

Legislative Council General Purpose Standing Committee No 1

Inquiry into Allegations of Bullying at WorkCover

WorkCover Questions on Notice

(from hearing 11/11/13; received 14/11/13; due to Committee 5/12/13)

Question 1:

Mr DAVID SHOEBRIDGE: Can you provide all the communications you have had about the Butler decision and this inquiry or Committee?

Mr BARNIER: Yes, we can do that. My understanding with regard to Department of Premier and Cabinet guidelines is that the House must refer the matter to instruct us to do that.

Mr DAVID SHOEBRIDGE: I am asking whether you will provide that information to the Committee. It is not a difficult question.

Ms NEWMAN: Yes.

Mr BARNIER: I apologise for misunderstanding.

CHAIR: That will be deemed a question on notice.

Answer:

Documents provided at Attachment A.

Question 2:

The Hon. MICK VEITCH: Reference was made to surveys. Who is the employee assistance program provider?

Mr BARNIER: It is now Davidson Trahaire Corpsych. We are in transition to new providers at the moment.

The Hon. MICK VEITCH: What is the transition process?

Mr BARNIER: The contracts we have in place are about to expire. We are finalising the new contracts and we will have different providers for each of those services mentioned based on their strengths. We did that using an outside panel.

The Hon. MICK VEITCH: What was the catalyst for making that change?

Mr BARNIER: First, the contracts were due to expire. We have been listening to feedback from people with experience of the various providers. We are required to conduct an open tender and we did so. Instead of having one provider delivering the separate programs, we looked at the providers who could best deliver them and those with the best strengths and reputations.

The Hon. MICK VEITCH: Did you conduct a survey of staff about their level of satisfaction with the service offered by the previous provider?

Mr BARNIER: No, I got that feedback from listening to various people.

The Hon. MICK VEITCH: It is anecdotal?

Mr BARNIER: Yes.

The Hon. MICK VEITCH: Did the organisation ever survey staff? You could do that anonymously and that is why I am asking. Did you survey staff about their satisfaction with the service being provided?

Mr BARNIER: I would have to check. I think the providers might do their own satisfaction reporting as part of their contract.

The Hon. MICK VEITCH: Can you take that question on notice? I would like to see the survey. How often is it conducted?

Mr BARNIER: I would have to check.

Answer:

The previous service provider for WorkCover's Employee Assistance Program (EAP) was Davidson Trahaire Corpsych (previously "Corpsych").

New contracts (effective 1 August 2013) for Employee Support Services were awarded through a competitive Government tender process for all of the Safety Return to Work and Support Division for the following services:

- Employee Assistance Service (EAP) – Davidson Trahaire Corpsych
- Critical Incident Support Program (CISP) – Converge International Ltd
- Bullying Response Service (BRS) – Converge International

Customer satisfaction surveys are conducted by Davidson Trahaire Corpsych with clients following completion of their agreed sessions. Clients are entitled to up to six sessions per presenting problem per year. The satisfaction survey results are reported to WorkCover in the annual report from the provider.

Satisfaction survey participation rates by WorkCover employees over the last five years are as follows:

Period	1/4/2008 – 31/3/2009	1/4/2009 – 31/3/2010	1/4/2010 – 31/3/2011	1/4/2011 – 31/3/2012	1/4/2012 – 31/3/2013
EAP utilisation rate (% of headcount)	13.25%	13.72%	12.94%	10.69%	12.56%
Total number of new EAP clients	152	166	158	137	153
Number of surveys received	20	17	19	28	38
Response rate from new clients	13.16%	10.24%	12.03%	20.44%	24.84%

Respondents are asked seven customer satisfaction questions relating to the service received. Specifically:

- Efficient and courteous service provided by office staff
- Timely and convenient access to the service
- The overall organisation of the service
- The Counsellor's understanding of your problem
- The professionalism, interest, respect and courtesy of counsellor
- Level of satisfaction with the degree to which the counselling helped you deal with your problem
- If you had the need in the future, would you use the EAP service again?

Davidson Trahaire Corpsych reported that on average in all five reports, the majority of respondents were either satisfied to very satisfied with the level of service provided. It attributes the increase in satisfaction survey response rates to the collection of email addresses for clients at the initiation of contact with the service. This enables clients to respond more efficiently.

Davidson Trahaire Corpsych has a dedicated customer feedback telephone number where workers can provide feedback directly to the provider. Any client feedback regarding EAP services provided directly to Employee, Safety and Wellbeing is forwarded to the service provider, who responds to the client directly. EAP satisfaction surveys are not conducted by People and Culture.

People and Culture (Manager, Employee Safety and Wellbeing) meets with the provider quarterly to review utilisation rates and discuss any issues or trends in presenting problems, as well as feedback relating to the service. Individual feedback is not provided.

Service providers are also afforded contract performance feedback at the quarterly meeting. This takes the form of a Performance Management Assessment against key performance indicators.

The Division's Employee Assistance Program provides staff and their immediate families with a free and confidential counselling and advice service for any personal or work related problems. The sorts of concerns that are suitable for Employee Assistance Program counselling include, but are not limited to, interpersonal conflicts both at home or at work, financial concerns, relationship and family issues, careers or work crossroads, problematic alcohol and/or drug use, grief and loss.

Davidson Trahaire Corpsych report on average over the last three years, 65 per cent of calls related to personal issues and 35 per cent to work-related issues (made up of on average of 12 per cent related to vocational issues, five per cent to work, health and safety issues and 17 per cent to interpersonal issues).

Safety, Return to Work and Support also provides its employees with a range of internal support aligned to the 'Wellness' component of the GROW framework. This includes the early intervention approach the Division has adopted in relation to the health and wellbeing of its staff, regardless of whether it is a work related or non-work related issue.

The approach involves supporting managers, individuals and impacted team members to address concerns from the first signs of there being any issue. Individual case management is a key component of the approach. The Division also increased the size of its Employee Safety and Wellbeing Team from a staff of three in 2011 to a staff of six in 2013, including the appointment of an Employee Relations and Wellness Consultant in January 2013. This role was established to encourage and enable early intervention in the workplace with working relationships, personal issues or bullying, as well as specific support to staff involved in investigations with Employee Relations.

The Division also operates other employee support services including a broad range of intranet resources, specific wellbeing focused development and learning opportunities, a dedicated People and Culture Service and Advice line, and externally contracted Critical Incident Support Program and Bullying Response Service.

The Critical Incident Support Program delivers immediate de-briefing interventions either on-site or by telephone to assist employees manage the effect of critical incident stress. This could include workplace violence or aggression towards employees, dealing with distressed clients, personal threats or abuse from clients, witnessing a traumatic incident, traumatic information affecting individuals or teams (including death of a loved one or work colleague) or investigating a serious workplace incident or fatality. This service was developed as an early intervention and risk management strategy to support employees with provisions for referral to Employee Assistance Program counselling if required.

The Bullying Response Service provides independent support and advice to employees and people leaders relating to issues of bullying in the workplace. It is to assist all employees who feel they are impacted, have witnessed or are managing a situation that may be considered bullying or harassment. The service is staffed by psychologists who help the individual decide whether it is an issue related to bullying assists to develop a plan to address the presenting concerns including what other resources or support might be available.

The Division also recognises the importance of promoting individual wellbeing through the following programs:

- Access to Fitness Passport - a health and fitness program that allows members to access a wide range of local health and fitness suppliers;
- Participation in the Global Corporate Challenge - a workplace health and wellbeing program aimed at changing the behaviour and improving the health of employees;
- Provision of onsite flu vaccinations;
- Early Detection Initiative to encourage staff participate in preventative health screening related to chronic illness and disease.
- Smoking cessation program;
- Mental health awareness (various seminars – maintaining good mental health in high performing cultures, training etc); and
- Support of initiatives such as R U OK? DAY, Mental Health Month, Breast Cancer Awareness, No Leave No Life Campaign, Movember and the Get Healthy Program.

The Division, through its health and safety consultation framework and Health and Safety Committee, formed a sub-committee focused on psychological wellbeing in June 2013. The sub-committee has developed and proposed a Psychological Wellbeing Action Plan which includes innovations such as a Wellbeing First Aid Officer and frameworks for due diligence obligations through officers and boards. The Action Plan is currently at consultation through Health and Safety Representatives and other consultation arrangements.

The number of mental stress claims across WorkCover has dropped from 21 claims in 2010/11 to 10 claims in 2011/12 to four claims in 2012/13. This is a reduction of 81 per cent in a two year period¹.

Question 3:

The Hon. CATHERINE CUSACK: I want to inquire as to how PricewaterhouseCoopers came to be engaged to conduct that review that was released in March 2011.

Ms NEWMAN: I cannot answer that question. I was in a role in WorkCover at the time but I was not the chief executive officer. So I have no idea.

The Hon. CATHERINE CUSACK: Does anybody know the answer to that question?

Mr WATSON: No, I certainly have no knowledge of how that process was undertaken.

The Hon. CATHERINE CUSACK: Can I ask that that be taken on notice?

Mr BARNIER: Sure.

Answer:

WorkCover understands that PricewaterhouseCoopers (PwC) was engaged independently by the Department of Premier and Cabinet in September 2010. This is properly a question for the Department of Premier and Cabinet.

Question 4:

The Hon. CATHERINE CUSACK: The Committee has received evidence that two protected disclosures were made to the Ombudsman concerning bullying of the chair of the occupational health and safety committee, that those disclosures were made on 6 October 2010 and 6 February 2011, and that these were accepted and responded to by WorkCover. Are you familiar with those?

Mr BARNIER: No, I am sorry, I was not in the organisation so I have no awareness of those. Protected interest disclosures or public interest disclosures are normally quite secret.

¹ As categorised by Allianz Australia Workers Compensation (NSW) Limited for the Treasury Managed Fund.

The Hon. CATHERINE CUSACK: You were not in the organisation on 6 February 2011?

Mr BARNIER: Yes, I was contracting to the organisation at that time but I am not aware—can you repeat what the matter was again?

The Hon. CATHERINE CUSACK: It concerned bullying of the chair of the occupational health and safety committee within WorkCover. The initial complaint was made on 6 October 2010. Then the complainant was concerned that nothing had been done so a follow-up complaint was made on 6 February 2011. The evidence we have is that it was accepted by WorkCover and that it was responded to by WorkCover.

Mr BARNIER: The concern raises a bell. I certainly have some awareness of that. In relation to the treatment of the protected interest disclosure, I am not across that.

The Hon. CATHERINE CUSACK: The reason I am inquiring is because WorkCover's annual report states that no protected interest disclosures were made during that period. I am just wondering if that register of protected interest disclosures is complete.

Ms NEWMAN: Can we take that on notice?

Answer:

The Annual Report for 2010/11 does not state the number of protected disclosures made during the reporting year. At that time, there was no requirement for annual reports to include this information.

On 3 March 2011, the name of the *Protected Disclosures Act 1994* was changed to the *Public Interest Disclosures Act 1994*. From 1 January 2012, agencies were required to include in Annual Reports information concerning public interest disclosures.

A fact sheet prepared by the New South Wales Ombudsman in 2011 entitled 'changes to the public interest disclosures system – information for public authorities', is provided at Attachment B. Reference to reporting requirements is at page 2.

Question 5:

The Hon. CATHERINE CUSACK: So my question is, and I suppose also taking on board the comments of Mr David Shoebridge in relation to the legislation, why does the board not appear in the organisational modelling that shows how the organisation reports to the Minister? Why is the board not—

Ms NEWMAN: I am not sure what model you are referring to.

The Hon. CATHERINE CUSACK: All the modelling in your annual reports.

Mr DAVID SHOEBRIDGE: The answers you gave earlier where you acknowledged they were not in your model because they were advisory, I think that was the substance of the question. How do you explain that?

Ms NEWMAN: I have always had them in the organisational structure. I am not quite sure. I would need to take that question on notice and come back with the diagram when I have had time to look at it.

Answer:

The WorkCover Board was still in place at the 2012 financial year end. Its functions and Board Member's details are included in the **2011/12** WorkCover Annual Report. The Board is not included in the diagram on page 7 of this report.

The *Safety, Return to Work and Support Board Act 2012* was assented to on 27 June 2012 but was not proclaimed until 1 August 2012. This Act established the Safety, Return to Work and Support Board and abolished the boards of the relevant agencies, including the WorkCover Board.

The **2012/13** WorkCover Annual Report was made available publically on 30 October 2013 and includes a diagram on page 8 that shows the governance arrangements of the Division. A copy of the diagram is provided at Attachment C. The functions of the Safety, Return to Work and Support Board are also described in the report and provided below.

The Safety, Return to Work and Support Board oversees the functions of the WorkCover Authority, the Motor Accidents Authority and the Lifetime Care and Support Authority. The Board comprises seven members, including the Chief Executive Officer. The three key functions of the Board are to:

- determine the general policies and strategic direction of each relevant authority;
- oversee the management and performance of each relevant authority; and
- advise the Minister and the Chief Executive Officer on any matter relating to the relevant authorities or arising under any relevant legislation, either at the request of the Minister or the Chief Executive Officer or on its own initiative.

In exercising its functions in relation to each of the Authorities it oversees, the Board is to ensure, as far as practicable, that the activities of the relevant authority are carried out properly and efficiently.

The Board determines investment policies for each of the funds administered by the authorities, which include the Workers Compensation Insurance Fund.

The Board can establish committees to assist it in connection with the exercise of its functions. The Minister can appoint Advisory Committees on an ad-hoc basis. The functions of an advisory committee may include investigating and reporting to the Minister on specific matters arising under or in connection with the compensation and other related legislation or any other Act under which a relevant authority exercises functions.

Question 6:

The Hon. MATTHEW MASON-COX: How many people used that bullying response service last financial year?

Mr BARNIER: I do not believe I have the numbers.

The Hon. MATTHEW MASON-COX: Please take it on notice.

Mr BARNIER: I understand it was very low usage.

The Hon. MATTHEW MASON-COX: How long has it been in place?

Mr BARNIER: At least two or three years.

The Hon. MATTHEW MASON-COX: Will you provide the number of people who have used that service for each of the years it has been in place?

Mr BARNIER: Yes.

Answer:

The Bullying Response Service (BRS) was established in 2009 as a result of recommendations from the Bullying and Harassment Joint Working Party (WorkCover/Public Service Association). Utilisation rates are provided on the following page.

Start Date	End Date	Totals
1/01/2009	30/06/2009	14
1/07/2009	31/06/2010	21
1/07/2010	30/12/2010	8
1/01/2011	30/06/2011	3
30/06/2011	21/12/2011	3
9/01/2012	30/07/2012	2
1/08/2012	31/12/2012	2
1/01/2013	30/06/2013	Nil
30/6/2013	20/11/2013	Nil

* dates reported are those provided in utilisation reports from the provider. Service was continuous during this time.

The statistical information above indicates a decline in the utilisation of the service since in 2010. The first iteration of the service provided for a confidential reporting, service and advice line. In consultation with the Public Service Association through the Bullying and Harassment Joint Working Party the parameters of service were discussed in late 2009 in conjunction with the tendering of a new provider. These discussions concluded that the service would be re-launched as a support and advice line only and reporting to the employer was essential to enable matters to be addressed by the employer.

On expiration of the contract, the Bullying Response Service again went to New South Wales Government tender in 2013 and was awarded to Converge International, who commenced contract provision 1 August 2013. The Bullying Response Service continues to provide independent support and advice to employees and managers relating to issues of bullying in the workplace. The service assists all employees who feel they are impacted, have witnessed or are managing a situation that may be considered bullying or harassment.

Callers discuss their concerns with a psychologist. Under the new contract, all callers are advised that the call is confidential, except where the psychologist believes there to be a risk to the individual's or another's health and safety. The Division has a duty of care to all employees under the work health and safety legislation.

The psychologist will help the caller work through whether the issue is considered bullying. They assist the caller to develop a plan to address the presenting concerns and what other resources or support might be available within the Division. If the caller considers the situation to be a health and safety risk to themselves or others, it is appropriate for the caller to notify this through the Online Service Centre (OSC) Hazard Reporting form. The Division takes a risk management approach to the resolution of concerns related to bullying where misconduct is not identified as a causative factor.

The Bullying Response Service is not a service to report workplace bullying.

In response to the decline in utilisation and employee concerns relating to confidentiality, the confidentiality arrangements for the Bullying Response Service were revised as part of the new contract. Employee conversations with the service provider are now confidential, except if the issues present an immediate risk to the health and safety of the caller or others in the workplace. The provider will notify the Manager, Employee Safety and Wellbeing, to ensure the safety and wellbeing of those involved and work to resolve the matter. Any subsequent referral to the Employee Assistance Program is confidential.

Quarterly and annual reports of statistical information are provided to the Division. The Bullying Response Service reporting is used to identify key issues, areas of concern, inform action plans and preventative strategies.

Question 7:

Mr DAVID SHOEBRIDGE: Mr Watson, you said you had some advice from the Ombudsman about how to deal with these internal complaints, is that right?

Mr WATSON: Yes, that is right. We had a discussion with him.

Mr DAVID SHOEBRIDGE: Could you provide that to the Committee?

Mr WATSON: We do not have written advice on that, I do not believe.

Mr BARNIER: I met with the Deputy Ombudsman early this year or late last year. The Deputy Ombudsman certainly had a view that as a regulator and an employer you should be trying to resolve the issues first as the employer and then if someone was dissatisfied with how the employer is dealing with their obligations under the Act then it could be referred to the regulator arm to do that.

Mr DAVID SHOEBRIDGE: But you are the regulator and the employer?

Mr BARNIER: Yes, so the view was if there was believed to be a serious concern—let us say the allegation was against one of the executives responsible for that area, there were a couple of other avenues to move to within the framework which could be either going to the Ombudsman's Office themselves or the Public Service Commissioner so there are a couple of other options.

Mr DAVID SHOEBRIDGE: Could you clarify the advice you got in an answer on notice?

Mr BARNIER: Certainly.

Answer:

The Chief Human Resources Officer, Manager, Employee Safety and Wellbeing (ESW), and the General Manager Work Health Safety Division met in early 2013 to consider the process and appropriateness of the application of the Work Health Safety Act 2011 in the resolution of internal work, health and safety disputes. Specifically, the role of WorkCover as the New South Wales regulator and the responsibilities and obligations under the Act placed on Safety Return to Work and Support as the employer.

Part 5 - Division 5, Issue Resolution, and Division 6, Dealing with Disputes, of the Act makes reference to requests for assistance from the regulator. It was proposed that although WorkCover as the regulator could adequately and appropriately respond without exposure to a conflict of interest, it was agreed to seek the advice and guidance of the NSW Ombudsman.

The Chief Human Resources Officer and Manager, Employee Safety and Wellbeing, met with the Deputy Ombudsmans and Manager, Projects and Major Investigations, on 4 February 2013. The purpose was to seek the Ombudsman's view as to whether there was a conflict of interest as the regulator assisting in dispute resolution for Safety, Return to Work and Support as the employer.

WorkCover understood that the Deputy Ombudsman's view was that Safety, Return to Work and Support as an employer, has a legal obligation and right to manage its staff and deal with bullying complaints under its obligation first as an employer, and secondly in its role as a regulator. As the employer of WorkCover employees and a Person Conducting a Business or Undertaking, Safety, Return to Work and Support Division is responsible for investigating work health safety concerns of its employees in line with the legislation. As long as there was delineation between the employee and the inspector, this was appropriate.

As an example, the Deputy Ombudsman referred to the view of that Office that police should have primary responsibility to investigate itself, subject to appropriate oversight to ensure that such investigations are done properly. He noted that the Police Royal Commission and the Police Integrity Commission took the same view. In his opinion, WorkCover's Work Health Safety Division has primary responsibility for investigating such allegations against its own staff. However, it needs to have in place systems to ensure people conducting such investigations are not subject to direction, not friends with the subjects of investigation, not from the same workplace.

There was a strong view that only a work health and safety regulator can investigate and take appropriate action with regards to health and safety matters. Where a specific matter may give rise to a concern of conflict of interest, for example an allegation against the agency head, then the matter could be referred to the Public Service Commissioner who may choose to involve another health and safety jurisdiction, ICAC or the Ombudsman.

WorkCover sought confirmation from the Deputy Ombudsman of his position prior to the submission of this response.

Question 8:

Mr DAVID SHOEBRIDGE: Ms Newman, you said that there had been two reports to the board about the Butler case, is that right?

Ms NEWMAN: As I recall, yes.

Mr DAVID SHOEBRIDGE: And then there was no doubt a response from the board after each report?

Ms NEWMAN: The response from the board after the report was: what were we doing about the findings in the Butler case of which we continued to report, not specifically around the Butler case but what we were doing with regard to the whole investigation process, how we support people or individuals while they are going through an investigation, any form of grievance; we reported all that to the board.

Mr DAVID SHOEBRIDGE: Could you provide to this Committee those reports you made to the board and the responses you got from the board both in relation to the Butler case and others?

Ms NEWMAN: Yes.

Answer:

Two reports were provided to the Board regarding the Butler case. A written update was provided to the Board in November 2012 advising of the finalisation of an investigation into misconduct, leading to the decision to terminate the staff member (Attachment D). The Board was informed that the Public Sector Association intended to lodge an unfair dismissal claim in the NSW Industrial Relations Commission.

Following the decision handed down by the Industrial Relations Commission on 21 June 2013, the Chief Executive Officer of Safety, Return to Work and Support provided an oral report to the Board at its meeting of the 24 June 2013 about the Commission's findings in the Wayne Butler (Attachment E). The Board discussed the findings and the Chief Executive Officer informed the Board that she had instructed the Director, of Corporate Governance to commission an external review of the Division's investigation processes to determine if the procedures complied with the accepted processes of the New South Wales Public Service. The Division also sought external legal advice as to the decision.

In addition, a written report was provided to the Board in September 2012 on the actions taken by Safety, Return to Work and Support Division to address the recommendations within the PwC report (Attachment F). The report included progress on actions against each of the six recommendations and the development of the GROW cultural framework program.

Regular reporting has since been provided to the Safety, Return to Work and Support Board on the actions taken by the Division to address the recommendations within the PwC report through the quarterly GROW cultural framework report (Attachment G). The report provides detail of the actions and initiatives commenced or planned during the reporting period regarding the key elements of the program, which include capability and leadership, achievement, safety and wellbeing and customer experience.

Other regular reports include the quarterly employee safety and wellbeing reports, which detail the number of workers compensation claims relating to workplace bullying and harassment as well as hazard and injury notifications. They also provide updates on policy development and provide an overview of the activities of the Health and Safety Committees during the relevant period (Attachment H).

Separately, the Public Service Commission issued a direction on 12 March 2013 to the Director Generals and Heads of Public Sector Agencies, pursuant to section 3J of the *Public Sector Employment and Management Act 2002*, for a response on what organisation specific approaches have been taken, or are being taken, to better understand the extent of, and respond to, workplace bullying. An initial response was provided to the Public Service Commission on 1 May 2013 and a second report provided on 29 July 2013. The initial response to the Commission was provided to the Board in May 2013 and the second report in August 2013 (Attachment I).

The Board was informed of the Parliamentary Inquiry by the Chief Executive Officer on 28 June 2013. The terms of reference were provided as part of a written report at the 29 July 2013 Board meeting. Since then, the Board has been provided with a written update and discussed the Parliamentary Inquiry at every subsequent meeting (Attachment J).

Question 9:

The Hon. ADAM SEARLE: Why did you embark on a disciplinary path, Ms Newman?

Ms NEWMAN: I embarked on that path because there were a number of other issues.

The Hon. MELINDA PAVEY: Are they issues that we are not privy to?

The Hon. CATHERINE CUSACK: What other issues?

Ms NEWMAN: Yes.

Mr DAVID SHOEBRIDGE: It was for an ulterior purpose?

The Hon. CATHERINE CUSACK: Let us just hear what the other issues were.

Ms NEWMAN: I cannot answer that question because there are other regulations that I need to consider. I will be happy to take it on notice.

The Hon. CATHERINE CUSACK: Which regulations?

CHAIR: We do not want allegations made against Mr Butler.

Mr DAVID SHOEBRIDGE: The long and the short of it is you are saying you engaged in this disciplinary process for an ulterior purpose?

The Hon. MATTHEW MASON-COX: No, she is not saying that.

Mr DAVID SHOEBRIDGE: There were other issues that motivated the process.

The Hon. MATTHEW MASON-COX: The witness has said there are sensitive issues and she will take it on notice and that should be acknowledged.

CHAIR: Is that the fact, it is on notice, Mr Searle?

The Hon. ADAM SEARLE: If that is how the witness chooses to answer. Can I clarify? These matters are not on the public record presently?

Ms NEWMAN: Yes.

The Hon. CATHERINE CUSACK: And not put to the Industrial Relations Commission?

CHAIR: You want the witness to take it on notice?

The Hon. CATHERINE CUSACK: Can you indicate that was a no?

Ms NEWMAN: No.

CHAIR: Can you take it on notice and indicate whether it should be kept in confidence in your answer?

Ms NEWMAN: Yes.

The Hon. ADAM SEARLE: My question is simple and I am happy for the witness to take it on notice. The question is this: There was a disciplinary process involving Mr Butler as a result of which the organisation terminated his employment. The issues were then ventilated in the Industrial Relations Commission. When you were making the decision about whether or not to go down the path of a disciplinary investigation were you motivated solely by those disciplinary matters or were these other non-disclosed matters you are now adverting to part of the motivating reason?

Ms NEWMAN: I would like to take that on notice and seek legal advice.

The Hon. MATTHEW MASON-COX: Saved by the bell.

The Hon. ADAM SEARLE: I will put them on notice.

[Answer kept confidential at WorkCover's request]

Question 10:

The Hon. CATHERINE CUSACK: Have there been complaints about apparently overzealous accessing of people's emails?

Mr BARNIER: I am not aware of any; I cannot recall any. I will take that question on notice.

The Hon. CATHERINE CUSACK: I would appreciate that. Can you provide a formal copy of the guidelines governing accessing email?

Mr BARNIER: Yes.

Answer:

Since August 2011, Safety, Return to Work and Support has received one complaint in relation to the accessing of employee emails and the perceived lack of policy in relation to information technology security.

The current policy governing email access, *Information Security Policy*, is provided for the Committee's information at Attachment K. The policy was put in place in 2006 and last reviewed and updated in July 2013. The policy takes a risk management approach to addressing information-related risks. On page 18 of the policy, under the heading "*Exchange of Information*", the following statement is included:

"Safety, Return to Work and Support Division has the right to access personal e-mail and other personal data stored on Safety, Return to Work and Support Division computer networks."

Section 6.18.1 of the Division's delegations manual requires information technology access to an employee's email and hard drive files by another employee to be approved by the Manager, Employment Relations. Approval is only granted where access is related to an investigation under chapter 9 of the Personnel Handbook, or during the long-term unplanned absence of an employee where access is required to email for business continuity purposes².

The Division's Information Technology Policy, *Acceptable Usage of Electronic Communication Devices and Services*, requires employees to read and accept a number of statements when logging on to their computers. These include the statement, "*Safety, Return to Work and Support Division monitors the use of communication devices and services*". Employees are required to click 'OK' indicating they have read and understood the acceptable usage policy. Prior to 2012, the statement appeared on a monthly basis. It now appears on a daily basis. A screen dump of the log in field is provided at Attachment L.

² Link to the Public Service Commission's Personnel Handbook -
www.psc.nsw.gov.au/Policies/Personnel-Handbook/Personnel-Handbook

'Privileged Users' are generally employees who work within information technology positions. The nature of their role responsibilities necessarily requires them to be assigned a level of computer system access which exceeds that of other users. For example, a 'Privileged User' has a level of access which allows them to respond to a properly authorised request to grant one person access to another person's email.

Over the past year, Safety, Return to Work and Support Division has undertaken a number of steps to reduce the possibility of allegations of abuse of authorised access being raised against employees who have 'Privileged User' access levels, as well as providing a level of assurance that the appropriateness of these individual's user activities are monitored and reviewed. This has included:

- reducing the number of employees with 'Privileged User' access following an internal review; and,
- engaging an external service provider to independently monitor and report on the activities of 'Privileged Users'.

WorkCover Supplementary Questions

(received 14/11/13; due to Committee 5/12/13)

From Mr David Shoebridge MLC

1. Please provide a copy of the Internal Audit Bureau report reviewing WorkCover's investigation process in relation to Wayne Butler and other cases.

Answer:

The Industrial Relations Commission handed down its decision in Butler on Friday 21 June 2013. The Chief Executive Officer approved an external review of the investigation process the same day, and informed the Board of the decision at the Board meeting held on Monday 24 June 2013. The Internal Audit Bureau (IAB) was appointed on 26 June 2013.

The Internal Audit Bureau of New South Wales is a statutory body with its own Act of Parliament, the *Internal Audit Bureau Act 1992*. Its statutory mandate is to provide audit, management review and consulting services to public authorities. The Bureau receives no Government funding and operates on a fully commercial basis. It provides services to over 100 public sector clients at State, Local and Commonwealth Government level. The Bureau provides three types of services - internal audit, organisational improvement consultancies and investigations. In the area of investigations, it assists agencies to respond to referrals from the Independent Commission Against Corruption, the Anti-Discrimination Board and the Australian Human Rights Commission.

Initial advice was received from IAB on 14 August 2013 and the reviewer provided training to People and Culture staff based on the interim advice matters. The draft report was received on 31 October 2013 and the final report provided on 3 December 2013. A copy of the report is provided at Attachment M.

From the Hon Adam Searle MLC

2. As a regulator, do you see a need for NSW laws to complement new Fair Work anti-bullying legislation, for workers not covered by those federal laws?

Answer:

This is a matter for Government policy and ultimately for the Parliament.

3. **In its submission to this Inquiry, the PSA makes a number of (negative) observations about WorkCover's response to union efforts to exercise right of entry laws and in response to a GIPAA application. What is WorkCover's response to these serious matters?**

Answer:

In regard to the application the Association lodged under the *Government Information (Public Access) Act 2009* (GIPA Act), WorkCover wrote to the Association on 3 September 2013 noting the size and scope of the request and acknowledging that WHS Permit Holders from the Association had already requested similar documents under Notices of Entry served on WorkCover. It was suggested that the GIPA application be placed on hold until the Notice of Entry matter was finalised, and that the Association would then be able to review the size and the scope of its application. As WorkCover did not receive any response to its suggested course of action, it wrote to the Association again on 1 November 2013 seeking direction.

The Association responded to WorkCover on 4 November 2013 raising concerns about the Right to Information Officer being aware of the Notice of Entry documents served on WorkCover by WHS Permit Holders from the Association. WorkCover has advised the Association that the Right to Information Officer became aware of the corresponding activity when undertaking a search for the documents requested under the GIPA Act. WorkCover has apologised to the Association for the delay and is now processing the GIPA application.

Pursuant to notice of entry provisions in Part 7 of the *Work Health and Safety Act 2011* (WHS Act) WHS Permit holders from the PSA sought access to a wide range of documents including private, personal records of individual public sector employees (such as workers compensation claim forms for psychological and psychiatric injuries, copies of preliminary and formal disciplinary investigations undertaken over a period of 2 years and investigation reports of complaints made by individual employees.)

The Notice of Entry provisions in Part 7 of the WHS Act, contrary to the apparent understanding of the PSA officials, do not give an unfettered right to WHS permit holders to enter workplaces and access any document they wish to inspect. The documents sought to be inspected must be directly relevant to a suspected contravention under the WHS Act. It was that misconception that presented some difficulty and took some time to resolve.

Given that the PSA sought to inspect private, personal records of individual public sector employees, WorkCover had a statutory obligation to satisfy itself that the Notice was valid under the WHS Act and that the documents sought were in fact directly relevant to a suspected contravention. Furthermore, the suspected contravention had to be sufficiently particularised as the Notice of Entry provisions are not intended to be used to permit a broad ranging general Inquiry.

The documents sought were voluminous - a two page list was annexed to the Notice - WorkCover required time to collate and properly consider whether the documents fell within the scope of the Notice(s).

WorkCover has responded to the various Notices of Entry issued by PSA officials in accordance with its legal obligations and with the advice and assistance of its legal advisers in this matter, the Crown Solicitor. The WHS Act does not preclude a Person Conducting a Business or Undertaking from seeking or acting on legal advice. WorkCover has acted as any responsible Person Conducting a Business or Undertaking of a large and complex Government agency would, by obtaining legal assistance to ensure that it only responded to Notices issued by the Association to the extent that they were lawful in scope and content and that its responses were strictly in accordance with the relevant statutory provisions.

Such an approach accords with WorkCover's experience as a regulator exercising statutory powers of entry. It is not infrequent for a person served with a statutory notice to be legally represented, or for the form, time and method of compliance with a Notice to be the subject of negotiation between the legal representative of the person served with the Notice and the regulator.

In this context, and as a matter of law, WorkCover takes into account that it is incumbent on those with statutory powers, like the Notice of Entry powers, to exercise them properly and reasonably. This includes giving the person served with the notice enough time to gather and make available relevant material.

4. **We have received evidence highly suggestive that the focus of the regulator has moved from enforcement towards advice and a pro-employer bias - said to be evidenced by a significant decline in prosecutions:**
 - a. **Does WorkCover see value in providing for statutory independence for inspectors in their role enforcing work health and safety laws, to ensure integrity in application of the law?**

- b. What have been the number of prosecutions for breach of safety laws initiated by WorkCover (under each of the 2000 Act, the 2011 Act and the 2012 Act) by calendar year for each of the last ten financial years? What have been the number for year to date?**

Answer:

The most significant shift in regulatory approach has been driven by national harmonisation. The New South Wales *Work Health and Safety Act 2011*, *Work Health and Safety Regulation 2011* and supporting codes of practice are part of a nationally harmonised scheme for work health and safety legislation which includes the National Compliance and Enforcement Policy. WorkCover has adopted the National Compliance and Enforcement Policy. The New South Wales Prosecution Guidelines have been revised in line with the *Work Health and Safety Act 2011*.

- a) The current WorkCover framework provides inspectors with the skills and discretion to utilise the full range of tools provided in the Work Health and Safety Act including prosecution. Giving statutory independence to inspectors would be a matter for Government policy and ultimately for the Parliament. It would involve New South Wales moving out of the harmonised national work health and safety approach unless other jurisdictions agreed to the same direction.
- b) Over the past five years, New South Wales has experienced a decline in the incident rate of major workplace injuries of 12.6 per cent and decline in the fatality incidence rate of 26 per cent. Over the past 10 financial years, WorkCover has initiated prosecutions as reported on the following page.

Occupational Health and Safety Act 2000 and Work Health and Safety Act 2011 - Prosecutions Commenced Financial Year 2003 to 27 November 2013

Financial Year	Total WH category charges commenced ^	OHS Act 1983 Charges	OHS Act 2000 Charges	OHS Act 2000 (as amended 2011) Charges	WHS Act 2011 Charges	Other Regulations and Acts^^
2002-2003	323	236	62	n/a	n/a	25
2003-2004	449	45	376	n/a	n/a	28
2004-2005	559	13	398	n/a	n/a	148
2005-2006	535	n/a	508	n/a	n/a	27
Note: Data prior to 2007 was migrated from a previous database and data captured and reported may not be accurate or verifiable due to the age of the files.						
2006-2007	290	8	273	n/a	n/a	9
2007-2008	145	n/a	133	n/a	n/a	12
2008-2009	209	n/a	197	n/a	n/a	12
2009-2010	102	n/a	94	n/a	n/a	8
2010-2011	145	n/a	145	n/a	n/a	n/a
2011-2012	151	n/a	134	3	n/a	14
2012-2013	130	n/a	91	35	2	2
2013 to date	51	n/a	n/a	13	36	2

NOTE: Data prior to 2007 was migrated from a previous database and data captured and reported may not be accurate or verifiable due to the age of the files.

^ Charges commenced may include charges that were subsequently withdrawn or dismissed. Annual report data prior to FYE 2007 doesn't report total charges, the total number of WH category matters are drawn from our database.

^^ Other Regulations and Acts include: *Crimes Act 1900; Dangerous Goods Act 1975; Occupational Health and Safety Regulation 2011* and others.