BULLYING IN THE WORKPLACE: ARE YOU READY?

As covered in earlier editions of News In Brief, the anti-bullying provisions contained in the Fair Work Act 2009 ("FW Act") will commence on 1 January, 2014. However, another important element of the new wave of rights and obligations that are being created in relation to workplace bullying, is Safe Work Australia’s proposed Preventing and Responding to Workplace Bullying draft Code of Conduct ("the draft Code"). Below is a closer look at the new rights under the FW Act and the wider implications of the Code under the Work, Health and Safety Act 2011 ("WHS Act").

THE FW ACT PROVISIONS

Under the FW Act, a worker is bullied at work if an individual or group repeatedly behaves unreasonably towards that worker or group of workers and that behaviour creates a risk to health and safety.

Importantly, the FW Act refers to “workers” rather than employees, giving a much broader group access to the protections. The term “worker” is a term derived from the WHS Act which encompasses anyone who performs work for the business including employees, contractors, sub contractors, trainees, apprentices and volunteers.

It follows, that any member of any of the groups named above, if they reasonably believe they have been bullied at work, can by-pass the employer and head straight to the Fair Work Commission ("FWC") to have their bullying complaint dealt with.

For a bullying complaint to be dealt with by the FWC, the conduct or behaviour complained of must be:

- Repeated conduct or behaviour (persistent behaviour that can be a range of behaviours over time); and
- Unreasonable conduct or behaviour (behaviour that a reasonable person, having regard for the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening); and
- Conduct or behaviour that creates a risk to health and safety.

The Exception – Reasonable Management Action

However, reasonable management action carried out in a reasonable manner will not constitute bullying for the purposes of the FW Act. “Reasonable management action” although not defined may include, amongst other things:

- setting reasonable performance goals, standards and deadlines;
- allocating and rostering reasonable working hours;
- deciding not to select a worker for promotion where a reasonable process is followed and documented;
- informing a worker about unsatisfactory work performance in accordance with policy and procedure; and
- informing a worker about inappropriate behaviour in an objective and confidential way.

In our view, a complainant who lodges a claim with the FWC is likely to be approaching his/her situation quite subjectively. Accordingly, we envisage that some bullying complaints will be lodged in the FWC for legitimate employer conduct such as performance management and/or disciplinary action. Consequently, employers will need to be diligent with their processes and treat each case with objectivity.

FWC Powers

Once lodged with the FWC, the FWC must start to deal with a bullying application within 14 days of it being made. There are a variety of ways in which the FWC may handle bullying complaints including requiring a person to attend before the FWC, by inviting oral or written submissions, by requiring a person to provide documents or records, or it may decide to conduct a conference or a hearing.
As such, employers will need to be ready to respond to the FWC in a timely fashion and comply with the FWC’s processes.

Where the FWC is satisfied that the worker is being bullied and that there is a risk the worker will continue to be bullied, the FWC has the power to make any orders it deems appropriate. Under the new anti-bullying legislation, the FWC’s powers do not extend to reinstatement, awarding of compensation or the imposition of a pecuniary penalty. The FWC may also refer a matter to a work health and safety (WHS) regulator where it considers this necessary and appropriate.

**DRAFT CODE OF PRACTICE FOR WORKPLACE BULLYING**

Safe Work Australia has developed a proposed model Code of Practice in relation to preventing and responding to workplace bullying which, once approved under the WHS Act, will provide a comprehensive guide in relation to obligations of employers (and employees) and required standards for the management of bullying under the WHS legislation. Once approved, the Code will have a special status and will be automatically admissible in court proceedings and may be relied upon by a court in determining what is reasonably practicable in relation to bullying management practices in a workplace.

Under the WHS Act, as a person conducting a business or undertaking, employers have a primary duty of care to ensure so far as is reasonably practicable, that workers are not exposed to health and safety risks in the workplace. That is, an employer has a duty to maintain a workplace that is without risks to health and safety which includes bullying behaviour.

The draft Code sets out in some detail an employer’s obligations in relation to what is required to manage the risk of workplace bullying. The draft Code can be divided into 3 separate categories:

1. **Preventing Workplace Bullying**

   The best way to manage workplace bullying is to prevent it in the first place. The draft Code provides the following best practice approach in preventing workplace bullying:

   - Identify a risk or hazard of workplace bullying through:
     - talking to workers;
     - monitoring things such as absenteeism and its causes;
     - seeking feedback when workers leave the business;
     - seeking feedback from managers and supervisors about bullying hazards; and
     - monitoring hazard reports of workplace bullying, workers compensation claims and issues raised by health and safety representatives.

   - Control the risk or hazard by introducing workplace management and control measures including:
     - developing a code of conduct or bullying policy in consultation with workers which outlines expectations of all levels of staff, processes for reporting bullying, consequences of non-compliance with the policy and a process for managing vexatious claims;
     - developing procedures to respond to reports of bullying;
     - developing recruitment and performance management procedures and ensuring they are implemented in a reasonable manner;
     - empowering supervisors and managers to respond effectively to instances of bullying;
     - providing training to all levels of staff in relation to policy and procedure and each individual’s responsibilities under the policy.

   - Monitor and review control measures once implemented to ensure they are working by:
     - Seeking information from workers, managers, supervisors etc through confidential surveys, exit interviews and records of sick leave;
2. Responding to Workplace Bullying

The risk of bullying will be present wherever you have a group of people working together and can be difficult to stamp out completely despite efforts to prevent it occurring. Where a bullying complaint is made, the draft Code details the effectiveness of early intervention either by the individual themselves, a manager or supervisor or a health and safety representative. Where an issue cannot be resolved between the parties, the draft Code identifies key principles for employers to adopt when responding to a claim, including the following:

- acting promptly;
- treating all matters seriously;
- maintaining confidentiality;
- remaining neutral;
- supporting all parties;
- not victimising the complainant, the accused or any witnesses;
- communicating about process and outcomes; and
- keeping records.

The draft Code also details the WHS Act and its encouragement that employers have an issue resolution procedure in place where an issue cannot be resolved between the parties. That way both parties are aware of the procedure that will be implemented in an effort to resolve the issue.

If/when the issue is resolved, the draft Code states that the resolution should be set out in an agreement where a party requests it. All parties should be satisfied that the agreement accurately reflects the issue and the resolution reached and each party should be given a copy of the agreement.

After the issue is resolved, the employer should conduct a review and follow up of the issue to ensure the wellbeing of the parties involved.

3. Investigations into Bullying Complaints

Where an issue has not been resolved through the above means or an allegation indicates a serious risk to health and safety, the draft Code states that an investigation may be necessary.

Once it is established that an investigation will take place, the draft Code states that a neutral and unbiased person should undertake the investigation. The person investigating the complaint should then inform the parties about the investigation process itself including:

- how the parties will be informed through the process;
- expected timeframes for the investigation; and
- what support mechanisms are in place for each party.

Once the investigation is complete a report should be provided to the employer (not the parties) who can then use the findings of the report to make a decision. If substantiated, appropriate action should be taken in accordance with relevant policy and parties should be given information arising from the investigation relevant to them.

Once the investigation and any outcomes from the investigation are complete, the draft Code states that the employer should conduct a follow up review to ensure the wellbeing of both parties.
Implications for Employers and Business

Once approved, the Code will be an important document for employers and will assist with compliance with obligations under the WHS Act and the new provisions in the FW Act.

The practical implications of the creation of a statutory right under the FW Act and the introduction of the Code are that businesses must:

1. ensure that their workplaces are free from bullying behaviour;
2. have relevant and up to date policies that take into account matters contained within the Code including those set out above;
3. implement processes and systems that encourage open communication and reporting lines in relation to bullying complaints;
4. be alert to and act swiftly in response to any sign of a potential bullying hazard to minimise the impact of claims being brought to the FWC or under the WHS legislation.

By abiding by the Code, businesses can ensure that bullying is not a common occurrence in their workplace and if/when it does occur, the business can demonstrate that all reasonable practicable steps were taken to prevent it.

WHAT CAN CWL DO TO ASSIST YOUR BUSINESS IN BEING LEGALLY COMPLIANT?

CWL can assist you with:

- Providing your business with a full copy of the draft Code and the final Code once it is approved;
- Providing you with further detailed advice in relation to the draft Code;
- Conducting a review of your current bullying policy to ensure compliance against the draft Code;
- Drafting a new bullying policy that is Code compliant;
- Providing tailored training to all levels of staff in relation to workplace bullying and the Code;
- Undertaking independent investigations and reporting on behalf of the business when bullying complaints arise;
- Conducting an audit of your business’ current bullying policy against WHS legislation.

For more information or advice in relation to this article, please contact CWL on 02 9222 2065.