Submission No 20

INQUIRY INTO ALLEGATIONS OF BULLYING IN WORKCOVER NSW

Organisation: Public Service Association

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Public Service Association of NSW

Submission

to

Parliamentary Inquiry

General Purpose Standing Committee No. 1

on

Allegations of Bullying in WorkCover NSW

September 2013

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Executive Summary of Recommendations

1. That SRWSD be afforded a period of stability in order that resources can be focussed on improving the internal workplace environment. Any further proposed structural changes should be re-considered in this light.

2. Employee surveys be conducted annually using a stable survey tool which allows for comparative analysis of results over time.

3. An action plan be developed and reviewed each year to address the top 10 issues identified in the employee survey.

4. Employees in the People and Culture Unit be provided with training in how to deal with employee related matters in a constructive and supportive way.

5. SRWSD to review all policies and procedures to remove unnecessary inflexibility and restrictiveness and/or punitive approaches.

6. The government's disciplinary guidelines should be reviewed and amended to remove the current barriers to procedural fairness.

7. SRWSD should review the working arrangements of staff in the ISB to ensure that all staff are receiving proper payment and conditions for work performed.

8. SRWSD should review the electronic time sheet to allow staff who perform duties outside of the bandwidth to properly record the hours they work.

9. That the staff in the People and Culture Unit receive training to respond to matters more positively and constructively, in a manner which relies less on formal and punitive procedures.

10. That SRWSD and Crown Solicitors Office create a constructive and co-operative approach to resolving safety issues which complies with the legislative requirements.

11. That officers within the PCBU, SRWSD, receive training in relation to responsibilities to comply with the WHS legislation and the penalties for non-compliance.

12. That members of the Board for SRWSD agencies receive training in relation to responsibilities to comply with the WHS legislation and the penalties for non-compliance.

13. SRWSD should implement a regular risk identification process for all safety issues but particularly for bullying risk factors.

14. That all of the recommendations made in the PwC report be reviewed and implemented together with any recommendations arising from this current inquiry. A plan to be developed and shared which addresses each of the recommendations. This should include appropriate consultation with employees and the Association.

15. That WorkCover develop a pro-active approach to dealing with complaints of bullying and develop simple and concise materials to assist PCBUs in dealing with these matters internally.

16. That WorkCover develop a responsible approach to compliance in this area and provide support to the inspectors handling bullying complaints. This may involve extending the time frames for resolving these usually complex cases.

17. Arrangements be developed for an independent entity to deal with safety and workers' compensation complaints made against WorkCover and SRWSD as a PCBU which would normally be made to WorkCover as the safety regulator.

18. That managers in WorkCover's Work Health Safety Division be required to document all their actions and interactions relating to formal safety complaints, in the same manner as required of inspectors.

19. That the organisational goals for improving the experience of SRWSD external customers, should be mirrored with statements about how SRWSD relates to its internal customers. These statements should reference the corporate values.

20. That the corporate values could be further reinforced in the Performance Development System and also in the Key Performance Indicators of all staff including managers. The Key Performance Indicators should include indicators for Work Health and safety including indicators of psychological health and job satisfaction.

21. WHS Inspectors and health and safety representatives to make broad use of improvement notices to require hazard prevention and risk management of psychosocial risks.

22. Workers in WHS Regulators to be covered by a nationally harmonised psychosocial hazard memorandum of understanding (MOU) negotiated with the workers involved, their unions and the WHS Regulators, to deal with complaints of inappropriate and unreasonable behaviour within WHS

Regulators.

23. To facilitate the formation of the WHS Regulators psychosocial hazard MOU - all necessary legal changes to the legislation applying to the WHS Regulators to be identified and implemented.

24. WHS Regulators to establish well-resourced psychosocial hazard inspectorates where they do not already exist.

25. Insecure public sector work in the form of fixed term contracts and long term casual employment are themselves an inappropriate and unreasonable behaviour hazard. Insecurely engaged workers are much less likely to raise WHS complaints for fear of losing their position. Governments should review and severely limit insecure work to cover exceptional short term employment events only.

26. Public sector grievance resolution procedures should be based in natural justice principles, subject to external review, have as speedy as possible time frames for resolution, be externally investigated and funded by a centralised agency (WHS Regulator etc).

Introduction

The Public Service Association and Professional Officers Association Amalgamated Union of NSW (the Association) represents over 43,000 employees in NSW in diverse roles across government departments, state-owned corporations, schools, universities and TAFE. More particularly, we are the relevant trade union with industrial coverage of all employees of WorkCover NSW (WorkCover) and its umbrella organisation the Safety, Return to Work Support Division (SRWSD).

The Safety Return to Work Support Division is made up of Motor Accidents Authority, Workers' Compensation (Dust Diseases) Board, Lifetime Care and Support Authority and WorkCover Authority. The Association represents around 600 members in SRWSD, over 500 of which are employed by WorkCover. Our members are engaged in a variety of roles including case management of injured people, management of statutory funds, maintaining compensation insurance schemes, safety compliance, administration of licensing frameworks, research and various support functions.

The Association is pleased to have this opportunity to submit material for consideration of the General Standing Committee No.1 and we are eager to follow with direct face to face representations if requested.

The Association has been involved for many years in trying to improve the responses within WorkCover to complaints of workplace bullying and to address the underlying causes. For many years bullying has been one of the biggest causes of requests for help from the Association. This has only quite recently been surpassed by issues related to the never-ending restructuring processes being undertaken in all government agencies. However, even when members contact seeking help in obtaining an appropriate placement in their new agency structure, the matter is often still related to bullying issues. Members often feel that they have not been treated equitably in the placement processes due to ongoing issues of bullying.

Over time there has been a great deal of media exposure and parliamentary questioning in relation to WorkCover and its governing entities, much of which focussed on exposing issues of workplace bullying. The Association has had a pivotal role, as it has frequently it has been the actions of the Association in defending its members that has caught the public attention. In the same fashion, it was the outcomes of an unfair dismissal application made by the Association on behalf of one of its members, which most recently caught the attention of the media. The severity of the finding against SRWSD on this occasion was what stood out, as the independent decision put forward by the Industrial Relations Commission Deputy President confirmed the Association's previously held views that the processes applied were overly punitive. Exposure arising from this case ultimately led to the call for this Inquiry.

An overview of the issues

After many years of trying to specifically identify the underlying causes of bullying within WorkCover and SRWSD, we have identified that the systemic problem is one of a punitive culture. In general, matters are approached from a negative perspective rather than a helpful and positive perspective. A number of factors will be explored below which we believe le
d to this punitive culture but it is obvious that once this approach becomes entrenched in the human resources area, this punitive outlook then becomes encouraged throughout all managerial positions. That is not to say that there are no managers who approach things from a helpful perspective, but as they are in the minority they tend to simply manage things quietly and they go unnoticed.

There also seems to be a general culture of denial and cover up in WorkCover. This frequent denial of the obvious problem of bullying was also identified in the Association's submission to the earlier inquiry into bullying within WorkCover, which was undertaken by Pricewaterhouse Coopers (PwC) in 2010 (Attachment A) (pg 9).

The fact that WorkCover was also prepared to misrepresent the truth about bullying in WorkCover to the responsible Minister, was what ultimately led to the then-Minister calling for the inquiry. Then-Minister Michael Daley twice gave incorrect advice to parliament on the findings of a WorkCover Inspector's investigation into bullying within WorkCover's licensing unit.

The Inspector found that "a pattern" of bullying "has been occurring for a prolonged period of time". Despite this finding, WorkCover management provided a briefing to the then-Minister that allowed him to repeatedly inform parliament that no bullying had been found.

The ABC News on 21 September 2010 explained what happened next:

"But Mr Daley says when questioned in Parliament, he had not been advised of a bullying problem.

"You can see from the questions I have answered in Parliament that my advice from WorkCover is that there has been no bullying, in contravention of the published guidelines", he said.

"And now I'm not satisfied with that, and I've asked for an independent investigation."
[http://www.abc.net.au/news/stories/2010/09/21/3017442.htm?site=news]

As the Opposition spokesman for industrial relations, Greg Pearce, said at the time:

"If it (the finding) has been covered up, that is of even greater concern".

It is not only the then-Minister who lost confidence in WorkCover management.

How can WorkCover staff have any confidence in their executives when it has been clearly seen they are quite capable of deliberately misleading their own Minister about the finding of an important safety investigation into bullying?

There has never been an apology or explanation provided to WorkCover staff for this dishonest behaviour.

This misleading of the then-Minister followed formal correspondence to the PSA on the findings of the Inspector's investigation. The letter from the senior manager responsible for the investigation stated that the investigation concluded "with the findings revealing no evidence of bullying".

There has never been an apology or explanation provided to the PSA for this dishonesty.

Needless to say, if an ordinary member of WorkCover's staff showed this level of dishonesty they would face disciplinary action. Surveys of staff for many years have shown a profound lack of trust in executive management at WorkCover. A singular lack of accountability at this level helps explain why this is the case.

The report from the PwC inquiry (Attachment B) also touches on this problem of denial, identifying that a management representative on the Gosford OHS committee simply continued to make statements that there was no bullying in the Licensing Unit for which he was responsible. This stance was taken despite him being provided with a copy of the inspector's investigation report showing a finding to the contrary. He also continued with this stance of denial despite being confronted with statements from OHS committee members that they were still being approached with bullying complaints. Clearly it is not possible to address any problems if the manager responsible simply denies there is a problem at all.

Once challenged about an issue the frequent managerial response is to become aggressive and attack the messenger, with attack being preferred over constructive issues resolution. Over time numerous delegates of the Association have been threatened or had some action taken against them, believed to be in response to their actions to resolve industrial and safety issues, including bullying. Details of threats made regarding the Association's bullying survey and other specific punitive actions were also detailed in the Association's submission (Attachment A) and individual written and verbal submissions made to the PwC Inquiry.

Background

Since 2004 the Association has been seeking to engage WorkCover and then SRWSD (previously known as Compensation Authorities Staff Division) to deal with the cultural issues which have created an unpleasant and at times unhealthy working environment for a large number of employees. A brief timeline is provided below to outline the major achievements and stumbling blocks.

September 2004	Premiers Department launched the Dignity and Respect in the Workplace Charter as government policy
September 2005	WorkCover CEO finally agrees to sign the Dignity and Respect in the Workplace Charter
Mid-2007	PSA conducted a dedicated survey on bullying
December 2007	Bullying Working Group established with Terms of Reference (Attachment C)
2008	PSA repeated the 2007 bullying survey
2008	WorkCover produce industry guidance publication *Preventing and Dealing with Workplace Bullying*
01/01/09	Bullying Response Service commenced
July 2009	*Managing the Risk of Workplace Bullying* and Managing Reports of Workplace Bullying policies approved
July 2009	Formal investigation into bullying with the Licensing Solutions Unit (LSU) concluded finding a “pattern of unintended bullying”
July 2009	WorkCover writes to the Association to advise that the investigation had found “no evidence of bullying”
December 2009	Management representative of Gosford OHS committee erroneously stated that the investigation into LSU did not substantiate claims of bullying
2009	Workcover produce a revised industry guidance publication *Preventing and Responding to Bullying at Work*
Feb 2010	Minister for Finance reports to parliament that in 2008/09 there were **no** complaints of bullying received and that an investigation into the LSU “revealed no evidence of bullying
April 2010	Management representative of Gosford OHS committee stated that there is no bullying in LSU in response to further complaints being raised with committee members
April 2010	CEO directed all business units to complete the bullying checklist attached to the policy
June 2010	The Association's delegate is formally accused of bullying
Sept – Dec 2010	PwC Inquiry undertaken. Findings include:

	• 779 (59%) of WorkCover's 1312 staff responded to a survey on workplace culture • 310 (40%) of these respondents "reported they felt they had been bullied and / or harassed in the workplace" • 215 (69.4%) of those who reported being bullied and / or harassed said they were bullied by a manager / supervisor
2011	The Association's requests to re convene the Bullying Working Group were ignored
2011	WorkCover as the employer abandons consultations to establish an independent safety complaints investigation mechanism

At all stages of this process we have met with considerable resistance to progressing the issues. At times we have been encouraged by some managers in WorkCover being prepared to work towards cultural improvements. An example of this was the eventual agreement in 2007 to establish the Bullying Working Group. Constructive terms of reference were agreed and a considerable amount of good, collaborative work emanated from this group. The eventual result was the establishment of 2 new policies specifically related to bullying along with a detailed training package and training video.

Unfortunately our optimism always seems short lived when we would again meet with further resistance. It was not uncommon for managers to ignore the new policies and instead continue to deal with instances of bullying under the grievance or disciplinary procedures. These policies typically framed bullying as a purely individual issue as either requiring mediation or discipline. Management typically refused to recognise the preventative actions they could take. For example these could include clarifying role ambiguity, facilitating consultation, providing mentoring, monitoring and close supervision of those that need it. A more detailed illustration of the resistance to improvement is outlined below in the risk assessment section.

The Bullying Working Group still had much work to perform to refine and develop further initiatives however, when one senior manager left the organisation, WorkCover's commitment waned and the productive Bullying Working Group was never re-convened despite the Association's repeated requests for this to occur.

It is apparent that the underpinning culture of the organisation is itself a barrier to implementing any positive change. The positive visions of a small few are generally not embraced or prioritised by the bulk of managers throughout the organisation. Key performance indicators in this area have never been developed and therefore there is no consequence for managers who do not embrace positive cultural change. This problem is exacerbated by turnover of staff as certain initiatives simply fall away with the loss of a key manager or facilitator.

This was probably most obviously illustrated by the loss of the CEO in early 2012. This former CEO had indicated a commitment to cultural change and to implementing the recommendations of the PwC report. Notwithstanding the fact that the Association often did not agree with the manner in which she chose to do this, there were at least occasionally some statements regarding the need for cultural change and references back to the PwC recommendations.

The former CEO seemed to have in mind a 3-5 year plan of improvement to achieve the majority of objectives arising from that report. She made a useful start towards fixing the culture by development of a set of corporate values. The adoption of these values by the workforce was supported to a limited extent by its incorporation in the appraisal and development system. She left the organisation less than 12 months after the PwC recommendations were released and before most recommendations were actioned. A lengthy caretaker period ensued before the new, and current, CEO was finally appointed.

There was a significant hiatus in momentum during this period and now only 2 years later the Association is viewed with open suspicion, resistance and sometimes aggression, whenever we continue to mention the need to address outcomes from the PwC report. It has been clearly stated by senior managers that this was in the past and the Association needs to move on, as significant improvements have been made. Such an attitude ensures that the lessons which could have been learnt are lost forever. The suggestion that significant improvement has been made is not supported by employee surveys which continue to indicate an unhealthy working environment for a large number of employees.

Employee surveys

The survey conducted in conjunction with the PwC Inquiry found that 40% of staff had been bullied and/or harassed. It would be helpful in establishing the current prevalence of bullying if a survey, using the same instrument, were to be conducted annually. It has been a recurring problem in WorkCover that different survey instruments have been used. This means that trends over time cannot be established. This approach makes it harder for WorkCover to learn from its experiences and easier to cover up recurring problems.

Employee surveys have been helpful in identifying some of the systemic problems in the organisation. The various surveys have repeatedly indicated that employees do not have faith that the best person for the job is always appointed. The view that favouritism is routinely displayed continues to be held very broadly across the organisation. It is acknowledged that considerable effort has been put towards improving the integrity of recruitment processes however it must be conceded that even the best merit selection process is open to some level of interpretation or manipulation by the convenor

or recruitment panel. The Association made some recommendations regarding recruitment processes in our submission to the PwC Inquiry (Attachment A). The majority of these recommendations remain valid today if sometimes to a lesser degree.

Another repetitive theme arising from employee surveys is a lack of managerial or leadership skills in manager and senior manager positions. Poor managers exercise favouritism to surround themselves with followers rather than leaders. Many of these favoured managers/supervisors lack the skills or expertise to properly perform in the role. The resulting under-performance is then reported or resented by less senior staff. This creates the simultaneous need to cover up the under-performance of the managers and to silence those who hold them accountable. This is the perfect recipe for systemic bullying in an organisation.

Few senior managers in WorkCover have been in the position for a long time, but where that does occur it is possible to see the cultural effect throughout the entire area they supervise. Employee surveys identify the hotspot areas which need intervention however if the responsibility for addressing this is put back to the same senior manager, then failure is almost inevitable as there is no vested interest in change. Follow-up monitoring is essential. Research shows that whilst it is difficult to change a bully, they can be taught to curb their behaviours if given consistent incentives and dis-incentives.

Once the poor managerial stream becomes entrenched, systems to silence the vocal objectors emerge. Unfortunately our union delegates are often at the front line of the call for accountability. The Association has repeatedly had cause to defend our union delegates and other vocal “conscientious objectors” against what we would characterise as unfair disciplinary or performance management processes. These become the tools for bullying employees into submission and silence. Thus the punitive culture emerges which encourages nit-picking by managers and the unnecessary escalation of issues. The existence of this environment in WorkCover and more broadly in SRWSD, is supported by repeated employee surveys.

Recommendations: employee surveys be conducted annually using a stable survey tool which allows for comparative analysis of results.
An action plan be developed and reviewed each year to address the top 10 issues identified in the survey.

The punitive culture

In 2011 in our submission to the PwC inquiry (Attachment A), the Association outlined four cases in detail of how otherwise legitimate processes had been used to victimise and unfairly pursue our members and delegates. The most recent unfair dismissal case which gave rise to this inquiry, is another illustration of this punitive culture. This case will be explored in more detail

below as it unfortunately demonstrates that this unfair application of process continues.

This negative or punitive approach permeates the whole organisation as it is reinforced and perhaps even encouraged by the People and Culture Unit. It is frequently the case that the People and Culture Unit respond to individual issues which arise by reviewing and producing ever more restrictive practices and policies. This sends a clear message to managers and supervisors that it is the "letter of the law" which is most important rather than the "spirit of the law".

This organisational response dis-empowers good managers by discouraging them from exercising discretion and properly managing matters themselves. Instead they become concerned that they too will be disciplined if they allow flexibility and do not impose the strictest interpretation of all policies. This also empowers potential bullies as it creates another tool for favouritism. Managers who wish to do so can allow a more flexible approach to some but apply a more restrictive and punitive approach to others. They are confident that when the employee complains, they will be backed up by the People and Culture Unit for applying the strictest possible interpretation of policy.

Recommendations: employees in the People and Culture Unit be provided with training in how to deal with employee related matters in a constructive and supportive way.
Managers and supervisors be provided with training in how to exercise judgement in a constructive and supportive way.
Managers and supervisors be provided with training in how to deal with employee related matters in a constructive and supportive way.

Punitive policy

Here we explore a particular illustration of how policies can evolve to have harsh and unnecessarily punitive outcomes for employees.

Example one

It occasionally arises that a manager may have cause to speak to an employee regarding their attendance. Such an issue arose some time ago with an employee, the details now forgotten, but the end result was that the policy regarding notifying absences from work was amended.

The new People and Culture policy now explicitly states that it is not acceptable for an employee to notify SRWSD of his or her intended absence via email, the supervisor must be contacted directly by telephone. If the supervisor is unable to be contacted the employee must escalate this action up the supervisory chain of command until they are able to speak to someone directly to notify that they will not be in that day. The policy states that the employee will not be paid if this requirement is not adhered to.

The Association does not agree to this change of policy, considering it harsh, impractical and unnecessary. There are good and proper reasons why an employee should be able to notify an absence by email. For instance if the employee has been unable to sleep, they may realise in the early hours of the morning that they will not be fit to attend work the next day. It may also be apparent that they will finally be asleep at the time when the work day is commencing and thereby consider it prudent to send an email to their supervisor at 3am to let them know they will not be in attendance in the morning.

For practical reasons, and because of the high reliance on email these days as a method of communication, many employees notify their absences in this way. This is unremarkable and accepted practice in many areas in SRWSD. It is often only when a manager wishes to take issue with a particular employee that the policy is even consulted. This also sometimes arises because the supervisor has been challenged by their supervisor in turn, about why they have allowed a departure from policy.

Recently one of the Association's members realised on a Sunday that he would be unable to attend work on Monday due to his carer's responsibilities. He sent an email to his whole team indicating why he wouldn't be in, but undertaking to work from home to get a number of particular pieces of work completed. He heard nothing on the Monday and worked all day on the tasks indicated. When he returned to work he was told that he had not spoken directly with his supervisor regarding his absence from work and so he would not be paid. He suggested that he apply for a FACS leave day. This was declined and his salary was docked for the equivalent of one day's pay.

There was no disagreement that the employee had in fact completed the work required, there was no denial that he had FACS leave available to him, however his pay was docked because the policy required it. When this issue was later escalated by the Association as an industrial issue, the decision to dock the salary was reversed. The policy has not however been amended in recognition of the harsh and unnecessary outcomes it engenders. The policy is overly prescriptive and the source of continuing daily friction between supervisors and their staff.

Example Two

The SRWSD also recently made an amendment to its policy regarding secondary employment. The Public Sector Employment Management Act 2002 (PSEMA) at S59 provides that:

59 (1) A person employed in the Public Service *is not to undertake any other paid work without the permission of the* appropriate Department Head*.*

In a recent disciplinary matter described below, the SRWSD determined that

the employee had breached the agency's policy in relation to secondary employment, even though he had no other **paid** employment. The employee had been encouraged to apply formally for approval for the volunteer work he was undertaking. Clearly this was not a requirement under the PSEMA which relates only to paid employment.

As soon as the application was received he was investigated in relation to his volunteer activities. A private investigator was engaged to undertake covert surveillance on the employee in relation to his secondary employment. This became one of the allegations used to dismiss Mr Butler in the case examined in more detail below. Deputy President Harrison in his decision on this matter (Attachment C, pg 41) that there was no basis to the allegation and that "the policy in place did not require approval of secondary employment for unpaid, voluntary involvement in community organisations."

Although SRWSD denies that the policy was changed as a result of this particular disciplinary matter, subsequent to this matter arising, SWRSD amended the policy to include a requirement to seek approval for volunteer work, claiming that a volunteer being reimbursed for out of pocket expenses constitutes "paid work".

This has created a punitive policy which actively discourages all employees from engaging in volunteer community activities as they may at any time be investigated for some form of misconduct related to this. Now any employee involved in coaching at their local football club or the Parents and Citizens Association at their children's school is required to formally request permission from SRWSD to engage in this volunteer activity. As a result a large number of employees would now be in breach of the SRWSD Code of Conduct by not having permission for their volunteer activities. It must be noted that there was no campaign to build awareness of this new requirement.

This action in changing this policy defies all common sense. It is clearly outside of the intent of S59 of the PSEMA. It will not be applied to the vast majority of staff who will continue to engage in their volunteer activities, oblivious to the change in policy. It will be applied only when a circumstance arises where an employee is targeted for some other reason. This is a further example of how this organisation embeds bullying into its culture by demonstrating that the most restrictive approach possible will be supported, thereby creating another tool for bullying.

Recommendation: SRWSD should review all policies and procedures to remove unnecessary inflexibility and restrictiveness and/or punitive approaches.

<u>Guidelines for dealing with misconduct</u>

There are also some fundamental flaws in the government procedure for managing allegations of misconduct. Chapter 9 of the government Personnel Handbook outlines the procedures for managing conduct and performance

issues, including three appendices. The procedural guidelines for dealing with an allegation of misconduct are contained in Appendix 9.1 (which can be found at http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0019/10855/MCP.pdf).

As a result of assisting a number of our members through what we viewed as unfair procedures, the Association has identified two significant flaws or limitations inherent in these policies.

The first barrier to procedural fairness relates to the taking of remedial action. The PSEMA (s42) prescribes remedial action, which may be taken in relation to an officer to mean one or more of the following:

> *counselling – informal and formal training and development*
> *monitoring the officer's conduct or performance*
> *implementing a Performance Improvement Plan*
> *issuing of a warning to the officer that certain conduct is unacceptable or that the officer's performance is not satisfactory*
> *transferring the officer to another position in the Public Service that does not involve a reduction of salary or demotion to a lower position, and*
> *any other action of a similar nature.*
>
> *Other similar actions that may be considered include:*
> *mentoring*
> *staff rotation*
> *supervision*
> *referral to relevant policies*

A number of these options can be significantly punitive to an employee, in particular the option of transfer. The provisions do not however provide for an appeals mechanism in relation to a decision to take remedial action against an employee. A decision to take remedial action can take place at any point in the investigation process including at the initial point of receiving the allegations. Once a decision is made to take remedial action, the employee is denied any access to information related to the investigation which led to this action being taken against them. Although they may have an opportunity to directly address the allegations, they may never be provided with the evidence gathered against them and are therefore denied an opportunity to provide counter argument. This is inherently unfair.

The second major flaw relates to the procedures once a decision is taken to pursue the allegations as a disciplinary matter. An investigation is conducted and a report provided to the decision-maker. The decision-maker then makes a determination as to whether disciplinary action should be taken. This decision to take disciplinary action is made prior to the employee being provided with the investigation report or any details of the evidence gathered against them. As a consequence they are denied an opportunity to refute any of the evidence before a decision is made to take disciplinary action against

them. This is an inherent unfairness.

The disciplinary guidelines do allow an employee an opportunity to provide evidence as to why disciplinary action should not be taken. At this point they are usually provided with a copy of the investigation report. This is the first time they are fully informed of the case against them. It places employees at a significant disadvantage to have to persuade a decision-maker to change their mind regarding a decision already made, rather than having an opportunity to influence them to arrive at a different decision. Procedural fairness would require that this opportunity be provided **prior** to the decision-maker deciding that the employee's conduct required that disciplinary action would be taken.

Recommendation: The government's disciplinary guidelines should be reviewed and amended to remove the current barriers to procedural fairness.

Information Services Branch time sheet audit

When this submission refers to a negative or punitive approach, what is meant is that the focus on any activity remains on how to find fault rather than how to assist improvement. An illustration of this would be the audit undertaken in the Information Services Branch (ISB) of time sheet records. It is of course acknowledged that an employer has a right to ensure that workers are in fact completing the required hours of work and complying with policy, however when issues are identified, a constructive approach to resolving the issues would be preferred.

Two audits of time sheet records in ISB were conducted in early 2012. A document was generated listing people who appeared to be non-compliant with the policy relating to time sheets. This document was colour-coded and included recommendations for disciplinary action against some employees who had not submitted their time sheets appropriately.

The audit confirmed what had already been identified through other investigation processes; that there was a significant problem of non-compliance in the ISB unit which included a large number, approximately 40%, of employees. The Association's members had advised that a very informal approach was taken by the then Director of the unit in relation to time-keeping. His focus was on work outcomes not the administrative minutiae.

It emerged that a number of employees had not submitted time sheets for extensive periods of time, up to 2 years in one instance. The result was that staff were counselled for being negligent in their duties and were instructed to complete their time sheets for the entire missing period. All employees complied with the instruction and produced their time sheets. The records produced by all employees were accepted, except for one person.

The case of one member will be described in further detail below however he was inequitably and disproportionately subjected to a disciplinary process resulting in what was later determined an unfair dismissal. This action was taken even though he was not one of the employees recommended for disciplinary action in the document mentioned above.

What the response to this audit did not address, was the underlying cause of employees not completing time sheets. It had no constructive focus designed to improve conditions and compliance with policy in this unit, it had merely the punitive outcome. Whilst it is acknowledged that all but one employee was permitted to complete their time sheets retrospectively and without further action being taken against them, there were no solutions offered to assist them to comply into the future.

Employees in this area are often contacted at odd hours including in the evening or on the weekend to undertake urgent work to rectify the agency's computer system or to complete time critical work. Much of this work is able to be conducted from home, thereby not always requiring a return to the workplace.

What is also known is that:

- employees are not paid an on-call allowance to be available for such calls,
- employees are not paid overtime in accordance with award conditions for recall to duty when expected to complete urgent after hours work,
- most employees in the ISB work excessive hours and regularly forfeit accrued hours,
- employees have routinely managed their work situation by working the unusual hours required and then taking the corresponding amount of time off at a later date, (it should be noted that this approach results in no additional cost to the employer – contrary to the prescribed conditions of employment),
- employees are unable to accurately record the times they work on their time sheet record as the electronic form precludes entering times outside the allowable band-width of 7am to 7pm Mon-Fri.
- although the flexible working hours agreement allows for special arrangements to be made with one's supervisor, the electronic form does not allow entry of such non-standard arrangements.
- the electronic form provided is not sophisticated enough to deal with cases of purchased leave, creating errors in the flex record,
- the electronic form had a technical error, in that leave entered would be defaulted to flex time in error.

The outcomes of this process, undertaken by the People and Culture Unit addressed none of these cultural issues of the unit or the systemic problems with the administration of time-keeping. It was focussed only on the punitive

outcomes for not complying strictly with the flexible working hours agreement.

Employees in the ISB now have a dilemma:

- they have been counselled for not accurately recording the times they work even though they are unable to record the actual times they work on the tool provided by the employer,
- they have been counselled over not working sufficient hours between the bandwidth even though they have already worked sometimes well in excess of the 35hrs a week they are contracted for,
- they are regularly required to work overtime but overtime payment is not approved,
- if they refuse to undertake out of hours work there will be significant negative outcomes for the organisation.

The time sheet audit failed as a management tool as it addressed none of these underpinning issues. Employees in the ISB must now ensure that they work 35 hours during the normal bandwidth in order to avoid disciplinary action for defrauding the employer of time. If they are called to perform urgent after hours work or to work late to meet a critical deadline, they know that it will not count towards their required 35hrs a week, nor will they be paid overtime. If their professionalism demands that they not refuse the work they will undertake the work in the knowledge that no payment, nor remuneration of any kind will be forthcoming.

A positive approach to this matter would have been to:

- waive the requirement for employees to spend countless hours of public time trying to re-construct records which will be by necessity incorrect,
- put in place protocols for employees to be contacted out of hours with an appropriate overtime approval process and where appropriate on-call arrangements
- amend the time sheet record to allow recording of hours outside the bandwidth with appropriate notation of the approval obtained
- identify the number of hours being forfeited by employees and adjustments made to workloads accordingly
- monitor compliance on a routine basis.

In the absence of any effort by SRWSD to address the issues identified, the Association is now faced with angry members looking for a resolution. We will need to organise an industrial campaign to bring pressure to bear on SRWSD to correct these known problems it has chosen to ignore. The ultimate result will be either inconvenience (or worse) to the employer or additional cost to the employer by a requirement to adhere to the award conditions of employment.

Recommendations: SRWSD should review the working arrangements of staff in the ISB to ensure that all staff are receiving proper payment and conditions for work performed.
SRWSD should review the electronic time sheet to allow staff, who perform duties outside of the bandwidth to properly record the hours they work.

Butler vs Safety Return to Work Support Division – IRC 1177 of 2012

In 2012 SRWSD started a disciplinary investigation into one of our members, Wayne Butler. There were a number of allegations including two related to flex sheets: one for not submitting them on time and another alleging they were not accurate. From the outset the Association raised objections to the way the matter was being unnecessarily escalated to a misconduct investigation when all of the allegations would have been more appropriately handled, and if necessary easily corrected, as simple performance matters. The People and Culture Unit were responsible for making initial inquiries and recommendations on how to proceed. The person responsible in this unit was adamant that the matter was serious and must proceed as a disciplinary investigation.

The matter proceeded and despite Mr Butler providing quite sound explanations for each his actions he was ultimately dismissed by SRWSD. In the Association's view Mr Butler's termination defied understanding. As a result we assisted Mr Butler with an unfair dismissal application.

Deputy President Harrison of the Industrial Relations Commission ultimately determined that “the termination of Mr Butler's employment [was] harsh, unreasonable and unjust”. From the bench his Honour made comment, words to the effect of “in 26 years on the bench I struggle to find an example where someone has been dealt with more unfairly or unjustly.”

In his decision (Attachment C) Deputy President Harrison was scathing of the actions taken by SRWSD. He commented on “the eagerness of WorkCover to launch the investigation” and that Mr Butler had been used as “a scapegoat for systemic management failure and as a sacrifice to an application of policy and procedure in a draconian way which countenances no innocent explanation” (pg 58).

Deputy President Harrison went on to say that:

> “there are two consistent trends in respect to all of the allegations. The first is that in each and every case Mr Butler was acting in the interests of others ….. The second is an apparent determination by WorkCover, its investigator and decision makers, to persecute Mr Butler out of the organisation by accepting and amplifying any notion adverse to Mr Butler while at the same time discounting anything in his conduct that may be mitigating or supportive of an innocent explanation”.

This case is a perfect illustration of the key points raised above regarding the existence of a punitive fault-finding culture which focusses on negatives and apportioning blame instead of positive, co-operative resolution of issues. It is also an illustration of how the People and Culture Unit allows and facilitates employees being singled out for for special punitive treatment. It should be noted that it was clear from the time sheet audit results that Mr Butler was not the worst "offender" in relation to submitting time sheets. He had in fact updated all his missing time sheets prior to any allegation of misconduct being made.

Deputy President Harrison's decision offers some useful insights into the source of the problem in this case as he is deeply critical of the actions taken by the People and Culture Unit and of the General Manager who was the decision maker.

Recommendation: That the staff in the People and Culture Unit receive training to respond to matters more positively and constructively, in a manner which relies less on formal and punitive procedures.

Right of Entry issues

The decision in the Butler unfair dismissal case outlined above, which gave rise to this inquiry, was extremely critical of the procedures followed by SRWSD in relation to disciplinary matters. The comments made by Deputy President Harrison were an independent confirmation of a long held belief of the Association, that SRWSD often applies the disciplinary procedures in an overly punitive way, targeting some individuals but not others, resulting in unfair outcomes. As a result a decision was made to pursue with new vigour, this and many other safety issues we consider remain unresolved.

In an effort to gather further information to inform decisions on an appropriate resolution pathway, the Association decided to exercise its rights under the WHS Act to enter the WorkCover workplace and inspect various documents which otherwise have been made unavailable. Unfortunately the outcomes merely confirmed the concerns outlined above, as WorkCover was found to be deliberately obstructive rather than co-operative and willing to address safety matters. The events are summarised in the timeline below.

12 July 2013	Section 117 Notice of Entry sent to WorkCover, Section 120 Notice of Entry sent to both Pricewaterhouse Coopers and DPC, advising of a right to enter WorkCover on 19/7/13 and Pricewaterhouse Coopers and DPC on 18/7/13, to examine documents
16 July 2013	Reply from SRWSD advising that only 2 of the 28 sets of documents would be provided (Attachment D)
17 July 2013	PSA replies rejecting SRWSD position (Attachment E)

18 July 2013	SRWSD replies indicating access to all documents will be refused. (Attachment F)
18 July 2013	PSA makes a complaint to WorkCover as the regulator that Workcover the PCBU was in contravention of the WHS Act by refusing entry to examine the documents.
19 July 2013	Meeting occurred at WorkCover Gosford, during which access to all documents was refused. WorkCover inspector attempted to mediate a resolution. It was agreed that the PSA would provide further detail of a suspected contravention where possible.
26 July 2013	Revised Notice of Entry for 1 Aug 2013 including 3 pages of further particulars
31 July 2013	Crown Solicitors Office replies advising that entry will be refused (Attachment G)
31 July 2013	PSA advises by email that still further detail will be provided in a fresh notice on 1 Aug 2013
31 July 2013	Crown Solicitors office email reaffirming that entry will be refused on the basis that 24hrs notice required under S120 cannot provided.
1 August 2013	Meeting occurred during which a further Notice of Entry was provided. Access to all documents was refused on the basis of the need for SRWSD to obtain further legal advice.
2 August 2013	Crown Solicitors Office reply advising that documents are being collated (Attachment H)
13 August 2013	PSA letter to Crown Solicitors Office asking when documents will be available.
24 August 2013	Crown Solicitors office reply indicating some documents would be available on that day at 4.30pm.
27 August 2013	PSA attend to inspect and copy documents.
27 August 2013	SRWSD representatives handed a letter from Crown Solicitors office, dated 27/8/13 (Attachment I).
3 September 2013	SRWSD letter advising that GIPA application will be placed on hold (Attachment N)

Properly authorised union officials have certain rights to enter workplaces in which they believe there to exist a possible safety breach. The particular rights are described in the Work Health Safety Act 2011 (WHS Act) and include the right to access and copy documentation relevant to the suspected safety breaches.

Section 117 – Entry to inquire into suspected contraventions

(1) A WHS entry permit holder may enter a workplace for the

purpose of inquiring into a suspected contravention of this Act that relates to, or affects, a relevant worker.

(2) The WHS entry permit holder must reasonably suspect before entering the workplace that the contravention has occurred or is occurring.

Section 118 - Rights that may be exercised while at workplace

(1) While at the workplace under this Division, the WHS entry permit holder may do all or any of the following in relation to the suspected contravention of this Act:

(a) inspect any work system, plant, substance, structure or other thing relevant to the suspected contravention.

(b) consult with the relevant workers in relation to the suspected contravention,

(c) consult with the relevant person conducting a business or undertaking about the suspected contravention,

(d) require the relevant person conducting a business or undertaking to allow the WHS entry permit holder to inspect, and make copies of, any document that is directly relevant to the suspected contravention and that:

(i) is kept at the workplace, or

(ii) is accessible from a computer that is kept at the workplace,

(e) warn any person whom the WHS entry permit holder reasonably believes to be exposed to a serious risk to his or her health safety emanating from an immediate or imminent exposure to a hazard, of that risk.

The Association provided a week's notice to SRWSD of our intention to enter the workplace on 19 July 2013. This notice included a list of documents which we were seeking to inspect. SRWSD refused access on 19 July 2013 on the basis that the notice of entry did not provide sufficient details of the suspected contravention. The Association attempted to address the concerns raised by SRWSD by amending the notice of entry and provided three additional pages of further particulars describing the suspected contraventions, and then giving further notice of entry on 1 August 2013.

Access was again refused on 1 August 2013 (Attachment G) on the basis that the notice of entry did not sufficiently detail the suspected contravention of the act. When we offered to provide still further detail we were advised that entry would be refused on the basis that 24 hours notice had not been provided. On 1 August 2013 when the Association entry permit holder attended the workplace, access to the documents requested was refused on the basis that legal advice was being sought.

On both occasions of entry the Association had provided more than 24 hours notice. It should also be noted that a WHS entry permit holder under S119 of the WHS Act is not required to give any notice under some circumstances and

otherwise notice must be given “as soon as is reasonably practicable **after** entering a workplace”. (emphasis added). The WHS Act provides no mechanism to refuse a right of entry under S117 in order that legal advice be sought.

During the meeting on 1 August 2013 the Association attempted to negotiate that access be provided to at least some of the less contentious items requested such as policies and OHS committee minutes. This was refused. The Association was advised to direct all further correspondence or discussion to the Crown Solicitors Office; a third party and not the person conducting a business or undertaking (PCBU). The lawfulness of such a direction is questionable.

Crown Solicitors Office correspondence (Attachment G) quotes the requirements for access under S120 of the WHS Act. The Association considers this advice irrelevant as access was not being requested under S120 but under S117 as outlined above. In any case notice well in excess of 24 hours had been provided. The original request having been made some 20 days earlier.

The Association considers that SRWSD, as the person conducting a business or undertaking (PCBU), did not have reasonable excuse for failing to comply with this requirement; the penalty for which is prescribed under S118 (3) as $10,000 for an individual or $50,000 for a body corporate.

With reference to the correspondence (Attachment H) indicating that documents are being collated; this response in no way addresses the right of the entry permit holder to examine the documents themselves. It opens SRWSD as the PCBU to accusations of tampering with the documents or from withholding some information. It is clearly the intent of the WHS Act that WHS entry permit holders are permitted to enter the workplace to inspect and examine the premises and documents prior to the PCBU having an opportunity to tamper with evidence.

The Association considers the actions of SRWSD in this whole matter to be unconscionable behaviour on the part of the safety regulator. It sets a dangerous precedent for all other PCBUs in this state, that they can refuse a right of entry simply by questioning the notice or advising that legal action is being sought. A commitment to provide some documents does not in any way address the right of the WHS entry permit holder [S118 (b) and (e)] to consult with relevant workers and appropriately warn them, nor the right [S118 (c)] to consult with the PCBU regarding the suspected safety breaches. To date these rights have not been complied with.

On 27 August 2013 an Association entry permit holder attended the workplace to inspect the documents which SRWSD had advised would be made available under the notice of entry. Only 8 of the 21 items requested were provided. It

should be noted that access to all documents which SRWSD had characterised as employee records was refused. It was not denied that the Association may have a right to view the records withheld, but rather that the reason they were withheld was because in the view of SRWSD access to such documents was only permitted under S120 of the WHS Act and the Association had not ticked the box for S120 on the form.

There exists here a significant difference in the interpretation of the WHS Act in relation to S120. Regardless of which view is correct, the obvious absurdity is that should the Association entry permit holder simply provide an additional notice of entry, ticking the box which refers to access under S120 of the WHS Act then the documents would need to be provided, albeit in redacted form. The Association is left with the view that SRWSD has taken this stance merely to be obstructive and require the Association representative to issue yet another document and make yet another visit to the workplace.

During attendance at the workplace on 27 August 2013, described above, the Association was not permitted to view the documents where they were kept. Instead selected documents had been collected and brought to a meeting room for viewing. Rather than simply providing a copy of the documents, a photocopying machine had been relocated to the meeting room (at no doubt some inconvenience) to allow the entry permit holder to copy documents should she wish to do so. The reason given for the documents not being copied in advance and simply provided to the entry permit holder, was on the basis that the WHS Act required only that the entry permit holder be **allowed** to copy the documents. SRWSD preferred to allocate three senior staff the task of monitoring the entry permit holder for the period of approximately one hour that it took to copy 2 large folders.

The majority of documents provided were materials which were known to already be in the possession of the Association through the normal consultative mechanisms. One item, being minutes of a joint consultative meeting between the Association and WorkCover, was redacted to leave just one agenda item remaining in the document. The reasons for spending so much time and resources to alter a document which has already been willingly provided to the Association, simply defies understanding.

The extraordinary actions taken by SRWSD in this matter demonstrate the resources that this employer is prepared to put to being obstructive. A co-operative approach would have involved a fraction of the resources expended on this exercise of pedantry and denial.

During each visit to the workplace (19/7/13, 1/8/13 & 27/8/13) SRWSD representatives refused to engage in meaningful discussion of any issues with the Association's entry permit holders. Instead on the last two occasions the Association was directed to the Crown Solicitor's office for all enquiries. Arrangements were not made to have a representative of the Crown Solicitors

Officer present to enable a meeting to take place. We have already questioned the legality of such a stance.

S118 of the WHS Act clearly indicates that entry permit holders have a right to "*consult with the relevant person conducting a business or undertaking about the suspected contravention".* SRWSD repeatedly refused to discuss the matter. The Association can find no provision in the WHS Act which allows for a PCBU to delegate its responsibilities under the Act to a third party organisation. Even if this were possible it would be incumbent upon the PCBU to make arrangements for the third party to be present at the time of entry.

WHS breaches

Quite aside from any safety contraventions which may yet be discovered through right of entry provisions, the Association considers that SRWSD was in breach of the WHS Act by:

1. refusing entry to the Association's legitimately authorised entry permit holders,
2. not allowing for consultation to occur with workers,
3. refusing to consult as the PCBU about any suspected safety breach,
4. delaying access to documents for a period of 5 weeks which should have been made available at the time of entry,
5. refusing access to documents characterised as employee records,
6. referring the Association to a third party (not present on any occasion) in relation to all matters relating to right of entry

We have not rushed into taking legal action against SRWSD on this point because it will necessarily publicly advertise the dangerous precedent we believe it sets for all PCBUs in this state. We are still considering our next actions. Regardless of any further legal proceedings which may follow, the behaviour of SRWSD and WorkCover in this matter is not indicative of a PCBU which wishes to eradicate bullying. Instead it is perhaps indicative of the very underpinning negative attitudes which allow bullying to flourish in this organisation.

Recommendation: That SRWSD and Crown Solicitors Office alter their approach to a constructive and co-operative approach which complies with the legislative requirements.
That officers within the PCBU, SRWSD, receive training in relation to responsibilities to comply with the WHS legislation and the penalties for non-compliance.

Risk Assessment

The Association and its delegates contributed enormously to developing policies and procedures to assist with addressing the occurrence of bullying in WorkCover. A repetitive theme was that we would seem to be making great

progress by developing policy and procedure jointly with WorkCover representatives only to then have WorkCover managers refuse to implement the procedures.

In 2004 the Premier's Department launched a campaign jointly with the unions to promote dignity and respect in all workplaces. This campaign was in recognition of the huge costs to government and businesses as a result of workplace bullying. The relevant section in the Association's submission to the PwC inquiry (Attachment A pg 2) describes in more detail the difficulties experienced in implementing the goals of the charter. Even though the charter was adopted as government policy it was over a year before WorkCover finally agreed to commit to the charter. From that point on, the Association unsuccessfully attempted to engage WorkCover in implementation of the agreed steps towards a respectful workplace outlined in the charter.

Step 1 of the charter requires that a risk assessment "be conducted to ensure the organisation is not at risk by fostering a culture that encourages, or tacitly condones bullying and harassment." The Occupational Health and Safety legislation in force at the time also required a risk assessment be completed for any potential hazard. WorkCover repeatedly ignored or refused the Association's requests to conduct a risk assessment and then denied knowledge of how to conduct such an assessment.

In July 2009 two policies were approved after development through the Bullying Working Group – a joint PSA/WorkCover working party. These were *Managing the Risk of Workplace Bullying* and *Managing Reports of Workplace Bullying.* The strength of these policies is that they encouraged an open risk management approach to understanding, preventing and/or reacting to issues. This enabled responses that could be flexibly tailored towards positive outcomes whether that be for individual or systemic change.

A checklist was attached to the *Managing the Risk of Workplace Bullying policy.* This was designed to assist managers in assessing the risk of bullying in their work areas. The Association asked WorkCover to embrace the new policy and call for risk assessments to be conducted by all managers. This request was resisted for quite some time. The reasons for this resistance are unknown. It was not until March 2010 that a direction was finally given to managers to implement the risk assessment part of the policy.

Management commitment to this process was inconsistent and the Human Resources team had to actively chase up results. The results were only shared with the Association in a global fashion but indicated that most managers had identified the risk of bullying in their team but very few understood the necessity to act to eliminate or reduce the risk. This lack of awareness of how to appropriately manage safety risks is difficult to understand within the safety regulator. We can now see from the PwC report (Attachment B page 39) that 56 risk assessments were completed but "only 8 respondents attempted to

work through the risk control measures and noted their actions".

This exercise highlighted the need for training of managers in relation to their responsibility to deal with safety issues and in particular how to reduce the risk of bullying in the workplace. The Association is unaware of any efforts being made to address the lessons learnt. The PwC report also outlined that an internal submission had been made to the WorkCover Executive which reviewed this risk assessment exercise. It was stated that the submission made a number of recommendations (Attachment B page 39) including that the risk assessment be adopted as a regular management activity and that the Bullying Working Group develop a more comprehensive checklist.

To our knowledge there has never been another attempt to conduct any form of risk assessment for bullying in WorkCover. The same policy, with the same bullying checklist, is still in place today. The Bullying Working Group was never reconvened despite several requests by the PSA throughout 2011.

As a further important point on this issue, we note that the OHS legislation then in force required risk assessments to be conducted through the mechanism of workplace OHS committees. Based on feedback from our members across the state, this legal requirement was never complied with. The Association is unaware of a single instance of a risk assessment for bullying being conducted in consultation with an OHS committee within WorkCover or SRWSD.

It can easily be argued that this breach of the OHS legislation has had significant consequences for the organisation's ability to properly control the risk of bullying.

WorkCover and the whole of SRWSD has been in upheaval for the past 12-18 months as a massive, ongoing restructuring process was undertaken. Research shows that bullying is likely to increase during times of change and uncertainty. In the absence of a regular risk identification programme it would be a fundamental risk reduction strategy to conduct another risk assessment at this time. This is yet another example of how the good work completed to develop effective mechanisms to address the issues is wasted through a lack of commitment to the implementation phase.

Recommendation: SRWSD should implement a regular risk identification process for all safety issues but particularly for bullying risk factors.

Pricewaterhouse Coopers Inquiry

This inquiry was called by the then Minister for Finance, the Hon. Michael Daley MP, to be overseen by the Department of Premiers and Cabinet (DPC) following significant media exposure regarding bullying in Workcover in 2010. This media attention was predominantly regarding the attack on one of our

delegates who had been assisting members to make their complaints of bullying in the Licensing Solutions Unit.

The inquiry was to investigate issues of bullying in WorkCover and more specifically in the Licensing Solutions Unit.

A formal advice received from DPC dated 15 October 2010 (Attachment J) confirmed the terms of reference of the inquiry. It advised (pg 2 par 7) that "*all documentation prepared by the consultant arising from the Inquiry and interviews conducted with staff will be provided to, and become the property of, DPC.*" It went on to say (pg 2 par 10) that "*where claims are made that are outside the scope of the Inquiry (including any specific new claims of bullying or harassment instances), these will be referred to DPC during the course of the Inquiry for appropriate timely action*."

This was confirmed during meetings with representatives of DPC, where the Association was reassured that any complaints of bullying would be referred to DPC to investigate further. The Association was specifically keen to ensure that matters were not referred back to WorkCover as they had not acted appropriately to date and our members had no confidence in them. The Association was also assured that matters would not be held until the end of the Inquiry process but appropriately referred as they arose, to avoid any unnecessary delay.

Association representatives were present as support persons during the majority of interviews conducted. As a result we are aware that many unresolved complaints of bullying were raised which should have been referred for resolution. We are aware of one specific instance where the interview was interrupted as the consultant was so concerned about the complaint received as to immediately exit the room to seek some advice on referral to ICAC.

The Association and its members were astonished that it was later claimed that no matters had been referred for follow up.

It is noted that the PwC report (Attachment B) states (pg 3) that "*we were not asked by DPC to further investigate previous, existing or current individual cases of bullying and harassment.*" Further that "*as we did not formally investigate any of the matters, we did not refer any matters to either DPC or any other government agency for further investigation*". This is clearly at odds with the verbal and written assurances provided by DPC.

This outcome was devastating for those employees who had in good faith gone through the painful process of telling their stories yet again with the expectation that their complaints would finally be properly investigated. This was a fundamental breach of trust which destroyed the last remaining hope for some, that issues of bullying would be addressed.

The discrepancies between the claims of DPC and PwC cannot be resolved without further interrogation of the decision makers involved. However, what we do know from the advice from DPC mentioned above, is that all the documents and interview materials were provided to DPC. Despite their commitment and despite being in possession of all the relevant information to conduct independent investigations, DPC refused to do so.

Recommendation 2.4 of the PwC report was that Workcover "*develop and implement a process to resolve any backlog of bullying and harassment complaints*". To refer people back to Workcover, the agency that had previously failed to deal appropriately with their complaints, could only ensure that the vast majority of issues remained unresolved.

The Association understands that WorkCover was not provided with any of the documents or interview materials collected by PwC. This left the CEO of WorkCover with no alternative but to offer to deal with complaints if the person was prepared to come forward and tell their story all over again for at least the third time. Not surprisingly only a few people took up that offer. The vast majority were left to ponder whether there would ever be a genuine attempt to address bullying issues.

PwC Recommendations

Six (6) main recommendations, each with a sub-set of specific related recommendations, resulted from the PwC report (Attachment B pg 9). The extent to which these recommendations were embraced and implemented by WorkCover could be taken as an indication of a preparedness to improve in this area. Sadly, despite public statements made by the CEO of WorkCover that all recommendations had been accepted, the vast majority of recommendations were not fully implemented.

A brief assessment of the recommendations is as follows:

Recommendation 1 – *Continue the process of providing clarity on the corporate vision, values and strategic direction to all employees. Improve communication with employees and engage them and the union in the cultural change*.

On 12 August 2011 the Association wrote to the Premier's Department (Attachment K) outlining the failure of WorkCover to have any meaningful discussions with the union in relation to the report. We had expected a proactive approach to engaging with union.

The Director of People and Culture met the Association on 5 September 2011. A brief discussion occurred around WorkCover's intention to engage fully with the Association and employees about each recommendation made in the PwC report and what WorkCover or CASD was intending to do to address it. The Association welcomed this approach but it was disappointing that we had to

escalate to the Premier's Department. What was more disappointing was that no further discussions occurred other than in relation to recruitment issues, discussion about which was compelled through an industrial disputation process.

A communication was sent from the CEO to all staff (Attachment L) on 27 September 2011. It provided a six month update following the PwC report. Although it was good to see some communication, there was little in the way of detail to relate back to specific recommendations from the report. Following the departure of the CEO in January 2012 little was heard of the corporate plan, as a result a further 18 months has passed without due focus on corporate goals, especially those arising from the PwC report. The Association's members have reported feeling a lack of direction and purpose.

A new corporate plan has just been announced on 26 July 2013.which reduces the previous 7 Key Result Areas to 4 being: Affordability, Commerciality and Solvency; Safety, Recovery and Support; Customer Service; Capabilities. Unfortunately the customer service goals all seem externally focussed with no obvious mention of improving the internal customer experience. The capabilities area mentions cultural reform and the implementation of a consistent strategic risk and compliance approach. Unfortunately there is no obvious link back to the recommendations made in the PwC report.

Recommendation 2 – *Develop a revised and consolidated bullying and harassment policy, including changes to internal and external support mechanisms. Communicate and provide training in that policy to employees, managers, and other key stakeholders*.

Despite its high priority rating a draft new policy was not provided to the Association for input until August 2013; some 2.5 years after the recommendation was made. The Association has provided input on this draft policy which was, in our view, very inadequate. Unfortunately it appears to have removed the Bullying Response Service as a means of resolution for bullying issues. The new policy proposes only one internal means to raise a grievance of any description. The removal of an independent external means of grievance resolution will undoubtedly be a barrier to reporting. It should also be noted that the new policy does not include specific procedures to be followed for each category of complaint, in accordance with PwC recommendation 2.2. On the contrary the new policy outlines a one size fits all approach.

Recommendation 2.3 relates to the need to reaffirm the confidentiality of both the Bullying Response Service and the Employee Assistance Programme. The Association continues to raise serious issues regarding the confidentiality of the Bullying Response Service. The first issue raised was that the invoices received actually named the employees who accessed the service, thereby identifying the users to a number of people in WorkCover involved in the administrative process for the Bullying Response Service. Recently, members contacting the BRS have reported that they were later confronted by a manager who had detailed knowledge of the complaint made. It is understood

that a detailed report is provided by the Bullying Response Service to the WorkCover Employee Safety and Wellbeing unit. Serious breaches of confidentiality and trust have had the effect that very few staff will now use the service. The Association has been unable for some time to recommend that members use this service because its integrity has been compromised.

Recommendation 2.6 outlines the high priority of developing a framework for external investigation. Although no detail is provided, this appears to refer to the intention to develop a framework for external regulation of Workcover. It was agreed as a result of the investigation conducted by a WorkCover inspector into the Licensing Solutions Unit, that there was an inherent conflict of interest in Workcover (as the state regulator) investigating itself for potential breaches of safety. Although some work was done to develop a process this was abandoned. Efforts from the Association throughout 2011 to revive discussions on this issue were unsuccessful. This issue will be discussed in more detail below.

Recommendation 3 – *Review the structure, capabilities and roles organisation-wide, and more specifically the roles and capabilities of all leaders and the People and Culture and OH&S teams.*

There has been continuous structural review throughout the organisation before and since the PwC report. None of the processes have been linked directly to the recommendations of the report.

Recommendation 4 – *Cascade the clear organisational direction to team and individual goals and implement a system for clear guidelines for performance management. Communicate this to employees, managers and other key stakeholders (including unions)*.

A new performance management system was introduced however the loss of organisational direction has had a negative impact on the ability to develop individual goals. Members have reported to the Association that the new performance management system is very complicated and difficult to use with the result that only 10 people were able to successfully complete the full 12 month cycle to 30 June 2013.

Recommendation 5 – *Enhance the rigour and transparency of all recruitment and selection processes. Communicate this to employees, managers and other key stakeholders (including unions)*.

This has been the main area of visible intervention and resulted in industrial disputation with the Association. Whilst it is acknowledged that changes have been made to these procedures, there have still been significant issues raised, even within the past few months, regarding inappropriate application of selection principles and priority assessment procedures. It is also clear that without addressing the underlying causes it is not possible to develop a recruitment process to completely prevent favouritism.

Recommendation 6 - E*stablish and embed measures to assess the success of cultural change following the inquiry. Share outcomes with management and employees, celebrating successes and identifying areas for improvement*.

Compliance with this recommendation would allow for an overall assessment to be made of WorkCover's performance towards implementing these recommendations. Documentation showing the key performance measures developed (Rec 6.1) and the outcomes of the regular reviews (Rec 6.2) should confirm WorkCover's commitment to change and the extent to which improvements have been made.

On 15 March 2011 a email was sent to all staff from the Senior Managers Group (Attachment M) it advised that in the following 6 weeks “we will develop a draft framework and then seek feedback from staff before we finalise a way forward”. No such documents have been shared. The Association has made a GIPA application seeking documentation/information detailing any such plans and reviews. At the time of writing no information has been received from SRWSD, despite the legislation requiring all requests to be processed within 20 days.

Notwithstanding our GIPA application it would be expected that, given the overriding public interest in this matter, that such plans should have been pro-actively made available. The absence of such material is cause for concern and warrants further examination.

Recommendations: That all of the recommendations made in the PwC report be reviewed and implemented. That a plan be developed and shared to address each of these recommendations.

GIPA application

The GIPA application mentioned above was posted on14 August 2013. On 3 September 2013 the Association received a reply from the SRWSD Right to Information officer (Attachment N). The reply indicated that because the Association had exercised our right of entry to inspect some documents under the WHS Act, that our GIPA request for information would be placed on hold.

This outrageous response raises a number of concerns.

How did the Right to Information Officer become aware of the Association's right of entry request and why was this information considered relevant when considering our rights under the GIPA Act? The Act makes no provision to refuse to provide information on the basis that the information may already have been provided in another way.

It would be known to SRWSD that information obtained under the right of entry provisions can only be used for purposes relevant under the WHS Act, i.e. in order to resolve safety issues. It is not lawful to use the information obtained in that way for other purposes. A refusal to process our GIPA application is a deliberate and calculated attempt to prevent the Association accessing information which could be used for other purposes, such as providing evidence to this inquiry.

It is clearly no coincidence that acknowledgement of our application was delayed until after our right of entry visits, just as it is no coincidence that providing access to those documents was delayed for 5 weeks to ensure that access was only granted at 4.30pm on the day that submissions to this inquiry were due to close. SRWSD has demonstrated that it considers itself above the legislated responsibilities which apply to others. How can this organisation act as the regulator responsible for ensuring compliance with the law when it does not comply with the law itself?

Recommendation: that managers and decision-makers be held accountable for their decisions in the same way that other staff are held accountable.

The regulator's response to bullying

WorkCover has produced a number of useful documents to help guide industry on how to address issues of bullying, however the commitment to tackling this issue from a compliance perspective is lacking. The extent to which bullying complaints are pursued with any PCBU is very much determined by the particular inspector involved. Inspectors seem to be discouraged from taking on these issues from a compliance perspective and appear to be encouraged to limit their investigation to determining whether a PCBU has a policy for dealing with bullying issues. If a policy exists the inspector is encouraged to close the file by noting that the employer is compliant with the legislation.

The Association also has cause on occasion to call on WorkCover as the safety regulator to investigate issues which have occurred with our members employed in other government agencies. The success of these matters is also quite variable, depending on the particular inspector and the extent to which their manager will intervene in their investigation. In a number of cases that the Association has been involved with, the inspector that we were working with has unexpectedly and without explanation been removed and replaced by another inspector who appeared to have been directed to deal with the matter in a quite different way.

One example of this was described in detail in the Association's submission to the PwC Inquiry (Attachment A pg 4). In that case the Association made a general complaint about bullying in one unit of WorkCover. No particular complainants were named in that complaint due to fears of retribution. The first inspector allocated to the case indicated that he understood the need for the Association to maintain the confidentiality of our members and was prepared to proceed with a risk assessment approach aimed at identifying and addressing the risk of bullying in the area. This approach would have avoided the need to target any particular manager or supervisor with the complaint and for a more general intervention to be made to address underlying causes such as lack of training etc.

Without explanation the Association was contacted by another inspector and advised that he would be dealing with the matter. His approach was

completely different. He advised the Association that if we failed to name specific complainants, he would close the case and not proceed with the investigation. Apart from exposing a number of our members to the risk of victimisation, this approach also then necessitated the complaints being made against someone in particular, rather than dealing with general cultural issues.

The result of this unnecessary escalation was that the manager herself lodged a workers compensation claim and never returned to workplace. There were also a number of other anomalies with the way this matter was handled and these are dealt with in more detail in the Association's submission to the PwC Inquiry. The problems identified in this case gave rise to concerns of conflict of interest for the regulator to investigate itself, which will be discussed below. However the relevant point here is that the matter could have been dealt with much more constructively and without injury to anyone further, by taking a risk management approach rather than the punitive approach of trying to identify someone to blame.

Recommendation: that WorkCover develop a pro-active approach to dealing with complaints of bullying and develop simple and concise materials to assist PCBUs in dealing with these matters internally.

That WorkCover develop a responsible approach to compliance in this area and provide support to the inspectors handling bullying complaints. This may involve extending the time frames for resolving these usually complex cases.

Who regulates the regulator?

In the Association's submission to the PwC inquiry (Attachment A pg 4) we outlined some of the difficulties experienced when the safety regulator also happens to be the employer which is the subject of the safety complaint. Although the results of this investigation were deeply unsatisfactory it did serve as a valuable learning exercise. As a result the CEO at the time became deeply concerned about the inherent conflict of interest of WorkCover as the safety regulator investigating itself as a non-compliant employer. A number of valuable discussions occurred throughout late 2010 and early 2011 on this issue and possible resolutions to the problem were tabled.

Three flow charts were provided by WorkCover to the PSA for comment. These were entitled:

- *Complaints to Workcover as the regulator.*
- *Complaints made to WorkCover as the OHS regulator involving Workcover as the employer*
- *Complaints made to WorkCover as the Workers' Compensation regulator involving WorkCover as the employer*

Together they outlined a proposal to have an independent person oversee

regulatory investigations into WorkCover. The proposed model was contemplating the involvement of another regulator such as Worksafe Victoria or Comcare. The proposal would in no way prevent WorkCover from exercising its obligations as an employer to investigate and deal with bullying or other safety issues, prior to a complaint being escalated to WorkCover as the regulator.

Unfortunately after the Association provided feedback in April 2011 on the suggested processes there were no more meetings to discuss the matter despite a number of attempts by the Association throughout 2011 to re-invigorate the discussion. As a result the issue remains unresolved to this day and further difficulties have arisen for WorkCover staff and the Association as a result of having nowhere independent to go to make a complaint.

This question of who regulates the regulator has also been the subject of much debate in other state jurisdictions. A common theme has been that a simple solution to the problem would be to undertake reciprocal arrangements with a regulator in another state to deal with safety complaints made against any safety regulator. It must however be acknowledged that the regulators in each state or territory have been building alliances for quite some time as they move towards harmonisation of WHS legislation across Australia, as a result even this reciprocal regulatory investigation arrangement may be subject to undue influence.

This conflict of interest problem has been exacerbated by the new WHS Act 2011 with the introduction of Health and Safety Representatives (HSRs). HSRs have the capacity to issue provisional improvement notices to their PCBU. The PCBU then has a right to ask for the provisional improvement notice to be reviewed by a WorkCover inspector. When the HSR is an employee of WorkCover the conflict of interest arises again with WorkCover, as the regulator, allocating an inspector to review a notice issued by a fellow worker who is an HSR, because WorkCover, as the PCBU, has objected to the notice being issued. The pressure on an inspector placed in that situation is unreasonable. It is an obvious possibility that the inspector could be unduly influenced in this situation to the potential detriment of safety of workers at WorkCover.

Recommendation: That arrangements be developed for an independent regulator to address compliance issues which arise within WorkCover and SRWSD. This protocol needs to broad enough to cover all aspects of compliance with the WHS legislation such as WHS consultation, and not just safety complaints.

Previous inquiries into workplace bullying

In 2012 a federal inquiry into workplace bullying was conducted. Many useful recommendations came out of this inquiry which are relevant to the current

inquiry into bullying within WorkCover.

The Community and Public Sector Union (State Public Services Federation Group) made a comprehensive submission to the House Standing Committee on Education & Employment. This submission (No. 188) contained a great deal of material directly arising from experiences with WorkCover NSW. The entire submission can be accessed online at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ee/bullying/subs/sub188.pdf however the following few recommendations made in that submission are particularly relevant.

Recommendation 12: WHS Inspectors and health and safety representatives

to make broad use of improvement notices to require hazard prevention and risk management of psychosocial risks.

Recommendation 18: Workers in WHS Regulators to be covered by a nationally harmonised psychosocial hazard memorandum of understanding (MOU) negotiated with the workers involved, their unions and the WHS Regulators through the auspices of Safe Work Australia - to deal with complaints of inappropriate and unreasonable behaviour within WHS Regulators.

Recommendation 19: To facilitate the formation of the WHS Regulators psychosocial hazard MOU - all necessary legal changes to the legislation applying to the WHS Regulators to be identified by Safe Work Australia and implemented by governments.

Recommendation 20: WHS Regulators to establish well-resourced psychosocial hazard inspectorates where they do not already exist.

Recommendation 21: Insecure public sector work in the form of fixed term contracts and long term casual employment are themselves an inappropriate and unreasonable behaviour hazard. Insecurely engaged workers are much less likely to raise WHS complaints for fear of losing their position. Governments must review and severely limit insecure work to cover exceptional short term employment events only.

Recommendation 22: Public sector grievance resolution procedures must be based in natural justice principles, subject to external review, have as speedy as possible time frames for resolution, be externally investigated and funded by a centralised agency (WHS Regulator etc).

Integrity of WorkCover compliance actions

For years the Association has been raising issue with WorkCover in relation to a perceived interference by managers with the inspectors' legislated duties. The Association has received numerous complaints involving concerns from an inspector that, whilst they were in the process of undertaking an investigation into a safety complaint, they became aware that a manager had some interaction with the PCBU which was the subject of the investigation. The concerns covered a broad range of issues including concerns that:

- the inspector had not been informed of the managers activity with the PCBU,
- inconsistent messages may be given to the PCBU,
- complaints from the PCBU about the inspector result in their removal from the case,
- directions are given to cease the activity with the PCBU without adequate explanation,
- the interactions of managers with the PCBU are not recorded in the complaint records system known as WSMS,
- notices issued by inspectors against PCBUs were being withdrawn by the manager without consultation with the inspector,
- directions given by managers in relation to ceasing or closing a case are not recorded in the complaint records system known as WSMS.
- lack of appropriate record keeping results in a lack of transparency to the complaint management process
- if managerial decisions are not recorded it creates a risk exposure to potential corruption
- the absence of complete record-keeping can leave the inspector exposed to allegations of not appropriately fulfilling their duties, or worse.

On each occasion that these issues have been raised they have been met with resistance from the management team. On one occasion they agreed to look into the issues only to report that nothing out of order was discovered. No attempt was made to justify that position or to address the issue of managers not recording their interventions or reasons for their decisions. There was simply no evidence of any action being taken.

Eventually in 2011 these issues became such a problem for the Public Sector Agencies Team in WorkCover's OHS Division that the inspectors collectively escalated the matter to more senior management. The inspectors drafted a protocol to address the issues they were experiencing with their manager's interference in their investigations. Fortunately the Senior Manager appreciated the importance of resolving the issues and the protocol was amended and ultimately adopted as a practice note for the whole operational area. Even then, this practice note was not widely promoted and it was not until June 2013 that it was published on the organisation's intranet after the PSA raised its invisibility at a joint consultative meeting.

Whilst this has been of great assistance, it requires co-operation of all levels of management to accept that they must be accountable for their actions and comply with the practice note. Commitment to this is not universal so the resolution will be of limited value without follow-up for compliance.

Recommendation: that Work Health Safety Division managers be required to document all their actions and interactions relating to formal safety complaints. That compliance in this regard be monitored as part of the performance management process.

Conclusion

There have been issues related to workplace bullying in WorkCover and SRWSD for a very long time. The cultural issues are so deeply embedded that it will take considerable effort over an extensive period of time to effect any positive change. A first step in resolving psychosocial issues like bullying is to acknowledge the errors made and the harm caused. A public apology to staff for allowing such an unhealthy environment to develop and continue would help many staff towards a process of healing.

Commitment to this change needs to come from the top but it is insufficient for the Chief Executive Officer to make a public commitment to eradicate bullying. This kind of public statement of commitment needs to be re-iterated at each successive layer of management down to the frontline worker.

Commitment needs to be backed by action. It is usually in the implementation phase that positive change falls down. Ongoing monitoring for performance against common key performance indicators in this area needs to take place. Managers and supervisors need to get into the habit of correcting small disrespectful or inappropriate actions before they become bullying. This level of action needs to be visible to employees.

Although this is a difficult area it **is** possible to make positive change. The employees know best what they need to make a healthy and safe work environment so any intervention must include input from those employees.

Attachments

A Public Service Association submission to Pricewaterhouse Coopers Inquiry (this document has been redacted and case 2 removed due to lack of consent to publish)

B Pricewaterhouse Coopers report - "*WorkCover (NSW) Review. Independent inquiry into workplace bullying and harassment.*"

C Industrial Relations Commission decision – IRC 1177 of 2012 – *Wayne Butler vs Safety Return to Work Support Division – 21 June 2013*

D Letter from SRWSD – dated 15 July 2013 – re Notice of entry

E PSA letter to SRWSD – 17 July 2013 (erroneously dated 10 July 2013)

F Letter from SRWSD – dated 18 July 2013 – re notice of entry

G Letter from Crown Solicitors Office - dated 31 July 2013

H Letter from Crown Solicitors Office – dated 2 August 2013

I Letter from Crown Solicitors Office - dated 27 August 2013

J Advice to staff from Department of Premier and Cabinet regarding PwC inquiry process – dated 15 October 2011

K PSA letter to Department of Premier and Cabinet – dated 12 August 2011

L CEO email to all staff – dated 27 September 2011 – re PwC implementation

M Email from Senior Management Group to all staff – dated 15 March 2011

N Letter from SRWSD Right to Information Officer – advising that the Association's GIPA request would be put on hold.