

30 March 2021

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Ministry of Business, Innovation & Employment
Wellington

By email: HSWRegs@mbie.govt.nz

Re: Bullying and Harassment at Work – Issues Paper

1. Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Ministry of Business, Innovation & Employment (**MBIE**) *Bullying and Harassment at Work* Issues Paper (**Issues Paper**).
- 1.2 MBIE is seeking feedback on “*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.*”¹ Feedback received from this consultation will inform forthcoming changes to the way agencies address bullying and harassment at work and help identify other areas where further work is needed.²
- 1.3 The Law Society’s Employment Law Committee have considered the Issues Paper and identified aspects of the current systems that work particularly well, or that could benefit from further improvements – these are set out below.³
- 1.4 Where appropriate, we have used the term **complainant** to refer to individuals who make, or wish to make, a complaint regarding a bullying or harassment incident. Similarly, we have used the term **respondent** to refer to the alleged perpetrator of bullying and/or harassment. For consistency with the terminology in the Issues Paper, we have used the term **worker** (where appropriate) to capture all people ‘at work’ in New Zealand.

2. Sexual harassment at work in New Zealand

Q4. *How can government help businesses and workers in preventing and responding to sexual harassment at work?*

- 2.1 The Law Society makes three key suggestions that could help businesses and workers:

¹ Issues Paper, at p3.

² Issues Paper, at p89.

³ The Law Society’s Employment Law Committee is comprised of senior employment lawyers with experience across a range of workplaces in New Zealand. For more information regarding the Committee, see: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/employment-law-committee/>.

- a. The resources presently available are viewed by some as cumbersome and formal, and spread across the Human Rights Commission, MBIE and WorkSafe websites.⁴ It would be helpful to provide simple, accessible and easy-to-use resources which are complainant-focussed but which also give clear guidance to businesses, including for example:
 - i. an 0800-hotline to provide information and guidance, alongside specific assistance (such as referral to counselling and support, lists of unions, advocates and lawyers, and options for experienced investigators);
 - ii. information that can be found through a quick web search and containing simple and easily applicable guidance and information regarding: low-level interventions and informal investigations; role-play examples in plain language;⁵ examples of conduct that comprises sexual harassment; and examples of conversations where the person engaging in that conduct is asked to cease;⁶ and
 - iii. multi-media materials that are easily accessible through mobile phones and are available in multiple languages.
- b. Nominating a single central government agency to be responsible for those resources; and
- c. Appointing a Sexual Harassment Prevention Commissioner, similar to the Equal Employment Opportunities (EEO) Commissioner model, so there is a specific voice and line of responsibility for ensuring there is information available and an accessible pathway for workers. Alternatively, the EEO Commissioner's role could be re-titled and expanded to include specific responsibilities relating to sexual harassment.

Q5. *Do businesses and organisations have sexual harassment policies and processes in place for responding to concerns?*

2.2 Sexual harassment policies and processes are more commonly found in larger organisations. Smaller organisations are far less likely to have a policy or process in place, and responding to concerns can be difficult in those organisations (for example, where the respondent is also the business owner or manager).

2.3 In relation to the legal profession, the Law Society has proposed amendments to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Lawyers' Conduct and Client Care Rules**) to address ongoing concerns regarding bullying and sexual

⁴ For example, the only complaints avenue outlined on the Human Rights Commission (HRC) website (www.hrc.co.nz) relates to its formal complaints process. Other parts of the website do not include any references to sexual harassment, and contain expired links to relevant guidance material. The WorkSafe website (<https://www.worksafe.govt.nz>) does not provide any points of contact for workers and employees who require assistance, and refers readers to the MBIE and HRC websites (unless the matter specifically relates to a work-related incident). The MBIE website contains some helpful information, which essentially notes that a person can raise a personal grievance or complain to the HRC. The Safe To Talk website (<https://safetotalk.nz/>) also contains some useful information that is focussed on more serious sexual harm.

⁵ See, for example, this advertisement from *RainbowYOUTH*:
<https://www.youtube.com/watch?v=nYsUKPoW-Qo>.

⁶ See, for example, this advertisement from *Respect Victoria*:
<https://www.nzherald.co.nz/lifestyle/uncomfortable-advert-urges-people-to-call-out-sexual-harassment/FJ5WY6TGV2F4L2BL2UOMHYXXYM/>.

harassment in the profession. The amendments, which will come into force on 1 July 2021, will require all law practices to have effective policies and systems in place to prevent bullying and harassment, and to protect employees (and others) from conduct including bullying and harassment.⁷

Q6. *What is the quality of sexual harassment policies and processes for responding to concerns regarding sexual harassment?*

2.4 Members of the Law Society's Employment Law Committee observe that the quality of sexual harassment policies varies across different organisations: some organisations have very lengthy policies which are difficult to understand and follow, while others are overly brief. There are some excellent template policies online,⁸ but they are not necessarily easy to find.

Q7. *How can people better understand what is appropriate and inappropriate behaviour at work?*

2.5 A key part of improving understanding includes showing examples of what constitutes inappropriate behaviour using, for example, advertisements, role play and illustrations.⁹ Without such guidance, there is a risk that workers may inadvertently engage in conduct considered to be inappropriate.

Q8. *How can people who have witnessed or heard about the sexual harassment of someone else at work be supported to take action to prevent or reduce the harm caused by this harassment?*

2.6 We recommend that these people are given easy access to guidance about options to prevent and reduce harm and are made to feel safe in coming forward and reporting incidents. There is some guidance available to witnesses on the WorkSafe website,¹⁰ however the guidance is brief and can be difficult to locate.

3. Rights and responsibilities under New Zealand law

Q10. *Are people aware of their obligations under the legislation for preventing and responding to bullying and harassment?*

3.1 In our view, employers are generally aware they have an obligation to prevent and respond to workplace bullying and harassment. However, there is less awareness (particularly among smaller businesses) of:

- a. The employer's specific obligations and where these sit under each relevant piece of legislation (noting that the current legislation only includes references to sexual and racial harassment, and does not include references to bullying);¹¹

⁷ For more information regarding the amendments, see the Law Society's website: <https://www.lawsociety.org.nz/news/lawtalk/lawtalk-issue-941/key-proposals-for-change-to-the-conduct-and-client-care-rules/>.

⁸ See, for example, the template policy on the WorkSafe website: <https://www.worksafe.govt.nz/topic-and-industry/sexual-harassment/sexual-harassment-example-policy/>.

⁹ See, for example, the Australian Human Rights Commission's *Know where the line is* programme which includes videos, stories and workplace posters: <https://knowtheline.humanrights.gov.au/>.

¹⁰ Available here: <https://www.worksafe.govt.nz/topic-and-industry/sexual-harassment/advice-for-workers/#lf-doc-49533>.

¹¹ As noted at [2.3], the Law Society has proposed amendments to the Lawyers' Conduct and Client Care Rules. The amendments, which will come into force on 1 July 2021, include specific definitions of

- b. The practicalities involved in preventing and responding to bullying and harassment; and
- c. The legislative obligations on workers to conduct themselves in a way that does not cause harm to others. Workers are generally aware of their duties as an employee/contractor (and the disciplinary ramifications of not complying with such duties) but are less aware of the legislative obligations that sit behind those duties.

Q11. *Do businesses provide regular training, education and information to workers on their legal responsibilities for preventing and managing bullying and harassment at work?*

- 3.2 This depends very much on the size of the business. Many larger businesses have some policy-based information, and in some cases, training (in the form of an e-learning or workshop-based training) available to workers. Smaller businesses are less likely to have such mechanisms in place due to resourcing constraints.
- 3.3 In addition, much of the information is focussed on setting out the options available to workers who wish to raise concerns about bullying or harassment. The information is often less focussed on preventative measures, such as building an inclusive culture where bullying and harassment cannot thrive, and low-level interventions to prevent unacceptable conduct from escalating.
- 3.4 There is also a lack of resources and training for managers, focusing on:
 - a. Creating a diverse and inclusive culture where bullying and harassment cannot thrive;
 - b. Leading from the top and role-modelling respectful behaviour;
 - c. Assessing and developing managers' leadership styles to align with the organisation's strategic direction and values; and
 - d. Creating expertise in managers in informing and advising workers about their options and facilitating appropriate low-level interventions.
- 3.5 Small businesses may not have sufficient resources and expertise to provide this information and training. It would therefore be helpful for government agencies to provide more resources for workers and businesses – for example, by making available e-learning modules for workers, and by widening the scope of the MBIE Employment Mediation Services (**Mediation Services**) to operate in a way more akin to the practices of the Advisory and Conciliation Arbitration Service in the United Kingdom.

Q12. *How clear is the legislation when it comes to setting out people's responsibilities for bullying and harassment at work?*

- 3.6 The legislation is currently unclear. As discussed in the Issues Paper, the relevant legislation is spread across a number of different statutes including the Human Rights Act 1993, New Zealand Bill of Rights Act 1990, Crimes Act 1961, Harassment Act 1997, Employment Relations Act 2000, Health and Safety at Work Act 2015, and the Harmful Digital Communications Act 2015.
- 3.7 The references to bullying and harassment in the legislation are implied rather than explicit. For example, the Health and Safety at Work Act 2015 (**HSWA**) provides a definition of

'bullying', 'harassment' and 'sexual harassment' to provide better guidance to lawyers and employees of law practices.

“hazard” and notes that an individual’s behaviour is capable of being a hazard, but does not explicitly specify that bullying and harassment are behaviours that constitute a hazard.¹²

- 3.8 The Human Rights Act 1993 and the Employment Relations Act 2000 refer to sexual and racial harassment, which can create confusion as to the status of, and requirements regarding, other types of harassment and the boundaries between the types of behaviour that constitute bullying or harassment.
- 3.9 The current legislation also makes it difficult for smaller and less-resourced businesses to:
- a. articulate their obligations;
 - b. set expectations of managers and other workers; and
 - c. apply those expectations to the practical realities of a bullying or harassment situation (which can often involve issues of finely balanced judgment and credibility).
- 3.10 It could therefore be helpful for one central government agency to have oversight of the relevant legislation, as suggested at [2.1] above.

4. How do these rights and responsibilities work in practice?

Q13. *Are businesses identifying and assessing the risks of bullying and harassment at work as part of their risk assessment processes? If not, why not?*

- 4.1 Again, this depends on the size of the business. Larger businesses with mature risk management systems and processes and a well-resourced people and culture function will likely identify this as a risk, and have a number of appropriate controls in place to manage the risk.
- 4.2 However, smaller businesses will only tend to consider this as a risk after having managed a bullying or harassment situation. Smaller businesses are also less likely to conduct a formal risk assessment process when setting specific controls to eliminate or mitigate the risk and to measure and report on the effectiveness of those controls.
- 4.3 In our view, the reasons for not assessing bullying and harassment in the course of a normal risk assessment process comes down to two factors:
- a. The priority placed on bullying and harassment as a risk within the business (which will depend on the degree to which these issues have been raised previously, the other risks facing the business at that point, and the general resourcing available to the business); and
 - b. The degree to which bullying and harassment are seen as a risk that can be controlled, rather than a situation to be managed if and when it arises. This comes back to the degree to which businesses consider they can control their culture, and the processes and training they have in place for workers and managers around appropriate conduct, leadership and raising and managing concerns. It is also an issue for businesses that have significant operational demands and do not have the capacity to focus on this area.

¹² Section 16: “hazard” – “includes a person’s behaviour where that behaviour has the potential to cause death, injury, or illness to a person (whether or not that behaviour results from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition that affects a person’s behaviour).”

- 4.4 In addition, any controls put in place to respond to this risk are often reactive, and focus on the processes that need to be in place to raise, investigate and respond to issues. Controls regarding workplace culture, leadership development and training on matters such as early intervention, good communication and building an inclusive culture, are less common.
- Q14.** *Do the risk management policies businesses put in place address the risk of bullying and harassment at work? Are the processes being established by these policies effective in addressing these particular risks?*
- 4.5 Again, the response to this question varies across businesses. The policy response to bullying and harassment largely documents the processes to manage concerns by satisfying the employer's obligations when concerns are brought to their attention (rather than focussing on early intervention and preventing bullying and harassment).
- 4.6 As discussed in the Issues Paper, significant progress can be made to prevent bullying and harassment by creating a diverse and inclusive culture where behaviour that does not align with that culture is called out early and respectfully. This is not a matter that can be solely addressed by policy – although organisational policies can assist by setting out low-level resolution options and by promoting early intervention before situations escalate into bullying and/or harassment. Such policies must be supported by good training and leadership development (perhaps through external facilitation where appropriate).
- Q15.** *Are policies to address bullying and harassment being clearly communicated by businesses to staff? Are staff aware of the processes they should go through if an incident arises?*
- 4.7 Most workers have only a broad awareness of some of the steps they can take to raise concerns regarding bullying and harassment. Where policies are in place, they are often only accessed when a bullying or harassment situation arises and are not the subject of ongoing training programmes.
- 4.8 Workers' awareness could be improved by:
- a. Providing a clear definition and understanding of the term 'bullying'. The term is often misunderstood and/or used in a generic way to cover a wide range of behaviour. Currently, there is no statutory definition of 'bullying', and interpretation tends to vary across businesses and industries;¹³
 - b. Emphasising the importance of raising issues before they escalate, and while a solution exists that enables the employment relationship to continue;
 - c. Increasing workers' awareness of the full range of options open to them (from addressing the issue directly with the individual concerned, through to making a formal complaint or notifying the Police). It is important workers are aware of their options, the degree to which they would retain control of the relevant processes, and the potential resolutions that may be available in respect of each option;
 - d. Considering what 'resolution' looks like for the worker raising the issue and providing them with advice as to whether their view of 'resolution' is realistic. For

¹³ NZLS Employment Law Committee members note that many businesses have now adopted the WorkSafe definition of 'bullying' ("*repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm*"). See also [2.3] above: the Law Society's amendments to the Lawyers: Conduct and Client Care Rules include a similar definition of 'bullying' ("*repeated and unreasonable behaviour directed towards a person or people that is likely to lead to physical or psychological harm*").

example, expectations of dismissal without an appropriate investigation or dismissal in response to low-level bullying, are likely to lead to the worker not being satisfied with the outcome. Equally, some resolution options, such as a transfer or a change in working arrangements to a different reporting line, may not be possible in small working environments;

- e. Managing workers' expectations by clearly communicating that a complaint will likely result in an investigation, and may not always result in the complainant's preferred outcome (for example, where there is no independent corroborating evidence for the alleged conduct, or the alleged conduct is not sufficient to justify the respondent's dismissal).

Q16. *What further support and guidance would help businesses to strengthen their risk management processes in relation to bullying and harassment at work?*

4.9 There are a number of areas where further support and guidance could help businesses to strengthen their risk management processes regarding bullying and harassment, including:

- a. Improved knowledge and understanding of what amounts to 'bullying';
- b. Knowing where to go and having one central government agency charged with providing integrated and consistent information and guidance (as discussed at [2.1]);
- c. Providing smaller businesses with information that is accessible, easy to understand and available in a range of different languages (in the same way that employee information is made available in different languages);
- d. Focussing that information on creating a culture where bullying and harassment cannot thrive and highlighting the benefits of early intervention in situations before they develop into bullying and harassment;¹⁴
- e. Providing manager/business-owner training (ideally in the form of engaging and easy to understand e-learnings) on diversity and inclusion, the benefits of early intervention, assessing the risks of bullying and harassment to the business and developing appropriate response plans;
- f. Providing generalised information on risk management processes;
- g. Having better access to external mediators and facilitators. The Office of the Privacy Commissioner maintains a Directory of Privacy Professionals, and a similar database could serve as a useful index of mediators and facilitators (alongside caveats requiring parties to do their own due diligence and choose an adviser who is appropriate for a specific situation); and
- h. Considering whether advice and external facilitation can be provided through a government agency, such as MBIE, in a similar (but extended) way to the services currently provided through Mediation Services.

Q17. *To what degree are businesses aware of, and accessing, the tools and training currently available to minimise the risk of bullying? How useful and effective are these tools?*

4.10 Many smaller businesses do not consider the WorkSafe risk assessment and management tools to be relevant to a risk assessment process related to bullying and harassment.

¹⁴ There are various 'violence pyramids' which demonstrate how particular types of behaviour can develop into behaviour that constitutes bullying and/or harassment. See, for example, the Violence Pyramid created by Statistics Canada: <https://www.ucalgary.ca/student-services/ask-first/facts>.

Business awareness of these tools could therefore be improved by having a central government agency replicate or link the tools to other government resource pages (as suggested at [2.1] above).

4.11 The resources provided by membership bodies such as the Institute of Directors New Zealand, Business Leaders' Health & Safety Forum and the Institute of Risk Management are useful but need to be purchased at a cost to the organisation and are directed largely at a corporate audience. Such tools could be better promoted to non-members and supplemented by other freely available tools that are specific to small businesses and businesses outside the corporate environment.

Q18. *How can we lift management capability to identify, prevent and manage workplace bullying and harassment (including sexual harassment)? For example: a) Stocktaking management training programmes to assess their coverage, effectiveness and relevance to current labour market patterns; b) Creating a proactive duty on workplace leaders to develop and maintain a 'healthy and respectful' workplace culture; c) Developing new methods of tracking problematic sectors and workplaces (e.g. where complaints are regularly being raised).*

4.12 All of these options, combined with the options discussed above at [3.4] and [4.9], are likely to assist in improving management capability.

4.13 In addition, we note the following in relation to the options identified in Question 18:

- a. *Stocktake of programmes:* a stocktake of programmes would allow government agencies to identify gaps in coverage and areas where good programmes are available but not promoted widely enough to the right groups.
- b. *Creating a proactive duty on workplace leaders:* any proactive duty would need to be carefully crafted to ensure that:
 - i. It is targeted at workplace leaders who have the ability to influence positive change;
 - ii. It is appropriately caveated by a 'reasonableness' component (similar to the "reasonably practicable" test set out in the HSWA),¹⁵ and supported by appropriate guidance (similar to the guidance provided to PCBU officers carrying out their duty of due diligence under the HSWA);¹⁶ and
 - iii. It sits within the appropriate jurisdiction (which is likely to be the employment jurisdiction) and is coupled with appropriate enforcement mechanisms.
- c. *Methods of tracking problematic sectors:* tracking problematic sectors could assist in ensuring that information and training are being directed to the right places. In our view, tracking should be used for educational and resource allocation purposes, and not for enforcement purposes. We would also discourage using complaint numbers as a sole tracking mechanism, as high complaint numbers may simply reflect a 'speak-up' culture or a healthy complaints resolution process within a business.

¹⁵ Section 22.

¹⁶ See section 17 (definition of PCBU) and section 44 (duty of officers).

Q20. *What difficulties do businesses face in monitoring and reviewing the risks from bullying and harassment at work?*

4.14 There are a number of key difficulties that businesses face in monitoring and reviewing bullying and harassment risks.

4.15 First, success is often measured in the negative (i.e., an absence of bullying or harassment issues being raised). However, this can occur for two reasons:

a. either there is a positive culture with issues being resolved early, informally and at a low level; *or*

b. there is a culture that discourages people from speaking up and voicing concerns.

4.16 It can be difficult for businesses (particularly those with fewer resources) to assess why issues are not being raised. As discussed above, there are other indicators that can assist with raising issues, including: exit interviews (when used consistently); worker engagement surveys; regular monitoring of sick leave and turnover data; and monitoring hits on any bullying and harassment policy documents. Retaining data (anonymised if necessary) regarding the number of early interventions by managers or by human resource personnel could also assist with monitoring risks.

4.17 It should be noted, however, that it is difficult to conduct exit interviews in small businesses where the departing worker is being interviewed by a person who, in their view, contributed to the bullying or harassment (or failed to respond adequately). Workers can also be reluctant to provide full disclosure in an exit interview if they are likely to require a reference from that employer for future employment.

4.18 Another key difficulty in monitoring and reviewing bullying and harassment risks is that settlement agreements are usually signed on a confidential basis. It could therefore be helpful to retain anonymised data on the number of settlements, for monitoring purposes.

4.19 Finally, there is generally little desire to revisit an incident of bullying or harassment for learning and development purposes if the issue has already been resolved. Smaller businesses may also be short of workers who are able to undertake an objective review of the situation and appropriately assess any lessons learned.

Q21. *Are worker representatives involved in collecting and analysing information about the workplace culture, assessing risks and reviewing the effectiveness of processes?*

4.20 Not as much as they could be. Many smaller businesses do not have specifically designated worker representatives. This type of work is also not seen as part of the role of a health and safety representative, which often focusses on the risk of physical harm.

4.21 In unionised workforces, there can also be some hesitancy in sharing information regarding workplace culture with delegates or officials, for fear that it could be used against the business.

Q22. *What additional guidance and support could be made available to help businesses with monitoring and reviewing their culture and risk factors?*

4.22 There are a number of additional support mechanisms that would be helpful here:

a. An emphasis on providing information regarding the importance of monitoring and reviewing their culture and risk factors, as part of overall risk management;

b. A simple checklist or menu of options that businesses can use to monitor and measure the success of their policies and processes; and

- c. Access to simple and easy to use tools to measure worker engagement and to conduct exit interviews (such as template surveys and questionnaires).
- 4.23 Much of this information is currently available online but would likely be easier to access if it were located in one centrally organised site, and made available in different languages.

5. What options are available when bullying and harassment at work occurs?

Q23. *Are workers able to identify their options and the best approach for escalating a bullying and harassment issue?*

- 5.1 Many workers cannot easily navigate their options for addressing concerns about bullying and harassment, nor can they decide which legal pathway is most appropriate without access to information regarding low-level interventions and early resolution options. The guidelines provided by WorkSafe can be useful but are very lengthy and may not be easily understood by workers and some smaller businesses.¹⁷
- 5.2 Workers who find themselves in a formal process involving an independent investigator are often ill-prepared and surprised by how quickly the matter has escalated. This can cause some complainants to withdraw or refuse to participate in the process for fear of retaliation by the respondent.
- 5.3 Much of the work required to manage workers' expectations needs to be done by the business at the outset to avoid confusion and unmet expectations. While larger businesses are often well-equipped to prepare workers, smaller businesses are typically less resourced to do so. It would be unusual for a small business to have well-defined policies and procedures that can assist workers in identifying options and knowing how to escalate issues. Anecdotally, we understand some workers and businesses tend to contact MBIE or look for online guidance, and then seek legal advice because the guidance is unclear.
- 5.4 The idea posited in the Issues Paper of "*developing a one-stop triage (telephone) service drawing together resources currently found across several information providers*" could therefore assist workers in identifying their options for escalating a bullying or harassment issue.¹⁸

Q24. *How supported are vulnerable populations for identifying and navigating the different pathways available?*

- 5.5 Workers who are part of a vulnerable population must overcome additional barriers before they can identify and navigate the pathways available to them. While there are some freely available resources, access is sometimes limited, including for people:
 - a. without access to the internet;
 - b. for whom English is a second or third language;
 - c. who cannot afford legal advice or to take time off work to find out what their rights are; and
 - d. who feel less able to access support because they are unaware of their rights.

¹⁷ WorkSafe *Preventing and responding to bullying at work* (March 2017), available here: <https://www.worksafe.govt.nz/topic-and-industry/bullying/good-practice-guidelines-preventing-and-responding-to-bullying-at-work/>.

¹⁸ Issues Paper, paragraph 291.

- Q25.** *Are the processes businesses have in place for raising bullying and harassment concerns and/or complaints (both formally and informally) clear to workers? Do these processes address where the bullying or harassment involves a person's manager or senior manager?*
- 5.6 The quality of processes within businesses varies greatly. It will often depend on the size of the organisation and the ability to resource required roles or to engage a consultant or lawyer. Policies may provide avenues for formally addressing issues but are generally less clear about options for addressing concerns on an informal basis (which, by definition, are informal and less likely to be documented). It is therefore possible that policies favour more formal interventions.
- 5.7 Processes vary greatly in what they address too. Many smaller businesses do not have formal processes and rely solely on a brief policy based on an online template.¹⁹ In contrast, larger organisations tend to have comprehensive processes supported by policies that outline expectations and responsibilities, and set out a full range of informal and formal options.²⁰
- Q26.** *Are existing types of workplace representatives (eg, health and safety representatives, health and safety committees, human resource personnel and unions) suitably trained and supported to support workers to raise bullying or harassment concerns?*
- 5.8 Workplace representatives are not typically trained to provide support and to adequately address concerns relating to bullying and harassment. Advising workers is a complex process, further complicated by other responsibilities and pressures on workplace representatives.
- 5.9 Issues relating to bullying and harassment also tend to involve complex employment issues (sometimes covering several areas of law and difficult subject matter) that should be addressed by a qualified independent advisor.
- 5.10 Human resource personnel and unions are likely better equipped to focus on preventing and informally addressing concerns. However, this will depend on the culture of the organisation and the resources available to the organisation or union.
- Q27.** *What support would help people to be clear on what is and isn't a bullying and harassment issue?*
- 5.11 Definitions of bullying and harassment are often supported by examples of behaviour that may, or may not, amount to bullying or harassment. Employment Law Committee members observe that workers sometimes refer to these examples as a 'tick box' exercise, which 'labels' a respondent's behaviour instead of enabling them to provide an objective account of their personal experience. This can be particularly unhelpful when a complaint is received and the organisation is attempting to understand the nature of the complaint and how it ought to be addressed. It could therefore be useful for workers to have access to initial advice (for example, through an 0800-harassment hotline, as discussed above at [2.1]) to help them prepare an objective narrative of the incident that is the subject of the complaint.
- 5.12 Policies and guidelines must also clearly state that complaints relating to bullying or harassment may not automatically be upheld. For example, a complaint relating to

¹⁹ Such as WorkSafe's anti-bullying policy template, available here: <https://www.worksafe.govt.nz/topic-and-industry/bullying/anti-bullying-policy-template/>.

²⁰ See, for example, the online policy provided by Vodafone: <http://foundation.vodafone.co.nz/wp-content/uploads/2018/03/Bullying-and-Harassment-Policy.pdf>.

unreasonable or unwelcome behaviour may not be upheld where it does not meet the WorkSafe definition of ‘workplace bullying’²¹ because the behaviour only occurred once. Clarity around the various components of bullying and harassment could therefore improve workers’ understanding of what is, and is not, a bullying or harassment issue and help manage their expectations regarding the outcome of a complaint or investigation.

Q28. *What support would help workers to raise bullying and harassment concerns early?*

5.13 Organisations would benefit from having an internal champion to assist workers in raising and resolving issues before they escalate. An individual who understands how the organisation works, what the relevant policies and procedures are, and the relationships at stake, may be better equipped to help workers within their organisation.

5.14 External, independent parties may also be well-placed to assist with resolving matters early. Mediation Services have in the past provided early problem resolution services; however, this assistance has recently been thwarted by resourcing limitations and delays.²²

5.15 Further support for workers includes offering Mediation Services in a restorative and conciliatory format. It is also possible that the ‘quick resolution service’ pilot that is currently being scoped by MBIE could better assist parties in resolving issues earlier and more effectively.²³ A conciliation service similar to that offered in the United Kingdom could also assist in ensuring workers raise and resolve issues early.²⁴ Both services will require adequate resourcing to be successful (and will otherwise experience similar challenges caused by delays in the Mediation Services and the Employment Relations Authority (ERA)).

Q29. *Are there any gaps in the guidance and support currently available? How can this guidance and support be improved? Q30.* *How can businesses be supported to take informal steps to respond to and resolve an issue (where this is in the best interest of the parties involved)?*

5.16 See our comments at paragraphs [2.1], [3.4], [3.5] and [4.9] above.

Q31. *What would assist businesses to conduct investigations that are impartial, support all parties, and have a conciliation or restorative approach?*

5.17 As suggested at [5.14] above, Mediation Services could be offered in a conciliatory and restorative format (perhaps as an extension of the current model). This calls for an ‘interventionist’ approach which may require multiple or ongoing mediations facilitated by mediators who are specially trained to conduct such mediations.

5.18 The adversarial nature of investigations also discourages parties from apologising, to avoid legal risk. One option for addressing this issue could be to provide privilege for apologies that are made in an effort to resolve matters (similar to that provided under the Privacy Act 2020).²⁵

²¹ Above n 17, at p8.

²² In addition, delays have recently been exacerbated by the increased volume of work and backlogs created by the COVID-19 pandemic.

²³ Issues Paper, paragraph 325.

²⁴ Issues Paper, paragraph 323.

²⁵ See s 100(1) which states: “[i]f an apology is given by an agency in connection with an action alleged to be an interference with the privacy of an individual, it is not admissible as evidence in any civil proceedings against the agency ...”.

Q32. *What is the quality of the investigations conducted by the independent investigation market?*

- 5.19 The quality of investigations varies greatly and depends on the experience and expertise of the investigator engaged to conduct an investigation.
- 5.20 The Private Security Personnel Licensing Authority (**PSPLA**) recently confirmed that individuals who undertake investigations into workplace complaints are likely required to hold a licence under the Private Security Personnel and Private Investigators Act 2010,²⁶ (although lawyers and in-house investigators are exempt from this requirement). Unfortunately, this PSPLA decision is not widely known, and many investigators do not hold a licence, which would otherwise provide some protection for those wanting to ensure their investigator is competent and experienced.
- 5.21 Some overseas investigators voluntarily train and upskill through membership organisations such as the Association of Workplace Investigators (**AWI**) in the United States. Investigators accredited by the AWI follow Guiding Principles, which require investigators to be impartial and objective, and possess the necessary skills and time to conduct investigations.²⁷
- 5.22 New Zealand does not currently have a similar body to accredit and upskill investigators, and businesses are required to carry out their own due diligence on the independent investigation market. It should also be noted that the cost and time associated with completing an investigation to an adequate standard have become barriers for many businesses, and it may be more cost-effective for a business to negotiate a settlement without incurring additional costs (and avoid any risk of failing to resolve the matter at the end of an investigation). This neither assists the worker nor the business in dealing with the underlying concerns relating to bullying and harassment.
- 5.23 An accreditation scheme and relevant training programmes for investigators could therefore greatly improve the quality of investigations and provide better outcomes for workers and businesses.

6. The employment relations pathway

Q33. *To what degree does the current online application requirement for mediation create a barrier?*

- 6.1 The current online application format creates various barriers to accessing mediation, by:
- a. Failing to acknowledge that there is a digital divide between those who have internet access and those who don't (noting that the 2018 Statistics New Zealand Census found that 13.9% of people live in households without access to the internet);²⁸
 - b. Requiring a RealMe login, which in turn requires the applicant to provide copies of their passport, birth or citizenship certificate, or immigration documents (all of which come at a price and are not always on hand). It also requires an active email address; and

²⁶ *D, E & C Limited* [2020] NZPSLA 007, available at: <https://www.justice.govt.nz/assets/Documents/Decisions/2020-NZPSLA-007.pdf>.

²⁷ Association of Workplace Investigators *Guiding Principles for Conducting Workplace investigations* (2020), available at: <https://cdn.ymaws.com/www.awi.org/resource/resmgr/files/publications/AWI-Guiding-Principles-Broch.pdf>.

²⁸ See <https://www.stats.govt.nz/information-releases/2018-census-totals-by-topic-national-highlights-updated>.

- c. Requiring applicants to complete an application form that is confusing and convoluted, and requests information that applicants may not have or know.
- 6.2 We note that applicants have the option to phone MBIE, however this option is not widely promoted.
- Q34.** *Are there variations by ethnicity, gender, or other factors, in parties' ability or willingness to access mediation services?*
- 6.3 Parties' ability and willingness to access mediation services can vary due to a number of factors, including:
- a. *Gender:* Smellie J has noted that "[m]any women, in particular, will put up with an environment in which unwelcome or offensive conduct is prevalent rather than run the risk of losing employment, getting offside with fellow workers or having a confrontation with a dominant employer. For many, making a formal complaint will be the last resort."²⁹ This still rings true, and women who raise concerns are likely to face a situation where their concerns are not appropriately responded to or managed.
 - b. *Immigration status:* workers who hold temporary work visas are much less likely to raise concerns or seek mediation if there is a possibility they may lose their job. This is particularly so where their visa is contingent on their continued or ongoing employment.³⁰
 - c. *Ethnicity/nationality:* language barriers (although interpreters are available) and cultural factors may also discourage workers from raising issues.
 - d. *Income and other socio-economic factors:* these factors can impede parties' access to legal (or non-legal) representation in a mediation. Representation comes at a cost as Community Law Centres do not assist at mediation, and there are very few employment lawyers who provide legal aid services. The applicant may also be required to take time off work to attend the mediation, thereby incurring further cost.
 - e. *Lack of representation:* some applicants do not feel comfortable attending mediation without representation if the other party is represented, because they feel the other party may have an unfair advantage.
 - f. *Reluctance to engage with the respondent:* complainants may be not willing to attend mediation at all, particularly where it is with the person accused of bullying or harassment.
- Q35.** *How quickly are mediation meetings occurring for issues involving bullying or harassment? Where there are delays, what are contributing to these?*
- 6.4 There are currently significant delays in accessing mediation (including wait times of up to 45 days for an acknowledgement of an application for mediation). We understand these delays are partly due to the backlog caused by COVID-19.

²⁹ *Read v Mitchell* [2000] 1 NZLR 470 at 480.

³⁰ The Government has also recently announced that it is drafting a bill to enact legislative reforms to prevent exploitation and protect temporary migrant workers: <https://www.beehive.govt.nz/release/stronger-enforcement-and-protection-migrant-workers>.

- 6.5 Delays can dissuade some applicants from applying for mediation, and may be a factor in complainants leaving their employment (instead of staying on and resolving the issue with the respondent and/or employer).
- 6.6 There are also longer wait times for in-person mediations,³¹ and Employment Law Committee members have observed a preference by MBIE for phone mediations. Phone mediations are often not appropriate or effective for bullying and harassment claims because the mediator (and the parties) cannot see or read the facial expressions and body language of the other participants. An important part of effective mediation involves reading visual cues (including facial expressions and body language) and responding appropriately (for example, by taking a break). Without visual feedback, phone mediations could potentially cause more harm to parties and to working relationships.
- 6.7 On the other hand, virtual mediation by videoconference can, in some cases, be beneficial for bullying and harassment claims because the complainant may feel safer attending mediation virtually (without facing the respondent in person). It could therefore be useful for this option to be made clearly available to applicants.
- Q36.** *What are the benefits and/or risks with the involvement of legal and/or non- legal representatives in bullying and harassment cases?*
- 6.8 Legal representation can benefit parties by assisting their understanding and assessment of legal risk. It can also help parties navigate the employment relations pathways and better understand the consequences of an unsuccessful mediation.
- 6.9 As discussed at [3.6] and [3.7] above, the legislation that applies to bullying and harassment in the workplace is complex and layered, and lawyers can assist parties in understanding and applying the correct legislation.
- 6.10 It is equally important for parties (and complainants in particular) to understand the effect of any confidentiality provisions included in settlement agreements prepared under section 149 of the Employment Relations Act 2000. Lawyers can ensure that settlement agreements are carefully constructed, and that thought is given to how enforceable some provisions may or may not be.
- 6.11 As noted at [6.3], a complainant may also feel hesitant to attend mediation alone if their employer, or the respondent, is legally represented, and there is a perceived or actual inequality of power between the parties. Parties are likely to feel safer, more supported, and more comfortable addressing bullying and harassment issues if they are represented by a lawyer who can clearly explain the relevant legal principles and options.
- 6.12 However, having legal representation at mediation involves the cost of engaging a lawyer. Non-legal representatives may be able to offer some of the benefits and services outlined above – they are not however subject to the same level of regulation, and are not bound by the same professional obligations and ethical duties that apply to lawyers.³²

³¹ The MBIE website states that remote mediations can usually be confirmed sooner (see <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/mediation/request-meditation/>).

³² Lawyers are bound by the ethical duties and professional obligations set out in the Lawyers: Conduct and Client Care Rules. This includes, for example, duties of independence (Chapter 5) and confidentiality (Chapter 8). The current Rules are available here: https://legislation.govt.nz/regulation/public/2008/0214/latest/DLM1437806.html?search=ts_act%40

Q37. *How can parties feel supported and safe to attend mediation without legal or external representation?*

6.13 Parties are likely to feel comfortable attending mediation without any representation where the other party is also unrepresented. This may however discourage, and be detrimental to, employee-parties who often face an inherent inequality in bargaining power.

6.14 Mediators would therefore need to be upskilled in managing mediations where the complainant and respondent are both present, and be trained to explain the effect of any confidentiality provisions relating to a settlement. Parties should also be encouraged to bring non-representative support people to such mediations.

Q39. *What should a low-level dispute resolution process for cases involving bullying or harassment look like?*

6.15 As discussed above at [5.13] – [5.14], an early resolution model or mediation-type service could be of assistance to both parties, and their employer. However, these models would only assist where the complainant agrees and is willing to face the respondent.

Q40. *Are there particular types of bullying or harassment cases where it would be appropriate and beneficial to attempt to resolve the issue by phone mediation?*

6.16 As noted at [6.6] above, phone mediations may not be appropriate. Mediation by videoconference could however be useful in cases where the complainant is afraid or reluctant to face the respondent in person.

Q41. *Are there current issues with the way non-disclosure and/or non-defamation clauses are being used for cases involving bullying or harassment, particularly sexual harassment? What risks would arise if their use was restricted?*

6.17 There is a risk that perpetrators of bullying and harassment could become ‘repeat offenders’ if they are able to negotiate confidential settlements with complainants and/or their employer. Employers whom themselves are the perpetrators can continue to cause harm to current and future workers by signing confidential settlements with victims.

6.18 On the other hand, confidential exit arrangements with respondents are likely to protect complainants who continue to remain with the business, by preventing them from being called to give evidence or being named in proceedings brought by disgruntled respondents.

7. Claims before the ERA and the Employment Court

Q42. *Are the grounds for raising a grievance for bullying, or for the employer’s response to a bullying complaint, clear? Are these grounds appropriate for raising such a claim to the ERA?*

7.1 The answer to both of these questions is ‘no’. Bullying is not a ground for a worker to raise a personal grievance and there is no clear course of action for an employee in such a case. The options currently available to employees are not clear where, for example:

- a. The employee has left their employment due to bullying. In such instances, the appropriate claim would be for unjustified dismissal under section 103(1)(a) of the Employment Relations Act, which requires the employee to establish that there has been a ‘constructive dismissal’. In such cases, the onus of proof initially rests with the employee who is required to demonstrate that there was a breach of duty on

[bill%40regulation%40deemedreg_conveyancers_resel_25_a&p=1](#), and further changes will come into effect on 1 July 2021, as noted at [2.3].

the employer's part, or there were actions (or inaction) which caused their resignation; and

- b. The employee has not left their employment. In such circumstances, the employee could raise an 'unjustifiable disadvantage' claim under section 103(1)(b) of the Act. For these claims, the employee will need to show that there is a disadvantage to their employment which the employer cannot justify. This does not *fix* a bullying issue for the employee in the short term, and merely provides the potential for financial remedies further down the track.

Q43. *Are the grounds for raising a sexual and racial harassment claim to the ERA appropriate?*

7.2 The definition of 'sexual harassment' in section 108(1) of the Employment Relations Act is not easy to follow, as it is drafted in two parts. The first part is the more serious type of sexual harassment (which includes requests for sexual intercourse, sexual contact or other sexual activity),³³ and the second is the more frequent occurrence of sexual harassment in employment situations (involving the use of language, visual material or physical behaviour of a sexual nature that directly or indirectly subjects the employee to unwelcome or offensive behaviour).³⁴ Section 108(1) is long and difficult to follow and would benefit from being simplified.

7.3 Racial harassment is defined in section 109 and is much easier to read and understand. Section 109(a) is, however, relatively limited, as it requires the harassing person to act towards the employee in a way that "expresses hostility against, or brings into contempt or ridicule" that employee. Racial harassment can be more subtle and can include, for example, instances where an employee is given a poor performance review or is subjected to less serious (and possibly repeated) comments. Employees who are subject to such behaviour are not appropriately protected because these actions do not meet the relatively high threshold of section 109(a).³⁵

Q44. *Is the requirement to raise a personal grievance within 90 days appropriate for bullying and harassment cases? If not, does this apply to all bullying or harassment cases or specific types/situations?*

7.4 In bullying and harassment cases, the behaviour that is the subject of a personal grievance can occur over a period of time, and examples of the conduct the employee wishes to raise may fall outside the 90-day time limit. Therefore, the 90-day limit should not prevent an employee from referring to earlier examples of relevant conduct to support their grievance. This tends to be the approach taken by the ERA, but a legislative mandate would provide more clarity and certainty to parties who wish to raise a grievance.

Q45. *Is cross-examination of witnesses during bullying or harassment, particularly sexual harassment, cases appropriate? If so, what needs to be in place to prevent re-victimisation? If not, how should facts be established?*

7.5 Options such as screens and remote witness attendance can be utilised during cross-examination, but it is very difficult to ensure natural justice for the accused party if they are unable to cross-examine the person accusing them of bullying or harassment.

³³ At s 108(1)(a).

³⁴ At s 108(1)(b).

³⁵ We further note that only a small number of cases discuss the s 109 threshold. See, for example, *Vij v Signora Cafe Ltd* [2020] NZERA 338, which illustrates the difficulties faced by employees who need to prove that racial harassment has occurred.

- 7.6 The ERA's investigative process and the Employment Court's ability to govern its own processes could therefore assist in establishing a framework for effectively cross-examining witnesses. Any framework should address the issues that can arise where the respondent is self-represented and is able to question the person who is accusing them of bullying or harassment.
- Q46.** *How should representatives be governed?*
- 7.7 As discussed at [6.12], lawyers are regulated under the Lawyers and Conveyancers Act 2006 and bound by extensive professional obligations and ethical duties set out in the Lawyers: Conduct and Client Care Rules. Further regulation of lawyers is not appropriate or required.
- 7.8 However, the introduction of an appropriate framework to regulate the training, qualifications and conduct of non-lawyer advocates is strongly recommended. Such a framework should also provide channels for making a complaint about the quality of advocacy services and alleged unprofessional behaviour and/or misconduct by non-lawyer advocates.³⁶
- 7.9 We note that immigration advisers are required to hold a licence granted under the Immigration Advisers Licensing Act 2007. This licence allows immigration advisers to represent and provide specialist immigration advice to clients. The provisions of that Act are complemented by the Immigration Advisers Code of Conduct (which sets out the required standards of professional and ethical conduct) and the Immigration Advisers Authority is empowered to administer the Code and investigate complaints relating to violations of the Code. A similar statutory framework could provide an effective mechanism for regulating the conduct and services provided by non-lawyer employment advocates.
- Q47.** *Is there adequate support for employees who do not have representation during ERA cases involving bullying and harassment?*
- 7.10 Unrepresented employees who are victims of bullying and harassment do not receive adequate support. ERA support officers and information sheets assist to some extent, but most employees are generally unfamiliar with ERA processes and require further support, as discussed at [6.8] – [6.9].
- Q48.** *Are the remedies for grievances involving bullying or harassment appropriate?*
- 7.11 The remedies are not appropriate as they do not address the root causes of bullying and harassment. Remedies are also primarily financial, and do not ensure that an employee can continue their employment without being bullied or harassed.
- 7.12 There are also significant delays in mediation dates being arranged, and in cases being investigated and determined by the ERA. Such delays (which generally span from a year to 18 months) have a significantly negative impact on parties' access to justice and on ensuring appropriate outcomes for parties with grievances.
- Q49.** *Are there any issues with the way bullying and harassment personal grievances are dealt with by the Employment Court?*
- 7.13 Some issues may arise where parties are self-represented (as noted at [7.6]), or are represented by non-lawyer advocates (as discussed at [7.8] – [7.9]). The Law Society is not

³⁶ At present, the only form of regulation exists via the Employment Law Institute of New Zealand (**ELINZ**) complaints process and Disciplinary Investigation Process. However, ELINZ is a voluntary member organisation: its processes are limited to ELINZ members and do not apply to non-member employment advocates.

otherwise aware of any issues relating to the way bullying and harassment personal grievances are dealt with by the Employment Court.

Q50. *Do employees who have experienced sexual or racial harassment at work feel able to escalate a grievance to the ERA or Employment Court?*

7.14 The very low number of cases referred to the ERA and the Court suggest that employees may not feel they are able to escalate a grievance. Anecdotally, we understand most employees opt to resign – where they can – or continue to tolerate the behaviour where they cannot resign (for example, if they are unlikely to find other employment or their employer sponsors their work visa).

Q51. *Are there situations where the ERA or Employment Court should inform WorkSafe of bullying and harassment cases for consideration where there may be an ongoing safety risk?*

7.15 As discussed above at [2.1], [3.10] and [4.9], one option is to have one central agency which holds responsibility for dealing with concerns relating to bullying and harassment. In the absence of a central agency, the Court could notify WorkSafe of more serious cases including, for example:

- a. Cases where there have been multiple reports of bullying or harassment in the same workplace and there are compelling grounds for believing it is a problem throughout the workplace; or
- b. Cases where an employee is diagnosed with one or more health conditions (including mental health conditions) which may have arisen predominantly from the bullying or harassment they experienced at work.

7.16 However, there are some practical issues that need to be considered, including:

- a. The threshold for referring a matter to WorkSafe and how the Court and the ERA assess what constitutes an “ongoing safety risk”;
- b. Ensuring consistency when referring matters to WorkSafe and considering whether a matter must first be reviewed by another judge or ERA Member before it is referred to WorkSafe;
- c. The extent of any evidence that will need to be provided to WorkSafe;
- d. The risk of ‘double-jeopardy’, where matters are referred to the ERA and the Court, and subsequently referred to WorkSafe;
- e. Informing parties of a decision to refer a matter to WorkSafe in order to meet the relevant requirements under the Privacy Act 2020;
- f. Seeking parties’ consent to refer a matter to WorkSafe, and consideration as to whether a matter can be referred if one or both parties object to the referral;
- g. Options for dealing with a matter once it is referred to WorkSafe (for example, by requiring WorkSafe to provide training and education, or conduct an investigation);

- h. Ensuring that any WorkSafe prosecutions comply with statutory timeframes,³⁷ and take into account the time taken for a matter to reach the Employment Court (which will likely be several years after the incident has occurred); and
- i. How referrals should interplay with employers' duties to notify WorkSafe of breaches of the of the HSWA.

Q52. *Overall, how well does the existing employment relations pathway work for people who have experienced bullying and harassment, including sexual harassment?*

7.17 The employment relations pathway does not work well at all. Most people who face a harassment or bullying situation simply want the behaviour to stop, and for it not to happen to anyone else. The current systems do not fulfil that aim.

7.18 Another key issue is the significant amount of time it takes to set down mediation dates and ERA investigation meeting dates, because both systems are currently significantly under-resourced.

Q53. *How well is the existing employment relations pathway working for Māori?*

7.19 For many, it may be considered to be overly formal. There is a heavy reliance on written evidence and written submissions (particularly in the ERA and the Court) and it may be more appropriate to have:

- a hui or a kōrero,
- a process allowing for tautoko (supporters) to speak,
- a karakia, and
- appropriate mihi/greetings.

Q54. *How well is the existing employment relations pathway working for other minority and vulnerable populations (eg, people with disabilities, migrant workers, and trans and non-binary New Zealanders)?*

7.20 It is likely out of reach to most, because the existing pathway is expensive and difficult to navigate. The issues regarding delays, noted at [6.4] – [6.5] and [7.12], also do not serve such claimants well.

Q55. *What is working well in the existing employment relations pathway?*

7.21 The following aspects of the employment relations pathway currently work well:

- a. *Free access to mediation* – free mediation significantly improves parties' access to justice;
- b. *Access to free information* – NZLS Employment Law Committee members have observed that most parties find it helpful to have free access to information; and
- c. *Variety of relief options* – the employment relations pathway provides a spectrum of relatively informal to formal relief, which can be conducive to resolving issues effectively.

³⁷ Current statutory timeframes are set out in s 146 of the HSWA, which states that prosecutions must be brought within 12 months after the date on which the incident first became known (or ought reasonably to have become known) to WorkSafe.

Q56. *What is the biggest issue with the way a bullying and harassment issue is currently dealt with within the employment relations pathway?*

7.22 The Law Society has identified a number of issues:

- a. *Delays* – there are significant delays in setting mediation dates. If an issue is not resolved by mediation, a complainant will need to wait another 12 to 18 months until the matter is investigated and determined by the ERA.
- b. *The transactional nature of mediation* – as discussed at [7.11], remedies in mediation are predominantly financial remedies which do not focus on repairing the damage on a personal level (even if the employment relationship cannot be repaired). As a result, parties are often left feeling acrimonious.
- c. *Perpetrators are not always involved in the mediation* – mediations which deal with workplace bullying and harassment claims are generally between the complainant and their employer, and not the alleged perpetrator. As noted at [6.15], it could be helpful, in appropriate cases, to facilitate mediation between the complainant and the alleged perpetrator to promote reconciliation between the parties.
- d. *Difficulties in reporting incidents* – it is also often difficult for those who believe they are being bullied or harassed to report an incident because the current pathway requires the respondent to be informed of a complaint (and complainants often fear that their situation will worsen if the respondent is aware of their complaint).

Q57. *What improvements or changes would have the biggest impact?*

7.23 The following suggestions for improvement will likely have the biggest impact:

- a. Placing a greater focus on the inter-personal aspect of mediation (which can be particularly important in ongoing employment situations) and upskilling mediators in this area.
- b. Reducing the use of remote mediation by teleconference for resolving matters relating to bullying and harassment, as this is less likely to properly address the interpersonal issues involved. (By comparison, as discussed at [6.7] above, remote mediation by videoconference may have some benefits for some complainants). It should also be noted that remote participation might impede access to justice for parties who do not have the necessary technology to participate remotely.
- c. Providing quick and easy access to early intervention-type dispute resolution.
- d. Increasing the availability of mediation through better resourcing to attempt to resolve issues before they escalate (for example, by increasing the number of mediators or having contractors who are available to assist on an ‘as and when needed’ basis). Increased resourcing will also reduce the need for parties (and their representatives) to travel when mediators are not available locally.
- e. Increasing the resources of the ERA so cases are investigated and determined faster.

8. Other available pathways

Q58. *Should changes be made to WorkSafe’s criteria, threshold or approach for triaging and handling bullying and harassment incidents at work?*

8.1 WorkSafe’s current processes are not appropriate for dealing with bullying and harassment incidents. At present, WorkSafe relies on employers to report incidents to WorkSafe, and

employers are unlikely to report incidents if they do not consider the incident constitutes of bullying or harassment.

8.2 WorkSafe also relies on employers submitting evidence to inform its investigation. While it is relatively easy to provide evidence of physical harm and injuries, it is much more difficult to provide evidence of bullying and harassment. Evidence could include, for example, reports from psychologists, which come at a cost and requires the complainant to undergo a psychological assessment.

8.3 It is currently unclear what criteria, thresholds and processes are used to triage and respond to bullying and harassment incidents,³⁸ and it would be helpful to have clarity regarding WorkSafe's role and its approach to bullying and harassment. Information should be provided, clearly setting out WorkSafe's role and specifying the criteria, thresholds and processes for investigating incidents relating to bullying and harassment. Corresponding amendments to the HSWA may also be required to further clarify WorkSafe's role.

Q59. *How can WorkSafe most effectively use its range of intervention options to reduce the risk of harm from bullying and harassment at work?*

8.4 The following options are most likely to reduce the risk of harm from bullying and harassment at work:

- a. Educating workers and employers before bullying or harassment begins;
- b. Working with other agencies to share information and provide a central information-resource for those who seek assistance;
- c. Issuing improvement notices with recommendations for improving risk areas to support businesses in making positive changes; and
- d. Deterring bullying and harassment in the workplace by issuing infringement notices and/or fees, and prosecuting serious cases.³⁹

Q60. *What role should WorkSafe have in engaging with, and encouraging change in, sectors or organisations where risks have been identified?*

8.5 We suggest that the following factors are considered in light of WorkSafe's role:

- a. Clarifying WorkSafe's approach to bullying and harassment (as discussed at [8.3]), and how WorkSafe's role interplays with the work currently undertaken by MBIE and the Human Rights Commission.
- b. Enabling WorkSafe to liaise with employers to provide practical solutions to systemic and cultural problems, for example, by:
 - i. identifying factors within a workplace that need to change and providing a framework for effecting that change, and
 - ii. having support persons available to provide situation-specific health and safety (including mental health and wellbeing) guidance and advice to workers.

³⁸ The WorkSafe website only states that it responds to "the most urgent and serious concerns relating to bullying and harassment": <https://www.worksafe.govt.nz/topic-and-industry/bullying/dealing-with-a-bullying-concern-our-role/>.

³⁹ But note the issue of 'double-jeopardy' discussed at [7.16] above.

Q62. *How effectively do these different regulatory systems work together? What gaps or areas of overlap are arising?*

8.6 At present, the various systems work in parallel, and do not work together. Anecdotally, we understand WorkSafe has generally declined to intervene on bullying issues (in relation to all its functions, including education). While the online resources provided by WorkSafe on sexual harassment and bullying in the workplace provide useful guidance, it appears that WorkSafe does not currently have the resource or specialist expertise to investigate these workplace hazards. As a result, issues relating to bullying and harassment are almost exclusively addressed via the employment relations or Human Rights Commission pathways.

9. Next steps

9.1 The Law Society is grateful for the opportunity to provide feedback on the Issues Paper. If further discussion would assist, the convenor of the Law Society's Employment Law Committee, Maria Dew QC, can be contacted through the Law Society's Law Reform and Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa nā



Tiana Epati
NZLS President