

# Australian Education Union



## SUBMISSION

TO THE

## NATIONAL REVIEW INTO THE MODEL OCCUPATIONAL HEALTH AND SAFETY (OHS) LAWS

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**AUSTRALIAN EDUCATION UNION**

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OHS LAWS**

The Australian Education Union represents 175,000 teachers and allied educational staff in the public education system, which includes pre-schools, schools and TAFE colleges, in all States and Territories.

In providing this submission to the National Review into OHS laws the Australian Education Union would wish to express its full support for the position paper and submission paper being submitted by the Australian Council of Trade Unions and the ACTU Charter of Workplace Rights for OHS and Workers' Compensation.

The ACTU paper and submission have been developed in an extensive consultative process with affiliates and is endorsed by the Australian Education Union.

We provide this additional submission in order to express our views on some occupational health and safety issues which the AEU sees to be important in the context of our members in the Education Industry and suggest how the National model OHS legislation could address these issues.

## **1.0 INTRODUCTION**

Informing the AEU's position are the overarching principles that OHS law is:

- Legislation that is designed to protect the health and safety of all workers and all those that attend workplaces in a non-work capacity such as students, parents and volunteers.
- Legislation based on universally recognised democratic principles which includes the right of workers to be represented by a Union and to be fully consulted and to participate in decisions that may impact on their health, safety and welfare.
- That changes to occupational health and safety law must not result in a diminution of the rights and entitlements of any worker.
- That all occupational health and safety laws should be developed in a tripartite manner.

Issues that are fundamental to the AEU's position are:

- An effective, adequately funded and resourced, participatory, tripartite system to implement and oversee the governance of OHS in Australia.
- A system that guarantees a mandated right of workers to participate in a meaningful and effective way into determining control of their occupational health and safety while at work through elected OHS representatives and Committees.
- The ability of States and Territories to determine the application of the national legislation and other OHS related matters in their own jurisdiction provided it does not conflict with or undermine the National system.
- All breaches of legislation must be liable for prosecution or other enforcement action. Enforcement action must not be limited to injury outcomes.
- The onus of proof in prosecutions should rest with the principal duty holder and not the enforcing authority.
- Where death arises from occupational hazards, a criminal charge of industrial manslaughter should be available to the courts with a range of appropriate penalties for Directors and Corporate Officers who have contributed to that death through their negligence.
- The right of unions to enter and inspect workplaces where there is a potential risk to the health and safety of their members.

- The right of unions to intervene with the employer or enforcing authority, in any relevant tribunal and issue resolution process where there are industry wide implications for the health and safety of members.
- The right of a union to prosecute a breach of the OHS legislation where the enforcing authority is unable or unwilling to do so.
- The importance of setting and maintaining the highest standards of duty of care that protect the mental and physical health of workers and prevents chronic diseases that may be caused through work.

## **2.0 LEGISLATIVE APPROACH**

The AEU supports a harmonised approach to OSH legislation with model OHS law supported by model regulations and codes of practice, all developed through a tripartite process. The AEU recognises the right of States and Territories to have supplementary regulation to deal with matters which impact on health and safety within their jurisdiction that does not contradict national OSH law and is not in conflict with the objectives and principles of the national legislative framework.

The AEU supports a system where each State and Territory has a tripartite Occupational Health and Safety Commission established to oversee application of the OHS law in that jurisdiction including implementation of the Act, Regulations and Codes, enforcement, management, education, training, promotion, collection and reporting of statistics, reviewing and implementing research related to Occupational Health and Safety.

The State or Territory tripartite Commission would also examine, review recommendations and decisions of the ASCC (or replacement body) and make recommendations to their own Government Minister and to the ASCC (or replacement body).

## **3.0 DUTIES OF CARE – WHO OWES THEM AND TO WHOM?**

### **3.1 Duty of care relating to employment accommodation**

The AEU supports the inclusion of a duty of care on employers for accommodation provided in connection with employment where the employee has no reasonable alternative for accommodation and the accommodation is essential to the performance of work.

Currently a limited duty of care by employers for accommodation exists in OHS legislation in WA, SA and Tasmania.

The Commission for Occupational Health and safety in WA examined this matter in great detail, over a number of years, following a fatality, in 1996, of Jeremy Scott Corcoran at Mallina Station, WA.

Mr Corcoran, a shed hand with the shearing crew at Mallina Station, was apparently electrocuted as result of contact with a washing machine in the shower block, immediately after showing. The washing machine had become "live" due to an electrical fault. The method of supplying electricity to the shower block and the washing machine itself were both found to be in poor condition, incorrectly wired and potentially hazardous.

Mr Corcoran had finished work for the day and, as he was not at a workplace nor undertaking a work activity, it was considered the circumstances surrounding his death did not fall under the jurisdiction of the *Occupational Health and safety Act*.

Following this specific case, considerable feedback was received regarding the generally poor standard of on-site accommodation on farms and stations. Further, it was suggested that employees and contractors found it difficult to complain, for fear of losing the work. Information received by UnionsWA from workers suggest that some accommodation and workplaces are lacking even in things as basic as toilets and running, potable water.

Early in 2007 two workers were killed and 22 injured when Cyclone George passed over a rail construction accommodation camp situated near Port Hedland, WA. The rail camp was a temporary camp of transportable units built to house 280 construction workers.

Some of the accommodation units broke away from their tie-downs during the cyclone. Some units broke into pieces and this resulted in the deaths and injuries. There were no cyclone shelters and workers were directed to stay in their normal accommodation rather than be evacuated. There is some question about the standard to which the dongas were secured. Information has been provided to the WA Crown Prosecution Service and is under consideration.

Poor living conditions are not confined to agriculture or mining work, employees in almost any type of work in a remote or regional area such as retail, tourism and public services can be exposed to unsafe living conditions.

The Auditor-General of Queensland recently conducted an audit into the management of public sector employee housing in Queensland and found serious shortcomings in maintenance and security. (Report to Parliament No.4 for 2008 Auditor-General of Queensland)

The Education Industry has teachers and allied staff working in hundreds of remote communities and provided with housing, either through their employer directly or through a Government statutory authority, of a variable standard. In some cases this is provided free of charge and in some cases for a subsidised rent. Generally, there is recourse to repairs and maintenance but given the remote nature of the locations contractors are few and far between and many members suffer inordinate delays in having faults rectified. This is particularly a problem currently in WA and Queensland due to the mining boom.

Due to the transient nature of remote communities and variable student numbers and the gender and family circumstances of staff posted to remote communities and some rural locations, it is not unusual for there to be insufficient accommodation. Under these circumstances employees may be housed in caravans, dongas and transportable buildings of a substandard nature. We frequently receive complaints of unsafe wiring, unsafe and insufficient water supplies, poor sanitary facilities, lack of security, asbestos containing materials in poor condition, water leaks to the structure, lack of communication facilities, particularly for emergencies, and lack of air-conditioning. Recent examples are of a remote community without a running portable water supply to the school and employee accommodation for 3 months and one case of an absence of heating or cooling for many months. Leaking septic tanks and broken sewerage contaminates the groundwater supplies which are used for drinking water in many communities. Interruptions to water supply or a breakdown of the chlorination or other disinfection systems are common.

Where there is a lack of secure accommodation, members have been threatened and attacked, and in one case raped, by intruders.

This issue of substandard accommodation that could give rise to injury is a widespread problem in the Education Industry in QLD, NT, SA and WA.

Following the fatality of James Corcoran in 1996, the WA Commission received extensive legal advice regarding the application of the OSH Act 1984 and other legislation.

**Key points from the opinion of the Crown Solicitor's Office concerning the applicability of the *Occupational Health and Safety Act* and other legislation to accommodation provided in connection with work**

- The application of the employer's duty (specifically Section 19(1)(a) of the *Occupational Health and Safety Act* to residential accommodation has never been tested. An argument of considerable force could be mounted to say that residential accommodation amounted to neither a workplace nor part of the working environment as the employee was not in the course of their work at the time when they were in that area.
- The above is not beyond doubt. The advice states that the Act probably does not cover the situation of residential accommodation provided by the employer on a shearing station.

- The concept of “out of or in the course of employment”, which appears in workers’ compensation legislation, was examined. Under that legislation, a person in the position of Mr Corcoran remains in the course of his employment when living in on-site accommodation provided by the employer. However the context of the phrases “out of or in the course of employment” and “in the course of their work” is very different in the respective legislation and it is not clear that decisions with respect to the former can be transferred to the latter.
- Other legislation does to some extent address the problem, although not in a way that provides a significant criminal sanction against substandard or unsafe residential accommodation.
- The CSO seriously doubts whether the *Shearers Accommodation Act 1912* would cover situations such as that of Mr Corcoran. Section 6(1) (which refers to the provision of “proper, adequate and sufficient accommodation for the comfort and health of shearers”) does not refer to safety, and the specifics set out in section 6(2) indicate the section is more concerned with the extent of facilities than safety. In any event the maximum penalty is \$50.  
**(The Shearers Accommodation Act has since been repealed)**
- Regulations under the *Electricity Act 1945* generally apply only to the person performing the work and not the person who may occupy the premises as an employer.
- Provision is made under the *Health Act 1911* for a dwelling house to be declared unfit for human habitation after which it may not be inhabited or occupied. This requires some notice to be issued by the local authority or the Executive Director of Public Health before any criminal liability can arise.
- The *Occupiers’ Liability Act 1985* does not provide for any criminal sanction for premises in a dangerous state. However in circumstances such as that involving Mr Corcoran it is likely, but by no means certain, that the employer will be liable for damages.

The situation was, in summary, that there was no criminal sanction for this situation of dangerous accommodation and no legislation of a nature that could be used to prevent or remedy a health and safety risk prior to it causing harm or injury in WA law.

As a result the WA Government amended the legislation to insert section 23G and 23H. It does not apply to accommodation occupied by an employee who is at a workplace to which Mining and Petroleum legislation applies.

[See 23G(4) and 4(2) below]:

## Division 4 – Duties relating to certain employment accommodation

### 23G. Duty of employer to maintain safe premises

(1) In this section –

**“residential premises” –**

- (a) means residential premises that are situated outside –
  - (i) a townsite within the meaning in section 26(1) of the *Land Administration Act 1997*; and
  - (ii) the metropolitan region as defined in section 6 of the *Metropolitan Region Town Planning Scheme Act 1959*;
- and
- (b) includes land and outbuildings that are intended to be used in connection with the occupation of the premises.

(2) Where –

- (a) an employee occupies residential premises that are owned by or under the control of the employee’s employer; and
- (b) the occupancy is necessary for the purposes of the employment because other accommodation is not reasonably available in the area concerned,

the employer must, so far as is practicable, maintain the premises so that the employee occupying the premises is not exposed to hazards at the premises.

- (3) Subsection (2) does not apply if the occupancy is pursuant to a written agreement containing terms that might reasonably be expected to apply to a letting of the residential premises to a tenant.
- (4) This section does not apply to the occupation of residential premises by an employee who is employed at a workplace referred to in section 4(2).

23H deals with breaches and penalties.

The WA situation was complex because the fault lay in the definition of workplace but to amend this definition would have changed the interpretation of many other sections of the Act.

South Australia and Tasmania have a much simpler provision in OHS and Welfare Act 1986 and the Workplace Health and Safety Act 1995, the wording being identical –

*Ensure that any accommodation, or eating, recreational or other facility, provided for the benefit of the employer's employees while they are at work, or in connection with the performance of their work, and under the control or management of the employer, either wholly or substantially, is maintained in a safe and healthy condition.*

This wording however may be problematic for the accommodation arrangements of teachers and other education workers in some states and territories where the accommodation is provided through a third party such as a government housing authority, in which case it would not be under the control or management of the employer.

The AEU is not advocating that any of these existing provisions be included in a national model OHS Act but that the legislation should provide coverage for employee accommodation where the employee has no reasonable alternative for accommodation and the accommodation is essential to the performance of work.

Insertion of the amendment to the WA legislation regarding employment accommodation has not resolved all of our accommodation issues by any means and there is still some doubt as to its interpretation but has brought about a more responsive attitude towards living conditions in remote communities. For example: the Government Regional Officers' Housing Authority (GROH) is conducting a survey of the condition of asbestos cement containing materials (ACM's) in all Government Housing.

The Department of Education is considering placing water filtration and chlorination or ultra violet sterilisation units in all schools and employee housing in remote communities.

GROH are also providing satellite/cable communication systems to houses in remote community housing to ensure communication is available in emergency situations such as cyclones.

### **3.2 Duty on employer to inform employee who reports a hazard or injury**

The AEU supports inclusion of a clause requiring the outcome of an investigation of the employer into the report of a hazard or an injury to be reported back to the employee as consistent with section 23K of the OSH Act 1984 of WA.

- .... (2) The employer must, within a reasonable time after receiving the report-
- a) investigate the matter that has been reported and determine the action, if any, that the employer intends to take in respect of the matter; and
  - b) notify the employee of the determination so made.
- (3) If an employer contravenes subsection (2) the employer commits an offence.

Although implied in any proper consultation process or issue resolution process, the duty of an employer to report back determinations and actions regarding a complaint or accident needs to be stated. If there is an obligation on employees to report accidents, injuries, ill-health and hazards, there needs to be a reciprocal obligation to respond and report back.

This is often overlooked in the Education sector, particularly in the case of student behaviour, work related stress and, work place bullying, where members advise the relevant union of lack of action, investigation or response. The employer often sees these matters as “normal” and “inevitable”. As a result the hazard remains without intervention or control. The employer also frequently cites “confidentiality” as a reason for not reporting back to the employee.

### **3.3 Employers’ Duty of Care to Provide OHS Training to Managers**

Throughout all states and territories training for “Principals” or “Managers” although offered is not generally seen as obligatory. Employers should be required to train managers in OHS to a level consistent with their responsibility and keep relevant records. This could also be considered a performance indicator against which Government and business need to report against in annual reports, e.g. number of managers trained. In the Education sector, educational or professional matters tend to take priority in terms of attendance at professional development or training. OHS is not seen to be “core” business and many managers do not attend OHS training.

### **3.4 Control**

Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?

Various duties and duty holder obligations cannot be delegated. In instances where duties between duty holders operate concurrently and overlap the primary duty to ensure worker health and safety is protected must reside with the employer.

While it is accepted that responsibility for occupational health and safety can be delegated down the management line, managers must only be held responsible for matters within their control.

The delegation of the day to day management of OHS can be problematic in schools, especially when trying to resolve issues.

In Education we have a central Education Department in each state with the ultimate responsibility for OHS matters. However, we have several hundred workplaces under the day to day control of a “Principal” or “Manager”. These persons have limited budgetary control and issue resolution frequently comes to a halt when the Principal or Manager is advised there is no money in the budget to provide the required remedy.

Despite a recognised breach of the legislation existing, the Principal or Manager has no power or maybe coerced into not progressing the matter. This could be overcome if there was a duty on appointed persons, officers, principals or managers to report to the enforcing authority a breach that exists that cannot be resolved at the workplace.

This may go some way to preventing intimidation and discrimination against these persons with delegated authority but limited power to resolve OHS issues.

#### **4.0 CONSULTATION, PARTICIPATION AND REPRESENTATION**

4.1 The AEU believes that workplace health and safety representatives are fundamental to achieving improvements in health and safety. The WA government stated:

“Recognising, valuing and supporting the role played by elected workplace health and safety representatives is the **key to improving workplace safety ...**”<sup>1</sup>

Given that the AEU has coverage of members in a great deal of small workplaces, we do not support the right to form an OHS Committee as a substitute for the right to have worker representation through elected OHS representatives. OHS Committees may be impracticable in some education workplaces.

Consultation with workers should be required under the Act and underpinned by a definition and a specification on who needs to be consulted, when and how that should occur and be facilitated.

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<sup>1</sup> WA Government Media Office Ministerial Media Statements 29/10/04

Failure to consult adequately on OHS matters is a frequent cause of disputes in the Education sector, as in all industries.

The fact that the Education sector is characterised by a central overarching governing department with several hundreds of workplaces, often geographically distant from the central bureaucracy makes consultation problematic and as a result it is often ignored or overlooked. This is where the requirement to consult the relevant unions is really important to ensure adequate expertise is applied to the issues and to ensure that consultation does occur. Unions generally have the democratic structures to ensure that workers have a genuine input into matters affecting their health and safety and the Education unions have a significant membership density in all States and Territories to ensure that participation in decisions affecting OHS are maximised.

## **4.2 Right to Cease Unsafe Work**

- Q67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?
- Q.68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?
- Q.69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?

The AEU supports the right of an individual to cease work considered to be unhealthy or unsafe and also for an elected health and safety representative to order the cessation of work where workers that they represent may be exposed to injury or ill-health. This should be specifically stated in the model OHS Act.

These rights should be backed up by strong protections against victimisation and discrimination of individuals and health and safety representatives. Workers should be entitled to stop work on full pay until the issue is resolved.

In many jurisdictions these rights exist but in some cases the wording of these sections is currently problematic and doesn't provide the worker the ultimate protection from harm which is embedded in common law.

In some jurisdictions workers can only exercise this right where the harm to themselves or others is "imminent and serious". Legal advice suggests that it is a fairly difficult test to meet particularly in the case of disease inducing hazards or psycho-social hazards such as violence, bullying and stressors even though the consequences may be very severe.

Psycho-social hazards are major contributors to injury and ill-health in the education sector.

The percentage of workers compensation claims caused by mental stress across all jurisdictions and for most industries is approximately 2%. Across Australia, the percentage of the total claims for mental stress, in public education systems, is approximately 10% and it is as high as 19% for the Department of Education and Early Childhood Development in Victoria.

In 2008 in WA it is reported by the Education Department that more than 600 teachers and other school staff have been assaulted or abused, 480 of which were physical attacks. The true figure would be far higher as many assaults are not reported.

Problems have arisen for our members who feel that their health and safety is seriously threatened for example in the case of working with violent students. Cases have arisen where violent students place education workers and those in their care at risk or injury, but the employer has refused or is unable (due to other legislation governing Education) to take action to remove or control the hazard. It is difficult to assess or demonstrate that the risk is "imminent" in a legal sense. Yet we know that it is extremely likely that harm or injury may arise.

Such a test is also difficult to prove in the case of exposure to chemicals or substances that may cause diseases of long latency such as asbestos.

Ill-health through work related stress, is generally characterised by a progression over time rather than a single one-off situation, although there comes a point where an individual has not been able to resolve their concerns with their employer that they should be able to refuse to expose themselves to further stressors.

It is requested that any legislative right to refuse to work should be worded in a way that takes account of these situations and that the word "imminent" not be included in a "right to refuse unsafe" work provision.

Wording such as "... given the nature of the threat and the degree of risk, work should immediately cease ..." or "... where to continue work would expose the worker or others to a risk of serious injury or harm" would be a more reasonable test to have to meet.

The Department of Education and Training in WA are specifically using the wording in the legislation of "*imminent and serious*" to deny workers their right to protect themselves from persistently violent students along with the provisions in equal opportunity or anti discrimination legislation. Workers are bullied and threatened and have even been served with written directives to include violent students in classes, even though refusal to work is generally only initiated in extreme circumstances and when the employer has refused to initiate the "issue resolution" process.

## **5.0 PROSECUTIONS**

Q110. Who should be entitled to commence criminal proceedings?

- 5.1 The AEU believes that it is an essential aspect of an OHS regulatory system for the prosecution of offences, whether in criminal or civil proceedings, for trade unions having a legitimate interest in the circumstances of an offence to be permitted to prosecute where the regulator is unable or unwilling to do so.

This allows trade unions having extensive experience in a particular industry or workplace to use its expertise and resources to bring about organisational and cultural change. This has been demonstrated by the NSW Teachers Federation which has initiated successful prosecutions against the NSW Education department for breaches of the OHS legislation in respect of violence against its members.

The NSW Teachers Federation has prosecuted the NSW Department of Education and Training (DET) twice using the right to prosecute conferred on secretaries of registered industrial organisations of employees under Section 106 of the NSW Occupational Health and Safety Act 2000. In part because of the high costs involved, the Federation has only prosecuted where the breach has been significant and as a last resort following the failure of other attempts to address problems. It has also only prosecuted where it became necessary to drive system-wide improvements.

The Federation's prosecutions, both successful, related to the failure of the DET's failure to protect the health and safety of teachers from violent student behaviour at two Sydney schools, Dover Heights High School in the eastern suburbs and Rowland Hassall School for Specific Purposes (catering for students with intellectual disabilities) at Parramatta. Both prosecutions canvassed the failure of the DET to provide information it held and/or could have reasonably obtained, on violent students and had failed to make available to teachers at the school when the students were enrolled. It was argued in both cases that this failure had led to significant injuries to teachers in the schools. In the case of the student at Dover Heights, it was fortunate that a knife-wielding student was disarmed by building workers before he could stab a teacher and students he was pursuing. Two of the four teachers involved at Dover Heights did not recover sufficiently from their injuries (psychological) to return to teaching. In the Rowland Hassall case, a teacher was physically assaulted, with severe bruising, lacerations and a broken tooth.

The DET was convicted of failing to protect the health and safety of teachers at Dover Heights High School in March, 2006 and fined \$220,000. In September, 2006 the DET was convicted of failing to protect the health and safety of teachers at Rowland Hassall SSP, followed by a fine of \$105,000 imposed in June, 2008.

The first of these prosecutions was only commenced by the Federation after discussions entered into with the DET to secure improvements in inadequate DET policy and procedures concerning enrolments of students with a history of violence and the provision of relevant OHS information to teachers were unsuccessful. The Federation also unsuccessfully sought assistance from WorkCover NSW to have the DET address the matters. These discussions were sought by the Federation after the Federation obtained workers compensation figures which indicated approximately 27% of successful workers compensation claims by teachers in the DET were for psychological injury, with many of these related to workplace violence, and after a survey of members indicated that there were over 7,000 separate acts of violence (using WorkCover NSW's definition) directed against teachers in DET workplace within a one month period. The survey also made it clear that many teachers were being injured because they were not being provided with relevant information about students with a history of violence and that the employer was not facilitating risk assessments and risk management plans, all requirements under the OHS Act 2000.

As a result of both prosecutions, significant improvements were introduced which have contributed to NSW public schools and TAFE colleges becoming much safer.

Within months of first prosecution commencing in December, 2003 the DET changed its Suspension and Expulsion of Students Policy to make it mandatory for the suspension of students whose violence had resulted in pain or injury and included explicit provisions requiring risk assessment and control measures to put in place before the return of such students could be considered.

Further very significant changes occurred between the conviction in 2006 and the conviction in September 2006. These were set out in *Legal Issues Bulletin* No 40 issued to all schools and TAFE colleges in NSW on May 17, 2006. Although the *Legal Issues Bulletin* is headed "Collection, use and disclosure of information about students with a history of violence", it spells out clearly the procedures that must be followed when any current DET student is seeking enrolment in any other DET school or TAFE college or when an existing student is violent. Importantly, it also provides clear procedures to be followed when a student is seeking enrolment from a Department of Community Services or Juvenile Justice institution, a private school or interstate.

*Legal Issues Bulletin* No 40 makes it clear that:

- Violence is not restricted to physical acts. It includes "threats to commit violence, aggressive behaviour which is non-contact in nature and may also include offensive, aggressive or abusive language directed to staff or students".
- Staff must be provided with all relevant information about any risk they may be exposed to and be "provided with any information necessary to ensure the employee's health and safety". This includes new teachers, casual teachers and support staff as appropriate.

- "Staff must be consulted at all stages of the risk assessment process."
- Advice and resources can be sought from the Region via the School Education Director.
- A student seeking to transfer from one DET school to another DET school is not allowed to attend "until the relevant student records from the previous school have been received and any risk assessment considered necessary is completed, and appropriate solutions, including control strategies, are commenced".
- If a student is seeking enrolment from a private school or interstate and there are reasonable grounds to suspect that the student has a history of violence, enrolment is not to be completed if parents do not give permission to obtain records or if the private/interstate school declines to provide the information. In such circumstances the matter is to be referred to the regional DET office to resolve. Similar arrangements also apply to access information held by the Department of Community Services, Juvenile Justice, Health or similar agency.
- TAFE colleges can, with student's permission, access DET and private school records where there are reasonable grounds to suspect that the student has a history of violence. If a student declines to provide permission the enrolment has to be rejected.
- Information must be obtained and risk assessment occur if violence occurs at any time after a student is enrolled in a school or TAFE college, regardless of the initial assessment.
- School counsellors must provide relevant information about violent students. When doing so to meet obligations under the Occupational Health and Safety Act, there is no breach of privacy or of professional ethics.
- Principals and TAFE institute managers must ensure "that any violence related incidents occurring in schools or institutes are full [sic] documented and the records retained."

In December 2006 the NSW Government amended the Education Act to provide for the exchange of information regarding students with a history of violence transferring between public and private schools, and for the exchange of information between authorities in different states. It also gave the NSW Director-General of Education and Training the power to direct the enrolment of students with a history of violence in schools with appropriate resources, including special schools and units established to cater for students with a significant history of violence.

In 2007 the NSW DET commenced a program designed to provide every student with a unique identifier number to ensure that any student with a history of violence could be easily tracked if they changed schools.

As a consequence of these changes, there is no doubt NSW public schools are safer, with the DET also reporting to the Federation a significant decline in psychological injury as represented by workers compensation claims.

The prosecutions against the NSW Education Department have influenced other Departments of Education such as that in WA to take the issue of violence against staff more seriously and are implementing preventative measures such as behavioural centres, new enrolment procedures, and an increase in psychological and other support services.

The right of a third party to prosecute allows the prosecution of offences that may fail the “public interest” test applied by the Government in most jurisdictions or where there is the appearance or actual conflict of interest on the part of the regulator. This is particularly important for public servants where there seems a reluctance on the part of the regulator to prosecute government Departments.

In WA there was a particular case which was recommended by the regulator and the Department of Public Prosecutions for prosecution. It related to the suffocation of a child in a grain silo in Esperance. The suggestion that the farmer, who was the father of the child, be prosecuted caused a public outcry from the community and the powerful farming lobby. The decision of the regulator was based on the findings of an extensive investigation and was not taken lightly. Eventually the WA Government capitulated and decided it wasn't in the public interest. There has recently been an incident under similar circumstances in Esperance. Had the initial prosecution proceeded maybe it would have raised awareness and vigilance when working with grain silos and prevented similar incidents.

The independent right for trade unions to prosecute may encourage employers to actively involve trade unions in the management of OHS issues.

The right for trade unions to prosecute breaches of OHS legislation is not a power that will be used indiscriminately as prosecutions are resource intensive. Prosecutions are difficult to prepare and expensive to conduct. Very few prosecutions initiated by trade unions in NSW have been unsuccessful. There is no evidence that the NSW legislation has been abused in this respect.

## **5.2 Other Sentencing Options**

Options should exist for courts to provide penalties in addition to fines such as publicity orders and enforceable undertakings. Monetary penalties are likely to have a low impact on Government Departments and large fines are likely to impact on the community in other ways. Other sentencing options should not however be seen as an alternative to fines.

## **6.0 OTHER ISSUES**

### **6.1 Unions ability to influence OHS through awards and agreements within their industry**

This has significantly diminished with the impact of Industrial Legislation changes. OHS is not an allowable matter under federal awards. This prevents the Victorian Education Union from incorporating OHS matters into awards and agreements.

The State School Teachers' Union of WA has had extensive provisions relating to the OHS of its members for 12 years in Certified Agreements however in negotiations for a new agreement the Department of Education and Training has refused to include any OHS matters. They have submitted an Enterprise Order to the Industrial Relations Commission of WA which excludes previously included OHS provisions. Generally other States and Territories tend to pursue similar lines in Agreements and this may happen in other States and Territories.

This fact makes it very important to the AEU that National Model Legislation will address the OHS hazards in our industry such as violence, workplace bullying and work related stress, employee accommodation and other matters raised in this submission.

### **6.2 Workplace Bullying**

Workplace bullying is inherent in the education industry. In WA approximately 13% of all workers' compensation claims for mental stress are caused by bullying and harassment.

Workplace bullying is difficult to address in all workplaces and as a result most states and territories have produced codes of practice or guidance notes and some states such as South Australia have included provisions in their Act. WA currently has amendments to the OSH Act before Parliament <sup>2</sup> which provide specific provisions to deal with workplace bullying disputes, other states have relevant regulations.

The AEU supports specific reference to the OHS hazard of workplace bullying to be included in a National OHS Act and specific provisions for preventing and dealing with workplace bullying.

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<sup>2</sup> Industrial & Related Legislation Amendment Bill 2007

The proposed amendments to the WA OSH Act incorporate a mechanism to refer disputes regarding workplace bullying that cannot be resolved at the workplace to be referred to the OSH tribunal of the Industrial Relations Commission. The proposed legislation would give wide ranging powers to the Tribunal to deal with the bullying of one or more employees and to order conciliation and mediation and the ability to grant various remedies such as:

- order a person to do or refrain from doing any specified work or engaging in specific behaviours
- order the employer to make specified arrangements to deal with bullying
- order persons to participate in specific courses at their own expense
- make a declaration that a person engaged in bullying
- orders as to costs if the proceedings have been frivolously or vexatiously instituted or defended.

The experience of the AEU is that workplace bullying issues are notoriously difficult to deal with under the OHS legislation and grievance procedures available. Regulations are generally limited to dealing with specific breaches of the legislation and not equipped to deal with or resolve individual cases.

The impact of workplace bullying on individuals and the workplace as a whole can be severe and the longer disputes go unresolved, the more severe the impact. The AEU supports legislation specific to workplace bullying similar to that proposed in WA. It is considered this would provide an incentive to the relevant parties to deal with bullying matters in a more expeditious manner thereby minimising the impact on individual workers, their colleagues and the workplace.

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The AEU wishes to reiterate its endorsement of the ACTU submission to the National Review into Model OSH Laws.

Where there is no comment on a specific issue raised in the Issues Paper it should be assumed that the AEU position is that of the ACTU.

**APPENDIX A**

**Australian Education Union  
Policy on Occupational Health & Safety**

**Australian Education Union**

**Policy on Occupational Health and Safety**

**As adopted at the 2001 Annual Conference**



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# Australian Education Union

## Policy on Occupational Health and Safety

### 1. Preamble

1.1 The AEU recognises that one of the major struggles of the trade union movement has been for the prevention of injury and ill health caused by the working environment and it is still a key issue in the working lives of our members.

1.2 The AEU believes that a preventative approach to occupational health and safety issues is critical to the provision and maintenance of safe workplaces.

The AEU believes that every education worker has the right to a workplace that is as far as possible free of risks to the mental and physical health of all education workers.

1.3 The AEU also recognises the occupational health and safety of its members is a key organizing and recruitment tool and is a key issue in its defence of quality public education.

1.4 The AEU believes that the provision of the highest achievable standards of occupational health and safety is a right of all working people and it is the responsibility of governments and employers to improve and maintain standards in Australian workplaces.

### 2. Principles

2.1 The AEU supports a system of legislation, regulations and codes of practice that dictate the obligations of employers, occupiers and owners of workplaces that provide for the rights of employees and other persons that enter workplaces or might be affected by the activities conducted at workplaces. Manufacturers, suppliers and designers of plant, substances and builders/contractors must also be subject to OHS law. These standards must be vigorously enforced and promoted by government inspections that are adequately resourced.

2.2 All breaches of legislation must be liable for prosecution or other enforcement action. Enforcement action must not be limited to injury outcomes.

2.3 Where there is prima facie evidence that death, injury or ill health was caused by occupational hazards the employer must have the burden of proving that they were not negligent.

- 2.4 Where death arises from occupational hazards, a criminal charge of industrial manslaughter should be available to the courts with a range of appropriate penalties for those who have contributed through their negligence to that death.
- 2.5 Improvements in workers health and safety should be won through reducing the risk from hazards at source and modifying the workplace to fit the needs of people, rather than through modifying people's behaviour, or adapting them to fit the demands of a hazardous workplace.
- 2.6 The victims of occupational injury and disease should be compensated by a range of statutory and common-law remedies.
- 2.7 All sick and injured workers should be given assistance with rehabilitation back into the workplace on request and that the rehabilitation process should be fair and compassionate. The aim of rehabilitation must be to return injured workers to meaningful employment, which provides comparable salary and conditions to their pre-injury employment.
- 2.8 The achievement of safe workplaces must be based on a consultative process with elected occupational health and safety representatives that are adequately trained and provided with time and resources to ensure their effective participation. The rights and roles of these elected representatives must be embodied in legislation.
- 2.9 Employers must recognize the rights of Unions to participate in determining conditions at work to ensure the health and safety of their members.
- 2.10 The AEU Branches will vigorously support their elected safety representatives in the workplace to pursue better OHS conditions by providing advice, guidance support and relevant training or ensuring that relevant and appropriate training is available to them.
- 2.11 The AEU will defend the rights of union officials to enter and inspect workplaces and will campaign for the legal right for unions to initiate prosecutions for breaches of OHS laws.
- 2.12 The AEU supports a tripartite National Occupational Health and Safety Commission whose role will be to:
  - a) Develop and implement national OHS standards and codes of practice for existing and emerging health hazards.
  - b) Conduct and support independent research into occupational health and safety matters and to coordinate national research efforts.

- c) Promote development of advice and guidelines on the integration of OHS into industry training packages, new apprenticeships and into the education or training of managers, designers and OHS professionals.
- 2.13 The NOHSC must be adequately resourced by Government and this must include funding for the participation of the parties to the Commission.
- 2.14 Employers in the Education Industry must recognize that they have a duty of care to employees outside of the immediate workplace for activities connected to work.
- 2.15 The AEU believes that Government employers should not only comply with minimum OHS standards but must strive to achieve best practice and lead other employers by example.
- 2.16 Where Education Industry employers, whether they be Government or not, breach OHS legislation, they should be subject to enforcement practice and penalties consistent with those applied to other employers.
- 2.17 Employers must provide adequate training to all employees to ensure that they can work safely and without risk to health of themselves or others.
- 2.18 Employees have an obligation to work safely and not to harm the health of other employees or persons that might be affected by their work.
- 2.19 Employers have an obligation to monitor safety performance at the worksite and to assess the OHS performance of their managers.
- 2.20 The AEU believes and will vigorously support the right of employees to refuse hazardous work or to work in an unsafe place or situation.
- 2.21 The AEU will strongly pursue industry or enterprise agreements which advance the OHS of education workers and do not result in risks to safety or health.