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A failure to prevent workplace violence has important legal consequences for employers, managers and employees

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## WORKPLACE VIOLENCE LEGAL CONSEQUENCES

A SECURE WORKPLACE FOR YOUNG AUSTRALIANS  
is a project of WorkCover New South Wales and the National Children's and Youth Law Centre

### CRIMINAL LAWS

Any employer or employee who actually carries out workplace violence is liable to be charged with assault under the criminal law.

Assault is defined as “**any act which intentionally or recklessly causes another person to apprehend immediate and unlawful violence.**” (R v Venna (1976) QB 421 ). This means that an assault can be committed without touching another person - fear of immediate violence is enough.

Judges and magistrates are unsympathetic to this sort of behaviour, and those found guilty can expect heavy fines and even jail sentences.

In an initiation, a 16 year old Melbourne apprentice was set on fire with paint thinners, hurled into a bin of glass, burnt with cigarettes, bashed, stapled in a crucifix position to a wall by his overalls, shot at close range with a carpentry staple gun, hung from a raised forklift, and dragged behind a car trailer. The perpetrators in this case were both convicted of assault and sentenced to suspended jail terms and between 100 and 200 hours' community work each. In addition, in separate proceedings, the Victorian WorkCover Authority fined the immediate supervisor \$10,000 and the company \$50,000.

(Neales, 'When rites go wrong' (6 September 1997) Good Weekend, p 32)

### OCCUPATIONAL HEALTH AND SAFETY LAWS

Under occupational health and safety laws, employers have a duty to ensure the health, safety and welfare at work of all their employees. This includes providing safe plant and systems of work, information, training and adequate supervision. WorkCover New South Wales has the power to prosecute employers who fail to fulfil this duty. The maximum penalty for a first offence is \$550,000 for a corporation, and \$55,000 in any other case.

### BREACH OF CONTRACT

Every employer and employee has a contract of employment between them, even if it is not written down. The law also says that, as part of that employment contract, every employer has a duty to take reasonable care of an employee's safety. As the highest court in Australia has said: '**The standard of care for an employee's safety is not a low one.**' (O'Connor v Commissioner for Government Transport, (1954) 100 CLR 225).

Accordingly, if an employer breaches that contractual duty by failing to prevent workplace violence, the employee can sue the employer for breach of contract and potentially obtain damages from the employer for that breach of contract.

Additionally, the law in Australia is also coming to accept that an employer must not, without reasonable cause, undermine the trust and confidence that an employee places in the employment relationship. Again, exposing that employee to workplace violence would arguably be a breach of that contractual term.

An employee may also be forced to resign due to the workplace violence. In the eyes of the law, where an employee is forced to leave his or her job due to the actions of the employer then this is considered to be a constructive dismissal. When an employee is constructively dismissed, he or she may bring a claim against an employer for unfair or unlawful dismissal and seek reinstatement and/or compensation.

Under contract law once an employer becomes aware, or should have become aware, of the workplace violence then it must take action to prevent that violence.

We recommend that every prudent employer should examine closely the “Awareness”, “Prevention” and “Intervention” materials in this Resource Kit.

The South Australian Industrial Commission has said that a single serious act of sexual harassment or a persistent pattern of minor acts or incidents of sexual harassment by the employer, or the employer’s staff for whom it is vicariously liable; may be enough to constitute a sufficient breach of the employer’s obligations under the contract of employment so as to amount to a constructive dismissal.

(*Francesca v Prime Security Systems Pty Ltd* (1994) AILR | 81)

## PERSONAL INJURY LIABILITY

Not only does an employer have contractual obligations to an employee but it also has an additional duty of care to an employee which it must not breach - this obligation arises in the law of tort, commonly known as negligence. The obligation is similar but distinct from an employer’s contractual obligation. Put simply, an employer has a legal obligation to provide a safe system of work and where the employer breaches that obligation then it would be liable to the employee for damages for personal injury.

In this area, there is what is known as vicarious liability. This is where an employer is liable because of what an employee has done or failed to do, despite the utmost precaution taken by the employer. Of course, vicarious liability does not extend to cover every act of an employee, as the conduct of the employee must have a close relationship to the work and the act must be negligent or intentional. However, in certain circumstances an employer may be liable for workplace violence committed by another employee even where that employer has no knowledge of the conduct of the employee.

Employers are also under a legal obligation to provide a safe system of work, and this includes making sure that all employees behave themselves on the job. If an employer knows that some employees are misbehaving or skylarking, but does nothing to stop this, then the employer will be liable if another employee is hurt.

## WORKERS COMPENSATION

In New South Wales, a person who has suffered a personal injury arising out of, or in the course of, his or her employment shall receive compensation from the worker’s employer. The employer does not have to be at fault for the injury. Workers compensation injuries can include both physical and mental injuries.

So long as employment was a substantial contributing factor to the injury the employee will probably receive workers compensation payments. Of course this has a significant impact on an employer’s workers compensation premium.

## ANTI-DISCRIMINATION LAW

Increasingly, employees who have suffered because of workplace violence are considering a complaint to the NSW Anti-Discrimination Board, or the Federal Human Rights and Equal Opportunity Commission, claiming that they have been the victims of unlawful discrimination.

This has been common for years in the case of sexual harassment, but now employees are beginning to realise that other forms of workplace violence, such as the bullying of young male apprentices, may also lead to complaints on the grounds of sex or age discrimination.

A 17 year old apprentice whose co-workers “tarred” him with grease, tried to bind him with masking tape, and grabbed him around the throat, made a complaint to the Anti-Discrimination Board on the ground of age discrimination. The case was settled on the morning of the hearing on confidential term. The apprentice was expected to have sought \$40,000 for each claim of discriminations.

(“Secret settlement for whipping-boy apprentice” (19 August 1997) *The Australian*, p 3)

*produced by WorkCover New South Wales  
and the National Children’s and Youth Law Centre  
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These Factsheets are intended only to provide an alert to some of the important matters in workplace violence. They do not purport to be comprehensive Legal advice. Any person presented with such a problem should seek specific Legal advice in relation to that matter.