

## WORKPLACE BULLYING

**Kate Jenkins, Partner and Marianne Coulson, Solicitor,  
Freehills**

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### 1 Introduction

Australian businesses have been extremely slow to adapt to bullying in the workplace. A recent study has indicated that only 47 per cent of Australian businesses have in place a formal policy on bullying.<sup>1</sup>

More worrying is a recent report that “Workplace bullying is apparently on the rise with latest figures showing a rise of almost 140 per cent in the number of incidents reported ... in just two years.”<sup>2</sup>

This rise in workplace bullying is costing employers between six and thirteen billion dollars every year in sick leave and legal costs, such as investigations and court hearings, arising from the bullying complaints.<sup>3</sup>

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### 2 What is bullying?

#### 2.1 Definition of bullying

The term *bullying* has not been legislatively defined in any Australian jurisdiction, however it has been defined in the Codes, Guidelines and Reports of individual States and Territories. These definitions have yet to be clearly tested in case law.

##### (a) **Victoria**

The WorkSafe Victoria Guidance Note, *Prevention of Bullying and Violence at Work* (2003), defines bullying as:

*repeated, unreasonable behaviour directed toward an employee, or group of employees, that creates a risk to health and safety.*

Behaviour that a reasonable person, having regard to all the circumstances, would expect to humiliate, intimidate, undermine or threaten is considered bullying.

Behaviour that is a one-off will not be considered bullying as it must be repeated, that is, an established pattern must be identifiable.

##### (b) **Australian Capital Territory**

The Australian Capital Territory WorkCover *Guidance on Workplace Violence* (2000) defines ‘workplace violence’ as:

*An action or incident that physically or psychologically harms another person. It includes situations where employees and other people are threatened, attacked or physically assaulted at work.*

##### (c) **New South Wales**

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<sup>1</sup> *OHS Alert*, “Employers failing to act on bullying” Tuesday 24 June 2003

<sup>2</sup> *Occupational Health & Safety Daily News*, Monday June 30, 2003

<sup>3</sup> *Op cit* 1.

In New South Wales, there is no specific definition of workplace violence, however its guidelines on workplace violence state that:

*violence and aggression include: verbal and emotional abuse or threats and physical attack to an individual or to property by another individual or group.*

(d) **Northern Territory**

The Northern Territory Work Health Authority has produced a *Work Environment – Violence in the Workplace* (2001), which defines “violence at work” as:

*Any incident in which employees and others are abused, threatened or assaulted in circumstances arising out of, or in the course of work undertaken.*

(e) **Queensland**

The Queensland Workplace Bullying Taskforce Report *Creating Safe and Fair Workplaces: strategies to Address Workplace Harassment in Queensland* (2002) defines ‘workplace harassment’ as:

*repeated behaviour, other than behaviour that is sexual harassment, that:*

1. *is directed at an individual worker or group of workers*
2. *is offensive, intimidating, humiliating or threatening;*
3. *is unwelcome and unsolicited; and*
4. *a reasonable person would consider to be offensive, intimidating, humiliating or threatening for the individual worker or group of workers.*

(f) **South Australia**

In the South Australian publication *Bullies not Wanted: Recognising and Eliminating Bullying in the Workplace* (1999) the Employee Ombudsman defined workplace bullying as:

*the persistent ill treatment of an individual at work by one or more other persons. To be recognised as bullying the ill-treatment must be continuous and directed against a particular person.*

(g) **Tasmania**

No relevant papers have been released to date.

(h) **Western Australia**

The Western Australia *Code of Practice on Workplace Violence* (1999) defines ‘workplace violence’ as:

*An action or incident that physically or psychologically harms another person. It includes situations where employees and other people are threatened, attacked or physically assaulted at work.*

## 2.2 General Definition

Whilst the definitions of bullying may vary from jurisdiction to jurisdiction, the main elements, which are sometimes not included in the definition, are:

- unreasonable behaviour, that is, behaviour a reasonable person, having regard to all the circumstances, would expect to humiliate, intimidate, undermine or threaten;
- unfavourable treatment;
- behaviour that is directed at an individual or specific group; and
- that creates a risk to health and safety.

In some States and Territories, the definition is broader than in others. In Australian Capital Territory, New South Wales, Northern Territory and Western Australian, the definition of bullying includes *an action or incident*. However, in Victoria, Queensland and South Australia, the bullying must be *repeated, continuous or persistent*.

### 2.3 Bullying behaviour

Bullying can include the following types of behaviour:

- repeated verbal abuse;
- excluding or isolating employees;
- harassment or intimidation;
- sending abusive emails;
- assigning meaningless tasks (unrelated to their employment);
- putting a person under undue stress by giving them impossible deadlines;
- deliberately changing rosters to inconveniences employees; and
- deliberately withholding information.

*Source: Worksafe Victoria, Guidance Note: Prevention of Bullying and Violence at Work, February 2003.*

The most common form of bullying, according to the Queensland Workplace Bullying Taskforce, *Workplace Bullying Issues Paper* (2001), is in the form of:

- inappropriate comments about the appearance/ lifestyle of an individual;
- abusive language and insults;
- constant criticism or belittling;
- overwork, unnecessary pressure or impossible deadlines; and
- failing to give credit where due.

This form of bullying behaviour can be seen in the case of *State of NSW v Jeffrey* (unreported, SC NSW Court of Appeal, 1 September 2000). The court found that the employee had been bullied by his superior, who regularly found inappropriate fault with his work, publicly disparaged and humiliated him, and made threatening remarks to him, such as that he would be sacked and his family would 'end up in the gutter'.

### 2.4 What is *not* bullying

Employers have a *managerial prerogative* to direct, monitor and control how work is done. Indeed, the WorkSafe Victoria Guidance Note, *Prevention of Bullying and Violent at Work* (2003) states that:

*[workplace bullying] is not intended to diminish an employer's managerial prerogative to direct and control how work is done in their organisation other than in terms of ensuring so far as is practicable the health and safety of employees*

Bullying will not include:

- legitimate performance and management processes;
- allocation of work in compliance systems;
- implementation of organised change or downsizing; or
- poor or bad management practices.

This means that a manager may deliver constructive feedback or counselling if it is intended to assist employees to improve their work performance or standard of behaviour.

However, comments unrelated to actual performance and which are unnecessarily aggressive or intended to embarrass or humiliate the employee, may constitute bullying, especially when this behaviour occurs in conjunction with other bullying behaviour.

The case of *Midwest Radio v Arnold* (1999) EOC 92-970 illustrates the fine line between managerial prerogative and bullying. The sales manager of a newspaper, who had been subject to verbal abuse at regular staff meetings, sarcastic comments about her performance, and belittling conduct from her manager, brought a negligence claim and a claim under the *Workplace Health and Safety Act* 1989 (Qld) for failing to ensure the health and safety of an employee.

The court, at first instance, found that the manager had gone beyond the reasonable prerogative of management, which amounted to bullying. The case was successfully appealed, however not on this point.

## 2.5 Occupational violence

Occupational violence is any incident where an employee is physically attacked or threatened in the workplace.

Occupational violence includes:

- striking, kicking, scratching, biting, spitting or any other type of forceful physical contact;
- threatening to harm somebody;
- throwing objects;
- attacking with a weapon such as a knife or tool; and
- pushing, shoving, tripping, grabbing.

Violence can come from:

- a co-worker (including a supervisor, manager or contractor);
- a customer or client;
- a person known to the organisation or employee; or
- a stranger.

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### 3 OHS guidelines on bullying currently available

#### 3.1 Effect of Guidelines

There are five different types of instruments that affect compliance with OHS obligations:

- Legislation
- Regulations
- Approved Codes of Practice
- Guidance Notes
- Workplace Systems

Both legislation and regulations have the force of law and must be complied with. Approved Codes of Practice (**Codes**) and Guidance Notes do not have the force of law and do not have to be followed. The difference between Codes and Guidance Notes is that the former must be laid before, and approved by, parliament, whereas the latter does not.

Whilst both Codes and Guidance Notes can be used in prosecutions as evidence of broad industry knowledge, and the requisite state of knowledge of the employer, an organisation cannot be prosecuted for failing to observe an approved Code or Guidance Notes.

However, as Codes and Guidance Notes are based on legislation, the court will often use failure to comply with a Code and Guidance Notes as evidence that the organisation has failed to comply with the legislation on which it is based. For example, the Victorian Guidance Note on *Prevention of Bullying and Violence at Work*, provides practical advice on how to comply with the general requirements of Victorian OHS legislation. Failure to comply with the Guidance Note may equate to failure to comply with the legislation.

In cases where organisations have breached legislation, but complied with a Code or Guidance Note, the organisation could contend that they had followed the state of knowledge in the industry at the time of the incident.

#### 3.2 Australian Capital Territory

Australian Capital Territory Workcover, *Guidance on Workplace Violence*, October 2000.

For more information visit the website: [www.workcover.act.gov.au](http://www.workcover.act.gov.au)

### 3.3 New South Wales

WorkCover NSW has produced a series of sector-specific and industry neutral guidelines on workplace violence, which include:

- *Preventing Violence in the Accommodation Services of the Social and Community Services Industry* (1996);
- *Violence Prevention for Taxi Drivers* (1996);
- *Workplace Violence in the Finance Sector* (2001); and.
- *Violence in the Workplace* (2001).

For more information visit the website: [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)

### 3.4 Northern Territory

The Northern Territory Work Health Authority has produced a bulletin entitled *Work Environment – Violence in the Workplace* (2001).

For more information visit the website: [www.worksafe.nt.gov.au](http://www.worksafe.nt.gov.au)

### 3.5 Queensland

State government has amendment the *Industrial Relations Act 1999* (Qld) to include workplace harassment as an industrial matter.

*Workplace Health and Safety Act 1995* (Qld) has been amended to include advisory standard on the prevention and management of workplace harassment.

For more information visit the website: [www.workcover.qld.gov.au](http://www.workcover.qld.gov.au)

### 3.6 South Australia

WorkCover South Australia has produced a number of sector-specific and industry neutral guidelines for reducing occupational violence and workplace bullying, which include:

- *Managing the Risks of Violence at Work in Aged Care Facilities* (1998)
- *Managing the Risks of Violence at Work in the Education Sector* (1998)
- *Managing the Risk of Violence at Work in Home and Community Based Care* (1998);
- *Managing the Risks of Violence at Work in the Hospitality Industry* (1998); and
- *Guidelines for Reducing the Risk of Violence at Work* (1998).

For more information visit the website: [www.workcover.sa.gov.au](http://www.workcover.sa.gov.au)

### 3.7 Tasmania

The policy branch of Workplace Standards Tasmania is drafting a portfolio of documents on workplace bullying, according to the Australian Institute of Criminology, *Occupational Violence Prevention Initiatives in Australia* (2002).

For more information visit the website: <http://www.workcover.tas.gov.au>

### 3.8 Victoria

WorkSafe Victoria, Guidance Note, *Prevention of Bullying and Violence at Work*, February 2003.

For more information visit the website: [www.workcover.vic.gov.au](http://www.workcover.vic.gov.au)

### 3.9 Western Australia

WorkSafe has a *Code of Practice on Workplace Violence* (1999)

WorkSafe Western Australia Commission, Guidance Note, *Dealing with Workplace Bullying: A Guide for Employers*, January 2003.

WorkSafe Western Australia Commission, Guidance Note, *Dealing with Workplace Bullying: A Guide for Employees*, January 2003.

For more information visit the website: <http://www.safetyline.wa.gov.au>

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## 4 What types of claims can employees make about bullying

### 4.1 Types of Claim

- Occupational Health and Safety
- WorkCover
- Negligence
- Constructive Dismissal
- Criminal Law
- Equal Opportunity;
- Privacy
- Victims of Crime Assistance

### 4.2 Occupational Health and Safety

Occupational health and safety laws (**OHS laws**) operate throughout each state and territory in Australia.

OHS laws impose obligations on employers to provide employees with a safe system of work.

An employer is required to:

- provide and maintain so far as is practicable for employees a work environment that is safe and without risk to health;
- provide necessary instruction, information, supervision and training to enable employees to perform their work in a manner that is safe; and
- provide safe systems of work.

The obligation extends to psychological as well as physical health and safety.

A safe system of work includes the manner in which employees are disciplined and the work load of employees, such as excessive hours or overtime.

In some jurisdictions, OHS laws provide that an employer must, so far as is practical monitor the health of its employees, that is, whether employees are suffering distress or other systems associated with workplace bullying (see legislation in *Australian Capital Territory, South Australia, Tasmania and Victoria*).

OHS laws provide for criminal and civil liability, in the forms of fines and/or imprisonment, to attach to officers, employers and employees who fail to comply with the laws.

An officer is defined as a director, secretary or executive officer of an the organisation, any person in accordance with whose directions or instructions the organisation are accustomed to act; or a person concerned in the management of the body corporate.

In *Victorian WorkCover Authority v Peninsula Prestige Cars Pty Ltd* (unreported, Frankston Magistrates Court, October 1999, Magistrate Spooner), the employer was fined \$45,000 for failing to provide adequate information, instruction, training and supervision relating to the harassment and abuse of employees.

### 4.3 WorkCover

An employee who suffers an illness or injury related to bullying in connection with their employment can make a claim under state workers' compensation schemes. The claim can be for psychological, as well as physical, injuries.

In the case of *Schmerl v South Australian Metropolitan Fire Service (1995) AWCCD 74-703*, the tribunal held that a firefighter, who suffered stress as a result of an injury which occurred to his daughter on the employer's premises, was entitled to compensation as he had sustained a compensable injury in the course of his employment.

However, due to an increase in work-related stress claims, most states have taken measures to limit the circumstances in which stress can be found to have arisen in the employment. This means that stress related illness that arise wholly or predominantly out of selected incidents of employment will not be compensatable if the employer's actions were reasonable.

The incidents of employment include:

- reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker;
- a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or
- an expectation of the taking of such action or making of such a decision.

The legislative sections are section 82(2A) of *Accident Compensation Act 1985* (Vic); section

34(5) of the *WorkCover Queensland Act 1996*; section 4(3) of *Workers Compensation Act 1951 (ACT)*; section 30(2a) of *Workers Rehabilitation and Compensation Act 1986 (SA)*; and section 5(1) of *Workers Compensation and Rehabilitation Act 1981(WA)*.

Workers compensation scheme also provide a defence to misguided claims of bullying that were really reasonable disciplinary action of the employer (exercise of managerial prerogative).

Whilst insurers, rather than the individual employer, are responsible for workers' compensation payments, the number of worker's compensations claims against an employer will affect their insurance premium.

An employer also has an obligation, as soon as practicable, to prepare a return to work plan in respect of the injured employee. In addition, the employer has an obligation to prepare a risk management program, which provides steps to be taken after an injury has occurred in the workplace to, as far as is practicable, reduce the risk of subsequent injury of that kind.

#### **4.4 Negligence**

Employers can be liable for damages if the bullied employee brings a common law claim for negligence.

Such a claim would be based on the fact that an employer has a duty of care to protect the psychological and physical health and safety of employees while they are at work. In terms of safety, an employer has a duty to provide a safe workplace, that is safe systems of work, safe equipment and safe and competent fellow employees.

In order to make out a successful claim in negligence, the employee would need to show that the injury was foreseeable, and ought to have been avoided or prevented.

In the case of *State of NSW v Jeffrey* [2000], a bullied employee was awarded \$35,000 in damages as due to developing a psychiatric condition as a result of being bullied by his police sergeant. The court held that despite the fact the police sergeant had not harassed co-workers prior to the incident, the employer should have been aware of the "bullying tactics" of the sergeant, and taken action to prevent them.

#### **4.5 Constructive Dismissal**

A constructive dismissal claim will arise when a bullied employee terminates his/her employment as a result of being bullied. The employee must show that the actions of the employer were a principal contributing factor which led to their termination of employment. If the claim can be established, the employee can seek reinstatement and/ or compensation.

Note that this claim will only arise if the employee meets the eligible criteria under the unfair dismissal regimes in each state.

In the case of *Airlie v Australia Wide Computer Repair* [1999], the employee was subject to "bullying, blatant rudeness and abuse" by her colleagues. The employer arranged for mediation to deal with the above behaviour. However, the employee

refuse to attend until the bullying behaviour was resolved. The employer implied that if the employee didn't attend the mediation she would be terminated. The employee resigned, rather than face the humiliation of being terminated.

The court found that the mediation was an inappropriate strategy to combat the bullying. The employee was found to have been constructively dismissed, as she was justified in resigning in the face of a demand for mediation.

#### **4.6 Criminal Law**

Criminal charges, such as common assault, assault occasioning bodily harm, grievous bodily harm and stalking, could be laid against an individual if the bullying behaviour constitutes physical assaults or threats. Furthermore, any persons who have "aided and abetted" the bullying behaviour could also be charged under the criminal law.

#### **4.7 Equal opportunity**

State and Federal equal opportunity laws do not specifically prohibit bullying behaviour.

However, equal opportunity laws do prohibit behaviour that relates to an attribute, such as sex, age, gender, race, disability or family responsibilities. If the bullying behaviour is based on an attribute of an individual that is protected under equal opportunity legislation, then it may amount to unlawful discrimination. Note that an employee who is treated detrimentally due to his/ her involvement in a discrimination claim can make a claim of victimisation under equal opportunity laws.

In order to be successful under equal opportunity legislation, an employee would need to prove that he/ she received less favourable treatment, which could include words and actions that constitute bullying behaviour, on the basis of a protected attribute.

An individual can be personally liable for unlawful conduct under equal opportunity laws. In addition, an individual that requests, instructs, induces, encourages, authorises or assists another person to contravene equal opportunity legislation will be taken to have contravened the act as well, and a complaint can be lodged against either or both of them. An employer will be vicariously liable for the actions of its employees, unless it can establish that it took all reasonable precautions to prevent the unlawful conduct.

Parties who are found guilty of discrimination may be ordered to pay damages and/ or non-financial compensation, such as reinstatement or written apologies.

In the case of *Cvetkovsi v Clearly Brothers Ltd* [1999], a truck driver of Macedonian Yugoslavian descent was subjected to bullying behaviour because of his race. The employee was successful in bringing a discrimination claim against his employer based on the fact he received less favourable treatment because of his race. The court ordered the employer to pay \$43,650 in damages.

#### **4.8 Privacy**

Privacy legislation exists at both a state and federal level. The state-based privacy legislation in New South Wales, Victoria and Western Australia regulates the type, and extent to which, surveillance of workers is allowed. The Federal *Privacy Act 1988* (Cth) and some State and Territory legislation regulates the collection, use, disclosure and storage requirements of personal information.

Whilst no case law exists on the link between bullying and privacy legislation, this type of legislation could be used to contend that workers in particular environments, such as call centres, are exposed to greater stress because of the extensive surveillance and performance monitoring in their employment, and that this constitutes a form of bullying.

Moreover, in a recent case, which did not rely on existing privacy legislation, *Grosse v Purvis* [2003] QDC 151<sup>4</sup>, the court found a new common law right, similar to rights with respect to nuisance, trespass and negligence, to claim damages (ordinary, aggravated and punitive) for invasion of privacy generally.

The new common law claim may have implications for employers in relation to workplace bullying if employers can be found liable for conduct, such as intimidation, harassment or threats, which intrudes on the privacy or seclusion of an employee in a manner which would be considered highly offensive to a reasonable person. The harm it causes can be mental, psychological or emotional.

#### **4.9 Victims of Crime Assistance Tribunal (formerly Crimes Compensation Tribunal)**

An individual can seek damages for any harm caused to them by another person, or an organisation. In relation to bullying, such claims would be limited to harm resulting from assaults or threats to kill.

The Tribunal may make a compensation order for pain and suffering and for damage to property where an offender is found guilty, and the Tribunal has appropriate evidence before it, such as medical reports.

Note that individual *may* not be paid financial assistance by the Tribunal if they are assisted from other sources, such as WorkCover.

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## **5 What should you do to prevent it<sup>5</sup>**

### **5.1 Bullying Policy**

The bullying policy must be:

- written in plain language;
- provided in languages other than English (where appropriate)
- displayed where all employees can read it; and

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<sup>4</sup> Note the case is subject to an appeal.

<sup>5</sup> Note that this summary is based on the Worksafe Victoria, *Guidance Note: Prevention of Bullying and Violence at Work*, February 2003.

- be communicated to all employees (such as being made available on work site noticeboards, or by link on the organisation's intranet site).

A bullying policy can be created in conjunction with an Equal Opportunity Policy or it can be a 'stand alone' policy.

## 5.2 Consult Employees

Employers can consult with either an OHS Committee, or individual employees, regarding the:

- development of measures designed to ensure the health and safety at work of the employees; and
- formulation and dissemination of rules and procedures relating to health and safety.

## 5.3 Minimise Risks

### (a) Identifying Risk Factors

It is best that a qualified assessor is engaged to identify the risk factors.

There are a number of other factors that can contribute to the risk of bullying taking place:

- **Organisational Change:** the *Queensland Bullying Taskforce* noted that significant operational change (such as internal restructuring or technological change) may inadvertently create an environment ripe for bullying.
- **Minority Groups:** certain employees will be more at risk of workplace bullying than others if the workforce contain minority groups, groups based on to age, gender, ethnicity, disability, parental status, religious or political views. This risk is also increased for new employees, apprentices trainee, contractors or casuals.
- **Unsatisfactory relationships:** where employees at the organisation maintain unsatisfactory relationships, such as toleration for teasing and practical jokes, workplace bullying it likely to be experienced more.

The above factors could be revealed through:

- reports from health and safety representatives;
- workplace audits;
- organisational climate/ employee opinion surveys;
- sick leave reports; and
- issues raised by health and safety committees through consultation process

### (b) Controlling Risk Factors

In order to control risks, based on a risk assessment employers may implement risk control strategies such as:

- clearly define the roles of employees;

- develop a conflict management process;
- reduce excessive hours; and
- review staffing levels.
- workplace relationship monitoring;
- additional training for employees in workplace diversity and tolerance;
- specific training for managers in dealing with high risk employees;
- training for managers in appropriate methods of performance management.

#### **5.4 Encourage reporting and educate staff**

If employees are not educated and behaviour is not reported, or is not reported at an early stage, it may escalate, other individuals may become targets, or it may result in needless resignations and unproductive work arrangements. It is thus important that employees understand acceptable and unacceptable behaviours and are encouraged to report instances of inappropriate behaviour.

Note that workplace bullying may be subtle or hidden. Employers should not therefore assume their workplace is free of bullying simply because there are no obvious signs.

Many recipients of bullying or violent behaviour simply tolerate it for fear of retribution. They may think that the behaviour is normal for the particular individual or feel that the behaviour is not serious enough to report and should be tolerated. Others may believe that to report the behaviour is against accepted norms. This can make the reduction and elimination of bullying a difficult task.

Some common signs that someone is being bullied, or is the subject of violence, may include the following:

- behaviour that is withdrawn, secretive or depressed;
- behaviour that is unusually angry or short tempered;
- lack of motivation, fatigue, ill health or absenteeism;
- poor general appearance and demeanour; and
- otherwise acting out of character

Organisations must therefore encourage reporting of bullying in order to:

- develop an accurate picture of the extent of the bullying;
- be able to take action to correct bullying;
- assess whether preventative measures and helping; and
- provide prompt assistance where necessary.

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## **6 Conclusion**

Bullying and occupational violence often have detrimental effects on the

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particular individuals involved as well as their family, friends, workgroup. A person who is subjected to bullying conduct can feel intimidated, stressed, frightened and uncomfortable at work.

The detrimental effects of bullying and occupational violence include the following:

- increased absenteeism, lower productivity and reduced work performance;
- low morale;
- high staff turn-over and increased costs of recruiting and training replacement employees;
- time lost from leave as a result of bullying;
- time lost in investigation and resolution of complaints; and
- damage to the company's reputation.

It is therefore essential that organisations establish preventative measures so that its impact on the workforce can be minimised, as:

*Bullying can cost not only the goodwill of the workforce, and profits, but also the company's reputation if the matter goes to court.<sup>6</sup>*

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<sup>6</sup> WorkSafe Victoria, Guidance Note, *Prevention of Bullying and Violence at Work*, February 2003, 1.