

Workplace Bullying

JobWatch
Employment Rights Legal Centre

This infosheet is designed for Victorian and national system employees in Tasmania and Queensland.

If you are in **Victoria**, you can use this infosheet unless you are employed in a sector that provides essential services of core government functions, including state infrastructure services such as electricity and gas, and your employer is not covered by a nationally registered collective agreement.

If you are in **Tasmania**, you can use this infosheet unless you are a state public sector employee not covered by a nationally registered collective agreement.

If you are in **Queensland**, you can use this infosheet unless you are a state public sector or local government employee not covered by a nationally registered collective agreement.

What is bullying?

Workplace bullying has been characterised by WorkSafe as **'persistent and repeated negative behaviour directed at an employee that creates a risk to health and safety'**.

Under the *Fair Work Act 2009* (Cth) (FW Act) workplace bullying occurs when **'an individual or group of individuals repeatedly behaves unreasonably towards a worker or group of workers and the behaviour creates a risk to health and safety'**.

However, reasonable management action conducted in a reasonable manner does not constitute workplace bullying.

Some examples of bullying

Examples of workplace bullying may include the following behaviours:

- Insulting, abusive or offensive language
- Offensive or harmful initiation practices
- Inappropriate comments about a person's appearance or lifestyle
- Physical assaults or threats
- Spreading malicious rumours
- Behaviour or language that frightens, humiliates, or degrades
- Overloading a person with too much or too little work
- Setting tasks above or below a person's skill level
- Isolating or ignoring a person
- Unfair treatment in relation to accessing workplace entitlements
- Setting unachievable or constantly changing deadlines
- Inappropriate letters, emails, phone calls, text messages or social media

Some examples of what may NOT be bullying

Not all actions amount to bullying. When carried out in a fair way some actions are seen as reasonable management actions and can include:

- Allocating work to a worker
- Setting performance goals, standards and deadlines
- Transferring a worker

Disclaimer

This infosheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information.

This infosheet is designed for Victorian and national system employees in Tasmania and Queensland only, with some exceptions. If this is not you, you should obtain specialist legal advice about your case as soon as possible.

Some examples of what may NOT be bullying (cont.)

- Allocation and rostering working hours
- Informing a worker about unsatisfactory work performance
- Informing a worker about inappropriate behaviour
- Deciding not to select a worker for promotion
- Constructive feedback
- Performance management processes
- Implementing organisational changes
- Downsizing

Bullying should not be ignored if it is occurring in your workplace. It creates an unsafe working environment and it is unlawful.

Practical options to handle bullying

There are a number of practical options available to employees who believe they are being bullied:

1. Direct approach

Tell the person (the bully) that their behaviour is unreasonable and inappropriate, that you are offended and want it to stop. This option is possible only if you feel safe and comfortable to do so and you are confident your employer will not dismiss you or take other adverse action against you.

2. Seek advice

Most workplaces have a health and safety representative who you can go to and seek advice. You can also seek professional counselling and/or advice outside of your workplace, for example, from your doctor.

3. Keep a diary

Keep a record of the episodes of bullying in a diary. Include details such as:

- Names of people involved
- Any witnesses
- What happened, on what date and at what time
- How you felt
- What you have done to try and stop it
- Any documentation if it exists

4. Report/Dispute settlement

Be familiar with and utilise workplace or occupational health and safety (OHS) procedure to inform your workplace of the situation. Your complaint may be informal or formal, but should be acted upon. Alternatively, if your workplace is covered by an enterprise agreement you may activate the dispute resolution procedure in relation to bullying which is an OHS issue. If your workplace is not covered by an enterprise agreement, your employer may still have a grievance procedure policy which may be applicable.

5. Talk

Discuss the situation with someone you trust at your workplace – such as your supervisor, manager, a co-worker, union or other representative or someone in Human Resources.

Note: Bullying is not the same as conflict. If a person's behaviour is repeated, persistent, negative and unreasonable, carrying with it a risk to another person's health and safety, it may be a case of workplace bullying. However, bullying doesn't include one off instances of rudeness or insensitivity to the individual.

Note: Before complaining, consider that it is always possible that your employer may dismiss you or take other adverse action against you for complaining (see "Legal options" below).

Legal options to handle bullying

1. Application to the Fair Work Commission for an order to stop bullying

Workplace bullying may be covered by a number of areas of law. As of 1 January 2014, a national law came into effect which specifically targets workplace bullying, giving individuals (including employees, independent contractors and volunteers) the right to make an application to the Fair Work Commission (FWC) for an 'Order to Stop Bullying' (Form F72).

The application form is available from the FWC. The FWC also has other helpful information regarding stop bullying orders on its website including an anti-bullying benchbook and application process flowchart.

A small filing fee is required to be paid with your claim. If payment of the fee will cause you financial hardship you can apply to have the fee waived, this must be done at the same time as you lodge your application. The fee waiver application form is also on the FWC's website.

To be eligible to make an application for this order, you must still be working at the business where you are being bullied. The business where you are working must also be a constitutionally covered business. In Victoria, Tasmania and Queensland this includes:

- Constitutional corporations (for example a Pty Ltd company whose business is in trade or finance);
- The Australian Government and its agencies; and
- Incorporated volunteer associations that have at least one employee.

A worker who works for a sole trader, partnership, a state government department or local council that is not a trading or financial corporation is not eligible to apply for a stop bullying order. However, the worker may still be able to make a complaint to WorkSafe in their state and/or take other legal action (see below).

If the FWC is satisfied on the evidence that a worker is eligible to make a stop bullying application, is being bullied and that the bullying is likely to continue, it can make any orders it considers appropriate to prevent the bullying from continuing. If the FWC's order is breached, the worker has **6 years** from the date of the breach to apply to the Federal Court or the Federal Circuit Court for a remedy. The courts can make any orders they deem fit including an order for financial compensation.

2. Police complaint

In **Victoria**, recent amendments to the *Crimes Act 1958* (Vic) broadened the offence of stalking to include serious workplace bullying behaviour. Although not an exhaustive list, a person stalks another if they engage in a course of conduct that includes:

- Interfering with property in the victim's possession
- Using abusive or offensive words to or in the presence of the victim
- Performing abusive or offensive acts in the presence of the victim
- Directing abusive or offensive acts in the presence of the victim
- Acting in any way which could cause physical or mental harm to the victim
- Arousing apprehension or fear in the victim

Note: There are no time limits for filing a stop bullying application at the Fair Work Commission.

Fair Work Commission

P: 1300 799 675

W: fwc.gov.au

Note: Before you apply for an 'Order to Stop Bullying', consider whether you have any other legal or practical options available to you (e.g. internal grievance procedure or WorkSafe complaint) because the FWC may prefer you to have at least tried other options before filing your application.

2. Police complaint (cont.)

Bullying in the form of physical or sexual assault, or threats to a person or their property may also be a matter for the police. If this is happening to you at work, make a complaint at your local police station. There is no time limit to make a complaint however the earlier it is made the sooner it may help stop the behaviour and also preserve evidence for prosecution.

The maximum penalty is 10 years imprisonment if the behaviour was intended to cause harm or fear. Although there is no compensation remedy available to the victim, intervention orders can be applied for in the Magistrates' Court of Victoria to stop the behaviour from persisting. To grant an intervention order, the court must be satisfied on the balance of probabilities that the intervention order is necessary to ensure the safety of the person affected by the bullying. Compensation may be available via the Victims of Crime Assistance Tribunal (VOCAT).

In **Tasmania**, if a bully has threatened you, or physically or sexually assaulted you, you can report this to police. If the bully has committed a crime, you may also be entitled to Victims Compensation through the Tasmanian Department of Justice Victims Support Services.

You should also consider applying to the Magistrates Court of Tasmania for a restraint order which is a court order that orders the bully to stop behaving in a certain way or doing the things that make you feel threatened.

In **Queensland**, if you have experienced violence, assault, or stalking you should report abuse directly to police. If you are a victim of crime, you may be able to get some compensation (called financial assistance) from the government through Victim Assist Queensland. You should also consider applying for a peace and good behaviour order or a restraining order in the Magistrates Court of Queensland.

3. WorkSafe complaint

In **Victoria**, WorkSafe Victoria enforces occupational health and safety law and can investigate bullying complaints. They have the power to visit the workplace and issue improvement notices and prohibition notices.

A person who is being bullied in their workplace can make a complaint to WorkSafe under the *Occupational Health and Safety Act 2004* (Vic) if their employer has failed to, 'so far as is reasonably practicable, provide and maintain for employees... a working environment that is safe and without risks to health.' A risk to health includes a risk to psychological health and therefore extends to psychological injuries caused by bullying.

An employee's loss and suffering is not compensable and a victim of bullying is not able to commence proceedings themselves, only the inspector or Authority is able to initiate legal proceedings. Despite this, WorkSafe may be able to change the workplace behaviour to stop workplace bullying from continuing.

In **Tasmania**, WorkSafe will only investigate when:

- the bullying is still occurring, and
- the victim has exhausted all options within their workplace to stop the bullying

Victoria Police

Urgent assistance: 000
Non-urgent assistance:
131 444
W: police.vic.gov.au

Magistrate's Court of Victoria

W: mcv.vic.gov.au

Victims of Crime Assistance Tribunal Victims of Crime

Hotline: 1800 819 817
W: vocat.vic.gov.au

Tasmania Police

Urgent assistance: 000
Non-urgent assistance:
131 444
W: police.tas.gov.au

Magistrate's Court of Tasmania

W: magistratescourt.tas.gov.au

Victims Support Services

P: 1300 300 238
W: justice.tas.gov.au/victims

Queensland Police

Urgent assistance: 000
Non-urgent assistance:
131 444
W: police.qld.gov.au

Magistrate's Court of Queensland

W: courts.qld.gov.au/courts/magistrates-court

Victims Assist QLD

P: 1300 546 587
W: qld.gov.au/victims

3. WorkSafe complaint (cont.)

It is the inspector's role to investigate and determine if those involved have met their obligations under the law: for example, if your employer has a policy and procedure in place for preventing and responding to bullying.

It is not the inspector's role to mediate between the victim and the alleged bully or become involved in the specific details of the reported bullying activities. The inspector may issue verbal advice and/or improvement or prohibition notices, according to WorkSafe's enforcement policy. If WorkSafe Tasmania decides to prosecute, your employer and the bully may be ordered to pay substantial fines.

In **Queensland**, under the *Work Health and Safety Act 2011*, WorkSafe Queensland can deal with bullying (workplace harassment) where a person is at risk of injury or illness from bullying behaviour that:

- is repeated, unwelcome and unsolicited
- the person considers to be offensive, intimidating, humiliating or threatening
- a reasonable person would consider to be offensive, humiliating, intimidating or threatening
- is not unlawful discrimination sexual harassment or vilification.

However, if you want to make a complaint to WorkSafe Queensland, you must first raise the issue in the workplace and try to resolve it there. If WorkSafe Queensland decides to prosecute, your employer and the bully may be ordered to pay substantial fines.

4: Worker's injury compensation claim

An employee who suffers a work related injury as a result of workplace bullying may be able to make a worker's injury compensation claim (also known as a WorkCover or WorkSafe claim). A successful claim may result in compensation for a percentage of wages lost, medical expenses and further compensation in certain circumstances.

To make a worker's injury claim in **Victoria**:

- Notify your employer of your injury within 30 days of becoming aware of the injury.
- Ensure that the injury is noted in the Register of Injuries of your workplace.
- Complete a worker's injury claim form and obtain a Certificate of Capacity from your doctor to include with the claim form which you must give to your employer.
- The employer should then complete the claim form and is responsible for submitting it to their WorkSafe Agent, otherwise you can send it to the agent directly.
- Continue to obtain Certificates of Capacity for the period of time that you don't have the capacity or have a limited capacity to work.

To make a worker's injury claim in **Tasmania**:

- Seek treatment and get a workers compensation certificate from your doctor. Your doctor must be accredited by the WorkCover Tasmania Board to issue these certificates if they reside or provide a medical service in Tasmania.

WorkSafe Victoria

P: 1800 136 089

W: worksafe.vic.gov.au

WorkSafe Tasmania

P: 1300 366 322

W: worksafe.tas.gov.au

WorkSafe Queensland

P: 1300 362 128

W: worksafe.qld.gov.au

Note: Workers Injury Compensation Claims are very complicated so you should obtain advice from a personal injuries lawyer as soon as possible.

WorkSafe Victoria

P: 1800 136 089

W: worksafe.vic.gov.au

WorkSafe Tasmania

P: 1300 366 322

W: worksafe.tas.gov.au

WorkSafe Queensland

P: 1300 362 128

W: worksafe.qld.gov.au

4: Worker's injury compensation claim (cont.)

- Tell your employer about your injury/illness as soon as possible. Preferably, this should be done in writing but can be done verbally.
- Your employer must give you a Notice of Right to Make a Workers Compensation Claim form within 14 days of you telling them about your injury. Your employer must then tell their insurer within 3 working days about your injury.
- If you wish to make a claim, ask your employer for a workers compensation claim form. You should usually do this within 6 months of the date of your injury and, if you decide to leave your employment, you must do this before you leave.
- Complete the claim form and give it to your employer in person or by post, along with your workers compensation medical certificate.
- Your employer must tell their insurer within 3 working days that they have received your claim and forward it within 5 working days.
- Your employer's insurer will tell you and the employer they have received the claim within 28 days. They will also supply both of you with information about your rights, roles and responsibilities during the compensation process.
- Make sure you continue to promptly supply medical certificates and invoices to your employer while your injury is ongoing.

To make a worker's injury claim in **Queensland**:

- Contact WorkSafe Queensland to make a claim as soon as you become aware that you have suffered a work related injury as a result of bullying.
- You can also lodge through your doctor. If you're unsure, you can either call WorkSafe Queensland or your GP to check.

5. ComCare claim

An employee who suffers a work related injury as a result of workplace bullying may be able to claim compensation under ComCare. A successful claim may result in compensation for a percentage of wages lost, medical expenses and further compensation in certain circumstances. ComCare is a national scheme which covers employees of:

- Commonwealth Government agencies and statutory authorities (excluding serving members of the Australian Defence Force);
- ACT Government and agencies; and
- corporations who have been granted a licence to self-insure.

To make a ComCare claim:

- Report your injury to your employer, ensure the necessary workplace procedures are followed.
- Obtain a Certificate of Capacity from your medical practitioner.
- Notify ComCare and your employer in writing as soon as practicable of your injury or illness.
- Complete a Claim for Worker's Compensation Form and hand that along with your Certificate of Capacity to your employer.
- Your employer will then complete the second half of the claim form and submit it to ComCare or alternatively you can provide the form and the medical certificate to ComCare and they will then liaise with the employer to complete the second half of the form.
- Continue to obtain Certificates of Capacity for the period of time that you don't have the capacity or have a limited capacity to work.

6. Anti-discrimination action

State and federal laws exist that prohibit discrimination or harassment based on protected attributes which include race, colour, sex, sexual preference, age, religion, physical or mental disability, marital status, family or carer's responsibility, pregnancy, political opinion, national extraction or social origin. An employee who is bullied because of a protected attribute may make a discrimination claim.

It is important to seek legal advice before making an anti-discrimination claim as the law varies between state and federal jurisdictions and a complaint cannot change from state to federal jurisdiction once made.

In **Victoria**, if a worker is bullied because of one of these protected attributes, within 12 months of the bullying behaviour occurring, a person can:

1. Apply to the Victorian Civil and Administrative Tribunal (VCAT) to have the matter heard by the tribunal. This can be done after conciliation at the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) or directly without a conciliation occurring.
2. Before VCAT, it is possible to apply to VEOHRC for a voluntary conciliation conference to occur.

In **Tasmania**, if a worker is bullied because of one of these protected attributes, within 12 months of the bullying behaviour occurring, a person can:

1. Apply to Equal Opportunity Tasmania who will investigate and hold a conciliation to try to resolve the matter by agreement.
2. If the matter is not resolved at conciliation, your matter can be referred to the Anti-discrimination Tribunal for a hearing.

In **Queensland**, if a worker is bullied because of one of these protected attributes, within 12 months of the bullying behaviour occurring, a person can:

1. Apply to the Anti-discrimination Commission Queensland who will investigate and hold a conciliation to try to resolve the matter by agreement.
2. If the matter is not resolved at conciliation, your matter can be referred to the Queensland Civil and Administrative Tribunal for a hearing.

At the **federal** level, four pieces of key legislation collectively protect an employee from being the target of bullying based on the protected attributes of sex, race, disability and age as well as sexual harassment and victimisation.

If a person is the target of workplace bullying because of one of these attributes, within 6 months from the date the discrimination occurred:

1. A complaint can be made to The Australian Human Rights Commission (AHRC). The AHRC President is then able to conduct a conciliation conference, attendance of which can be compulsory.
2. If the complaint is not resolved at the AHRC, the applicant then has 60 days to commence legal proceedings in the Federal Court.

Victorian Equal Opportunity and Human Rights Commission

P: 1300 292 153

W: humanrights.vic.gov.au

Victorian Civil and Administrative Tribunal

P: 1300 018 228

W: vcat.vic.gov.au

Equal Opportunity Tasmania

P: 1300 305 062

W: equalopportunity.tas.gov.au

Anti-discrimination Tribunal Tasmania

P: (03) 6166 4750

W: justice.tas.gov.au/tribunals/tribunal_sites/Anti-Discrimination_Tribunal

Anti-discrimination Commission Queensland

P: 1300 130 670

W: adcq.qld.gov.au

Queensland Civil and Administrative Tribunal

P: 1300 753 228

W: qcat.qld.gov.au

Australian Human Rights Commission

P: 1300 656 419

W: humanrights.gov.au

7. If you are dismissed

You have the right to report bullying that occurs in the workplace and to expect that something will be done about it. If you make a complaint about bullying and as a result you are dismissed this may amount to:

Unfair dismissal

If eligible for unfair dismissal protection, a claim for unfair dismissal may be made where your dismissal was harsh, unjust or unreasonable. You have **21 days** from the date the termination of your employment takes effect to lodge a claim with the FWC. Be aware that strict eligibility requirements apply to unfair dismissal applicants.

Constructive dismissal

To be able to make an unfair dismissal claim (or possibly a General Protections Dispute - Termination claim), the termination of your employment must be at the initiative of your employer. In certain circumstances, an employee may have no reasonable option but to leave their employment due to workplace bullying. In these circumstances, the termination of the employee's employment may be considered to be at the employer's initiative. You should obtain specific legal advice before considering that you have been constructively dismissed because constructive dismissal claims can be very difficult to prove.

General Protections Dispute – Termination claim

It is unlawful to terminate your employment because you make a bullying complaint. This is because it is unlawful for 'adverse action' to be taken by an employer against an employee in circumstances where an employee exercises a workplace right which includes complaining to their employer about workplace bullying and making a complaint to WorkSafe.

Further, it is unlawful for an employer to terminate your employment or take other unlawful adverse action against you because you have a workplace right or a protected attribute similar to anti-discrimination laws. If the reason for your termination is that you have complained about bullying, the existence of a workplace right, or due to a discriminatory reason, you may have the option to make a General Protections Dispute - Termination claim.

You have **21 days** from the date the termination of your employment takes effect to lodge a General Protections Dispute - Termination claim with the FWC.

8. If Adverse Action is taken against you but you are not dismissed

Unlawful 'adverse action' can also include injuring an employee in their employment, altering their position or discriminating against them. If unlawful 'adverse action' is taken against an employee but it does not amount to a dismissal, a person has **6 years** to file a General Protections Dispute - Non-Termination claim in the Federal Court or the Federal Circuit Court, however an optional conciliation conference can be held at the FWC first.

Note: Get Legal Advice from:

- A private lawyer
- Your Local Community Legal Centre
- Legal Aid in your State

Note: You should obtain specific legal advice before considering that you have been constructively dismissed because constructive dismissal claims can be very difficult to prove.

See JobWatch infosheets on the following topics for more information:

- Unfair Dismissal
- Constructive Dismissal
- General Protections Dispute

Fair Work Commission

P: 1300 799 675

W: www.fwc.gov.au

9. Common Law Action

It may, in certain circumstances, be possible for an employee to seek a remedy under the common law for a breach of duty of care or breach of contract. The time limit for filing in court for breach of contract is **6 years** from the date of the breach but you should obtain specific legal advice first and as soon as possible because this is a very complicated area of law.

Where to get help

JobWatch's free and confidential Telephone Information Service

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

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| Fair Work Infoline (Office of the Fair Work Ombudsman) | 13 13 94 |
| Fair Work Commission | 1300 799 675 |
| Victoria Police, Tasmania Police, Queensland Police (non-urgent assistance) | 131 444 |
| Australian Human Rights Commission | 1300 656 419 |
| Community Legal Centres Australia | 02 9264 9595 |
| ACTU Worker Information line (for referral to a union) | 1300 362 223 |
| Law Institute of Victoria's Legal Referral Service | 03 9607 9311 |
| WorkSafe Victoria | 1800 136 089 |
| Victorian Equal Opportunity and Human Rights Commission (VEOHRC) | 1300 292 153 |
| Victorian Civil and Administrative Tribunal | 1300 018 228 |
| Victoria Legal Aid | 1300 792 387 |
| Queensland Law Society (for referral to a lawyer) | 1300 367 757 |
| WorkSafe Queensland | 1300 362 128 |
| Anti-Discrimination Commission Queensland | 1300 130 670 |
| Queensland Civil and Administrative Tribunal | 1300 753 228 |
| Legal Aid Queensland | 1300 651 188 |
| Law Society of Tasmania (for referral to a lawyer) | 03 6234 4133 |
| WorkSafe Tasmania | 1300 366 322 |
| Equal Opportunity Tasmania | 1300 130 670 |
| Anti-discrimination Tribunal Tasmania | 1300 135 513 |

Note: Get Legal Advice from:

- A private lawyer
- Your Local Community Legal Centre
- Legal Aid in your State

Acknowledgements

JobWatch acknowledges and is grateful for the financial and other support it has received from both the Commonwealth of Australia Attorney-General's Department, the Victorian State Government, Victoria Legal Aid and Victoria Law Foundation.

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.