

# ADR / Mediation and 'Workplace Bullying' complaints:

*A risk management perspective*

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## Lets get our thinking hats on..

- What is the difference between bullying and conflict
- What do you think the differences are in bullying behaviours displayed in Western business cultures compared to Asian business cultures?

# Bullying from a global perspective

- 14 countries grouped into six country clusters: Southern Asia (India), Anglo (England, United States, Australia), **Confucian Asia (Singapore, Taiwan, Hong Kong)**, Latin America (Colombia, Argentina, Mexico), Sub-Saharan Africa (Nigeria), and Eastern Europe (Greece, Poland, Hungary).
- Nearly 1450 alumni and current students of Masters in Business Administration (MBA)

<http://www.hrinasia.com/general/are-asians-more-accepting-of-workplace-bullying>

# Bullying in the 'Confucian Asia' cluster

- Behaviours such as shouting, loading certain employees with too much work, and consistently highlighting mistakes was seen in some countries as boosting productivity.
- Because of this there was a high acceptance rate of bullying by bosses found in Singapore, Hong Kong and Taiwan compared to Western clusters.
- This is linked to the cultural feature of “high performance orientation.”

# High Performance Orientation and High Power Distance Cultures

- In some countries a strong performance orientation is linked to strong “power distance” making some types of authoritarian behaviours more acceptable, and not labelled bullying (despite them having similar effects).
- Such high power distance means that the actions of those with ‘power’ are seen as a natural right.
- As a result, certain types of bullying behaviour from bosses is deemed acceptable – and may not be perceived as bullying – despite the consequences of the behaviour being negative.

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## Research into bullying in the Asian context confirms these findings

- The cultural context in which the bullying occurs has been found to influence both the subjective experience of bullying as well as the type of behaviours perpetrated by the bully themselves (Liu, Nauta, Spector, & Li, 2008).
- In a study of American and Chinese work cultures, Liu and colleagues (2008) found that, compared to direct conflicts, indirect conflicts were a more important factor in determining detrimental health effects in Chinese employees and were perceived as more harmful.

# Research into bullying in the Asian Context

- Jacobson, Hood, & Van Buren, (2014) proposed that, in some cultures (such as many Asian cultures), bullying behaviours from colleagues are more likely to manifest as covert behaviours rather than obvious bullying, as may be more common in Western or cultures.
- They argued that in Japan, a culture low in assertiveness, perpetrators of bullying are often more indirect with behaviours such as teasing, exclusion from the group, ignoring and ostracism being the most common.



# Australia: Fair Work Act s.789FD(1)

- A worker is *bullied at work* if:
  - (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.

...does not apply to reasonable management action carried out in a reasonable manner.

# Risk to health and safety – objective test

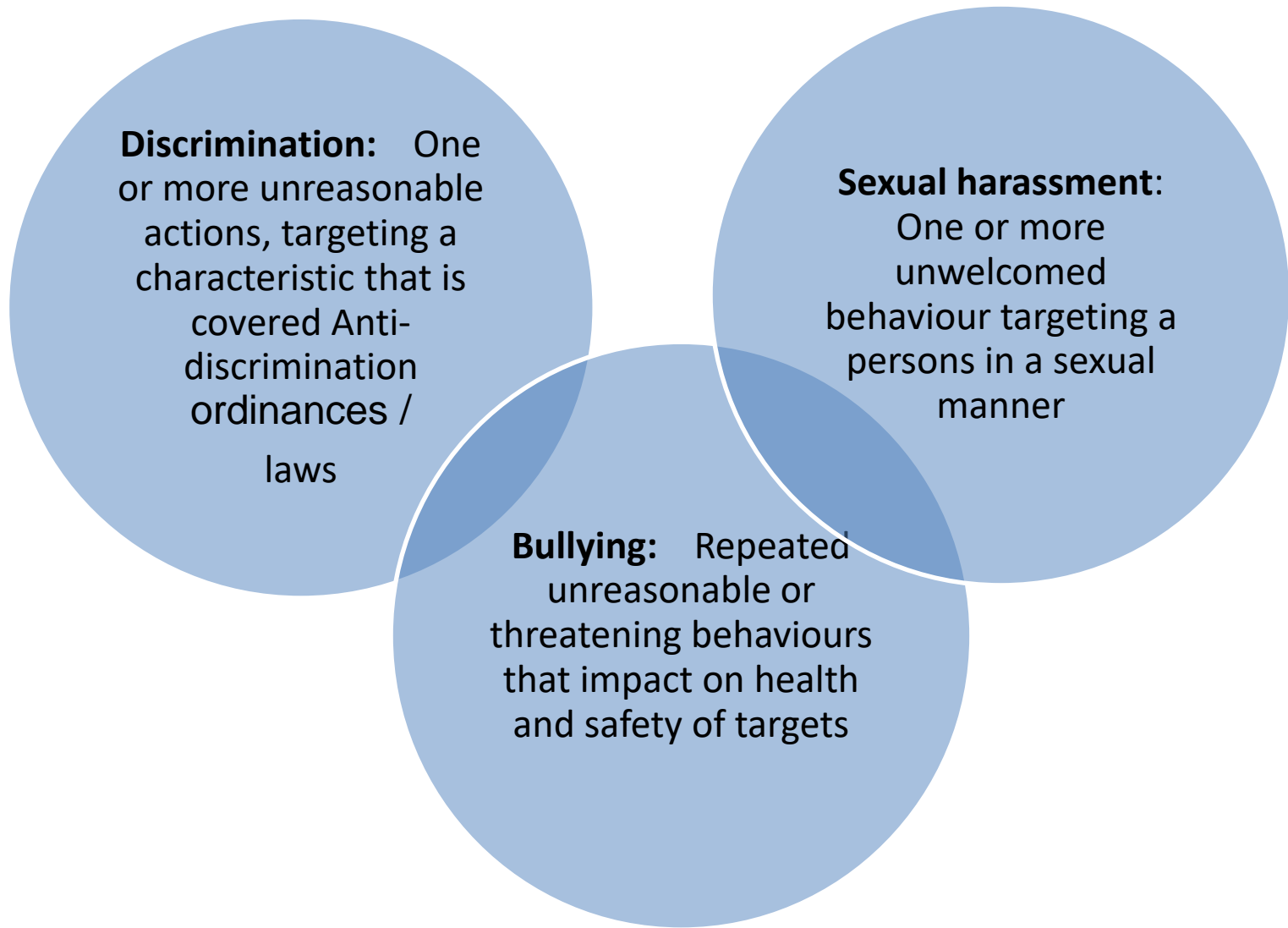
- A risk to health and safety means the possibility of danger to health and safety, and is not confined to actual danger to health and safety.
  - the target must be exposed to the possibility of injury or loss;
  - the risk must be real and not simply conceptual;
  - the bullying behaviour itself must create the risk to health and safety and there must be a causal link between the behaviour and the risk.

## ‘Reasonable Management Action’ Section 789FD(2)

Behaviour will not be considered bullying if it is reasonable management action carried out in a reasonable way.

- the behaviour must be management action;
- it must be reasonable for the management action to be taken;
- the management action must be carried out in a manner that is reasonable;

## Relationship between Bullying, Discrimination and Sexual Harassment



## Inherent in all forms of bullying are:

- Power used in a subversive manner
- Threatening / humiliating behaviours
- Behaviours are repeated
- Behaviours escalate over time if not addressed
- Behaviour is of a nature, and longevity that it presents a risk to the health and safety of the target/s

# There are different types of bullying

- Conflict escalation (may or may not be intentional)
- Predatory bullying
- Mobbing
- Normalised behaviours (which are in fact bullying)
- Upwards bullying
- Overlap between bullying, repeated acts of discrimination and sexual harassment

# How did this happen?

- Often looks like a relationship issue – and is dealt with as a relationship issue
- Occurs due to the risks in the organisation that have allowed poor behaviour to emerge and escalate.

# The background risks associated with workplace bullying

<b>Organisational / industrial factors and the way the work is organised</b>	<b>Work groups and workgroup culture</b>
<b>Systems and processes within the organisation and within departments</b>	<b>Characteristics of targets and perpetrators</b>



# The background risks associated with workplace bullying

- Organisational issues and the type of work
- Systems, policies and processes
- Work group / department culture
- Characteristics of individuals and management style.



# Interventions from a 'risk management' perspective

- Unfortunately, most interventions address either:
  - the relationship in isolation of the broader systemic issues (i.e. **mediation**);
  - the perpetrator in isolation of the broader systemic issues (**investigation** and disciplinary action)

# Most interventions

- Do not address the root causes of the behaviour, or the risks that may have contributed to the dispute / behaviour.
- Interventions (whether mediation or investigation) should also assess the 'risks' that potentially contributed to the behaviour emerging and escalating into bullying.
- Each intervention has its strengths and challenges, but can be carried out from within a risk management approach.

# Mediation

- May be suitable for some complaints of bullying
- Is NOT suitable for all complaints of bullying
- Can be carried out from a risk management perspective

# Is the issue suitable for mediation?

- Indicators of suitability for mediation
- When is mediation not a suitable process?

These questions need to be kept in mind throughout the mediation process. The mediation can be stopped at any time.

# Indicators of suitability for mediation

- The conflict between the parties is mild to moderate;
- Both parties are committed to achieving a negotiated settlement that does not involve making a finding of substance;
- There is a continuing relationship between the parties;
- Where the mediator can provide procedural equality to allow an equality of voice and of negotiation power between the parties

# Indicators of suitability for mediation

- The parties are competent to negotiate themselves;
- There are adequate resources provided to conduct a mediation;
- The parties can accept that the process is private and the outcome is confidential (within the limitations of the confidentiality agreement);
- There is no ongoing legal claim / process that might comprise the integrity of the mediation process.

# When mediation is not suitable

- The dispute involves a pure legal question;
- When the objective of the mediation is to substantiate an allegation;
- When one or both of the parties have ulterior motives for using mediation;
- The use of mediation could involve the risk of personal danger to one of the parties, the mediator or another person;
- One of the parties is 'vulnerable' and may not be able to negotiate in good faith
- The dispute cannot be resolved without making specific findings of fact;
- One or more of the parties is in a disturbed emotional or psychological state which impacts on their ability to negotiate an outcome in good faith;
- The dispute involves uncompromising differences over matters of value or fundamental principles that are not susceptible to negotiation;



## When mediation is not suitable.. Continued.

- When there are significant 'risks' identified in the organisation that may place the parties in a situation where it is unlikely that any resolution can be sustained (ie: absence of policy, significant culture of bullying);
- Where there is an imbalance of power that cannot be rectified by third party support and this will impact on one parties ability to negotiate in good faith, or be heard effectively;
- When mediation has been used previously in relation to the same complaint (complainant and / or respondent) and a successful resolution has not been sustained;
- When the complaint is a serious bullying or harassment allegation;
- Upwards bullying, or mobbing (group bullying) where more formal dispute resolution practices are more appropriate, or where a team culture needs to be addressed rather than a dispute between two parties.

# What do we mean by a serious complaint? Should serious complaints be mediated?

- A complaint against a senior manager by a junior member of staff;
- Multiple complainants against one respondent;
- A long standing bullying allegation (i.e. the alleged behaviour has been going on for over six months);
- One or both parties are injured as a result of the behaviour and the mediation would exacerbate the injury;
- The behaviour is of a criminal nature.
- Any others???

# Power

- Mediation can provide procedural equality but does not usually alter the basic power relations between the parties
- However, mediators can and should prevent power being used in a way that that is contrary to the principals of mediation and ADR
- Mediation should not exacerbate the power inequalities between parties, or prevent them from obtaining any support or assistance that might be available to them to balance power relations

# Pre-mediation

## Assessment and preparation for mediation

- Is mediation a suitable process?
- Confidentiality agreement – what information is provided to HR and what remains confidential;
- Limitations of confidentiality;
- Identification of risks if you are using a risk management approach– (use of surveys to assist ?);
- Building rapport with both complainant and respondent and identifying their concerns;
- The option of conflict management coaching as part of pre-mediation to prepare the parties for the mediation.

# Agreement to mediate - limitations of confidentiality

- Safety issues and concerns can not remain confidential
  
- Be clear about what **will be** reported back to HR
  - Themes related to risk factors that may have contributed to the dispute
  
  - What is confidential and what is not:
  
  - *What do you say to the parties about confidentiality?*

# Post mediation follow-up

- **Team level**
  - Debriefing
  - Team values, processes
  - Training on rights and responsibilities
  
- **Organisational level**
  - Policy development
  - Development of systems to address gaps identified
  - Job and person specifications or other identified risks

# Possible post mediation follow-up

- **Individual level**
  - Conflict coaching
  - Performance management training
  - Debriefing for both parties
  
- **Relationship level**
  - Ongoing facilitated discussions
  - Regular joint reviews

# Takeaways

- Mediation is not suitable for ALL complaints of bullying.
- Traditional mediation frameworks fail to address the risks that contributed to the behaviour.
- Mediation from a risk management perspective may be appropriate for SOME bullying complaints.
- Investigations can also be carried out from a risk management perspective.



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