



Industrial Relations Commission
of New South Wales

Sexual Harassment and Bullying Jurisdictions

10 November 2025

Commissioner Janine Webster
Commissioner Chris Muir

Overview of bullying and sexual harassment jurisdictions.... a 'one-stop shop'

	Bullying	Sexual harassment
Coverage	Public sector, local government and unincorporated entities	Public sector & local government
Remedies	Stop bullying order include: up to \$100,000 damages, prohibition on continuing or repeating bullying	Sexual harassment order include: up to \$100,000 damages, prohibition on continuing or repeating sexual harassment
Direct prohibition	No	Yes, civil penalty - \$18,870 for individual or otherwise \$93,900 for breach of the direct prohibition
Civil penalty for Order contravention	\$18,870 for individual or otherwise \$93,900	\$18,870 for individual or otherwise \$93,900



Prohibition of Sexual Harassment at work



The Prohibition on sexual harassment

144N Prohibition on sexual harassment in connection with work

A person must not sexually harass another person (the protected person) in connection with the protected person being—

- (a) an employee, or
- (b) a prospective employee, or
- (c) a person conducting a business or undertaking.

Maximum civil penalty—

- (a) for an individual—\$18,870, or
- (b) otherwise—\$93,900.



Who does the sexual harassment prohibition apply to?



An “employee”

- ✓ A “worker” under the *Work Health and Safety Act 2011* (NSW) ...
- ✗ ... who is **NOT** a national system employee.



A prospective employee



A person conducting a business or undertaking



Who does a sexual harassment prohibition apply to? (cont.)



**Two-year time
limit**



**Multiple actions
under anti-
discrimination law
not permitted**



**Concurrent
WH&S claims
permitted**



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Who has standing to bring a sexual harassment matter?



An aggrieved
person



An industrial
organisation

(including for more
than one aggrieved
persons)



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What must be established to make a valid claim of Sexual Harassment?

- Section 144L provides Sexual harassment has the same meaning as in the *Anti-Discrimination Act 1977*, section 22A(1):
 - A person sexually harasses another person if—
 - the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or
 - the person engages in other unwelcome conduct of a sexual nature in relation to the other person, and
 - the conduct, advance or request occurs in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.



What must be established to make a valid claim of Sexual Harassment (cont.)?

Circumstances to be considered (Section 144L (2)):

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour or national or ethnic origin of the other person,
- (b) *the relationship between the other person and the person who made the advance or request or who engaged in the conduct,*
- (c) a disability, if any, of the other person,
- (d) another relevant circumstance.



Points of Proof for Sexual Harassment

(1) One of the three forms of conduct identified in s 22A (1) occurred, namely, a person:

- made a sexual advance; and/or
- a request for sexual favours; and/or
- engaged in conduct of a sexual nature in relation to the person harassed.

(2) If such conduct is found to have occurred, it was unwelcome.

(3) The unwelcome conduct occurred in circumstances in which a reasonable person would have anticipated the possibility that the complainant would be “offended, humiliated or intimidated” by it.



Vicarious Liability

144O Vicarious liability

(1) A person contravenes section 144N if—

- (a) an employee or agent of the person does an act that contravenes section 144N, and
- (b) the act is in connection with the employment of the employee or the duties of the agent as an agent.

(2) For a person who has contravened section 144N by operation of this section, this Act applies in relation to the person as if the person had also done the act.

(3) This section does not apply if the person proves that the person took all reasonable steps to prevent the employee or agent from doing acts that would contravene section 144N.



Vicarious Liability – reasonable steps

***Von Schoeler v Boral Timber* [2020] FCAFC 13:**

- “All reasonable steps” does not mean every conceivable or necessary step to prevent the person from doing the unlawful act(s).
- It means “*all steps* that are reasonable to take”.
- What is reasonable depends on all the circumstances, including an organisation’s size, the nature of the workforce, conditions under which work is carried out and any history of sexual harassment.



Remedy

- The Commission *may* make any order the Commission considers appropriate.
- This *may* include:
 - (a) damages to the employee as compensation (max \$100,000),
 - (b) a prohibition on continuing or repeating the sexual harassment,
 - (c) the performance of reasonable actions or course of conduct to redress loss or damage,
 - (d) an apology or retraction,
 - (e) the introduction of a program or policy to eliminate sexual harassment.
- The order may apply to either the individual who engaged in the sexual harassment or a person vicariously liable under the IR Act.



Relevant factors in determining remedy

The Commission *must* take into account:

- (a) other grievance or dispute procedures available to the aggrieved person that the Commission is aware of,
- (b) outcomes, whether interim or final, the Commission is aware of from other—
 - (i) investigations into the conduct the subject of the application, or
 - (ii) grievance or dispute procedures carried out in response to the conduct the subject of the application,
- (c) other matters the Commission considers relevant.



Remedy

- General law principle in damages, “Put the Applicant back into the position they would have been had the wrong not occurred”: *Haines v Bendall* (1991) 172 CLR 60 at 63.
- Damages can include economic, and non-economic losses.
- Causal connection between employer/principal conduct and losses needs to be established: *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334.
- It is essential that there is evidence to support a claim of damages: *Hurst v Queensland (No 2)* [2006] FCAFC 151 at [26].



When can an order for civil penalties be imposed?

- Section 144N is a civil penalty provision.
- An application for a civil penalty order for an alleged contravention of the civil penalty provision under section 144N ***must not be made unless*** a sexual harassment order has been made for the same or substantially the same conduct constituting the alleged contravention.
- There may be more than one contravention arising out of an application.
- Additionally, section 144U provides that the Industrial Court may impose a civil penalty if a sexual harassment order is contravened.
- Maximum penalty for either civil penalty order is \$18,870 for an individual, otherwise \$93,900.



PN 35 – Sexual harassment applications

- PN 35 applies to sexual harassment applications, but not Civil Penalty proceedings.
- Encourages workplace resolution, *if safe*.
- Commission may determine its own procedure: r 4.9



Practice Note 35 – Service & Responses (Rule 3.5)

- The *Registrar* must serve the application on:
 - any person the application identifies as having engaged in sexual harassment; and
 - the employer or principal of any person the application identifies as having engaged in sexual harassment: Rule 3.5.
- Respondents *must* file and serve a response within 7 days.
- Commission can join or remove respondents.





How will sexual harassment claims be resolved?

“The just, quick and cheap resolution of proceedings”

1. Conciliation

- Usually within 21 days of commencement
- May be done via AVL or with parties in separate rooms (r 4.9)

2. Arbitration

- If conciliation fails, the Commission *must* arbitrate.
- The usual directions to apply.

3. Civil penalties are separate.



Last word - tips for sexual harassment matters

- For all – Familiarise yourself with the PN35, the new Rules and Forms.
- For Applicants – particularise the alleged conduct as far as possible. Is there one or more contraventions of s 144N?
- For Applicants - be conscious of your ethical obligations in threatening other action to gain leverage in negotiations.
- For Applicants – adduce evidence relevant to Damages
- For individual respondents – consider whether criminal and penalty privilege may apply.
- For employers/principals – take all reasonable steps to prevent sexual harassment in the workplace *before* there is a claim.



Stop Bullying Orders



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Preliminary thoughts

- Focus of the jurisdiction is on creating safe workplaces, by stopping bullying conduct
 - No general prohibition on bullying
- To make an order there must be a risk that the applicant will be subject to further bullying
 - The parties will likely still be sharing a workplace
 - No time limit
- Participants are likely to be emotionally invested
- Commission must consider workplace processes, and other “investigations” and any outcomes, including interim outcomes



Remembering a ‘one-stop shop’

	Bullying	Sexual harassment
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Who can apply for a stop bullying order?



An “employee who reasonably believes [they have] been bullied at work”



An industrial organisation (including for more than one employee)



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Who can apply for a stop bullying order? (cont.)



**No time limit, but
needs to be a
risk of continued
bullying**



**Multiple actions
under anti-
discrimination law
not permitted**



**Concurrent
WHS claims
permitted**



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What is bullying?

144C Definition of bullied at work

(1) For this part, an employee is ***bullied at work*** if, while the employee is at work—

(a) an individual, or group of individuals, repeatedly behaves unreasonably towards—

(i) the employee, or

(ii) a group of employees of which the employee is a member, and

(b) the behaviour creates a risk to health and safety.

(2) subsection (1) does not apply to a reasonable management action carried out in reasonable way



What is bullying? (cont)

- There is no definition of “at work”
- The definition of bullying is substantively the same under the Fair Work Act and the IR Act.
- The FWC described bullying in *Mac v Bank of Queensland Limited* (2015) 247 IR 274 as potentially including (at [99]):

“....intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination.”



Making a stop bullying application?

- Form 63A – Stop bullying application
- Should name each of:
 - the person(s) alleged to have bullied the applicant;
 - the employer or principal contractor of the applicant; and
 - a person conducting a business or undertaking if the bullying occurred in connection with the business or undertaking.
- Sufficient details of the conduct including:
 - when the conduct occurred;
 - who engaged in the conduct; and
 - a description of the conduct.



Responding to a stop bullying application?

- Form 63B – Response to a stop bullying application
- Employer *must* file and serve
- Person alleged to have bullied *may* file and serve





The Commission's process

"The just, quick and cheap resolution of proceedings"

1. Conciliation

- Usually within 21 days of commencement
- May be done via AVL or with parties in separate rooms (r 4.9)

2. Arbitration

- If conciliation fails, the Commission *must* arbitrate.
- The usual directions to apply.

3. Civil penalties are separate.



When can the Commission make a stop bullying order?

- The Commission can make an order pursuant to s 144G (1) if it finds that:
 - the employee has been bullied at work, and
 - there is a risk that the employee will continue to be bullied at work.
- A stop bullying order may apply to one or more of (s 144G):
 - an individual or one or more individuals;
 - the (bullied) employee's employer.
 - a person conducting a business or undertaking if the bullying occurs in connection with the business or undertaking.



Things the Commission must consider.

(5) In determining the terms of the order, the Commission must take into account all of the following—

- (a) other grievance or dispute procedures available to the employee that the Commission is aware of,
- (b) outcomes, whether interim or final, the Commission is aware of from other—
 - (i) investigations into the conduct the subject of the application, or
 - (ii) grievance or dispute procedures carried out in response to the conduct the subject of the application,
- (c) other matters the Commission considers relevant.



What order can the Commission make?

- The Commission *may* make any order it considers appropriate.
- This *may* include:
 - damages to the employee as compensation (max \$100,000),
 - a prohibition on continuing or repeating the bullying,
 - the performance of reasonable actions or course of conduct to redress loss or damage,
 - an apology or retraction,
 - the introduction of a program or policy aimed at eliminating bullying.



Contravention of stop bullying order

A person to whom a stop bullying order applies must not contravene a term of the order.

Maximum civil penalty—

- (a) for an individual—\$18,870, or
- (b) otherwise—\$93,900.



Practice Note 34 – Stop bullying applications

- PN 34 applies to stop bullying applications, but not Civil Penalty proceedings.
- Encourages workplace resolution, *if safe*.
- Commission may determine its own procedure: r 4.9



Remembering a 'one-stop shop'

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