

**INQUIRY INTO REVIEW OF THE INQUIRY INTO  
ALLEGATIONS OF BULLYING IN WORKCOVER NSW**

**Organisation:** Unions NSW

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# **Review of the Inquiry into allegations of bullying in WorkCover NSW**

**The Legislative Council General Purpose Standing  
Committee No. 1**

**Submission of Unions NSW**

**17 October 2014**

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## **Preamble**

1. Unions NSW welcomes the opportunity to make a submission to this Inquiry and hopes that the Parliament will be able to make some insightful recommendations that enables greater safety for NSW workers and greater support for injured workers: the two main functions of WorkCover NSW.
2. Unions NSW is the peak union council in New South Wales with over 600,000 members in affiliates and 60 affiliated unions. Unions NSW and our affiliates play an essential role in all workplaces across the state through a range of representative activities such as assisting in the negotiation of workplace WHS, Injury Management and Return to Work policies and our extensive network of workplace representatives that assist workers prevent injuries and facilitate return to work.
3. The WorkCover Authority, like government labour inspection and workers compensation regimes around the world, was established after tireless efforts by organised workers in unions. Unions fought for an independent body to ensure occupational health and safety and support for injured workers when injury prevention fails. At times these efforts have been met with assistance from the employers who have agreed to the moral arguments of improving workplace safety.
4. Due to the constitutional history of Australia and the development of the State of New South Wales, a majority of workers in NSW are under the umbrella of the WorkCover Authority for injury prevention and support when they are injured.
5. The WorkCover Authority is enshrined with ensuring the human rights contained in International Labour Organisation Conventions for workers including those conventions that Australia has ratified are upheld. The key generic conventions pertaining to Occupational Health and Safety governance are:  
  
C081 - Labour Inspection Convention, 1947 (No. 81);  
C155 - Occupational Safety and Health Convention, 1981 (No. 155); and  
C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).
6. The crucial position that WorkCover has to influence whether workers go to work and come home again or suffer life and family destroying injuries and incidents makes the operation of WorkCover vitally important for all workers in NSW.
7. Throughout this submission there are references to independent research by Macquarie University. The research is contained in the document *"The Impact on*

*Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1* (the Macquarie University Report)<sup>1</sup>

## **Disclaimer with regard to Safety Return to Work and Support Board.**

8. With regard to recommendations 1, 3, 4, 5 these refer to actions by the Safety Return to Work and Support Board. This submission was not authored by Mark Lennon who currently sits on the Safety Return to Work and Support Board. Unfortunately more often than not Mr Lennon is limited as to what he can tell persons who are not on the Safety Return to Work and Support Board. This submission was written by a Unions NSW officer. Unions NSW is therefore operating a Chinese wall situation with regard to the operations of the Safety Return to Work and Support Board.
9. The secrecy of the Board appears to run contrary to the activities of the WorkSafe Victoria consultations. In Victoria and other states there are public listings of the deliberations at the Board Level. Unions NSW has made recommendations for this to occur at Work Cover Authority of NSW and repeat this request. You can see the Victorian deliberations at online at:  
  
<http://www.vwa.vic.gov.au/stakeholders2017/home>  
<http://www.vwa.vic.gov.au/stakeholders/policies>
10. The Victorian WorkCover forums provide a clear agenda for the public to scrutinize. If introduced in NSW this would open up WorkCover's operations and decision making to greater transparency.
11. We stand by the recommendations of our original submission.

## **Government Response**

12. In the afternoon on Friday 17 October Unions NSW received the Government response to the inquiry. We have not received the WorkCover response so we cannot comment on this.

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<sup>1</sup> Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures

13. We are aware from conversations with senior public servants that the Executive in Office of Finance and Services prepared this response for the Minister. The Unions NSW does not intend to disrespect the Minister.
14. All of the recommendations have been addressed below. Please note that until the last week we have generally seen little public action on the recommendations of the Parliamentary Report.

## **Recommendations**

### ***Recommendation 1***

***That the WorkCover NSW Executive Team and the Safety, Return to Work and Support Board make a public statement that genuinely:***

- a) accepts that WorkCover, as an organisation, has a significant problem with workplace bullying***
  - b) apologises to employees for past wrongs, including in respect of Mr Wayne Butler***
  - c) accepts the findings of the NSW Industrial Relations Commission in respect of Mr Butler***
  - d) commits to addressing at an organisational level the problem of bullying.***
- a) The 2011 PWC Inquiry occurred after after the WorkCover Authority continued to misinform the then Minister Daley regarding workplace bullying. History tells us that the Agency acknowledged its errors publicly, committed to doing certain actions and then proceeded to water down the response as the spotlight was pointed elsewhere.
  - b) Unions NSW is unaware of the issuance of this public statement to all employees to date and have not viewed WorkCover's submission to this review. The behaviour to date indicates that the WorkCover Executive may not yet be ready to issue such a statement.

Hearsay information from staff indicates that legal advice was sought from internal legal staff from within the Office of Finance and Services (this includes the WorkCover Authority and Safety Return to Work and Support Board).

Hearsay information is that the general apology was not to be delivered to all employees for past wrongs because the legal advice allegedly stated that it may expose the organisation to further liability. We would be happy if the WorkCover submission included an apology to all employees, but as of last week this was not forthcoming.

Unions NSW questions the willingness of the agency to make amends. There are clearly methods available to demonstrate their remorse that don't compromise future liability claims.

Unions NSW notes the Sydney Morning Herald article in which the WorkCover Authority apologised to Mr Butler. However, we ask why this apology could not have been provided earlier?

- c) Unions NSW is aware that the new Chief Executive Officer's statement apologises to Mr Butler and also clears him of any wrongdoing. Unions NSW hope that those remaining executive members of staff are also able to accept the IRC findings.
- d) Unions NSW is unaware of this commitment, and hope the commitment lasts longer than previous commitments after the PWC Report of 2011 regarding this workplace hazard.

#### **Recommendation 2**

***That the WorkCover NSW Executive Team sincerely apologise to Mr Wayne Butler for how he was treated during his investigation, for his dismissal, and for their failure to accept the findings of the NSW Industrial Relations Commission.***

The apology was reported this week in the Fairfax article by Ms Anna Patty: *WorkCover NSW Bullying: Wayne Butler receives belated apology for poor treatment and dismissal.*<sup>2</sup>

It is unknown why this apology was not conducted prior to the deadline for submissions to this inquiry. Unions NSW notes WorkCover itself recommends that workplace safety issues should be resolved and controlled in a proactive and timely manner.

#### **Recommendation 3**

**That WorkCover NSW report to the Safety, Return to Work and Support Board on actions to be taken to address the punitive use of process within the organisation, especially in human resources matters.**

Please read the disclaimer above regarding the Safety and Return to Work Support Board.. The Committee will need to inquire with WorkCover and the SRWS Board to answer these questions.

#### **Recommendation 4**

***That the Minister for Finance and Services review the structure and functions of the Safety, Return to Work and Support Board to determine whether they are appropriate or expansive enough to cover the board's obligations under the Work Health and Safety Act 2011, including its obligation to ensure that WorkCover is addressing its organisational problem with bullying.***

***Further, that in undertaking this review, the Minister consider whether it is feasible for all these functions to be undertaken by the existing board.***

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<sup>2</sup> (October 16 <http://www.smh.com.au/nsw/workcover-nsw-bullying-wayne-butler-receives-belated-apology-for-poor-treatment-and-dismissal-20141016-116jx1.html>).

Unions NSW is of the view that this Board's responsibilities are very broad, but have been made ineffective due to at least three factors.

These factors are:

- 1) A lack of advisory councils. These previously existed and allowed for day to day policy and operational work and supervision well beyond a small Board that meets once a month. This has been recommended by in multiple submissions to the original inquiry and also the Functions of WorkCover Authority Inquiry.

Recommendations have been issued in the Functions of WorkCover Report (Law and Justice Committee) for Advisory Councils to be formed. This is needed purely by the need to have over 100 guidelines reviewed alone as identified by the Law and Justice Committee.

- 2) A lack of willingness of the Executive to undertake all the actions of the Board. This may be demonstrated by activities at the Dust Diseases Board, with actions not being acted upon or being responded to with reasons for non-action by the chair of the DDB who was also previously the CEO of WorkCover.
- 3) A confused view contained within the Executive. This is demonstrated by the transcript from the original GPSC1 Inquiry into Bullying in WorkCover: (Monday 11 November 2013, page 24 onwards under questioning from The Hon. Catherine Cusack) that the role of the Board is advisory.

The Executive clearly is confused, as such there is a clear need for the role of the existing Board and Executive to be clarified with the additional assistance of established advisory councils.

Additionally the existing arrangement is in clear violation of ILO Conventions requiring tripartite consultation over OHS. Schedule 2 of the Work Health and Safety Act 2011 was written when the previous WorkCover Board and Advisory Council existed in the Workplace Injury and Workers Compensation Act 1998. During the 2012 amendments the tripartite OHS and WC Advisory Board was abolished and the WorkCover Board was replaced with the Safety and Return to Work Support Board which has no designated position for workers representatives. The placing of deliberations in camera makes any trace of tri-partite nature of the operations of the Board obsolete.

We note the Government's Response and despite writing to the Minister we have not had a response regarding the nature of the Treasury review nor how the consultation will occur.

#### ***Recommendation 5***

***That WorkCover NSW report to the Safety, Return to Work and Support Board on the progress of all actions arising from the recommendations of this inquiry, at intervals of at least six months, and that these reports be published on WorkCover's website.***

The six month period is not expired and there has been no report that we are aware of on the website.

***Recommendation 6***

***That WorkCover NSW formally review, in liaison with the Public Service Association of NSW, the findings of the 2013 People at Work Survey and other measures of workplace bullying, with a view to collecting, monitoring and publicly reporting reliable data on workplace bullying within the organisation on an annual basis.***

As far as Unions NSW is aware there was an initial “get to know you” meeting with the PSA with little content. This was followed up with a meeting on the 9<sup>th</sup> of October with little notice. We are informed a draft policy was presented. Unions NSW has not had time to follow up the content of the meeting, however, the timing appears to be very close to the deadline for this review.

***Recommendation 7***

***That WorkCover NSW ensures that all investigations of bullying complaints within WorkCover are investigated independently.***

Unions NSW notes the government response. Unions NSW also notes that the Office of Finance and Services wrote the Government’s response whilst also providing legal representation for WorkCover in disputes. As such Unions NSW questions the independence of the Office of Finance and Services. See the response for the following two recommendations also.

***Recommendation 8***

***That WorkCover NSW undertake a formal evaluation of the arrangements with the Department of Trade and Investment, Regional Infrastructure and Services for referral of work health and safety matters for investigation, including allegations of workplace bullying, within two years of the commencement of the arrangements. The review, which must be published, is to:***

- include formal input from employees and the Public Service Association of NSW***
- be formally considered by the Safety, Return to Work and Support Board and the independent workplace bullying steering panel (see recommendation 12).***

With regard to recommendation 7 and 8, Unions NSW are unaware if such a process has yet to be established. We do note however, that the suggestion of Mines Inspectors undertaking these investigations would be difficult as their expertise is as former Mine Managers, are of an engineering (Physics, Geology and Construction background) and may not have the technical skills to investigate the “psychosocial” or behavioural hazards of workplace bullying.

Please also note Recommendation no. 5 in Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority* to provide the WorkCover Independent Review Office with improved health and safety and investigative powers. This may be a better approach than allowing mine inspectors with little psychological training to undertake this function.



**Recommendation 9**

***That WorkCover NSW ensure that the code of conduct for WorkCover and scheme agent staff is enforceable by individual workers and their representatives, and that financial penalties are included as one of the remedies where breaches of the code are established.***

Unions NSW are unaware of the discussions to allow enforcement of the code of conduct occurring or the mechanism for it to occur. In the Law and Justice Inquiry into the Functions of WorkCover, we submitted independent research from Macquarie University that supported the existence of conflict of interest for WorkCover and the Scheme Agents. A possible approach could allow third parties to bring these actions (it would require risk amelioration through legal funding and real remedies) to an independent body such as the Workers Compensation Commission. This approach would also require adequate information gathering powers to enable the matters to be successfully executed to improve the behaviour of the WorkCover Authority and their Scheme Agents.

The Government response is inadequate as there is no mechanism or effective body for workers to take their issues with a scheme agent or WorkCover. For example if a scheme agent bullies the worker the worker is reliant on WorkCover to chase up the scheme agent. The independent Macquarie University Research clearly indicates that there is a conflict of interest for WorkCover as the WorkCover Authority has an interest in injured workers being managed forcibly by the Scheme Agents as it affects the nominal insurer's bottom line.

The Law and Justice Committee have unanimously agreed with these conflicts of interest. WorkCover of course will have no interest in pursuing itself if it is undertaking the bullying via its policy directives or otherwise. For example, WIRO has made a number of recommendations that WorkCover prosecute the Scheme Agents for breaches of the Workers Compensation Act 1987 and Workplace Injury Management and Workers Compensation Act 1998. WorkCover is yet to undertake these actions when asked by the law and Justice Committee.

The Ombudsman has suffered repeated budget cuts and does not have the expertise or resources to undertake investigations of this nature. They also have no powers of enforceability.

Failing adoption of the Unions NSW tripartite committee recommendation, a better alternative to what the Government proposes is to extend the WIRO's scope and investigative and enforcement powers as recommended in Recommendation 5 of the Law and Justice Functions of WorkCover inquiry.

**Recommendation 10**

***That the Minister for Finance and Services take the necessary steps to ensure that complaints against WorkCover NSW staff by injured workers are investigated independently, and that investigations of complaints against scheme agent or WorkCover staff are reviewable by an independent body.***

Unions NSW understands that the Law and Justice Committee unanimously recommended that WIRO's powers be extended to health and safety. The legislative basis for this occurring is yet to be developed and their investigative powers are yet to be described. Enabling

properly structured investigations (funded and empowered to undertake investigations) by third parties and WIRO would provide a suitable mechanism to meet this recommendation.

The Government response is problematic as Unions NSW believes that complaints have been made against WorkCover to the NSW Ombudsman. It is Unions NSW understanding that this evidence was provided to the initial Inquiry, and that the response from the Ombudsman were inadequate.

***Recommendation 11***

***That the Parliament of New South Wales enact laws which protect all workers in the state, including injured workers, from workplace bullying, and that such laws be based on the National Occupational Health and Safety Commission's Draft National Code of Practice.***

Unions NSW endorses such a move and sees no reason that the WHS Act and Regulations cannot be improved immediately. Unions made submissions for this to occur during the harmonisation process, and also during the review of the Code of Practice. The code was supported by several employers.

Without repeating what has been included in previous submissions the placement of such laws fits the health and safety laws.

Unfortunately WorkCover Authority voted at Safe Work Australia against the making of these laws when the Code of practice was contemplated.

***Recommendation 12***

***That the Minister for Finance and Services and the Safety, Return to Work and Support Board establish an independent workplace bullying steering panel to oversee the actions of WorkCover NSW in addressing workplace bullying, both within its own organisation and in other workplaces as the state regulator of work health and safety. The panel must be empowered to require action on its recommendations and sufficiently resourced to perform its role.***

Unions NSW has asked verbally to have discussions regarding recommendations of this Inquiry at senior levels of government. This is yet to occur. The independent panel has not been publicised yet nor have members been called for.

Unions NSW note the Government response.

***Recommendation 13***

***That General Purpose Standing Committee No. 1 conduct a review in late 2014 of the implementation of the recommendations of its 2014 report into allegations of bullying in WorkCover NSW***

This recommendation is contained through the enactment of this inquiry.