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Leanne has experience in advising clients on all aspects of employment law. Leanne has advised both businesses and individuals on:

- employment issues such as employment contracts,
- employee entitlements,
- termination,
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- sexual harassment and discrimination,
- WorkCover and
- employment policies and procedures.

Workplace bullying

Workplace bullying can result in criminal liability including imprisonment, after changes to the Victorian *Crimes Act 1958* came into effect on 7 June 2011.

In the past week, cyber-bullying in schools has also made the news, with Attorney-General Robert Clark confirming that the Crimes Act provisions apply in schools (reported in *The Age*, 21 August 2011). This means that parents, teachers and students (aged 10 or over) could face criminal sanctions in cases of serious bullying.

The new Crimes Act provisions are likely to be used only in the most serious cases. However, penalties may also be imposed under the *Occupational Health and Safety Act 2004*. In addition, claims for compensation as a result of bullying conduct may be made under WorkCover legislation, the *Fair Work Act 2009* and equal opportunity legislation.

In this edition of *Employment Alert*, we outline the legal consequences of bullying and steps employers should take in order to prevent and deal with bullying behaviour.

What is bullying?

Workplace bullying is defined by WorkSafe Victoria as "repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety".

Bullying can be direct (such as verbal abuse, interfering with work equipment or spreading rumours) or indirect (such as deliberate exclusion, setting unreasonable tasks or timelines or withholding vital information).

However, WorkSafe states that "reasonable management actions carried out in a fair way are not bullying." (Reference - WorkSafe Victoria, 'Preventing and responding to bullying at work', June 2009).

Crimes Act—Brodie's law

The Crimes Act amendments have been informally dubbed 'Brodie's law' in honour of 19 year old Brodie Panlock, who took her own life in September 2006, after being subjected to persistent and vicious bullying at the café where she worked as a waitress.

The company she worked for was fined \$220,000, the company director fined \$30,000 and three employees fined a total of \$85,000. However, the Victorian Attorney-General stated that the tragedy of Brodie's death "was compounded by the fact that none of those responsible for the bullying was charged with a serious criminal offence under the Crimes Act" (see the Second Reading Speech).

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The crime of 'stalking' has now been broadened so that it expressly covers verbal abuse and threats, and the intention to cause a person to harm themselves. The maximum penalty for stalking is 10 years' imprisonment.

In some circumstances, employers could be liable under the Crimes Act, if they become aware of employees engaging in serious bullying behaviour and fail to intervene to stop it, or if they conceal the offence in return for a benefit.

Occupational Health and Safety Act

Under the *Occupational Health and Safety Act 2004*, employers and those who manage or control workplaces have a number of duties – to employees, to contractors and to a range of 'other persons'.

The central duty of an employer is to "provide and maintain for employees of the employer a working environment that is safe and without risks to health" (so far as is reasonably practicable). "Health" is defined to include "psychological health".

WorkSafe Victoria may investigate bullying allegations made by employees. This may result in a visit from a WorkSafe inspector, who may require the employer to produce documents such as workplace policies and procedures and records of training on bullying.

WorkSafe may issue an improvement notice, setting a deadline for the employer to take specific action to address the problems. If WorkSafe considers there has been a breach of the OHS Act, it may prosecute the employer.

On 1 January 2012, uniform health and safety laws will come into effect Australia-wide. Obligations will apply to a 'person conducting a business or undertaking' ('PCBU') rather than an 'employer'. 'Officers' of PCBUs will have particular duties, including having current knowledge of work health and safety matters. It is more important than ever for businesses and other organisations to be aware of their health and safety obligations.

Compensation claims

Workers who are adversely affected by workplace bullying may be entitled to lodge one or more of the following types of claim:

- Workers' compensation claim.
- Equal opportunity claim, where the bullying is linked with discrimination on the basis of an attribute such as the worker's race, disability, sex or religion.
- Unfair dismissal claim under the *Fair Work Act 2009*, where the employee is forced to resign, because of the employer's failure to provide a safe workplace.
- Adverse action claim under the *Fair Work Act 2009* – for example, where the employee complains about bullying and is victimised as a result, or where the employee makes enquiries about their employment and is bullied, or otherwise harassed or victimised, as a result.

A former Pacific Brands senior executive has lodged a claim in the Federal Court, alleging bullying and discrimination, and seeking \$9 million plus unspecified exemplary damages.

Although most claims do not involve such large amounts of money, any compensation claim involves potential expenses for the employer, whether in the form of increased insurance premiums, settlement payments, legal costs or lost productivity in the workplace.

Additionally, such claims can also result in adverse publicity and considerable reputational damage for the employer.

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Steps employers should take to prevent and manage bullying

In order to meet obligations under the OHS Act and avoid compensation claims arising from bullying, employers should ensure that:

- Appropriate Policies and Procedures are in place;
- All staff are aware of such Policies and Procedures (including casual and temporary staff);
- The work environment is managed so as to address risk factors (such as excessive work demands or the presence of new, young or otherwise vulnerable workers);
- Supervisors are equipped to recognise and handle bullying situations;
- Complaints are handled appropriately, with external assistance if required.

When handling bullying complaints, employers need to respond promptly, investigate thoroughly and act impartially. It can be a difficult balancing act to protect the interests of both the 'victim' and the 'accused'.

In a recent unfair dismissal claim, an alleged bully successfully argued that he had been unfairly dismissed by Oakey Abattoir, because the employer had insufficient evidence of his involvement in the bullying. Fair Work Australia ordered reinstatement and compensation.

Seeking assistance

Businesses and employers have onerous obligations in relation to the physical and psychological health and safety of workers and others affected by their operations.

Moores Legal can assist in the preparation of appropriate Policies and Procedures, advise on the management of bullying allegations and assist employers to navigate through this complex area.

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The Moores Legal Workplace Relations team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property & Construction Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

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