



## Occupational Health and Safety in Victoria

- **Safe Working Environment**
  - **Workplace Bullying**

### Introduction

In Victoria, occupational health and safety in the workplace is principally regulated by the Occupational Health and Safety Act 2004 (Vic) ("the Act") and the Occupational Health and Safety Regulations 2007 (Vic).

The Act contains the key principles, duties and rights in relation to occupational health and safety. The general nature of the duties imposed by the Act means that they cover a very wide variety of circumstances.

The prevention arm of the Victorian WorkCover Authority, WorkSafe Victoria, is the regulatory agency which administers and enforces occupational health and safety legislation in Victorian workplaces. WorkSafe Victoria may prosecute organisations and individuals that breach the Act and the duties contained therein.

### The Duties

The principal duty imposed on employers under the Act is to, so far as reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

'Employee' is defined to include independent contractors engaged by employers as well as the employees of any such contractors.

The definition of 'health' in the Act includes psychological health.

In discharging their principal duty towards employees, employers must be able to demonstrate that they have maintained the workplace in a safe manner; provided systems of work that are safe and without health risks; ensured the safe use, handling, storage and transport of plant substances; and provided adequate facilities, information, instruction and training to enable employees to carry out tasks safely.

Further, employers must, so far as reasonably practicable, monitor the health of employees, and the conditions of their workplace, and keep records about employee health and safety.

The obligations and duties of employers encompass the need to have effective systems in place to eliminate, and deal with, workplace bullying and violence.

The Court of Appeal described the content of duties under the Act in *DPP v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181 at [48]-[49] as follows:

... the formal adoption of a satisfactory safety management system will not have the beneficial effects intended unless it is accompanied by the employer's active implementation of the system in the workplace. The employer's duty will not be discharged by simply creating a safe system of work. The obligation requires the employer to ensure "that procedures and instructions are actively and positively complied with by employees". Not only must employees be appropriately trained but there must be ongoing supervision and compliance audits, to ensure that the system is being applied in practice. Employee compliance with the safe system of work must be constantly monitored by the employer.

[49] An employer should recognise that it is common experience that human error will be encountered in the workplace. Error can range from inadvertence, inattention or haste through foolish disregard of personal safety to deliberate non-compliance with the prescribed safe system of work. In *R v Australian Char Pty Ltd* and *DPP v Amcor Packaging Pty Ltd*, this Court has referred with approval to the observations of Harper, J in *Holmes v R.E. Spence & Co Pty Ltd* that an employer's responsibility for the safety of its workers will not be discharged unless the employer takes "an active imaginative and flexible approach to potential dangers in the knowledge that human frailty is an ever-present reality".

Under the Act an employee has a duty to take reasonable care for his or her own health and safety and for the health and safety of anyone else who may be affected by his or her acts or omissions at the workplace, and to cooperate with his or her employer with respect to any action taken by the employer to comply with any requirements imposed by the Act.

### **Workplace Bullying**

Recent cases in Victoria clearly illustrate that workplace bullying can lead to prosecutions against employers, company officers and/or employees for conduct falling below the standard required and alleged breaches of the duties imposed under the Act.

While bullying currently has no legal definition, WorkSafe Victoria and other regulatory organisations have defined workplace bullying as "repeated unreasonable behaviour directed towards an employee or group of employees that creates a risk to health and safety".

A broad range of behaviours can be bullying, and these behaviours can be direct or indirect.

Examples of direct forms of bullying include:

- verbal abuse.
- putting someone down.
- spreading rumours or innuendo about someone.
- interfering with someone's personal property or work equipment.

Examples of indirect bullying include:

- unjustified criticism or complaints.
- deliberately excluding someone from workplace activities.
- deliberately denying access to information or other resources.
- withholding information that is vital for effective work performance.
- setting tasks that are unreasonably above or below a worker's ability.
- deliberately changing work arrangements, such as rosters and leave, to inconvenience a particular worker or workers.
- setting timelines that are very difficult to achieve.
- excessive scrutiny at work.

Those employers, company officers and/or employees who are prosecuted may be liable for significant penalties and costs orders, as well as the resultant adverse publicity.

In addition employers can be liable to pay compensation to victims of bullying.

Recently the Melbourne Magistrates' Court imposed fines totalling \$335,000.00 in relation to bullying conduct which was in breach of the Act.

The case focused on a café in Hawthorn and the bullying of a teenage waitress who allegedly committed suicide as a result of the harassment. The matter received unprecedented media attention for a bullying prosecution in Victoria.

Charges were brought against three individual employees, the company which owned the café, and also the sole director of the company.

An earlier coronial inquest into the death of the teenage waitress had implicated the individual employees in the physical and psychological bullying which occurred at the café. The defendants pleaded guilty to the charges.

At the Plea Hearing the Court heard that between 1 June 2005 and 20 September 2006 the teenage waitress was subjected to a range of repeated direct and indirect physical and non-physical bullying behaviour by the individual employees.

The bullying acts allegedly included verbal taunts, criticisms, name-calling, and physical interference.

In sentencing the defendants, the Magistrate described the atmosphere at the café as almost "poisonous", and found that the café was aware and had "tacitly approved" of the "persistent and vicious" bullying of the teenage waitress.

Also relevant was the fact that the employer provided no induction program/system for new employees and had no policies or procedures in place to educate employees in respect of appropriate workplace behaviour and workplace bullying.

The company was fined a total of \$220,000.00 for failing to provide and maintain a safe workplace and for failing to properly train and supervise employees. The company's director was fined a total of \$30,000.00 and convicted of the same offences.

The three individual employees were fined \$45,000.00, \$30,000.00 and \$10,000.00 for failing to take care for the health and safety of a fellow employee.

In addition to the fines, each of the defendants received costs orders of between \$1,500.00 and \$2,500.00.

## What should employers do?

It is of the utmost importance that employers can identify and manage the risk factors associated with workplace bullying, and that a direct approach is taken to their investigation in an effort to discharge the duties established under the Act.

Employers need to take a preventative approach to bullying in the workplace by indentifying bullying risks; assessing the likelihood of those risks causing injury or illness; implementing risk control measures to eliminate the risks or, where that is not reasonably practicable, reducing risk so far as is reasonably practicable; and reviewing/improving the effectiveness of risk control measures over time.

Consultation (so far as is reasonably practicable) with health and safety representatives and health and safety committees and workers is also an essential part of the risk management approach to the prevention of bullying at work.

The best way for employers to deal with workplace bullying is to take steps to prevent its occurrence before it becomes a health and safety risk. However, response by employers in instances where bullying has already occurred is just as important.

Employers must ensure that they have an adequate bullying and workplace violence policy that clearly sets out the responsibilities of employees within the workplace and the methods the employer will utilise to address cases of workplace bullying.

In particular, employers need to ensure that employees are aware of their duty to take reasonable care for the health and safety of other employees in the workplace and to co-operate with his or employer with respect to any action taken by the employer to comply with any requirements imposed by the Act.

Nevett Ford has represented parties in occupational health and safety prosecutions that have gained significant media attention and has an expert understanding of the conduct of such prosecutions.

Nevett Ford regularly assists small and large businesses to understand their obligations/duties under occupation health and safety laws, and provides expert advice about the implementation of appropriate workplace policies and procedures.

Nevett Ford has an Employment Law & Workplace Relations work group headed by Philip Brewin, an accredited LIV Workplace Relations Specialist. For further advice or assistance contact Angus Galbraith, the article's author, or other members of Nevett Ford's Employment Law & Workplace Relations work group.

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