



House of Representatives Standing Committee on Education and Employment

**INQUIRY INTO WORKPLACE BULLYING**

**Comment from Finance Sector Union of Australia**

**Introduction**

The Finance Sector Union represents workers in finance, services to finance, insurance and superannuation.

Our members work in increasingly pressured environments which are often characterized by large workloads, excessive hours of work and unfair performance targets. In recent years these work hazards have led to an increase in complaints of bullying within the industry.

FSU Public Comment on Model Work Health and Safety Regulation and Codes of Practice included reference to these key issues in our industry which have contributed to an increase in bullying (see Appendix 1, April 2011, attached.)

Reporting of bullying incidents is notoriously difficult to separate from actual claims lodged under the various health and safety jurisdictions.<sup>1</sup> Some indicators in our industry include in the 12 months to 31 January 2012, FSU received 992 calls related to Bullying or Harassment via our Member Rights Centre (MRC) telephone line.<sup>2</sup> A recent national day dedicated to speaking up about bullying resulted in 88 calls from FSU members. In the year to June 2012, the NSW/ACT Branch of the FSU represented or provided advice to 207 members around bullying related to sales targets.<sup>3</sup>

FSU is represented on the ACTU Occupational Health and Safety and Workers' Compensation Committee and the ACTU and Unions are calling for a specific health and safety Regulation around psychosocial issues. We will continue to push for greater regulation to support the duties under the Act and recognize this growing area of hazard to our members.

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<sup>1</sup> Refer *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*, Research Report, Australian Productivity Commission, 2011.

<sup>2</sup> This is down from 1261 calls over the previous 12 months; this earlier reporting period would have included many calls from a major bank where there were a number of complaints and disputes in a contact centre, over 18 months (see below).

<sup>3</sup> Some of these 207 calls may have come through the national MRC originally.

## Comment on specific Terms of Reference

The FSU Submission is confined to Terms of Reference 1, 2, 5 and 6.

### **1. The prevalence of workplace bullying in Australia and the experience of victims of workplace bullying.**

Some examples from FSU workplaces are provided below.

### **2. The role of workplace cultures in preventing and responding to bullying and the capacity for the workplace-based policies and procedures to influence the incidence and seriousness of workplace bullying.**

Workplace cultures must be supported by strong policies and procedures around bullying and must include consultation with workers at all stages of policy development. Appropriate structures must be in place to facilitate consultation and support. These include strong networks of HSRs and Health and Safety Committees, and open dialogue and consultation with workers and their unions.

However, policies can only influence a workplace culture if enforced. Workers require the certainty of legislation to act as a deterrent and enforceable response to workplace bullying.

In the finance sector, two of the four major banks operate under the Comcare jurisdiction of occupational health and safety and workers compensation. Each of these banks keeps tight, centralized control over their network of HSRs. FSU would argue that there is not an overt and cohesive occupational health and safety culture within these Banks. There are policies in place, but access to these involves proactive searching for them on already cluttered intranet sites and there is no one-on-one training of people leaders/managers in bullying risk management and prevention. In one of these major banks, FSU was consulted over development of the bullying policy.

Work Groups in these banks are very large – often crossing more than one state – making it impossible for genuine face to face consultation to occur. The capacity for a HSR to assist with an investigation into bullying is extremely limited.

A number of the large banks are also self-insurers for the purposes of workers' compensation. A scan of data in the FSU NSW/ACT Branch found a link between self-insurance and a pattern of bullying to pressure workers to return to the workplace when on workers' compensation payment. For instance, in just one bank there were 11 instances where the employer disregarded the advice of their internal insurers to ring workers at home and shout or scream at the worker or their family members that they needed to return to work. In each case the underlying pressure to return to work was explained as pressure that the team would not achieve their work targets for sales, and the team manager would not achieve their performance bonus if the team member remained away from work. This pressure from targets and performance objectives, -linked to remuneration- is a core component of a bank's culture and is therefore inevitably linked to stress, well-being and the potential for bullying; (*refer below for more on the performance management culture within banking*).

Responses to bullying which take account of cultural factors must also address instances of organizational *change*, as change can introduce new risk factors. These include restructuring

and downsizing, introduction of technological change, outsourcing, contracting out and changes in management arrangements. Each of these is prevalent in the modern finance sector workplace. In recent years, the off-shoring of finance sector jobs has led to further job insecurity and the added psychological stress of employees being required to train overseas workers in their jobs, before losing their own.

Finally, bullying can be strongly linked to discrimination on various grounds, including against workers with family responsibilities, pregnant workers and minorities. Though also difficult to prove, there are various jurisdictions through which acts of discrimination can be resolved – via various legislation under the Human Rights and Equal Opportunity jurisdiction, state anti-discrimination and human rights law, and the *Fair Work Act*. Claims against sexual harassment can be made under several jurisdictions and there is recourse against victimisation on various grounds.

There are no overt equivalents in relation to bullying and nowhere is risk management around bullying enforceable via legislation or regulation. The ACT, Queensland, NSW, South Australia and Victoria each have either a Code of Practice or Guidance on Bullying, but only the current South Australian legislation makes a direct reference to bullying.<sup>4</sup> As a risk to the health and safety of workers, bullying requires clear, practical and enforceable laws under federal and state health and safety legislation. The mere existence of a policy on bullying is not sufficient.

***Recommendation: The FSU supports the Submission of ACTU in relation to an effective response to workplace bullying.***

**‘Reasonable management action’ – the performance management culture in the finance sector.**

Stringent performance management and performance improvement systems have been a feature of banking for many years. There is often little if any relationship between performance management systems and the positive development of skills for workers. Further, these systems have never just related to industry compliance; they are often used in an arbitrary way to drive adherence to targets which are inherently unreasonable, and over which individual employees have no control.<sup>5</sup>

This means the concept of ‘reasonable management or reasonable administrative action’ is fraught in the finance sector.

This issue was highlighted by a recent case in the Federal Court. The case involved an appeal by the Commonwealth Bank of Australia against an Administrative Appeals Tribunal decision which found the Bank liable for the depressive disorder suffered by a Branch Manager employed in Western Australia.<sup>6</sup>

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<sup>4</sup> *Occupational Health, Safety and Welfare Act, 1986*; sn. 55A

<sup>5</sup> Targets do relate to the completion of processing work but far greater stress arises out of the targets that are assigned to retail bank employees who are required to “sell” products which are generally debt producing products. These targets are not focussed on particular client demographics and are being sold to clients who may have no need for them, or do not understand the costs and obligations of the products.

<http://www.dailytelegraph.com.au/news/banks-are-handing-out-bonuses-to-staff-who-upsize-your-debt/story-e6freuy9-1226167497887>

<sup>6</sup> *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21, 8 March 2012.

The Judges considered the construction of s. 5A of the *Safety, Rehabilitation and Compensation Act* which excludes compensation for disease or injury caused by “reasonable administrative action”. Sub-section 5A (2) lists non-exclusive examples of such action. Sub-section 5A (2) (a) is ‘*a reasonable appraisal of the employee’s performance*’.

In this case, the applicant was put under considerable stress and humiliation when his managers sought to rely on a customer satisfaction survey as an accurate appraisal of his performance. The applicant had an excellent work record but had recently been under pressure from staffing and organizational changes to his branch which were outside his control. Adding to the stress was the fact that 40% of the applicant’s performance bonus was dependent on the results of this customer satisfaction survey.

The Union believes that reliance on this survey and its arbitrary nature are startling when one considers the consequences. The survey, known as a “Customer Experience Survey” (CES) ranked the standard of service in the branch on a scale from 1-10. The Bank regarded a ranking of 9 or 10 as valuable, but anything below 8 was counted as zero. *Customers surveyed were not told that the results would be evaluated in this way.* Presumably if the survey scale and its evaluation were properly explained, customers may give very different responses.

The applicant’s disorder arose from this *unreasonable* action in assessing his performance against the CES, and the combined effect of several other hazards. These included an area manager’s lack of personal support; the implementation of the organizational restructure and staffing changes; and the approach to a teleconference to discuss the unsatisfactory CES results which resulted in the applicant’s humiliation and embarrassment.

Such hazards overlap to compound the affects of workplace change and lead to (what should be) preventable illnesses.

The FSU highlights this case to demonstrate the arbitrary nature of many administrative or management actions in our industry. Cases such as these have led to months of prolonged ‘performance management’ which involves bullying of already stressed workers, and result in unnecessary break-down of employment relationships, and in some instances, years of psychological illness. This perpetuates an unhealthy culture in which workers feel confused, unsupported and from which there is not legal recourse.<sup>7</sup>

In the 12 months to June 2012, the FSU NSW/ACT Branch had 207 documented cases received by Union Advocates who provide advice and/or representation to members who were being bullied by managers in relation to meeting sales targets. In each of these cases there was no other performance issue apparent in relating to actual work performance, adherence to process or meeting service quality standards. Each of these cases related to the culture of push- selling products to the public.

One FSU NSW/ACT official likened this system to ‘pyramid selling’ where the staff member’s bonus is dependent on selling products and the manager’s bonus is in turn dependent on how much their staff can sell. Such a system is not unusual in sales environments but in

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<sup>7</sup> FSU welcomes the Commonwealth’s current review of financial adviser regulations particularly in relation to the ban on conflicted remuneration systems of non accredited Financial Advisers such as bank tellers and customer service employees. The current remuneration structure is partially based on the sale of products which are not disclosed to the public and are the cause of significant stress.

each of the above cases, the ‘sales’ people are front-line customer service staff with no accreditation as financial advisers. This creates an environment where systemic bullying can take hold and perpetuate.<sup>8</sup>

***Recommendation: FSU recommended that the forthcoming Code of Practice around Bullying include in a definition of indirect bullying ‘setting unreasonable performance targets and/or unreasonable performance management’. FSU recommends that these criteria be included in any adopted definitions of bullying.***

***Recommendation: FSU recommends that examples provided to illustrate ‘reasonable management action’ include “performance management processes which are transparent, fair and reasonable, and clearly related to work performance”.***

### ***The approach to sick leave in a major Bank Contact Centre***

Another common issue linked to bullying in finance is the use and management of sick leave.

In 2010 FSU members in a Melbourne contact centre in a major bank experienced systemic bullying by managers relating to absenteeism.

The situation started with one worker lodging a complaint of bullying and victimization with the bank’s workplace relations team. The complaint was not upheld.

Over several weeks the FSU experienced an influx of calls from workers at the same site, complaining of bullying by the same Business Unit Manager and Team Leader.

The Union provided educational material to the site and conducted a telephone survey on the bullying that was occurring. The survey identified a pattern of systemic bullying on every floor within the work site, mainly related to use of sick leave. The recurring theme was an extremely negative and punitive response from management to the taking of sick leave; this resulted in a target of sick leave being set (at 9% of a team’s combined FTE hours).

The FSU received legal advice that the Union’s members had provided enough evidence to lodge an adverse action claim in accordance with s. 340 of the *Fair Work Act*; in this case adverse action preventing workers from exercising their right to sick leave. Needless to say, such action would have taken many months and a toll on the financial resources of the Union, and a further psychological toll on FSU members at the Contact Centre.

Ultimately the union met with management and presented them with a list of demands. These included:

- For all staff to have bullying and harassment training
- Immediate removal of the 9% sick leave target
- An end to harassment of staff on sick leave
- For the Senior Manager to be removed and his behaviour to be investigated and

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<sup>8</sup> Cases relating to understaffing, rehabilitation, pregnancy discrimination or other forms of unlawful discrimination have not been counted in this figure. Behaviour and tactics that were common to these 207 cases included aggressive verbal assaults; threats of consequences ranging from performance or micro-management to termination; public embarrassment either verbally or via shared emails, exclusion or ‘divide and conquer’ tactics; calling individuals at home after hours or when they were on sick leave and denial of workplace rights based on a punitive rationale for not meeting target, for example, denying an annual leave application. These cases resulted in 15 employees resigning from the industry and indicating that they were not confident their workplace would change, in 7 cases managers were terminated and in 5 they were moved elsewhere.

- A review of the sick leave policy and its application at the work site.

The Union had previously been consulted over the Bank's bullying policy which in our view was sound. However, the policy had no link to the Bank's Enterprise Agreement with the FSU and therefore no enforceability at law.

The Union expended a lot of resources in subsequent weeks, with the Victorian Branch Advocate attending 10 separate interviews followed by 10 further meetings to report-back.

On 2<sup>nd</sup> February 2011 the Victorian Branch Director of Organising and the Advocate met with Workplace Relations at the Bank and the outcomes of the investigations were advised. The Senior Manager had been "moved on" from the Bank and there were general and individual outcomes in relation to the bullying allegations.

The Bank reported that the 9% sick leave target had been applied incorrectly across certain business units and that would cease. The 9% figure was intended for 'internal forecasting purposes' and not to be used as individual targets. The Bank also admitted that inappropriate conversations had occurred when staff returned from sick leave and that would now cease. Individual findings would be communicated to each employee complainant in their outcome meeting. The Bank also found that 90% of cases regarding inappropriate behavior involved the Senior Manager who was no longer working for the Bank.

Some of the individual complaints were substantiated following investigation and some weren't.

The Bank also agreed that:

- a full report would be provided to the new Head of the Contact Centre at the Bank;
- they would review the conduct of return to work meetings;
- they would provide refresher training around the Sick Leave, Bullying and Harassment Policies and Code of Conduct; and
- disciplinary action would be taken against certain individuals where appropriate.

In the year or so since these disputes were resolved, the culture within this Contact Centre has been transformed. Union membership grew within the Centre and the Bank received more nominations for the vacant position of Health and Safety Representative than they had received in any Work Group in their history. The disputes also resulted in there now being 18 FSU representatives at the site.

The FSU were also able to influence the culture of responses to bullying, but it was a costly and time-consuming process and several FSU members remain on workers' compensation payments due to their poor health.

A risk management approach to bullying, adopting the hierarchy of controls, would have saved this workplace and its staff from exposure to the risk. For example, identification of the 9% target on sick leave, in its intended context, could have ensured that the risk of imposition of this target on *individuals* was eliminated. There were clear risk management 'sign-posts' in this case study which strongly contradict views that psychosocial hazards cannot be identified, managed or controlled.

Indeed the interaction of a risk management approach to bullying, and other workplace policies should be overt. The implementation of 'unlimited sick leave' policies in the Comcare banks led to an immediate increase in punitive measures to control sick leave which should have been foreshadowed, and may have been picked up in a risk assessment exercise. The two banks within the Comcare system had several years where this approach was evident through cases brought to FSU. For example, the policies placed strong emphasis on continued communication between staff on sick leave and their managers, and 'cooperation' from staff in returning to work as soon as possible; this was often abused by management. Some further examples of this issue from our South Australian branch include:

- A young female teller in a regional area was on sick leave and she was visited – uninvited - at her home by her Area Manager and his assistant. He invited himself in to her home and quizzed her about whether she lived alone and who would pay the rent if she wasn't working. The assistant suggested to the staff member that she should be on stronger medication to help her get back to work.
- One of our centralized sites has the work practice of 'return to work meetings', where staff are interrogated after a sick day (or even a half day). The senior manager will ask why they were off sick and what medication they were asked to take. She has commented (snapped) that 'you don't look sick to me', and 'why didn't you ask for stronger medication?' Staff dread these meetings and suffer anxiety and loss of sleep at the thought of sitting through them.

In NSW, a manager in a centralized site (non-branch) has been reported for sending a group email to all direct reports detailing the sick leave taken by individuals and their stated reason for the leave. The staff concerned have heard that the manager is taking this action to ensure that sick leave is managed and people understand the impact of their sick leave on the team's performance. FSU is dealing with this case at the time of writing and aside from the bullying involved, there could be recourse under the *Fair Work Act* in relation to discrimination on the grounds of ill health and/or adverse action taken against workers seeking to exercise their workplace rights (to personal leave).

Initial psychological illness or injury can lead to prolonged illness when complainants are victimized further as their claims are often handled in an ad hoc and punitive manner.

The often extreme performance targets applied to workers in contact centres contribute to the nexus between performance management and perceptions of bullying and seem to attract a disproportionate number of complaints to FSU.

Some further examples from our South Australian branch:

- A contact centre worker performing beyond expectations but told not enough effort on their part due to disability; complaint made to all lines of management, workplace behaviour not modified. Diagnosed by psychiatrist as having 'suicidal ideation'. Received Workers Compensation settlement, one year later still unable to work.
- A contact centre worker alleged by employer to have breached a code of conduct, yet had extensive evidence of employer's harassment. Certified unfit to return to work and dismissed whilst on sick leave. Had been diagnosed with extensive physical and psychological conditions related to workplace bullying. Nearly two years on is still unable to work.

- A contact centre worker under extreme stress in workplace, conveyed by ambulance from workplace to emergency department at a local hospital. Subsequently diagnosed with neurological condition. During recovery and return to work received two warnings that performance was not sufficient. Developed psychological condition and attempted to take own life.
- A data processing worker developed a disability due to a workplace injury. For over a year the employer said their performance was insufficient and threatened to terminate their employment. Was dismissed and subsequently developed a psychological condition.

**5. Whether there are regulatory, administrative or cross jurisdictional and interpretational legal and policy gaps that should be addressed in the interests of enhancing protection against and providing an early response to workplace bullying, including through appropriate complaint mechanisms.**

**6. Whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying.**

The current regulatory framework does not provide a sufficient deterrent against workplace bullying.

The best way to maximize prevention of workplace bullying is to regulate for risk management of bullying hazards. The risks associated with bullying must be managed as any other health and safety risks are managed; the *Work Health and Safety Act* recognises 'psychological health' but must be supported with specific regulation aimed at controlling psychosocial hazards.

In turn industries must be supported to review systemic and specific issues which can give rise to bullying. For example, in finance bullying can clearly be a hazard arising from unfair targets linked to pay systems.

Health and safety laws related to bullying must also be *enforced* as stringently as any other health and safety laws. This requires:

- a well resourced and well – trained inspectorate,
- consistent definitions of bullying,
- well resourced education programmes and management training,
- transparent grievance and complaints mechanisms, for example via enterprise agreements, and
- consistent anti-bullying laws and codes of practice. The key jurisdictions for applying consistent laws around bullying are the Commonwealth and State work health and safety jurisdictions.

Part of the consistency required in laws around bullying includes consistency in definitions of what constitutes bullying. In our response to the Draft Code *Preventing and Responding to Workplace Bullying*, FSU suggested broadening the definition of bullying in the Code to:

- acknowledge the potential for single incidents to create a health and safety risk to workers;
- include the range of internet technologies as conduits for bullying;



- include behaviour that *threatens* in examples of direct bullying; and
- allude to victimization by including in examples of indirect bullying, ‘*pressuring a worker not to make a complaint about bullying or any other workplace matter*’.<sup>9</sup>

This range of factors should be captured by one work health and safety law, regardless of the current options available in anti-discrimination or workplace relations law.

***Recommendation: The FSU assisted in developing the ACTU Psychosocial Policy. FSU supports the ACTU Recommendation in relation to a Psychosocial Regulation and supporting Code of Practice.***

In comments on the Draft Code of Practice, FSU was critical of the ‘informal style’ of the section related to risk assessment. A Code of Practice on Bullying must direct readers to move systematically through a risk assessment process, linked to specific regulations in the *Work Health and Safety Act*.

A proposed Regulation should be linked to the duties under the Act; specifically, the obligation to consult with health and safety representatives when undertaking risk assessment [s. 49].

The Code should prescribe training for managers responsible for carrying out risk assessment and training, risk identification and reporting should be part of management compliance.

In turn, and to fill the policy gaps which currently exist in workplaces, the Code should direct workplaces to:

- develop a workplace bullying policy;
- develop policies related to diversity, access and equity; for example, equal opportunity for all workers regardless of gender, race, pregnancy, family responsibilities, tenure, form of employment etc etc; and
- communicate all policies effectively and regularly review and update policies in conjunction with workers, HSRs and unions.

A review of policies and their relationship to each other should also be part of a risk assessment process.

Finally a Code of Practice should mention the right of workers to be represented and supported by Health and Safety Representatives and/or Union Representatives.

The industrial parties should be encouraged to include processes around psychosocial hazards in enterprise agreements, thereby making such provisions enforceable in *Fair Work Australia*. This would ensure that health and safety provisions can also be linked to other industrial provisions in agreements, including disputes procedure, in an enforceable manner.

Consistent and confidential complaints procedures should be available for complaints around bullying. These processes should be simple and transparent in order to encourage genuine complaints.

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<sup>9</sup> See FSU Submission *Preventing and Responding to Workplace Bullying, Draft Code of Practice*, (Safe Work Australia), December 2011.

***Recommendation: The FSU supports the ACTU Recommendation 3 in relation to bullying complaints.***

FSU does not support mediation as a remedy in itself around bullying cases. FSU submits that reference to mediation in a forthcoming Code of Practice on Bullying must be clear about *when mediation is appropriate*. We have had instances in poorly managed workplaces where members are not aware of their right to an investigation of an incident and are effectively 'ordered' to enter a mediation process. This can effectively break the confidentiality around a complaint, leading to more uncertainty around process and outcomes and potentially compounding any risk to the psychological health of the worker.

Mediation should only be used following an investigation, where a direct approach has not resolved the issue of bullying. The Victorian Guide *Preventing and responding to bullying at work*, (WorkSafe Victoria) includes a sensible approach to this process.

**FSU National Office  
July 2012.**