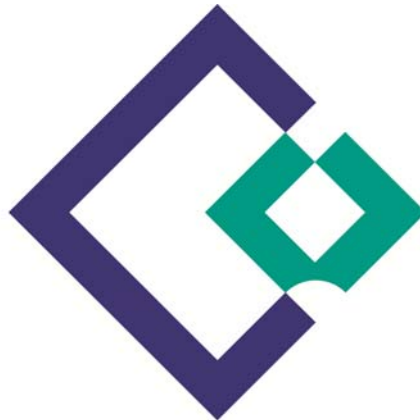


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A•S•U
Australian Services Union

ASU Submission

to the

**House of Representatives Standing
Committee on Education and Employment**

Inquiry into Workplace Bullying

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Introduction

The Australian Services Union [ASU] is one of Australia's largest Unions, representing approximately 120,000 employees.

The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

- Local government (both blue and white collar employment)
- Social and community services
- Transport, including passenger air and rail transport, road, rail and air freight transport
- Clerical and administrative employees in commerce and industry generally
- Call centres
- Electricity generation, transmission and distribution
- Water industry
- Higher education (Queensland and SA)

The ASU has members in every State and Territory of Australia, as well as in most regional centres.

The ASU welcomes the opportunity to participate in the Inquiry into Workplace Bullying. The outcome needs to deliver nationally consistent regulation that addresses the complexities of workplace bullying as part of a broader agenda to reduce psychosocial hazards in the workplace.

The ASU is disappointed the terms of reference are restricted and would have preferred an Inquiry into related psychosocial hazards at work such as: harassment, occupational violence¹, fatigue and work overload. Stress, as a

result of psychosocial hazards at work, is endemic and existing regulatory frameworks have clearly been ineffective. National harmonised Occupational Health and Safety (OHS) laws along with the *Fair Work Act* provide the best opportunity for a coordinated approach.

This ASU submission supports the ACTU Submission to the Inquiry and the Union Charter of Workplace Rights².

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

The incidence of workplace bullying and psychosocial hazards at work in Australia is generally recognised as being under-reported yet the data available still illustrates just how widespread it is³.

Since the mid to late 1990s the ASU has pursued raising awareness of stress at work particularly through annual ACTU OHS campaigns. The ASU participated in successive related OHS campaigns including in 2000 the ACTU National Health and Safety Campaign; "*Being bossed around is bad for your health – the workplace is no place for bullying*".

The ASU has always recognised workplace bullying but with modern computer/email/mobile phone technology pushing 24/7 work cycles, fragile organisational structures, insecure employment, contracting out and downsizing; bullying has become insidious and difficult to address in isolation.

Research by Unions NSW in 2004⁴, and cited in an article by the Australian Psychological Society (APS) led them to claim bullying was the worst OHS issue in that State. ASU Branches in NSW can confirm this, with examples such as earlier this year when the ASU's United Services Branch was approached by members at [redacted] Call Centre with concerns over bullying in the workplace. Members expressed they were loath to raise workplace concerns as they were fearful of reprisals. The Branch has taken action and notified the organisation of a dispute and sought an investigation.

As a result [redacted] is seeking the assistance of an external independent company to investigate the claims.

At the City of [redacted] in 2011 more than 20 ASU members complained about bullying in the previous two years, with at least a dozen leaving. The ASU WA Branch believed employees were being forced out to make way for employees who could be hired on lower classifications and paid less. A further example in WA occurred at the City of [redacted] where over an 18 month period 140 members left the organisation, many of whom were psychologically damaged with 10 of those members pursuing workers compensation claims. As a result of these claims the CEO has been forced to resign.

In South Australia there is currently a significant industrial dispute in relation to treatment of staff at the [redacted] Council. A staff survey undertaken in late 2011 produced extremely negative results of both the prevalence and impact of bullying behaviour. The Union had attempted constructive discussions with Council but this proved unsuccessful and a formal dispute was notified to the SA Industrial Relations Commission. This dispute is not yet resolved.

In Queensland the ASU Central & Southern Queensland Clerical & Administrative Branch (known as "Together" in Queensland) has had some success with the *Queensland Work Health and Safety Act 2011*. The duty of officers to exercise due diligence and the prospect of a fine was relied on by the Workplace Health and Safety Queensland - Metro South Unit where an inspector was sent to the workplace. As a result policies for bullying and harassment, staff training were instigated and employees were made aware that bullying complaints would be taken seriously. Unfortunately this prompt response by the Inspectorate has not been repeated in other regional units in the State. The role of the Inspectorate is crucial in any legislative regulatory response to workplace bullying.

In Victoria this month at _____ over 50 employees accused the Council of bullying and incompetence. Exit interviews of staff revealed some employees had walked out on their jobs due to workplace bullying and harassment. One employee who quit because of a supervisor said "(He/she) was just someone I just could not work with. (They) always put me down, patronised me, said nothing positive in relation to my development"⁵.

Another employee wrote ``A fear of retribution and owning up and being open. People has (sic) become defensive and don't like to be open about shortcomings as a fear of being seen badly"⁶. The ASU's Victorian & Tasmanian Authorities and Services Branch said workers' concerns were often disregarded with anyone complaining being walked or bullied out of the workplace.

Currently at the _____ Council in Victoria staff are threatening to take industrial action over claims the council failed to offer employee union representation during a recent performance meeting. The ASU's Victorian & Tasmanian Authorities and Services Branch said the council's HR department was denying the employee basic workplace rights. An employee must be offered union representation in a meeting if it could potentially affect their employment status. A meeting of ASU members will be conducted in early July 2012⁷.

Both these local government examples in Victoria are traditionally highly unionised workplaces yet were still confronting allegations of systemic bullying from management. The reality is that the greater majority of workers feel powerless to stop a culture of bullying and collective action and representation give them the only opportunity for empowerment they wouldn't otherwise achieve in the workplace.

As workplace bullying is often subtle rather than overt, employees have difficulty in describing these incidents are often embarrassed and fearful of the consequences or repercussions of reporting.

The ASU believes bullying is a core workplace issue that affects both the organisation and employee. Workplace bullying affects employees quality of life through physical illness, depression, loss of motivation and self-confidence, anxiety and sleep difficulties to name a few. It also affects organisations with higher absenteeism, loss of productivity, higher employee turnover and earlier retirements.

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

The ASU supports the ACTU submission highlighting the important role of Health and Safety Representatives (HSRs) and Health and Safety Committees and harmonised OHS laws must protect and enhance their legal status in the workplace.

The ASU acknowledges that many organisations have genuinely sought to address workplace bullying as a serious occupational health and safety issue by implementing company policies, reporting lines, complaints mechanisms and independent workplace investigations.

However company policies traditionally protect the interests of the employer and only where necessary or legally required do they protect the interests of employees. Company policies alone even with the best of intentions do not adequately address workplace bullying or indeed psycho social hazards in the workplace without a regulatory requirement that enforces such policies.

The ASU believes employees have the right to be genuinely consulted in all matters relating to their work health and safety. For effective hazard identification and risk control workplace consultation is essential.

Worker based policies are best negotiated through Enterprise Agreements underpinned by the safety net of modern awards. Collective bargaining is the best way to engage workers in the workplace on equal terms with the employer.

Jointly negotiated agreements that incorporate workplace bullying policy assist organisations and employees in establishing what constitutes workplace bullying and accessing a grievance procedure with the ability to have Fair Work Australia conciliate and where necessary arbitrate disputes in an efficient and cost effective way.

The following example is a Workplace Harassment clause found in the Uniting Church Property Trust t/a Blue Care and West Moreton Aged Homes Council and Australian Services Union (C&A) Branch – EBA:

Workplace Harassment (workplace bullying)

5.5.1 Workplace harassment (bullying) will not be tolerated. Workplace harassment (bullying) is repeated behaviour, other than behaviour that is sexual harassment, that:

- (a) is unwelcome and unsolicited; and*
- (b) the person considers to be offensive, intimidating, humiliating or threatening; and*
- (c) a reasonable person would consider to be offensive, humiliating, intimidating or threatening.*

5.5.2 Workplace harassment (bullying) can occur between management and workers, between co-workers, or between workers and clients. The parties acknowledge that workplace harassment can be both overt and covert

Recognising the role of Unions in the workplace is an important step in preventing and responding to workplace bullying and psychosocial hazards at work. Unions can assist in identifying, assessing and controlling workplace risks associated with bullying behaviour and workplace harassment.

3. The adequacy of existing education and support services to prevent and respond to workplace bullying and whether there are further opportunities to raise awareness of workplace bullying such as community forums;

The ASU supports the ACTU submissions and also questions reliance on community forums for workplace bullying.

Since 2011 “Brodie’s Law”, with all its flaws as legal reform⁸, has raised the issue of workplace bullying with the general public particularly in Victoria. The ASU believes real human stories need to be communicated with the public and Brodie’s tragic case has captured the public imagination. It highlighted the

inadequacy of existing support services and no ready access to tribunal/court intervention until it was too late.

As witnessed with “Brodie’s Law” community expectations can be powerful drivers of change and can influence the nation’s psychosocial safety policies. Organisational cultures can be influenced by broader community values and attitudes. The ASU supports the ACTU submission in relation to education providing duty holders with the necessary skills to identify potential risks. This is the role of a properly resourced inspectorate.

4. *Whether the scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent workplace bullying;*

Under current OHS legislation employers or more particularly Person Conducting a Business or Undertaking (“PCBU”) have a duty of care to provide a safe workplace for employees, volunteers, visitors and contractors. This includes a workplace free of bullying and other forms of harassment.

The Queensland Ministerial Reference Group report into Workplace Bullying⁹ highlights the need for a common understanding on the term “workplace bullying”. No single law in Australia (apart from South Australia) expressly describes what constitutes workplace bullying.

However SafeWork SA has not initiated a prosecution arising from breach of s55A.

The relevant part of the clause for current discussion reads as follows (*Occupational Health, Safety and Welfare Act 1986 SA*) -

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 ASU's South Australian & Northern Territory Branch experience is that this provision has been of persuasive value in that it has allowed Unions to promote the anti-bullying agenda in a context of a clear statutory provision. In practice it has not been successful in resolving workplace complaints. The reasons for this include problems arising from the way in which individual complaints have been handled by SafeWork SA.

The major problem, however, is that there is no specific, required procedure that an employer must follow 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. This extends to the subsequent limited capacity for the Regulator (SafeWork SA) to enforce reasonable standards.

The ASU South Australian & Northern Territory Branch 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. This process should also consider the overall and ongoing workplace impact of specific allegations – i.e. 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.

The ASU South Australian & Northern Territory Branch recent experience has been that s55A, in the absence of a required holistic follow up process, has simply helped employers 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 ASU would like to see a national uniform approach adopted in every state and territory to address and prevent workplace bullying and psychosocial hazards at work.

5. *Whether there are regulatory, administrative or cross-jurisdictional and international 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;*

In Australia workplace bullying may result in an employee seeking remedy under the common law (e.g. a breach of contract or a breach of duty of care) or through one or more of several statutes. These statutes include occupational health and safety legislation, workers' compensation legislation, equal opportunity and other discriminatory legislation as well as unfair dismissal legislation¹⁰.

In addition to regulation of workplace bullying through comprehensive psychosocial hazards regulation and code of practice under harmonised OHS laws; the ASU would like to see workplace bullying formally recognised in the *Fair Work Act*. Currently bullying or harassment is not unlawful under the *Fair Work Act* unless the behaviour can be shown to be an adverse action linked to a person's attribute such as race, sex, age, disability etc.

If workplace bullying was formally recognised in the *Fair Work Act* it would allow employees to raise grievances and have disputes heard and resolved by an independent umpire quickly, efficiently and at a low cost. These laws would be complimentary to the new OHS harmonisation laws.

Employees should be given quick and ready access to a tribunal or court that can pre-empt or stop workplace bullying before it causes damage to workers' health. Prominent workplace specialist lawyer and principal at Maurice Blackburn, Josh Bornstein, believes that the key to addressing bullying is for

policymakers to legislate a practical means for employees to expose their work environment to external scrutiny in a court or tribunal¹¹.

Bornstein believes employees would benefit more if bullying was recognised in the *Fair Work Act*. “If you are an employee who is misled about workplace bargaining, if you are subjected to racial vilification or sexual harassment, or if you make a complaint to your employer about an issue in the workplace and are punished or sacked for doing so, you can immediately have your matter heard in a tribunal or court. A similar approach should apply for victims suffering from workplace bullying¹²”.

Workplace Bullying recognised in the *Fair Work Act* would empower the Fair Work Ombudsman (FWO) to investigate workplace bullying as has occurred already in relation to unlawful workplace discrimination. The FWO has the resources to deal with workplace bullying. The following two examples highlight this capacity.

In August 2008 the FWO said offensive and bullying behaviour towards employees is against the law and unacceptable. The FWO prosecuted the operator of a _____ franchise who allegedly tried to force a staff member to sign an Australian Workplace Agreement.

In November 2008 a female worker was sacked after querying her workplace entitlements at _____. The FWO said the case was one of the most serious examples of bullying the Agency had encountered. The FWO is adequately resourced to not only investigate and prosecute workplace bullying but also publicise its achievements as part of an awareness agenda sorely needed right now with workplace bullying and psycho social hazards at work. The ASU supports the FWO as a Government agency for change in workplace culture.

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

Currently the existing regulatory framework does not provide a sufficient deterrent against workplace bullying. The ASU supports the ACTU call for

national regulation and national supporting codes of practice to address psychosocial hazards including bullying. Penalties should be both civil and criminal.

The prevention and regulation of workplace bullying is mainly covered by OHS law but may also be covered by discrimination law, general protections under the Fair Work Act 2009, unfair dismissal law, employment contract and enterprise agreements. However these have not been sufficient to stop the increasing incidence of workplace bullying.

Many existing laws focus on the individual causes and symptoms, individual bullies and victims and not systemic workplace bullying that are both conspicuous and insidious.

The passing of “Brodie’s Law” is the most recent example of reacting to workplace bullying with an emphasis on holding individual bullies responsible when it is too late rather than an employer’s obligation to provide a safe workplace. As the legislation simply extends the definition of stalking it has been drafted to capture extreme conduct and not the more common insidious types of workplace bullying.

The ASU recognises that Brodie’s law was well intended, led to a greater public awareness of bullying and more complaints made to Worksafe (Victoria). However the law has not been used in its first 12 months and made little or no apparent impact on workplace bullying in Victoria. This is most likely because Brodie’s Law requires police to lay charges for an offence and convicting a person for this offence requires the criminal standard of proof to be met¹³.

Nationalising Brodie’s Law on its own is not the answer to workplace bullying. Although the initiative is symbolically important it is predicted to have little to no impact on at least the greater majority of genuine cases.”¹⁴

The tragic story of systemic workplace bullying resulting in a young female taking her own life deserves a far greater legacy – a comprehensive strategic

campaign against workplace bullying in the context of psychosocial hazards at work.

The systemic issues relating to workplace bullying are best addressed through nationally harmonised OHS laws and the legal framework of union representation under the *Fair Work Act*.

Enforcing the Person Conducting a Business or Undertaking (PCBU) duty of care in relation to workplace bullying as a specific workplace psychosocial hazard.

7. The most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another; and

National uniform OHS harmonisation legislation with a psychosocial hazard regulation, including workplace bullying, will ensure there is no inconsistency between all States and Territories.

8. Possible improvements to the national evidence base on workplace bullying.

The ASU supports the ACTU's Multi Agency Approach and recommendation that Safe Work Australia be the tasked with evidence gathering. It should be confidential with no fear of retaliation.

The ASU supports the ACTU recommendations and supplements these with the following:

Recommendation 1

Workplace Bullying along with psychosocial hazards should be recognised by the *Fair Work Act* so as systemic workplace bullying can be addressed in the workplace through awards, agreements and dispute settling and grievance procedures enabling Fair Work Australia to conciliate and where necessary arbitrate outcomes.

Recommendation 2

A national harmonised OHS regulation that enables employees to seek urgent orders to stop bullying conduct early.

Recommendation 3

Work Health and Safety Regulators should be required to provide clear and concise 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 4

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.

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