

Guide

Anti-workplace bullying

1. About bullying at work

A worker may apply to the Fair Work Commission (the Commission) for an order to stop bullying at work from continuing. This right comes from the *Fair Work Act 2009* (the Fair Work Act).

What is bullying at work?

Bullying occurs when:

- a person or a group of people **repeatedly** behaves unreasonably towards a worker or a group of workers at work

AND

- the behaviour creates a **risk to health and safety**.

Bullying **does not include reasonable management action** carried out in a reasonable manner.

Bullying behaviour may involve for example any of the following types of behaviour:

- 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.

However, this behavior must be repeated and unreasonable and must create a risk to health and safety in order for it to be bullying.

What is ‘reasonable management action’?

Reasonable management action carried out in a reasonable manner does **not** constitute bullying.

Reasonable management action may include for example:

- performance management processes
- disciplinary action for misconduct
- informing a worker about unsatisfactory work performance or inappropriate work behaviour
- directing a worker to perform duties in keeping with their job

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- maintaining reasonable workplace goals and standards.

However, any reasonable management actions must be conducted in a reasonable manner. If not, they could still be bullying.

For more information on the ways to manage workers who are not performing their job as required, download the Fair Work Ombudsman's *Managing underperformance best practice guide* from www.fairwork.gov.au.

2. What to do if there is bullying, or reports of bullying, at work

Try to resolve the issues at the workplace

Where possible and safe, workers should try to address issues of bullying at work within the workplace. There may be processes already in place in the workplace to deal with issues of bullying.

Workers are encouraged to raise the issues with their:

- supervisor and/or manager
- health and safety representative
- human resources department.

Workers can also speak to their union for information and advice on how to raise and deal with the issues in the workplace.

Federal, State or Territory work health and safety (WHS) regulators may be able to provide information on how to raise issues of bullying at work. Contact details for your local regulator can be found in section 8 of this guide *Where to get help*.

Employers and principals are encouraged to respond quickly and appropriately to the issues being raised. They have a duty of care to provide a safe workplace under WHS laws.

An **employer or principal** is:

- the person or business that employs or engages the worker who is alleging they are being bullied at work, and/or
- the person or business that employs or engages a person against whom bullying has been alleged.

Employer organisations, industry or trade groups registered with the Commission, chambers of commerce and peak industry bodies may be able to provide information on how to resolve issues of bullying at work.

The Department of Business (or equivalent) in most States and Territories often has information to assist small businesses manage their staff, resolve disputes and develop HR policies (including policies that deal with bullying). Contact details for the relevant Department in your State or Territory can be found on the Commission's website www.fwc.gov.au.

Many of the State or Territory WHS regulators have guides for employers/principals on how to deal with bullying at work, which can be found on their websites. Details of these websites can be found in section 10 of this guide: *Where you can get help*.

Take care of your health and wellbeing

Bullying at work is a serious issue that can affect people in a number of ways. If you have been assaulted or fear that you may be assaulted you may wish to consider contacting the police.

If you are feeling anxious or depressed it is important to speak to someone. Some options are:

- many workplaces have an employee assistance program (EAP) that can offer confidential support and assistance
- make an appointment to visit your doctor
- call **Lifeline** on **13 11 14**. Lifeline is a 24 hour service.

3. What can the Commission do to stop bullying?

The Commission can make an order to prevent a worker being bullied at work if satisfied that:

- the worker has been bullied at work by an individual or group of individuals, and
- there is a risk that the worker will continue to be bullied at work by that same individual or group.

The Commission is a tribunal, and is required to hear from all relevant parties before making orders. It does not conduct investigations into allegations of bullying at work.

What is an order?

An **order** is a ruling made by a Commission Member after he or she has heard and determined a matter. Once an order has been made, anyone bound by that order must comply with it. Courts can impose substantial penalties on parties who fail to comply with orders.

In bullying matters, a Commission Member can make any order the Member considers appropriate to prevent the worker being bullied.

The focus of any orders the Commission may make must be to prevent further bullying. Actions that the Commission might consider could include:

- requiring the individual or group of individuals to stop the specified behaviour
- regular monitoring of behaviours by an employer or principal
- compliance with an employer's or principal's bullying policy
- the provision of information and additional support and training to workers
- review of the employer's or principal's bullying policy.

However each case will be considered on its merits and parties should consider the specific circumstances of the workplace when seeking orders or responding to proposals for orders.

The Commission **cannot issue fines or penalties** and **cannot award financial compensation**.

Before making an order, the Commission must take into account:

- any outcomes arising out of an investigation into the alleged bullying conducted by another person or body
- any procedures available to the worker to resolve the alleged bullying and any outcomes arising from those procedures.

How do other agencies deal with bullying at work?

Information on the other agencies that deal with bullying at work can be found in the section called *Where to get help* on page 8 of this guide.

4. Who can apply to the Fair Work Commission?

The national anti-bullying laws only apply to certain workers in Australia. To make an application for an order to stop workplace bullying, a person must:

- be covered by the national anti-bullying laws, and

- meet the definition of a ‘worker’.

A **worker** includes:

- 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 a particular business or organisation
- an outworker
- an apprentice or trainee
- a student gaining work experience
- a volunteer.

Workers are only covered by the national anti-bullying laws if they are at work in a ‘constitutionally-covered business’. This includes a business or undertaking conducted by:

- a constitutional corporation—for example, a proprietary limited company or an incorporated association conducting trading or financial operations (this includes foreign corporations formed within the limits of the Commonwealth)
- the Commonwealth or a Commonwealth authority
- a body corporate incorporated in a Territory
- a business or organisation principally in a Territory or Commonwealth place.

Who is not covered by these anti-bullying laws?

Workers are only covered by the national anti-bullying laws if the bullying occurs while they are at work in a constitutionally-covered business. Businesses that are not constitutionally-covered may include businesses or undertakings conducted by:

- sole traders or partnerships
- state government departments and some state public sector agencies
- some local government organisations
- corporations whose main activity is not trading or financial.

Members of the Defence Force are not covered by these laws.

The Commission may dismiss an application if the Commission considers that the application might involve matters that relate to Australia’s defence or national security.

The Commission can only make an order if there is a risk that the worker will **continue** to be bullied at work by the particular individual or group. Accordingly, orders cannot be made where the worker is no longer engaged in connection with the workplace where they alleged the bullying conduct occurred or for some other reason is no longer exposed to bullying by the individual or group at work.

If you are not covered by the national anti-bullying laws, read section called *Where to get help* on page 8 of this guide.

5. How to apply for an order to stop bullying

A worker who reasonably believes he or she has been bullied at work may make an application to the Commission for an order to stop bullying conduct.

If there is more than one worker who believes they are being bullied, each worker will need to make a separate application. Related applications may however be heard together where appropriate.

The application form

The form used to make an application for an order is Form FX— Application for an order to stop bullying. This form can be completed using the form which is available on the Commission's website www.fwc.gov.au.

The application form is also available:

- by calling the Commission on 1300 799 675
- from the Commission's public counters in each capital city.

The Commission will inform those people who might be affected by your application that you have applied for a workplace bullying order.

This will include providing a copy of your application to:

- your employer or principal
- the person or people you allege are bullying you
- the employer or principal of this person or people (if different from your employer/principal).

The application fee

There is an application fee of **\$65.50**.

If the fee will cause you serious financial hardship, you can apply to have the fee waived. You must lodge the waiver form at the same time as you lodge your application.

Copies of the waiver form are available:

- on the Commission's website www.fwc.gov.au
- by calling the Commission on 1300 799 675
- from the Commission's public counters in each capital city.

Time limits

There is no time limit on making an application. However, **a worker must still be exposed to bullying by the same individual or group**—the Commission can only make an order if there is a risk that the worker will **continue** to be bullied.

6. How to respond to an application for a workplace bullying order

After a worker has made an application for an order to stop bullying at work, the Commission will ask for a response from:

- the employer or principal who employed or engaged the worker, and
- the person or people the worker has alleged is bullying them.

The response should be made by completing the relevant response form. This is the first opportunity the parties will have to respond to the allegations outlined in the worker's application. There will be an opportunity to make further responses as the matter progresses.

Response from an employer or principal

An **employer or principal** is:

- the person or business that employs or engages the worker who has made an application, and/or
- the person or business that employs or engages the person or people against whom bullying has been alleged.

Once an application has been received, the Commission will send the employer/principal a Form F74—Response from an employer/principal to an application for an order to stop bullying.

The Commission will also send them a copy of the worker's application form, so that the worker's allegations can be addressed.

The employer/principal must complete its response form and send it to the Commission **within 7 days**. The employer/principal must also send a copy to all of the parties to the matter. This includes:

- the worker who has made the application
- the person or people the worker has alleged is bullying them
- any other employers/principals involved (if any), and
- any legal or other representatives.

Response from the person(s) alleged to have bullied the worker

The Commission will in most cases send any person the worker has alleged is bullying them a Form F74—Response from a person against whom bullying has been alleged to an application for an order to stop bullying. The Commission will also send a copy of the worker's application form, so that the worker's allegations can be addressed.

The person must complete the response form and send it to the Commission **within 7 days**. The person must also send a copy to all of the parties to the matter. This includes:

- the worker who has made the application
- the person or business who employs or engages the worker
- the person or business who employs or engages you (if different),
- any other person who is alleged to have bullied the worker; and
- any legal or other representatives.

Disputing an application

If you are responding to a worker's application for a workplace bullying order, you can dispute to the application on a number of different grounds. These would include that:

- alleged bullying behaviour has not occurred or has not occurred repeatedly
- the worker is not covered by the national anti-bullying laws
- the action taken was reasonable management action carried out in a reasonable manner, and/or
- the application is frivolous, vexatious or has no reasonable prospects of success.

You should record any objections you have to the application on your response form.

If you are objecting to an application, you will still need to complete all sections of the response form. The Commission will need this information before it can determine whether to uphold your objection.

7. What happens at the Commission?

Once the Commission has received the application form, a staff member will call the worker to confirm the details of the application.

The Commission will then send a copy of the application form to:

- the employer(s)/principal(s), and
- in most cases, the person or people against whom the bullying has been alleged

and will ask them to respond in writing. (See section 6 of this guide *How to respond to an application for a workplace bullying order* for more information.)

The Commission will then decide how best to deal with the matter.

Mediation

If appropriate, the Commission will schedule a mediation session for the parties involved to try to help them resolve the dispute themselves.

Mediation is an informal, voluntary, private and generally confidential process facilitated by a Commission Member or by one of the Commission's anti-bullying mediators. The Members and mediators are independent and do not take sides.

The style of each Member and mediator may vary but, in general, mediation will include the following steps:

- the Member or mediator explains their role and the manner in which mediation is to be run
- each side briefly outlines their story including what happened, any relevant facts, and what they want
- the Member or mediator may ask questions and may speak with the parties separately
- the Member or mediator will try to help the parties reach an agreement by identifying common ground and suggesting possible options for resolution, and
- if an agreement is reached, the Member or mediator can assist the parties to record their agreement in writing.

The mediation may take place in person, by telephone or by video conference.

Given the nature of the jurisdiction and the orders available, the Commission will not be promoting or recommending the resolution of these applications on the basis of monetary payments.

Conferences & hearings

If the Commission thinks that the matter is not suitable for mediation, or if the matter can't be resolved by the parties at mediation, the Commission may hold a conference or hearing.

The purpose of a conference or hearing is to enable the Commission to determine whether an order to stop workplace bullying should be made. A conference is generally conducted in private, while a hearing is generally open to the public.

The Commission may also hold a preliminary conference designed to better inform the Member about the parties and issues involved.

The Commission will write to the parties with the details of any conference or hearing. The notice will include the time, date and location of the conference or hearing. It may also include instructions (also known as 'directions') for the lodgment of written material with the Commission.

Adjournments

If you can't attend on the date of the mediation, conference or hearing, or there is any other reason why you think the matter should be delayed, you can apply for an adjournment.

An application for an adjournment must be made in writing, and you must provide full reasons as to why the adjournment should be granted. Adjournments will only be granted where there are substantial grounds.

Any request for an adjournment should be made as soon as you become aware that the date is unsuitable.

Where a party does not attend a hearing when required, orders may be made in their absence.

For more information on hearings and conferences, including information on what will happen on the day, read the fact sheet *About hearings & conferences* which can be found on the Commission's website www.fwc.gov.au

8. Costs

In general, parties to a workplace bullying application will bear their own costs.

However, the Commission may order a party to pay some or all of the costs incurred by another party if the Commission is satisfied that:

- the application or response to the application was made vexatiously, or without reasonable cause, or
- it should have been reasonably apparent that the application or response to the application had no reasonable prospects of success.

9. Privacy

In general, applications for orders to stop workplace bullying and discussions in private conferences are confidential between the parties. Details will usually only be disclosed to the parties directly involved or their representatives.

Where formal hearings are conducted, these are open to the public unless the Commission determines otherwise.

The Commission is required by law to publish its decisions. Decisions are published on the website www.fwc.gov.au and generally include the names of parties to the matter.

If parties do not want their matters heard in public or their names and other details published in decisions, they will need to make an application for the Commission to make an order to that effect. This application can be made in writing to the Member of the Commission dealing with the matter.

10. Where to get help

Interpreters

The Commission can arrange for an interpreter to be present at your mediation session, conference and/or hearing at no cost to you. However, you must notify the Commission as early as possible of your need for an interpreter, and provide details of the required language.

Legal or other representation

Representation is where another person (such as a lawyer, union official or family member) speaks or acts on your behalf.

There is no requirement for you to be represented when you appear at the Commission. In any conferences or hearings, you will need the permission of the Commission Member dealing with your case if you wish to be represented by a lawyer or paid agent unless that person is:

- one of your employees or officers (if you are an employer/principal) or
- employed by a union or employer organisation, a peak union or peak employer body.

If you decide to represent yourself in proceedings you will need to make sure you are well prepared. You are welcome to bring one or more individuals with you for support. There are generally no objections to this, although in a private conference you should be prepared to tell the Commission why you would like the person to be present.

Different arrangements apply when voluntary mediations are conducted by staff of the Commission and you will be advised of these in advance of any such process.

Commission staff & resources

Commission staff cannot provide legal advice or advice on how best to run a case. Commission staff can, however, can give you information on:

- processes in the Commission
- how to make an application to the Commission and how to respond to an application that affects you
- how to fill out forms
- where to find documents such as legislation and decisions
- other organisations that may be able to assist you.

The Commission's website www.fwc.gov.au also contains a range of information on workplace bullying that may be of assistance.

Where else can I go to have my bullying at work issues dealt with?

Workplace bullying can be a breach of health and safety laws, which are administered by regulators Federally and in each State and Territory. Regulators may decide to respond to complaints of workplace bullying and can prosecute for breaches of health and safety laws. Like the Commission, the regulators cannot award financial compensation. Contact details for the State and Territory regulators can be found on the Commission's website www.fwc.gov.au.

If you think you are being bullied for a discriminatory reason, this may be a breach of equal opportunity laws. Contact details for anti-discrimination and equal opportunity bodies in each State and Territory can be found on the Commission's website www.fwc.gov.au.

Other specific laws also apply to some particular workers, such as public servants and defence personnel.