

## Managing the Risk – Workplace Health and Safety and the Harassment Code of Practice

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By Clayton Payne, Associate

Employers may be unaware that bullying and harassment can lead to substantial prosecutions under Queensland's workplace health and safety legislation.

The *Prevention of Workplace Harassment Code of Practice 2004* (the Code) commenced operation in July 2004. The Code seeks to reinforce an employer's obligation to prevent harassment in the workplace.

The *Workplace Health and Safety Act 1995* (Qld) (WHS Act) imposes general obligations on employers, persons conducting a business or undertaking, persons in control of a workplace, workers and others to ensure that the workplace is free from risk of death, injury or illness. The Code specifically addresses the obligations in the context of workplace harassment.

Employers are required to comply with the Code's terms. The Code defines the expected level of care to be provided to employees and provides a measuring stick against which businesses will be judged. The Code serves as both the basis for a prosecution and a useful blueprint for businesses to establish a positive defence.

A person is subject to 'workplace harassment' under the Code if the person is subjected to repeated behaviour, other than behaviour amounting to sexual harassment

(that is dealt with in the anti-discrimination legislation), by a person, including the person's employer or a co-worker or group of co-workers of the person that:

- is unwelcome and unsolicited; and
- the person considers to be offensive, intimidating, humiliating or threatening; and
- a reasonable person would consider to be offensive, humiliating, intimidating and threatening.

The Code provides that workplace harassment may occur laterally (worker harassing a co-worker), upwards (worker harassing supervisor/manager) and downwards (supervisor/manager harassing worker). Reasonable managerial action by an employer in connection with the person's employment is excluded from this definition of workplace harassment.

A single incident of behaviour constituting workplace harassment will generally not constitute workplace harassment for the purpose of the Code.

The manner in which workplace harassment is to be managed is in accordance with the five step system detailed in the WHS Act and the general *Risk Management Code of Practice 2002*, which is as follows:

1. **Identifying** the hazards (establishing whether harassment exists in the workplace – where is the potential for it to occur?);
2. **Assessing** the hazards and the level of risk presented (assessing the likelihood of

workplace harassment and its consequences – both direct and indirect);

3. **Deciding** on control measures to prevent or control the risk, having regard to the assessed level of risk (policies, complaint handling systems, review of human resource systems and training and education);
4. **Implementing** the control measures; and
5. **Monitoring and reviewing** on a regular basis the effectiveness of the control measures.

Consultation at the workplace with respect to managing workplace harassment should engage any nominated workplace health and safety officers and workplace health and safety committee, managers and workers. Consultation should be designed to both improve awareness and encourage adoption and support by those it is designed to protect.

Under the Code, all businesses are required to have a workplace harassment policy in place. Failure to do so, even where no injury is sustained, can result in a prosecution for breach of the WHS Act. Training and reviews are a must for any business, alongside appropriate record keeping evidencing the training provided to employees. Record keeping is an essential ingredient to any defence that might later be raised by an employer, particularly with respect to a prosecution for breach of the Code.

Some examples of workplace harassment that could lead to breaches of the Code if the behaviour is repeated or occurs as part of a pattern of behaviour include:

### In Brief

- Policies seeking to prevent workplace harassment are a must for businesses.
- Details of upcoming seminars.

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- abusing a person loudly (usually when others are present);
- constantly ridiculing and putting a person down;
- spreading gossip or false and malicious rumours about a person with an intent to cause the person harm.

An example of the application of similar standards interstate can be found in the case of *Inspector Gregory Maddaford v (1<sup>st</sup> defendant) M A Coleman Joinery (NSW) Pty Ltd* [2004] NSWCMC 42. This case involved an incident of harassment in a timber joinery.

A labourer was grabbed by five of his colleagues who proceeded to wrap him from his neck to his feet in cling wrap using a manual cling wrapping machine. The labourer was then picked up and placed facing up on a wheeled trolley and secured to the trolley by more cling wrap and then covered in sawdust and wood glue, over his body and into his mouth.

None of the men who were involved were subjected to disciplinary action. As a result, the labourer suffered a psychiatric illness attributable to his employment.

The court found that the employer was in breach of the *Occupational Health and Safety Act 2000* (NSW) for failure to provide a safe place of work regardless of the fact that occupational health and safety policies were in place. The company was fined \$24,000 and two of the individual directors of the company were fined \$1,000 each.

### What should employers do?

Prosecutions for breach of the WHS Act are difficult to defend as the legislation is strict. When there is an injury at work, in most cases a potential breach of the WHS Act arises, subject to the ability of a business to establish a positive defence such as compliance with an applicable Code of Practice.

For this reason, consideration and implementation of the Code is very important. The number of prosecutions and the amount of fines under the WHS Act are increasing. More than

ever, employers need to be aware of their obligations and take the appropriate steps to protect their businesses and their employees.

## Complimentary Breakfast Seminar: But it was only a Joke – Sexual Harassment in the Workplace

On Thursday 4 September, Clayton Payne will host an informative in-house breakfast seminar covering legislation and case law relating to sexual harassment in the workplace and what employers should do to avoid claims.

For further information or to RSVP, please refer to the attached flyer.

## ALB Employment Law Masterclass: 7 October 2008

Clayton Payne will be presenting at the ALB Employment Law Masterclass on Tuesday 7 October at the Stamford Plaza, Brisbane. Clayton's topic, "National Employment Standards: Evaluating the 10 Core Standards of the New IR Legislation" will address:

- Flexible working arrangements;
- Parental, long service and annual leave;
- Personal/carers and compassionate leave;
- Community service leave and public holidays;
- Notice of termination and redundancy; and
- Provision of the Fair Work Information Statement.

For further information or to RSVP, visit [www.albmasterclass.com](http://www.albmasterclass.com)

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