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Protection of CEOs from bullying in the workplace under the Occupational Safety and Health Act

While the majority of organisations including local government have improved the process of identification and management of traditional hazards (for example; falls, electric shock and use of machinery), the issue of psychosocial harm has lagged behind.

Evolving societal norms are slowly corroding the stigma surrounding workplace mental harm which has opened the way for more open discussion of psychosocial hazards in the workplace.

Arguably the most relevant source of psychosocial harm in local governments today is bullying. Bullying carries significant impacts not only for individuals as victims, but also for organisations as a whole.

Bullying in the workplace

Bullying behaviour can include any or all of the following:

- Threats to any individual's professional status (e.g. public humiliation and accusation of mistakes)
- Threats to an individual's personal standing (e.g. insult, teasing and spreading rumours)
- Isolation – withholding work-related information or prohibiting access to opportunities for development
- Overwork (e.g. unrealistic workload and deadlines)
- Destabilisation (e.g. attempts to undermine an individual or group of workers).

Within the operational context of local government, bullying is a realistic source of psychosocial harm in the workplace that is capable of both identification and management.

Arguably the most relevant source of psychosocial harm in local governments today is bullying. Bullying carries significant impacts not only for individuals as victims, but also for organisations as a whole.

Bullying in local government

Bullying is traditionally considered as occurring between employees at a similar employment level, or in a 'top-down' pattern between a manager and an employee. The less acknowledged pattern, however, is 'upward' bullying where an employee bullies a manager or more senior employee. In the local government context, this may include bullying of a Chief Executive Officer (CEO) and senior managers.

This article primarily focuses on the legal obligations of local governments to protect individuals from bullying, however it is important to also recognise less apparent impacts that bullying has on the local government as an employer. These impacts include reduction in employee morale, lack of trust by the wider workforce and reputational damage to the local government.

Bullying of CEOs and Senior Managers

Acknowledgement and management of 'upward' bullying in local government, has a layer of complexity at least in part due to the role of elected members in the process of employing, assessing the performance of and terminating CEOs. This complexity can potentially lead to confusion in identifying the employer of the CEO and duty holders in local governments under the *Occupational Safety and Health Act 1984 (OSH Act)* and *Occupational Safety and Health Regulations 1996 (OSH Regulations)*.

While elected members play a role in the appointment, ongoing performance and potential termination of the CEO, the fact remains that the local government, as a body corporate, is their employer. As employees of the body corporate, CEOs and senior managers are afforded the same protections from harm under the OSH Act and OSH Regulations as all other local government employees. These protections extend to the risk of psychosocial harm resulting from bullying and other known hazards.

Legislative framework

Section 19 of the OSH Act prescribes that:

- '(1) An employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the employees) are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall –
 - (a) provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, the employees are not exposed to hazards;'

Given that bullying is a known source of psychosocial harm, it would be difficult for a local government to argue that it was not aware of such a hazard. The presence of such a hazard gives rise to a further statutory obligation under regulation 3.1 of the OSH Regulations:

- 'A person who, at a workplace, is an employer, the main contractor, a self-employed person, a person having control of the workplace or a person having control of access to the workplace must, as far as practicable –
 - (a) identify each hazard to which a person at the workplace is likely to be exposed; and
 - (b) assess the risk of injury or harm to a person resulting from each hazard, if any, identified under paragraph (a); and
 - (c) consider the means by which the risk may be reduced.'

A local government would therefore be required to identify and assess hazards in the form of psychosocial harm to which a person in the workplace may be exposed. In this respect, CEOs must also be considered in the category of persons potentially affected by such hazards.

Application to local government CEOs

Local government CEOs and senior managers are very rarely given specific consideration when identifying those persons in a work place who are at risk of being susceptible to bullying.

There is perhaps an outdated view or expectation that an attractive remuneration package and prestigious job title means that a CEO should ignore or otherwise be impervious to certain unacceptable behaviours. This is coupled with the fact that a majority of CEOs face stress levels that are incomparable to other local government roles.

By virtue of their position as 'public faces' of the local government, the potential sources of psychosocial harm faced by CEOs and senior managers are unique to their positions. These sources include but are certainly not limited to:

- elected members;
- local government constituents;
- regulators;
- employees and;
- the public at large.

In a day and age where every decision, action or comment is subject to unprecedented public scrutiny through social media, the risk of psychosocial harm to a CEO is exponentially higher than ever before.

Reducing the risk of psychosocial harm

It is incumbent on local governments to formally identify potential sources of psychosocial harm and the reasonably practicable measures available to address them. Failure to do so, may constitute a failure to meet the duties of an employer pursuant to section 19 of the OSH Act and expose the local government to prosecution as a body corporate.

There are a range of reasonably practical measures that may be employed to reduce the risk of psychosocial harm in the local government workplace. Such measures may include a local government formally recording risks using a risk register or other similar records and to identify a number of base level risk controls that must be implemented for all staff. Risk controls may include bullying and harassment policies, Codes of Conduct, HR disciplinary policies addressing bullying behaviours, and the development of promotional and awareness material such as posters and electronic training modules.

When assessing the risk of psychosocial harm to their workforce, local governments should also consider whether in their specific circumstances, it is necessary to distinguish the role of CEOs and senior managers from other roles within the organisation. Such distinction may be justified by the sources of potential psychosocial harm, including bullying that are unique to their roles. A local government may consider it appropriate to establish specific policies and procedures for these roles, which allow for confidential reporting and investigation of potential psychosocial harm hazards.

However a local government decides to deal with the risk of psychosocial harm, it should do so with due consideration to the context of employee positions within the organisation as it is fundamental to the principles underscoring the OSH legislative regime to consider all risks in their context. Accordingly, with regard to psychosocial harm from bullying, local governments should consider whether the context of a CEO's or senior manager's working environment is different to that of other employees and mitigate accordingly.

The adoption of appropriate practical measures in response to identified risks of psychosocial harm will not only protect the health and wellbeing of local government employees, but will minimise the risk of a prosecution for breach of OSH duties, which not only is public in nature and therefore damaging to reputation, but also carries significant financial penalties for an organisation.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information and advice please contact Scott Wade at swade@mcleods.com.au



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