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How to manage **Bullying** and **Harassment** in the workplace

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About the Presenter

- My name is Rocco Musumeci.
- I am a Senior Associate at Acorn Lawyers with over 5 years' experience providing expert legal advice to clients.
- I provide legal services mainly in the areas of:
 - Business Law
 - Commercial Transactions
 - Wills and Estate Planning
 - Estate Administration and Litigation
- I work with a large array of clients:
 - Publicly listed companies
 - Small companies and sole traders
 - High net worth individuals in excess of \$100 million
 - Pensioners and pro bono services

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What is Workplace Harassment & Bullying?

- We often talk about harassment and/or bullying at a workplace.
- But, what do we really mean by “harassment” or “bullying” in a workplace environment?
- What is harassment or discrimination generally and from a legal perspective?
- What is bullying generally and from a legal perspective?
- Are they same?
- What are the examples of harassment and bullying?
- Let's look at some of these common issues.

What is Workplace Harassment & Bullying?

- Several State and Federal laws have workplace anti-discrimination provisions.
- There are separate legal provisions for disability harassment, sexual harassment and racial hatred.
- Generally, it is unlawful to treat a person less favourably on the basis of particular protected attributes such:
 - age
 - gender
 - sexual orientation
 - disability
 - race
- Some examples of unlawful actions can be classified as harassing or bullying a person at workplace.

Workplace Harassment

- A range of legislation set out harassment provisions which can be sexual harassment:
 - **Sex Discrimination Act 1984**
 - Section 28A defines sexual harassment as when a person makes an unwelcome sexual advance, an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature in relation to a person.

This occurs in circumstances where it is possible that the person harassed would be offended, humiliated or intimidated.

Sexual harassment can be subtle and implicit rather than explicit.



Workplace Harassment

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➤ Racial Discrimination Act 1975

- Section 18C prohibits offensive behaviour based on racial hatred.

Offensive behaviour includes an act that is likely to:

- Offend
- Insult
- Humiliate
- Intimidate

another person because of their race, colour or national or ethnic origin.



Workplace Harassment

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- **Disability Discrimination Act 1992 (Cth)**
 - Section 25 prohibits harassment in relation to an employee's disability.
- In Australia, each state and territory has its own equal opportunity legislation which also deals with discrimination at a workplace.
- **Anti-Discrimination Act 1977 (NSW)**
 - Prohibits harassment in relation to disability discrimination



Workplace Harassment

...contd.

- **Age Discrimination Act 2004 (Cth)**
 - Aims to eliminate discrimination in work
 - Employer can take age into account if have impact on inherent requirements of job
- **Anti-Discrimination Act 1977 (NSW)**
 - Applies to compulsory retirement and age based discrimination in employment and job seeking
 - Subject to any act authorised by another act

Examples of Harassment

What constitutes harassment depends on the specific circumstances but some examples can include:

- sending explicit or sexually suggestive messages, emails, notes
- displaying pornographic posters or screen savers
- asking intrusive questions about an employee's private life such as their sex life
- taunting or making derogatory comments about a person's disability
- telling insulting jokes about particular racial groups
- displaying racially offensive posters or screen savers

Workplace Bullying

- ▶ Workplace bullying can happen to volunteers, work experience students, interns, apprentices, casual and permanent employees.
- ▶ *Fair Work Amendment Act 2013 (Cth)*
 - Section 789FD defines bullying as:

“When an individual or group of individuals repeatedly behave unreasonably towards a worker and that behaviour creates a risk to health and safety.”

The actual section is as follows:

- (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.



Workplace Bullying

...contd.

- (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.

What is Not Bullying

- ▶ Not all behaviour that one may think to be bullying, is actually bullying.
- ▶ ‘Unreasonable behaviour’ should be considered to be behaviour that a reasonable person, having regard to the circumstances, may consider to be unreasonable.
- ▶ The behaviour must occur at workplace.
- ▶ Behaviour will not be considered to be bullying conduct if it is a reasonable management action carried out in a reasonable manner.
- ▶ An employer or manager can:
 - ▶ make decisions about poor performance
 - ▶ take disciplinary action
 - ▶ direct and control the way work is carried out.
- ▶ Management action not carried out in a reasonable way may be bullying.

Examples of Bullying

- Fair Work Commission recognises *the following* as examples of bullying:
 - Aggressive or intimidating conduct
 - Belittling or humiliating comments
 - Spreading malicious rumours
 - Teasing, practical jokes or 'initiation ceremonies'
 - Exclusion from work-related events
 - Unreasonable work expectations, including too much or too little work, or work below or beyond a worker's skill level
 - Displaying offensive material
 - Pressure to behave in an inappropriate manner

Difference Between Bullying & Harassment

- ▶ Unreasonable behaviour which in isolation may not involve workplace bullying (especially if it's not repeated behaviour), may involve unlawful discrimination or harassment (1).
- ▶ So, the most important difference is that harassment or discrimination, unlike bullying, may occur only once. You don't have to put up with it multiple times. Once is enough.
- ▶ Discrimination happens when there is adverse action (2).
 - ▶ Adverse action includes terminating the employment of a person or demoting them because of their characteristics.
- ▶ Bullying at work happens when:
 - ▶ a person or group repeatedly act unreasonably toward a worker or a group of workers
 - ▶ the behaviour creates a risk to health and safety.
 - ▶ This behaviour doesn't have to be related to the person (or group's) characteristics. Adverse action doesn't have to have happened.

(1) SafeWork NSW

(2) Fair Work

I am Harassed or Bullied, what to do?

- If you observe or are aware of workplace bullying or you are a victim of harassment, discrimination or bullying at your workplace, you can generally do the following (although your employer may also have certain policies in this regard that you could follow):
 - ▶ Obtain Advice
 - The first step is to work out that the behaviour you are observing, witnessing or experiencing is workplace harassment or bullying.
 - ▶ Document
 - Document the evidence that you believe can help you establish the behaviour you are observing, witnessing or experiencing.



I am Harassed or Bullied, what to do?

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- ▶ Informal discussion with your Supervisor.
 - it may be helpful to seek the perspective of your immediate supervisor, manager or if relevant, your human resources manager. This can potentially help you determine whether the behaviour in question is actually workplace harassment or workplace bullying.
- ▶ Contact the Support Services Facilitated by your Employer (if any).
 - Some employers facilitate or recommend free support services.
 - Support Services can help you understand what you could do under the circumstances or provide you information on how a bullying complaint could be managed.

I am Harassed or Bullied, what to do?

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- ▶ Lodge a Formal Complaint with your employer.
 - if you think you are observing, witnessing or experiencing workplace harassment or bullying, you can lodge a formal complaint to your employer.
 - you can lodge a complaint by:
 - informing your supervisor or manager
 - if the complaint relates to your supervisor or manager, you could speak to their manager



I am Harassed or Bullied, what to do?

...contd.

- ▶ Once the complaint is lodged, you should expect that your complaint would be dealt with:
 - confidentially
 - sensitively
 - fairly
 - in a timely manner
- ▶ If relevant, your employer will conduct a formal investigation and document the process.
- ▶ Your employer will advise you of the outcome of the assessment and any action that they have or intend to take to manage your concern.

What Actions Can an Employer Take

- ▶ An employer is obliged to protect the welfare of all parties concerned at least until the final action to address the complaint is taken.
 - ▶ Legal responsibility under Occupational Health and Safety and anti-discrimination law to provide a safe workplace.
 - ▶ Duty of care for health and wellbeing whilst at work.
 - ▶ An employer that allows bullying to occur in the workplace is not meeting this responsibility.
- ▶ An employer may take the following immediate action(s):
 - Implement alternative working arrangements
 - Provide alternative work locations
 - Change the reporting arrangements
 - Make appropriate arrangements to manage any necessary work interactions between the parties
- ▶ If relevant, an employer may initiate a formal investigation. Such investigation is usually conducted by a suitably qualified, independent person.



Potential Outcomes of Workplace Bullying or Harassment Complaint

- ▶ Depending on the outcome of a formal investigation which establishes workplace harassment or bullying and the related circumstances, an employer may:
 - require acknowledgment or an apology from the person who has engaged in such behaviour
 - provide counselling to the person against whom the complaint was made
 - provide counselling to the person who made the complaint
 - implement ongoing monitoring
 - make the temporary changes noted above, permanent



Potential Outcomes of Workplace Bullying or Harassment Complaint

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- provide training to the relevant employees
- consider and take disciplinary action which may include:
 - formal warning
 - in more serious cases, terminate employment of the person against whom complaint is made

External Avenues

- Workplace harassment or Bullying Complaints can also be made to:
 - Union
 - Fair Work Commission
 - State or Territory Bodies such as SafeWork NSW in the State of NSW and Anti-Discrimination Board of NSW
 - Federal/National Bodies such as the Australian Human Rights Commission
 - Legal Organisations such as Courts

Interesting Cases

- ▶ **Koehler v Cerebos (Australia) Ltd [2005] HCA 15**
- ▶ The leading case on workplace stress injury.
- ▶ An employer's duty of care to avoid psychiatric injury to an employee depends on the nature and extent of the work being done by the particular employee and the signs given by that employee.
- ▶ Employers have a duty to take reasonable care to avoid psychiatric injury" but stressed that the content of that duty "cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment, equity and any applicable statutory provisions.
- ▶ The central inquiry remains whether, in all the circumstances, the risk of a plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far fetched or fanciful.
- ▶ The relevant duty of care is engaged if psychiatric injury to the particular employee is reasonably foreseeable and that invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned.

Interesting Cases

- ▶ **NATIONWIDE NEWS PTY LTD v NAIDU and Another; ISS SECURITY PTY LTD V NAIDU and Another [2007] NSWCA 377**
- ▶ A security guard was placed by his employer at a client's premises.
- ▶ The security guard awarded damages for injury to his mental health which he suffered due to humiliating and harassing treatment by his supervisor.
- ▶ This bullying and harassment included being referred to as a "black boy", "black cunt", "monkey face", "curry muncher", "boofhead", "poofter", "hopeless" and was so frequent that the Court found it could accurately be characterised as "systemic".
- ▶ It is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury.
- ▶ An employer can be liable for negligence because of a failure to protect an employee against bullying and harassment.
- ▶ The client (owner of the premises) was vicariously liable for the damage due to the bullying and harassment his superior subjected him to.

Interesting Cases

- ▶ **New South Wales v Mannall [2005] NSWCA 367 (28 October 2005)**
- ▶ Employee alleged that she was subject to "victimisation, harassment, humiliation and abuse in the workplace causing her to suffer psychiatric injury" following her appointment as Team Leader.
- ▶ A number of her team members were rude, refused to accept proper direction and spoke to her in a negative manner, with one team member referring to her as "a little Hitler".
- ▶ The employee made regular complaints to her supervisor, who had mechanisms available to him to deal with the bullying and harassment, but the Court found that he instead tried to sweep things under the rug.
- ▶ The supervisor's "*negligence materially contributed to the mental breakdown and the damage*" suffered by the employee as a result of the harassment and bullying
- ▶ The employee was awarded costs, on top of the nearly \$340,000 she received under the District Court's orders.

Interesting Cases

- ▶ **Mathews v Winslow Constructors (Vic) Pty Ltd [2015] VSC 728 (17 December 2015)**
- ▶ The employee alleged that she was "subjected to abuse, bullying and sexual harassment" from other employees and subcontractors,
- ▶ Included having extremely explicit language being spoken to her, being threatened with sexual assault and being shown pornographic material.
- ▶ When she complained about this treatment to her manager, he "laughed".
- ▶ The manager also on occasion participated in the bullying.
- ▶ As a result, she suffered psychiatric and physical illness, and the Supreme Court of Victoria found that she will likely "not work again" and awarded her \$1.36 million in damages.

Interesting Cases

- ▶ **Mrs Taylor [2019] FWC 1794**
- ▶ Mrs Taylor alleged that Mr Hoad bullied her, particularly following the breakdown of her marriage, included:
 - ▶ Rudeness and abuse;
 - ▶ Exposing her to private vitriol;
 - ▶ Exclusionary behaviour;
 - ▶ Unreasonable work demands and scrutiny; and
 - ▶ Unreasonable threats to dismiss.
- ▶ The Commission found that the claims of bullying were substantiated, and made a number of orders to stop the bullying, including that:
 - ▶ Mr Hoad communicate with Mrs Taylor only by email, unless otherwise agreed or required by law;
 - ▶ Mr Hoad not communicate with Mrs Taylor on personal matters "or matters relating to the matrimonial dispute and shall limit such communication to matters relating to the business";
 - ▶ Mr Hoad "not denigrate or disparage her to any owner, manager, employee, customer, supplier or other third party of the business while she performs work for the business";
 - ▶ Mr Hoad "not restrict or limit her from communicating with any manager, employee, customer, supplier or other third party of the business (including drivers) should it be necessary for her to do so in the performance of her work duties"; and
 - ▶ past warning notices issued to Mrs Taylor be withdrawn.

Interesting Cases

- ▶ **Gould v Director-General, New South Wales (on Behalf of Ambulance Service, New South Wales) [2011] NSWADT 35**
- ▶ The employee (who worked for the Ambulance Service) alleged that she was subject to bullying, discrimination and sexual harassment in the workplace because she was a woman.
- ▶ She alleged that if she was a male worker, her complaints would have been taken more seriously and she would not have been subjected to this kind of treatment.
- ▶ The Tribunal found that she did not, on the balance of probabilities, prove that she had actually been subject to sexual harassment, as her claims were broad and did not specify behaviour which is typically associated with/constitutes sexual harassment.

Interesting Cases

- ▶ **Dharmalingham v Western NSW Local Health District [2015] NSWCATAD 74**
- ▶ A doctor made a number of complaints about specific incidents which he said amounted to bullying in the workplace (a hospital).
- ▶ Evidence was presented for each incident.
- ▶ Ultimately, the Tribunal found that only some of the claims of bullying were substantiated – so bullying can occur, but not every incident that you consider bullying may be so.
- ▶ The employer was ordered to pay \$10,000.00 to the doctor.

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