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AUSTRALIAN MANUFACTURING WORKERS' UNION



**Submission to the House Standing Committee
on Employment and Education**

Inquiry into Workplace Bullying

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Enquiries:

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INTRODUCTION

- i. The "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" is known as the Australian Manufacturing Workers' Union (AMWU). The AMWU represents over 110,000 members working across major sectors of the Australian economy, in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations in engineering and across diverse industries including food technology and construction. The AMWU has members at all skills/classification from entry level to degree.
- ii. The AMWU welcomes this House of Representatives Inquiry an opportunity to consider bullying in a broader context than work health and safety laws. The AMWU supports the adoption of a National Code of Practice on bullying, as an immediate measure. The AMWU understands that SafeWork Australia should be considering a Draft Code during July 2012. The AMWU supports the development of regulatory and administrative changes in industrial and discrimination law which would complement a National Code of Practice for the Prevention of Bullying under WHS or OHS laws.
- iii. The AMWU has chosen to include a few individual stories as a mechanism to illustrate key points. The experience of our members clearly indicates that the current systems for redress and prevention of bullying are failing. This submission offers some suggestions for improving the situation.

1. SUMMARY

The AMWU contends that bullying behaviour is unacceptable behaviour that appears to be on the increase. Our current prevention system is failing and we are not preserving the mental health of those that experience such behaviours. The causes of bullying are multifactorial and differ between individual circumstances, however the evidence and research points to key risk factors which increase the likelihood of bullying behaviours. Bullying is a productivity “killer” and is estimated to cost the Australian economy billions annually.

The promotion of work which provides for “decent” work or facilitates “dignity at work” is likely to prevent the development of circumstances and relationships that predispose to bullying. As there is considerable overlap in the risk factors, workplaces which are conducive to preventing bullying are likely to prevent exposure to general psychosocial hazards, such as work related stress. The regulatory frameworks to deal with “decent work” include industrial law and instruments and health and safety laws.

Current avenues for the victims of bullying undervalue or do not preserve a person’s mental health. Particularly:

- Work health and safety regulators’ processes take considerable time, the investigators can be ill equipped and unwilling to take action to stop/prevent the bullying and the alleged victim(s) is confronted by inadequate action which can compound the situation and have further negative impacts on their health. Most regulators invoke operating procedures for their inspectorate and advice lines which focus on employer policies and procedures, failing to focus on “systemic or up-stream” risk factors for bullying behaviours.
- Industrial instruments are only useful if the bullying can be moulded to fit the definitions of adverse action under the FWA e.g. when the individual faces dismissal and bullying is a component of that behaviour. Additionally when mediation and conciliation fails, applicants have few options.
- Discrimination laws can only be useful if the bullying behaviour is aimed at the particular characteristic of the person eg sexuality, race.
- Workers compensation laws can only be used when the person has suffered an injury and requires medical treatment. The present construct of workers compensation laws deters workers from making successful claims and the processes associated with disputed claims (psychological injuries are regularly disputed) often add “insult to injury”.
- In many workplaces, even those with high profile bullying cases may have excellent HR policies, but the process of “workplace self regulation” has not been successful. In some cases the HR policy is a “paper trail” designed to meet corporate or legal obligations to minimise risk to the corporate entity but does little to shift cultures or improve compliance; that is *employers need to take active steps that employees, in particular those in positions of power and authority are educated about the nature and consequences of bullying.* (Squelch & Guthrie)¹

¹ J Squelch & R Guthrie “The Australian legal framework for workplace bullying” Comparative Labor Law Policy Journal, 32(1) Fall 2010, pp 15-52

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The AMWU proposes that to more effectively change workplace behaviours the following need to occur:

- systemic changes to reduce the precarious situation of many workers using measures highlighted in the AMWU Submission to the Secure Work Inquiry.
- a consistent definition of bullying (and hence what is not bullying) across OHS law and other law [as proposed below].
- immediate adoption under OHS/WHS laws of a National Code of practice for the Prevention of Bullying.
- up skilling and improved willingness of OHS regulators to enforce compliance with risk control measures that reduce the risk of bullying behaviours.
- creation of a mechanism that gives an individual the ability to seek a remedy which is fast, efficient, specific under civil law e.g. a stand alone tribunal within FWA or under discrimination law.
- removal of the impediments that limit the access to workers compensation of workers suffering psychological injury, legal and administrative.

The AMWU does not support the extension of laws such as “Brodies Law” as such law will not address the majority of bullying behaviours. Those who have campaigned around this law have definitely raised the profile of the issue, but *Brodies Law* refers to stalking which should be addressed through the criminal justice system. These reservations are better explained by Kelly² and Bornstein.³

Whilst this criminal legal reform represents a positive development in the sense that it ensures the punishment of serious offenders, this paper argues that a punitive, legalistic approach such as this to the issue of workplace bullying, whilst providing some benefits, is inadequate for three main reasons. First, such an approach would be directed to the punishment of serious offenders. Only the most severe cases of workplace bullying, therefore, would fall under the new provisions and those cases perceived as less serious may go unaddressed. This is compounded by the onerous criminal standard of proof of ‘beyond reasonable doubt’. Second, the prospect of criminal proceedings, which can be traumatic and lengthy, may act as a deterrent for victims to take action. Third, the criminalisation of workplace bullying from the outset does not cater to that part of the issue which is organisationally, as opposed to individually, driven. (Kelly page 25)

² C Kelly “The problem of workplace bullying and the difficulties of legal redress: an Australian perspective” Centre for Employment and Labour Relations Law, University of Melbourne, Student Working Paper No 7 May 2011

³ J Bornstein “Bullies in Business” Law Institute Journal June 2011, pp 34-38

2. BULLYING PREVALENCE

2.1 The phenomenon of workplace bullying and inappropriate behaviour is recognised worldwide by governments and international agencies. There exists a large volume of academic literature. For example:

Press release | 14 June 2006 GENEVA (ILO News) - Violence at work, ranging from bullying and mobbing, to threats by psychologically unstable co-workers, sexual harassment and homicide, is increasing worldwide and has reached epidemic levels in some countries, according to a new ILO publication... "Bullying, harassment, mobbing and allied behaviours can be just as damaging as outright physical violence," the authors say. "Today, the instability of many types of jobs places huge pressures on workplaces, and we're seeing more of these forms of violence." ... Violence at work, Third edition by Vittorio Di Martino and Duncan Chappell

Any cursory searching of the internet will find a plethora of sites with "self-help survival tips", professional services and advocacy groups.

2.2 The prevalence of bullying in Australian workplace has been variously estimated

- using international studies: conservative rate of 3.5 per cent = estimate of 350,000 persons bullied in Australia in 2000 and cost businesses somewhere between \$6 billion and \$13 billion.
- higher prevalence rate of 15 per cent (which is actually based on mid point of two international estimates — a UK survey finding a 10.5 per cent and a US survey finding 21.5 per cent) = One and half million workers bullied in Australia in 2000 with estimated costs to businesses of between \$17 and \$36 billion.
- using the results of international research, the Beyond Bullying Association in Australia has estimated that somewhere between 2.5 million and 5 million Australians experience some aspect of bullying over the course of their working lives (AHRC 2010)⁴

2.3 Bullying appears to be on the increase in industries covered by the AMWU. There is a common misconception that bullying is confined to female dominated occupations and that bullying should be uncommon given the predominantly male membership of the AMWU (other than that of apprentices). But as one of our officials said

"people think that big bad grown up men do not get bullied, but they do"

2.4 There is an increased community awareness of bullying type behaviours, due in part to the ability to "name" and describe the behaviour. The author recalls a telephone conversation on the ACTU Helpline during the 2000 campaign *"the workplace is no place for bullying"*. The caller was a woman working in a call centre, who recounted a conversation she had had with a male colleague...

⁴ <http://www.pc.gov.au/projects/study/regulationbenchmarking/ohs/report> Productivity Commission Report, Regulation Benchmarking –OHS, April 2010

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"I said to him, it's like domestic violence, until someone names it for you, it's hard to believe it's happening to you, that it's wrong and you should not have to put up with it"

- 2.5 The ACTU submission contains summary information from the anti bullying campaign run by the union movement in 2000.

3. DEFINITION

- 3.1 There is considerable debate about what behaviours actually constitute bullying: for example the South Australian *Occupational Health, Safety and Welfare Act 1986*:

section 55A (1)

Workplace bullying means any behaviour that is repeated, systematic and directed towards an employee or group of employees that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten and which creates a risk to health and safety.'

The SA Government Guide says:

Repeated refers to the persistent or ongoing nature of the behaviour and can refer to a range of different types of behaviour over time.

Systematic refers to having, showing or involving a method or plan. Whether behaviour is systematic or not will depend on an analysis of the circumstances of each individual case with this general guideline in mind.

Risk to health and safety includes the risk to the emotional, mental or physical health of the person(s) in the workplace.

- 3.2 The current Australian discussion on definition lacks reference to a key element of the bullying phenomenon --- the imbalance of power between the perpetrator(s) and victim(s). Of course, any imbalance of power does not limit bullying to behaviour expressed "vertically" in an organisation but refers to the repeated abuse of power across an organisation that is intended to cause distress in another person.
- 3.3 The UK Andrea Adams Trust⁵, a charity which is committed to preventing workplace bullying, defines workplace bullying as follows (emphasis added):
- *Unwarranted humiliating offensive behaviour towards an individual or groups of employees.*
 - *Such persistently negative malicious attacks on personal or professional performance are typically unpredictable, unfair, irrational and often unseen.*
 - *The abuse of power and position that can cause such anxiety that people gradually lose all belief in themselves, suffering physical ill-health and mental distress as a direct result.*

⁵ <http://workplacebullying.org/multi/pdf/adams.pdf>

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- *The use of position or power to coerce others by fear, persecution or to oppress them by force or threat.*

3.4 The abuse of power is explicitly referred to in the definition used by unions in the UK such as Unite and Unison.⁶

Workplace bullying can be defined as “ persistent, unacceptable offensive, intimidating, malicious, insulting or humiliating behaviour, abuse of power or authority which attempts to undermine an individual or group of employees and which may cause them to suffer stress’.

3.5 These definitions also make a distinction between harassment and bullying. Harassment arises out of discrimination where an individual or group are targeted because of their specific characteristics e.g. gender, marital status and race.

Harassment can be defined as conduct which is unwanted and offensive and affects the dignity of an individual or group of individuals. Whether the harassment is intentional or not is irrelevant; the key point is that it is offensive.

*As both bullying and harassment are linked to an abuse of power there are clear similarities between the two types of behaviour. **However, there is an important difference in that harassment springs from discrimination. While harassment is often aimed at individuals on the grounds of their race, gender or sexuality etc., it can also be a form of bullying.** As many forms of discrimination are outlawed by specific legislation, it is important that cases of harassment are identified as such.*

3.6 The AMWU has examples of workplace policies that refer to power eg:

Example 1: Bullying is an abuse of power. It is repeated unreasonable, inappropriate and or unprofessional behaviour. It is a form of power.

Example 2: Bullying is physical or psychological behaviour or conduct where strength (including strength of personality) and /or a position of power is misused by a person in a position of authority or by a person who perceives that they are in a position of power or authority.

3.7 Other commentators have preferred the following definition (Kelly page 26)

Bullying, harassment or victimisation means repeated behaviour in the workplace that:

- (a) is offensive, unreasonable, unfair or inappropriate; and*
- (b) causes the target to feel demeaned, belittled, intimidated, threatened or similarly; and*
- (c) is distinct from legitimate management practices.*

3.8 The AMWU recommends that any definition must include reference to repetition, the nature of the behaviour and the effect of the behaviour. The definition needs to be consistent across laws, however for the WHS laws the link with H&S risks would be required .e.g

⁶ Respect: a health and safety Issues, Unison. www.unison.org.uk

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Workplace bullying is the “repeated, unacceptable offensive, intimidating, malicious, insulting or humiliating behaviour, which attempts to undermine an individual or group of employees and which creates a risk to health and safety”.

- 3.9 The discussion of misuse of power and /or authority would be part of the explanation of the law and one of the factors that can distinguish bullying from other forms of inappropriate behaviours.
- 3.10 The discussion should also refer to the distinction between bullying and harassment (which is linked to discrimination) and other forms of disrespectful behaviour.
- 3.11 It is important that *what is and what is not bullying* is made clearer to the community and regulators. This is important, as there is a trend by some Australian health and safety authorities is to dismiss or vigorously interrogate those trying to seek assistance/redress when being bullied.
- 3.12 An example of a Victorian workplace bullying policy (available on request) defines, for the purposes of that workplace, “What is not Bullying”. The AMWU official who negotiated the policy noted

“We specifically put in the what is not bullying, because the experience at Employer J and other workplaces was that people were being encouraged to do on others for minor disagreements and also because people genuinely did not know when their behaviour crossed the line, and so there was a lot of confusion and people unnecessarily being punished for what was in essence a spat that should have been sorted.

- 3.13 Employer J policy says (emphasis added)

*It is not the intention of this policy to capture behaviour that is part of normal workplace interaction such as banter and humour that is **reciprocated and welcome**. Further it is acknowledged that misunderstanding and disputes may arise between people on a day to day basis which can and usually are resolved on an amicable basis between the parties.*

What isn't Bullying

*Reasonable management actions **carried out in a fair way** are not bullying for example:*

- *Setting performance goals, standards and deadlines*
- *Allocating work to a worker*
- *Rostering and allocating working hours*
- *Transferring a worker*
- *Deciding not to select a worker for promotion*
- *Etc*

- 3.14 The policy clearly recognises the need for procedural fairness (managing in a fair way) whilst acknowledging that interpersonal relationships can be enjoyable as well as respectful. There is no need for respectful behaviours to be lacking in fun.

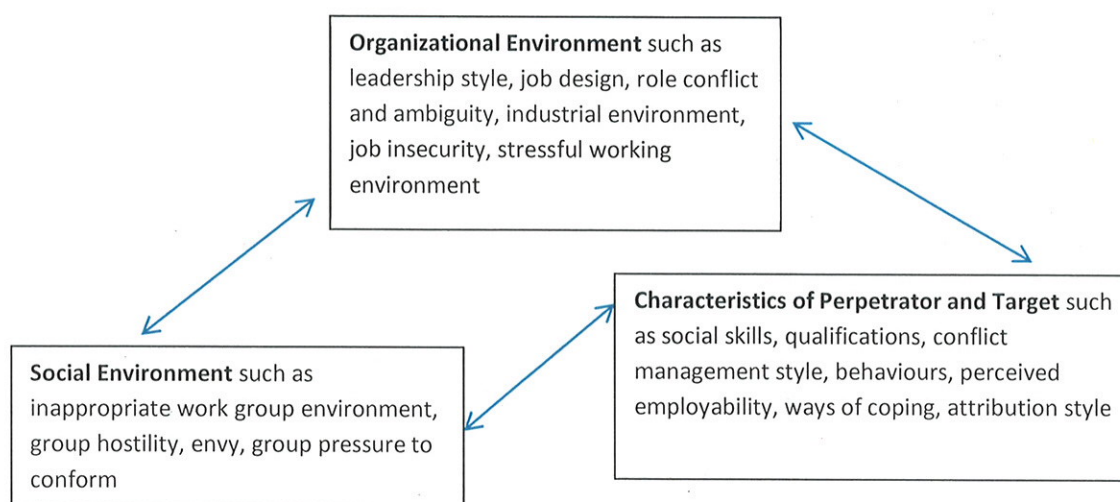
4. RISK FACTORS FOR BULLYING

- 4.1 As with many health issues, causation or risk factors for bullying are multifactorial. This is the case for musculoskeletal disorders [caused by hazardous manual handling], the most

prevalent of work related health problems. Unfortunately many occupational health and safety authorities perceive the multifactorial risks as an excuse to limit their investigations or compliance activity around bullying complaints. OHS/WHS authorities are charged with ensuring compliance with the general duties of health and safety law (in that they must provide, so far as reasonably practicable, a work environment free of risks to health and safety); this must include prevention of bullying by the reduction of risk factors which increase the likelihood of bullying.

- 4.2 M Jenkins, from South Australia uses the following diagram to explain the risk factors that contribute to workplace bullying.⁷ The risk factors for stress and bullying have some confluence and overlap e.g. unclear work role/role conflict and ambiguity; conflict management style, job insecurity etc.

Page 30 Figure 1. Factors that contribute to the development and maintenance of workplace bullying



- 4.3 Risk factors associated with bullying behaviour were well documented in the WorkSafe ACT investigation into compliance by CIT with duties under the Work Safety Act 2008. (emphasis added)⁸

The concerns raised by the staff who participated in the independent consultant's assessment strongly suggested an increased risk that workplace bullying and harassment had occurred, was occurring or could occur. These concerns included:

- *a lack of transparency in management and decision-making processes affecting staff;*
- *perceptions of poor morale and poor people management practices;*
- ***a high proportion of staff on casual or short-term employment arrangements;***
- ***a number of staff facing limited or no career paths;***
- *a perceived lack of leadership and strategic direction;*

⁷ M. Jenkins. "Practice Note: is Mediation Suitable for Complaints of Workplace Bullying?" Conflict Resolution Quarterly, vol29,no1, Fall 2011, pp 25-37

⁸ WorkSafe ACT, Investigation into Compliance by the Canberra Institute of Technology (CIT) with its Duties under the Work Safety Act 2008 and the Work health and safety Act 2011 in response to allegations of Bullying and Harassment at the CIT. 11 April 2012

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- *a lack of respect between staff combined with poor team behaviours;*
- *a perception that a culture existed that discouraged the reporting or the making of complaints about workplace bullying and harassment;*
- *inequity in working arrangements, including allegations of nepotism and uneven workloads;*
- *lack of clarity of roles and responsibilities creating friction, mistrust and frustration; and*
- *poor communication, including a lack of regular meetings or the provision of timely information.*

4.4 This list of risk factors also highlights the link between structural employment arrangements and the risk of bullying behaviours.

4.5 The growth of insecure work, especially for the lower paid, may be one of the contributing factors to the increase in prevalence of bullying. The AMWU submission to the Secure Work Inquiry⁹ noted:

International research has made it clear that the global growth of insecure work has directly and indirectly caused detriment to the personal well-being of employees and society generally. This is in part a result of the centrality of job security to employee perceptions of what constitutes 'decent work'. For example, the International Social Survey Program found in 1997 that job security was the most significant factor in determining whether a job was a 'good job', followed by the nature of the work and finally wages, flexibility and opportunities for progression. These findings were repeated in 2005. These findings indicate that employees in practice generally perceive insecure work as highly detrimental and unappealing, supporting more specific concerns about the negative impact of insecure work.

Insecure work is recognised as a contributor to psychosocial risk factors (stress, bullying, harassment etc.) which are associated with poorer health outcomes such as diabetes, cardiovascular disease (CVD) and metabolic syndrome. The mechanism for these relationships appears to be directly through exposures to risk factors and indirectly through the increased likelihood of poor health behaviours by insecure workers.

The Organisation for Economic Cooperation and Development has said that changes in working conditions such as decreased physical activity at work, increased levels of stress and job insecurity and longer working hours was one of the three major factors that have contributed to recent rises in chronic conditions, mainly through their effect on lifestyle choices.

4.6 The following examples highlight factors that increase the likelihood of bullying. In this case the worker did exhibit symptoms of psychological injury requiring medical assistance (a workers compensation claim was not lodged).

Example Q

Over five months, employee X was required to change her place of residence [a distance of nearly 500 kilometres] with less than 24 hours notice, twice.

⁹ http://securejobs.org.au/submissions/03_feb_2012/AMWU%20National%20Office.pdf

S Taylor. Submission to the Independent Inquiry into Insecure Work in Australia January 2012. AMWU

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Personal belongings were unable to be moved in time (due to short notice p.m. for a 7 a.m. flight) which led to the persons home contents being packed by a fellow employee (on instruction from management), without the employees permission.

Consistently being given extremely short notice to perform work, which to be performed properly required liaison with others and included travel; abusive emails and phone calls which included "threats" to "dob the person into significant others at the workplace", on several occasions workloads with time frames that were extremely difficult to meet and when they were not met the worker received derisive comments from others; allegations of impropriety from fellow employees which were not dealt with by management; emails with serious allegations from co-workers whom employee X had had limited contact and therefore found very difficult to understand and regular refusal by management and selected co-workers to respond to work related phone calls or requests for assistance to enable employee X to perform their work. Employee X had been to seek medical advice.

- 4.7 Each of these incidents by themselves could be explained as minor conflict or disagreements, but in context this account has the features of bullying:

"repeated, unacceptable offensive, intimidating, malicious, insulting or humiliating behaviour, abuse of power or authority which attempts to undermine an individual or group of employees and which may cause them to suffer stress".

- 4.8 Using an OHS framework, the risk factors for bullying are clear in this account. Using the Cochrane¹⁰ review:

"..... bullying takes place several antecedents need to be present and these have been identified in the literature as role conflict, role ambiguity, level of workload and level of autonomy in the job. Stress inherent in the job or the environment has also been named as a triggering factor. Organisational change can also lead to bullying. This is manifest in situations where managers enforce change by bullying their employees.

Others have "identified perception of the victim, an individual's locus of control, power, distance and a permissive culture in the workplace as precursors to bullying".

- 4.9 For employee X there was role conflict, role ambiguity, lack of autonomy and workload issues. The individual felt powerless in a culture where management took no action to address communication, workload or behaviour issues. The post script to this story is that the person lost their job, not for poor work performance but because management "did not like the way employee X performed the work". Employee X has now been replaced by a 457 visa worker.

- 4.10 Example JIS

The background to the workplace is a production process that is designed using time and motion measurements:

¹⁰ PA Gillen et al "Intervention for Prevention of Bullying in the Workplaces (Protocol)" The Cochrane Collaboration, The Cochrane Library, 2012 issue 4

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- There is a team of e.g. 10 workers – the work is going smoothly with good quality, production targets etc. At the same time each task is analysed - job cycle down to the second. For example it takes 2 seconds to walk 1 meter to pick something up, 2 seconds back 1 second to put it on a machine and it goes on. Each worker is then reviewed which identifies that workers have 10 – 15 seconds in say 100 second cycle where the worker is not physically doing anything. As a consequence a worker is removed and their individual load is shared amongst the remaining 9 worker i.e.–more tasks performed in less time.
- The above analysis, because it is done during times when production is running smoothly etc fails to include tasks such as a worker needing to assist another person or that every 15 minutes the worker needs to remove an empty stillage and replace it with a full one
- Job rotation is mostly every 2 hours and in some cases is 1 hourly – these are tasks that put a lot of pressure on the ever moving body. In isolation they do not lift heavy weights – though cumulative a lot.
- The performance of individual workers is recorded with their names in a public place which is able to be viewed by anyone.

It is this context that job losses have occurred. The pressure from senior management on production targets means that middle management is personally responsible for targets, which have been set using the above, flawed process. There has been little training on how, with less staff, production targets can be met. Consequently middle managers personalise the production difficulties and use verbal abuse as a mechanism to improve an individual worker's performance. Given the fear of job loss, the lack of training and the "pressure" from middle management workers cry when a mistake is made or when trying to deal with increased tasks. Workers will silently accept this circumstance because a bad job is better than no job -- unemployment benefits do not a mortgage pay.

- 4.11 This example displays the coping behaviour and solutions sought by middle management of *'focussing on the action of the individuals'* in a context of work overload, poor training, job insecurity and lack of worker participation and consultation.
- 4.12 The example highlights the negative effects [extreme psychological distress] as a result of lack of job control, supervisor support, praise and recognition and change consultation. (see later)

5. HEALTH AND SAFETY AUTHORITIES DEALING WITH BULLYING COMPLAINTS

- 5.1 The AMWU has numbers of examples where the action taken by the relevant authority is limited to the reviewing of existing policy e.g. Victorian workplace, June 2009, extract from letter from Worksafe Victoria. In this circumstance the individual making the allegation had contacted the Authority six months prior to this response from WorkSafe:

During the workplace visit inspector Y ascertained that the workplace needed to modify their existing policy/procedure in relation to the prevention of and management of workplace bullying issues.

Inspector Y returned to the workplace on xx/xx/yy and determined that the policy/procedure had been modified as required...I have reviewed the inspectors file ...I am unable to recommend further enquiry or action by Worksafe Victoria at this time.

- 5.2 These types of responses are common in all jurisdictions and it is the AMWU's view that such responses are of little assistance to workplace parties, do not constitute an assessment of the risks for bullying behaviour and amount to little more than a paper trail. Inspectors generally do a poor job at investigating claims and often claim that the problems are outside of their jurisdiction e.g. industrial or discrimination matters. These responses generally "add insult to injury" for the person(s) making the complaint.
- 5.3 Some WHS/OHS regulators exhibit an underlying cynicism about the complainant and quickly resort to personalising of problems in an effort to minimise their role in adjudicating or remedying the circumstances. The regulators fall into the same sort of behaviour that predisposes to a bullying environment "*when confronted with problems such as there, rather than examining and improving existing operations and methods, solutions are often sought by focussing on the action of the individuals*".
- 5.4 This finds further expression in the lack of understanding by WHS/OHS regulators of the need for procedural fairness. The acceptance by regulators that workplace bullying policies that **exclude** the option of allowing for outside assistance during complaint investigation are reasonable and fair i.e. the bullies may be investigating themselves, which of course means that any examination of root causes or identified risk factors are less likely to be addressed.
- 5.5 Part of this reluctance comes from an assumption that these cases are impossible to deal with legally and that anything the regulator may do will not stand scrutiny. Such approaches may lighten the load of the regulator but will not address the prevalence and ill effects of workplace bullying (see Productivity Commission Report and ACTU and Unions NSW submissions).
- 5.6 The experience of AMWU members and officials is consistent with the Productivity Commission ¹¹report:

OHS inspectors generally find psychosocial issues in the workplace harder to address than physical hazards. OHS inspectors responded in a survey that they found it much harder to get employers, particularly small manufacturing firms, to deal with psychosocial factors. They also found cases of bullying to be much more difficult to resolve. Inspectors described bullying cases as being emotive and involving a range of different individual interpretations of the events, making it more difficult to substantiate a claim.

As a result of these difficulties, some inspectors reported that they were reluctant to handle psychosocial complaints (Johnstone, Quinlan and McNamara 2008).

The results of consultations between the CPSU and its members included comments such as:

- *investigations of psychosocial issues are more time consuming than other activities*
- *there is a lack of capacity and not enough staff focussed on the issue*
- *workers' compensation data is sufficient to demonstrate that issues such as*
- *violence, bullying, fatigue and job stress are not being dealt with effectively.*

¹¹ <http://www.pc.gov.au/projects/study/regulationbenchmarking/ohs/report>

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5.7 The AMWU strongly supports the development of policies and procedures that prevent and address bullying in the workplace. The AMWU believes that the current disproportionate focus on policies and procedures, whilst neglecting workplace culture and effective complaint resolution, has resulted in an increase in bullying as the measures available to resolve complaints do not encourage behaviour change.

6. WORKERS COMPENSATION FOR VICTIMS OF BULLYING WITH PSYCHOLOGICAL INJURY

6.1 Another aspect of the inadequate systems is workers compensation processes. Eligibility for work related compensation claims is restricted by the phrase "reasonable management action". This places a very high threshold on claims and often the process of making and appealing contested claims becomes a damaging and traumatic experience which aggravates the original injury.

6.2 The poor and loose definition of *reasonable management action* and its use by insurers and employers creates a "grey" area that is exploited as a mechanism for denial of liability. For example during the workers compensation claim process supporting statement and witness details are provided to the employer, who is often the perpetrator. The employer then has time, resources etc. to be able to deny liability. The concept of a fair hearing or natural justice is not practised.

6.3 Lawyers involved in workers compensation systems note that "*defendants know that claimants with a psychological injury are unable to deal with court processes and this helps the defendant's case*". For example, presentations at lawyers' conferences refer to "*in the midst of all these sorts of issues the plaintiff may have the makings of some kind of case but carries significant risk. Psychiatric injury plaintiffs however not uncommonly have considerable difficulty in apprehending those risks and being able to allow them to be brought to account in settlement negotiations*".¹²

6.4 In some cases those injured make the decision not to pursue procedural fairness e.g. follow through with workers compensation claims or tribunal processes under health and safety laws, because to do so adds to the "trauma" of the original injury. Some who traverse these processes may find it extremely difficult to stay or re-enter the workforce and are literally "lost to themselves" for a considerable time

6.5 The AMWU refers the Committee to the ACTU Submission for more detail.

7. FAIR WORK ACT

7.1 In theory the FWA should provide an avenue for dealing with allegations of bullying, however if the issue cannot be related to an adverse action or dealt with at conciliation, the FWA is not a particularly useful mechanism.

7.2 The General Protections provisions of the FW Act prohibit an employer from taking adverse action against an employee in a number of circumstances, some of which may be relevant to bullying and harassment claims. Under s342, an employer takes adverse action against an employee if the employer:

¹² Presentation at the Australian Lawyers Alliance Queensland State Conference February 2012.

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- Dismisses the employee,
- Injures the employee in his or her employment,
- Alters the position of the employee to the employee's prejudice, or
- Discriminates between the employee and another employee of the employer.

These categories are quite broad and could potentially capture bullying conduct.

7.3 Section 351 deals with adverse action taken due to race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibility, pregnancy, religion, political opinion, national extraction or social origin. The legislation prohibits employers taking adverse action on these grounds, unless the action is not unlawful under the applicable anti-discrimination law, taken due to the inherent requirements of the job or in certain circumstances relating to religious institutions (s341(2)). Several successful claims have been brought in relation to termination motivated by the relevant attributes.¹³ However, no claims as yet have been brought in relation to general bullying conduct. This section may be an attractive option for employees seeking remedies against bullying and harassment, in particular because of its focus on the impact of the conduct on the person rather than issues of direct and indirect discrimination. However, in practice it is currently not being used for these purposes.

7.4 In theory, the adverse action protections could also protect victims of bullying after they make a complaint. S341 prohibits the taking of adverse action due to the exercise of a workplace right by a person. This could extend to the reporting of a bullying complaint under the dispute settlement procedures available under the person's governing industrial instrument (s341 (2) (j)).

Several claims have been brought alleging adverse action was taken following the making of a complaint; however to date none have been successful in securing the sought-after remedies.¹⁴ These decisions do not close the door on the use of adverse action protections in this manner, but do highlight the difficulty in securing assistance.

7.5 The AMWU has an example of the difficulties in securing assistance using the FWA system. At workplace TTT worker(s) have been the subject of angry outbursts and intimidating behaviours, including issuing of warnings, often done in a manner that there are no witnesses. This behaviour occurs in the context of a young man having to return to a work area, under the direction of management, where he experienced physical and mental intimidation. The employer claims there is insufficient evidence (not the "hidden nature" of the behaviour). The AMWU has taken cases to FWA however FWA has ruled there is no jurisdiction under the Act or Enterprise agreement.

7.6 The example highlights the lack of legal avenues that are open to workers experiencing intimidation and bullying.

¹³ See, eg, *Birch v Wesco Electrics (1996) Pty Ltd* [2012] FCMA 5; *Stephens v Australian Postal Corporation* [2011] FMCA 448; *Ucchino v Acorp Pty Ltd* [2012] FCMA 9.

¹⁴ See, eg, *Hobson v BWL Pty Ltd & Ors* [2010] FCMA 772; *McCulloch v Preshil, The Margaret Lyttle Memorial School* [2011] FCA 1218; *George v Northern Health* [2012] FCA 379; *Stevenson v Airservices Australia* [2012] FMCA 55.

8. PREVENTION: PROVISIONS OF DECENT WORK

8.1 The International Labour Organisation's Decent Work Agenda¹⁵ refers to essential features of decent work. These include (emphasis added):

- Promoting labour protection, which comprises decent conditions of work, including wages, working time and occupational safety and health, essential components of decent work.
- Promoting social dialogue – involving strong and independent workers' and employers' organisations as central to increasing productivity, avoiding disputes at work, and building cohesive societies.
- Guaranteeing rights at work – to obtain **recognition and respect for the rights of workers**. All workers, and in particular disadvantaged or poor workers, **need representation, participation, and laws that work for their interests**.

8.2 These rights should be available to workers under the WHS and industrial laws

8.3 There is considerable consensus that a working environment that is respectful and provides for dignity at work decreases the risk of bullying and psychological injury.

8.4 In their section entitled "How do problems arise?" the Finnish Occupational Safety and Health Administration *Guidelines for Preventing and Dealing with Harassment and Inappropriate Treatment in the Workplace* (page 7) comment that¹⁶

Time pressures, increased overtime work, information and communication problems, difficulties in keeping schedules, quality issues and customer complaints are all common day to day challenges faced by an organisation and its workforce. When confronted with problems such as these, rather than examining and improving existing operations and methods, solutions are often sought by focussing on the action of the individuals. Such instances of scapegoating or personalising a problem can arise, for example, if an employee's working approach differs from his/her colleagues and the problems are attributed to this person instead of the team's working method.

8.5 The Finish guidelines focus attention to the creation of a healthy and functioning work community and list the following: work assisting leadership, work supportive organisation, clearly defined working arrangements, cooperation and effective communication, common rules and continuous monitoring and review of operations (pages 12-14). The discussion that follows highlights the importance of creating respectful work environments and providing those with managerial responsibilities the skills to address everyday conflict and ensure that it does not escalate into inappropriate or bullying behaviour.

8.6 A similar approach is taken in the UK where the Health and Safety Executive Stress Management standards¹⁷ aim to promote positive working environments to avoid conflict and dealing with unacceptable behaviours.

¹⁵ <http://www.ilo.org/global/topics/decent-work/lang--en/index.htm>

¹⁶ Guides and Instructions 42 "Inappropriate Treatment at Work- Guidelines for Preventing and Dealing with Harassment and Inappropriate Treatment in the workplace" Occupational Safety and Health Administration, March 2010, Tampere Finland.

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8.7 The risk factors for environments conducive to bullying behaviours converge with the risk factors associated with work related stress. The recognised risk factors for work related stress are job strain = high job demands and low job control where job control includes risk factor such as work overload & pressure, lack of control, unclear work role, management style; social support (co-worker and supervisory); job insecurity; job pressure = job strain plus job insecurity; effort-reward imbalance; organisational justice (procedural fairness and relational justice).

8.8 Given the prevalence of bullying it is clear there is a lack of compliance to these laws and **employers and governments need to take action to raise the standards in our workplaces.**

8.9 The AMWU supports the position of the ACTU that the general provisions of Work health and Safety law must be supplemented by a regulation to address psychosocial risks (see ACTU Submission)

8.10 The AMWU supports findings reported in the Productivity Commission Report¹⁸:

On the other hand, a study by Johnstone, Quinlan and McNamara observed that having psychosocial issues regulated through a separate code of practice (in Queensland and Western Australia) rather than guidance material, sent a strong signal both to employers and to inspectors, in terms of giving them stronger direction to monitor compliance behaviour (2008, p. 30)

8.11 The Queensland government, in collaboration with University of Queensland is engaged in a research project entitled "People at work, An Assessment of Psychosocial Factors in the Workplace"¹⁹.

According to the overview its objectives are to

- *developing a reliable and valid risk assessment tool for psychological injury that is freely available to industry;*
- *assisting Queensland organisations implement a risk management process for psychological injury and assessing its outcomes; and*
- *collecting reliable data on risk factors, incidence, and intervention outcomes for psychological injury.*

8.12 The AMWU understands that the researchers have used the UK Health and Safety Executive Management Standards in the development of the resources and tools which will be aimed at improving an employer's ability to prevent bullying behaviour and manage psychological risks.

8.13 As the project is collaboration between researchers and governments, workplace stakeholders are not directly involved, which could negatively impact on the potential usefulness of this work.

¹⁷ Management Standards for Work related Stress, Health and Safety Executive, UK..

<http://www.hsc.gov.uk/stress/standards/>

¹⁸ <http://www.pc.gov.au/projects/study/regulationbenchmarking/ohs/report>

¹⁹ "People at Work: Overview. An Assessment of Psychosocial Factors in the Workplace". University of Queensland and Workplace Health and Safety Queensland (WHSQ), Department of Justice and Attorney-General, Queensland.

- 8.14 Environments that strive to minimise work related stress are likely to remove many of the risk factors for bullying. Work should promote mental health and well being thus decreasing the likelihood of bullying behaviours.

9. DEALING WITH ALLEGATIONS OF BULLYING

At the Workplace

- 9.1 Bullying behaviours or behaviours that have the potential to escalate into bullying should be addressed at the workplace level, using agreed procedures that have been discussed and developed with the workforce. Many current WHS guides outline the basic principles of workplace procedures.
- 9.2 Procedures should outline how reports of bullying will be dealt with, and should set out broad principles to ensure the process is objective, fair and transparent.
- 9.3 Procedures should be developed to suit the size and structure of an organisation. The procedure should be flexible enough to accommodate both the direct and formal methods of dealing with bullying. Any procedure should ensure confidentiality and fair treatment of those involved. A reporting procedure can be developed and implemented in a number of ways.
- 9.4 The principles of dealing with bullying incidents must include the principles of natural justice. This is explained in the ACT WorkSafe report on CIT²⁰:

Specifically, by not examining the claims as thoroughly as their seriousness should warrant, and by not ensuring that the investigations which were conducted had an appropriate level of independence and adhered to principles of natural justice, the CIT cannot be assured that it reached a valid conclusion as to the veracity of the claims or the possible risks to the health and safety of its workers which they may indicate.

Section 4 of the ACT Code of Practice for Preventing and Responding to Bullying at Work in place prior to 1 January 2012 indicates that "where a serious allegation has been made, an investigation should be the first step taken ... the principles of natural justice and the principles for addressing bullying should be followed throughout the investigation process".

The code goes on to say that:

"An investigation should be undertaken for: allegations involving senior staff/management; allegations covering a long period of time; allegations involving threats; allegations involving multiple workers; allegations involving vulnerable worker; informal approaches that have failed."[the AMWU notes that in our opinion informal here means direct approaches]

While the Code was not in force at the time of the complaints, the requirement under the Act to take all reasonably practicable steps to manage risks was. The requirements outlined above in the Code are no more than what is expected under good administrative practice.

²⁰ WorkSafe ACT, Investigation into Compliance by the Canberra Institute of Technology (CIT)

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These principles have been used by public sector agencies as the basis for deciding how to deal with complaints for many years.

9.5 Workplace procedures that totally rely on informal approaches which in our experience predispose to

- a. a lack of records;
- b. workers are encouraged/pressured to use the informal approach even for serious breaches;
- c. there is a lack of transparency and failure to apply the principles of natural justice; and
- d. employers are able to avoid their legal obligations which includes the control of risk factors that affect workers mental health. Employers must use the process of hazard identification, risk assessment and risk control and this cannot occur if the “informal approach” is used.

9.6 *The workplace procedure needs to refer to the following three approaches to address a complaint of bullying. They can be used in combination or on their own, depending on the situation. They can also be used as a step-by-step approach to resolution. The approach should reflect the seriousness of the situation. It is important that the worker who reported the situation agrees with the proposed approach or combination of approaches that will be used:*

- The direct approach
- Investigation
- Acting on outcomes

9.7 **Impartiality is critical in the investigation** of a complaint and the person in charge of the investigation must never be directly involved in the incident(s). Confidentiality is important so that only those directly concerned should know about the matter. It is essential that parties are committed to confidentiality but do not use confidentiality to fail to investigate the allegation (employers have claimed confidentiality issues as reasons not to provide details to those involved).

9.8 Unfortunately H&S Authorities lack an understanding of the importance of the impartiality in the investigation process. Lack of impartiality compounds the difficulties in resolving allegations of bullying.

9.9 The procedure must provide for access to assistance and representation for both alleged perpetrator(s) and victim(s). Workers involved need to be informed of the support and representation available to them under the WHS Act and the FWA.

For example Section 68 WHS Act: “The function of the HSR under section 68 WHS act is to represent, investigate and inquire on matters of health and safety”.

9.10 Additionally the Fair Work Act gives workers representatives’ rights in Awards and Enterprise Agreements Section 146 and Schedule 6.1.

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An example can be found in the Manufacturing and Associated Industries and Occupations Award 2010 Disputes Clause

Clause 10.5: *An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.*

10. LEGAL RESOLUTION OF WORKPLACE BULLYING

10.1 When the above measures fail or the bullying is of such a nature that such an approach is inappropriate, there must be the ability to deal effectively and quickly to preserve the mental health of the person(s) and curtails the bullying behaviour.²¹

10.2 The current mechanisms provided for in the WHS Acts or the FWA are not effective. Legal reform is necessary. This is particularly well discussed in a paper by Kelly²²:

This paper has explored the question of whether the law presently accommodates and addresses this issue adequately in light of its prevalence and multidimensionality. There are indeed a wide variety avenues of recourse which may be available to those who are harmed by the experience of bullying at work, including those at common law in tort and contract, and in statute under anti-discrimination laws, workers' compensation legislation, occupational health and safety legislation and the Fair Work Act. This paper has argued, however, that upon closer inspection these avenues are in many cases inaccessible or inadequate either by virtue of their cost and indeterminacy or in the sense that they are only available under limited circumstances.

Where an individual who has been subjected to bullying in the workplace cannot show discrimination, unfair dismissal, breach of an enterprise agreement or modern award or adverse action, seeking legal redress can prove extremely difficult. The very nature of workplace bullying, which can be covert and underhanded, can make attempts to recover workers' compensation unsuccessful and the evidencing of common law causes of action impossible. Many targets of workplace bullying, then, may find themselves to be confronted with a legal landscape that is patchy and disjointed, and ultimately providing no legal remedy.

10.3 The AMWU recommends that legal reform is necessary which addresses the difficulties highlighted above. As suggested by Kelly²³

Thus, new legislation has here been proposed that seeks, through civil means, to proscribe and prevent workplace bullying in specific terms.

.....the proposed legislation would be enacted under the auspices of the Fair Work System and involve two levels of regulation: first, the proscription of workplace bullying at the level of the individual as well as, at an organisational level, the imposition of an obligation on employers to take all reasonable steps to provide a bullying-free workplace.

²¹ Bornstein

²² Kelly, page 30

²³ Kelly, page 30

Targets of workplace bullying would have access to complaint mechanisms provided by the court system, the Fair Work Ombudsman and Fair Work Australia. The enforcement and compliance mechanisms of the latter two it has been argued, as the regulatory bodies of Australia's national industrial legislation, are particularly useful in the context of workplace bullying. Through the dispute resolution facilities of Fair Work Australia, targets of workplace bullying could find efficient, cheap and accessible avenues of redress, the pursuit of which could be aided by the investigatory and representative powers of the Fair Work Ombudsman. In addition to this, the compliance powers of the Ombudsman could have a fundamental role in the enforcement of organisational-level preventive measures, enabling the law to have a fundamental role in thwarting the cultural normalisation of workplace bullying.

Complaint Mechanisms

The enactment of the proposed legislation under the auspices of the Fair Work Act enables the provision of three main complaint mechanisms.

First, it is proposed that both the individualised prohibition of workplace bullying, as well as the organisational obligation to provide a bullying-free workplace, as outlined above, be enacted as civil remedy provisions. As such, a target could apply to the courts for orders in relation to a contravention or proposed contravention of these provisions either in isolation from one another or concurrently as the situation requires.

Second, a target could make a workplace complaint to the Fair Work Ombudsman, who would be authorised to investigate and prosecute on behalf of National System Employees in the event of a suspected contravention of the legislation.

Third, should the proposed legislation expressly provide, a person who has been subjected to bullying at work in a way they believe contravenes the new legislation, could apply to have Fair Work Australia deal with the dispute as an alternative to the pursuance of action in court.

- 10.4 The AMWU recommends that the Committee investigate these proposals in an effort to address a flawed and ineffective system that does not protect workers mental health and fails to provide effective and quick remedies to stop people being exposed to inherently unjust and unfair bullying behaviours.

11. RECOMMENDATIONS

1. Adopt a definition that incorporates the concept of repeated nature of the behaviour and the risk to health and safety.
2. Adoption of a nationally consistent regulation and code of practice under the relevant work health and safety laws.
3. The above regulatory tool would address all the risk factors which contribute to a "bullying environment", thus providing regulators and workplace parties with the tools to be able to identify risk factors and hence the solutions. This is similar to the approach for manual handling.
4. By provision of the correct regulatory tools, it should be easier for WHS/OHS inspectorates to enforce and encourage compliance with WHS/OHS laws [beyond the current paper trail approach].
5. WHS/OHS inspectorates need to undergo consistent training in the issue of bullying including the appropriate investigation of complaints and enforcement measures that address causation.
6. Provide for improving the skills of those involved in management , including training on how identify and to deal with complaints of bullying in an effective and sensitive manner
7. Provide for alternative mechanisms for handling of workplace bullying complaints.
8. Amend workers compensation legislation by removal of the terms "reasonable management decisions". The legislation needs to include reference to procedural justice etc.
9. Provision of a tribunal or other forum where bullying complaints can be heard. Serious consideration needs to be given to the proposals separately proposed by Kelly and Bornstein.