



Reverend the Hon. Fred Nile
Chair
General Purpose Standing Committee No 1
Parliament House
Macquarie Street
Sydney, NSW, 2000

CC:
The Hon C. Cusack
The Hon. M. Mason-Cox
The Hon. M.J. Pavey
The Hon. A Searle
Mr D. Shoebridge
The Hon. M. Veitch

Dear Reverend Nile,

Re: Inquiry into Bullying in WorkCover

Again thank you for providing Unions NSW with the opportunity to contribute to this important inquiry.

Please find below the amendments to the transcript and questions that the committee has requested.

We have identified the following transcription errors from our reading of the transcript.

Reference	What is stated	What should be stated
Page 6 last reference to Mr Deguara	No. That is why you should have an independent inspector and a reviewer of the inspector, not one who is tied to some sort of political aspect which is outside the objects of the department or the authority	No. That is why you should have an independent inspector and a reviewer of the inspector, not one who is tied to some sort of political aspect, one which is outside the directs of the department or the authority
Page 7 first Mr Deguara reference	The fact that WorkCover around the country	The fact that WorkCovers around the country
Page 7 first Mr Deguara reference – last line	financial health as well as for a lot of people	financial health as well , for a lot of people
Page 10 second Mr Deguara reference	“mine supervisor”	Should read :”line supervisor”
Page 10 last reference to Mr Deguara	Churn and churn	Should read churn and turn

As far as the questions on notice we have answered these as follows:

The Hon. Adam Searle

- 1. Does having multiple functions carried out by WorkCover (insurance, compliance, prosecutions) within the single body contribute to the organisation’s problematic culture?*

There are multiple functions of WorkCover and the existing management structure is problematic.

There is a large level of expertise associated with Occupational Health and Safety (with different skill sets required for enforcement and prosecutions to the skillset required for educating and advising members of the public), with Workers Compensation (including return to work, injury management, financial payments, service providers) as well as other aspects of the organisation such as licensing (including processing, competencies, timeliness and governance).

There is no specific Board dealing with WorkCover's functions. The Safety Return to Work and Support Board has been established in 2012 to replace the WorkCover Board. It however has carriage of all aspects of the portfolio including Lifetime Care and Support, Motor Accidents, Dust Diseases, and WorkCover. Whilst WorkCover makes up a large percentage of the portfolio, unlike the other parts there is no particular board for the WorkCover functions.

There was previously a WorkCover Board and there was also the WorkCover Advisory Council which did the detailed work. These bodies provided specificity to the actions of WorkCover Authority. It enabled the Authority to meet its tripartite responsibilities and to cooperatively develop health and safety and workers compensation policies and procedures usually by agreement.

The operation of the two main functions of OHS and workers compensation is problematic as it leads to a number of conflicts of interest.

An obvious conflict of interest arises from the issue of bullying and inspectors guidance provided with the original submission by Unions NSW. The guidance materials allows inspectors to remove themselves from the process of resolving what is a safety issue if there is the hint that another jurisdiction may have an interest, even where there is no such excuse.

The conflict of interest exists in relation to what the WorkCover Authority may do to change the way claims are assessed in order to reduce claims rather than fixing the problem. For instance there is currently a higher threshold for psychological illness of 15% than other physical injuries for permanent impairment and a requirement to exempt reasonable actions from liability. If it is alleged that a reasonable action is occurring an inspector may not investigate further and allow the bullying hazard to continue regardless whether it is the case or not.

It leads reactivity rather than proactivity. The reason for this is that the Authority in applying its enforcement and education regime will focus on the biggest issues of cost to the scheme where they have already established clear precedents for the type of offence. This often leads to no or little focus on issues that are of lesser frequency to the scheme but of great cost to the economy and the worker or emerging issues.

Another example of where the conflict arises is anecdotal evidence provided by inspectors where we were told that they had prepared a case with significant evidence to win the matter as a landmark prosecution by WorkCover with that hazard, but due

to the possibility that the large employer may move their workers compensation policy to come under the Comcare regime the inspectors were presented with significant road blocks internally.

A further conflict exists in that the knowledge of a health and safety inspector may be limited in the area of suitable work or what is reasonable in attempts for a worker to get back to work. Workers are often hindered by a refusal to make the workplace safe yet are not assisted by inspectors who state that Return to Work is an industrial issue.

Perhaps the biggest issue of conflict is the conflict between the WHS regulator or enforcer and the WHS advisor. This was identified several years ago and the Business Advisory Group was established so that the business could with confidence call WorkCover for advice. With the abolition of the Business Advisory Group the inspectors now are doing the advice. This causes conflict as the inspectors are encouraged to advise even if there is an obvious hazard. The conflict extends to a requirement to build a relationship with an employer despite the employer being a constant re offender.

This conflict of interest has been identified by independent researchers who have studied the WorkCover Authority.

However, it is the funding from the WorkCover scheme that funds all the units of the WorkCover Authority and therefore to avoid government being burdened with another cost, the workplaces that benefit from improved safety from the WHS Division should have to pay a percentage of their workers compensation to the scheme to keep Health and Safety a priority.

2. *Does this make the organisation more difficult to manage for middle and senior managerial staff? If so, how?*

If there are conflicts of interest as described above and multiple masters or objectives then it would become more difficult.

For example the definition of what constitutes a health and safety risk may be different in different circumstances to what can be claimed under workers compensation.

For example if WorkCover were issuing health and safety guidance on driver fatigue; driver fatigue is applicable for work journeys and journeys to and from your place of abode as a safety issue, yet for workers compensation it only relates to injuries on work related journeys (with a few yet to be determined exceptions).

If you are writing a guidance for the above example you would need as a manager to get the all clear with managers in legal and publications, workers compensation and health and safety, yet the risk does not change or how you deal with it, as the risk is a factor of accumulated driving and fatigue.

3 Should WorkCover be separated into different bodies, each charged with a discrete part or parts of its current functions? If yes, what do you suggest as being the best proposal to effect this?

We do not have position on the alignment of WorkCover functions or their separation. However before any change occurs, it should be noted that the funding of the organisation comes from a % of the premium pool for workers compensation. Therefore if you want to have an adequate health and safety authority that is properly resourced you will need to maintain the funding stream from the insurance pool.

By creating separate tripartite functional boards that have the capacity to deal with operations that may resolve the issue of the problems with the functional alignment.

4. Given the evidence received regarding alleged interference by managers in inspectors enforcing safety laws, is there a need for some of the WorkCover's functions being made statutorily and legally independent of Executive Government (similar to Police or the DPP)? If yes, what functions and what model do you suggest?

In relation to the first question we have stated that there is a need for this. Even if the organisation acquired the services from other bodies such as the Mines Inspectorate or interstate inspectors you would be faced with problems including:

- Mines Inspectors not having the requisite knowledge of the broad range of technical issues for a general health and safety inspector such as for instance how to deal with bullying.
- Interstate inspectors would be handpicked by other Regulator heads who would pick a person to undertake the enquiry to not offend the colleague on HWSA. A similar approach was taken by WorkCover when requested to investigate bullying at WorkCover, they appointed an inspector who closed the file prior to undertaking the investigation.

In relation to the suggested model part of the above question- we would suggest a model which exists in other parts of government or a hybrid of such approaches.

We were proposing that a position similar to that of the WIRO be established who reports to the Parliament of NSW through either the General Purpose Standing Committee No.1 or some other appropriate committee.

That the position could be titled an Independent Safety Inspector who could if they so wished employ additional staff with the relevant technical expertise and power to undertake investigations. That their function could be several fold.

1. That they could deal Regulation and enforcement of safety matters internal to WorkCover.
2. That they could be responsible for dealing with safety issues outside of WorkCover employment to ensure that members of the public are getting a service from WorkCover in relation to health and safety; A workCover appeal priocess.
3. They could issue guidance or directions to WorkCover to undertake an action or undertake their own enforcement if the WorkCover Authority does not.
4. They could report on the integrity of WorkCover.

As stated in our submission the DPP would not have the capacity to undertake investigations into WorkCover matters unless the safety investigation was undertaken first, the Ombudsman lacks the specialist skills, and the problem of Police investigating safety offences has long been established since the industrial revolution and quoted by practitioners and academics such as Michael Tooma.

Questions Arising from the transcript

Page 7- The Hon. Adam Searle: You mentioned the idea of parallel laws to the new Fair Work Australia bullying laws. I am happy for you to take this question on notice. What is your view on whether the current structure of those Federal laws are sufficiently well formulated to achieve the objective or should New South Wales laws take a slightly different form?

There is the capacity to run disputes and seek orders on bullying issues already in the NSW jurisdiction as an industrial matter. It is complicated however, in that the Industrial Relations Commission does not have the framework for the easy and timely access to the Industrial Relations Commission, and what might be perceived as an onerous requirement to convince that the matter is genuine by some commissioners when the often delayed internal Agency processes are not yet finalised or not followed.

Page 7 The Hon Catherine Cusack:" Paragraph 13 of your submission refers to the fact that most of the academic literature described workplace change and job role certainty as risk factors that increase the risk of workplace bullying. Given the circumstances that have been besetting WorkCover for some years now, would you provide these references."

There is a proliferation of material on this subject matter which can be provided if requested. The following is not meant to be exhaustive but indicative.

These were risk factors identified in the 2003 Dignity and Respect Charter that was based on the Irish literature at the time that included these items as risk factors.

We are aware that Dr. Carlo Caponecchia (UNSW) was called to provide evidence before this committee who is a significant expert referenced internationally and of local residence.

Therefore we have quoted Caponecchia C., Wyatt A., Preventing workplace bullying: An evidence-based guide for managers and employees (2011), Allen and Unwin, p. 56

"Several job stressors have been shown to be related to the occurrence of workplace bullying, including:

- Workload and excessive task demands;
- Role conflict (the perception that competing demands and expectations are required to fulfil one's job);
- Role ambiguity (being unsure about what tasks are part of one's own job, as opposed to someone else's job);
- Job insecurity and change;
- Unreasonable or negative task related feedback;
- Lack of control over work tasks; and
- Lack of social support from co-workers and supervisors
- (see Hague et al. 2007; Notelaers, et al. 2009; Matthieson and Einarsen 2001)
-"

Page 10 Chair the Hon. Reverend Fred Nile: "We will move on. In the document that you have tabled Right of information Notice of Decision", did you also ask for the disclosure of bullying reports within WorkCover? This is covering the general area of the whole State for all industries? Did you actually focus on WorkCover?

Mr Deguara:...

Chair: You are not aware whether the Public Service Association [PSA] did it? Could you take that on notice and inquire?"

I am aware that this has been requested via the Association's powers under the WHS Act and also through GIPA legislation.

It is my understanding that the requests have had limited success with only part of the responses being provided. It is my understanding that since the hearing of the Association's evidence that they have had part of the requested information provided to them but not all of it. I have not seen the information provided.

Yours faithfully,

Shay Deguara
Industrial officer

Yours Faithfully

A handwritten signature in black ink, appearing to be 'Shay Deguara', with a stylized, sweeping flourish at the end.

Shay Deguara
Industrial Officer