legalise doctor-assisted suicide after a parliamentary committee recommended reforms to give some terminally ill patients the right to choose death.

The state government has six months to respond to the proposals, which - if passed into law - would be followed by an 18-month adjustment period.

The committee, chaired by Liberal Edward O’Donohue, recommended the choice should only be given to adults with decision-making capacity, suffering from a serious, terminal condition, and at the end of their lives.

The proposal prohibits suicide tourism by limiting the regime to Victorian residents. It also excludes dementia patients and those suffering from a mental health condition alone.

Requests must be entirely voluntary, come from the patient directly, and be approved by two doctors.

Labor’s Cesar Melhem said when he started work on the inquiry he was opposed to euthanasia, but was strongly supportive of the final recommendations. “I think it will get overwhelmingly support from all members of parliament,” he said.

Premier Daniel Andrews suggested the recent loss of his father after a long battle with cancer had informed his thinking on the issue.

“That’s when the pain becomes unbearable and there’s no quality of life,” he said.

In the meantime, Mr Erica has access to the barbiturate Nembutal to end his life when the time comes but said many do not have that choice and he fears for those who support him.

“For those people who are in a situation where they want to terminate their life, they’re still going to go through the same anguish and worry before this is accepted,” he said.

“I’ve still got the worry that if I’ve got to take the dreaded drug I’m not committing an offence but anyone who wants to sit with me could be implicated.”
Sue Jensen, 59, who was diagnosed with oesophageal cancer in 2009 and later secondary lung cancer, said when her time comes being entitled to choose would bring her great comfort. “It’s my health and it’s my decision,” Ms Jensen said.

Dying with Dignity Victoria vice-president, Dr Rodney Syme, who says he has helped scores of people die peacefully, is being investigated by the Medical Board of Australia. “I had a little smile on my face because I thought this report may bring the medical board to their senses,” he said. “It validates what I’ve been doing over the last 25 years and I feel gratified that this committee has seen it in that light.”

More than 50 Australian bills have attempted assisted suicide reforms since 1993 and the only one to become law, a Northern Territory bill, was struck down by the Federal government. Professors Lindy Willmott and Ben White, the directors of the Australian Centre for Health Law Research, recently published a study examining those bills. Professor White said history suggests the future of the Victorian recommendations could hinge on the support of an “influential and charismatic proponent”.

“Despite high-level public support, up to 80 per cent of people support changes to the law in this area, the actual translation in the political will has struggled,” he said.

Any legislation is likely to be a conscience vote for major party MPs. Committee chair Edward O’Donohue said the weight of sometimes harrowing evidence about suicides showed the need for new laws. The committee could not “turn a blind eye” to the 240 suicides identified by the coroner between 2009 and 2013 by people who were facing a painful death, he said.

Mr O’Donohue conceded that some people would view the proposed laws as not going far enough. “We have struck a balance between protection, integrity of the system...and providing access.”

Liberal frontbencher Inga Peulich - who wrote in dissent alongside Labor’s Daniel Mulino - said any proposal for physician assisted dying was “not only a slippery slope, but people will die as a result of accident, error or misdiagnosis.”

Catholic Episcopal Vicar for Life Marriage and Family, Fr Tony Kerin said “the misguided but sincere pleas for assisted suicide seem only to address the fear of pain.”

The church warned that assisted death would usher mistrust into medical practice.

**Student Activities**

1. Voluntary euthanasia is a state issue. Why do you think this is the case?
2. Why do you think some people see the change in the law relating to voluntary euthanasia extremely important?
3. Investigate the name of the committee that has just handed down a report into doctor-assisted suicide in Victoria.
4. What were the main recommendations of that report?
5. Would the decision to end their life be open to everyone? Explain.
6. Why do you think two doctors need to approve any decision to end your life?
7. Approximately how many witnesses gave evidence to the committee?
8. What other procedures do committees of this type use to reach their recommendations?
9. Why do you think Dr Rodney Syme was pleased with the findings of this report?
10. Discuss reasons for and reasons against the introduction of new laws to allow doctor-assisted suicide in Australia.