

## Bullying in the Workplace

### A New Challenge for Employers and Management

## Presentation by

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## Outline of Today's Discussion

- Today I will concentrate upon the law relating to workplace bullying, although I should make it clear that the law relating to bullying, insofar as it operates applies to all types of bullying with one significant exception.
- That exception is the passage of Commonwealth legislation last year, which for the first time in Australia gave a legal definition to bullying and provided a new remedy for persons bullied in the workplace. I will discuss this in some detail subsequently.
- I should also make it clear that I will be discussing legal issues, rather than offering advice on human relations or psychology of bullying that I am happy to leave to persons with professional qualifications in those areas.
- I will however outline some of my own experiences as a lawyer and judge and more recently as chair of the National Centre against Bullying (NCAB)

## The National Centre against Bullying (NCAB)

<http://www.ncab.org.au/>

- NCAB is a group of experts from all over Australia advising and informing on the issues of bullying and the creation of safe schools and communities.
- NCAB works closely with school communities, governments and industry in addressing bullying issues.
- Until recently its focus has been directed at schools and students, upon the basis that if progress can be made with them, it is probable that they will be less likely to be bullies in adult life.
- However, more recently we have taken the view that there are many young people in the workplace who also need guidance and protection and many employers and managers who may benefit from expert assistance in handling bullying problems in the workplace

## Alannah & Madeline Foundation (AMF)

<http://www.amf.org.au/>

- AMF was set up to prevent violence against children following the Port Arthur tragedy in 1996 at the instance of Walter Mikac, the father of Alannah and Madeline, two young schoolgirls who were murdered at Port Arthur.
- Its many activities include an active role in bullying prevention.
- To this end it set up NCAB in 2002, when I was asked to be its inaugural chair and I have performed that role ever since.
- Since 2010, AMF has also been engaged, with the help of NCAB, in setting up a revolutionary program to assist with bullying prevention called eSmart, following the successful precedents of Sunsmart and Quit where real change in community attitudes to the dangers of suntan and smoking has occurred.
- Although that program was developed in schools, we are in the process of extending it to the workplace and other areas and I will discuss this later in my presentation

## Common Effects of Bullying

- Bullying can seriously damage physical, social and emotional health, often on a permanent basis and blight people's lives.
- There is strong evidence of a connection between bullying and suicide.
- Despite this, the law does not recognise bullying as a criminal offence.
- The law has long served the purpose of setting boundaries as to what is acceptable behaviour and in educating people as to what is not acceptable.
- For this reason I have long argued that bullying should be an offence, not because I want to see more people prosecuted, but rather because I want to see less people bullied and I think that the best way to do this is to make it clear to all of us that it is an offence against the law.

## A generational Problem

- Bullying is an intra and inter-generational phenomenon, with children who bully others at the age of 14 years likely to still engage in aggression at the age of 32 years and to have children who themselves engage in bullying and aggression.
- Thus bullying is not just a problem amongst children and youth but its reality extends into the home and the workplace

## My experience in relation to Bullying

- As we know, bullying is rife in our society and I come from an era when it was even worse, particularly in schools, where physical punishment was a normal part of school discipline;
- Those experiences and my later experience as a trial lawyer and judge, both in the criminal and family courts, heightened my concern that there was a need for action;
- A particular area that concerns me is the connection between family violence and bullying, which I saw so often at the Family Court.
- It is does not take much imagination to see that this sort of behaviour also extends into the workplace.
- The economic costs of bullying must be enormous and is often overlooked when the subject is discussed.

## Bullying and the Law

- As I have mentioned, bullying is not a criminal offence nor is it a civil wrong in Australia
- This is important because it means that the criminal law only provides a limited or no response to certain types of bullying and the civil law has to be adapted to do so and is similarly not always applicable.
- Many types of bullying can be criminal offences depending on the circumstances and may also attract civil liability for damages and the latter is particularly relevant to bullying in the workplace.
- Recent changes to workplace law have heightened the possibility of significant financial loss to employers arising from bullying

## What is Bullying

- **NCAB and AMF Definition:**
- ***"Bullying is when someone or a group of people with more power repeatedly and intentionally causes hurt or harm to another person or group of people who feel helpless to respond. Bullying can continue over time, is often hidden from adults and will probably continue if no action is taken"***

## Statutory definition of Workplace Bullying

- Workplace bullying occurs when:
  - an individual or group of individuals repeatedly behaves unreasonably towards a worker or
  - a group of workers at work,
  - AND
  - the behaviour creates a risk to health and safety.
- Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.

## Examples of Workplace Bullying

- aggressive and intimidating conduct
  - belittling or humiliating comments
  - victimisation
  - spreading malicious rumours
  - practical jokes or initiation
  - exclusion from work-related events
  - , and
  - unreasonable work expectations.

## Who is Covered?

- A person will be covered by the anti-bullying laws, and therefore eligible to make an application, if
- they:
  - are a worker (as defined in the Work Health and Safety Act 2011 (Cth))
  - are not a member of the Defence Force, and
  - work in a constitutionally-covered business.

## Who is a Worker?

- an employee
- a contractor or subcontractor
- an employee of a contractor or subcontractor
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking
- an outworker
- an apprentice or trainee
- a student gaining work experience
- a volunteer—except a person volunteering with a wholly 'volunteer association' with no
- employees (whether incorporated or not).

## What is a constitutionally covered Business?

- A constitutionally-covered business is a person conducting a business or undertaking (PCBU),
- conducted principally in a Territory or Commonwealth place, or where the person conducting the
- business or undertaking is:
  - a constitutional corporation
  - the Commonwealth
  - a Commonwealth Authority,
  - or
  - a body corporate incorporated in a Territory.

## What is a Constitutional Corporation?

- The Australian Constitution defines constitutional corporations as 'Foreign corporations, and trading
- or financial corporations formed within the limits of the Commonwealth:
- This applies to most if not all private schools and hospitals but may not apply to employees of State Authorities such as teachers.

## Remedies under the legislation

- These allow a worker to apply to the Fair Work Commission for an order to stop the bullying.
- Applications must be dealt with within 14 days and if successful and orders are made, breach can lead to penalties of up to \$10,000 for individuals and \$50,000 for corporations.
- A successful application will almost certainly trigger a successful application for damages.

## What the worker must establish

1. The applicant *reasonably believes* they've been bullied at work
2. That the worker was bullied at work by an individual or group, and
3. There's a *risk* the bullying *will* continue

## What areas of Employment are not covered by the new legislation?

- The Fair Work Act does not cover:
  - State public sector employees or local government employees or employees of non constitutional corporations in WA.
  - State public sector employees or local government employees in NSW, Queensland and SA.
  - State public sector employees in Tasmania.
- It does cover:
  - All employees in Victoria, NT and ACT.
  - All private sector employment in NSW, Queensland and SA.
  - All private sector and local government employment in Tasmania.

## Other Relevant Commonwealth Law affecting bullying

- The most important Commonwealth law affecting bullying relates to telecommunications, which include all forms of electronic communication. It is an offence to use a carriage service, which includes internet and phone services:
  - **"In a way that reasonable persons would regard as being menacing harassing or offensive"** and carries a penalty of up to three years imprisonment;
  - Threats to do serious harm carry up to seven years imprisonment.
  - Threats to kill carry up to ten years imprisonment.
- Importantly these threat offences can only be established if it can be proved that the perpetrator intended the victim to fear that they would be carried out, which is quite difficult to prove.

## State and Territory Law affecting Bullying

- These consist of :
- Laws against assault and like offences cover serious physical bullying and death threats and threats of violence, although in practice they do not operate effectively unless the police consider the offences serious enough to warrant action. Sometimes the offences themselves are not particularly serious but as the definitions of bullying recognises, their cumulative effects can be devastating.
  - Provisions tucked on to stalking laws cover most forms of bullying and harassment involving following and besetting type offences. Some of these offences can also be difficult to prove, but do carry heavy penalties and can provide a basis for an intervention order.
  - Suicide provides a particular difficulty because it is difficult to prove beyond reasonable doubt that the bullying was a cause of the suicide.

## Brodie's Law

- A highly publicised suicide occurred in Victoria several years ago involving a classic case of workplace bullying where a young girl, Brodie Parlock was mercilessly bullied while working in a small restaurant by the proprietor and her workmates to the point where she suicided. As in most such cases, there may have been other factors involved, but it seems reasonable to assume that the bullying was a major one.
- Because of the difficulty of proof of manslaughter the only charges that could be brought were under industrial safety legislation, carrying minor financial penalties.
- As a result the Victorian Government legislated to make serious bullying a criminal offence by extending the application of the stalking provisions in the Crimes Act 1958 to include a range of behaviour that involves serious bullying. The offence carries a maximum penalty of 10 years imprisonment.
- Although desirable legislation, it has limited value on its own, because police are reluctant to use it for other than serious offences.

## Laws against bullying overseas

- Proposed New Zealand legislation will introduce an offence of up to three months imprisonment for cyber-bullying covering adults and children.
- The legislation also provides for an offence of inciting a person to suicide, **whether or not the suicide takes place.**
- Five Canadian Provinces and many US States have introduced laws against bullying and cyber-bullying.
- Most of this legislation was a response to tragic cases such as that of Brodie.
- It seems likely that we will see similar developments in other Australia States and territories

## Civil Law and Bullying

- So far I have discussed criminal law but civil law is also important:
  - In the case of workplace bullying the most important category under which these rights arise is the law of negligence. The other important category is assault.
  - Negligence is a failure to take reasonable care for the safety of persons to whom a duty of care is owed and such a duty is owed by employer to employees.
  - If it is breached by a failure to take reasonable care and someone suffers personal injury or damage to property then they have a right to claim damages.
  - Assaults can be physical or threatened and also give rise to an action for damages as well as criminal remedies against the perpetrator.
  - An important difference is that employers are vicariously liable for negligence but not for assault

## The extent of the employers duty of care to control workplace bullying

- The duty obviously extends to taking reasonable steps to prevent an employee being bullied at the workplace or away from it when engaged in work.
- The employer is vicariously liable for any negligence by a manager or supervisor in discharging this duty.
- More difficult issues arise when bullying takes place away from work.
- However if an employer or senior manager becomes or ought to have been aware of it occurring elsewhere at the hands of another worker or group of workers, then it is likely that the employer will also be liable if it does not take reasonable steps to prevent the employee from suffering harm.
- There have even been decisions where employers have been found liable for sexual harassment by one employee towards another that takes place away from work.

## Possible relevant additional considerations

- the particular circumstances of the individual involved
- whether anything should have prompted a simple inquiry to uncover further circumstances
- Whether proper records were kept
- whether established policies or procedures were appropriate and whether they were followed
- whether any investigations were carried out in a timely manner

## What do you do as professionals to control bullying?

- Instruct your managers and supervisors as to their duty to control bullying.
- Develop appropriate anti-bullying policies and make sure that they are known to all employees.
- Make a written record of all complaints of bullying and properly investigate any such complaints.
- Provide appropriate support and protection to any staff who are subject to bullying.
- Ensure that staff have a confidential means to report bullying.
- Try to resolve the problem internally if possible

## Deficiencies in Australian Law

- No specific law against bullying;
- Many forms of bullying such as verbal abuse, name calling and exclusion are unaffected by the law unless electronic means are used or the new Commonwealth law applies.
- Lack of uniformity in State and Territory law makes cross boundary prosecution for cyber offences difficult;
- Commonwealth law is deficient in many ways;
- New workplace bullying law is not uniform across the Commonwealth because of constitutional limitations.
- Existing laws relating to bullying are complicated and largely unintelligible to young people and others;
- Civil remedies are slow and expensive;

## The need for proper anti-bullying programmes

- Quite apart from legislative sanctions there is an obvious need to control and eliminate workplace bullying on economic grounds, some of which are:
- Bullying detrimentally affects staff efficiency;
- It may increase staff turnover;
- It detrimentally affects staff morale;
- It contributes to absenteeism;
- It lowers output and increases costs;
- It contributes to unnecessary insurance claims;

## eSmart proposals of the Alannah and Madeline foundation

- The Alannah & Madeline Foundation, in conjunction with NCA&B has been working for some years on a project involving online interaction to assist in the control of bullying.
- Its program for schools, eSmart schools is up and running in over 2300 Australian schools.
- Its eSmart Libraries, which commenced in July 2013 is in one third of public libraries with the support of \$10M from Telstra.
- eSmart Workplaces is currently under development will lay out a step-by-step process for workplace improvement, by ensuring that a workplace is taking all the necessary actions, in a systemic and well-planned way, to boost employee engagement and create a respectful workplace.
- eSmart Workplaces will also be a quality assurance system for a workplace to prevent bullying and cyberbullying.

## Initial research of action areas

- These include
- Understanding the essentials of being a good manager,
- Setting employees up for success, individually and collectively,
- Fostering teamwork and morale,
- Understanding and fulfilling one's obligations as an employer,
- Recognising issues in the workplace, such as bullying, and
- Setting up systems and processes to address issues if and when they arise.

## Proposed support measures

- A **framework and set of actions**, outlining all the steps required to create a respectful and positive culture,
- An **online system tracking tool**, where the workplace (or work unit) tracks which activities have been completed,
- A suite of relevant and high-quality **resources**, such as tools, templates and guides, to help each workplace complete the actions necessary to become an eSmart Workplace, and
- Real-time **support** – access to a helpdesk, training and webinars, a starter kit and collateral so that workplaces.

