# Bullying and Harassment at Work

→ Issues Paper: **A Summary**

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# Purpose of this Paper

In New Zealand, we want everyone to enjoy healthy and safe workplaces, and this includes being free from bullying and harassment.

This Issues Paper outlines what we know about the nature and extent of bullying and harassment at work in New Zealand, and examines current systems for preventing and responding to such behaviour.

We are seeking feedback from individuals and groups who have considered or have experience with these systems. We want to hear how systems and policies are working to prevent and respond to bullying and harassment, what areas are working well and not so well, and what opportunities for improvement there may be.

Your views will be incorporated into our workplace bullying and harassment project and will help us develop future policies and guidance in this area.

# Introduction

This paper provides an overview of the nature and extent of bullying and harassment at work in New Zealand and current systems for preventing and responding to such behaviour.

If you wish to look at any of the areas made in more detail, a more in-depth discussion of these topics can be found in *Bullying and Harassment at Work: Issues Paper – An In-depth Look* at [www.mbie.govt.nz/bullying-and-harassment-at-work](www.mbie.govt.nz/bullying-and-harassment-at-work).

We want your feedback on the scale, nature and drivers of the bullying and harassment at work, and how regulatory systems overseen by the Ministry of Business, Innovation and Employment (MBIE) may be improved to address these issues. There are questions included in this document, and more in the full report, that can help guide your submission.

This Issues Paper is concerned with all forms of bullying and harassment (including sexual harassment) that occurs at work.

The main focus is on how well the systems and responsibilities established under work-related regulatory systems are preventing and responding to bullying and harassment at work. This includes the detail and operation of relevant parts of the *Employment Relations Act*, the *Health and Safety at Work Act* (HSWA) (both administered by MBIE), and to a lesser extent, the *Human Rights Act* (administered by the Ministry of Justice).

It is largely focused on identifying improvements to the work-related regulatory systems and not the broader societal context in which bullying and harassment can occur. While mentioned, cyberbullying and criminal activities covered by the *Crimes Act* and the *Harassment Act* are out of scope.

# Bullying and harassment at work in New Zealand

Bullying and harassment at work is a complex and serious problem in New Zealand. Available research on workplace bullying suggests that New Zealand has higher rates of bullying than comparative countries, with some sources suggesting as many as one in five workers may be affected each year.

Women and minorities experience the highest levels of bullying and harassment at work. Māori report a higher incidence than Europeans (12.7 per cent compared to 10.8 per cent). Migrants, trans and non-binary New Zealanders and people with disabilities are also at relatively higher risk of bullying and harassment in the workplace.

Bullying and harassment rates also vary across industries. StatsNZ's 2018 Survey of Working Life revealed the industries with the highest reported bullying and harassment rates were health care and social assistance (18.8 per cent), public administration (18.1 per cent), and education and training (14.6 per cent).

When an individual experiences bullying and harassment at work, the impacts often go beyond the work environment. It can also impact their wellbeing in a broader sense through health issues, ranging from anxiety and self-esteem concerns, to stress, depression, post-traumatic

stress disorder and suicide attempts. These can limit an individual's ability to remain in paid work or participate in society.

# Sexual harassment

Sexual harassment fits within broader patterns of bullying and harassment, but also has its own distinct characteristics and impacts. Sexual harassment represents a unique abuse of power at work. Key characteristics of sexual harassment are:

- It is unwelcome or offensive sexual behaviour
- It is repeated or serious enough to have a harmful effect, or carries an express or implied threat or promise of differential treatment
- The intentions of the perpetrator are irrelevant to whether harm actually occurred.

The limited data sources available suggest that sexual harassment at work is a widespread issue in New Zealand. The full extent of the issue is unknown – as with family violence and sexual violence, sexual harassment is believed to be considerably underreported.

If an incident of sexual harassment occurs at work, it may be necessary to think about responses in a different way to other forms of bullying and harassment. There are a variety of reasons for this, including social norms and workplace power imbalances deterring victims and bystanders from taking action and the need to avoid retraumatisation of victims.

# Good practice

Good practice suggests that there needs to be a strong focus on both preventing bullying and harassment from happening in the workplace in the first place and in developing effective systems to respond to incidents that occur.

We can break down good practice into what it looks like at a system level (ie, government processes and legislation), at a business level and for individuals.

| *Good practice for prevention* | |
| --- | --- |
| System | <ul><li>Provides clear leadership in the health and safety system for the prevention of harm from psychosocial risks</li><li>Provides clear evidence-based guidance on how to prevent bullying and harassment</li><li>A whole-of-government approach to addressing psychosocial risks at work</li></ul> |
| Businesses | <ul><li>A healthy and respectful workplace culture where bullying and harassment is not tolerated</li><li>Capable management – in particular, managers and human resources being trained to spot problematic behaviour, and deal with it, early</li><li>Strong leadership – role modelling positive behaviours and setting the 'tone from the top'</li></ul> |

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|---|---|
| | • Diversity and inclusion built into businesses |
| | • Proper resourcing levels and support, including appropriate staffing levels and clearly defined roles |
| Individuals | • Can identify bullying behaviour and distinguish between bullying and appropriate behaviour (eg, reasonable management action can sometimes be seen as bullying) |
| | • Know how and when it is appropriate to respond to low-level incidents (as victim and as bystander), and have the confidence and support of their organisation to do so |

Unfortunately, a focus on prevention isn't going to prevent all instances of bullying and harassment in the workplace. This means that having a good practice for responding to issues is also vital. Good practice for responding will look different in different circumstances.

| *Good practice for responding* | |
|---|---|
| System | • Shaped to allow for and encourage early intervention and early resolution to problems |
| | • Fit-for-purpose enforcement tools in place and used |
| | • Process and options are clearly defined and widely understood |
| Businesses | • Evidence-based policies and procedures in place to manage bullying and harassment |
| |    o Managers and human resources are appropriately trained to use these policies |
| |    o Ensuring all staff are aware of the policies and procedures and what to do if they experience or witness bullying |
| |    o Enough flexibility in response options to appropriately deal with different circumstances or kinds of harassment |
| | • Provide support to individuals who are experiencing bullying and harassment or have been accused of bullying and harassment |
| | • Processes in place to spot bullying or harassment |
| Individuals | • Awareness of policies and procedures, and where to go for information and support |
| | • Effective bystander behaviour ('active bystanding' includes report, call out, check in and defuse steps) |

# What happens in New Zealand

## Prevention

Under the Health and Safety at Work Act, businesses have a primary duty to do what is reasonably practicable to ensure the health and safety of workers and others is not put at risk by their work. The health and safety system covers all types of working relationships (not just employer–employee).

This means that businesses should have a focus on eliminating or minimising the risk from bullying and harassment at work. This should include risk assessments and management practices to identify factors that may give rise to bullying and harassment, and consideration of how identified risks should be managed.

One of the most effective ways to minimise such risks is to review, and modify if necessary, the culture within an organisation. This involves businesses taking a proactive role in identifying potential cultural factors that may give rise to bullying and harassment at work, and putting appropriate controls in place to minimise the risks.

WorkSafe, as the regulator of the HSWA, provides a range of guidance on its website to support businesses with risk assessment and management practices to minimise the likelihood of bullying.

A relatively high proportion of businesses report that they have risk management practices and/or processes to manage risks to mental health (including bullying and stress) in place. However, the continuing high prevalence of bullying and harassment at work despite this suggests having a policy in place may not be enough, and that businesses may not be adequately focusing on, or properly identifying and assessing, risks from bullying and harassment at work.

An important element that weaves through the above process is the need for clear information, training and instruction on identifying bullying and harassment and best practices to prevent and respond to it. There are several organisations that provide targeted training and support for New Zealand businesses to help them meet their obligations.

## Response

Bullying and harassment can be a difficult issue to raise, particularly as workers may be concerned that it could impact their future employment. Sexual harassment can be particularly difficult to raise due to its traumatic nature. In many cases affected parties will choose to leave their employment rather than raise the issue. Stakeholder feedback and calls received by MBIE's employment services and health and safety at work helplines suggest that there is still a lot of confusion on what is considered bullying and harassment and what to do when it occurs.

Under the Employment Relations Act, employers are required to respond to and address complaints regarding bullying and harassment at work as part of their duty of good faith and to provide a safe workplace. When a concern or complaint is raised, the response taken should be impartial, fair to all parties, guided by the rules of natural justice, and take into account the

nature of the issue and wishes of the person who raised it. Businesses have indicated they understand the importance of working through the 'good faith steps', but find the requirements difficult to understand and are aware that if they make a procedural error it may become grounds for a personal grievance. We have heard concerns from employees that rather than a focus on resolution, the issue is often responded to as a legal matter, with internal investigations focused on protecting the business. We have also heard concerns around the quality and impartiality of independent/private investigators.

If the business or organisation does not appropriately respond to an issue raised about bullying or harassment at work, many workers will simply change jobs. However, if they wish to seek a further response, there are various options that a person may take. We have heard that it can be difficult for people to know which option is available and best for them.

Often workers are referred to the employment relations system. This system includes the following stages for escalating an issue:

- **Mediation** – The focus of mediation is to help the parties resolve the problem. It is voluntary, impartial and confidential. Mediation services are available to anyone in a work-related relationship (including contractors).

  We have heard concerns about this stage regarding access delays, the impact and qualification of external representatives, parties feeling pressured into accepting settlement agreements, and the use of non-disclosure clauses in settlement agreements. A common concern was that mediation services are not currently seen as providing low-level resolution services, but viewed as a formal and adversarial process, generally involving lawyers and focused on negotiating settlements.

- **Lodging a statement of problem with the Employment Relations Authority (ERA)** – The ERA is an investigative body with the role of resolving employment issues. Only employees (including homeworkers and persons intending to work) are able to seek a determination from the ERA. Sexual and racial harassment are identified in the Employment Relations Act as grounds for a personal grievance. While bullying is not specifically referred to in the Employment Relations Act, a failure to appropriately respond to, and address, complaints of bullying has been determined to be a breach of the employer's obligations and therefore grounds for a personal grievance.

  We have heard concerns about this stage regarding the requirement that an employee must raise a personal grievance with their employer within 90 days of the alleged action, the appropriateness of cross-examination for bullying and harassment (particularly sexual harassment), and the amounts of compensation awarded.

- **Challenging an ERA determination in the Employment Court** – If a party does not agree with a written determination of the ERA, they can have the matter considered by the Employment Court.

  We have not heard any specific concerns relating to this stage in the process. This likely reflects the emphasis placed on resolving issues prior to reaching the Employment Court. However, concerns have been raised regarding the risk of re-traumatisation when a person is required to repeat their experience of traumatic events if they do escalate the issue through all these stages.

Alternatively (or in addition), depending on the nature and seriousness of the issue, a worker may be able to take their issue to:

- **WorkSafe New Zealand** – as a health and safety concern. WorkSafe has a high threshold before it will intervene in cases of alleged bullying at work. A decision to refer a case to investigation requires a specialist medical diagnosis of a serious mental health condition *and* a link to bullying at work as the cause. To achieve a conviction under the HSWA there is a higher burden of proof required, compared to a determination under the Employment Relations Act. We have heard concerns about the small number of investigations regarding bullying or harassment undertaken by WorkSafe.

- **the Human Rights Commission New Zealand** – the Human Rights Act does not deal with bullying or harassment of a general nature, but protects people from being bullied or harassed based on a characteristic covered by the Act (such as a disability or sexual orientation). The issue will first be considered by a free, confidential and impartial dispute resolution service. If it is not resolved, the individual can then take their case to the Human Rights Review Tribunal or the Ombudsman.

While out of scope of this Issues Paper, in some circumstances a person may be able to take their issue to:

- the Police – the bullying or harassment may be a criminal offence under the Crimes Act (if physical or sexual harm occurred), or harassment under the Harassment Act

- Netsafe – if the bullying or harassment included serious or harmful repeated communications, it may be covered by the Harmful Digital Communications Act.

In some countries, where a person is unable to continue their paid work due to a work-related health issue, they may be eligible for a form of workers' compensation. In New Zealand, this is not the case, as the Accident Compensation Scheme only covers mental health conditions in limited circumstances (eg, mental injuries due to criminal sexual acts). People who experience mental injury instead generally receive treatment under the public health system and may be eligible for financial support under the welfare system.

# Issues and opportunities for improvements

## Prevention

At the system level, it appears there is scope for clearer and more visible leadership for the prevention of harm arising from bullying and harassment at work. Good practice in addressing workplace bullying and harassment is the right combination of clear guidelines for managers and staff, a culture of respect for colleagues and staff, and a set of workplace procedures to deal with issues as they arise. Available information tells us that workplaces in New Zealand often have one or two of these elements, but rarely have all three. Even more rarely do businesses use incidents of workplace stress or conflict to develop their systems and ensure that managers and staff know how to identify and effectively address workplace bullying and harassment.

Initiatives to prevent workplace bullying and harassment are most effective if resourced appropriately and if managers and workers know how to access these initiatives when required. While a range of resources to assist in developing initiatives are available it appears more support is needed to help businesses effectively implement them. This could include a greater focus on training (eg, in conflict resolution or building respectful workplace cultures) or development of management capability.

Another suggested opportunity is the development of a front-footed navigation service to pool together resources on bullying and harassment from across the system. This could operate as a 'one-stop' service to help businesses and workers know what to do regarding bullying issues and give them the confidence that they are using the right channels and resources.

There is a significant amount of work that can be done in New Zealand, given the right focus and resources. If parties shifted their focus from incidents of bullying and harassment after they have occurred to building healthy and respectful workplaces, it appears workers and businesses could benefit hugely.

## Response

A key issue is that when a person experiences bullying or harassment at work, this is not being identified or raised until the issue has escalated, in whatever form the escalation may take. The earlier a concern or issue is responded to, the more likely it is to be resolved rather than escalated. Improvements are therefore needed to help:

- workers to feel able to raise concerns early, rather than waiting until the behaviour has gotten worse and they feel the need to make a formal complaint

- businesses to feel able to respond in less formal ways (where appropriate), including considering whether changes targeted at their overall culture are needed, rather than treating it as a formal employment issue. Workers and businesses should engage with mediation services earlier, while the focus is still on resolving the issue within the employment relationship, rather than reaching a reasonable exit package for the worker.

Resolving workplace bullying and harassment issues earlier would also reduce the risk of re-traumatisation. When an employee does feel the need to escalate their issue up the employment relations pathway, the feedback received suggests improvements are needed to improve accessibility, reduce associated costs, and reduce the risk of re-traumatisation. Any changes to the employment relations system need to be carefully considered given the range (and at times interdependence) of issues covered by this system, the complexity of bullying and harassment issues, and the importance of ensuring natural justice for all parties.

There may also be opportunities to improve the interfaces between the regulatory systems. For instance, if the ERA or the Employment Court identifies a potential ongoing safety risk in a particular business, it could potentially refer this to WorkSafe to consider.

A related consideration is whether WorkSafe should increase its role in engaging with, and supporting change in, sectors or organisations where an ongoing risk of bullying or harassment has been identified.

# What's next

The feedback received in response to this Issues Paper is will be used to inform upcoming work on the workplace relations and safety regulatory systems, and to identify other areas change may be needed. Work that will be impacted by feedback on this Paper includes:

- consideration of whether there are potential operational improvements that can be made to the services and information provided by regulators and operational agencies; in particular, MBIE's Employment Services and WorkSafe
- upcoming reviews of the disputes resolution system under the Employment Relations Act and selected aspects of the HSWA
- longer-term consideration of psychosocial risks at work and how they are covered and managed by the health and safety system.

# Have your say

MBIE is seeking written submissions from the public (including businesses, workers and other stakeholders) on the issues raised in this document by 31 March 2021. Questions are posed at the end of this Issues Paper to guide your submission.

You can make your submission:
- by completing the short online survey at MBIE's website: www.mbie.govt.nz/bullying-and-harassment-at-work
- by sending your submission as a Microsoft Word document to: HSWRegs@mbie.govt.nz
- by mailing your submission to:

> Issues Paper on Bullying and Harassment at Work
> Health and Safety Team
> Ministry of Business, Innovation and Employment
> PO Box 1473
> Wellington 6140 New Zealand

Please note this submissions process is to inform MBIE's policy development process, not to address individual cases of bullying and harassment. If you wish to seek resolution for a personal experience of bullying or harassment you should contact Employment New Zealand on 0800 20 90 20.

Note: Your submission may be requested under the *Official Information Act*. If this happens, MBIE would normally release your submission (excluding personal details) to the person who asks for it. If you consider there are good reasons to withhold it, please clearly indicate these in your submission.

Any personal experiences provided will be treated in a confidential and sensitive manner. If you find this topic distressing, support is available from helplines such as Need to Talk? 1737, Lifeline 0500 543 354, Samaritans 0800 726 666 and Safe to Talk 0800 044 334 (for more information, see https://www.mentalhealth.org.nz/get-help/in-crisis/helplines/).

# Questions

## Prevention

A. How can we increase our understanding of the drivers of bullying and harassment in New Zealand?

B. How can people better understand what is appropriate and inappropriate behaviour at work, particularly in relation to sexual harassment?

C. How can government help business, organisations and workers prevent and appropriately respond to sexual harassment at work?

D. How clear is the legislation when it comes to setting out responsibilities regarding bullying and harassment at work?

E. What further support and guidance would help businesses to strengthen, and effectively implement, their processes for managing risks and engaging with staff about bullying and harassment at work?

F. How do we increase the capacity of managers to identify, prevent and manage workplace bullying, harassment and sexual harassment?

## Response

G. How can workers be supported to raise concerns early?

H. Are workers, particularly those in vulnerable populations, able to identify their options and the best approach for escalating a bullying and harassment issue?

I. How can businesses and organisations be supported to take informal steps to respond to and resolve, an issue (where this is in the best interest of the parties involved)?

J. What type of support would help businesses and organisations to conduct investigations that are impartial and have a conciliation or restorative approach?

K. What should a low-level dispute resolution process for cases involving bullying or harassment look like? (For example, are there particular circumstances where it would be appropriate and beneficial for Employment Mediation Services to attempt to resolve the issue by phone?)

L. Overall, how well does the existing employment relations pathway work for people who have experienced bullying and harassment, and in particular, sexual harassment?

M. How well is the existing employment relations pathway working for Māori?

N. How well is the existing employment relations pathway working for minority and vulnerable populations?

O. What is the biggest issue with, or improvement opportunity for, responding to bullying and harassment issues under the employment relations system?

P. How could the regulatory systems work more closely to prevent bullying and harassment at work at an individual or organisational level?

Q. What role should WorkSafe have in engaging with, and encouraging change in, sectors or organisations where risks have been identified?