

# SOLVE WORKPLACE BULLYING COMPLAINTS IN 30 DAYS

SEGAL CONFLICT SOLUTIONS | 2021 White Paper



## **Disclaimer:**

This white paper contains information from the author's point of view on how best to deal with bullying complaints in the workplace. It is not intended to represent a comprehensive overview of the law as it applies to bullying in the workplace nor is it intended as a substitute for legal advice.

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## About Saranne Segal

Saranne is a conflict resolution expert who worked previously as a lawyer, with a Master's degree in Industrial Relations and Human Resource Management. She is also an accredited mediator.

Saranne thought it important to write this paper to assist organisations as bullying in the workplace is as rampant as ever. In conducting workplace investigations and mediations, she noticed that not only are these complaints on the rise, but that the handling of the bullying complaints often seem to make the matter worse. To her, this pointed strongly to something being wrong within the grievance process.

Saranne believes that bullying complaints need to be examined by organisation's through a legal lens to best mitigate their liability. To achieve this, the leaders, senior managers and HR must be fully conversant with the legalities surrounding bullying which ultimately will help reduce the organisation's legal liability and at the same time have a positive impact on the victims. It can be very much a win-win situation.

Saranne is very interested in hearing your comments and invites you email her at [saranne@segalconflictsolutions.com.au](mailto:saranne@segalconflictsolutions.com.au).

## Introduction

Bullying in the workplace is very much alive and well. It appears to be thriving in organisations across Australia. Organisations are recognising this and are trying to alleviate bullying. However, much of the focus seems to be on leadership and culture- creating leadership and culture that is transparent, fair and respectful and has zero tolerance for any inappropriate behaviour.

Focusing on leadership and culture is commendable and is no doubt, a great start. However, things do not appear to be improving in leaps and bounds. I have asked myself many times as a specialist in conflict resolution what else can be done within the realm of an organisation that already has strong leadership and culture to alleviate this issue further to make the workplace a more pleasant experience for employees.

Every time I have gone into an organisation to investigate grievances and bullying allegations, I notice there is always one commonality and that is that the complaint cycle is deficient in some way. There is no systematic, robust complaint cycle in place, and therefore the organisation is not operating within best practice or a legal framework. This, in effect, means that grievances are not being handled timeously, and by the time I get called in, the situation has become fraught and often highly litigious.

I liken this situation to an analogy of having a fire evacuation system in place. All organisations are required to have a fire evacuation plan. If there is a fire, employees know exactly what steps have to be taken to escape the building unharmed. We need to have the same kind of process in place when a grievance comes to light. Just like a fire is a risk, so too are bullying allegations. Organisations cannot afford to deal with these issues in an ad hoc, non-systematic way otherwise harm will occur – both to the employee and the organisation.

There needs to be a standard, automatic process in place so that when a grievance is lodged, there is no uncertainty about how to deal with it. With most of my clients, the truth is that most of them have had no idea what to do when the grievance arises, and as a result, they sit on the issue for weeks, if not months hoping it will disappear on its own. It is like a fire occurring in an organisation and snuffing out the flames with a watering can instead of a hose or shutting the door when a small fire breaks out and hoping the flames will burn themselves out. This rarely if ever occurs.

As we move into more socially conscious times, leaders need to step up and LEAD the way. It is not enough to pay lip service to the issue while it continues to run rampant. This means implementing a cohesive, systematic complaint cycle that applies to all grievances lodged in an organisation. We have seen what happens when one tweet exposes toxic workplaces/bully employers. Look at the case of Ellen DeGeneres for example. It is doubtful that her reputation will ever recover from the damage caused by her behaviour. Accordingly, best practice needs to be implemented across all industries. Organisations need to recognise once and for all that their day of reckoning is here. They need to, as a result, do all they can to protect both their employees and themselves otherwise they risk not only their reputations which can be damaged in one fell swoop, but also their bottom line.

## My Hypothesis

Organisations fail to deal with grievances and bullying complaints adequately, and the complaint cycle itself contributes to the victim's injury and suffering, thereby increasing the organisation's legal liability.

To reinforce my hypothesis, I began to record and analyse FWC/court decisions relating to workplace bullying in Australia over the last 24 months. What I have seen and continue to witness fully underpins my hypothesis.

## My Research

To test my hypothesis, Segal Conflict Solutions created two "thought runner" surveys – the first in late 2019 and the second in late 2020 to examine common patterns of where organisations fail in the complaint cycle.

I recognised that it would not be easy to get bullying victims to participate in the surveys, given that bullying in the workplace is a silent epidemic. Indeed, this is reflected in the latest survey results, which indicate that a staggering 50% of participants did not make a formal complaint of the bullying, 62% said it was because their boss was their bully, 49% said they did not trust management.

There has been a lot of research into the question of why employees remain silent in bullying situations. For example, Brinsfield has identified six silence dimensions to understand better the scope and motives underlying employee silence. Harlos and Knoll speculate that among these dimensions, those most relevant to bullying situations are defensive silence, which refers to an acquiescent form of silence; deviant silence, which refers to retaliatory actions against persons or the organisation; diffident silence, which relates to lack of confidence and self-doubt; ineffectual silence, which refers to the belief that no good would come from speaking up and disengaged silence, referring to the desire to detach oneself from the situation. <sup>[1]</sup>

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[1] HARLOS, K. & Knoll, M. (2018). Employee silence and workplace bullying, p.11

## The Impact of COVID-19

The first edition of this white paper was written in late 2019/early 2020 when COVID-19 had not yet appeared. The extraordinary impact COVID has had on Australian workplaces – indeed on the world and humanity as a whole- cannot be put into words. In addition to remote working, employers have had to implement workplace changes to ensure workplaces are safe and social distancing is adhered to.

Due to the remote working and socially distant workplaces, I wanted to assess whether bullying had become less of an Australian workplace issue. Consequently, I conducted a further thought-runner survey in late 2020 to examine the impact of COVID-19 on bullying in the workplace.

The survey results are insightful. We discovered that bullying has not decreased or been eradicated even though the nature of the bullying may differ . In other words, while there may be more micromanagement or exclusion due to COVID-19 for example, a surprising 48% of survey participants said that bullying had increased since the advent of COVID-19.

## Definition of Bullying

Workplace bullying is repeated and unreasonable behaviour directed towards an employee or group of employees that creates a risk to health and safety. [2]

**Bullying behaviour has been held to include** [3]:

- the making of vexatious allegations against an employee;
- spreading malicious rumours;
- investigating in a grossly unfair manner;
- aggressive and intimidating conduct; belittling or humiliating comments;
- victimisation;
- practical jokes or initiation;
- exclusion from work-related events; and
- unreasonable work expectations.



[2] 789FD of the Fair Work Act 2009

[3] Based on the Fair Work Commission's examples of bullying provided in its Anti-Bullying Bench book

## What isn't bullying?

Many workplace scenarios are not considered bullying. You have many different types of people working together, and there are going to be conflicts, differences of opinion and personality, and culture clashes. While some of these situations may escalate into bullying, a single incident of unreasonable behaviour is not bullying.

Behaviour towards employees is also not considered bullying if reasonable management action is carried out in a reasonable manner.<sup>[4]</sup>

Managers need to be able to respond to poor performance and, if necessary, take disciplinary action. In doing so, managers and supervisors are not 'bullying,' but doing their jobs through reasonable management action of their employees' performance.

Performance reviews/appraisals, counselling or disciplining an employee for misconduct, and investigating alleged misconduct are illustrations of what is considered reasonable management action.

## Cost of Bullying

Not only do the individual victims of bullying hurt, but it also impacts the broader workplace culture as a whole through low morale, a decrease in productivity, increased absenteeism and turnover, and so much wasted time dealing with bullying claims.

There is a substantial monetary cost to organisations. It is estimated that bullying costs Australian organisations between \$6 billion to \$36 billion per year.<sup>[5]</sup>

Bullying, of course, can lead to physical health problems. It is also closely linked to several mental health issues, including depression, anxiety, post-traumatic stress, and burnout. There have been several reported suicide deaths as a result of workplace bullying.



[4] To be considered reasonable, the management action must be lawful and must not be irrational, absurd or ridiculous (Ms SB [2104] FWC 2104)

[5] Productivity Commission. (2010). Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety. Research Report. Canberra, Australia

## Duty of Care

Employers have a duty of care towards their employees' health and well-being while working under Occupational Health and Safety and Anti-discrimination laws.

In March 2004, the ACT became the first state to introduce industrial manslaughter laws. These were separate from their workplace health and safety laws and sat instead under the Crimes Act 1900 (ACT).

Queensland introduced industrial manslaughter laws into its workplace health and safety laws in October 2017, following the death of two workers who were crushed from a concrete slab at Eagle Farm Racecourse and the shocking Dreamworld ride incident, which claimed the lives of four people. In Queensland, maximum penalties include 20 years' imprisonment for individuals or \$10 million fines for a body corporate. It remains to be seen whether these laws, in these jurisdictions, will extend to the mental injuries of employees.

Significantly, since November 2019, Industrial Manslaughter is now a crime in Victoria as well. The offence falls under the Occupational Health and Safety Act 2004. This new piece of legislation means that negligent employers in Victoria could face up to 20 years in jail and \$16 million in fines for their employees' suicide deaths. The law will cover deaths caused by mental injuries, including trauma from bullying or other forms of abuse sustained on the job.

While Brodies Law was introduced in 2011 to stop employees from bullying each other (Brodie Panlock was a 19-year-old who committed suicide after being bullied at work), this new law will apply to employers whose negligence results in the death of an employee by failing to provide a safe workplace or failing to provide appropriate mental support.<sup>[6]</sup>



Every state has either implemented or is debating manslaughter laws. With the highest rate of workplace deaths in Australia, NSW is still to announce a firm position on the issue. It seems likely, however, that all states are moving in this direction.

The impact on all organisations across Australia will be huge. It will no longer be sufficient for organisations to turn a blind eye and hope that the issue disappears quietly. Neither will it be enough to turn the problem over to HR and hope for the best. Healthy, decisive action will have to be shown to be taken.

We need to address this issue, keeping in mind the startling fact that it is currently estimated that millennials comprise 35% of the global workforce. By 2030, it is estimated that they will make up a staggering 75% of the workforce.<sup>[7]</sup>

[6] Crimes Amendment (Bullying) Act 2011 No. 20 of 2011

[7] The Deloitte Global Millennial Survey 2019



Why is this so significant? Because this hyper-connected, socially conscious "woke" generation wants to work for a company that they perceive has the same values and principles of social justice as themselves. They won't hang around a toxic workplace where the culture does not align with these values.

Due to this changing workplace dynamic, the balance of power is shifting dramatically to the employee. Organisations who understand this changing dynamic can become leaders in transforming their company culture to a best-practice organisation.



## Liability of Organisations

Organisations are becoming increasingly exposed to legal liability. You only have to look at the case law to see that this is indeed the case. To illustrate this point, in 2019, the NSW District Court awarded over \$1.3million in damages to an employee whose employer was found liable for the deliberate actions of a manager who verbally and physically bullied the plaintiff over 14 months.<sup>[8]</sup> Similarly, in 2017, the Queensland Supreme Court awarded over \$1.7million in damages to an employee against an employer whose CEO's "unjustified blaming, humiliation, belittling, isolation, undermining and contemptuous disregard" of the employee resulted in severe psychiatric injury.<sup>[9]</sup>

The employer was found vicariously liable for the CEO's actions. The liability of organisations very much hinges on the test of 'reasonableness.' In other words, has the organisation acted reasonably or taken reasonable steps in preventing the bullying behaviour?

Reasonableness can relate to many situations:

- Where the company takes an excessive amount of time dealing with the complaint;
- Where company policy does not expressly prohibit the bullying behaviour, a court may be more ready to infer that no reasonable preventative measures had been in place.
- Inversely, having adequate procedures in place but not following the policies will not be considered reasonable.
- Employers who do not adequately respond to and investigate bullying claims may be found not to have acted reasonably.
- The requirement of 'reasonableness' also strengthens the view that investigations must be conducted impartially and fairly.

It has interestingly been argued that an employer who fails to conduct an appropriate internal investigation to a bullying claim may be engaging in the statutory definition of bullying itself.<sup>[10]</sup>

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[8] Ward v Allianz Australia Services Pty Ltd (2019) NSWDC 293

[9] Robinson v State of Qld (2017) QSC 165

[10] Ms SB (AB2014/1035)

## Key Results from the Survey

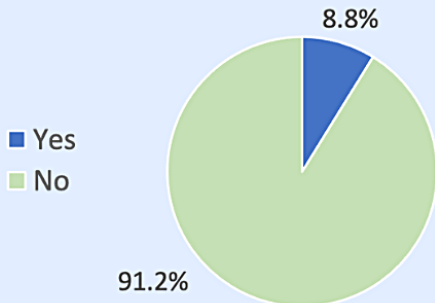
Over 300 participants completed the two surveys which is a massive feat given the silence bullying thrives in. The results are distinctly qualitative in nature and are overwhelmingly in line with my hypothesis that organisations fail to deal adequately with bullying complaints and the complaint cycle itself contributes to the victim's injury and suffering, thereby increasing the company's legal liability.

### The key results of the 2020 survey indicate the following:

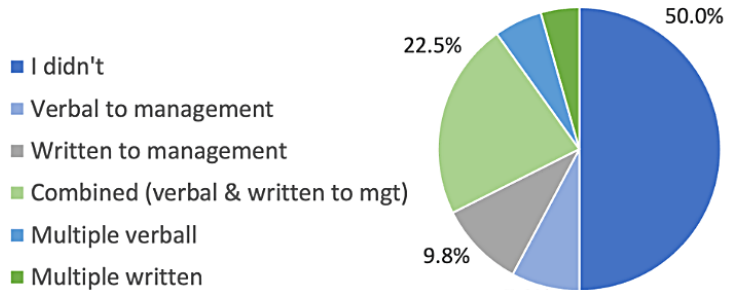
- 48% of participants say the bullying has increased since the advent of COVID-19.
- 34.3% of participants felt they could not talk to HR about the bullying due to the problematic circumstances COVID had brought to the workplace.
- 75.4% of participants stated that the matter was not resolved within 30 days.
- 91.2% of participants did not feel supported during the complaint's procedure by the organisation;
- 69% of participants do not think HR fulfilled their role within this process;
- An overwhelming 88.5% of participants stated that they lost trust in the company during the complaints process.
- 77.3% said the bullying continued or escalated during the complaints process.
- 43.5% of participants stated that it took four weeks or more for the organisation to respond to the complaint;
- 84.2% of participants said their company did not use an external investigator to assist in the grievance.
- Only 7.69% of participants felt that the company's procedure was procedurally fair to both parties.

# Workplace Bullying Survey Results (Part 1)

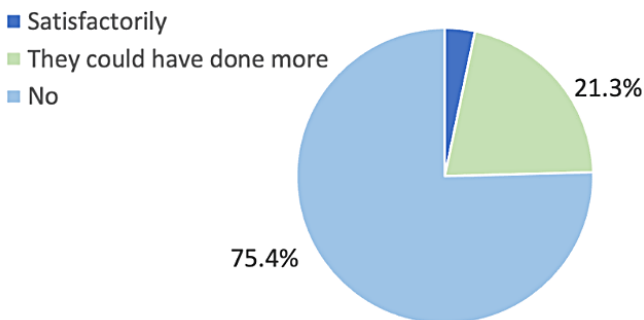
**DID YOU FEEL SUPPORTED BY THE COMPANY DURING THE COMPLAINTS PROCEDURE?**



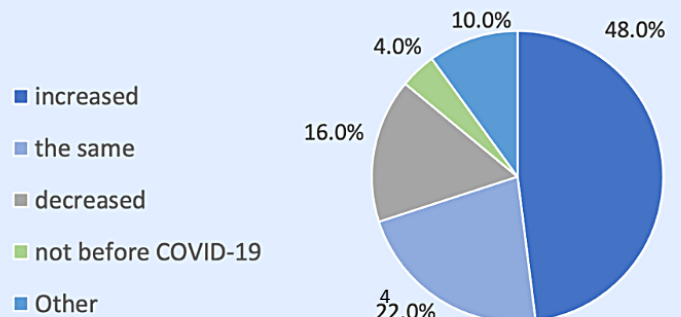
**HOW DID YOU MAKE A FORMAL COMPLAINT?**



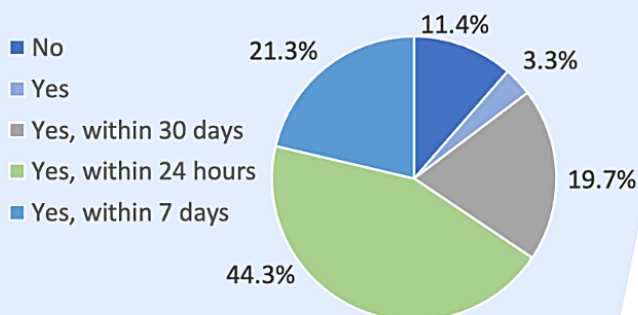
**WAS THE MATTER RESOLVED WITHIN 30 DAYS AFTER REPORTING IT?**



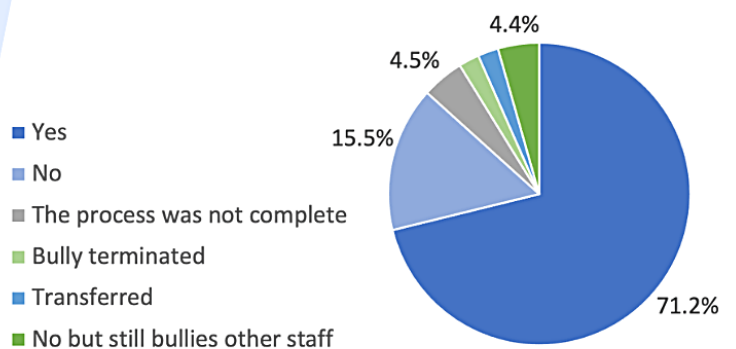
**HAS THE BULLYING AGAINST YOU INCREASED OR DECREASED SINCE THE ADVENT OF COVID-19?**



**DID YOU LOSE TRUST IN THE COMPANY DURING THE COMPLAINT'S PROCESS?**

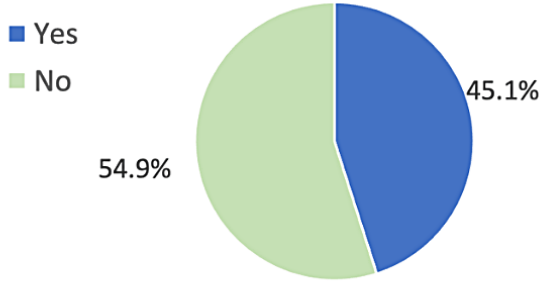


**DID THE BULLYING CONTINUE ONCE THE COMPLAINTS PROCESS WAS COMPLETE?**

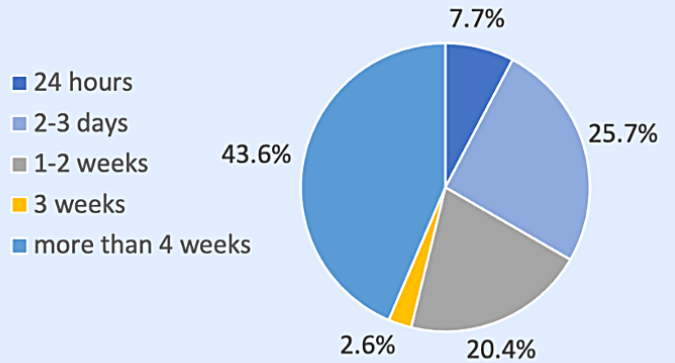


# Workplace Bullying Survey Results (Part 2)

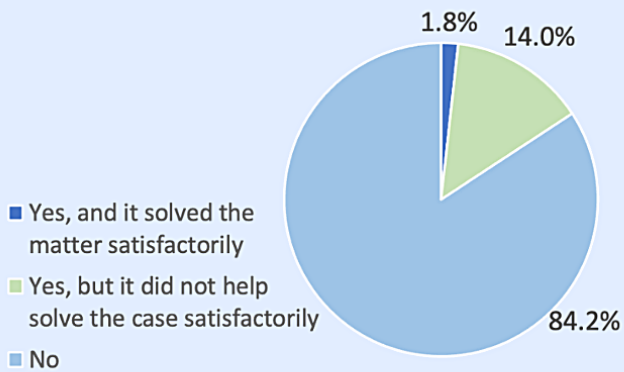
**DID THE COMPANY HAVE A COMPREHENSIVE GRIEVANCE PROCEDURE?**



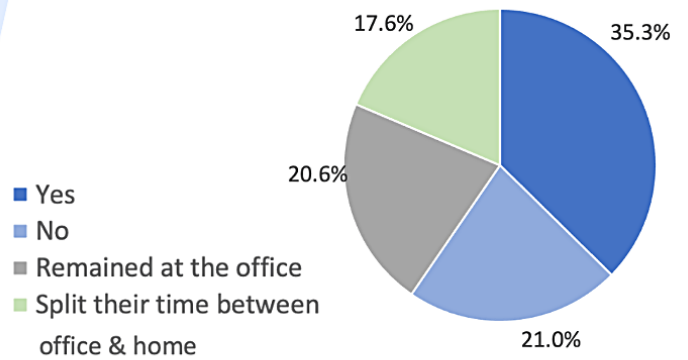
**HOW LONG DID IT TAKE FOR THERE TO BE AN OFFICIAL RESPONSE TO YOUR COMPLAINT FROM THE ORGANISATION?**



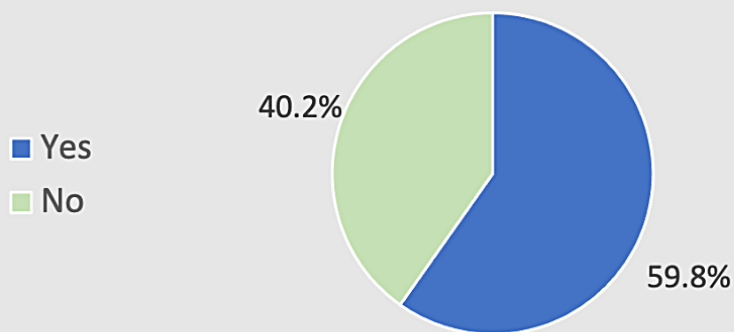
**DID THE COMPANY USE AN EXTERNAL INVESTIGATOR/MEDIATOR TO ASSIST?**



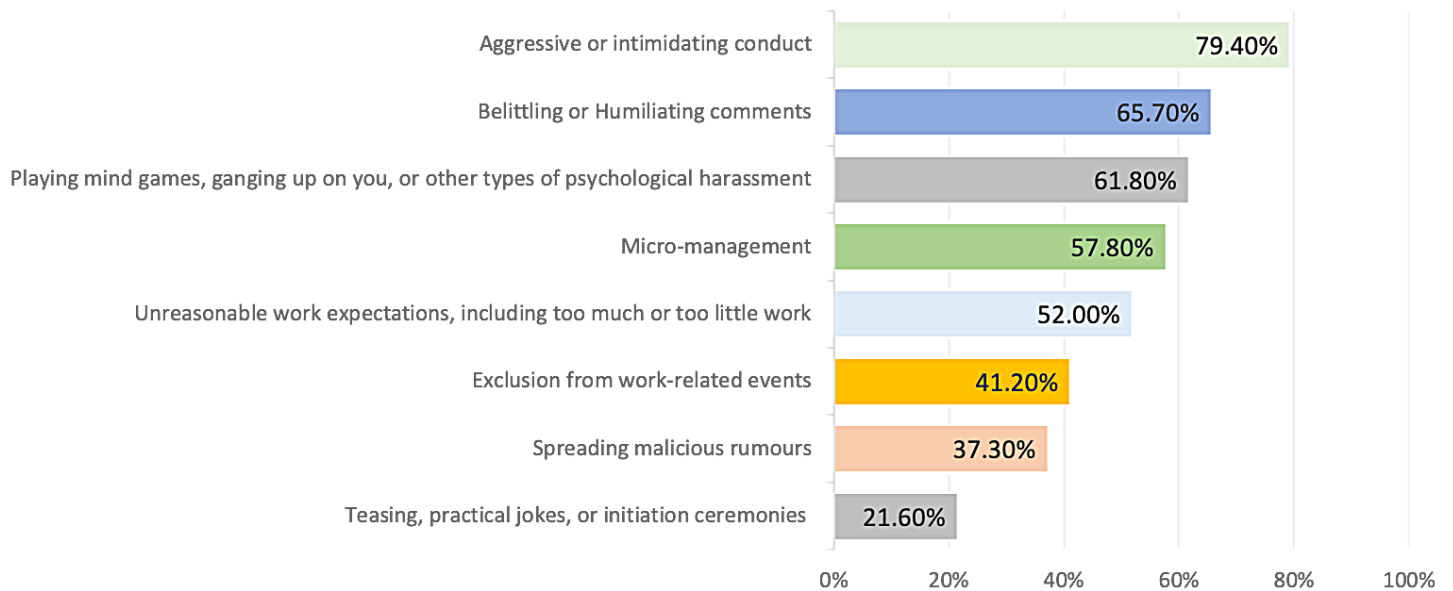
**HAVE YOU BEEN WORKING REMOTELY SINCE COVID-19?**



**DID YOU TAKE SICK DAYS AS A RESULT OF YOUR BULLYING?**



## What form did the bullying behavior take?

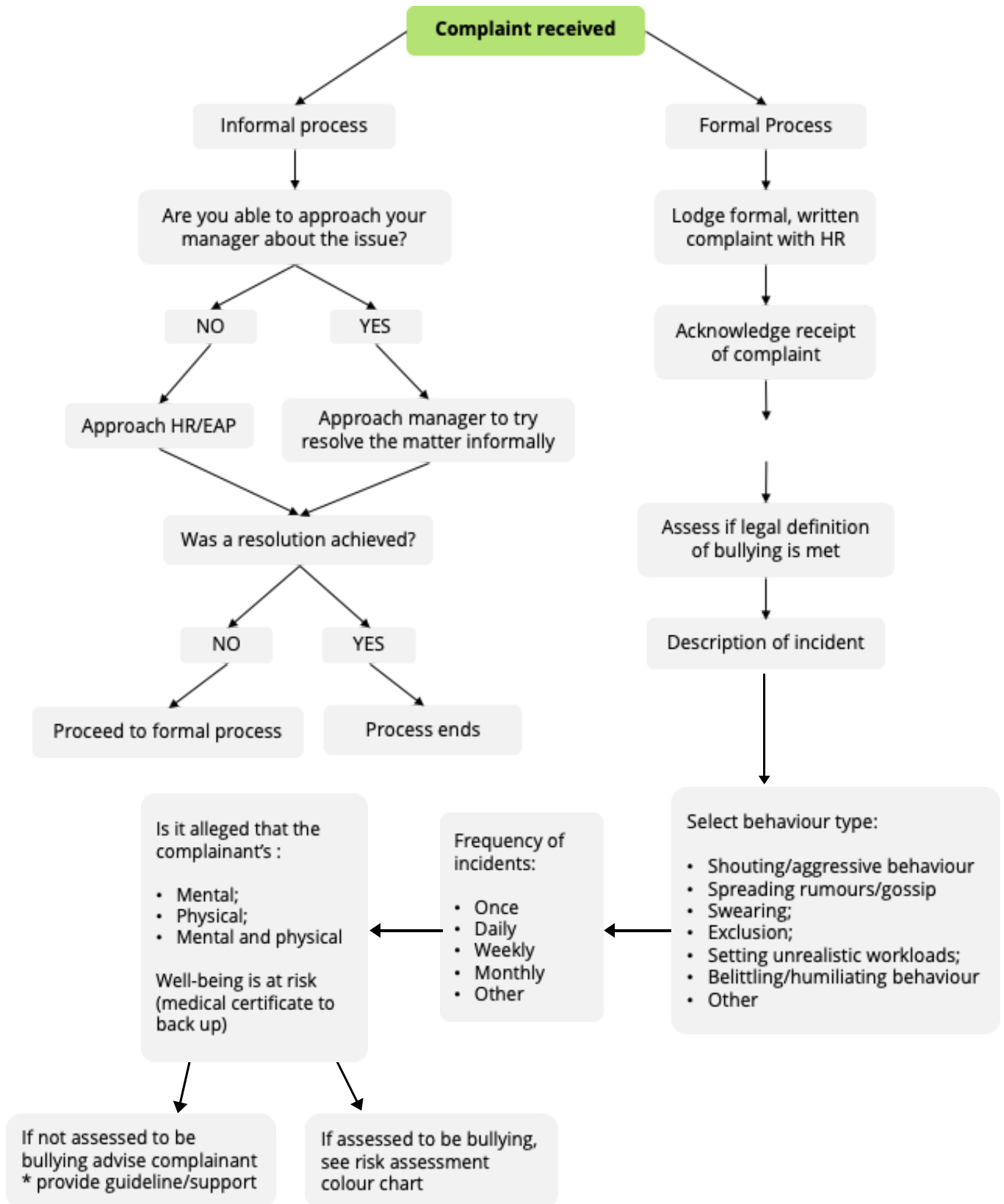


## Assessment of the Survey Data

While the survey results point to multiple aspects of the complaint cycle which are failing, what was striking is that many of these issues would seem to stem from two primary sources. Firstly, the length of time organisations are taking to manage bullying complaints and provide resolution. Secondly, the lack of transparent due process, both of these issues contribute to the victim's loss of trust in the organisation and the process, exposure to the bully/s and therefore chance of injury. Increased exposure and likelihood of psychiatric injury increases the companies' legal liability, which is reflected in the court settlements.

My conclusion is that the failure of the complaints cycle and lack of due process, and the time companies are taking to resolve bullying complaints directly impact victim injury and company liability. To remedy the issues, there is an obvious solution. We need to instal a best practice bullying complaints policy to reduce the risk of injury to the victim and the organisation's legal liability. Therefore, best practice policy is focused on reducing the time frame, assessing and minimising risk, introducing third party experts for more severe cases, and providing a transparent and clear process for all parties.

## Proposed Best Practice Policy Flowchart for Bullying Complaints



## Proposed Risk Assessment Colour Chart for Bullying Complaints

Internal Investigation	Internal investigation subject to safety provisos	External Investigation
Conduct is a single act/low level allegations of bullying	Co-worker is the alleged bully	Supervisor/Manager/Employer is the alleged bully
	<p><b>Provisos:</b></p> <ul style="list-style-type: none"> <li>•That the investigator is impartial and unbiased;</li> <li>•If parties work in close proximity to each other, consider separating them until investigation is complete or allowing one of the parties (usually complainant) to work from home</li> <li>•If likelihood of further exposure of bullying – external investigation recommended</li> </ul>	Allegations of multiple parties involved;
		There is no suitably skilled person to conduct the internal investigation.
		Serious allegations of systemic/ongoing bullying
		Conduct already been the subject of an internal investigation and not resolved
		Requirement to report the conduct to authorities – i.e. criminal offence

## Day 5-10

### Victim Management Investigation

- Both parties need to be advised as to how matter is to be investigated and estimated timeframes;
- refer them to the policies and procedures of the organisation;
- Ensure natural justice is adhered to by advising the respondent of the details of the complaint – who, how, when and where;
- Advise of potential disciplinary outcomes;
- Support persons permitted;
- Discuss confidentiality requirements.



## Day 11-20

### Investigation Commences

- Parties to give statements to investigator;
- Any witnesses to give statements;
- Collect relevant correspondence such as emails, letters, etc;
- Keep parties updated on progress.



## Day 21-28

- Report to be completed by investigator.

## Day 29-30

### Investigation Complete

- Organisation to advise parties of outcome;
- Discuss & implement recommendations.





## A 30-day Window - Best Practice Policy

Organisations have a limited time to resolve grievances before employees start losing trust in the organisation.



## A Final Word

I have seen first-hand from my years of experience as a workplace investigator and mediator that there is a clear link between bullying and toxic workplaces. The longer a single isolated case of bullying is left to fester, the bigger the risk that the ugliness will spread throughout the organisation. Once this has occurred, the organisation exposes itself to legal liability, and it takes extreme effort on behalf of management to eradicate the toxicity, usually done with professional assistance.

It's not to say too, of course, that even when a (best practice) complaints cycle is complete, the bullying will automatically stop. The goal of the 30-day window is to deal with bullying complaints quickly and effectively. It is additionally recommended that organisations, to be considered a best practice organisation equipped with the tools required to do away with bullying in the workplace, need to simultaneously adopt the following principles:

1. Ensure that all employees understand there is a zero-tolerance policy of bullying in the organisation; (ensure policies and procedures are updated regularly).
2. Leaders must lead by example and enforce anti-bullying policies confidently.
3. An open-door policy of communication must be encouraged; and
4. Training content that builds self-awareness and effectiveness must be held regularly for all employees.

