

Individual/Organisational name: Australian Industry Group

**Model Work Health and Safety Code of Practice Preventing and Responding to Workplace Bullying - Public Comment Response Form**

**Code or Guide**

See Page 2 of the draft model Code of Practice

**Comments:**

**5.3 Consultation Regulation Impact Statement (RIS) - page 18**

*"A draft model Code has been developed for release for public comment as recommended by the Parliamentary Inquiry into Workplace Bullying and accepted by the Australian Government in its response to the enquiry... As well as seeking comment on the content of the draft model code, public comment is being sought as to whether the document should be adopted as a model Code of Practice or as national guidance material."*

It is our view that the document should be adopted in the form of national guidance material.

Whilst supporting the objective of the proposed reform we consider that the draft Code of Practice (code) is overly prescriptive. A possible result being that a 'compliance mentality' could emerge rather than industry addressing the cultural change that is required to eradicate bullying from the workplace.

Additionally, the draft code does not meet the following criteria set out by Safe Work Australia for determining suitability for a Code of Practice:

- *There are certain preferred or recommended methods to be used (or standards to be met) to achieve compliance.*

We suggest that in practice there can be no 'standard' or 'recommended' method used to achieve compliance in cases of bullying, since every case will differ as will the individuals and the workplaces involved.

- *The information on the hazard, risks and control measures is well-established, reflects the state of knowledge and therefore will not require frequent updating.*

We suggest that this criterion can be applied more readily to physical rather than behavioural hazards. We acknowledge that the hazard exists but that control measures are not 'well-established' and again, tend to be specific to individual workplaces.

Ai Group continues to support the proposed common definition of bullying (which also mirrors the definition in the Fair Work Act).

**Model Code of Practice – Preventing and Responding to Workplace Bullying****Chapter 1: Introduction****Comments:****1.1 What is workplace bullying? – page 6**

Behaviour that is “threatening” is included in the definition of “unreasonable behaviour”. Later in the document under the sub-heading ‘Bullying and workplace violence’ (page 7), workplace violence is described as behaviour in which a person is “threatened”. This terminology could cause confusion i.e. workplace bullying includes unreasonable behaviour which includes “threatening” behaviour. Workplace violence is described as being different from bullying but includes behaviour in which a person is “threatened”, presumably by someone using “threatening” behaviour.

**1.1 Bullying and workplace violence – page 7**

Workplace violence is a criminal behaviour which should be reported to the police. The information about workplace violence set out in the draft code of practice does not link the issue of workplace violence to workplace bullying, but rather treats it as a separate issue. Set out in this way, this information is not appropriate to be included in the code.

**1.2 Reasonable management action taken in a reasonable way (not considered bullying) – page 7**

Section 1.2 lists examples of reasonable management. It is important that strong emphasis is placed on differentiating reasonable management action from bullying behaviour and while we agree with the examples of reasonable management action listed, we propose the following amendment to dot point 5. This amendment is important because it takes into account that not all businesses have formal workplace policies and procedures. These are usually confined to larger employers and therefore the dot point must be varied in a way which is inclusive of small to medium sized businesses:

- *“informing a worker about unsatisfactory work performance ~~when undertaken in accordance with any workplace policies or agreements such as performance management guidelines in a reasonable way~~”*

**1.2 Discrimination and harassment and Workplace conflict – pages 7 and 8**

Ai Group strongly agrees that discrimination and harassment and workplace conflict is not workplace bullying. Incidents of discrimination and harassment and workplace conflict can only be characterised as workplace bullying if the behaviour escalates to meet the definition of workplace bullying, i.e. ‘*repeated and unreasonable behaviour .... that creates a risk to health and safety*’. We do not accept that single incidents of discrimination and harassment or workplace conflict would meet the definition of workplace bullying.

The information set out on pages 7 and 8 dealing with discrimination and harassment and workplace conflict, while useful guidance to understand what is not workplace bullying, it is not appropriate for the inclusion in a code of practice but rather is more appropriate for a guide.

The paragraph on page 8 states that low level and task based workplace conflict can:

*“benefit an organisation by generating debate leading to new ideas and innovative solutions.”*

This information is inconsistent with the draft Workers Guide which describes workplace conflict negatively as:

*“friction or opposition resulting from disagreements or personality clashes.”*

However, we acknowledge that both the draft code and the guide do consistently state that ~~low level~~ workplace conflict is generally not considered to be bullying.

**1.3 Who has duties in relation to workplace bullying? – page 8**

The first paragraph states that *“everyone has a duty..”*

We suggest amending the sentence to read *“everyone has a work health and safety duty...”*

**1.4 What is required to manage the risk of workplace bullying? – page 9**

The second sentence in the first paragraph says:

*“the risk of workplace bullying can be eliminated or minimised by creating a work environment where everyone treats each other with dignity and respect”.*

While this statement suggests an example of good behaviour i.e. *“dignity and respect”*, this statement is inappropriate for inclusion in the code, as it may give rise to circumstances whereby the level of dignity and respect displayed by workers at a workplace is judged at a court of law. This entails a very subjective measurement and must be deleted.

**1.4 Consulting workers – pages 9 and 10**

This section lists when consultation with workers “must” occur. Ai Group views this as problematic for two reasons:

- a) This is very prescriptive and inflexible. Consulting with workers, so far as is reasonably practicable, is a requirement of the WHS laws. Section 49 of the WHS Act lists when consultation is required therefore prescription in the code or any guidance is not necessary. A better approach would be to list examples of when it would be recommended for the person/s conducting the business or undertaking to consult with workers e.g. the directive *“consultation with workers must occur when”* should be changed to *“examples of when employers may consult with workers include”*.
- b) Although generic consultation with workers must occur, it is not made clear that specific incidents of alleged bullying will require confidentiality to be maintained, at least during the investigation process.

The paragraph following the dot points specifies that for an owner of a small business consultation may involve discussions with workers *“reminding them about expected behaviour.”* We suggest rewording this sentence to read:

*“reminding them about the standard of behaviour expected in the workplace.”*

The second paragraph following the dot points describes possible consultation mechanisms for larger businesses including consultation with health and safety committees or health and safety representatives (HSRs). The size of the business is irrelevant, it is not a mandatory requirement for businesses to have health and safety committees or HSRs. Therefore we suggest adding the words *“if any”* to the end of the paragraph so that it reads:

*“...health and safety committees or health and safety representatives (HSRs), if any”*

This section attempts to illustrate different approaches to consultation for small and large businesses. However, the wording infers that HSRs are not present in any small business. This is not the case as some small businesses can have at least one HSR. The information should make it clear that regardless of the size of the business, if the business has HSRs then the HSRs must be involved in the consultation process.

**1.4 Consulting, co-operating and co-ordinating activities with other duty holders – page 10**

The third sentence stipulates that so far as is reasonably practicable PCBUs must consult, cooperate and coordinate activities with other persons who have a health or safety duty relating to the same matter, and that:

*“this means ensuring policies and procedures on workplace bullying are consistent and there is an agreed approach to dealing with reports of bullying.”*

In addition to the policies and procedures being consistent it would also mean:

*“the consistent application of workplace policies and procedures pertaining to behaviour at the workplace.”*

At a practical level duty holders in separate, individual businesses would have great difficulty in fulfilling this requirement. This example again illustrates our concern about the prescriptive nature and impracticality of the draft document being a code.

**Chapter 2: Preventing workplace bullying****Comments:****2.1 Identifying the hazard – page 11**

For consistency and/or clarity, a structural change to this section would be helpful. We suggest the following amendments (written here as tracked changes) be made:

~~There is a risk of workplace bullying.~~ *Wherever people work together a risk of bullying exists. There may not be obvious signs of bullying at the workplace but this does not necessarily mean it is not occurring.*

*Processes that may assist in identifying workplace bullying or the potential for it to occur include:*

- *Regular consultation with workers, including discussions ~~talking to workers~~ aimed at finding to find-out if bullying is occurring or if there are unreasonable behaviours or situations likely to increase the risk of bullying (for some businesses, conducting an anonymous survey may be useful)*
- *monitoring patterns of absenteeism, sick leave, staff turnover, grievances, injury reports and other such records to establish any regular patterns or sudden unexplained changes*
- *recognising any changes in workplace relationships between workers, customers and/or managers*
- *holding exit interviews and seeking feedback when workers leave the business ~~by holding exit interviews~~*
- *seeking feedback about workplace behaviours from managers/supervisors or any other internal and external parties*
- *monitoring hazard reports, workers compensation claims and issues raised by health and safety representatives and health and safety committees.*

**2.2 Controlling the risks – page 11 and 12**

For consistency and/or clarity, a structural change to this section would be helpful. We suggest the following amendments (written here as tracked changes) be made:

*The health and safety risks associated with workplace bullying can be eliminated or minimised so far as is reasonably practicable by implementing:*

- *general workplace management control measures in conjunction with*
- *~~specific~~ workplace bullying control measures specific to the workplace.*

~~A combination of control measures may be necessary depending on the situation~~ *If these measures already exist and it is identified that bullying is occurring or likely to occur, a review of the control measures should be undertaken.*

## 2.2 General workplace management and control measures – pages 11 and 12

This section sets out general workplace management control measures as:

- a) *Create a workplace where everyone is treated with dignity and respect*
- b) *Design safe systems of work; and*
- c) *Develop productive and respectful workplace relationship.*

Points a) and c) introduce characteristics, “*dignity and respect*”, which can only be measured by a person’s subjective understanding of the workplace. The words “dignity” and “respect” are not defined within WHS and/or industrial law and their inclusion in a code or guidance would subject employers to impossible measures.

In respect of b) – *Design safe systems of work*, the control measures suggested, particularly dot points 2 and 3 suggest that a heavy workload could lead to workplace bullying. Ai Group does not accept that a heavy workload, on its own, would be enough for a person to sustain a complaint of workplace bullying. Furthermore, at particular workplaces or in respect to some jobs it sometimes is not practicable or appropriate for workers to have discretion over the management of their own workloads or be involved in decision making about their workloads.

Point c) – *Develop productive and respectful workplace relationships* suggests control measures to ensure productive and respectful workplace relationships include:

*“promoting positive leadership styles by recruiting managers who are competent in people management”*

The inclusion of such a control measure in a code or guidance is inappropriate. It goes without saying that employers, when recruiting for management roles, aim to recruit, where possible, the most competent person for the role. Having this control measure in a Code of Practice could, in a court of law, lead to a circumstance whereby an employer would be required to defend its recruitment choices in employing a particular manager. This also shifts the focus from the individual manager’s behaviour to why the employer employed the manager in the first place.

Ai Group suggests removing the part dealing with *general workplace management control measures*.

We agree to retain the section that deals with specific control measures. However, having removed the general workplace management control measures section, we suggest that the word “*specific*” is removed from the title. This one section would be titled “*Workplace bullying control measures*”.

## 2.2 Specific workplace bullying control measures – pages 12 and 13

For consistency and/or clarity, a structural change to this section would be helpful. We suggest the following amendments (written here as tracked changes) be made:

*A clear ~~culture message~~ should be promoted in all workplaces with a specific statement by the business stating that bullying will ~~is~~-not be tolerated. Persons conducting a business or undertaking should ensure that all workers are aware of any workplace bullying policies and procedures so that any bullying behaviour can be reported, responded to and resolved as soon as possible.*

- a) *Implement a workplace bullying policy (which could be part of a Code of Conduct)*

*A workplace bullying policy should be developed in consultation with workers that clearly states the organisation’s commitment to preventing and responding to workplace bullying. It can be a stand-alone policy or incorporated into an existing workplace policy or handbook. For a small business this may be a clear statement to workers telling them that bullying behaviour is not tolerated in the workplace*

Whatever form the policy takes, it should set out the standards of expected behaviour and include a statement that unreasonable behaviour must not occur and will not be tolerated. It should also contain:

- a definition of workplace bullying with supporting examples (such as those set out in this Code)
- the process for reporting workplace bullying and encouragement that workers use the process
- the process for responding to reports of workplace bullying
- accountability and responsibilities of various staff, i.e. who makes the decisions
- contact points within the organisation if a person has questions
- the possible consequences for not complying with the policy
- the process for managing vexatious reports and the implications of making such complaints.

The last dot point in the list above mentions “vexatious reports”. This is first time that this term is used in the document, so may require a brief explanation of its meaning.

## 2.2 Training – pages 13 and 14

The first sentence in the first paragraph would be improved by changing the wording as indicated below:

*“All workers should be trained to recognise workplace bullying types of behaviour as these #occur.”*

The third paragraph of this section sets out that:

*“training should be tailored to meet the needs of workers and suit the characteristics of your workforce (e.g. levels of literacy).”*

We propose that this statement also include a reference to the individual workplace. Training should be tailored to meet the circumstances of the individual workplace. For example, smaller workplaces may have less formal systems of training than larger workplaces. Also tool box talks may be a forum to not only provide information but also training to workers whereby a more formal, classroom training environment would not be ideal. Not only because of the nature of the work performed but the characteristics of workers, i.e. the workers may not feel comfortable in classroom environments.

We suggest that the sentence in paragraph three be changed to:

*“Training should be tailored to meet the needs of workers, the size of the business and suit the characteristics of your workforce (e.g. levels of literacy).”*

Furthermore, the example that face-to-face training with facilitated role plays, group work and opportunities to ask questions are often most effective, is not appropriate for this publication which is meant to be used by all types of employers, not just large employers in office environments where this type of training may be easier to implement.

## 2.2 Providing workers with information – pages 13 and 14

For consistency and/or clarity, a structural change to this section would be helpful. We suggest the following amendments (written here as tracked changes) be made:

*There are a number of ways information can be delivered given to workers including:*

- *talking directly with workers by holding team meetings, tool box talks or speaking one-on-one with them at the beginning of the working day*
- *running ~~more~~ formalised information and training sessions*
- *handing out company newsletters or pamphlets that deal with the standard of conduct expected at the workplace*
- *including information sheets with payslips*
- *putting up posters around the workplace such as in kitchens, lunchrooms or an office that workers have access to*
- *posting intranet announcements and providing easy access to workplace policies and procedures*
- *providing information through email messages that link to the relevant policies and procedures.*

**Chapter 3: Responding to Workplace bullying****Comments:****3.2 Principles when handling reports of bullying – pages 15 and 16**

The principles when handling reports of workplace bullying set out on the table on pages 15 and 16 are useful, but the accompanying commentary in the second column is not appropriate for a code. Rather this information should be included in guidance for employers.

Of particular concern is the use of the word “*courteously*” to describe how reports of workplace bullying should be responded to. While courteous behaviour is expected, what one person believes to be courteous may not be courteous to another person. How this behaviour is received by an individual is very subjective and should not be included in a document which has weight in a court of law.

Additionally, the second column requires some changes to the wording before being published as guidance for employers. For example:

**“Maintain confidentiality** - *The confidentiality of all parties involved should be maintained so far as is reasonably practicable. Details of the particular matter should only be known by those directly concerned.”*

**“Ensure procedural fairness** - *The person who is alleged to have perpetrated ~~engaged in~~ the bullying behaviour...”*

**“Do not victimise** - *It is important to ensure anyone who reports bullying is not victimised for doing so (noting that it would be unlawful to do so).*

**“Keep records** – *The following should be recorded:*

- *details of the issue reported ~~the nature of the issue~~*
- *whether the conduct complained of fits within the definition of bullying”*

**Chapter 4: Investigations****Comments:****4.3 Outcomes of an investigation – page 19**

The second paragraph refers to assistance that may be provided to resolve any outstanding issues, and that this may involve “*mediation, counselling, changing working arrangements...*” Having given several possibilities, only “mediation” is given an explanation in the sentence that follows.

We suggest that the explanation of “mediation” be relocated as a numbered footnote:

*“mediation<sup>1</sup>, counselling, changing working arrangements...”*

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*“<sup>1</sup>Mediation is a voluntary process where an impartial third party (preferably a trained mediator) assists the parties put their respective cases before each other. The role of a mediator is to assist both parties understand the perspective of the other and to find an agreement the parties are willing to abide by.”*

**4.4 Actions after an investigation – page 19 and 20**

We suggest the following change be made to the last dot point:

- *organising an ~~opportunity to~~ work in a new area of the business if appropriate*

Individual/Organisational name: Australian Industry Group

### General Comments

#### Comments:

The primary view of Ai Group is that workplace bullying is a health and safety issue best addressed through the preventative focus of work health and safety regulation and guidelines.

Where workplace bullying is identified in the workplace, the employer is obliged to control or eliminate the hazard where practicable. If workplace bullying results in an injury or illness to a person, then workers' compensation is available to that person to assist them with the management and recovery from the illness and/or injury.

We are concerned with the overlap of regulation now created by the new workplace bullying jurisdiction under the *Fair Work Act 2009*, due to commence on 1 January 2014. Despite our opposition to the creation of the new bullying jurisdiction, we must now work towards ensuring that the fair work system works harmoniously together with work health and safety regulation and workers compensation laws; and that workplace bullying does not become an industrial relations issue, thereby shifting the important preventative focus to an adversarial, compensatory process.

**Workers Guide****A Worker s Guide to Managing Workplace Bullying****Comments:****What is not workplace bullying? – pages 1 – 3**

The opening sentence of this section states that:

*“There are a number of situations that, although they may feel unpleasant, are not examples of bullying, such as..”*

A list of five dot points follows and includes *“workplace violence”* as dot point number four. This has obviously been included to indicate that workplace violence does not fit the definition of bullying. However, because of the wording leading into the dot points, *“workplace violence”* becomes trivialised as something that *“may feel unpleasant”*.

We strongly suggest that either the words *“although they may feel unpleasant”* be removed or that the order of the dot points be changed to make *workplace conflict* the fourth dot point and *workplace violence* to be a separate sentence with its own descriptor:

- *a single incident of unreasonable behaviour*
- *reasonable management action taken in a reasonable way*
- *discrimination and harassment*
- *workplace conflict*

*Workplace violence is another situation that does not come under the definition of bullying.*

**Workplace conflict – page 3**

We refer to our comments under item 1.2.above

**Check if your workplace has a bullying policy and procedure – page 3**

Three different terms; *“complaint resolution”*, *“bullying resolution”* *“issue resolution”* are used interchangeably and on page 6 *“dispute resolution”* is used. This has the potential to confuse. We suggest that consistent terminology be used.

**Complaint that you have bullied... - page 7 - 9**

We think it is useful to have information to assist individuals who have allegations of bullying made against them. However the information mirrors the information for an individual who is being bullied. This is very circular and could suggest to the reader that the alleged bully is also being bullied because of the allegation itself. This is potentially problematic for the employer.

**Second text box – page 7**

Insert *“do”* before *“not feel comfortable”* in the last sentence.