



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Bullying and Harassment at Work

Issues Paper: An In-depth Look



Disclaimer

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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.

How to have your say

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions from the public (including businesses, workers and stakeholders) on the issues raised in this document by 31 March 2021. Questions are posed throughout the document to guide submissions.

Your submission may respond to any or all of these questions. We also encourage your input on any other relevant issues. Where possible, please include evidence to support your views – for example, references to independent research, facts and figures, or relevant examples. Any personal experiences provided will be treated in a confidential and sensitive manner.

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

If you find this topic distressing, support is available from helplines such as 1737 Need to Talk?, 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/>).

More information on this consultation can be found at www.mbie.govt.nz/bullying-and-harassment-at-work.

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:
Bullying and Harassment at Work
Health and Safety Policy Team
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140 New Zealand

Please direct any questions that you have in relation to the submission process to HSWRegs@mbie.govt.nz

Use and release of information

The information provided in submissions will be used to inform MBIE's policy development process, and may inform advice to Ministers about potential changes to the health and safety at work and employment relations systems. We may contact submitters directly if we require clarification of any matters in submissions.

Information is not being requested and will not be used for any enforcement purposes. If you wish to seek resolution of a personal experience involving bullying or harassment you should contact Employment New Zealand on 0800 20 90 20.

Submissions are subject to requests for information under the Official Information Act 1982. Please clearly indicate in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

The Privacy Act 1993 applies to submissions. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of any policy advice on this subject. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other information, to be included in any summary of submissions that MBIE may publish.

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Glossary and abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
ACC	Accident Compensation Corporation
ERA	Employment Relations Authority
HSWA	<i>Health and Safety at Work Act 2015</i>
HSR	Health and safety representative
ILO	International Labour Organization
MBIE	Ministry of Business, Innovation and Employment
NSE	National Survey of Employers
OECD	Organisation for Economic Co-operation and Development
PCBU	Person conducting a business or undertaking

Terminology

Certain words have particular meanings under legislation. Where the words ‘employee’ or ‘employer’ have been used in this Issues Paper, they are deliberately used in relation to a particular piece of legislation – eg, the *Employment Relations Act 2000*. In the case of general discussion, the word ‘worker’ is intended to capture all people that are ‘at work’ in New Zealand. Where the word ‘business’ is used, it refers to a business or undertaking (‘PCBU’) under the *Health and Safety at Work Act 2015*.

Chief Executive's Foreword



Kia ora tātou,

Everyone in New Zealand deserves to work in a healthy and safe environment, free from bullying and harassment. We need to ensure that all workplaces are good places to be, they follow good practices and follow the law.

Bullying and harassment is a complex problem that is prevalent in New Zealand and internationally. Some studies suggest as many as one in five New Zealand workers experience bullying or harassment each year. We all know this is not acceptable and that we can do better. We have the opportunity to work together on making that happen.

We each have a role in doing this. While work is underway to improve the wellbeing of people in New Zealand, we all can play a part in promoting a culture that is inclusive and respectful, in every forum.

We know bullying and harassment is a common and serious work risk in New Zealand. Taking steps to prevent it at work should be part of every business's health and safety management. All employers are responsible for providing safe work environments and managing risks of both physical and mental harm. However, the continued high rates of bullying and harassment at work suggest our systems and processes need to be improved.

This is believed to be the first time the Government has had an in-depth look at the issue of bullying and harassment at work in New Zealand. The issues are complex, span employment and health and safety systems, and connect with wider matters around mental health, human rights and crime.

This issues paper aims to outline the nature and extent of bullying and harassment at work in New Zealand; describes the current health and safety, and employment relations systems; and suggests some areas where there may be opportunities to improve. We want your feedback on whether we have correctly identified the issues with these systems, and how you think the Government could better support businesses and workers to address bullying and harassment at work.

Tackling these issues is an important step towards building healthy and respectful work environments that everyone is proud to work in. To develop effective policies we need to hear from as many people as possible, including those who have experienced bullying and harassment, those advocating for them, those exploring the problem, and those involved in designing processes to deal with it.

Consultation closes at 5pm on 31 March 2021. I look forward to hearing your views and thank you for taking the time to contribute to this vital work.

A handwritten signature in black ink, appearing to read 'Carolyn Tremain', written in a cursive style.

Carolyn Tremain
Chief Executive, Ministry of Business, Innovation and Employment

Opening stories

The following are some workers' stories on their experience with bullying and harassment at work in New Zealand. These vignettes showcase what bullying and harassment at work feels like and how the experience impacts people both at work and outside of work.

"Bullying wrecks a whole week. It leads to self-doubt and second guessing. It takes a long time to recover from. It is poorly recognised."

"Professionally it has affected my enjoyment of my job ... At times it is intolerable. The behaviour has caused me stress which has spilled over into my personal life too."

"Recognise the behaviour and dismiss it and remain calm ... Does not affect me and I do not try to defend against allegations made. Have had many years of practice"

"Karen [not her real name] walked past them and saw that they were laughing about a list of staff members. She asked them what it was all about. They laughed again and explained that it was a list of women staff in order of 'rootability'. They continued laughing and Karen left, feeling very uncomfortable."

"I feel disempowered ... I am very anxious about work. This affects my sleep, which makes me worry more ... I find it harder to trust people in general, and am more defensive ... I am less patient with my children, as I feel so stressed. It feels like being trapped in an abusive relationship ... I often dream of leaving."

Part 1 Introduction

1. Bullying and harassment at work is a complex, widespread and serious problem in New Zealand and internationally. This problem reflects broader relationship issues between people in and outside of work, and no country is immune to them.
2. A number of reports and advocates have raised concerns over bullying and harassment at work in New Zealand. In 2018, the Organisation for Economic Co-operation and Development (OECD) reported on mental health and work in New Zealand and observed that there is a high prevalence of bullying at work. The last few years have seen a number of reviews of public sector entities (eg, New Zealand Defence Force, New Zealand Police, Fire and Emergency New Zealand, Parliament) and reporting of bullying and harassment in the private sector, particularly the legal profession. Internationally, there has been particular focus on issues of sexual harm, including the #MeToo movement.
3. Bullying and harassment at work can harm those affected, and this Issues Paper notes how the consequences extend beyond the individuals involved. The severity of harm caused by bullying and harassment to affected individuals should not be underestimated.
4. The primary focus of this Issues Paper is on how work-related regulatory regimes prevent and respond to bullying and harassment at work.
5. To prepare this Issues Paper, MBIE engaged with industry and local bodies, the New Zealand Council of Trade Unions, academics, the Employment Relations Authority (ERA) and the Employment Court, and entities that support those who experience bullying and harassment at work, including Citizens Advice Bureau New Zealand, Gender Minorities Aotearoa and Culture Safe. We also worked with colleagues in the Ministry of Justice, the Joint Venture on Eliminating Family Violence and Sexual Violence, the Ministry for Women, the Accident Compensation Corporation (ACC) and WorkSafe New Zealand.
6. This Issues Paper is structured as follows:
 - The rest of this introduction (Part 1) outlines the scope of the project and the framework applied. It also outlines current definitions of bullying and harassment at work.
 - Part 2 outlines the problem of bullying and harassment at work based on what we know about prevalence and incidents that occur in New Zealand and how they impact individuals.
 - Part 3 describes what good practice to address bullying and harassment at work looks like, based on available evidence. This Part identifies the importance of effective systems to both prevent and respond to bullying, and outlines what good

practice regarding prevention and responses looks like at a system, business and individual level. Part 3 also outlines how bullying and harassment at work is regulated internationally.

- Part 4 outlines the particular issue of sexual harassment at work, discusses how it may be distinctive from other forms of bullying and harassment, and outlines some options for good practice in addressing this issue.
 - Part 5 outlines New Zealand’s international obligations regarding bullying and harassment at work, and the legal obligations on businesses and workers under the *Health and Safety at Work Act 2015* (HSWA), the *Employment Relations Act 2000*, and the *Human Rights Act 1993*. It also describes how these systems interact and the roles and responsibilities of businesses, workers, representatives, WorkSafe (as the primary regulator of health and safety), the ERA and the Employment.
 - Part 6 outlines how New Zealand’s current systems to prevent and respond to bullying and harassment at work are working in practice, and identifies some opportunities there may be for improvement.
 - Part 7 provides a brief overview of some upcoming changes in the way agencies address bullying and harassment.
 - Finally, Part 8 provides a list of all the questions posed throughout the document to guide feedback.
7. Submissions are invited on this Issues Paper until 31 March 2021. They can be provided in the ways outlined on page 4.
8. The feedback received in response to this Issues Paper will help inform:
- 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 Employment Services and WorkSafe
 - upcoming reviews of the disputes resolution system under the *Employment Relations Act* and selected aspects of the HSWA¹
 - New Zealand’s approach to managing psychosocial risk at work and potential system changes that may be required, including the role of businesses in managing their risks.

¹ The scope of these reviews is yet to be determined.

Scope

9. This Issues Paper is concerned with bullying and harassment at work. It includes all forms of bullying and harassment, including sexual harassment. Definitions of all these terms are included on the following pages.
10. Bullying and harassment at times may have a discriminatory basis. Such experiences are covered by this Issues Paper. Other types of discrimination are out of scope of this paper.
11. This Issues Paper focuses on incidents that occur at work, wherever work is being carried out, and at any place a worker goes to or is likely to be while at work. It covers bullying and harassment that is perpetrated by customers and others with whom workers interact while at work, as well as co-workers.
12. The causes and drivers of these behaviours are many and varied, and include cultural and other factors which are not always easily amenable to policy intervention.
13. The main focus of this Issues Paper is on how well the systems and responsibilities established by work-related regulatory regimes are operating to prevent and respond to bullying and harassment at work. This Paper primarily considers the systems and responsibilities established by the *Employment Relations Act* and the HSWA (both administered by MBIE), and to a lesser extent, the *Human Rights Act* (administered by the Ministry of Justice). The main area of consideration for this Issues Paper is what (legislative and non-legislative) levers the workplace relations and safety system has to reduce the prevalence of bullying and harassment at work and improve how issues are responded to when it occurs. These levers can include the relevant legislative frameworks, the services provided by regulatory and operational agencies, and the guidance or support provided by government to support compliance with regulatory requirements.
14. The following areas are out of scope for this Issues Paper: behaviour covered by the *Harmful Digital Communication Act 2015* (eg, cyberbullying) and criminal activities covered by the *Crimes Act 1961* (eg, physical assault) or the *Harassment Act 1997*. Although these are largely out of scope of this Issues Paper, we recognise that they may be captured in circumstances where the behaviour occurs at work, such as abusive emails to a co-worker or a physical assault while at work.
15. This Issues Paper focuses on bullying and harassment at work that occurs between individuals and does not consider in depth any form of bullying that occurs at the corporate level (between businesses).
16. Table 1 summarises the areas that are in and out of scope of this Issues Paper.

Table 1: Scope

In Scope	Issues Paper	Out of Scope	Exceptions
Bullying and harassment at work	Parts 2, 3 and 4	Bullying and harassment outside work Assault relating to bullying (as a criminal offence)	Some analysis is provided in Parts 2, 3 and 4 Reporting physical harm to the Police is included as an option in Part 5
Sexual harassment	Parts 2 and 4	Sexual assault (as a criminal offence)	Reporting sexual harm to the Police is included as an option in Part 5
Incidents involving third parties (ie, customers)	Parts 2, 3 and 4	Cyberbullying	Where this occurs at work
		Discrimination	Where bullying and harassment results from unlawful discrimination Prevalence data that includes discrimination
		Corporate bullying	Impact on the environment at work

Framework for analysis

17. Bullying and harassment at work is analysed according to two main areas of focus: prevention and response. This Issues Paper discusses relevant legislation and refers to the ‘pathway’ available under each. The analysis of each pathway considers issues relating to prevention and response. Where stakeholders or our review of the international literature suggest potential issues, they are noted as questions and identified as such within a box in the text.
18. Prevention has two components: primary and secondary. Primary prevention relates to society and culture and includes education within the school environment and changing social norms. Primary prevention is not a focus of this Issues Paper, as outlined in the discussion of Scope.

19. Secondary prevention relates to legislation and regulation and includes introducing or amending rules that restrict or require certain behaviour and action. For bullying and harassment at work, the HSWA, the *Employment Relations Act* and the *Human Rights Act* are relevant, and each of these are considered in this Issues Paper.
20. Response relates to processes and systems that react to allegations or incidents of bullying and harassment at work to resolve issues, protect victims, and identify and respond to perpetrators.

Definitions of bullying and harassment

21. It is sometimes difficult to know whether a particular behaviour or situation is actually bullying and harassment at work. Often people approach support agencies feeling that they have been bullied or harassed at work but are unsure about whether their experience is defined as such. This can occur, for example, when the bullying and harassment occurs at events connected to work but outside of work time. We have also heard workers sometimes use the terms bullying or harassment when they are unhappy with the environment or conditions at work, but the issue is something different.

Legislative definitions

22. The *Employment Relations Act* and the *Human Rights Act* contain definitions of sexual and racial harassment (see Annex 1).

Working definitions

Harassment

23. Harassment includes any unwanted and unjustified behaviour that another person finds offensive or humiliating. It often has a negative effect on the person's employment, job performance or job satisfaction.
24. Harassment may be bullying if the behaviour is repeated.
25. Examples of harassment include:
 - comments or behaviour that express hostility, contempt or ridicule, repeated put-downs for people of a particular age, body shape, gender identity, etc
 - a general work atmosphere of repeated jokes, teasing, or 'fun' at someone else's expense because of a particular characteristic they have.

Sexual harassment

26. Sexual harassment can happen at any time and at all levels of a business. Sexual harassment can be spoken or written, visual or physical acts. It can occur in person, through text messaging, or online through email, Internet chat rooms or other social media channels (WorkSafe, 2018b).
27. Examples of sexual harassment include:
 - offensive sexual remarks or jokes

- implied or actual threats of being overlooked for work opportunities or promotion if workers say no to the boss's advances
- unwelcome touching, patting, or pinching by the boss, co-worker or customer
- being regularly hassled for a date or being followed home by a co-worker
- sexually offensive images at work, including screen savers of a sexual nature
- intrusive questions about a worker's sex life (WorkSafe, 2018b).

Bullying

28. Bullying is not defined in any New Zealand legislation. However, WorkSafe has a definition that has been considered by the ERA and the Employment Court when investigating claims of bullying:

“Workplace bullying is: repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.

- Repeated behaviour is persistent (occurs more than once) and can involve a range of actions over time.
 - Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.
 - Bullying may also include harassment, discrimination or violence.”²
29. For clarity, workplace bullying can occur at any place where work is being carried out, not just in a ‘physical workplace’. It includes any place where a person goes or is likely to be while at work.
30. Examples of bullying behaviour are set out in Annex 2.
31. According to WorkSafe, workplace bullying is not:
- one-off or occasional instances of forgetfulness, rudeness or tactlessness
 - setting high performance standards
 - constructive feedback and legitimate advice or peer review
 - a manager requiring reasonable verbal or written work instructions to be carried out
 - warning or disciplining workers in line with the business or undertaking's code of conduct
 - a single incident of unreasonable behaviour
 - reasonable management actions delivered in a reasonable way
 - differences in opinion or personality clashes that do not escalate into bullying, harassment or violence.

² The bullying definition is adapted from SafeWork Australia's definition.

32. There is no definitive list or agreement on the specific behaviours that constitute bullying at work. However, the research indicates the following commonalities to bullying at work:
- repeated and unreasonable behaviour directed towards a worker or group of workers
 - may cause severe social, psychological and psychosomatic problems
 - it includes a range of behaviours that can create different categories and layers of bullying
 - it can be overt or covert
 - is persistent and frequent, but does not have to be consistent in effect over time
 - creates a web of poor behaviour and/or a toxic environment
 - abuse of power and an unfair exercise of control over another person or persons.
33. Bullying refers to repeated behaviour, but this is not the case for sexual harassment (or harassment generally), which can be a single incident.

Part 2 Context to bullying and harassment at work

Bullying and harassment in New Zealand society

34. Bullying and harassment are not just an issue in New Zealand's workplaces. What happens in workplaces is often a reflection of what happens in wider society.
35. Bullying in schools has also been highlighted as an ongoing issue by the Youth2000 surveys (carried out in 2001, 2007 and 2012 by the Adolescent Health Research Group at Auckland University). The surveys have found little change in rates of bullying in New Zealand schools over the past decade, with the exception of cyberbullying, which is on the rise.
36. Both the Trends in International Mathematics and Science Study 2014/15 (Ministry of Education, 2016) and the Programme for International Student Assessment 2015 wellbeing reports (OECD, 2018b) show rates of bullying in New Zealand schools are high compared with many other countries.

A note on data

37. Data on bullying and harassment in New Zealand is patchy and incomplete. Much of the data we have comes from questions about bullying and harassment contained within larger surveys, and therefore does not necessarily provide a level of detail that would help to inform policy outcomes. In addition, some surveys use self-selected samples, and the survey questions are not generally aligned with WorkSafe's guidance definition of bullying and harassment at work, which creates questions about the reliability and interpretation of data.
38. Data also does not tell the whole story. We can look at the number of complaints, but this does not necessarily tell us how many instances of bullying or harassment there are at work. The number of complaints can change over time in response to awareness. For example, the Human Rights Commission found that after the global #MeToo movement gained traction, the number of complaints about sexual harassment it received increased significantly. Social awareness of the issue and changing social norms can mean that behaviour that previously went unreported or not raised to the level of a formal complaint is now more likely to be reported.
39. We have heard that many people do not approach formal channels with their complaint because they are not sure what the response will be, and they are worried that their complaint will be taken out of their hands or will result in an unsatisfactory outcome. Data on this is hard to capture. The Citizens Advice Bureau has reported that, in their experience, people who experience bullying and harassment at work are likely to move to a different job rather than go through the process of raising a complaint.

How big is the problem?

40. Bullying and harassment are serious and common work risks, with some sources suggesting as many as one in five workers are affected by such behaviours each year (WorkSafe, 2019b). Such behaviours can cause severe social, psychological and psychosomatic problems in the target.
41. Reports on bullying at work suggests that New Zealand has higher rates of bullying than comparative countries.³
42. StatsNZ's 2018 Survey of Working Life found that 11.4 per cent of people surveyed reported bullying, harassment or discrimination in the last 12 months.⁴ This is an increase from than the 10 per cent who reported bullying, harassment or discrimination in the December 2012 survey, and 9.8 per cent in the March 2008 survey.
43. For the past five years, conditions of work have consistently been in the top 10 categories of enquiries for which people seek the Citizens Advice Bureau's help. Bullying at work is included in this category of enquiry. There has been a 59 per cent increase in enquiries about bullying at work between 2012 and 2018, with the numbers increasing steadily each year.
44. The increases in reported prevalence may indicate that more people are aware of bullying and harassment issues and decreased societal tolerance of the issues, rather than a sudden increase in the level of bullying that is occurring at work. Regardless, the available data suggests that bullying and harassment at work is something that a large number of New Zealand workers have experienced, and as such, requires more attention.
45. Certain groups within society also report being disproportionately exposed to incidents of bullying and harassment at work, as outlined below.

Bullying and harassment may affect one in five workers in New Zealand.

Experiences by gender and ethnicity

46. StatsNZ's 2018 Survey of Working Life found that women are more likely to report they experience bullying, harassment or discrimination in the last 12 months than men (14.5 per cent of women compared to 8.5 per cent of men).
47. Women in ethnic minorities are also more likely to report experiencing bullying and harassment at work. High prevalence rates are reported for Pacific women (14.4 per cent), Asian women (15.5 per cent) and Middle Eastern, Latin American and African women (24.2 per cent).
48. Māori report a higher incidence of bullying and harassment than Europeans (12.7 per cent compared to 10.8 per cent).

³ For instance, some sources suggest New Zealand has the second-worst rate of bullying in the developed world (see <https://www.nzism.org/news/04-09-2018/04-09-2018-1/>).

⁴ Data provided by StatsNZ on 6 September 2019.

Experiences of trans and non-binary New Zealanders

49. The 2018 Counting Ourselves survey⁵ of the health and wellbeing of over 1,000 trans and non-binary people in Aotearoa New Zealand found that in the last 12 months, 57 per cent of participants did not disclose at work that they are trans or non-binary because they feared discrimination. This is understandable, as many participants reported negative experiences when co-workers were aware of their gender. For over a quarter of participants, employers or co-workers had inappropriately shared personal information. Almost one in five have quit a job because of how they were treated as a trans or non-binary person.
50. Almost half (49 per cent) of the trans and non-binary students surveyed had been bullied at school in the last 12 months. More than a quarter had been bullied once or twice (28 per cent), 10 per cent had been bullied once a week, and 11 per cent were bullied several times a week or most days. More than three out of five (62 per cent) of those who had been bullied said the bullying was because of their gender identity or expression.

Experiences of migrants

51. Migrants appear particularly at risk of bullying and harassment at work because they may be afraid that their ability to live in New Zealand might be threatened if they raise concerns or complain. This may apply to those on temporary rather than permanent visas, but could also include those in extreme situations who are experiencing exploitation (eg, restriction of movement and withholding of their passport).

Experiences of young people

52. Young people are also likely to be at increased risk of bullying and harassment at work. Young people will often be entering their first job, are likely to have low pay and are less likely to know their rights. Age and a culture of 'hazing' or 'initiation' to a workplace area are also contributing factors. There is limited data and research available on young people's experiences of workplace bullying and harassment, but it is likely that some groups of young people are more vulnerable due to their gender identity, ethnicity or ability.

Experiences of people with disabilities

53. People with disabilities are also likely to be more at risk of bullying and harassment with a discriminatory basis. Notions of bullying and harassment may vary from a disability perspective. For example, individuals may believe that they have experienced bullying or discrimination when requests for 'reasonable accommodations' have been denied. Decisions that exclude employees with disabilities from workplace events due to physically inaccessible venues is an example of practices that cause humiliation as described in the *Human Rights Act*. Individuals might consider that low-level bullying or discrimination begins at the employment interview, if questions are asked about an

⁵ <https://countingourselves.nz/index.php/community-report/> (accessed November 2019)

impairment that are non-standard (ie, questions that are not asked of non-disabled applicants).

Data by sector

54. StatsNZ's 2018 Survey of Working Life found that industries with workers reporting the highest rates of bullying and harassment at work were:
 - health care and social assistance (18.8 per cent)
 - public administration (18.1 per cent)
 - education and training (14.6 per cent)
 - retail trade, accommodation and food services (12.5 per cent)
 - rental, hiring and real estate (12.4 per cent)
 - transport, postal and warehousing (11.2 per cent).
55. Agriculture, forestry, fishing and mining recorded the lowest rate at 4.9 per cent. Further research is required to determine whether the lower rate is driven by lower rates of bullying and harassment at work, or from a higher tolerance of those behaviours at work and/or potentially greater focus on higher rates of physical harm.
56. The survey showed that community and personal service workers experienced higher rates of bullying, harassment and discrimination at work (16.7 per cent), although professionals and managers are also affected (12.9 and 9.2 per cent respectively). Higher rates were recorded for paid employees (12.1 per cent) compared to employers with staff (9 per cent) and self-employed workers without staff (7.9 per cent).
57. WorkSafe's 2020 Workforce Segmentation and Insights Survey found that 15 per cent of workers across all industry groups reported experiencing bullying or harassment in the last 12 months. Similar to the Survey of Working Life, sectors where workers reported a higher than average incidence of bullying and harassment included healthcare and social assistance, professional and technical services, education, and public administration and safety. Sectors that reported a lower than average incidence included agriculture, forestry, wholesale trade, and accommodation and food services.
58. Over the last few years public attention has been drawn to the work cultures where a high number of individuals or groups of individuals have been systematically bullied or sexually harassed. Data from three of these – the New Zealand Law Society, the New Zealand Parliament and Fire and Emergency New Zealand – is outlined below. These three organisations commissioned independent research on the nature and scale of the issues and recommendations on how to improve the cultures of these workplaces. Following the release of the reports, all are implementing changes to improve the working conditions for staff.
59. The 2018 survey of lawyers by the New Zealand Law Society shows that 31 per cent of female lawyers and 5 per cent of male lawyers have been sexually harassed during their working life. Of female lawyers, 5 per cent had experienced harassment in the last year,

13 per cent within the last three years, and 17 per cent within the last five years (New Zealand Law Society, 2018).

60. More than half of all lawyers surveyed reported having been bullied at some time in their working life.
61. The May 2019 Independent External Review into Bullying and Harassment in the New Zealand Parliamentary Workplace found that unacceptable conduct is too often tolerated or normalised. Of the more than 1,000 people who responded to an online survey sent to current and former staff, 29 per cent had experienced some form of bullying or harassment from either a Member or a manager, 30 per cent from peers, and 24 per cent from a member of the public. The online survey measured strength of agreement with the statement: 'My workplace has clear and effective systems for dealing with intimidating behaviour and workplace bullying, which are applied to everyone.' The result was 42 per cent, indicating a low level of agreement with this statement. This result was also significantly lower than comparative benchmark data for a similar question in surveys undertaken by the same survey provider.
62. The independent review into the workplace culture of Fire and Emergency New Zealand found that 45 per cent of staff surveyed reported witnessing and/or experiencing bullying in the organisation. Of these, only 43 per cent reported the behaviour (Shaw, 2019).
63. The finding that some sectors have much higher rates of bullying or harassment indicates there could be opportunities for targeted interventions where there is increased awareness of high rates in those sectors.

Use of government services to address bullying and harassment at work

64. In 2018/19 MBIE's Employment Services contact centre received 2572 calls seeking advice regarding bullying and harassment at work. Of these 123 related to sexual harassment.
65. In the same time period, Employment Mediation Services received 1,355 applications for support which included bullying, harassment or discrimination as one of the issues raised. Of these, 104 included sexual harassment.
66. In the five-year period from 2015 to 2019, the ERA considered 84 cases where bullying (either the employer bullying the employee or their lack of, or inappropriate, response to a bullying complaint) was the main basis of the personal grievance. From 2015 to 2019, the ERA considered 14 cases where sexual harassment, and seven cases where racial harassment, was the main basis of the personal grievance.
67. During 2015–2019, the Employment Court considered eight cases where bullying was the main basis of the personal grievance. During this time, the Employment Court considered one case where racial harassment was the main reason for the grievance and did not consider any cases where sexual harassment was the main basis for the grievance.

68. Between December 2013 and April 2019, at least 228 reports to WorkSafe involved bullying at work. WorkSafe targets its interventions to the most serious cases of bullying and harassment where intervention is necessary to achieve its purpose and functions. Of these reports, 20 were investigated by WorkSafe and 84 were either referred to a more appropriate agency (ERA, Police or other) or referred to the business to self-manage.
69. In the 2017/18 year, the most common issues raised with the Human Rights Commission were employment, followed by race, disability and harassment. Employment and pre-employment account for 42 per cent of complaints (Human Rights Commission & Office of Human Rights Proceedings, 2018).
70. Whether the issues raised to these services are being effectively resolved is difficult to determine. Parties to a case will often have different views on whether an issue has been appropriately resolved, and the particular outcomes reached will be highly variable depending on the circumstances of each case.

What are the impacts?

71. When an individual experiences bullying and harassment at work, the impacts go beyond implications at work, such as reduced performance or mental wellbeing. It can also impact their wellbeing in a broader sense through health issues, ranging from anxiety and self-esteem concerns to stress, depression, and even post-traumatic stress disorder and suicide attempts (Figure 1). These impact people's capability and capacity to engage in work, study, recreation and social activities (Treasury, 2018).
72. At the organisation level, bullying, harassment and discrimination at work can cause impacts through:
 - affecting staff morale
 - leading to stress and impact employee health
 - increasing staff turnover
 - damaging relationships
 - impacting on productivity and profit
 - leading to an employee taking action against the employer, causing a financial impact
 - damaging the organisation's reputation.
73. The way an organisation responds to bullying and harassment issues also has an impact. If issues are responded to poorly this can compound impacts caused to the person who has experienced bullying and harassment, the alleged perpetrator and to the wider organisation.

Wellbeing impacts



Figure 1: Impacts of bullying and harassment on individuals' wellbeing

74. Individuals do not experience these outcomes in isolation. They impact home life, whānau, community, and society more broadly (Figure 2). This is true of health and financial impacts. These include the immediate income loss of leaving a job, as well as long-term financial implications if the individual cannot continue to participate in paid work, or needs to take a lower-paid alternative.

Ripple effects

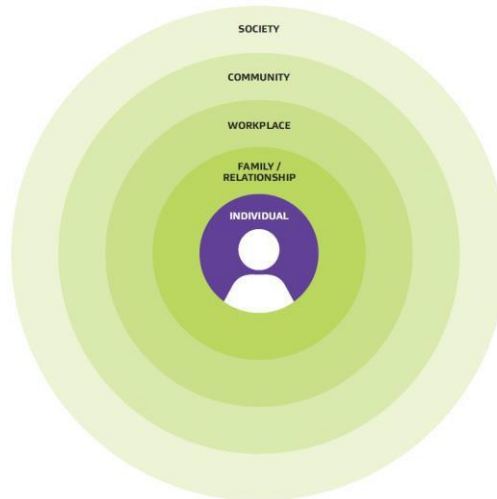


Figure 2: Ripple effects of bullying and harassment at work

75. The ripple effect is a two-way phenomenon. Elements of community and society have an impact on our experiences at work and vice versa. This has been acknowledged recently by changes to the *Holidays Act 2003* and the *Employment Relations Act* to provide, respectively, family violence leave and the right to request flexible working for those affected by family violence.

76. Wider social norms and values can impact the way bullying and harassment is viewed and responded to in workplaces, (eg, by making certain behaviour seem acceptable). The way bullying is responded to in non-work settings also impacts expectations of how it should be responded to at work.
77. Any incidents of bullying and harassment at work impact on the business or organisation. As identified above, the effects go beyond the perpetrator and the individual concerned, and impact bystanders and witnesses. This can take the form of negatively impacting their individual wellbeing through stress, or through creating or reinforcing a work culture where bullying and harassment is acceptable behaviour. A negative work culture can be one way in which bullying and harassment is able to occur. However, a work environment that previously had a positive culture can change, if incidents of bullying and harassment occur and are not stopped.
78. A common impact on the business is the cost of recruiting and training new staff, as many of those who experience bullying and harassment at work will simply change jobs. The perpetrator may also choose, or be required, to leave.

<p>Q1. How can we most effectively increase our understanding of the drivers of bullying and harassment? What types of data will be most useful in developing this understanding?</p>
<p>Q2. How can we reduce rates of bullying and harassment, including sexual harassment, experienced by Māori?</p> <p>a) How can we increase our understanding of the drivers for bullying and harassment experienced by Māori?</p> <p>b) What barriers are there for Māori seeking support to address bullying and harassment?</p> <p>c) What does a 'healthy and respectful' workplace look like for Māori (eg, diverse and inclusive)? How do we build culturally supportive workplaces?</p> <p>d) How well are relevant agencies (eg, WorkSafe and MBIE's Employment Services) partnering with Māori when developing guidance and support?</p>
<p>Q3. How can we reduce rates of bullying and harassment, including sexual harassment, experienced by other minority and vulnerable populations (eg, people with disabilities, migrant workers, and trans and non-binary New Zealanders)?</p> <p>a) How can we increase our understanding of the drivers for bullying and harassment experienced by these groups?</p> <p>b) What barriers are there for these minority and vulnerable groups seeking support to address bullying and harassment?</p> <p>c) What does a 'healthy and respectful' workplace look like for these groups (eg, diverse and inclusive)? How do we build culturally supportive workplaces?</p> <p>d) How well are relevant agencies (eg, WorkSafe and MBIE's Employment Services) working with these groups when developing guidance and support?</p>

Part 3 Good practice at work

What does the evidence say good practice looks like?

79. This section outlines what good practice for preventing and responding to bullying and harassment at work looks like, based on New Zealand and international literature. It will break this down into what good practice looks like at a system level (ie, what legislation and government processes are in place), at a business level, and for individuals.
80. Internationally, bullying and harassment at work is recognised as a problem, and many countries are also thinking about how to improve their approach.
81. The literature confirms that preventing bullying and harassment at work from happening in the first place is vital, and that prevention processes should be based on good evidence. It also confirms that responding to bullying or harassment when it does occur in the workplace requires having and following evidence-based policies that are flexible enough to deal with the differences in situations but firm enough that they are not ambiguous.
82. Government, businesses and individuals all have a part to play in preventing and responding to bullying and harassment.

There needs to be a strong focus on preventing bullying and harassment from occurring in the first place.

Prevention

83. Good practice suggests that preventing bullying and harassment from happening at work in the first place is an important part of how we reduce the harm caused by this type of behaviour.
84. Preventing bullying and harassment requires leadership, accountability and participation by government (at a system level), businesses and individuals.

<i>In summary: Good practice for prevention</i>	
System	<ul style="list-style-type: none"> • Provides clear leadership in the health and safety system for the prevention of harm from psychosocial risks • Provides clear guidance based on evidence on how to prevent bullying and harassment • A whole-of-government approach to addressing psychosocial risks at work
Businesses	<ul style="list-style-type: none"> • A healthy and respectful workplace culture where bullying and harassment is not tolerated • Capable management – in particular, managers and human resources being trained to spot behaviour, and deal with it, early • Strong leadership – role modelling positive behaviours and setting the ‘tone

	<p>from the top'</p> <ul style="list-style-type: none"> • Recognise and value diversity and inclusion in workplace culture • Develop and communicate clear policies and procedures relating to bullying and harassment • Proper resourcing levels and support, including appropriate staffing levels and clearly defined roles
Individuals	<ul style="list-style-type: none"> • 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

85. At a system level, government needs to be clear that prevention of bullying and harassment is a health and safety risk that businesses need to manage. Government should provide support to businesses to do so, including evidence-based guidance.
86. Businesses need to accept that managing bullying and harassment is a key part of managing their psychosocial health and safety risks, and that focusing on prevention will help them do this. Research from the United Kingdom suggests that bullying and harassment at work should be recognised as systemic issues for businesses to manage, and not just interpersonal relationships that need to be dealt with by individuals (Eveesson, Oxenbridge, & Taylor, 2015).
87. Businesses can prevent bullying and harassment by building a healthy and respectful organisational culture where bullying and harassment is not tolerated. Australian research found that workplace culture was a key determinant of whether bullying and harassment would occur and for how long it would be sustained (House of Representatives Australia, 2012). Well-defined standards of expected behaviour at work (and clearly articulated consequences for not following them) can contribute towards a culture where bullying and harassment is not tolerated.
88. One way businesses can build a healthy and respectful culture is by building diversity and inclusion into workplaces. Diversity is good for businesses because it brings different ways of thinking to problem solving and allows for mutual understanding of cultures. New Zealand research found that a supportive organisational culture that genuinely values diversity and appreciates the strengths of the different perspectives and viewpoints it brings is one that is likely to foster the wellbeing of employees (Gardner et al., 2013).
89. Building management capability is another way an organisation can help prevent bullying and harassment. Having managers who can identify the early stages of bullying or harassing behaviour at work and have the knowledge and capability to intervene early to prevent the behaviour escalating is crucial to being able to do this (Eveesson et al., 2015). Having a human resources function that can provide support and training to managers to guide them through this process is also useful.

90. Good managers can also help shape the culture of an organisation, and by modelling good behaviour can reduce stress within their teams and reduce the likelihood of bullying or harassment occurring.
91. Another way that businesses can help prevent bullying and harassment is by creating working conditions that reduce stress and overwork as much as possible. Good managers help with this, as well as proper resourcing levels (both having the right number of staff for the job and ensuring they have the right tools and equipment to do their jobs) and clearly defined roles. This reduces stress for staff and reduces the likelihood of stress-driven bullying and harassment behaviours (Safe Work Australia, 2016).
92. Large businesses with dedicated human resource functions are more likely to have the resources for this. Managing bullying and harassment can be just one of the many things that small and medium enterprises have to manage on limited resources. Government support for these businesses to manage bullying and harassment can make it easier and therefore more likely to happen.
93. Individuals also have a responsibility to prevent bullying and harassment. One way they can do this is by being clear what kind of behaviour is appropriate and what is not. Individuals can also help by contributing positively to workplace culture.
94. Individuals can also help prevent bullying and harassment by calling out poor behaviour directed towards themselves or others. This works best at the early stages of bullying and harassment (ie, it is unlikely to work if the bullying has been going on for a long time or is part of a relationship breakdown), and is much more effective if the individual has the support of their business to do so.
95. That said, if an individual is being bullied, then they should not be expected to deal with it on their own. Being bullied is stressful and emotionally draining, and it is not a failure on the part of an individual if they are bullied. In some cases, calling out the behaviour can make the behaviour worse, and individuals will rightfully worry about this. Ultimately, it is the person doing the bullying and harassment that is responsible for their behaviour.
96. Finally, all individuals have a responsibility to treat each other with dignity and respect.

Response

97. Unfortunately, a focus on prevention isn't going to prevent all instances of bullying and harassment in the workplace. This means that understanding and implementing good practice when responding to issues is vital.
98. Good practice for responding will look different in different circumstances. The factors that can change how you might respond include the nature of the behaviour, the severity, and the parties involved. Responding early to issues is crucial, and the earlier an issue is identified, the more likely it is to be resolved rather than escalated. For more serious issues, a different, more intense approach is likely to be necessary.

Responses need to be flexible due to the varied nature, severity and impact of bullying and harassment.

99. As for prevention, good practice for responding involves government, businesses and individuals working together.

<i>In summary: Good practice for responding</i>	
System	<ul style="list-style-type: none"> • 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, consistently communicated and widely understood
Businesses	<ul style="list-style-type: none"> • Evidence-based policies and procedures in place to manage bullying and harassment <ul style="list-style-type: none"> ○ Managers and human resources appropriately trained to use these policies ○ Ensuring all staff are aware of the policies and procedures and what to do if they experience or witness bullying ○ 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	<ul style="list-style-type: none"> • 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 diffuse steps)

100. Early intervention in an informal way should be encouraged where appropriate (Evesson et al., 2015). This implies that at a system level, it is important that a government's health and safety and employment relations systems are shaped in a way that allows this. Early intervention can prevent issues from escalating and requiring more intense intervention later on.
101. The individual circumstances of cases mean that the same approach will not work for all. Allowing different approaches at a system level could help to improve outcomes for individuals.
102. At the same time, it is important that processes are clearly defined and the options widely understood by businesses when developing their policies and by individuals when deciding which pathway to take.
103. For businesses, good practice means having clear behavioural expectations of staff, and policies and procedures for managing complaints. But it is not enough to just have policies in place. Managers and human resources must be trained to use them, and they must follow the policies when complaints are received. Evidence from New Zealand and overseas shows that policies adopted by businesses are generally sound and based on

good practice, but they are often not followed, including in the New Zealand public service (Crimp, 2017). This appears to be true in both small and larger businesses.

104. Good practice suggests that flexibility in the options for response should be available depending on the severity or the nature of the issue. Such policies acknowledge that the nature of bullying and harassment is such that it may be necessary to treat it differently than other issues to prevent secondary victimisation and improve rates of reporting. This is also the case when the behaviour is of a sexual nature.
105. It also suggests that individuals should be provided with support throughout the process, both those who are experiencing bullying and harassment and those who have been accused. This support could include help navigating the process, providing confidential external counselling, and language and cultural support as needed.
106. Businesses should also have processes in place to spot bullying and harassment. This can include gathering information through regular surveying of staff on culture, exit interviews, and taking a deeper look into a department or team when there has been a high number of resignations or increase in sick leave taken (Safe Work Australia 2016; WorkSafe, 2019b).
107. Again, these things are much easier for large businesses. Government should ensure that practical support is provided to small businesses to help.
108. Businesses should ensure their employees are aware of the policies, and individuals should know where to go to find information or support if they are experiencing bullying or harassment.
109. Research suggests intervening in issues early before they fester and become much larger issues with psychological harm. However, when issues are at a low level, individuals can feel as if it is not worth raising, or that they would be making too much of a fuss over something that doesn't warrant it.
110. Having a culture where individuals feel empowered to call out poor behaviour, and where managers and senior staff are looking out for this behaviour and intervening early, has been identified as good practice (Evenson et al., 2015; Safe Work Australia 2016). The ability to raise concerns about behaviour at early stages without requiring a formal complaint or process has also been identified as something that could contribute to reducing harm.
111. For issues that have escalated beyond minor, or are initially of a serious nature, following clearly articulated policies based on evidence is important. Formal procedures and processes are needed for cases where early intervention does not work.
112. Guidance by Safe Work Australia (2016) suggests that reports of workplace bullying of a serious or complex nature should always be investigated, with the aim of the investigation to look into the circumstances of the matter and work out what has occurred. Investigations should be conducted by an unbiased person with experience and knowledge in dealing with workplace bullying, and both parties should be informed of the process and kept up to date on progress. Safe Work Australia notes the importance of balancing the confidentiality of the parties involved and transparency

about how the complaint will be handled. An organisation also needs to make sure there is transparency to the rest of the organisation about what process will be followed if a bullying complaint is raised, and generic information about reports of bullying. This helps to generate confidence that the organisation is serious about preventing bullying.

Case Study: Independent External Review into Bullying and Harassment in the New Zealand Parliamentary Workplace – improving a problematic workplace

In November 2018 Parliament commissioned a review into bullying and harassment in the parliamentary workplace to be conducted by independent reviewer Debbie Francis.

In May 2019 the findings of this review were reported. The Francis Report found that bullying and harassment were systemic in the parliamentary workplace, including staff frequently having been exposed to sexual harassment. Unacceptable conduct was often tolerated and normalised, and perpetrators were perceived to have little accountability for their actions.

In response to these findings the Francis Report made a number of recommendations for change and outlined what good practice to address bullying and harassment looked like in the parliamentary workplace. This included:

- workplace leaders affirming a no-tolerance approach to bullying, harassment and sexual harassment, and establishing awareness-raising programmes on combating bullying and harassment for the entire workplace
- redeveloping workplace codes of conduct, and making codes of conduct a more active part of employee induction and day-to-day processes
- investing in upskilling the leadership and people management skills of managers, and in ensuring they are aware of their health and safety obligations
- developing systems to allow low-level dispute resolution of issues between staff before they escalate, and to provide support to staff who have suffered from bullying and harassment (including ensuring the availability of expert professionals and cultural supports)
- redeveloping human resource systems to ensure they appropriately support both managers and staff, and to create clear progress and outcome measures for workplace health, safety and wellbeing
- updating health and safety policies and processes to reflect current best practice guidance and ensuring they are periodically reviewed. These should include clear processes for complaints to be made and handled in confidence
- creating or reviewing other policies on workplace conduct that can impact bullying, eg alcohol use and interactions with media

The Report recognised that there was no silver bullet to address workplace bullying and harassment issues, and that changing parliament's workplace culture would require long-term efforts and investments.

While the particular recommendations made by the Francis Report will not be applicable to all workplaces, it does provide an example of the types of action workplaces can consider to address a workplace culture of bullying and harassment.

What are other countries doing?

113. The legislative and operational approach to preventing and responding to bullying and harassment in different countries reflects their different historical, socio-economic, political, and legal contexts.

Health and safety legislation

114. Traditionally, countries' health and safety systems have focused more on physical health and safety risks. However, the potential for psychosocial harm is increasingly being covered by health and safety systems around the world.
115. A 2016 comparative analysis across countries of the regulation and governance of psychosocial risks at work found that worldwide approaches taken in legal instruments dealing with psychosocial risks and their harmful effects differ in scope and specificity (Bluff, 2016).
116. In some countries, such as New Zealand, Australia and the United Kingdom, there is a broad duty to manage all risks to health and safety, including the risks of psychosocial harm. In New Zealand we have interpreted this to include managing the risks from the potential psychosocial harm that can arise as a result of bullying and harassment in the workplace.
117. New Zealand and Australia share a similar health and safety regime because New Zealand law is modelled on Australian law. In Australia, individual states are responsible for health and safety legislation, and states have modified the Model Health and Safety Law to fit their regulatory regimes. As in New Zealand, the Acts generally apply to all workers regardless of employment relationship, and the person conducting a business or undertaking (PCBU) has the primary duty of care to ensure, so far as is reasonably practicable, that workers and others are not exposed to health and safety risks arising from work carried out by the business.
118. In Australia in December 2018 the final report into the review of the model Work Health and Safety laws was released (Boland, 2018). One recommendation was to amend the model Work Health and Safety Regulations to deal with how to identify the psychosocial risks associated with psychological injury and appropriate control measures to manage those risks. Psychological health is included in the broad duties of a PCBU, but during the consultation on the report, many stakeholders pointed to a lack of clarity about how to manage the risks to psychological health. While subject to the same duties as physical health, the focus in the model laws on physical health makes psychological health feel like an afterthought. The report found employers also often feel out of their depth managing psychological harm, and questioned the extent to which a PCBU should have responsibility for their workers' overall psychological wellbeing. A minority of submitters did think that the existing laws are sufficient and all that is required is more education and awareness raising. The Australian Government is deciding how to respond to the report and its recommendations.

Psychosocial harm is a relatively new area of focus for health and safety systems.

119. In Victoria, anti-bullying legislation known as Brodie's Law was introduced in 2011 after a 19-year-old woman named Brodie Panlock took her own life after being bullied at work. Brodie's Law amended the *Victorian Crimes Act 1958* and made serious bullying an offence punishable by a maximum penalty of 10 years' imprisonment. Brodie's Law applies to all forms of serious bullying, including physical bullying, psychological bullying, verbal bullying and cyberbullying. It also applies to bullying occurring anywhere in the community, such as workplaces, schools, sporting clubs and on the Internet, including email or social networking sites. This has impacted the priority of bullying in other regulatory areas. Workers who are bullied can contact WorkSafe Victoria's advisory service for information on bullying and how to prevent it, advice on how to raise the issue of bullying in the person's workplace, or refer the matter to an inspector where appropriate.
120. In 2019 SafeWork South Australia secured its first two convictions for a workplace bullying incident. Two site supervisors were convicted and fined AUD\$12,000 and \$21,000 (about NZD\$12,830 and \$22,450) for the same incident involving the bullying of an apprentice. SafeWork SA said the case reinforced the importance of having a process in place to ensure bullying does not occur in the workplace, including the training of workers in how to manage any instances of bullying and reassuring workers that reporting such behaviour can occur confidentially and without fear of repercussions (SafeWork SA, 2019).
121. Other countries (eg, Canada) have more specific rules about how duty holders must manage psychosocial risks. Often particular psychosocial risks and requirements to manage these are identified as part of health and safety rules. In some jurisdictions this includes bullying and harassment generally, while in others bullying and harassment is only included as it relates to violence or the potential for violence in the workplace.
122. Health and safety at work regulators and authorities often also rely on advisory and information resources to support the practical application of health and safety legislation.
123. For countries that have general obligations to manage risks, but do not specifically mention psychosocial risks, regulators provide guidance material on managing these types of risks. In some, including New Zealand and Australia, this includes specific policies on managing bullying and harassment, but this is not the case in all countries.
124. Countries that have specific legal requirements around psychosocial risks also use guidance and other information sharing to inform a duty holder on how they can practically comply with the requirements. Some countries, such as the United States and the Republic of Korea, issue guidance that is sector- or occupation-specific.
125. Health and safety regulators are also often responsible for inspection and enforcement. A key issue in inspecting and enforcing for psychosocial risks is that psychosocial issues require different procedures and methods than the type of risks we traditionally associate with health and safety regimes. Some countries have developed procedures and methods to guide inspectors in assessing and investigating psychosocial risks. These are well developed in most of Europe. Other countries have looked at inspector

competence, including in Sweden, or have introduced specialist psychosocial inspectors to complement generalist inspectors.

126. SafeWork SA has a specialty psychosocial inspector unit that focuses on psychosocial hazards, including bullying and harassment.
127. In Australia, Tasmania has set up a cross-jurisdictional Workplace Bullying Project Team to address bullying in the workplace. It consists of representatives of the WorkCover Tasmania Board, WorkSafe Tasmania and the Office of the Anti-Discrimination Commissioner, and was formed in response to the WorkCover Tasmania Board's request to develop a strategy to deal with bullying in the workplace. WorkSafe Tasmania has provided inspectors with guidance on how to respond to psychological hazards in workplaces, including but not limited to bullying (defined as repeated unreasonable behaviour).

Employment relations legislation

128. A common avenue for a worker who has experienced bullying and harassment to seek a resolution or remedy is through the disputes resolution systems under employment legislation. The circumstances in which a worker is able to raise a bullying or harassment issue in the disputes resolution systems differs between countries. For instance, in some countries a worker who has experienced bullying behaviour is only able to make a complaint if they have resigned as a result, unless the behaviour involved a discriminatory basis. The ability to raise a personal grievance for unjustified disadvantage due to bullying while still in employment is a strength of New Zealand's system. Harassment on discriminatory grounds (eg, sexual harassment) is generally covered while still in employment.

Countries are grappling with similar issues regarding how to resolve disputes earlier.
129. The International Labour Organization (ILO) recently conducted a comparative assessment of individual dispute settlement systems in nine OECD countries (Australia, Canada, France, Germany, Japan, Spain, Sweden, the United Kingdom and the United States). This assessment found a number of commonalities; in particular:
 - a focus on reducing the cost and increasing the speed of labour dispute resolutions
 - a general trend towards conciliation and mediation, both as part of formal court processes and as stand-alone mechanisms, often established by the labour administration
 - in several jurisdictions, greater importance has been attached to the information, advisory and educational functions of labour administrations and state agencies
 - an emphasis of empowering and reaching out to weaker-party workers (International Labour Office, 2016).
130. The United Kingdom has introduced changes focused on promoting the earlier resolution of issues. In particular, in 2014, changes were made so that an employee could no longer go straight to the Employment Tribunal. If a worker is considering making an

Employment Tribunal claim, they are required to notify ACAS (Advisory, Conciliation and Arbitration Service), which will offer help in settling the dispute. This is similar to the requirement in New Zealand for parties to attempt to resolve the issue via mediation, before progressing to the ERA. The main difference is that ACAS's 'Early Conciliation' service is provided by phone, with parties contacted separately.

131. Another difference is the United Kingdom Employment Tribunal offers a Judicial Assessment service, which is an assessment of strengths, weaknesses and risks of the parties' respective claims, allegations and contentions on liability and remedy. The purpose of the provisional assessment is to help the parties to resolve their difference by way of settlement. The service is optional, and the Employment Judge cannot decide about the case at the Judicial Assessment. The United Kingdom system also has a strong preventive focus, with ACAS providing a range of information, support and training for workplaces.
132. Australia introduced an anti-bullying jurisdiction in 2014. Changes to the Fair Work Act gave the Fair Work Commission the power to make 'anti-bullying orders'. The purpose of this new avenue of redress was to address a gap in the system. Previously, a worker would only have grounds to make a complaint while still employed if they were subjected to adverse action as a result of making a complaint about bullying, not the bullying itself. The stages in their approach are similar to New Zealand, in that mediation is initially offered to help parties resolve the issue. If parties cannot reach an agreement through mediation, then the Commission has powers to determine whether workplace bullying had occurred and make an order to prevent further bullying occurring. The Commission cannot, however, order financial penalties or financial compensation to be paid to the worker. Penalties may be sought from the Federal Court if the order is not abided by.
133. Ireland has developed statutory codes of practice focused on bullying and harassment. It currently has two codes of practice for bullying – one relating to health and safety and one relating to workplace relations. Ireland is currently in the process of revising the two codes and replacing them with one up-to-date code covering both areas. Ireland also has a statutory code on Sexual Harassment and Harassment at Work. The codes are not legally binding, but failure to create and review policies and procedures as recommended would be a consideration if a case was taken against an employer.

Part 4 Sexual harassment at work in New Zealand

Context to sexual harassment at work

134. Sexual harassment fits within broader patterns of bullying and harassment, but it is also a unique abuse of power at work. Its key characteristics 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.

135. 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.

136. Research has found that women who do not conform to traditional feminine expectations – for example, by holding authority, not being heterosexual, and working in fields dominated by men – are more often the targets of sexual harassment (McKinsey & Company, 2018).

The full extent of sexual harassment is unknown due to lack of data and underreporting.

137. The recognition and response to this type of harassment is heavily shaped by the myths and norms of broader society. These can minimise, negate or undermine the victim's sense of agency and the responsibility of others to recognise sexual harassment as a safety issue.

138. It is important to note while structural discrimination and bias contribute to women more commonly experiencing sexual harassment, it is not exclusively an issue affecting women. Portraying sexual harassment as an issue that only affects women may discourage male victims from reporting complaints and seeking help.

Impact of sexual harassment on victims

"I was absolutely humiliated, I felt deep shame and was treated horrifically by my own colleagues and employers. I was the only woman ... in my place of work and when it came to the crunch, the boys' club rallied around for each other. Who was I supposed to go to for help? No-one cared and no-one listened. I was alone."

"I am deeply traumatised by everything. I do not feel safe ever ... I have to wear shoes I can run away in."

139. Individuals who experience sexual harassment report suffering from anxiety, depression, debilitating stress and loss of self-esteem. Such harassment can have severe and lasting physical, psychological and economic consequences.
140. People who experience sexual harassment are often unwilling to report it. When it is reported there is often a lack of understanding of what approaches may help or the outcome a victim may wish to achieve, and how to respond appropriately without undermining anyone's employment rights. As a result, sexual harassment often results in people leaving jobs, which can create financial stress and negatively impact their career trajectory. Those who cannot leave suffer ongoing stress. This stress may manifest itself in decreased productivity, job dissatisfaction, work withdrawal, disengagement and excessive absenteeism. Impacts of sexual harassment are also not limited to the victims themselves – bystanders and others at work can be adversely affected.

Bystanders at work

141. The impact of sexual harassment or violence on bystanders and their role in addressing such behaviour has drawn increasing attention over the last 10 years. Bystanders play a crucial role in preventing or widening the harassment.
142. In the 2018 Australian Human Rights Commission national survey, one in three people (35 per cent) who witnessed or heard about the sexual harassment of someone else at work took action to prevent or reduce the harm of this harassment. Most commonly (in 71 per cent of cases), the action taken by the bystander was to talk with or listen to the victim about the incident. In less than half of cases (47 per cent) the bystander reported the harassment to the employer.

Impact on broader workplace

143. Sexual harassment causes damage to employees who experience it, but it also has significant detrimental effects on businesses. These effects include higher employee turnover, lower employee productivity, increased absenteeism and increased sick leave costs. Advocates for victims of sexual harassment have noted that sexual harassment

has a cumulative, demoralising effect on groups of women at work, even if members of that group have not been individually targeted. Severe or pervasive sexual harassment in certain businesses or industries creates a hostile or intimidating environment that causes women to leave their jobs and discourages women from seeking those jobs in the first place. As such, it can hamper dismantling of occupational segregation and closing gender pay gaps.

144. A 2018 report by the International Center for Research on Women noted that sexual harassment was the manifestation of broader power imbalances in the workplace. In order to genuinely address sexual harassment, workplaces must deal with the individual perpetrators and victims of sexual harassment, as well as address these power imbalances.



Figure 3: Diagram taken from *The Costs of Sex-based Harassment to Businesses: An In-Depth Look at the Workplace* (International Center for Research on Women, 2018, p. 4).

Addressing sexual harassment at work

145. WorkSafe (2018b) recommends the following control measures for businesses to put in place to deal with the risks arising from sexual harassment:

- Build good relationships in a respectful work environment
- Educate workers (including managers and health and safety representatives) about sexual harassment
- Develop good managers
- Make sure everyone knows their responsibilities
- Make your sexual harassment policies, processes and systems transparent
- Make sure your workers (and others) know how to report sexual harassment
- Provide protection and support to workers who experience sexual harassment or see sexual harassment (bystanders).

146. A study conducted in the United States found women were far less confident that reporting sexual harassment would lead to a fair investigation and were twice as likely as men to say that it would be risky or pointless to report an incident. The report stated that these findings indicate:
- companies should underscore that bad behaviour is unacceptable and will not go overlooked
 - leaders at all levels should set the tone by publicly stating sexual harassment won't be tolerated and by modelling inclusive behaviour
 - human resource teams should receive detailed training so they know how to thoroughly and compassionately investigate claims of harassment, even if they involve senior leaders
 - companies would benefit from putting an audit process in place to ensure that investigations are thorough and sanctions are appropriate (McKinsey & Company, 2018).
147. ACC funds therapy for people who have experienced sexual abuse or assault (whether it occurred at work or elsewhere). Advice on accessing support is available on ACC's FindSupport website (<https://findsupport.co.nz/>).
148. The importance of providing appropriate responses to those who experience sexual harassment has been signalled by recent work by the Ministry of Justice to improve the experience for sexual violence complainants in the criminal justice system, with an emphasis on reducing the risk of re-victimisation. This work followed a 2015 report by The Law Commission, which found that the justice system often failed to respond appropriately to victims of sexual violence, and that this could lead to significant secondary victimisation and contribute to the low rates of reporting of sexual violence to the Police (Gravitas Research and Strategy Limited, 2018, p. 1).
149. The Ministry of Justice commissioned research to collect data on the perspectives of victims of sexual violence who have had some contact with the justice system (the Police and courts) over the previous three years. Victims identified the following issues:
- re-victimisation and re-traumatisation
 - a sense that the rights of offenders took precedence over the victim's rights
 - the victim's lack of understanding of, and access to, information about the judicial system, the process, their role and entitlements (Gravitas Research and Strategy Limited, 2018, pp. 10–11).
150. The *Sexual Violence Legislation Bill* was introduced in Parliament on 11 November 2019. This Bill aims to reduce the re-traumatisation of sexual violence victims during court proceedings. This Bill would increase the variety of ways complainants could give evidence in court. It would improve sexual violence complainants' experience of the court process by allowing:
- the cross-examination process to be pre-recorded

- for victims to give their impact statement without the public being present
- judges to intervene if questioning is inappropriate or excessive
- judges to tell the jury about any common myths surrounding sexual violence cases.

151. The Bill would also increase access to communication assistance. Anyone who needs help understanding court proceedings or giving evidence would be able to apply for assistance. Public submissions on this Bill closed on 31 January 2020.
152. The Solicitor-General has developed new guidelines for the prosecution of sexual violence cases, and Crown Law will provide training on the Guidelines to Crown Solicitors and Police Prosecutors prior to them taking effect.
153. These issues all have potential parallels within the employment relations system. The process of making a complaint, and providing details of the experience to one or more people, could result in re-victimisation and re-traumatisation. Solely focusing on the rights of the alleged perpetrator within the process of investigating the complaint can leave complainants feeling as though their own rights, needs and interests do not matter. The complainant may lack information regarding the policies and procedures of the business or their role and entitlements under relevant legislation.
154. Improvements made in the justice sector, in conjunction with the feedback received in response to this Issues Paper, will therefore help us to identify and consider potential improvements in how sexual harassment at work is prevented and responded to under the relevant regulatory systems.

Case Study: Screen Women’s Action Group – Tackling cross-industry sexual harassment

The Screen Women’s Action Group (SWAG) was founded in January 2018 as a local response to international movements highlighting women’s experiences of sexual violence related to their work. SWAG aimed to address the need for coordinated, specific and effective action on sexual harassment in the New Zealand screen industry.

Identifying that sexual harassment remains an ongoing issue in the NZ screen industry, particularly that low level sexual harassment frequently continued to be accepted as a norm, SWAG worked with sexual harassment specialists and educators to create recommendation’s aimed at creating both immediate and long-term changes within the industry. These recommendations included:

- developing an industry-wide policy to define sexual harassment, outlining the responsibilities various parties have in addressing sexual harassment, and establishing reporting and complaints processes. Businesses are encouraged to adopt this policy as part of every employment arrangement and as well as internally promote it
- to develop resources for screen industry workers to provide information regarding what is sexual harassment and how to appropriately respond to it, and resources for PCBUs on how to appropriately respond when complaints are raised

- developing multiple points of referral for sexual harassment concerns, such as specialist crew representatives and independent specialist contacts
- referring to sexual harassment policies regularly as part of health and safety briefings
- developing precautionary measures, such as safety officers, and particular polices to address the particular circumstances of the screen industry that could give rise to harassment (such as dealing with sexual content and isolated work)

SWAG has been partnering with industry health and safety association ScreenSafe New Zealand to develop these resources and promote awareness of sexual harassment issues.

The advocacy of SWAG represents a group recognising an issue within their industry and working to develop tools and processes in response to work within that industry context.

What are other countries doing?

155. Approaches to legislating against sexual harassment vary by jurisdiction, and some countries do not necessarily limit the scope of legislation about sexual harassment to an employment context.

Most countries require employers to have sexual harassment policies.

156. A 2017 OECD survey showed that in the four years prior, 19 countries introduced new measures aimed at eliminating sexual harassment in the workplace (Ministry for Women, 2019). The new measures have typically taken one of two forms:

- new or stronger laws or regulations governing sexual harassment
- information or awareness-raising campaigns around what constitutes sexual harassment and the right to a life free from sexual harassment.

157. Almost all countries reviewed by the Ministry for Women in a 2019 literature scan expect or require employers to have a sexual harassment policy and grievance procedures in place. The key differences lie in the strength of the requirements (Ministry for Women, 2019).

158. This literature scan also found that there were some common issues relating to legislation:

- lack of compliance with or effectiveness of current arrangements, even in countries with a relatively strong legislative framework
- inconsistencies as to who is covered, where and when – contractors, domestic and casual workers, volunteers and interns are often excluded, and harassment by third-parties or harassment offsite are not always included
- use of confidentiality agreements, and whether they are contributing to hiding the true extent of sexual harassment at a workplace, shield a serial harasser from accountability or prevent other victims coming forward

- requirements around timeframes for reporting and the burden of proof on the complainant can discourage victims from coming forward
- need to provide complainants with assurance that they will be free from further harassment (including revenge harassment) if they disclose.

159. In Australia, the *Sex Discrimination Act 1984* makes employers liable unless they have taken all reasonable steps to prevent sexual harassment taking place. In managing sexual harassment in the workplace, employers also have obligations under other laws, such as privacy, defamation, occupational health and safety and industrial laws. Australian health and safety laws also place duties on employers to take steps to ensure the safety and wellbeing of workers.

160. Similarly, in the United Kingdom there are a range of mechanisms in place to address sexual harassment in the workplace, including sex discrimination legislation that is not specifically limited to the employment context. Sexual harassment is regulated under the *Equality Act 2010*, which prohibits unwanted conduct of a sexual nature that has the purpose or effect of violating the person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Under United Kingdom health and safety laws, employers additionally have a legal duty to ensure, so far as is reasonably practicable, the health, safety and welfare of their workers when at work.

Training to deal with sexual harassment at work

161. Training on dealing with various aspects of sexual harassment is available from specialist providers such as the Sexual Abuse Prevention Network, Women’s Refuge, and Shine. Guidance on policies, reporting and responding to sexual harassment is available for workers and businesses from entities such as WorkSafe.

162. International literature suggests the key component of training to deal with sexual harassment at work is to confront what constitutes acceptable behaviour at work and in the community. Most training programmes aim to educate employees about the employer’s sexual harassment policies and procedures, including complaints procedures, as well as the conduct and behaviours that constitute harassment.

163. A literature scan by the Ministry for Women (2019) found that while researchers agree that training programmes can increase participants’ knowledge and awareness, there is little evidence to show that sexual harassment training is consistently effective in reducing incidents. The lack of strong findings signals the need for careful programme design and implementation.

Q4. How can government help businesses and workers in preventing and responding to sexual harassment at work?
Q5. Do businesses and organisations have sexual harassment policies and processes in place for responding to concerns?
Q6. What is the quality of sexual harassment policies and processes for responding to concerns regarding sexual harassment?

Q7.	How can people better understand what is appropriate and inappropriate behaviour at work?
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?
Q9.	What is the quality of training available to businesses and workers regarding sexual harassment available in New Zealand?

Part 5 What are the rights and responsibilities under New Zealand law?

What are New Zealand's international obligations regarding bullying and harassment?

164. As a country, New Zealand has obligations through its ratification of certain international conventions. These largely relate to the United Nations and the ILO.

United Nations obligations

165. New Zealand is party to seven core international human rights treaties of the United Nations and has obligations under international law to respect, protect and fulfil the human rights of everyone in the country. This means that the State must:

- refrain from actions that interfere with or curtail the enjoyment of human rights
- protect individuals and groups against human rights abuses
- take positive action to facilitate the enjoyment of basic human rights.

166. Should New Zealand breach its human rights obligations, mechanisms and procedures for individual complaints are available at the international level to help ensure that international standards are complied with and enforced.

Obligations under the ILO Conventions

167. The ILO is the key global organisation for the world of work. It sets international labour standards, promotes employment rights, and encourages decent work, enhanced social protection and strengthened social dialogue on work-related issues. New Zealand is one of the 187 member States of the ILO.

168. In June 2019, the ILO adopted the first international labour standard focused on violence and harassment – Convention 190, supported by Recommendation 206. The Convention will come into force 12 months after at least two member States have ratified it.

169. Convention 190 applies to violence and harassment occurring in the course of, linked with, or arising out of work. This covers the workplace and related spaces, as well as work-related communications, travel, accommodation, training events or social activities. Violence and harassment is defined as “a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment”.

170. Member States that ratify the Convention will – amongst other things – be required to adopt national policies, laws and regulations to define and prohibit violence and harassment in the world of work and provide reporting and dispute resolution mechanisms, including appropriate and effective remedies. Governments would also be required to legislate for the right to equity and non-discrimination in employment and occupation, including for persons belonging to vulnerable groups or groups in situations

of vulnerability that are disproportionately affected by violence and harassment in the world of work.

171. Employers would be legally required to take appropriate steps to prevent and control violence and harassment, including implementing workplace policies, hazard and risk assessments, and training.
172. The government will consider the possibility of ratifying Convention 190. This will involve consideration of the requirements of the Convention against current New Zealand law, policy and practice as it relates to violence and harassment. This is likely to be a complex process given that while New Zealand may have a number of laws and policies covering elements of the Convention, they may not fully align with the definitions and detailed requirements specified in the Convention.

What obligations do New Zealand businesses have regarding bullying and harassment?

173. The key pieces of legislation for New Zealand businesses in relation to bullying and harassment are the *Health and Safety at Work Act 2015 (HSWA)*, the *Employment Relations Act 2000*, the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*. Each is considered in turn.

Health and Safety at Work Act 2015

174. The main purpose of the HSWA is to provide a balanced framework to secure the health and safety of workers and workplaces. The HSWA recognises that to improve health and safety outcomes, parties need to work together.
175. The HSWA covers nearly all work in New Zealand and focuses on the conduct of the work rather than the physical location or workplace. It also covers all types of working relationships and does not require an employee–employer relationship.
176. The HSWA requires that workers and others are given the highest level of protection from health and safety risks while at work, so far as is reasonably practicable. This includes risks to both physical and mental health. Risks may be managed under the HSWA by reducing the seriousness of the harm and/or reducing the likelihood of it occurring.
177. The HSWA assigns duties to the various parties involved in work. These duties are legal responsibilities and mean that businesses and others involved in work have a responsibility to prevent the risks of bullying and harassment at work, or to minimise the risks so far as is reasonably practicable.⁶
178. The HSWA places a primary duty of care on the PCBU. The PCBU has the primary responsibility for the health and safety of its workers, any other workers it influences or directs, and other people who could be put at risk by the work carried out (eg,

⁶ This means each business should consider the likelihood and severity of its risks, and work out what types of actions they could reasonably take or systems they could reasonably put in place to manage these risks. These measures should then be reviewed regularly to check they are working effectively.

customers, visitors or the general public). If more than one PCBU is responsible for work (eg, on a building site), the PCBUs must work together to manage the risk, including risks of harm from bullying and harassment.

179. Officers of the PCBU (such as directors, partners or senior management) must take reasonable steps to understand how their business works and how it manages work health and safety, and ensure their decisions take account of the need for the PCBU to meet its duties. Officers must show the same level of care and skill that a competent person would show in the same circumstances.
180. Workers must take reasonable care for the health and safety of themselves, and not adversely affect the health and safety of other people. They must also comply with reasonable instructions given by the PCBU and cooperate with health and safety policies.
181. The HSWA also allows workers to cease or refuse to carry out work where the worker believes there is a serious risk to the worker's or other person's health or safety from an immediate or imminent exposure to a hazard.
182. When asked in the 2018/19 National Survey of Employers about their time and effort in meeting the legislative health and safety requirements, 50 per cent of employers agreed or strongly agreed that these requirements were reasonable, compared with 30 per cent who thought the requirements were unreasonable.

What does this mean for bullying and harassment?

183. Bullying and harassment is a work-related hazard that must be managed under the HSWA. In the HSWA, "health" means both mental and physical health, and the definition of hazard includes a person's behaviour where that behaviour has the potential to cause death, injury or illness to a person.
184. Addressing risks of bullying and harassment should therefore be part of every business's approach to effective management of health and safety. This requires a business to focus its efforts on its critical risks: first to identify, then to manage these as far as is reasonably practicable.
185. As with all health and safety risks, effective management requires leadership, risk management and engagement with workers. Businesses must recognise bullying and harassment as a risk and have clear processes in place to handle it.

Employment Relations Act 2000

How does the *Employment Relations Act* work?

186. The objective of the *Employment Relations Act* is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

187. The *Employment Relations Act* is focused on the employer–employee relationship,⁷ where an employee is ‘any person of any age employed by an employer to do any work for hire or reward under a contract of service’. This includes people who have been offered, and accepted, work as an employee (‘persons intending to work’).
188. It does not cover people who are contracted for service (‘contractors’), with the exception of homeworkers (a person who is engaged, employed, or contracted by any other person to do work for that other person in a dwelling house) who have been explicitly included.
189. The government is currently considering whether there are other types of contractors that should be provided some, or all, of the protections and rights of employees if they depend on one firm for most of their income and have little control over their daily work. A consultation document was released in November 2019 seeking feedback on a range of options.
190. The *Employment Relations Act* explicitly excludes volunteers and persons engaged in film production work (unless they have a written employment agreement that provides that they are an employee).
191. The *Employment Relations Act* establishes the grounds, remedies and penalties where an employee wishes to raise a personal grievance with their employer.
192. It establishes procedures and institutions to support successful employment relationships, including mediation services, the ERA and the Employment Court. Mediation services are available to anyone in a work-related relationship (including contractual relationships), not just employees.

What does this mean for bullying and harassment?

193. Bullying is not specifically referred to in the *Employment Relations Act*. Under the *Employment Relations Act*, employers have an:
- obligation to deal with employees in good faith
 - an express or implied obligation in all employment agreements to take reasonable steps to maintain a safe workplace.⁸
194. A failure to appropriately respond to, and address, complaints of bullying has been determined to be a breach of these obligations. If an employer breaches these obligations, and the employee is disadvantaged in their employment, or is forced to resign as a result, they may choose to raise a personal grievance.
195. The *Employment Relations Act* specifically identifies sexual and racial harassment as grounds for a personal grievance. This covers any sexual or racial harassment an

⁷ The *Employment Relations Act* also covers the relationships between unions, union members, parties to a collective agreement, and employers.

⁸ Case law has established that a duty on the employer to take reasonable steps to maintain a safe workplace will be implied into employment contracts. See *Attorney-General v Gilbert* [2002] NZCA 55.

employee experiences in their employment and is not limited to sexual and racial harassment by the employer.

196. If a contractor (unless they are a homeworker), volunteer, or film production worker experiences bullying or harassment, they are not eligible to make a personal grievance under the *Employment Relations Act*. However, if the other party agrees, they can seek Employment Mediation Services' help to resolve the issue.
197. Depending on the nature of the incident, workers not classified as 'employees' may be able to take a dispute to the Director of the Office of Human Rights Proceedings (under the *Human Rights Act*) or a complaint to WorkSafe (under the HSWA).
198. Two of the options included in the recent consultation regarding 'dependent contractors' would, to varying degrees, change the likelihood of dependent contractors being recognised as employees. If one or more of these options was progressed it could mean that some dependent contractors may become eligible to raise a personal grievance in relation to bullying or harassment.

New Zealand Bill of Rights Act 1990

199. The *New Zealand Bill of Rights Act* is an important piece of legislation for the promotion and protection of human rights. It sets out to affirm, protect and promote human rights and fundamental freedoms in New Zealand. It also affirms New Zealand's obligations under the International Convention on Civil and Political Rights.
200. With respect to bullying and harassment at work, the *New Zealand Bill of Rights Act* provides non-discrimination and minority rights, and these are more specifically provided under the *Human Rights Act*.

Human Rights Act 1993

201. The *Human Rights Act* sets out the functions, powers and structure of the Human Rights Commission. The *Human Rights Act* protects people in Aotearoa New Zealand from unlawful discrimination.
202. Unlawful discrimination takes place when a person is treated less favourably than another person in the same or similar circumstances based on a prohibited ground in a public area of life. The *Human Rights Act* lists the areas and grounds where discrimination is prohibited and sets out some exceptions. It specifically prohibits sexual and racial harassment, adverse treatment for people affected by domestic violence, victimisation for making a complaint under the *Human Rights Act* or making a protected disclosure, and the incitement of racial disharmony. It protects people from being bullied or harassed based on a prohibited ground.
203. Under the *Human Rights Act*, employers and employees are banned from unlawful discrimination (sections 21–35, 62–69). This means an employee or business client or customer cannot be treated less fairly than others based on a prohibited ground specified in the *Human Rights Act*. People cannot be sexually harassed, racially harassed, treated adversely in employment because they are affected by domestic

violence, or victimised because they have made a discrimination complaint or protected disclosure.

204. The *Human Rights Act* has broad application. It is not just paid workers that are protected by the provisions, but also independent contractors, volunteers and unpaid interns. Those applying for a job are also covered.
205. Businesses should have a policy, procedures and a training programme in place to prevent discrimination because an employer can be held liable for the unlawful acts of its employees.

What does this mean for bullying and harassment?

206. 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 *Human Rights Act* (eg, disability, sexual orientation). It specifically prohibits sexual and racial harassment.

What obligations do New Zealanders (as individuals) have regarding bullying and harassment?

207. In some cases, bullying or harassment at work can develop into criminal behaviour, either within or outside the workplace. When this occurs, individuals are also impacted by legislation and become involved with the justice system.
208. The key pieces of legislation for individuals in this situation are the *Harassment Act 1997*, the *Crimes Act 1961*, and the *Harmful Digital Communications Act 2015*. However, this legislation is not considered further in this Issues Paper, as the scope is limited to issues that more commonly occur within the workplace and covered by workplace regulatory systems.
209. Another way in which individuals may have obligations with respect to bullying or harassment at work is as a bystander or witness. There is no legislation that is relevant to this situation, though there may be a moral expectation to act. This could be to directly address what is happening, such as suggesting to the perpetrator that their behaviour is inappropriate, or reporting what they have seen to a suitable person. This could be a manager or human resources (if applicable). Alternatively, it could be to act as a witness if a complaint is made, or to provide moral support to the person being bullied or harassed.
210. Worker engagement and participation obligations are important to enable healthy workplaces. Workplaces with good worker engagement and participation are better placed to identify, prevent, improve or respond to incidents of unreasonable behaviour such as bullying and harassment.

How does the legislation interact?

211. The pathways vary greatly, and there are differences between the HSWA, the *Employment Relations Act*, and the *Human Rights Act*. The HSWA provides for prosecution of a defendant (eg, a PCBU) through the courts, and can allow for an

individual to take a private prosecution (under section 144 of the HSWA) if WorkSafe decides not to prosecute.

212. The *Employment Relations Act* and the *Human Rights Act* are both civil proceedings. A key focus of the *Employment Relations Act* is on resolving employment relationship problems between an employer and employee, whereas the *Human Rights Act* is designed to address unlawful discrimination.

Roles and responsibilities

213. There are a range of people who are involved in the health and safety and employment systems, and each have defined roles and responsibilities. These roles are meant to reflect modern working relationships, which largely place the responsibility for managing risks to health and safety on people who are closest to it or create the risk.

Government

214. Government has an important leadership role in the prevention and response to harm from bullying and harassment at work. This includes providing practical guidance and support to businesses, sectors and communities, ensuring that relevant legislation is fit for purpose and the regulatory system is performing effectively.
215. In its leadership role, government identifies gaps in the regulatory system as it applies to the prevention of and response to bullying and harassment at work and determines if these issues are being given appropriate prioritisation under current policy and operational settings.
216. Government's oversight of the health and safety system includes assessing the role and function of the different parts of the system. Government looks at the overall performance of the system for preventing and responding to bullying and harassment and identifies issues and gaps that can be changed. It also advises on the policies and monitors how well the policies are being implemented.

Businesses

217. For the purposes of this Issues Paper, a business can be an individual person or an organisation. It is usually a legal entity, and it can also be a body of people. A business cannot contract out of its duties under the HSWA.
218. A business has the primary duty to ensure that, so far as is reasonably practicable, the health and safety of workers, and that other persons, are not put at risk by its work. A business must take steps to eliminate risks to health and safety of its workers so far as is reasonably practicable, and if they can't be eliminated, the business must minimise the risks so far as is reasonably practicable.
219. A business must also engage with workers on health and safety matters and to have practices that give its workers reasonable opportunities to participate effectively in improving health and safety.
220. When one business works alongside another business, they may both have a role in managing health and safety risks on the same matter. The businesses need to set out the

roles and responsibilities of each business for managing the risk so that each business has a clear understanding of what to do.

221. Under the employment relations system, employers are obligated to take reasonable steps so that employees are safe and free from bullying and sexual and racial harassment at work.
222. Businesses also have a duty to act in good faith towards alleged perpetrators of bullying and harassment, and to ensure an appropriate process is followed when investigating allegations.

Workers

223. A worker is a person who carries out work in any capacity for a business.
224. The definition of a “worker” with obligations under the HSWA is wider than the definition of an employee under the *Employment Relations Act*. Under the HSWA, a worker may carry out work as an employee; contractor or subcontractor; employee of a contractor or subcontractor; employee of a labour hire company that works in the business; outworker (including a homeworker); apprentice or trainee; person gaining work experience or undertaking a work trial; volunteer worker; or a person of a prescribed class. In contrast, the *Employment Relations Act* only covers ‘employees’, being a person of any age employed by an employer to do any work for hire or reward under a contract of service, and does not include people contracted for service (with the exception of homeworkers).
225. A worker who is at work is responsible for:
 - taking reasonable care of their health and safety
 - taking reasonable care that their actions, or failure to act, does not adversely affect the health and safety of other persons
 - complying, as far as the worker is reasonably able, with any reasonable instruction that is given by the business
 - cooperating with any reasonable health and safety policy or procedure of the business.
226. A worker can refuse or stop work if they consider that their or another person’s health and safety is at serious risk from being exposed to a hazard. A worker needs to advise the business as soon as possible when they have stopped work.
227. Workers must be engaged about health and safety issues likely to directly affect them, and be given reasonable opportunities to participate in the ongoing improvement of the business’s health and safety.

Managers

228. Managers are workers and must ensure that they are not contributing to bullying or harassment at work or allowing conditions that might give rise to bullying and harassment to flourish.⁹
229. Managers have an important role in creating and maintaining respectful work environments, including modelling good practice in establishing and modelling 'reasonable behaviour', monitoring the workplace culture and identifying issues to create a climate of inclusiveness and diversity, setting clear expectations, and following up when those standards are breached. Many of these behavioural expectations also apply to workers who report to managers, the development of respectful work environments is a two-way process.

Health and safety representatives

230. Health and safety representatives elected under the HSWA have functions and powers including representing workers on health and safety, entering and inspecting workplaces, making recommendations relating to work health and safety, and promoting the interest of workers who have been harmed at work.
231. A health and safety committee enables business representatives, workers and other health and safety committee members to meet regularly and work cooperatively to ensure workers' health and safety. The functions of the health and safety committee include helping develop health and safety standards, rules, policies or procedures, and to make recommendations relating to work health and safety.

Unions

232. A union is an organisation that supports its membership by advocating on their behalf. The *Employment Relations Act* gives employees the freedom to join unions and bargain collectively without discrimination. A union is entitled to represent a person's employment interests, including on health and safety matters.

The HSWA regulator

233. WorkSafe is the primary regulator of the HSWA. Its main objective is to promote and contribute to a balanced framework for securing the health and safety of workers and workplaces.¹⁰ Its functions are set out in section 10 of the *WorkSafe New Zealand Act 2013*, and its role is covered further in 'Raising a concern with WorkSafe' on page 79.
234. Maritime New Zealand and Civil Aviation New Zealand are the regulators of the HSWA for work on ships and aircraft respectively.

⁹ A manager may also be an officer under the HSWA. If so, they will also have particular duties under the HSWA to take reasonable steps to understand how their business works and how it manages health and safety, and ensure their decisions take account of the need for the business to meet its duties.

¹⁰ *WorkSafe New Zealand Act 2013*, s 9(1).

235. The HSWA regulator is responsible for providing guidance to people with duties on preventing and managing risks under the HSWA, and also for monitoring and enforcing compliance. Regulators have a range of tools they can use for obtaining compliance, from issuing improvement notices, up to prosecution.

ERA and Employment Court

236. The ERA is an investigative body that was established under the *Employment Relations Act*. As an investigative body, the ERA's role is to resolve employment relationship problems by establishing the facts and making a decision without regard to technicalities.

237. When carrying out its role, the ERA must comply with the principles of natural justice, promote good faith behaviour, support successful employment relationships, and further the object of the *Employment Relations Act*.

238. The Employment Court hears and determines cases relating to employment disputes. People can challenge a decision of the ERA to the Employment Court, and in particular circumstances the case may be referred directly to the Employment Court without it being investigated first by the ERA.

Q10. Are people aware of their obligations under the legislation for preventing and responding to bullying and harassment?
Q11. Do businesses provide regular training, education and information to workers on their legal responsibilities for preventing and managing bullying and harassment at work?
Q12. How clear is the legislation when it comes to setting out people's responsibilities for bullying and harassment at work?

Part 6 How do these rights and responsibilities work in practice?

Prevention approach – How well is the system, businesses and others working to prevent bullying and harassment?

239. Good practice suggests one of the most effective ways to address bullying and harassment at work is to develop environments and policies to prevent or deter such behaviours occurring at all.
240. New Zealand and international experts agree that good practice in preventing workplace bullying and harassment is the right combination of:
- clear guidelines for managers and staff
 - a culture of respect for colleagues and staff
 - a set of workplace procedures to deal with issues as they arise, rather than wait for poor behaviour or a specific incident of harassment to become a pattern and create a toxic workplace.
241. In order to develop these features, businesses should identify and assess the risks of bullying and harassment they face, develop effective processes to manage these, and engage in ongoing monitoring of workplace culture.

How are businesses identifying and managing risks of bullying and harassment?

242. The National Survey of Employers (NSE) collects annual data from New Zealand employers on their practices and perspectives relating to responsibilities under employment-focused legislation.¹¹
243. The 2018/19 NSE found that 94 per cent of businesses surveyed reported having a process for identifying and assessing the business's main risks and hazards, and 95 per cent reported having processes in place to manage these. This was a slight increase from the 2017/18 NSE, where 91 per cent of businesses reported a process for identifying their main risks and 93 per cent processes to manage these.
244. In regard to risks to mental health, the 2018/19 NSE found that 69 per cent of businesses examined reported having processes to manage risks to mental health, including bullying and stress. This contrasted with 86 per cent reporting processes for managing physical health.
245. The continued high prevalence of bullying and harassment at work despite these reported high rates suggests that having risk management policies is not enough to fully address the problem. General risk management practices may not be focusing on, or

¹¹ These surveys are available at <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/labour-market-reports-data-and-analysis/national-survey-of-employers/>. In 2018/19 2,285 employers participated in the NSE, and 2,359 in 2017/18.

properly identifying and assessing, risks from bullying and harassment at work. Where policies are targeted specifically to psychosocial risks like bullying and harassment these still need to be openly and widely communicated from the top down to all staff, with expectations about the consequences for people who breach the policies. Training may also need to be provided, including opportunities for building management capability and raising staff awareness.

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?
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?
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?

What guidance and resources are available to support businesses in identifying and managing risks of bullying and harassment?

Identifying and assessing risks

246. The first step in eliminating or minimising the risk of harm from bullying and harassment is for businesses to take stock of the factors that are known to increase the likelihood of these behaviours and assess whether those factors are present.
247. WorkSafe (2017a) has identified factors where the likelihood of bullying may increase, including:
- poor work relationships (eg, poor communication, low levels of support)
 - workforce composition including workers at greater risk (eg, new workers, workers in a minority groups)
 - negative leadership styles (eg, not giving workers a say in decisions, not having adequate supervision)
 - problematic work systems (eg, lack of well-defined standards of expected behaviour at work, high job demands, lack of support systems)
 - organisational change (eg, downsizing, outsourcing, changes in the technology being used).
248. These factors should be considered by businesses when assessing the likelihood of bullying and harassment occurring in a workplace and the types of bullying that may occur. The result of this risk assessment will determine the extent and urgency of preventative actions that need to occur. Worker representatives can help with identifying the risks of bullying in a workplace.

249. WorkSafe has a wide range of guidance material available on its website to support businesses with risk assessment and management practices, based on the Plan-Do-Check-Act management approach.¹² These general practices can be applied to identifying and managing factors at work that may give rise to bullying and harassment and assessing the work-related risks.
250. Other resources on risk management are available through the Institute of Directors in New Zealand, the Business Leaders' Health and Safety Forum and the Institute of Risk Management, including training, education, research and thought leadership.
251. Sometimes cultural or sector differences can lead to misunderstandings or different ideas about what behaviour is 'reasonable'. Businesses should promote an acceptance of diversity and be aware of situations where workers may have different expectations – for example, when workers from a different culture or demographic are joining a workforce or organisation for the first time.
252. One of MBIE's ongoing functions, through Immigration New Zealand, is to provide trusted settlement information to recent migrants and their employers. These resources include workplace guides and toolkits and a number of tailored websites for new migrants and their employers (eg, NZ Ready, New Zealand Now and WorkTalk). Guides for migrant workers focus on ensuring migrants understand their employment rights and responsibilities and understand the New Zealand way of working. The employer guides outline employers' responsibilities and provide practical advice to employers so that they can develop better work relationships with migrant employees, be more sensitive to their cultural needs, and support them to settle into work in New Zealand (Immigration New Zealand, 2019a, 2019b).

Monitoring the workplace environment

253. Good practice suggests one of the most effective ways to minimise unreasonable behaviours at work is to review, and change if necessary, the culture within an organisation. This involves businesses taking a proactive role in identifying potential situations that may give rise to bullying and harassment, and putting appropriate controls in place to minimise the risks.
254. WorkSafe has identified the following control measures that a business can use to minimise the likelihood of bullying (Figure 4). Businesses should consider what is reasonably practicable, having regard to their particular circumstances and levels of risk, when deciding which of the control measures to implement.

¹² See <https://worksafe.govt.nz/managing-health-and-safety/managing-risks/how-to-manage-work-risks/>



Figure 4: Control measures that a business can use to minimise the likelihood of bullying (WorkSafe, 2017a)

255. Rather than waiting for issues to be raised, managers and employers should aim to be aware of, and respond to, the early signs that bullying or harassment may occur. Businesses are required to manage their work risks effectively. This will generally require ongoing monitoring of workplace culture and the psychosocial health of workers.
256. WorkSafe's (2017a) *Preventing and Responding to Bullying at Work* provides guidance on what bullying can look like and how to assess the likelihood that bullying is occurring – for example, where there is a string of resignations, or high level of sick leave, in a particular business unit. Responding early to signs of potential bullying removes the pressure on the employee to raise the issue and increases the likelihood that it can be resolved in a restorative manner.

Training and developing management capacity

257. An important element for the above processes to occur effectively is the need for clear information, training and instruction on the prevention of and response to bullying and harassment at work.
258. Several organisations provide targeted psychosocial training and support for New Zealand businesses. Some examples of targeted training include:
- respectful workplaces training
 - unconscious bias training
 - cultural intelligence
 - workshops that strengthen employee mental health, wellbeing and resilience.
259. Building good management capability has been particularly suggested by research as a way for businesses to manage the risks from bullying and harassment at work. Managers

who embody positive culture and values and set high standards for behaviour within their teams can help prevent a culture of bullying. It is also helpful to have managers that can spot potential bullying and harassment problems early and intervene early. Managers should be supported by policies and the wider organisation to manage individual instances of bullying.

260. Anecdotal evidence suggests there is a need in New Zealand to build the management capability of businesses in creating mentally healthy workplaces, such as through targeted training. Managers are expected to have sound technical nous and expertise in the core requirements of their job, but many do not have the requisite capabilities and 'softer skills' in driving emotionally intelligent workplaces. However, we do not currently know the extent of capability gaps in this area.

Q16. What further support and guidance would help businesses to strengthen their risk management processes in relation to bullying and harassment at work?
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?
Q18. How can we lift management capability to identify, prevent and manage workplace bullying and harassment (including sexual harassment)? For example: <ol style="list-style-type: none"> 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).

Worker engagement

261. Good practice to prevent bullying and harassment suggests businesses should engage with workers when determining how to minimise the likelihood of bullying and harassment at work. This includes:
- communicating with workers and their representatives (such as unions) about workplace culture
 - providing opportunities for workers to express their views and raise health and safety concerns
 - allowing workers to contribute to decision-making processes on possible actions to minimise the likelihood of bullying and harassment
 - taking account of the views of workers and reporting back on the actions/outcomes from their feedback.
262. A business should provide reasonable opportunities for staff to be involved in improving health and safety at work. Processes should be put in place for reporting staff concerns

and ideas about ways to improve health and safety, including risks arising from bullying and harassment.

- 263. One way for businesses to ensure that workers can participate is to have health and safety representatives and establish health and safety committees. Some businesses may already have other engagement and participation practices in place.
- 264. In the 2018/19 NSE, 66 per cent of businesses reported that they have a health and safety representative (elected or informal) and 19 per cent of businesses reported that they have a health and safety committee in place. 59 per cent reported that they hold regular meetings where health and safety issues and concerns are discussed.

Q19. Are businesses effectively engaging with workers to identify risks and develop processes to address bullying and harassment at work?

Monitoring and review

- 265. To effectively prevent bullying and harassment businesses should engage in regular review of both their workplace culture and their policies to ensure they continue to be effective.
- 266. One method for determining workers' exposure to bullying and harassment is to review informal and formal complaints/allegations, exit interview and absenteeism data, and feedback from worker surveys and from people outside the organisation.
- 267. Workers and their representatives should be involved in monitoring and reviewing the risks from bullying and harassment and the effectiveness of processes for managing them. This is particularly important when there are changes in the workplace affecting these controls.
- 268. The 2018/19 NSE showed that 52 per cent of surveyed employers reported that business officers had asked for information on how the business was managing its main health and safety risks and hazards in the last year. However, it is important to note this survey question only asked about information requests on health and safety risks and hazards generally, rather than psychosocial risks like bullying and harassment specifically.
- 269. Officers in large businesses were more likely to request information on how health and safety risks were managed. Eighty per cent of surveyed businesses with 20 or more employees reported that the business officers had requested this information, compared with 48 per cent of businesses with fewer than 20 staff. This result was similar to the reported levels in the previous two years.

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

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

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

Response – What options are available when bullying and harassment at work occurs?

- 270. A strong focus on prevention is intended to decrease the incidents of bullying and harassment at work that occur. The complexity of human and workplace relationships, however, means it is unlikely that we will be successful in completely eliminating bullying and harassment. As such, it is important that there are appropriate systems in place where workers are supported to seek a resolution when issues do occur.
- 271. When an incident of bullying or harassment occurs, workers are encouraged to raise the issue within their business or organisation as a first step (stage 1). However, if matters are not satisfactorily resolved within the business there are a range of regulatory pathways a worker may pursue to seek a remedy or further response (Figure 5).

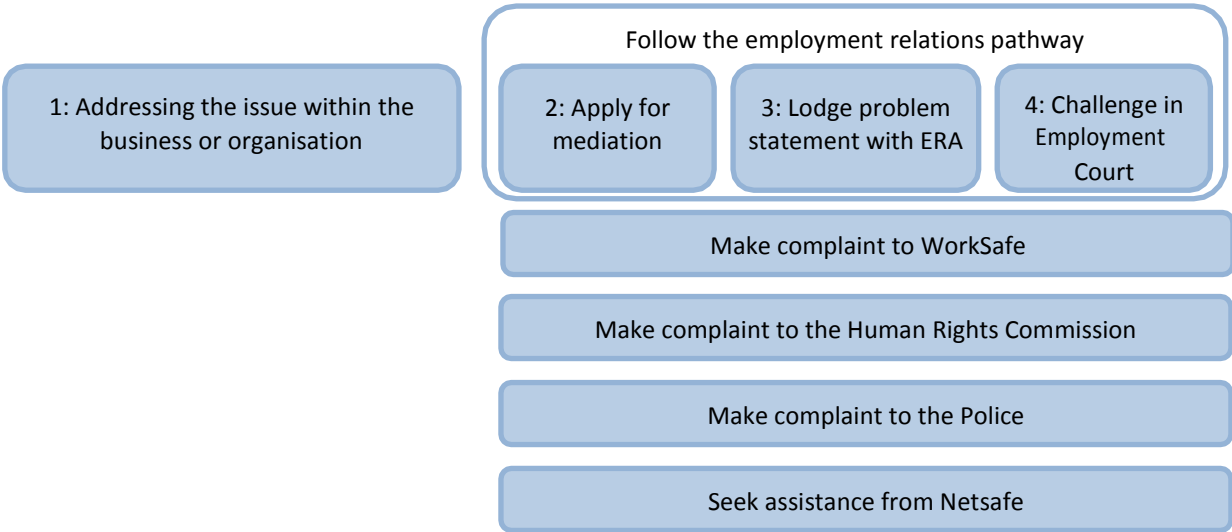


Figure 5: Options for workers seeking a response or remedy to bullying and harassment at work

- 272. Most often workers are referred to the employment relations pathway. This pathway includes mediation (stage 2), lodging a statement of problem with the ERA (stage 3), and challenging an ERA determination in the Employment Court (stage 4).
- 273. Alternatively (or in addition), depending on the nature and seriousness of the issue, workers may be able to take their issue to:
 - WorkSafe New Zealand
 - the New Zealand Human Rights Commission
 - the New Zealand Police (out of scope of this Issues Paper)
 - the Ombudsman

- Netsafe (out of scope of this Issues Paper).
274. Workers' compensation and other support systems may also have a role in providing responses to bullying and harassment issues.
275. When trying to determine their options to respond to a bullying or harassment issue, workers will often seek advice from their union (if they are a member), community law centres, the Citizens Advice Bureau, and community or church leaders. We have heard concerns that it is difficult to identify where to take a bullying and harassment at work issue, that there are numerous call centres providing information (eg, MBIE, WorkSafe, and others), and that the information provided is not always consistent. Some stakeholders have suggested it may be useful to have a single comprehensive source of information, or a common framework, that could be used by the groups that provide advice and respond to bullying and harassment queries.
276. For complaints relating to bullying and harassment, WorkSafe will often refer the person to the employment relations or other relevant helplines, unless the matter has resulted in a diagnosis of a serious mental health condition (refer to 'Raising a concern with WorkSafe' on page 79 for more details). When the Human Rights Commission considers a matter raised to them is more appropriately described as an employment matter, it will also advise the person to consider employment mediation instead of human resources mediation (refer to 'Following the *Human Rights Act* pathway on page 84 for more details).

Q23. Are workers able to identify their options and the best approach for escalating a bullying and harassment issue?
Q24. How supported are vulnerable populations for identifying and navigating the different pathways available?

Stage 1: Addressing the issue within the business or organisation

277. Good practice suggests addressing bullying and harassment issues within an organisation will often be the most effective way for an incident to be resolved. Resolution within the organisation will generally be more efficient than pursuing regulatory options, and allow matters to be resolved before they escalate. Internal resolution is often more likely to preserve the relationship between workers and employers, as it allows adversarial processes to be avoided. Internal resolution may also allow processes and outcomes to be more flexible, informal and tailored to the individual circumstances of the case.
278. However, for an issue to be resolved within a business workers must feel able to raise a bullying or harassment concern and businesses must have effective processes in place to address these issues.

Raising a bullying or harassment issue

279. Research indicates the earlier a bullying or harassment issue is identified, the more likely it is to be resolved rather than escalated. However, bullying and harassment, particularly sexual harassment, can be a difficult issue for workers to raise. Some stakeholders have reported a worker suffering from bullying and harassment will in many cases opt to leave their employment rather than raising this matter with the business. Several factors have been suggested that may discourage workers from raising such issues.
280. Firstly, workers may be unsure whether a particular behaviour will be considered bullying or harassment, or if their issue is sufficiently serious to merit a response from the business.
281. Workers may also be concerned that raising the issue will impact their current employment or be held against them when seeking another job. Concerns regarding the impact on future work, and risk of being viewed as a trouble maker, are particularly likely to be a factor in small industries or regions where employment options are limited. It can also be particularly difficult for workers to raise an issue when the perpetrator is their boss or a person in a more powerful position than them.
282. Some stakeholders have also suggested cultural discomfort with conflict may make it harder for New Zealand workers to raise issues.
283. For a worker to raise an issue, they must be aware of their options. In the absence of a clear process, it can be difficult for the worker to figure out where and how they should raise their issue. This can be particularly difficult in small businesses, if the owner is the one performing the bullying or harassment.
284. While many businesses have policies against bullying and harassment, with defined processes for raising and responding to issues internally, a number of others do not. The 2018/19 NSE found that 69 per cent of businesses surveyed reported having a process for managing the risks to mental health (eg, from bullying, harassment or stress) and 23 per cent did not. Larger businesses were more likely to report having a process for managing risks to mental health than smaller ones. For instance, 90 per cent of businesses with over 50 employees reported having such processes compared to 65 per cent of businesses with 1–5 employees.

What guidance and resources are available to encourage issues to be raised within the business?

285. Within the workplace, WorkSafe guidance recommends businesses have processes for both informally reporting unreasonable behaviour and making a formal complaint, and provides templates for these.
286. The Employment New Zealand website provides guidance on what is considered bullying and outlines the steps for raising a bullying and harassment issue. It recommends employees:
- conduct a sense check with a friend or colleague on whether what is experienced is unreasonable behaviour
 - make a record of each incident
 - identify and follow any relevant workplace policies or procedures
 - inform their employer as soon as possible – if the employee does not feel comfortable talking to their manager or employer because of the type of complaint, it recommends talking to another manager, human resources, a health and safety representative, a union representative, or a lawyer, or going straight to mediation.
287. Workers and businesses can access advice regarding the employment relations pathway through the Employment New Zealand contact centre (0800 20 90 20), Facebook page or website. MBIE Service Centre Advisors, who respond to calls or Facebook queries, have training in the employment space around bullying and harassment. The training material is predominantly the Employment New Zealand website; in particular, the general process outlined for preventing and dealing with bullying, harassment and discrimination.¹³ The WorkSafe website also forms part of advisors' training material regarding bullying and harassment at work.
288. In response to queries on bullying and harassment, advisors will generally recommend that the worker discuss the issue with their manager first and suggest they raise the issue in writing. If the worker has already done this, then they can provide guidance on further steps such as mediation, and provide a link for applying.
289. Health and safety representatives, health and safety committees, human resource personnel and unions can support workers to raise an issue and also advocate for them if they do not feel able to represent themselves.
290. Calls received by the helpline, and mediation requests, suggest that there is still a lot of confusion about both what is considered bullying and harassment and what to do when a bullying and harassment issue occurs. For instance, bullying is often added as a description of the problem, but when an issue progresses to mediation no evidence of bullying is provided; rather, the employee did not like what the manager was trying to do or their approach.

¹³ <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/>

291. One suggested opportunity for improvement is to develop a single, more comprehensive source of information and advice to workers and businesses regarding bullying and harassment issues. This could be done through developing a one-stop triage (telephone) service drawing together resources currently found across several information providers. Such a service could provide businesses and workers to help in navigating what to do, where to go and how best to get support if they are confronted with an emerging or actual situation involving bullying and harassment at work, and provide confidence they are going down the right path and are using the right channels and resources. Given the difficulty people may have in raising bullying and harassment issues, such a service could also provide a confidential avenue for people to get a better understanding of whether their experience does constitute bullying and harassment, and if so, what their options are.

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?
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?
Q27. What support would help people to be clear on what is and isn't a bullying and harassment issue?
Q28. What support would help workers to raise bullying and harassment concerns early?

Responding to issues within the business

292. Under the *Employment Relations Act*, employers are required to respond to and address complaints regarding bullying and harassment as part of their duty of good faith and to provide a safe workplace.
293. The response needs to determine whether bullying or harassment has occurred, and if so, what needs to be done to address the issue. Business and organisational responses can be informal (eg, informing the relevant person that the behaviour was inappropriate and should not occur again) or a formal investigation in response to a complaint. The approach taken should be guided by the wishes of the person that raised the issue and the outcome they are seeking. The response should be impartial, fair to all parties, and guided by the rules of natural justice. It is important that investigations are undertaken in good faith and with a focus on restoring the relationship where possible.
294. Different types and sized businesses will have different capabilities and avenues for seeking advice when issues occur. Large entities are more likely to have a human resources function to assist, while small entities often seek advice from the Chamber of Commerce or their accountant or lawyer.

295. Business have indicated they often feel overwhelmed when a bullying or harassment issue occurs. 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 the grounds for a personal grievance. They have also indicated that they would like to receive more support. One stakeholder suggested that businesses need more help to understand what they need to do, as they often don't know. They thought more information outlining their obligations and how to reduce conflict and find a resolution would be useful.
296. While in some situations an informal response might be the most effective, businesses often feel they need to take a more formal approach to protect themselves in case the matter results in a personal grievance. Setting up formal investigations is often time consuming and expensive. Businesses have commented that the difficulty and cost of these processes can have a negative impact on the sustainability of their business.
297. We have also heard concerns from the worker's perspective regarding the approach taken by businesses. Rather than a focus on resolution, the issue is often responded to as a legal matter, meaning the worker feels the need to get legal protection for the process. Adopting a formal approach involving lawyers not only increases the costs for the parties involved, but also increases the time to investigate and come to a suitable resolution. Employment Mediation Services has indicated that by the time a lot of the cases involving bullying and harassment request their services, the relationship has deteriorated to the point that the parties no longer want to continue the employment relationship, and the focus is on reaching a reasonable exit package for the worker rather than resolving the issue within the employment relationship.
298. We have also heard concerns that some internal investigations are not conducted impartially. For example, in some cases human resource teams reportedly prioritise protecting members of management over thoroughly investigating and addressing complaints.
299. Businesses are increasingly hiring independent/private investigators to run investigations to ensure it is perceived as neutral, or where they don't have the internal capability. We have heard concerns regarding the lack of credentials required for these investigators and the lack of quality control over the investigations and recommendations they make. There is also a perception that they are not always as neutral as intended, as they are paid for by the business or organisation.
300. Businesses may also be uncertain about the actions they should take where a bullying or harassment incident may meet the threshold of criminal behaviour (eg criminal assault or sexual assault). In deciding what employment action to take regarding an alleged incident, businesses should also have regard to whether any other proceedings are occurring. Where a criminal investigation may be occurring in relation to an incident businesses may need to delay their employment investigations or disciplinary action to

avoid prejudicing this criminal process, for instance where an employee would not be able to answer questions central to the investigation without prejudicing themselves.¹⁴

301. The obligation of a business to provide a safe workplace under employment and health and safety laws do not change depending on whether a victim has chosen to report potential criminal behaviour to police or not. Where a serious incident is known, or suspected, to have occurred the business should consider what action is needed to keep the victim and others in the work environment safe. What steps may be appropriate will vary depending on the circumstances, but may include making arrangements keep the victim and alleged perpetrator separated and in serious cases may involve speaking with the police and/or reporting the matter to WorkSafe.
302. Most businesses will have policies and processes in place to deal with incidents of serious misconduct, with options for disciplinary action including summary dismissal. In situations a serious incident is proven to have occurred businesses should generally look to follow these processes, irrespective of whether the victim has raised a criminal complaint.
303. In addition, if an incident has been so severe the victim required admission to hospital (or is of a type that would usually require admission) it may reach the threshold of a “notifiable event” that a business has an obligation to report to WorkSafe under the HSWA. Once again this obligation will apply irrespective of if a criminal complaint has been raised.

What tools and support are available for businesses responding to complaints?

304. A number of websites provide guidance for businesses on how to respond when a bullying complaint is raised. For example:
 - Employment New Zealand¹⁵ provides guidance on the best approaches to resolving problems at work, including the key elements of a fair investigation, advice on who should investigate, and how to prepare for and conduct the investigation. Where the investigation is in response to a bullying or harassment complaint, it recommends an experienced and independent investigator; for example, an investigator from human resources. It also suggests that WorkSafe can investigate bullying complaints. The mediation service provided by MBIE is confidential, so it cannot take the place of an employer investigation. It also includes specific advice around bullying, harassment and discrimination. MBIE’s Employment Services

¹⁴ Circumstances in which employers may be expected to delay employment investigations due to concurrent criminal proceedings has been considered by the Employment Court on several occasions. For instance, *Russell v Wanganui City College* [1998] 3 ERNZ 1076 and *Singh v Chief Executive Officer of Department of Labour* [2005] 1 ERNZ 569.

¹⁵ <https://www.employment.govt.nz/resolving-problems/> and <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/>

Branch is currently reviewing the information provided on the bullying page and intends to review the harassment page in the near future.

- WorkSafe¹⁶ provides a range of guidance and information for businesses about processes to respond to reports of bullying and sexual harassment.
- Business.govt.nz¹⁷ provides some guidance on resolving employment issues and the pathway for resolving a personal grievance. It advises people to seek advice from Employment New Zealand.

305. MBIE's Employment Services is currently working to enhance its business intelligence information in order to allow for more proactive targeted information and education resources. For example, it provides targeted information to engage businesses or sectors to raise awareness of their obligations and encourage them to develop their capability to support productive workplace relationships.

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)?
Q31. What would assist businesses to conduct investigations that are impartial, support all parties, and have a conciliation or restorative approach?
Q32. What is the quality of the investigations conducted by the independent investigation market?

Stages 2–4: The employment relations pathway

306. Where a worker considers an issue has not been satisfactorily resolved within the business or organisation they will generally be referred to the employment relations dispute resolution system.

307. The employment relations pathway is designed to encourage low-level interventions in the first instance. If a worker experiences bullying or harassment, they are generally required to progress through the following stages, until the point when the issue has been resolved:

- Stage 2: Mediation
- Stage 3: Lodging a statement of problem with the ERA
- Stage 4: Challenging an ERA determination in the Employment Court.

308. There can also be interaction between the stages. For example, mediation may result in a recommendation that the business or organisation conducts a formal investigation, or

¹⁶ <https://worksafe.govt.nz/topic-and-industry/bullying/good-practice-guidelines-preventing-and-responding-to-bullying-at-work/> and <https://worksafe.govt.nz/topic-and-industry/sexual-harassment/>

¹⁷ <https://www.business.govt.nz/news/resolving-employment-issues/>

the ERA may require parties to return to mediation if the ERA member considers further mediation could resolve the issue.

309. The employment relations system is not targeted towards addressing bullying and harassment issues in particular. Rather its focus is on resolving disputes in the employer-employee relationship generally, such as wage disputes, unjustified dismissals and personal grievances.
310. The employment relations system's focus on early resolution of issues and providing accessible dispute resolution options is consistent with good practice in responding to bullying and harassment concerns. However, it has been suggested that in practice this pathway may not be achieving these outcomes as intended.

Stage 2: Mediation

311. As part of the administration of the *Employment Relations Act*, there is a requirement to provide mediation service to support employment relationships. This is a free service provided by Employment Mediation Services within MBIE. An outline of the general mediation process for bullying and harassment issues is below.

Making an application for mediation

Who can apply:

Mediation services can be provided to any parties that are in a work-related relationship. Therefore, they are available to all workers, regardless of whether they are in an employer-employee relationship (and not just those who are able to raise a personal grievance under the *Employment Relations Act*). There are no restrictions on the types of issues with which Employment Mediation Services can assist.

Making an application:

If someone is experiencing bullying and harassment at work, they can request mediation assistance. While they will generally be encouraged to attempt to resolve the issue with their employer first, they can come straight to mediation if they do not feel comfortable talking to their business or organisation directly.

Since 2016, mediation requests are made online. To make an online application, the person needs to have a 'RealMe' account (the government's identification verification system) to gain access to a 'Resolve' account (Employment Services' online application service). If a person calls MBIE's call centre and they don't have access to the Internet or can't fill in the form, the call centre will take their details and forward them to Employment Mediation Services, which will complete the application. However, this option is not widely promoted.

What does the process involve:

Mediation is voluntary, meaning both parties must agree to attend. However, participation in mediation can be seen as part of the good-faith duties of an employment relationship. If an employer chooses not to take part, then the worker could take a complaint to the ERA.

The *Employment Relations Act* allows flexibility in how mediation services are provided. For issues involving bullying and harassment, the mediation meeting generally involves the worker and business or organisation, and not the accused person, though this can vary depending on the outcome sought (eg if the worker is seeking a personal apology).

Mediators are impartial, and the content of the mediation is confidential (unless parties provide consent for information to be shared). The intention of the mediation being confidential is to promote open and honest conversations, without a fear that the information will be used against one party as part of a personal grievance.

What support is provided:

Interpreters can be provided where required. If a person has cultural needs, they can also request for these to be included in the mediation approach; for example, holding the meeting on a marae. Both parties are able to bring support or representation to the mediation meeting. This often includes lawyers or independent representatives. Case coordinators will encourage employees to bring support, particularly if they are suffering from stress.

What are the possible outcomes of the mediation service?

When parties come to an agreement at mediation, they can sign a settlement. For cases involving bullying and harassment, depending on the nature of the behaviour and what the parties are seeking, there are a range of outcomes or next steps that come out of mediation, including:

- an agreement that there will be a formal workplace investigation and agreeing the terms of reference for the investigation
- guidelines for working together in the future
- processes and training focused on restoring team dynamics, which can be led by the business or organisation, or mediation services.

How well does the mediation process address bullying and harassment issues?

Accessibility of services

312. Wide access to mediation for bullying and harassment issues is considered an advantage of New Zealand's approach compared to similar countries. For instance, in the United Kingdom, ACAS's early conciliation or voluntary mediation cannot be accessed for a bullying issue, unless the bullying meets the definition of harassment (ie, relating to a relevant protected characteristic) or the worker is claiming unfair dismissal due to bullying. There had been a similar situation in Australia, which led to the introduction of an anti-bullying jurisdiction in 2014.
313. Some stakeholders have suggested the move to an online application process has created a barrier to accessing mediation services, particularly for vulnerable or unrepresented parties. Since moving to an online application process, the number of applications has increased year on year, and customer satisfaction surveys suggest that most people can successfully navigate the requirements. However, most applicants for mediation services do not complete the question regarding their ethnicity or gender, so we are not able to identify if there are differences in the extent to which workers of different ethnicity or gender are accessing mediation services.

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

Q34. Are there variations by ethnicity, gender, or other factors, in parties' ability or willingness to access mediation services?

314. Stakeholders have reported the current wait time for mediation services is four months for bullying and harassment cases. These concerns are somewhat surprising, as applications involving serious bullying or harassment, particularly if the issue is ongoing, are treated as priority one by Employment Mediation Services. For priority one applications, the expectation is that a meeting is scheduled to occur within 10 working days.
315. Employment Mediation Services has indicated there is often a delay between the first date offered for a mediation and when it is actually set. Mediation is a voluntary process and requires agreement by both parties to attend. Finding times that work for all parties (particularly when representatives are involved) and/or a lack of flexibility in the times that Employment Mediation Services offer, particularly in regional locations, can lead to delays. Some stakeholders have reported a tendency for employers to cause delays by not providing information in the requested timeframe or making time to attend the mediation meeting.
316. We have also heard some concerns about differences in regional access. The mediators visit about 40 locations on a circuit. If the parties are not available to attend a meeting when the mediator is in that area, it can mean the meeting is delayed until the next time they are in the area.

317. It is also important that applicants provide enough information on the application form for Employment Mediation Services to identify it as a serious bullying or harassment issue.

Q35. How quickly are mediation meetings occurring for issues involving bullying or harassment? Where there are delays, what are contributing to these?

Use of representatives

318. Businesses and workers generally bring legal representatives to mediation. Preliminary data from a business intelligence project suggests that on average parties bring representation to mediation around 80 per cent of the time. We have heard that businesses often bring lawyers to argue their case, which can cause the employee to either feel disadvantaged or that they need to bring their own legal representatives (making it a costly process for them). We have also heard concerns that people are unable to access free legal help from community law centres.

319. Some employees are represented by ‘representatives’ or ‘advocates’ who are not lawyers. These representatives can help their client to make an application and navigate through the steps required (either at mediation, ERA, and/or Employment Court). However, concerns have been raised regarding:

- their qualifications and experience – when these representatives are not lawyers, they are not subject to the same ethical obligations or regulation as a lawyer and may not have the legal expertise to advise clients on whether they have suitable grounds for raising a personal grievance (if it proceeds to the ERA)
- the impact their role has on the outcome sought – if a representative is working on a ‘no win no fee’ basis, they will only be paid if the employee is awarded compensation. They may therefore be more likely to encourage the employee to seek a financial, rather than non-financial, outcome.

Q36. What are the benefits and/or risks with the involvement of legal and/or non-legal representatives in bullying and harassment cases?

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

The mediation process

320. Employment Mediation Services surveys people on how they found the services. Most feedback received from parties is generally positive. For instance, for the period January to March 2019 92 per cent of parties surveyed were satisfied with the service, and for the period April to June 2019 there was 88 per cent satisfaction (note this applies to all mediation cases, not just cases involving bullying and harassment). However, in the context of bullying and harassment, stakeholders have suggested several potential issues with how mediation is conducted.

321. Employment Mediation Services has ethical obligations to parties under MBIÉ's Mediator Code of Ethics, and complaints about mediations and mediators are investigated and dealt with by dispute resolution managers. Even with these controls in place, we have heard concerns that the approach to mediation, particularly for bullying cases, does not adequately address the power imbalance between the parties, and workers are being pressured to accept the terms offered by the business or organisation. On the other hand, we have heard businesses often feel pressured to accept a settlement, regardless of whether they consider they were at fault, in order to avoid the costs associated with a grievance being taken to the ERA.
322. A consistent theme from stakeholders we spoke to when developing this Issues Paper is that Employment Mediation Services is not currently seen as providing a low-level resolution service, but is viewed as a formal and adversarial process, generally involving lawyers and focused on negotiating settlements. This perception is likely to be influenced by a number of factors, including:
- The state of the relationship at the start of mediation
 - This is influenced by the business's response to the issue when it was raised and the time taken to access mediation services
 - Preliminary data from a business intelligence project indicates that only a third of workers are still in employment when they apply for mediation services
 - The use of legal representation, particularly by the business and organisation
 - The approach of Employment Mediation Services
 - Depending on the needs and locations of the parties, Employment Mediation Services can provide mediation via the phone, videoconference, or with the parties in separate rooms. While there is flexibility in how the mediation service can be delivered, the concerns raised suggest there is disconnect between what people think is available or are being offered and what they would like.
323. As a result of the perceived gap, some stakeholders have suggested there is a need for an alternative low-level dispute resolution process. The United Kingdom approach, where early conciliation is provided by telephone, has been suggested as something that could be beneficial here. Consideration could be given to the applicability of a phone-based mediation service for bullying or harassment cases in particular circumstances.
324. This type of approach may provide a quicker response and could help address concerns about the impact and cost of lawyers and other types of representatives (as the phone discussion is held directly with the worker and business or organisation). However, this approach has more of a settlement focus, as the conciliator talks to the parties separately. For bullying and harassment cases, a face-to-face meeting can have the benefits of allowing the worker to feel heard and help to restore the relationship between the worker and business or organisation. This type of approach may also make it difficult to hear and consider the accused person's perspective.

325. Employment Mediation Services is currently scoping a ‘quick resolution service’ pilot. In this pilot, case managers are reviewing the information within applications in more detail to identify whether the issue could be resolved quickly via a phone discussion rather than a mediation meeting. It is generally expected that this type of approach will be suitable for simple cases (eg, ended employment relationships with non-complex issues to resolve, such as wages claims or single issues). However, we would like to hear whether there are particular types of cases involving bullying or harassment where people consider a telephone-based conciliation service would be beneficial.

Q38. How well is Employment Mediation Services currently supporting parties to reach an agreement without feeling unduly pressured?
Q39. What should a low-level dispute resolution process for cases involving bullying or harassment look like?
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?

The outcomes of mediation

326. Of mediation applications in 2018/19 that involved bullying, harassment or discrimination:

- 44 per cent were settled
- 13 per cent were not settled
- 43 per cent were not mediated (meaning the application was withdrawn, which may mean the matter was resolved prior to mediation occurring).

327. However, these figures do not necessarily indicate if parties regarded the outcome of their case satisfactory.

328. Some stakeholders have expressed concern about the use of non-disclosure and/or non-defamation clauses in settlement agreements, as it means the employee is not able to talk about what happened to them, even if it becomes apparent that a similar problem is occurring elsewhere in the workplace. This is similar to the concern raised in the United Kingdom that non-disclosure agreements are being used unethically by some businesses to silence victims of sexual harassment (McCann FitzGerald, 2018). The UK Equality and Human Rights Commission (2019) has recently released new guidance for employers on the use of confidentially agreements in discrimination disputes, suggesting such non-disclosure agreements should largely be limited to where these are necessary to protect a victim’s confidentiality, to protect the reputation of falsely accused parties, or to protect legitimate businesses interests (such as avoiding prejudice to ongoing investigations or proceedings).

Concerns have been raised regarding the use of non-disclosure agreements for sexual harassment cases.

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?

Stage 3: Lodging a statement of problem with the ERA

329. The *Employment Relations Act* establishes the ERA as an investigative body with the role of resolving employment relationship problems. If an issue relating to bullying or harassment is not resolved through mediation, the employee may file a statement of problem requesting that their personal grievance be considered by the ERA.

Making a personal grievance claim to the ERA

Who can apply?

Only employees (including homeworkers and persons intending to work) are able to take a personal grievance to the ERA under the *Employment Relations Act*.

The personal grievance process encourages parties to initially attempt to resolve their issues themselves. As such, the ERA will refer the parties to Employment Mediation Services if mediation has not already occurred, or if they consider further mediation would still be helpful.

What are the grounds for raising a personal grievance in relation to bullying?

If an employer has not adequately addressed a complaint of bullying and this has resulted in the employee being disadvantaged in their employment (unjustified disadvantage) or dismissed or forced to resign as a result of raising the complaint (constructive or unjustified dismissal), this can provide the grounds for a personal grievance.

When the person accused of bullying or harassment is not the employer, the worker is required to have raised the issue with their employer so that the employer has an opportunity to appropriately respond. If the employer was the one performing the bullying or harassment, or if there was evidence that the workplace culture was one where such behaviour occurred regularly, the worker could make an argument that the employer knew or ought to have known.

While the ERA is unable to directly apply the HSWA, principles from the HSWA can inform the ERA's understanding of an employer's obligation to provide a safe working environment. WorkSafe's guidelines and definition of bullying are often referred to in determinations of bullying cases.

What are the grounds for raising a personal grievance in relation to sexual or racial harassment?

The *Employment Relations Act* specifically identifies sexual and racial harassment as grounds for a personal grievance. Where the person harassing the employee is not their employer (eg, it is a customer or colleague), a personal grievance can only be successful if the employee has raised the issue with the employer and the employer has not taken adequate steps to prevent the harassment occurring again.

Timeframes for raising a personal grievance

An employee who wishes to pursue a personal grievance in the ERA must have raised the grievance with their employer within 90 days from when the alleged action occurred or came to the notice of the employee. For bullying or harassment performed by someone other than the employer, the grievance is actually the lack of, or inappropriate, response by the employer, rather than the bullying or harassment itself. Therefore, raising a grievance involves an employee raising a concern about:

- bullying or harassment they believe is injurious to their employment with their employer; and/or
- their employer's action (or inaction) in dealing with the employee's concerns.

The ERA may need to consider whether the employee's actions constitute 'raising' a grievance within the meaning of the *Employment Relations Act* within 90 days. The Employment Court has emphasised that no particular form of words is necessary to raise a grievance (and it can be raised orally) provided the employer is made sufficiently aware of the concern and is able to respond. Once a personal grievance has been raised, the ERA can only be asked to take action within three years of the grievance being raised with the employer.

The *Employment Relations Act* does allow exceptions to this 90-day requirement where the employer has consented or the ERA considers the delay was due to exceptional circumstances. However, the threshold for obtaining an exception is high, and exceptional circumstances requests have rarely been successful.

Making an application

The employee can make an application to the ERA online, by post, or by hand delivery. Once an application has been made and the fee paid, the applicant will receive a written acknowledgement by an ERA officer. The ERA officer is their point of contact throughout the investigation. The ERA will send the named respondent (ie, the employer) a copy of the application, which includes the statement of the problem. The respondent then has 14 days to provide a statement in reply. If the respondent does not respond, the matter will be referred to an ERA member who will determine the next steps (ie, refer to mediation or proceed to a case management conference or an investigation meeting).

What does the process involve?

The *Employment Relations Act* enables ERA members to determine their own procedure. This is intended to allow proceedings to be more informal than court proceedings and to enable ERA members' flexibility to deal with the specifics of the case.

Before any formal investigation, the ERA member will consider the issue. This can involve asking parties to clarify aspects of their statements, requesting more evidence, or holding a case management conference. Case management conferences are generally informal phone calls involving both parties, or their representatives, and the ERA member. The purpose of the case management conference is to make sure the issues being investigated are clear, to consider whether other methods of resolving the problem would be helpful, and to determine the timeframes and procedure for the investigation meeting.

The next step is the investigation meeting. The applicant is required to pay the cost of the meeting fees. Most investigation meetings take one day or less. There is no cost for the first day and then a fee of \$153.33 per half day after that. Investigation meetings are usually held in the ERA offices in Auckland, Wellington or Christchurch. Translators and assistance for people with disabilities are provided when requested. The applicant is able to bring friends, whānau or supporters and can present their own case or have a representative do it for them.

Every person who provides a witness statement is required to attend the investigation meeting, although this can occur via phone or video link. Investigation meetings are not intended to be as formal as a Court hearing. The *Employment Relations Act*, however, requires the ERA to allow cross-examination of witnesses.

What are the possible outcomes?

If the ERA determines that an employee has a personal grievance, it has a range of remedial actions it can require the employer to perform, including:

- reinstatement of the employee in their former or a similar position
- reimbursement of lost wages
- compensation for humiliation, loss of dignity and injury to the feeling of the employee and loss of any benefit.

The ERA is also able to order an interim reinstatement of the employee, at their request, while the personal grievance is being considered.

If the ERA finds that any workplace conduct or practices were a significant factor in the personal grievance, it can make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring. These recommendations are only binding if both parties agree. They are generally made public, which can provide motivation for employers to respond.

If the ERA finds an employee has been sexually or racially harassed in the employer's employment, recommendations to the employer may also include transfer of, disciplinary action against, or rehabilitative action for, the person who was found guilty of the harassing behaviour. It may also include any other action that is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.

How well does the ERA process address bullying and harassment issues?

Circumstances a grievance can be raised

330. One suggested limit on ERA personal grievance claims as means to address bullying and harassment issues is a lack of understanding of the grounds such a claim can be made on. Parties without existing knowledge of the employment relations system may not be aware, for instance, that claims can be made based on an employer failing to provide a safe working environment (a duty established by case law), or may be unaware of the requirement to the employer of an issue and given them an adequate opportunity to respond.

331. A linked question is whether the current grounds on which a personal grievance claim can be brought to the ERA for bullying or harassment are appropriate to address these issues.
332. Another potential issue area that has been highlighted by stakeholders is the requirement to raise the grievance within 90 days. This requirement is intended to emphasise the need to act promptly so that employment relationship problems can be resolved 'quickly'. However, in bullying and harassment cases this prerequisite has been identified as restrictive because individuals may not be ready to raise a bullying or harassment issue with their employer within that time. This was raised as a particular issue for transgender people, for whom the incident giving rise to the bullying or harassment (coming out as transgender) may coincide with other challenging events, such as loss of a relationship and home.
333. A bullying personal grievance relates to an ongoing pattern of behaviour, with some final action leading the employee to either resign or feel unsafe in their workplace. In the past there has also been concern as to whether behaviour that occurred outside of the 90-day limitation for raising a personal grievance could be considered by the ERA. The accepted legal position is that once it has been accepted that the employee has raised a personal grievance with the employer within 90 days of a relevant aspect of a series of events, the ERA is able to consider all aspects of the circumstances of the personal grievance, which may include surrounding and historical circumstances.

Where the behaviour was particularly traumatising (eg, sexual harassment), the employee may not feel ready to talk about their experience within 90 days.

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

The ERA process

334. Another area concerns have been raised is that parties risk being re-traumatised as issues are escalated through the dispute resolution process.
335. Since 2010, the Employment Relations Act has required the ERA to allow witnesses to be cross-examined. Prior to this, the ERA was able to allow cross-examination at its discretion. When this change was made, it was intended that the ERA would continue to control the exercise of this right where, in its view, the cross-examination is not assisting the proper investigation of a matter or is not being conducted in an appropriate manner.

336. In bullying and harassment cases, the use of cross-examination may increase the risk of re-victimisation and further trauma for the employee, or deter them from progressing their issue. This may be of particular concern in cases of sexual harassment. However, cross-examination is a useful tool to establish facts and allow parties to examine witness claims. A question therefore arises as to what the appropriate use of cross-examination in bullying and harassment cases may be.
337. The Solicitor-General recently developed new guidelines for the prosecution of sexual violence cases. These could provide useful guidance for how sexual harassment cases should be dealt with as part of the employment relations pathway.

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?

The role of representatives

338. Parties are not required to have a representative for ERA investigation meetings. Where an employee does not have a representative, the intention is that the ERA member will ensure that this does not unfairly disadvantage them. In practice, however, employees and employers generally feel that they need to hire a lawyer to represent them. This may be linked to the requirement to allow the cross-examination of witnesses. While this can ensure they receive appropriate advice and support, it can make the process expensive. Concerns have also been raised about the qualifications and impact of paid representatives, particularly those that work under a ‘no win no fee’ arrangement (discussed on page 70).

Q46. How should representatives be governed?

Q47. Is there adequate support for employees who do not have representation during ERA cases involving bullying and harassment?

Outcomes of ERA proceedings

339. We have also heard concerns about the low level of compensation amounts awarded in relation to personal grievances, and different levels of compensation amounts awarded between the ERA and under the *Human Rights Act*. In recent years, the Employment Court has given clear guidance about appropriate compensation levels. As a result, the amounts awarded by the ERA have increased. In 2015, there were only 2 cases where \$20,000–\$24,999 was awarded, and no higher amounts were awarded. In contrast, in 2018, there were 17 cases where \$20,000–\$24,999 was awarded, 4 cases where \$25,000–\$29,999 was awarded, and 5 cases where \$30,000 was awarded).

Q48. Are the remedies for grievances involving bullying or harassment appropriate?

Stage 4: Challenging an ERA determination in the Employment Court

340. An employee is not able to take their personal grievance directly to the Employment Court. If, however, one of the parties does not agree with the written determination of the ERA (either the employee or employer), they can have the matter considered by the Employment Court. In these situations, the party must file a challenge within 28 days of the determination being made. They can request that the determination, or part of the determination, be reconsidered by the Employment Court or can request that the Employment Court conduct a full hearing of the entire matter.
341. The Employment Court Judge will hear the complaint and reach his or her own view of whether there has been harassment or bullying. The Court may consider any particular policy adopted by the employer regarding bullying or harassment, and on occasion has been assisted by the WorkSafe guidelines regarding bullying.
342. Stakeholders we have spoken to so far have not raised any particular issues or concerns regarding the way bullying and harassment personal grievances are dealt with by the Employment Court.

Q49. Are there any issues with the way bullying and harassment personal grievances are dealt with by the Employment Court?

Use of the ERA and Employment Court to address bullying and harassment issues

343. From 2015 to 2019, the ERA considered 14 cases, and the Employment Court has not considered any cases where sexual harassment was the main basis for the personal grievance. This seems surprising given New Zealand's reported high levels of sexual harassment. During this time, the ERA considered seven cases, and the Employment Court considered one case, where racial harassment was the main basis for the personal grievance.
344. If these low rates are due to sexual or racial harassment issues being dealt with effectively at a lower stage, it could be considered a positive. However, it could also suggest that people do not feel able to raise and escalate sexual or racial harassment issues under the employment relations pathway.
345. During the same 2015-2019 time period the ERA considered 84 cases and the Employment Court eight where bullying was the main basis of a personal grievance.

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

How well does the employment relations pathway respond to bullying and harassment issues?

346. We have heard concerns that even when an investigation determines bullying or harassment did occur, there may be no consequences or accountability for the person who performed the bullying and harassment. Stakeholders have expressed frustration at situations when they are aware that the person went on to bully or harass other workers.

347. The employment relations pathway is focused on investigating and resolving employment relations problems. As such, it has a reactive rather than proactive focus, although the ERA and Employment Court can make recommendations to the employer on actions they should take to prevent similar employment relationship problems occurring. The HSWA does have a focus on the prevention of harm, but WorkSafe tends to focus at a systems levels rather than individual redress.
348. We would also like feedback on how the employment relations pathway is working overall to address bullying and harassment issues, and how it is particularly working for Māori and other groups we have identified as disproportionately exposed to bullying.

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?
Q52. Overall, how well does the existing employment relations pathway work for people who have experienced bullying and harassment, including sexual harassment?
Q53. How well is the existing employment relations pathway working for Māori?
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)?
Q55. What is working well in the existing employment relations pathway?
Q56. What is the biggest issue with the way a bullying and harassment issue is currently dealt with within the employment relations pathway?
Q57. What improvements or changes would have the biggest impact?

Raising a concern with WorkSafe

349. As New Zealand’s primary health and safety regulator, WorkSafe has three key roles: to educate, to engage and to enforce.
350. WorkSafe’s education role focuses on informing businesses and workers on their rights and how to meet their responsibilities under the HSWA. To help reduce the risk of harm from bullying and harassment, WorkSafe has provided guidance and information for both workers and organisations on its website. This includes information such as an anti-bullying policy template and a good practice guide for preventing and responding to bullying at work.
351. WorkSafe’s engagement role includes working in partnership with industry bodies, unions, employer organisations, government agencies and others to promote improvements in health and safety practices. WorkSafe’s frontline inspectors also work directly with businesses assessing health and safety practices and supporting them to assess, identify and manage their risks.

352. WorkSafe’s third role is enforcement – when WorkSafe believes the HSWA has been breached or people face an immediate risk to their health and safety, WorkSafe can take steps to remedy unsafe situations. WorkSafe has a range of enforcement tools it can use. These range from issuing ‘improvement notices’ requiring businesses to make changes to reduce risks, up to prosecution before the courts.
353. In an enforcement context, WorkSafe seeks to determine whether a business had processes in place to manage risks of harm. This means that when concerns are raised with WorkSafe about bullying or harassment, the approach is not to determine if someone is a bully or not but rather to look to whether these risks are being managed appropriately.
354. WorkSafe will generally learn about a bullying or harassment concern from the person affected or other concerned party. While the HSWA has requirements for PCBUs to notify WorkSafe of certain injuries or illnesses,¹⁸ these provisions are not geared to provide information about workplace bullying and harassment, except in the most extreme of cases.
355. WorkSafe has a high threshold before it intervenes in a case of alleged workplace bullying. 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.
356. WorkSafe’s investigation and enforcement activity is risk-based and targeted at the highest risks and harms. Investigations follow a formal, structured process of inquiry to identify any breaches of the HSWA. An investigation may have a range of outcomes, including prosecution and other statutory and non-statutory outcomes.
357. The box below describes the current triage and decision process when a person raises a concern about bullying to WorkSafe.

¹⁸ See s 23 of the HSWA for a definition of notifiable events, and s 56 for the duty to notify WorkSafe of notifiable events.

When a person raises a concern with WorkSafe

Concern is raised

Concerns about allegations of harm from psychosocial risks such as bullying can be raised by or on behalf of workers either by WorkSafe's free phone number 0800 030 040 or via WorkSafe's online form.

What does WorkSafe respond to?

WorkSafe responds to the most urgent or serious concerns to determine whether business systems and processes sufficiently protect workers from work risks. WorkSafe has to make choices about whether or not to intervene and considers whether:

- intervening helps WorkSafe to deliver on its purpose and functions
- the matter falls within WorkSafe's jurisdiction
- WorkSafe is the best-placed agency to intervene.

Examples of ways WorkSafe may intervene include:

- informing the business about the concern raised with WorkSafe and recommending they review their processes to manage bullying
- initiating an investigation
- working with industry groups to highlight and address issues specific to their work.

Triage criteria and process to decision

Safety of the person raising the concern

When raising a formal concern, it is important that a worker takes reasonable care for their own immediate health and safety. If WorkSafe believes the person raising a concern is experiencing mental distress and may benefit from professional support, WorkSafe will encourage the person to seek support or access a relevant service (eg, a mental health helpline). The concerned person is welcome to contact WorkSafe again at a later time.

Definition of bullying

The bullying concern must meet the definition of workplace bullying in WorkSafe's guidance – that is, it is repeated and unreasonable behaviour directed towards a worker or group of workers that can lead to physical or psychological harm.

Note: The guidance also sets out situations that are not considered workplace bullying – for example, reasonable management actions delivered in a reasonable way, or one-off occasional instances of forgetfulness, rudeness or tactlessness.

Consent and identification of the person affected

WorkSafe will need the name and contact details of the person or persons affected and confirmation they have not requested confidentiality (unless there are exceptional circumstances – eg, the concern has been submitted as a protected disclosure).

Anonymous bullying concerns cannot be progressed because evidence of the person's diagnosis of harm will be required (see below).

If the bullying is reported by a third party such as an advocate or relative, WorkSafe must have the consent of the person affected to proceed further.

WorkSafe will consider an investigation into a bullying concern where:

- the affected person has a medical diagnosis of a serious mental health condition, AND
- the diagnosis has been made or confirmed by a psychiatrist, clinical psychologist or district health board multi-disciplinary mental health team, AND
- there is a link to workplace bullying as a cause.

Concerns that don't meet the criteria for an investigation

Depending on the circumstances, and with the approval of the person raising the concern, a WorkSafe Inspector may write to the PCBU advising them that concerns have been raised, to remind them of their health and safety obligations, and to address risks in relation to the bullying concern.

In instances where the concern does not meet WorkSafe's threshold (as above), workers and/or a PCBU are encouraged to access WorkSafe's resources and guidance (the bullying toolbox).

Depending on the circumstances, workers may also be invited to consider approaching another agency – for example:

- the Police if the bullying may constitute harassment under the *Harassment Act 1997* or a crime under the *Crimes Act 1961*
- the Human Rights Commission if the bullying involves discrimination of a type covered by the *Human Rights Act*
- MBIE's Employment Mediation Services if the bullying is an employment relations issue.

What does this mean for the experience of people raising concerns with WorkSafe?

358. We have heard concerns about the small number of investigations regarding bullying or harassment undertaken by WorkSafe.

359. From early 2018 the numbers of bullying-related concerns raised with WorkSafe began to increase and a process was put in place to triage concerns so that investigations may be pursued in instances of most serious harm. This led to the threshold for investigations described above being put in place.

360. Over time, as investigations progressed under this approach, it has become increasingly clear that the enforcement decision-making model based on acute incidents may not be fit for purpose for managing psychosocial risks and harm.
361. One challenge to WorkSafe’s enforcement in cases of bullying and harassment is achieving the required evidential sufficiency for a case to advance to court. Prosecutions under HSWA are criminal. To achieve a conviction, WorkSafe must prove beyond reasonable doubt that a PCBU has offended, which can be difficult in respect of bullying allegations where there may be conflicting evidence. This is not a problem unique to New Zealand. Case law on bullying as a breach of health and safety is scarce in comparable regulatory jurisdictions.
362. WorkSafe is also aware the investigation process itself can risk retraumatising individuals who may have already pursued other avenues to resolve their issue.
363. Other issues with the current triage and decision process include the threshold, which can lead to unintended consequences. A bullying concern that proceeds to investigation relies on a person having the resources and capability to access a medical diagnosis to determine whether they meet the threshold. Lack of access to specialist medical services, due to geography, cost, or personal agency, can drive inequities. Meeting the threshold may in and of itself raise expectations, but does not equate to proof of an offence.
364. Focusing primarily on cases where harm has occurred is also inconsistent with WorkSafe’s regulatory reorientation. WorkSafe is seeking to place increased emphasis on determining breaches of the HSWA at an organisational or systemic level and taking action where businesses are not adequately managing risks, in addition to responding to incidents where harm has occurred.
365. A further question may also arise as to whether WorkSafe is effectively using the full range of its intervention options short of prosecutions (e.g. reviewing business processes, issuing improvement notices) to address issues of bullying and harassment.

Q58. Should changes be made to WorkSafe’s criteria, threshold or approach for triaging and handling bullying and harassment incidents at work?
Q59. How can WorkSafe most effectively use its range of intervention options to reduce the risk of harm from bullying and harassment at work?
Q60. What role should WorkSafe have in engaging with, and encouraging change in, sectors or organisations where risks have been identified?

Following the *Human Rights Act* pathway

366. The *Human Rights Act* provides a pathway for individuals who have experienced unlawful discrimination. This could include bullying or harassment linked to a prohibited ground, or discrimination in employment or recruitment. Individuals can contact the Human Rights Commission if they think they have been discriminated against under the *Human Rights Act*.
367. The Human Rights Commission provides a free and confidential dispute resolution service for complaints of unlawful discrimination and enquiries about a broad range of human rights issues.
368. Sometimes people take a complaint to the Human Rights Commission that is more appropriately described as an employment matter. In such cases, the Human Rights Commission will advise the complainant to consider employment mediation instead of Human Rights Commission mediation.
369. The Human Rights Commission dispute resolution process is flexible. Mediators will take account of the respective needs of the parties involved to provide a process that is fair, safe and accessible. For example, in the case of a sexual harassment case, a complainant might wish to meet with the alleged harasser and the employer, but in other cases might not want to have any direct contact with the alleged harasser. In such cases mediation can take place by way of the parties being in separate rooms, or by phone, audio visual or other means.
370. The Human Rights Commission's dispute resolution service is free, confidential and impartial. The Commission initially talks to complainants to help them identify the best path for them in their specific circumstances. This may involve suggesting how to resolve the complaint themselves, referring them to another organisation better placed to help them, providing an early resolution process with resolution occurring by phone calls, or setting up formal mediation.
371. If the complaint proceeds to mediation, the mediator will help both parties work through the issues and will help them to agree on outcomes that resolve the complaint. Commonly agreed outcomes for employment matters include an apology, an agreement not to do the same thing in the future, a policy to be introduced or amended, or financial compensation.
372. Where a complaint is not resolved through the Human Rights Commission dispute resolution process, the complainant can take their case to the Human Rights Review Tribunal or the ERA. They can only choose one of these options.
373. The Human Rights Review Tribunal is an independent judicial body (like a court) that makes decisions on claims brought before it. It is administered by the Ministry of Justice and is completely separate from the Human Rights Commission. The Human Rights Review Tribunal hears unlawful discrimination cases not resolved by the Human Rights Commission process. Applicants can seek legal representation from the Director of Human Rights Proceedings.

374. Complaints under the *Human Rights Act* can be made against individual employees and the employer. The complainant can seek outcomes from individuals against whom the complaint is made and the business.

Q61. How well does the human rights system work for someone who has experienced bullying or harassment at work that has a discriminatory basis?

Other pathways

375. Other avenues available for people to seek a response or support (depending on the circumstances) are briefly described below. Assessing these systems is outside the scope of this paper, but outlines of each are provided for context.

Report to the Police

376. If physical or sexual harm is caused through bullying or harassment, this may be a criminal offence under the *Crimes Act 1961*, or the behaviour may constitute harassment under the *Harassment Act 1997*. If so, it should be reported to the Police.

Seek assistance from Netsafe

377. If the bullying or harassment included serious or harmful repeated communications, it might be covered by the *Harmful Digital Communications Act 2015*. Netsafe has been appointed to resolve reports relating to alleged breaches of the 10 communication principles included in the *Harmful Digital Communications Act*. Netsafe is not an enforcement agency, but will assist the person to find a resolution. If the issue is not resolved, the person could apply to the District Court (eg, for an order for the material to be taken down or a cease-and-desist order).

Report to the Ombudsman

378. The Ombudsman sometimes receives complaints about bullying or harassment as a protected disclosure under the *Protected Disclosures Act 2000*. The *Protected Disclosures Act* is a law that helps employees to report serious wrongdoing happening in their workplace, without having to worry that detrimental action will be taken against them. Such complaints are often more appropriately addressed via the mechanisms provided for in the *Employment Relations Act*. However, where bullying could fall within the definition of serious wrongdoing and the *Employment Relations Act* is inapplicable, the Ombudsman can take steps to address the issue via the *Protected Disclosures Act*. Individuals with other employment concerns would generally be referred to other appropriate avenues, such as the employment relations helpline or a lawyer.

Workers compensation schemes

379. 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. This could be part of a broader social security or social insurance scheme or part of a specific workers' compensation scheme. The Australian States and Territories all have their own workers' compensation schemes (Safe Work Australia, 2019a). These schemes are a form of insurance payment to employees if they are injured at work or become sick due

to their work, and cover both wages during absence and medical expenses and rehabilitation (Fair Work Ombudsman, n.d.). All Australian workers' compensation schemes cover work-related mental health conditions (Safe Work Australia, 2019b).

380. In New Zealand, ACC administers the Accident Compensation Scheme, which provides weekly compensation to those who become unable to continue in paid employment due to an injury. ACC also has a broader role beyond this workers' compensation payment. It has a strong focus on injury prevention and provides access to health and rehabilitation services.
381. ACC describes itself as helping to "prevent injuries and get New Zealanders and visitors back to everyday life if they've had an accident" (ACC, 2018). Accidents are covered by the Accident Compensation Scheme regardless of how or where they are incurred. They do not have to be incurred at work, and because the Accident Compensation Scheme is a 'no fault' system, there is no requirement to determine blame. The type of injury covered by accidents is generally physical, although injury is deemed to include some specific health conditions, which have been identified as occupational diseases.¹⁹
382. However, injury excludes mental health conditions, except in limited specified circumstances. These include mental injuries arising from criminal sexual acts,²⁰ from physical injuries suffered by the person,²¹ and work-related mental injuries²² if they are caused by a single event that the person experiences, sees or hears directly and which could reasonably be expected to cause mental injury to people generally. In addition to these specified circumstances, a claim must meet the mental injury definition of a 'clinically significant behavioural, cognitive, or psychological dysfunction'²³ in order to be accepted for coverage under the Accident Compensation Scheme.

Other Support Systems

383. Given mental health conditions are generally not covered by the Accident Compensation Scheme, people who experience them often instead receive health treatment under the health system and may be eligible for financial support under the benefit system.
384. The health system provides health care on a needs basis. People with health conditions will receive the care they need, without needing to meet any eligibility criteria, although there may be waiting times before some treatment can be received. Services are provided by a complex network of organisations and people (Ministry of Health, 2018). The benefit system provides financial support on an entitlement basis. Various eligibility criteria are applied to determine entitlement. The form of financial support for people temporarily unable to work due to a health condition or disability is Jobseeker Support, and there is a Supported Living Payment for those permanently and severely restricted

¹⁹ See s 30 and Schedule 2 of the *Accident Compensation Act 2001*.

²⁰ These are known as 'sensitive claims'. See s 21 and Schedule 3 of the *Accident Compensation Act 2001*.

²¹ See s 26(1)(c) of the *Accident Compensation Act 2001*.

²² See s 26(1)(d) of the *Accident Compensation Act 2001*.

²³ See s 27 of the *Accident Compensation Act 2001*.

in their capacity to work (Work and Income, n.d.). However, these payments are income-tested, based on relationship status. This means a person whose spouse partner is working may not qualify for a benefit payment.

385. The rate at which Jobseeker Support and Supported Living Payment are paid is much less generous than payments under the Accident Compensation Scheme. As a result, people with the same level of incapacity can be in different financial positions, depending on whether the incapacity resulted from an injury (as defined under the Accident Compensation Scheme) or from an excluded injury or illness, or because they are in a relationship (Welfare Expert Advisory Group, 2019, p. 14).

How do these pathways interact

386. Each of these main regulatory pathways for raising a bullying or harassment at work issue has a different focus and approach.
387. The employment relations system is a key avenue for resolving employment relations issues. This system is intended to encourage low-level interventions, providing a pathway for people to escalate an issue if required. As it is a civil system, it has a lower burden of proof and has more flexibility to enable different approaches based on the issues being considered.
388. The health and safety regulatory system plays an essential part in setting up clear obligations and driving a prevention approach. In terms of providing a pathway for individuals to seek a response, this pathway has a much higher threshold for raising a complaint. This is because it is a criminal system and requires a higher burden of proof for a conviction. This system does not provide remedies for individual workers, but is focused on addressing risks identified in the workplace. Therefore, it depends on what the individual is seeking as to whether this is an appropriate pathway for them.
389. The human rights system provides broader coverage when a person has experienced unlawful discrimination, which may have occurred in the workplace or in any other avenue of their life.
390. We consider each of these systems has an important role in ensuring workers have an appropriate avenue for seeking a response. Concerns have been raised, however, about the difficulty in determining which system is appropriate for a particular person or particular circumstance, and that at times the information provided about the different systems is inconsistent.
391. One area appearing to need improvement is providing consistent and clearer guidance materials and/or navigation tools to help people to understand their options. The opportunity for a one-stop triage service for businesses and workers to get help in navigating what to do, where to go and how best to get support referred to on page 64 may also be one option to address this issue.

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

Part 7 What comes next?

392. Several changes to the way agencies address bullying and harassment at work are forthcoming. The feedback received in response to this Issues Paper will help shape how these changes occur, as well as identify other areas work is needed.

Prevention

393. The psychosocial risk domain is currently a key focus area for WorkSafe as it strengthens its work-related harm prevention capability and capacity. A commitment to mentally healthy workplaces has been set out in WorkSafe's 2019/20 Statement of Performance Expectations. New approaches being developed in the psychosocial domain are part of WorkSafe's planned regulatory approach to intervene where businesses have not are not adequately managing their risks, as well as where incidents of harm have occurred.

394. In line with these commitments, WorkSafe is embarking on a multi-year programme of work within the current refresh of *Healthy Work – WorkSafe's Strategic Plan for Work-Related Health 2016 to 2026*. This will include developing a broad view on where to prioritise efforts to support businesses to better identify, assess and manage psychosocial risks in work environments (including unreasonable behaviours at work) and prevent physical and psychological harm. Working closely with system, sector and tripartite partners, WorkSafe intends to develop proportionate approaches to harm prevention and assess the efficacy of a broader spectrum of its regulatory levers in the psychosocial domain.

395. Feedback received in response to this paper will also help inform WorkSafe's longer-term thinking on psychosocial risk at work and how it should be covered and managed by the health and safety at work system.

Response

396. Employment Mediation Services is continually looking for ways to improve its services. Current improvement focuses include:

- improving its business intelligence to identify underlying causes of employment relationship breakdowns and ways to prevent them, including more targeted information and education tools and resources
- an Early Resolution programme of work considering how to get people to resolve employment issues earlier, including engaging with Employment Mediation Services earlier.

397. The feedback in response to this Issues Paper will help inform the development of these improvement initiatives and also identify further operational improvements.

398. Reviews are also scheduled to occur of both the disputes resolution system under the *Employment Relations Act* and selected aspects of the HSWA. The scope of these reviews are yet to be decided. The information provided in response to this Issues Paper is intended to help inform these reviews through providing a clearer understanding of the specific issues relating to bullying and harassment.

Part 8 Questions

Context to Bullying and Harassment at Work

- Q1. How can we most effectively increase our understanding of the drivers of bullying and harassment? What types of data will be most useful in developing this understanding?
- Q2. How can we reduce rates of bullying and harassment, including sexual harassment, experienced by Māori?
- How can we increase our understanding of the drivers for bullying and harassment experienced by Māori?
 - What barriers are there for Māori seeking support to address bullying and harassment?
 - What does a 'healthy and respectful' workplace look like for Māori (eg, diverse and inclusive)? How do we build culturally supportive workplaces?
 - How well are relevant agencies (eg, WorkSafe and MBIE's Employment Services) partnering with Māori when developing guidance and support?
- Q3. How can we reduce rates of bullying and harassment, including sexual harassment, experienced by other minority and vulnerable populations (eg, people with disabilities, migrant workers, and trans and non-binary New Zealanders)?
- How can we increase our understanding of the drivers for bullying and harassment experienced by these groups?
 - What barriers are there for these minority and vulnerable groups seeking support to address bullying and harassment?
 - What does a 'healthy and respectful' workplace look like for these groups (eg, diverse and inclusive)? How do we build culturally supportive workplaces?
 - How well are relevant agencies (eg, WorkSafe and MBIE's Employment Services) working with these groups when developing guidance and support?

Sexual Harassment

- Q4. How can government help businesses and workers in preventing and responding to sexual harassment at work?
- Q5. Do businesses and organisations have sexual harassment policies and processes in place for responding to concerns?
- Q6. What is the quality of sexual harassment policies and processes for responding to concerns regarding sexual harassment?
- Q7. How can people better understand what is appropriate and inappropriate behaviour at work?
- 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?

Q9. What is the quality of training available to businesses and workers regarding sexual harassment available in New Zealand?

What are the 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?

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

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

Prevention approach – How well are businesses implementing their legislative obligations?

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?

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?

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?

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

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?

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).

Q19. Are businesses effectively engaging with workers to identify risks and develop processes to address bullying and harassment at work?

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

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

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

Response – What options are available to workers who experience bullying and harassment at work?

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

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

Stage 1: Addressing the issue within the business or organisation

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?

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?

Q27. What support would help people to be clear on what is and isn't a bullying and harassment issue?

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

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)?

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

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

Stage 2: Mediation

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

Q34. Are there variations by ethnicity, gender, or other factors, in parties' ability or willingness to access mediation services?

Q35. How quickly are mediation meetings occurring for issues involving bullying or harassment? Where there are delays, what are contributing to these?

Q36. What are the benefits and/or risks with the involvement of legal and/or non-legal representatives in bullying and harassment cases?

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

Q38. How well is Employment Mediation Services currently supporting parties to reach an agreement without feeling unduly pressured?

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

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?

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?

Stage 3: Lodging a statement of problem with the ERA

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?

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

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?

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?

Q46. How should representatives be governed?

Q47. Is there adequate support for employees who do not have representation during ERA cases involving bullying and harassment?

Q48. Are the remedies for grievances involving bullying or harassment appropriate?

Stage 4: Challenging an ERA determination in the Employment Court

Q49. Are there any issues with 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?

How well does the employment relations pathway respond

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?

Q52. Overall, how well does the existing employment relations pathway work for people

who have experienced bullying and harassment, including sexual harassment?

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

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)?

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

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

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

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?

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

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

Q61. How well does the human rights system work for someone who has experienced bullying or harassment at work that has a discriminatory basis?

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

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Annex 1 Legislative definitions

Employment Relations Act 2000

Section 108 Sexual harassment

- (1) For the purposes of sections 103(1)(d) and 123(d), an employee is *sexually harassed in that employee's employment* if that employee's employer or a representative of that employer—
- (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—
 - (i) an implied or overt promise of preferential treatment in that employee's employment; or
 - (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
 - (iii) an implied or overt threat about the present or future employment status of that employee; or
 - (b) by—
 - (i) the use of language (whether written or spoken) of a sexual nature; or
 - (ii) the use of visual material of a sexual nature; or
 - (iii) physical behaviour of a sexual nature,—directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.
- (3) For the purposes of sections 103(1)(d) and 123(d), an employee is also *sexually harassed in that employee's employment* (whether by a co-employee or by a client or customer of the employer), if the circumstances described in section 117 have occurred.

Section 109 Racial harassment

For the purposes of sections 103(1)(e) and 123(d), an employee is *racially harassed in the employee's employment* if the employee's employer or a representative of that employer uses language (whether written or spoken), or visual material, or physical behaviour that directly or indirectly—

- (a) expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race, colour, or ethnic or national origins of the employee; and
- (b) is hurtful or offensive to the employee (whether or not that is conveyed to the employer or representative); and
- (c) has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.

Human Rights Act 1993

The *Human Rights Act* also contains definitions of sexual and racial harassment.

Section 62 Sexual harassment

- (1) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) to make a request of any other person for sexual intercourse, sexual contact, or other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.
- (2) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) by the use of language (whether written or spoken) of a sexual nature, or of visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that—
 - (a) is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); and
 - (b) is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (3).
- (3) The areas to which subsections (1) and (2) apply are—
 - (a) the making of an application for employment:
 - (b) employment, which term includes unpaid work:
 - (c) participation in, or the making of an application for participation in, a partnership:
 - (d) membership, or the making of an application for membership, of an industrial union or professional or trade association:
 - (e) access to any approval, authorisation, or qualification:
 - (f) vocational training, or the making of an application for vocational training:
 - (g) access to places, vehicles, and facilities:
 - (h) access to goods and services:
 - (i) access to land, housing, or other accommodation:
 - (j) education:
 - (k) participation in fora for the exchange of ideas and information.
- (4) Where a person complains of sexual harassment, no account shall be taken of any evidence of the person's sexual experience or reputation.

Section 63 Racial harassment

- (1) It shall be unlawful for any person to use language (whether written or spoken), or visual material, or physical behaviour that—

- (a) expresses hostility against, or brings into contempt or ridicule, any other person on the ground of the colour, race, or ethnic or national origins of that person; and
 - (b) is hurtful or offensive to that other person (whether or not that is conveyed to the first-mentioned person); and
 - (c) is either repeated, or of such a significant nature, that it has a detrimental effect on that other person in respect of any of the areas to which this subsection is applied by subsection (2).
- (2) The areas to which subsection (1) applies are—
- (a) the making of an application for employment:
 - (b) employment, which term includes unpaid work:
 - (c) participation in, or the making of an application for participation in, a partnership:
 - (d) membership, or the making of an application for membership, of an industrial union or professional or trade association:
 - (e) access to any approval, authorisation, or qualification:
 - (f) vocational training, or the making of an application for vocational training:
 - (g) access to places, vehicles, and facilities:
 - (h) access to goods and services:
 - (i) access to land, housing, or other accommodation:
 - (j) education:
 - (k) participation in fora for the exchange of ideas and information.

Annex 2 Examples of bullying behaviours

PERSONAL ATTACKS (DIRECT) Examples include:	TASK-RELATED ATTACKS (INDIRECT) Examples include:
Belittling remarks – undermining integrity – lies being told – sense of judgement questioned – opinions marginalised	Giving unachievable tasks – impossible deadlines – unmanageable workloads – overloading – ‘setting up to fail’
Ignoring – excluding – silent treatment – isolating	Meaningless tasks – unpleasant jobs – belittling a person’s ability – undermining
Attacking a person’s beliefs, attitude, lifestyle or appearance – gender references – accusations of being mentally disturbed	Withholding or concealing information – information goes missing – failing to return calls or pass on messages
Ridiculing – insulting – teasing – jokes – ‘funny surprises’ – sarcasm	Undervaluing contribution – no credit where it’s due – taking credit for work that’s not their own
Being shouted or yelled at	Constant criticism of work
Threats of violence	Underwork – working below competence – removing responsibility – demotion
Insulting comments about private life	Unreasonable or inappropriate monitoring
Physical attacks	Offensive sanctions (eg, denying leave where there is no reason to do so)
Humiliation (in public or private)	Excluding – isolating – ignoring views
Persistent and/or public criticism	Changing goalposts or targets
Using obscene or offensive language, gestures, material	Not giving enough training or resources
Ganging up – colleagues/clients encouraged to criticise or spy – witch hunt – dirty tricks campaign – singled out	Reducing opportunities for expression – interrupting when speaking
Intimidation – acting in a condescending manner	Supplying incorrect or unclear information
Intruding on privacy (eg, spying, stalking, harassed by calls when on leave or at weekends)	Making hints or threats about job security
Unwanted sexual approaches, offers, or physical contact	No support from manager
Verbal abuse	Scapegoating
Inaccurate accusations	Denial of opportunity
Suggestive glances, gestures, or dirty looks	Judging wrongly
Tampering with personal effects – theft – destruction of property	Forced or unjustified disciplinary hearings
Encouraged to feel guilty	Lack of role clarity
Not trusting	
Sabotage	

Source: WorkSafe (2017a)

