

**SUBMISSION TO THE HOUSE
STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT**

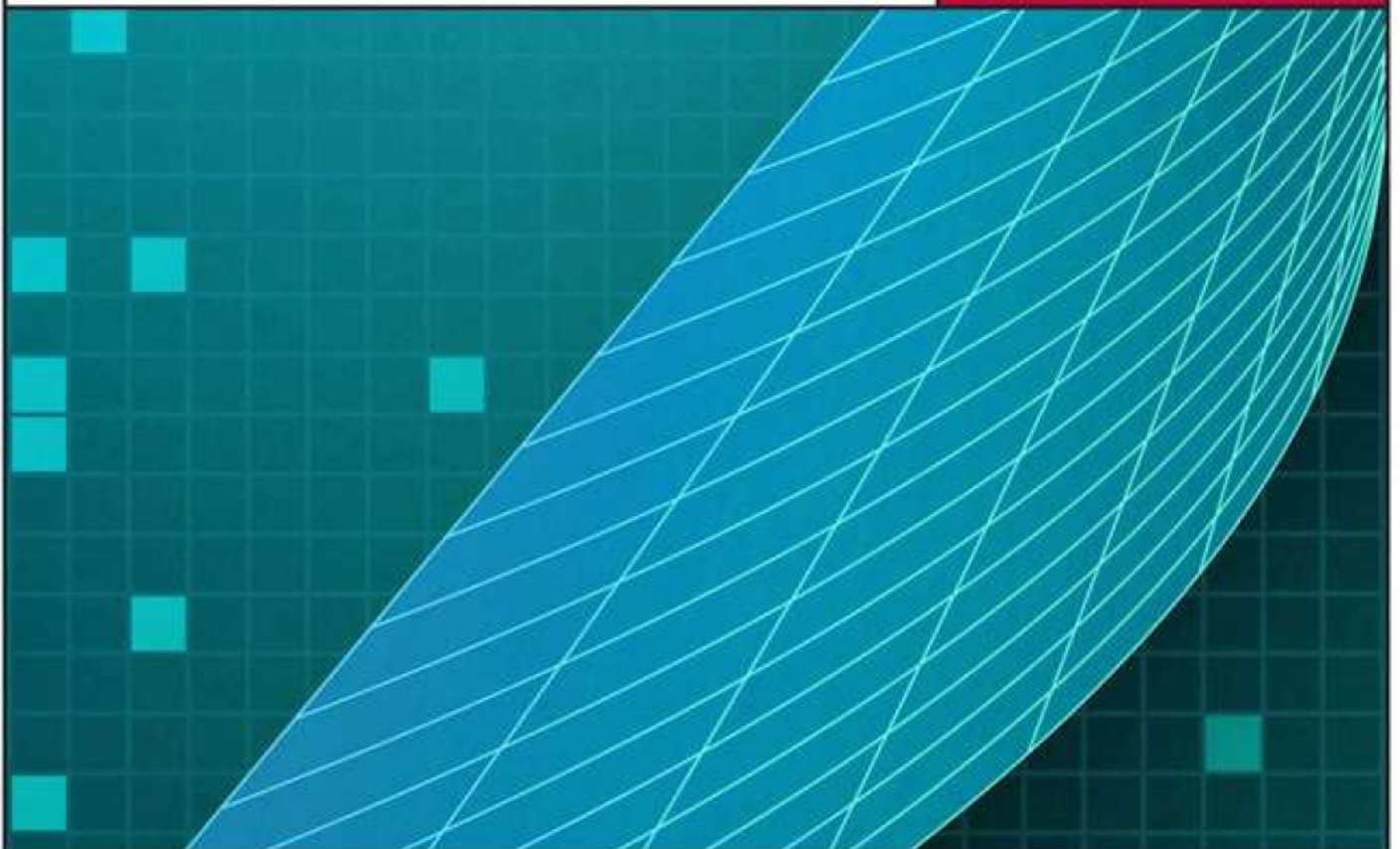
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Inquiry into workplace bullying

 AUSTRALIAN INDUSTRY GROUP

1 July 2012



Submission to House Standing Committee on Education and Employment - Inquiry into Workplace Bullying

1. Introduction

1. Ai Group welcomes the opportunity to make submissions to the House Standing Committee on Education and Employment (**Committee**) inquiry into Workplace Bullying (**Inquiry**).
2. On 31 May 2012 the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP asked the Committee to inquire and report into workplace bullying. The Committee invited interested parties to submit their views by addressing the terms of reference.
3. Ai Group is a peak industry representative body, representing industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees in numerous sectors including manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and services, airlines and other industries.
4. Workplace bullying is a problem that the Productivity Commission estimates is costing Australia between \$6 billion and \$36 billion annually. At the workplace level, the negative cost implications are far reaching and include decreased productivity, low workplace morale, mental health issues, increased workers' compensation claims, absenteeism, investigation costs, legal costs and reputational damage.
5. An increasing awareness of workplace bullying among employers and employees has translated into a steady rise in bullying complaints.

6. Despite the increased awareness, there is a lack of understanding in the community about what constitutes bullying behaviour at the workplace. In our experience the term bullying is often used loosely to describe unacceptable or anti-social behaviour or behaviour that a person is unhappy with. This misunderstanding is also compounded by the diverging definitions of workplace bullying by each of the workplace health and safety regulators.
7. Further it is not widely understood that workplace bullying is a problem that primarily falls within the jurisdiction of work health and safety regulation, and not anti-discrimination or industrial law.
8. The lack of understanding surrounding workplace bullying can be addressed by a renewed emphasis on prevention and education. Ai Group is supportive of this approach, rather than disturbing the current regulatory framework.

2. What is bullying?

9. Bullying is subjective in nature and the effects of bullying vary from person to person. This makes workplace bullying difficult to identify.
10. Unhelpfully, the term 'bullying' is often used to describe unacceptable or anti-social behaviour or behaviour that a person is unhappy with. Often this type of behaviour does not amount to 'bullying' in the technical sense as described by work health and safety regulators.

Bullying in the technical sense

11. The term 'bullying' is not formally defined in law. However, the lack of a legal definition is not necessarily problematic. It is enough, in our view, that the term is defined in work health and safety codes of practice and guidelines, which themselves carry strong legal significance.

12. There is inconsistency in how the term ‘bullying’ is defined by each of the different work health and safety regulators. While each of the definitions share common elements (being repeated behaviour that is unreasonable and creates a risk to health and safety) there are differences from jurisdiction to jurisdiction as set out in the following table.

Jurisdiction	Definition of workplace bullying
Commonwealth	<p>Workplace bullying is repeated, unreasonable behaviour directed towards a worker or a group of workers, that creates a risk to health and safety.</p> <p>‘Repeated behaviour’ refers to the persistent nature of the behaviour and can refer to a range of behaviours over time.</p> <p>‘Unreasonable behaviour’ means behaviour that a reasonable person, having regard for the circumstances, would see as victimising, humiliating, undermining or threatening.¹</p>
New South Wales	<p>Repeated, unreasonable behaviour directed towards a worker or a group of workers, that creates a risk to health and safety.²</p>
Queensland	<p>Repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person’s employer or a co-worker or group of co-workers of the person that :</p> <ul style="list-style-type: none"> • Is unwelcome and unsolicited; • The person considers to be offensive, humiliating, intimidating or threatening; • A reasonable person would consider to be offensive, humiliating, intimidating or threatening.³

¹ Safe Work Australia, Draft Code of Practice preventing and responding to workplace bullying, September 2011, p.4
 Note that this Draft Code of Practice is being further reviewed following comments received during the consultation process.

² WorkCover NSW, *Preventing and Responding to Bullying at Work*, Edition 3, June 2009, p.4

³ Queensland Government, *Prevention of Workplace Harassment – Code of Practice 2004*, 1 January 2012, p.2

Victoria	Repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety. ⁴
South Australia	<p>Bullying is behaviour:</p> <ul style="list-style-type: none"> a) that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and b) that creates a risk to health or safety. <p>Bullying does not include:</p> <ul style="list-style-type: none"> a) reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee; or b) a decision by an employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with an employee's employment; or c) reasonable administrative action taken in a reasonable manner by an employer in connection with an employee's employment; or d) reasonable action taken in a reasonable manner under an Act affecting an employee.⁵
Tasmania	Bullying is repeated, unreasonable behaviour directed towards a worker or group of workers. It creates a risk to personal and workplace health and safety. Differences of opinion, conflicts and personality clashes can happen in the workplace and they are not bullying. ⁶

⁴ WorkSafe Victoria, Preventing and Responding to Bullying at Work, Edition 3, June 2009, p.9

⁵ Occupational Health, Safety and Welfare Act 1986 (SA), s.55A(1) and (2)

⁶ WorkSafe Tasmania, Bullying - A guide for employers and workers, April 2012, p.2

Western Australia	Repeated unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety. ⁷
Australian Capital Territory	Bullying is repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety. ⁸
Northern Territory	Bullying at work can be defined as repeated, unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety. ⁹

Bullying as a buzz word

13. People often use the term ‘bullying’ to describe unacceptable or anti-social behaviour or behaviour that a person is unhappy with. Therefore ‘bullying’ is often confused with:
- harassment or discrimination; or
 - an emotional reaction to workplace stress or work pressure arising out of performance management, increased workload or an increase in the complexity of a person’s work.
14. For example, it is not uncommon for an employee to describe his/her feelings in response to reasonable changes in the workplace, such as changes to a person’s role or job tasks, or performance management processes, as ‘bullying’ by the employer. Reasonable management action is not ‘bullying’.
15. A workplace is made up of different people each bringing with them their own personalities shaped by their innate mentalities and life experiences. Circumstances will arise that bring uneasiness, discontent or unhappiness to a person, but this will often not constitute workplace bullying.

⁷ Government of Western Australia, Commission for Occupational Safety and Health, *Code of Practice – Violence, aggression and bullying at work*, 2010, p.19

⁸ Australian Capital Territory Government, Work Health and Safety (Preventing and Responding to Bullying) Code of Practice 2012 (No 1), p.3

⁹ Northern Territory Government, NT WorkSafe Bulletin, *Prevention of bullying at work – employers*; Northern Territory Government, NT WorkSafe Bulletin, *Dealing with bullying at work – workers*

16. This is consistent with the feedback from WorkSafe Victoria, which in May 2010 revealed that the majority of the 6000 bullying complaints made to the agency that year fell short of what was actually bullying behaviour. Some of the complainants confused 'bullying' with discrimination, conduct relating to industrial matters or reasonable management action.¹⁰ In response to the spike in bullying complaints in 2010, WorkSafe acknowledged:

“That the term bullying is being used quite loosely in the community now in many instances to describe something that has 'gone against me' or 'that I haven't liked' or something that 'I haven't wanted to do'.”

“As a result, we are seeing a mismatch between what is being labelled bullying and what would really constitute bullying under the Occupational Health and Safety Act”.¹¹

17. There is a poor understanding among, not only employees, but employers and the community more broadly, of what workplace bullying is, thereby highlighting the need for improved education and awareness by Governments at all levels.

Bullying as psychological violence

18. According to the International Labour Organisation (**ILO**) workplace bullying is a form of *psychological violence*. In their publication, *Violence at work - A major workplace problem*, the ILO describes workplace bullying as:

“Workplace bullying constitutes offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees. Such persistently negative attacks on their personal and professional performance are typically unpredictable, irrational and unfair.”¹²

¹⁰ Sydney Morning Herald, 'Most workplace bullying claims fall short', Rachel Wells, July 24, 2011
<<http://www.smh.com.au/small-business/managing/most-workplace-bullying-claims-fall-short-20110725-1hw1c.html>>

¹¹ Ibid

¹² International Labour Organisation, *Violence at work - A major workplace problem*, 1 January 2009
<http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/genericdocument/wcms_108531.pdf>

19. The ILO's description of workplace bullying is a useful summation of the types of unreasonable behaviour which would constitute 'bullying behaviour', that is persistent vindictive, cruel, malicious or humiliating behaviour. Reference to 'bullying behaviour' in this way may assist to curb the looseness with which the term 'bullying' is used by the community more broadly.
20. The ILO's characterisation of workplace bullying as psychological violence correctly alludes to the fact that the 'bullying behaviour' is a type of behaviour that poses a risk to mental health and safety, not just a type of behaviour with which a person is unhappy with.

3. Prevalence of workplace bullying in Australia

21. We have not identified any independent Australian research that reveals the prevalence of workplace bullying. While one can refer to international research¹³ to make assumptions about the prevalence of bullying in the Australian workplace, we find it difficult to make reliable parallels because of the uniqueness of Australia's industrial and work health and safety framework.
22. Perhaps a more relevant indicator to determine the prevalence of workplace bullying in Australia is an examination of the number of bullying complaints made by employees to regulators and workers' compensation claims made for mental stress or psychological injury (even though of course only a portion of these are related to bullying).
23. In the two years prior to June 2010, WorkCover NSW investigated 1,165 complaints relating to workplace bullying.¹⁴ During that period, 2,400 workers compensation claims were made for workplace bullying, costing more than \$60 million.¹⁵ As a result, WorkCover NSW launched a nine month campaign consisting of workplace advisory and compliance visits, public workshops and partnerships with industry bodies.

¹³ For example research undertaken by the U.S Workplace Bullying Institute.

¹⁴ NSW Government, Media Release, 'Stamping out Workplace Bullying is Everyone's Responsibility', 17 June 2010, Michael Daley.

¹⁵ Ibid.

24. There has been an increase in workers' compensation claims made for mental stress and psychological injury. The Australian Safety and Workers Compensation Council in 2007 reported that while trends over time indicated a fall of 13% in overall workers' compensation claims between the years 1996-1997 and 2003-2004, claims categorised as mental stress increased by 83%.¹⁶ It is difficult to draw assumptions from these figures because mental stress is usually not attributed to bullying occurring in the workplace.
25. The increase in the number of bullying claims, in our view, is due to the increased level of awareness about this issue. Our views on this point align with those of WorkSafe Victoria, which in May 2010, reported that the rise in bullying complaints made to the agency were attributed to a rise in awareness about bullying in the workplace, particularly following the death of 19-year-old waitress, Brodie Panlock, who committed suicide after being bullied at a Melbourne café.¹⁷
26. However, as discussed above in section 2 of this submission, many bullying complaints fall short of actual bullying behaviour as prohibited under workplace, health and safety legislation.

4. Impacts of workplace bullying

27. The impacts of bullying in the workplace (on individuals, the organisation and the community at large) are far reaching and include:
- Decreased productivity;
 - Mental health issues;
 - Low workplace morale;
 - Increased workers' compensation claims;

¹⁶Safe Work Australia, *Compendium of Workers' Compensation Statistics Australia 2004-05*, May 2007
<http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/337/MechanismOfMentalStress_Extract_CompendiumWorkersCompensationStatistics_204_2005_PDF.pdf>

¹⁷ See above n.10

- Absenteeism;
- The time taken to investigate bullying complaints;
- The cost of engaging an external investigator to conduct serious bullying investigations;
- The cost of defending workplace, health and safety prosecutions (including representation, legal costs, potential damages or settling a complaint); and
- The negative impact on an organisation's reputation.

28. Bullying complaints not only reduce workplace morale, but can prove to be a costly and time-consuming exercise for employers. Employers may be faced with the potential costs of defending bullying allegations under work health and safety laws, legal representation, settling a complaint, and the negative publicity that may arise as a result of the complaint. Even if a complaint is resolved internally, there are costs associated with conducting an investigation.

29. In practice, most employers are aware of and are taking active steps to address workplace bullying. As well as the negative impacts of bullying in the workplace (outlined above), work health and safety laws ensure that employers are addressing workplace bullying. In our experience, many employers have in place, or are in the process of developing, workplace bullying policies and procedures. Many employers also provide training to their staff on workplace bullying and, where the need arises, engage external investigators (such as Ai Group) to assist with training and with investigations into workplace bullying.

5. The role of workplace-based policies, procedures, training and investigations

Policies and procedures

30. In our experience, employers can promote safe workplaces and minimise the risks associated with bullying complaints by developing a comprehensive bullying policy and associated procedures for dealing with bullying complaints. The policy and procedures must be well communicated and accessible to employees and should be the subject of regular review by the employer.
31. Many employers appoint contact officers to assist their employees with bullying complaints and concerns. A contact officer acts as a reference point for employees who want to make a complaint or who want more information regarding the employer's bullying policy and procedures. A contact officer may assist in the formulation of informal and/or formal options for resolution of a bullying complaint.
32. Many employers develop procedures that include a step-by-step process for resolving grievances. The process often commences with informal resolution (including resolving the matter with the other party, or referral to a supervisor or manager) and may proceed to a formal investigation.

Workplace training

33. Employers often conduct training on workplace bullying, either internally or through an external provider (such as Ai Group). As an example, in the 2011-2012 financial year, Ai Group conducted 322 on-site training sessions covering topics which included workplace bullying.¹⁸ The training was targeted to contact officers, managers, executives and employees. In addition, Ai Group conducted four public training sessions and 11 online training sessions.

¹⁸ The training also covered EEO and workplace discrimination

34. Conducting training on workplace bullying is an effective means of establishing that an organisation takes bullying seriously and will not tolerate bullying in the workplace. It also ensures that management and employees understand their obligations (under relevant legislation and the organisation's bullying policy) and are aware of the procedures for dealing with bullying complaints.

Bullying investigations

35. If a bullying complaint cannot be resolved by informal resolution, or with assistance from the relevant supervisor or manager, employers should conduct a detailed investigation into the bullying complaint. Witnesses may be called as part of the investigation. It is important that investigations are structured, objective, impartial and fair.
36. Investigations not only provide an impartial process for dealing with bullying concerns, but may also alert employers to bullying issues in the workplace. In many cases, bullying complaints have led to cultural shifts in the workplace. For example, a bullying complaint may result in an employer reviewing or developing bullying policies and procedures, and/or conducting training on bullying for both management and employees.
37. Action taken to resolve a grievance will depend on the circumstances of the complaint, but may include an apology, an undertaking, counselling, disciplinary action (up to and including dismissal), training, dismissing the complaint, or notifying the police. If a complaint is not substantiated, the employer should provide reasons for its decision and should keep a separate and confidential file regarding the investigation.

6. Addressing and preventing workplace bullying

38. Ai Group strongly supports a holistic approach to workplace bullying with an emphasis on prevention and education. Ai Group supports the coordination and/or partnership of governments, regulators and industry groups to address and prevent workplace bullying.

Work health and safety regulators

39. Work health and safety regulators, such as WorkSafe Victoria and WorkCover NSW, have an important role to play in addressing and preventing workplace bullying. These regulators assist people to comply with work health and safety laws in relation to workplace bullying.
40. One of the main ways the regulators address workplace bullying is to focus on the preventative measures that can be taken before bullying becomes a risk to health and safety. As a result, the regulators have a number of resources available to assist with the prevention of workplace bullying, including guidance materials, fact sheets, sample policies, risk assessment tools and telephone advisory lines.
41. For example, WorkSafe Victoria, in conjunction with WorkCover NSW, developed a handbook, "*Preventing and Responding to Bullying at Work*"¹⁹, which provides general advice to employers and employees on workplace bullying.
42. In addition, WorkCover NSW has a "*Bullying Prevention Kit*"²⁰, to help managers, workers and others to prevent bullying in the workplace.

¹⁹ See above n.2 and n.4

²⁰ See <http://www.workcover.nsw.gov.au/newlegislation2012/health-and-safety-topics/human-behaviour/Pages/Bullying-prevention-kit.aspx>

Workplace bullying services provided by Ai Group

43. Ai Group is a leader in bullying awareness and education and is committed to preventing and reducing workplace bullying. As discussed above, in the 2011-2012 financial year, Ai Group conducted 322 on-site training sessions, four public training sessions and 11 online training sessions which included workplace bullying topics.²¹
44. Further, Ai Group's workplace relations advisers provide advice to employer members on preventing and responding to bullying issues, and conduct on-site bullying investigations.
45. In addition, Ai Group's workplace relations Infoline provides on-the-spot advice to employer members on workplace bullying.

7. The regulatory framework

46. Work health and safety law is the primary regulatory framework that deals with workplace bullying in Australia. Given that bullying is behaviour which can pose a threat to the health and safety of employees at work, employers have a duty of care to, so far as practicable, deal with and remove bullying from the workplace. Employers who breach work health and safety laws are subject to penalties under the relevant work health and safety legislation.
47. This positive statutory obligation on employers to provide a healthy and safe workplace free of bullying is coupled with access to workers' compensation for workers that suffer illness or injury resultant from being bullied at work.
48. Employers are obliged to provide workers' compensation to workers who suffer an illness or injury resultant from bullying behaviour. This obligation includes a positive duty to facilitate the employee's return to work in a full or partial capacity. The workers' compensation schemes in each jurisdiction make available to workers weekly payments in respect of their illness or injury

²¹ The training also covered EEO and workplace discrimination

for the period of their illness or injury, reimbursement of reasonable medical expenses, and importantly assist the employee to recover from the illness or injury and rehabilitate back into the workplace

49. This two-pronged approach, which obliges employers to provide a health and safe workplace and enables employees to access workers' compensation and medical care when ill or injured in the course of their employment is appropriate and well balanced regulatory approach to workplace bullying. It correctly puts a focus on mental health and encourages employees who do suffer illness or injury as a result of workplace bullying to remain engaged with the workforce as opposed to alienated from it via pursuits of legal action.
50. Of course, because of the general nature of bullying behaviour, it is possible for the behaviour to also fall within the definition of harassment, vilification and/or discrimination. Where this occurs, employees subject to bullying are able to pursue legal action against the employer in a court, anti-discrimination tribunal²² and/or Fair Work Australia (by effect of the General Protections provisions in the *Fair Work Act*).
51. More recently bullying behaviour, in the most extreme cases, has transcended into criminal law in Victoria. In 2001, the *Crimes Amendment (Bullying) Act 2011* (Vic) was passed by the Victorian Parliament following the death of 19-year-old waitress, Brodie Panlock, who committed suicide after being bullied in the course of her employment at a Melbourne café. The amendment to the *Crimes Act 1958* (Vic) expanded the existing offence of stalking under s 21A of that Act to include threatening, abusive or offensive behavior that would cause physical or mental harm to the victim, including self-harm. The offence is punishable against the person engaging in the bullying behavior and carries a maximum jail term of 10 years.

²²Age Discrimination Act 2004 (Cth); Disability Discrimination Act 1992 (Cth); Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 1995 (VIC); Anti-Discrimination Act 1991 (QLD); Equal Opportunity Act 1984 (WA); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1998 (TAS); Discrimination Act 1991 (ACT); Anti-Discrimination Act (NT).

52. This web of regulation as it relates to workplace bullying is not unique to Australia. The United Kingdom also regulates workplace bullying in a similar way, i.e. acknowledging the risk workplace bullying has to the health, safety and wellbeing of workers, and where links between bullying behaviour and behaviour that would constitute harassment or discrimination, through anti-discrimination law.²³
53. An unfortunate consequence of the web of regulation that exists in Australia is that it can be very difficult for employers and employees to understand. While part of the difficulty arises out of different legal obligations which apply, the misunderstandings in the community of what workplace bullying actually is and the looseness with which the term is used are significant contributing factors.
54. Ai Group believes that the regulatory difficulties which are being experienced can be appropriately addressed, not by disturbing the regulatory framework as it exists, but by an increased focus by all levels of Government on educating the community about workplace bullying, including differentiating it from other types of bullying and emphasising the link between workplace bullying and work health and safety.

Employers' common law obligations

55. Aside from statutory obligations, employers have common law obligations arising out of the employment relationship, including a general duty to take reasonable care to avoid exposing employees to unnecessary risks of injury to their health and safety.²⁴
56. This duty includes protecting employees against bullying and harassment. An employer can be found negligent if it fails in this duty.²⁵ However other elements must be proved before a breach of duty is made out before a Court. This includes that it was reasonably foreseeable that a psychiatric injury would

²³ For example see <<http://www.direct.gov.uk/en/Employment/index.htm>>

²⁴ *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* [2007] NSWCA 377 (21 December 2007), Spigelman CJ at [25]

²⁵ *Ibid*, Spigelman CJ at [26]

occur because of the employer's negligence.²⁶

Discrimination and harassment law

57. As identified above, bullying behaviour can sometimes also be behaviour that is considered harassment or discrimination in the eyes of anti-discrimination law. For the behaviour to constitute harassment or discrimination it must be done in respect of a particular ground, such as sex, age, race or disability.
58. Employees subject to this type of behaviour are free to make a complaint to the Australian Human Rights Commission or any of the State or Territory agencies that deal with discrimination and harassment, such as the NSW Anti-discrimination Board. Once a complaint is made, if not resolved through conciliation or mediation, the complainant is generally free to pursue a remedy, usually in monetary form, from a court or tribunal.
59. The nature of this approach is very different to the work health and safety approach which has a strong preventative focus.
60. Ai Group is not supportive of the notion that workplace bullying should be further dealt with under anti-discrimination law. In our view, this would shift the focus of managing unsocial behaviour at work and rectifying poor workplace culture and managerial practices into an adversarial arena. Because of the basis on which 'damages' are determined this approach encourages complainants to demonstrate that a return to the workforce is unlikely.
61. Also, the focus of anti-discrimination law is often to punish those who engage in discriminatory or harassing behaviour. While this is legitimate in some cases it often does not assist in effecting a positive culture change in the workplace.

²⁶ Ibid, Spigelman CJ at [27]

62. Cultural change is best achieved by educating staff about what is appropriate behaviour at work and assisting employers to develop and implement appropriate policies and procedures.

8. Conclusion

63. Workplace bullying is a significant problem with negative impacts on employers and employees.
64. The current regulatory framework as it relates to bullying, although fragmented at times, is appropriate.
65. More needs to be done to educate employers, employees and the community about workplace bullying.
66. The lack of community understanding about workplace bullying is clear by the high incidence of workplace bullying complaints that are incorrectly characterised as such by the complainant.
67. This misunderstanding is also compounded by the diverging definitions of workplace bullying by each of the work health and safety regulators.