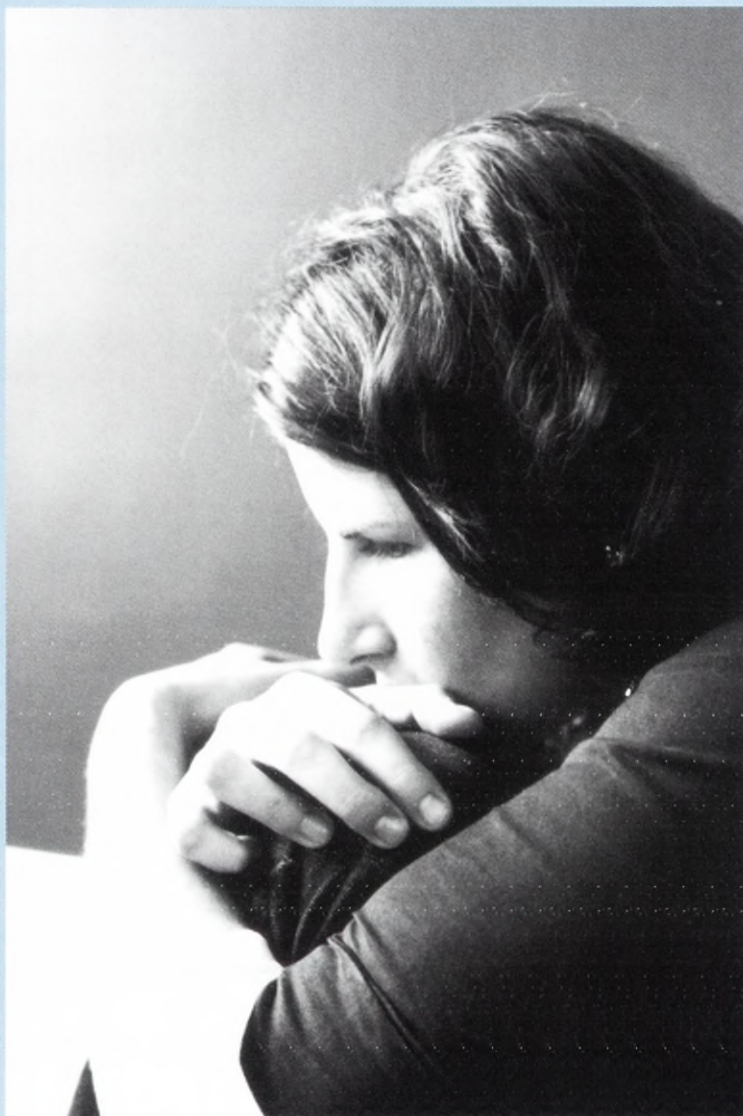


Dignity at work

Bullying in the workplace is prevalent both in Australia and overseas, so much so that 16 October 2003 is Anti-Bullying Day in the United Kingdom when people are encouraged to wear a silver ribbon to raise public awareness.

The Manufacturers, Science and Finance Union say the purpose of the day is: 'To raise awareness of bullying and its terrible consequences... We want to encourage everyone to express their displeasure and abhorrence of bullying and we want to encourage companies to adopt anti-bullying (or dignity at work) policies.'



The face of the workplace has changed dramatically over the past 20 to 30 years with many women entering employment through economic necessity and people working to a greater age. Workplaces tend to be open plan with workers in close proximity to each other during the working day. It is therefore vital to maintain a harmonious atmosphere and to deal with any instances of bullying before it interferes with the wellbeing of employees.

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The Mental Health Association of New South Wales describes bullying as 'bossing people around, intimidating, threatening or keeping them under pressure'. It identifies bullying behaviour as comprising one or more of the following:

- Unreasonable demands and impossible targets.
- Restrictive and petty work rules.
- Constant intrusive surveillance or monitoring.
- Being given no say in how the job is done.
- Interference with personal belongings or sabotage of work.
- Shouting or using abusive language.

- Open or implied threat of the sack or demotion.
- Oppressive unhappy work environment.
- Compulsory overtime, unfair rostering or allocation of work.
- Being made to feel afraid to speak up about conditions, behaviours or health and safety.
- Being required to perform tasks without adequate training, resulting in criticism of the task performed.
- Being forced to stay back to finish work or being given additional tasks.

Most people can identify a workplace bully and give a graphic account ►

of personality traits. They will generally say that a bully is a manipulative person who gains a sense of self-importance by putting other people down.

The bully is often a person with low self-esteem. They use bullying techniques to protect themselves from being exposed as a person who is neither competent nor productive. They often target competent and productive members who they view as a threat. Bullies are often extremely stressed and overworked people with little or no insight into their behaviour. Bullies are a workplace hazard and need to be treated as such.

The effect of bullying behaviour on the victim is progressive. A victim may become uncomfortable at work and start to feel undervalued through unnecessary criticism. They may think the bully's behaviour is temporary and will pass with time. However, more often than not things do not change and the bully continues to exhibit bullying behaviour until the victim dreads coming to work, and at worst lives in fear of losing their job.

“Bullies are a workplace hazard and need to be treated as such.”



The victim starts to suffer symptoms such as headaches, sleep problems, tearfulness, trouble concentrating, loss of confidence, which can lead to the more severe mental illnesses of anxiety and depression, possibly resulting in suicidal thoughts. Physical symptoms such as skin rashes, gastrointestinal upsets, nausea, heart disease and stress-related illness could also occur.

The victim is likely to take one of the following courses of action:

- Make a complaint to management, which may result in action being taken under the relevant occupational health and safety legislation.
- Take no action to protect themselves because of feelings of isolation, depression and vulnerability. As a result, they will go on sick leave and a diagnosis of depression and anxiety is likely.
- Resign and move to another job.

Once a complaint is made to management, the bully is likely to feel they have to protect themselves and will retaliate by ridiculing the complainant. The bully often reacts by accusing the complainant of being unable to achieve their set work tasks. The bully will rarely acknowledge their shocking and unacceptable behaviour. Management will often have difficulties finding a resolution.

CURRENT REMEDIES

Regrettably, there is no specific remedy for bullying either through statute or at common law, and there is a need for legislation requiring employers to put in place policies to prevent bullying and procedures to deal with bullying in the event that it occurs.

At the federal level, legislation is in place to protect various groups in the workplace, but the laws do not specifically address bullying. Such legislation includes the *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Race Discrimination Act 1975* (Cth).

In New South Wales, the *Anti-Discrimination Act 1977* (NSW) was passed to protect people on the grounds

of race,¹ sex,² marital status,³ sexual preference,⁴ carers' duties,⁵ disability,⁶ harassment⁶ and age discrimination.⁷ This Act also seeks to protect and provide redress for a person who is victimised for bringing proceedings under the Act.⁸

While there are many judicial decisions that reflect the success of the above-mentioned legislation, there is no specific legislation that permits the courts to deal with bullying.⁹

Currently, the most appropriate legislation for dealing with bullying is the *Occupational Health and Safety Act 2000* (NSW) which requires all employers to provide employees with a safe place of work and where failure to do so results in a breach of their duty. The Act imposes a strict duty on employers to ensure the health, safety and welfare of their employees. It contains onerous provisions when a breach is proved, ranging from criminal sanctions to substantial fines. The Act requires that employees also take responsibility for providing a safe system of work, a breach of which also results in a substantial fine.¹⁰

While this legislation is highly commendable, it does not provide policies and procedures for reporting and dealing with bullying, nor does it provide compensation to a victim.

The *Workers Compensation Act 1987* (NSW) provides for weekly payments to be made to a claimant who experiences work-related stress, but only if they are diagnosed with a medically recognised condition. Stress alone does not attract compensation.¹¹

At common law an employer has a non-delegable duty of care to an employee¹² to provide a safe system of work and to protect an employee from reasonably foreseeable risks.¹³ If a person suffers emotional distress as a result of bullying it must be classified as a form of mental illness.¹⁴ However, the victim is no longer required to suffer sudden shock in order to mount a claim.¹⁵

Two cases, one in Australia and one in the United Kingdom, provide recent examples of claims made for bullying in the workplace and demonstrate judicial recognition of this problem.

In *State of NSW v Seedsman*,¹⁶ Seedsman, a police officer, was responsible for the investigation of crimes committed against children. During her employment she was subjected to sexual harassment at work. A senior police officer, with whom she did not get on, 'set her up' by placing firearms and ammunition in her locker. As a result, she suffered severe stress and claimed for post-traumatic stress disorder.

Goldring DCJ gave a measured and detailed judgment in finding that the New South Wales Police Service was responsible for her developing a foreseeable mental injury because of its failure to provide her with a safe system of work. The State of NSW appealed.

The NSW Court of Appeal found that an employment relationship created a non-delegable duty of care. In dismissing the appeal the court referred to *Neill v NSW Fresh Food & Ice Co Pty Ltd*¹⁷ where it was stated that: 'The plaintiff has to prove that if the defendant had

taken the obviating measures relied upon by the plaintiff in his case then there was a likelihood that they would have obviated the "unnecessary" risk of an anxiety state. A risk is "unnecessary" if by the adoption of some reasonable form of precaution or safeguard it could be eliminated or minimised.'

Spigelman CJ agreed with Goldring DCJ that it was the employer's duty to provide a safe system of work, which included a duty to take reasonable precautions against the risk of mental or psychiatric injury as well as that of bodily injury.¹⁸

In his judgment, Meagher JA stated that *Donoghue v Stevenson*¹⁹ established that 'where a reasonable employer knows that there is a real possibility of injury to his employees, he must take due care to guard against such injury'.

The United Kingdom case of *Waters v Commissioner of Police for the Metropolis*²⁰ dealt with a similar situation. The House of Lords gave consideration to a new tort

of humiliation and a claim in negligence for bullying in the workplace.

The appellant, Ms Waters, was a police officer. She was raped and buggered by an off-duty policeman. She complained to her superiors, but nothing was done. The statement of claim listed 89 allegations of hostile treatment, ranging from ostracism to harassment and victimisation and attempts to get her to resign from the police force. Her statement of claim was struck out in the lower court for want of a cause of action.

The principal claim was negligence causing psychiatric injury on the part of the Police Commissioner for his failure to exercise his duty of care to look after an employee. Lord Slynn of Hadley stated:

'Generically many of the acts alleged can be seen as a form of bullying. The employer, or those to whom he delegated the responsibilities for running his organisation, should have taken steps to stop it, to protect the employee

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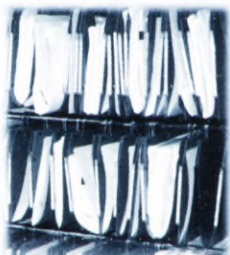
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from it. They failed to do so.'

His Lordship stated that the appellant had suffered illness as a result of the cumulative effect of the treatment to which she was exposed. The question to be addressed was whether it was fair and just and reasonable to recognise a duty of care. He stated that the law of negligence develops incrementally so that in this instance she could succeed in negligence. He gave consideration to the proposition of a new tort of intimidation, though ultimately found that it was a difficult tort to establish.

Lord Hutton considered that the facts alleged were indeed grave. He found that a person employed under a contract of employment could have a valid cause of action in negligence against an employer if the employer failed to protect the employee against victimisation and harassment, which led to physical or psychiatric injury. Such a claim arose out of the contract of employment and under the common law principles of negligence. The appeal was allowed and the claim sent back to the lower court for rehearing.



SUGGESTED REMEDY

As neither common law nor current legislation provide a specific remedy for the victim, legislation addressing bullying should be passed so that workers are certain of their rights in the workplace, bullies aware of the type of behaviour that will not be tolerated, and managers knowledgeable about how to deal with such problems when they arise.

In the United Kingdom in 1997, the Manufacturing, Science and Finance Union took a positive step in this direction by seeking to introduce the Dignity at Work Bill. Lord Monkswell steered the Bill through the House of Lords and attempted to introduce it into the House of Commons. However, John Major's conservative government blocked it and following a general election, which returned a Labour government, the Bill was never resurrected.

It was a much-needed attempt by a union to create a code of behaviour to rectify workplace practices that can have devastating effects upon the mental and physical health of employees. This is the type of legislation that should be introduced into Australia. The Bill provided:

1. Right to dignity at work
 - (1) Every employee shall have a right to dignity at work and if the terms of the contract under which a person is employed do not include that right they shall be deemed to include it.
 - (2) Subject to section five of this Act, an employer commits a breach of the right to dignity at work of an employee if that employee suffers during his employment with the employer harassment or bullying or any act, omission or conduct which causes him to be alarmed or distressed including but not limited to any of the following:
 - (a) Behaviour on more than one occasion, which is offensive, abusive, malicious, insulting or intimidating.
 - (b) Unjustified criticism on more than one occasion.
 - (c) Punishment imposed without reasonable justification.
 - (d) Changes in the duties or responsibilities of the employee to the employee's detriment without reasonable justification.

2. Victimisation

An employer commits a breach of the right to dignity at work of an employee if s/he treats that employee less favourably than s/he would treat other persons and does so by reason that the employee has:

- (a) Brought proceedings under this Act against the employer or any other person.
- (b) Given evidence or information in connection with proceedings brought by any person under

this Act against the employer or any other person.

- (c) Otherwise done anything under or by reference to this Act in relation to the employer or any other person.
- (d) Alleged that the employer or any other person has committed an act which (whether or not the allegation so states) would give rise to a claim under this Act, or by reason that the employer knows or suspects that the employee has done or intends to do any of those things.

If legislation of this type were passed in New South Wales it would bring about the writing of dignity at work policies, which would require all employees and employers to actively outlaw bullying in the workplace. To encompass a right to dignity at work in the *Occupational Health and Safety Act 2000* (NSW) would result in a complete package of measures designed to make the workplace a much happier environment. The common law should develop to provide damages at common law to those who are badly affected by a bully's behaviour and cannot continue to work. People are entitled to the basic human right of the right to work in an atmosphere where they are afforded a non-threatening environment. **PL**

Endnotes: 1 s 8. 2 ss 24(1), 25. 3 ss 39-40. 4 s 49S-49T, 49V. 5 s 49A-49D. 6 s 22. 7 s 49ZYA-49ZYB. 8 s 50. 9 *Hickey v Hunt & Hunt* (1998) HREOC; *Bree v Lupervo Pty Ltd & Ors* (2003) NSWADT 47; *Katherine Williams v Colin Robinson & The Commonwealth of Australia (Australian Defence Force)* (2000) HREOC; *Coleman v Bentley* (2002) NSWADT 87; *X v Commonwealth* (1999) HCA 63; *Stamatov v Department of Defence* (1998) HREOC. 10 s 20(1) An employee must, while at work, take reasonable care for the health and safety of people who are at the employee's place of work and who may be affected by the employee's acts or omissions at work; s 20(2) An employee must, while at work, cooperate with his or her employer or other person so far as is necessary to enable compliance with any requirement under this Act or the regulations that are imposed in the interests of health, safety and welfare on the employer or any other persons. 11 s 11A(7). 12 *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1. 13 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383. 14 *Annetts v Australian Stations Pty Ltd* (2002) HCA 35. 15 *Ibid.* 16 [2000] NSWCA 119. 17 (1963) 108 CLR 362 at 370. 18 *Supra* 16 at para 18. 19 [1932] AC 562 at para 172. 20 [2000] UKHL 50.