Submission Number: 69
Date Received: 4/7/2012

Australian Services Union SA+NT Branch

Contribution to the House of Representatives Standing Committee on Education and Employment Inquiry into Workplace Bullying

29 June 2012

Ambit of this submission

The Australian Services Union (ASU) is concerned about the prevalence and impact of workplace bullying on our members in South Australia and the Northern Territory. We represent workers in the local government, airlines, call centres, finance, energy, community services and legal sectors as well as private sector clerical and administrative workers. We concur with widely held opinions that the extent and impact of workplace bullying is under reported.

It is hoped that the SA+NT Branch Secretary, Ms Katrine Hildyard, will be able to explore these matters further with the Standing Committee when it convenes its Adelaide public hearing.

Workplace bullying is more than an individual issue as it both contributes to and is an indicator of 'toxic' workplaces. As such, it needs to be considered as part of a broader workplace psychosocial environment.

The ASU is called upon to support members who are victims of bullying as well as people alleged to be bullies. We have a balanced view about the complex nature of workplace bullying.

Given the relatively short amount of time available to prepare this submission we focus on a limited number of issues drawn from our recent work in this area, namely -

- the limitations in practice of s55A of the SA Act (the bullying clause);
- poor enforcement of the PCBU's duty of care in relation to workplace bullying as a particular type of workplace psychosocial hazard; and
- some steps that could be taken to improve regulation and prevention.

Time pressure also has meant that we refer here only to the situation in South Australia. Ms Hildyard will be able to discuss Northern Territory issues at the Committee's public hearing.

The SA+NT Branch of the ASU contributed to and concurs with the arguments and recommendations contained in the national ASU submission, including in relation to potential amendments to the Commonwealth Fair Work Act.

Noting this, we draw the Standing Committee's attention to four recommendations that are of particular interest to this Branch.

Recommendation 1

Work Health and Safety Regulators should be required to provide clear guidance about when and how properly conducted independent risk assessments in relation to bullying and related psychosocial hazards should be required in order to help PCBUs meet their primary duty of care.

Recommendation 2

Work Health and Safety Regulators should be required to provide clear guidance about what is required of PCBUs and their Officers in order to ensure that they comply with the due diligence requirements set out in the model Work Health and Safety Act (and its State/Territory equivalents) in relation to preventing and responding to workplace bullying and related psychosocial hazards.

Recommendation 3

Given the intense pressures faced by individuals who make complaints and the broader workplace impact of bullying, provision urgently needs to be made to enable Unions to identify this workplace hazard and thereby trigger preventative and/or responsive measures such as a competent risk assessment process.

Recommendation 4

That an urgent review be undertaken of the competencies required and held by both Government Regulatory staff and private contractors who have responsibilities for both investigating and making recommendations with respect to workplace bullying complaints. Such a review also should examine the potential for investigators to have conflicts of interest that bear upon investigation of bullying complaints.

The Bullying Clause in the South Australian Act[1] (s55A)

So far as we know SafeWork SA has not initiated a single prosecution arising from breach of s55A.

The relevant part of the clause for current discussion reads as follows -

55A—Inappropriate behaviour towards an employee

(1) For the purposes of this section, bullying is behaviour—

(a) that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and

(b) that creates a risk to health or safety.

(2) However, bullying does not include—

(a) reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee; or

(b) a decision by an employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with an employee's employment; or

(c) reasonable administrative action taken in a reasonable manner by an employer in connection with an employee's employment; or

(d) reasonable action taken in a reasonable manner under an Act affecting an employee.

The SA experience is that this provision primarily has been of persuasive value by allowing Unions to promote an anti-bullying agenda against the background of a clear statutory obligation. This has been a useful tool which we will lose when/if the current *Work Health and Safety Bill* is adopted.

[1] *Occupational Health, Safety and Welfare Act* (1986) SA

In practice, s55A has not realised the potential of a dedicated statutory provision to help achieve justice and resolve workplace complaints. A number of reasons contribute to this reality that bear further consideration. In this submission, however, we suggest that the major problem, is that there is no specific required procedure that an employer must follow if/once a bullying hazard has been identified. Instead, the victim is left with the almost unachievable task of proving specific allegations in an adversarial environment which can create additional stress. This extends to the subsequent limited capacity for SafeWork SA to enforce reasonable standards (assuming that the Regulator takes seriously its responsibilities with respect to workplace bullying as a significant workplace hazard).

The ASU maintains that a statutory provision such as s55A can only be effective if there is an accompanying and required process set out in *Regulations* to determine how and on what basis claims can be addressed. Related factors bearing upon effective regulation, investigation and evidence gathering are covered in the final section of this submission.

This process also should consider the overall and ongoing workplace impact of specific allegations – ie, as with any other hazard, this aspect of psychosocial health/safety should trigger a proper risk assessment that would be undertaken by an independent and appropriately qualified person.

Clause 55A, in the absence of a required holistic follow up process, has simply helped employers to avoid addressing the broader impact of bullying behaviour on their workforce. It has reinforced the idea of bullying as an individualised phenomenon rather than a hazard that seriously impacts upon a workplace's psychosocial environment. The result is a lack of preventative action with respect to collateral psychological health and injury issues.

Enforcing the PCBU duty of care in relation to workplace bullying as a specific workplace psychosocial hazard

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Occupational health and safety legislation, including under the model *Work Health and Safety Act*, supposedly protects against psychological as well as physical health and safety risks.

Our experience is that there is little institutional commitment or capacity to recognise an employer's primary duty of care under s19 of the *Occupational Health, Safety and Welfare Act* 1986) to respond to identified psychological hazards and then apply the required risk assessment process. In South Australia this would mean applying s 20 of the *Occupational Health, Safety and Welfare Regulations 2010* the relevant parts of which read —

> ***20—Hazard identification and risk assessment***
>
> *(1) An employer must, in relation to the implementation of these regulations, ensure that appropriate steps are taken to identify all reasonably foreseeable hazards arising from work which may affect the health or safety of employees or other persons at the workplace.*
>
> *(2) If a hazard is identified under subregulation (1), an employer must ensure that an assessment is made of the risks associated with the hazard.*
>
> *(3) In carrying out an assessment under subregulation (2), an employer must, as far as is reasonably practicable, determine a method of assessment that adequately addresses the hazards identified, and includes 1, or a combination of 2 or more, of the following:*
>
> *(a) a visual inspection;*
>
> *(b) auditing;*
>
> *(c) testing;*
>
> *(d) technical or scientific evaluation;*
>
> *(e) an analysis of injury and near-miss data;*
>
> *(f) discussions with designers, manufacturers, suppliers, importers, employers, employees or other relevant parties;*
>
> *(g) a quantitative hazard analysis.*

So far as we know, these requirements have never been mandated in cases involving workplace bullying.

This discussion is not simply academic. These matters are under discussion in a current dispute that the ASU has initiated on behalf of members at Council. In this case a staff survey undertaken in late 2011 produced extremely worrying results with regards to both the prevalence and impact of bullying behaviour. The ASU's attempt to discuss the situation constructively with Council proved unsuccessful and a formal dispute was notified to the Industrial Relations Commission. This is ongoing.

Measures to improve regulation and prevention

We draw the Standing Committee's attention to potential initiatives that would help address the blight of bullying in practical ways.

Supporting victims by better recognising the advocacy role of trade unions

As with several other victim focussed phenomena, workplace bullying is usually dealt with in a way that effectively puts the victim on trial in an adversarial context. The reality is that vulnerable individuals may have to place themselves at even greater risk by triggering and pursuing an individual complaint.

While recognising that allegations have to be tested in a way that provides natural justice to all parties, it would be helpful for individual based cases to be complemented by a collective capacity to identify and address bullying as a workplace hazard.

The obvious way to do this is enable a Union to draw attention to this workplace hazard on behalf of members. This should trigger an appropriate preventative and/or responsive measures such as a *competent* and *impartial* risk assessment process.

This proposal responds to our recognition of an institutionalised incapacity to provide the necessary level of support and advocacy for aggrieved individuals and work groups in a range of circumstances. In the past two years, for example, ASU Officers have faced situations in which an ASU Industrial Officer has been denied access to information even though the individual complainant had nominated our officer as their advocate. In another case, the ASU and affected members were denied access to the outcome report of a workplace bullying investigation undertaken by the City of that was instigated by ASU member action. What is the value of an investigation that denies the complainants the capacity to review the investigator's findings?

Appropriate investigations

As with most areas of psychosocial health and wellbeing, bullying is a less tangible phenomenon when compared to physical hazards. Too often this characteristic is used, explicitly or implicitly, to justify poor or misconceived investigatory processes.

Some factors that need to be addressed in this regard are the need to -

- seriously address the competencies of Government Regulatory staff and private contractors who have responsibilities for both investigating and making recommendations with respect to workplace bullying complaints;
  (The system seems to tolerate the idea that anyone who has an investigatory background of some sort is competent to deal with power and relationship based conflicts such as bullying and the resulting impact on the overall workplace climate.)

- guarantee *timely* intervention and evidence gathering by the Regulator. This was highlighted again for the ASU in a recent case involving a community sector employer where long terms damage has resulted from late intervention; and

- ensure that investigators do not have conflicts of interest. For example, is it appropriate for private contractors who provide services to employers in relation to their WorkCover or similar responsibilities also to 'investigate' allegations the outcome of which might be the corroboration of workers compensation claims?