



Anti-bullying jurisdiction

Summary of the case management model

For implementation from 1 January 2014

1—Overview

1.1 Purpose

1. This paper summarises the procedures and associated functions to be adopted for the implementation of the Commission's new anti-bullying jurisdiction. It is supported by comprehensive procedures manuals and guides.
2. The comprehensive case management model has been approved by the President following consultation with Members and key stakeholders.
3. This document is intended for public and internal distribution.

1.2 Statutory framework and functions

4. The *Fair Work Amendment Act 2013* conferred a new anti-bullying jurisdiction upon the Commission. From 1 January 2014, a worker in a constitutionally-covered business who reasonably believes that he or she has been bullied at work, can apply to the Commission for an order to stop the bullying. Part 6-4B of the *Fair Work Act 2009* (the Act) outlines the jurisdictional requirements for making such an application, including the definition of 'a worker', the definition of 'bullied at work' and the considerations the Commission must take into account when deciding whether to make orders.

1.3 Bullying defined

5. New s.789FD defines when a worker is 'bullied at work':

789FD When is a worker *bullied at work*?

- (1) A worker is ***bullied at work*** if:
- (a) while the worker is at work in a constitutionally-covered business:
 - (i) an individual; or
 - (ii) a group of individuals;repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
 - (b) that behaviour creates a risk to health and safety.
- (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.
- (3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:
- (a) the person is:
 - (i) a constitutional corporation; or
 - (ii) the Commonwealth; or
 - (iii) a Commonwealth authority; or
 - (iv) a body corporate incorporated in a Territory; or
 - (b) the business or undertaking is conducted principally in a Territory or Commonwealth place;
- then the business or undertaking is a ***constitutionally-covered business***.

6. 'Worker' is broadly defined, having the same meaning as in the *Work Health and Safety Act 2011* (Cth) (**WHS Act**), but does not include a member of the Defence Force (s.789FC(2)). Section 7 of the WHS Act defines a worker as an individual who carries out work in any capacity for a person conducting a business or undertaking, including work as: an employee; a contractor or subcontractor; an employee of a contractor or subcontractor; an employee of a labour hire company assigned to work in the person's business or undertaking; an outworker; an apprentice trainee or student gaining work experience; a

volunteer; a member of the AFP, and a Commonwealth statutory office holder (see further Revised Explanatory Memorandum (**EM**) at paras 103-105).

7. The express exclusion from bullying behaviour of 'reasonable management action carried out in a reasonable manner' (s.789FD(2)), emphasises the rights and obligations of persons conducting a business to take appropriate management action, including responding to poor performance, taking necessary disciplinary action and effectively directing and controlling the way work is carried out (EM at para. 112). Similar phrases are used in workers' compensation laws in all jurisdictions to limit the injuries that are compensable under those laws.

1.4 Applications and procedure

8. A worker who 'reasonably believes that he or she has been bullied at work', may apply to the Commission for an order under s.789FF (new s.789FC(1)).
9. The Commission must 'start to deal with' an application within 14 days after it is made (new s.789FE). This does not necessarily require an application to be listed for conference or hearing within 14 days. The Commission might start to deal with an application by informing itself through inquiries or by requiring the provision of information from other parties pursuant to s.590.

1.5 Orders

10. If satisfied that a valid application has been made, that bullying conduct has occurred and there is risk of further such conduct, the Commission is empowered by s.789FF of the Act to make any order it considers appropriate (other than an order requiring the payment of a pecuniary amount) to prevent the worker from being bullied at work.

In circumstances where the Commission does not have jurisdiction to make an order or where an application has no reasonable prospects of success the application may be dealt with, and dismissed, by a Member early in the process.¹

¹ Section 596 of the Act.

11. New s.789FF provides for the orders that may be made by the Commission:

789FF FWC may make orders to stop bullying

(1) If:

- (a) a worker has made an application under section 789FC; and
- (b) the FWC is satisfied that:
 - (i) the worker has been bullied at work by an individual or a group of individuals; and
 - (ii) there is a risk that the worker will continue to be bullied at work by the individual or group;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

(2) In considering the terms of an order, the FWC must take into account:

- (a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and
- (b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and
- (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and
- (d) any matters that the FWC considers relevant.

12. An order may only be made if the Commission is satisfied that there is a risk of continuing bullying by the same individual or group of individuals, and such orders are to be directed to preventing the worker concerned being bullied by that individual or group (s.789FF(1)). Consequently an order could not be made if the worker was no longer exposed to bullying by the individual or group (perhaps for example, if the worker had resigned or been dismissed).

13. The Commission's orders might be directed to the employer or principal of the worker concerned, the employer or principal of an alleged bully, an alleged bully and/or to co-workers. This might also include individuals who visit the workplace such as clients etc. It is intended that the focus be 'on resolving the matter and enabling normal working relationships to resume' (EM at para. 120). Orders might require, for example:

- an individual or group to stop specified behaviour;

- regular monitoring of behaviour by an employer;
- compliance with an employer's workplace bullying policy; provision to workers of information, or
- support and training, or review of an employer's workplace bullying policy.²

14. Breach of such an order will attract a civil penalty, but will not constitute an offence.³

15. Section 789FF(2) requires the Commission to consider specified matters, and any other matters that the Commission deems relevant, in considering the terms of any order. The Commission might, for example, have regard to: whether workplace dispute resolution or workplace bullying complaint procedures are available to and have been utilised by the worker concerned; the course or findings of any investigation into the alleged bullying by a WHS regulator, or whether the application raises issues that might more effectively be dealt with by the relevant WHS regulator. It is noted that the President may authorise disclosure of information acquired by the Commission to a WHS regulator pursuant to s.655 of the Act. However, voluntary provision of information to the Commission by WHS regulators could potentially be constrained by confidentiality requirements under WHS laws.

² Explanatory Memorandum at para. 121.

³ Section 789FG and section 675(2) as amended.

2—Observations on the jurisdiction

16. Given the nature and scope of the new jurisdiction the following observations can be made:

- It is difficult to predict the number of applications to be dealt with by the Commission, however we expect that there will be a significant number of applications and inquiries.
- The broad coverage of workers and the capacity to lodge claims in relation to conduct of individuals will mean that the Commission is dealing with multiple and sometimes complex legal and practical relationships.
- There are some jurisdictional limitations, including the need for the conduct to have taken place within a constitutionally-covered business.⁴
- There are certain potential limitations in dealing with applications concerning national security, the ADF and the AFP.⁵
- The concept of bullying conduct is defined broadly but must involve repeated unreasonable behaviour; while the worker is at work; and create a risk to health and safety. It does not include reasonable management action taken in a reasonable manner.
- There are no express limitations in terms of applicants making multiple applications under the Act or under other statutory processes. The Act expressly permits applications to be made both within this jurisdiction and under the WHS Act and corresponding State and Territory WHS laws.
- Some of the definitions and statutory concepts are drawn from the WHS Act.
- There must be a finding of a risk that bullying conduct will continue by the same individual or group as a prerequisite to making an order. This means in effect that applicants will need to be within the relevant employment/contractual relationship when applying to the Commission.
- We expect a large number of enquiries from potential applicants and many of them may not find the jurisdiction appropriate for their circumstances given the restrictions on the nature of the remedy that can

⁴ Section 789FD(3).

⁵ Sections 789FI–FL of the Act.

be provided and the role of the Commission as a Tribunal rather than an investigator.

- The range of behaviours and circumstances leading to the applications will be varied—ranging from conduct that is unlikely to meet the definition of bullying to conduct that borders on criminal abuse.
- Many of the parties in this jurisdiction will be unrepresented. Some of the parties may also exhibit challenging behaviours, both to other parties and potentially to the Commission.
- There is no express obligation to attempt to mediate or conciliate anti-bullying applications. There is however power to do so, at least in the context of a conference convened by the Commission⁶ and this will be appropriate in some cases. Given the nature of the jurisdiction and the orders available, the Commission will not be promoting or recommending the resolution of these applications on the basis of monetary payments.
- The Commission must commence to deal with the applications within 14 days of being lodged.⁷ The Commission may start to ‘deal with’ an application by informing itself through inquiries or by requiring the provision of information from other parties.

⁶ Section 592 of the Act enables the Commission (at a conference) to mediate or conciliate, make a recommendation or express an opinion.

⁷ Section 789FE of the Act.

3—Implications for the case management system and the Commission’s role

17. The nature of the new jurisdiction has a number of implications for the case management model, the procedures we adopt and for the Commission’s role.

- There is a need to communicate the nature of the Commission’s jurisdiction and the procedures to be adopted to potential applicants, the business community and their respective representatives, and to the community more generally.
- The prevention and resolution of alleged bullying matters within the workplace should be encouraged where appropriate.
- Many of the applications are likely to be incomplete and many applicants will not have a full understanding of the nature of the Commission’s jurisdiction and the orders that can be made.
- The fact that the applications will be made in the context of ongoing employment/contractual relationships, and that the applications involve conduct by other workers and individuals who may have no contractual relationship with the applicant (such as clients and regular visitors), must be taken into account in terms of how and when matters are dealt with.
- There is a need to gain sufficient information to make appropriate decisions as to how, when and where the applications will be dealt with by the Commission. This process must commence within 14 days of the application being lodged.
- There is a need to prioritise the applications where circumstances indicate a significant risk to parties or working relationships.
- Where applications are likely to be beyond jurisdiction, this aspect should be isolated and dealt with first.
- The approach taken to the conduct of hearings and conferences will need to take account of the nature of the alleged conduct, the relationship between and potential behaviours of the parties.

4—Key steps in the anti-bullying application case management process

18. This section sets out the key workflow steps in the proposed case management model.

- Worker lodges the application.
- The application is checked to ensure it is complete and valid. The details of the application and the applicant's intention to proceed will be confirmed by contact with the applicant prior to service on other parties.
- The application with attached answers (without any additional supporting materials that may also have been provided) is served by the Commission on the employer(s)/principal(s) and responses are sought.
- Where feasible, contact will be made with each of the employer(s)/principal(s) by the anti-bullying team.
- In most cases, the individuals whose alleged conduct has prompted the application will be served with the application by the Commission and advised that the employer/principal of the applicant (and/or their employer/principal if different) has been provided with a copy. This will not take place until shortly⁸ after the employer/principal(s) have been served.⁹ The individual(s) will be given an opportunity to provide a response to the Commission.
- In all cases, all relevant parties will be notified of the application and given an opportunity to be heard, before any substantive hearings are conducted.¹⁰
- A report is made to the Panel Head by the anti-bullying team outlining whether the matter involves any potential jurisdictional issues, the nature of the alleged conduct, whether it may be suitable for mediation, factors that might indicate the degree of urgency and other relevant factors that would inform a decision about the assignment of the application.

⁸ 24 hours in most cases.

⁹ Note: in some cases, the precise identity of the individuals and/or their employer/principal may not be known at this stage. In other cases involving alleged physical abuse or similar circumstances, it may not be appropriate to serve the application upon the individual until the Panel Head or other member has initially commenced dealing with the application.

¹⁰ Where relied upon, all materials filed with the application will be made available to all parties (subject to any required privacy redactions) prior to any hearings or determination of matters.

- No decisions will be made at the information gathering stage and whilst the anti-bullying team will accept and process withdrawals of applications, all matters requiring a decision by the Commission will be referred to the Panel Head and either dealt with or assigned as appropriate.
- The Panel Head makes a decision as to whether the matter will be assigned to a Member and if so for what purpose (e.g. mediation or determination). Where appropriate, immediate jurisdictional issues¹¹ and other preliminary issues¹² may be heard and determined by the Panel Head. In other cases, the applications may be assigned to Panel Members having regard to the location of the parties, the urgency of the circumstances and the availability of the Members to deal with the application. The matter may also be assigned by the Panel Head to a staff mediator¹³ at this point to conduct mediation or to make further contact with the parties to more fully investigate the circumstances before it is assigned to a Panel Member.
- Mediation in this context will mean a confidential and voluntary process in which the participants, with the assistance of an independent mediator, identify the issues in dispute and endeavour to reach an agreement to resolve the dispute. Mediators are responsible for conducting the mediation process. Mediators may provide guidance on the matters in dispute and/or options for resolution, but will not make a determination or recommendations on the outcomes.¹⁴
- Mediation will only be proposed where it is appropriate having regard to the nature of the parties and the allegations made in the application. Where mediation (or conciliation)¹⁵ is undertaken, the emphasis will be on

¹¹ These could include where the application apparently does not involve conduct in a constitutionally-covered business, involves a declaration pursuant to section 789FI–FL, or a submission has been made that the application should be dismissed on the basis that it has no reasonable prospects of success (s.587 of the Act).

¹² Section 789FE(2) contemplates that applications may be dismissed on national security and related ground at an early stage. See also sections 789FI–FL.

¹³ Staff mediators will be acting under powers delegated by the President (s.625). Mediation may also be conducted by a Member of the Commission at this point in the process or subsequently.

¹⁴ The President, on the advice of the Panel Head, may make directions dealing with the general protocols for mediations, pursuant to s.582 of the Act.

¹⁵ Members may also conduct conciliation of a matter as part of any conference. Conciliation in this context includes where the Member plays an active role in the generation of the potential resolution of the application, including by making assessment and recommendations where appropriate. Parties may be compelled to attend a conciliation conference (s.592(1)).

the resolution of issues to enable constructive and cooperative relationships to be resumed. Monetary settlements will not be promoted or recommended by the Commission.

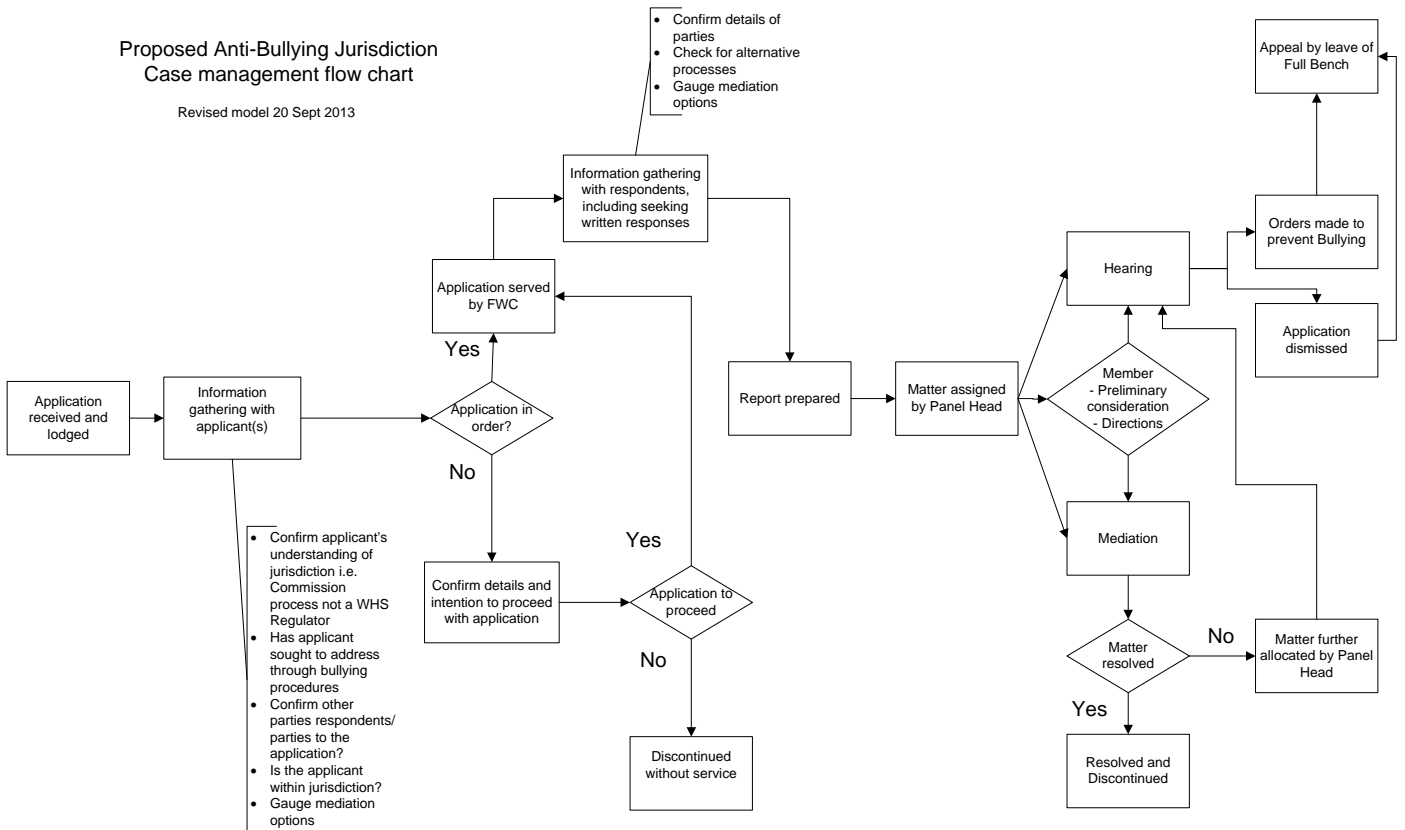
- Applications that are not resolved at, or subject to, mediation will be heard by a Member for determination.¹⁶ Where the assigned Member mediates or conciliates the matter and it is not appropriate to continue with the file, the Panel Head will assign the matter to another Member.
- It is expected that if a matter is referred to a Member by the Panel Head for determination, the Member will generally convene a preliminary conference of relevant parties with a view to understanding the issues involved, the position of the parties and the best approach to the matter. The Member will be responsible for determining when and how the matter will be heard in accordance with the Act. In the case of a Full Bench, the Presiding Member will make that determination. The arrangements for the conduct of conferences and hearings should take into account the nature of the alleged conduct, the relationship between and potential behaviours of the parties, and any associated personal security risks to parties, staff and Members.
- The Member may decide to:
 - Attempt to resolve the matter by conciliation or mediation at the preliminary conference or at a resumed conference;
 - Determine that other parties should be notified or required to attend;
 - Make interim orders—if the jurisdiction to do so is evident and the circumstances warrant that course of action; or
 - Make directions for the application to be heard.
- Appeals of decisions in this jurisdiction will generally be allocated in the same manner as all other applications save that only Members who have undertaken the PD training will be allocated to such appeals.

¹⁶ Anti-bullying applications will be determined by individual Members of the Commission unless the President decides to convene a Full Bench in relation to a particular matter.

5—Anti-bullying application process flow chart

Proposed Anti-Bullying Jurisdiction Case management flow chart

Revised model 20 Sept 2013



6—Confidentiality of parties and evidence

19. In dealing with anti-bullying matters, the Commission must perform its functions and exercise its powers in a manner that is open and transparent.¹⁷ Members and staff should also be conscious of the potential for such matters to result in unwarranted damage to the reputations of individuals and unnecessary publication of sensitive personal information (including medical information).
20. The Commission's information materials will alert parties to the availability of orders prohibiting or restricting the publication of evidence, the identities of parties, decisions or parts of them and other matters, under ss.594 and 593 of the Act. In some circumstances, Members may also consider it appropriate to draw these provisions to the attention of parties.
21. In accordance with s.592, unless determined otherwise by the Member concerned, mediations and other conferences in anti-bullying matters will be conducted in private. The identities of parties will not be disclosed in the Commission's public conference listings.
22. In accordance with s.593, unless orders have been made for private hearing, hearings in anti-bullying matters will be conducted in public. Members may keep in mind that, absent orders for non-publication, they nevertheless have some discretion as to the detail of parties and evidence that they include in their decisions.
23. Where orders prohibiting or restricting publication are made under ss.593 or 594, the orders are to be reduced to writing and published in the usual manner.

¹⁷ Section 577(c) of the Act.

7—Training and resources

7.1 Member training

24. Comprehensive training will be provided to Members who are to exercise the jurisdiction and will cover:

- The statutory requirements and the implications that can be drawn from related jurisdictions including WHS and workers' compensation jurisdictions;
- Theory and practice in the identification, prevention and management of workplace bullying;
- Techniques that should be considered in conducting mediation or other dispute resolution techniques in relation to alleged workplace bullying;
- Particular issues (such as self incrimination) associated with evidence where other proceedings involving the parties, such as prosecutions for breach of WHS obligations, are possible;
- The case management processes to be adopted by the Commission in relation to these matters; and
- Personal resilience.

7.2 Staff training

25. Members of the anti-bullying team, staff mediators and where feasible Associates to relevant Members, should undertake staff training covering the issues set out above as appropriate. They may also receive more detailed training in relation to processes and procedure depending on their role.

26. Registry staff and others expected to deal with anti-bullying enquiries and the initial aspects of such matters should undertake training in relation to:

- Techniques that should be adopted in dealing with applicants and other parties in relation to alleged workplace bullying;
- The case management processes to be adopted by the Commission in relation to these matters; and
- Personal resilience.

7.3 Other resources for Members and staff

27. In addition to the training and related resource material, a Benchbook will be provided. The Benchbook will cover the statutory provisions and legal issues drawing from relevant WHS, workers' compensation and other authorities.

28. Over time, standard form directions and orders will be developed for the optional use by Members when determining applications.

8—Information and promotion

8.1 Information for parties and the community

29. The range and nature of information provided to the parties and the community more generally will be reviewed and developed over time. It is envisaged that the following material will be provided over the course of 2014:

- A guide to the Commission's anti-bullying jurisdiction;
- A presentation on the new jurisdiction that Members and senior staff can present at public seminars, meetings of ALERA and other professional organisations and to briefings conducted by employer groups, unions, peak councils and legal firms.

30. Information to explain the new jurisdiction will also be available on the Commission's website and drawn from the above sources. This material should also promote the capacity for potential applicants to contact the Commission in advance of making an application. Where safe and reasonable to do so, workers should be encouraged to raise their concerns within the workplace.

8.2 Promotion of productive and cooperative workplace practices¹⁸

31. It is proposed that the Commission will work together with the peak employer and union bodies, relevant WHS regulators, the FWO, and other relevant interest groups to develop material that promotes good workplace practices to prevent workplace bullying and manage related issues.

32. This material may involve joint publications, guides for employers and workers, promotional 'video' productions and the use of social media.

33. This aspect of the Commission's role will also contribute to, and leverage from, the engagement strategies to be adopted by the Commission more generally. This could include Commission Members and staff acting as a resource to workplaces developing policies and strategies in this field.

¹⁸ Section 576(2)(aa) of the Act assigns this function to the Commission.

9—Review and development of the case management system

34. Given that this is an entirely new jurisdiction for the Commission, and represents an approach to workplace bullying not utilised elsewhere, the case management system and its operation will be carefully monitored by the Panel Head and regular reports will be provided to the President. In particular, the number of applications and the timeframes for each of the steps of the process will be measured.

35. In addition, a specific review of the system will be undertaken in July 2014 and again in early 2015.

JUSTICE IAIN ROSS AO
President

20 November 2013