

NZLS CLE PREVENTING AND DEALING WITH HARASSMENT AND BULLYING

Live web stream - Questions and Answers

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These are not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such.

If advice on the law is required, it should be sought on a formal, professional basis.

1. Do you know why WorkSafe's definition of bullying is so narrow, when the breadth of conduct that can create a health risk is well known?

The definition is open textured, and the examples of conduct are extensive: see WorkSafe Guidelines on the WorkSafe website.

2. What do the speakers think of using the mechanisms in the Health and Safety at Work Act to deal with harassment and bullying - to the extent that they create a health risk - improvement notices, provisional improvement notices?

It can and should be an avenue for addressing serious workplace hazards, but there are resourcing issues. Serious cases can lead to very serious harm including suicide – so we should be pushing WorkSafe.

3. Is a Minister's Office a workplace? If so, who is the PCBU?

Yes, it is a workplace. Ministerial Services (DIA) is probably the PCBU.

4. What practical and legal response is available to a person (any person in any relationship) when cyber bullying and/or threatening behaviour continues after requests to cease and desist have been made from the affected person?

My question is focused primarily on the legalities of cyber protection and or unwanted cyber exposure, confidentiality, privacy protection.

See Kathryn Dalziel's paper.

5. A client has complained that when he approached his employer to ask for a job to do, the employer said to him why don't you go and do a f*in sweep until I get back to you? Is this bullying?**

As a one off incident, no. But it's unacceptable conduct in the workplace so should be raised as such. If there was further similar conduct over time, it could be part of a course of conduct which could be held to be bullying.

6. How do you deal with bullying in Court from judges?

- Talk to senior colleagues, seek support to raise it.
- Could raise it with a senior Judge, perhaps with help of a senior colleague.
- Report it to the Judicial Conduct Commission:
<http://www.jcc.govt.nz/complaintprocess.html>.

7. Question regarding being side-lined when projects are shared around. Examples of how to deal with this kind of situation? Proof needed etc.

- Advise (publicly) that you have little work on and ask for an assignment.
- Go to the person one on one and note your availability/capacity, explain how many good projects/jobs have been assigned and point out you feel you are not getting a reasonable share. Also if you don't get the opportunity to work on such projects, you won't learn and be able to contribute fully.
- get a more senior colleague to put the case for you and involve you in a decent piece of work.
- Escalate.
- Keep records of who work is allocated to so you can prove a pattern.

8. Are we as lawyers well equipped to deal with the culture change necessary? We tend to deal with issues within a legal framework only and with individual behaviours, not systemic failure.

Yes, people especially lawyers often respond this way to allegations against them, and employers may be very defensive. A focus on our culture, prevention and support is the counter to this. We can educate ourselves and each other. The NZLS and other measures being put in place are a positive start. Hamish's observations and recommendations are very relevant: back to being human, showing respect and expecting it.

The skills that lawyers have include interpreting situations, coming up with solutions, being flexible and strategic, so there is absolutely no reason why lawyers should not be capable of responding to culture change.

9. I'm interested in the role of the Law Society in dealing with Harassment/Bullying amongst members - at what point do you think an ethical obligation is triggered?

Wherever behaviour is capable of amounting to misconduct, such that it could impact on whether the person is a fit and proper person to practice as a lawyer. This may apply where the conduct is:

- Plainly unacceptable and serious
- Having a serious impact on you or another person and/or
- Affecting a client's interests

Rule 2.8 requires misconduct to be reported where a lawyer has reasonable grounds to suspect it has occurred. This is likely to be clearly required following an investigation if allegations are substantiated.

Refer to an ethics person on Friends Panel, senior colleague or Law Society if unsure. However a complainant or direct witness to events would have good cause to report the matter prior to a full investigation taking place, based on their personal observation.

10. What efforts are being made to train HR people in law firms are they going to get any specific training. A lot of the issues have skyrocketed because of HR not taking action.

One can certainly give them feedback when the opportunity arises. They can access the many resources, training modules, peer support and advice. However, HR needs to be empowered by the Partners to proactively identify and deal with issues.

11. My view is victim is entitled to findings. Disciplinary outcome might be private, but actions taken to make workplace safe eg training courses need to be told to victim. What are presenters' views?

As Susan said, and in the paper, we agree they are entitled to be told whether their complaint has been upheld. However they should not be informed of any disciplinary actions taken against the respondent as this is a matter of their privacy. Whether they should receive other information (eg about training provided or other interventions) depends on the circumstances.

12. Within law firms, equity partners ultimately hold all the power. When they are bullying employees (not unusual) how can this be managed? Even CEOs and HR are under the thumb here...

If it is raised and not addressed properly, get support and exercise your rights outside the firm: Law Society, employment lawyers, ERA, HRA, media?

13. Is HR powerless in firms?

Yes/no – see Steph's part of the paper.

- 14. I'm also concerned at hearing that other criminal practitioners are being bullied by their colleagues at the Bar, and would interested in the Panel's comments on how to detect it, and how to intervene.**

Be receptive to colleagues raising issues. If someone seems distressed or to be struggling, ask how they are and really listen. Ask around – have coffees with colleagues, join the local Branch Council committee. Call it out when you see it. Report it. Behave with utmost professional courtesy and respect yourself – then you are in a position to hold others accountable.

- 15. Have seen a few colleagues and judiciary roll their eyes when we make submissions in criminal courts, based on Tikanga Māori. How do we call them out on racial discrimination?**

Stop, pause long enough to get attention, ask “Does your Honour have a concern about my submission?” If they say no, or ask why, say “It appeared to me that you might have. No? OK, I will continue”. You can take a colleague aside afterwards and explain “You may not be aware of it, but when you do X, I feel like you are being disrespectful. Please don't do it again.”

- 16. What in practical terms are we required to do in responding to a complaint that a client is harassing an employee?**

Keep the employee safe. Raise it with the client in a calm, professional way. Hear their explanation. If necessary, escalate it within the client (if it is an organisation). Escalate with appropriate agencies if very serious. Disengage the client if they won't take it seriously or it reoccurs – ethical rules allow disengagement – health and safety concerns for your staff, or a loss of sufficient trust to be able to represent the client's interests will justify this.

- 17. How far is this applicable? eg Working from home?**

Outside workplace, but with a connection to work, is covered.

- 18. I think the Q about working from home (*question 17*) is important - part of "workplace" for Health and Safety at Work, do other regimes extend there?**

Yes. As above, an employer can act on out of work conduct if there is a connection to work.

- 19. What constitutes sexual harassment is it a subjective or objective test? From an employer's perspective it is what a fair and reasonable employer would have done.**

See Steph's part of the paper – subjective in terms of “is it unwanted and offensive to the person”. An employer needs to show they took appropriate steps to investigate a complaint, and to prevent recurrence (or to prevent any occurrence, if under the HRA). What a fair and reasonable employer would have done is the test for justifying disciplinary action under s103A ERA.

20. What can we do if the person doesn't want to take a formal or official complaint?

See Susan's part of the paper. Support, encourage, explore less formal paths. What can be done to ensure the safety of this person and others?

21. What action can we take against the perpetrator?

If an employee, investigate and take disciplinary action if established. If a lawyer, report to Law Society, or report to WorkSafe or the Human Rights Commission.

22. Does employers criticising their employees when providing a reference to a future potential employer count as bullying; when the criticism is undue?

It can be but won't be any recourse if employee has already left employment. A breach of good faith if still employed. Employers must give fair and balanced references (and only if authorised by the employee). Tort if employer misrepresents suitability to a would be employer. Potential defamation or privacy claim (eg Privacy Act Principles 8, 10, or 11) if employer unfairly maligns the employee.

23. If you witness harassment can you be made to give evidence?

It is a reasonable and lawful request to an existing employee to participate in an investigation, but practically the employer can't force them. Unless issued a witness summons or subpoena, a person can't be forced to give evidence in proceedings.

24. What can an employer/manager do if accused of bullying by an employee seeking merely to use this to gain personal advantage?

Question first whether you have conducted yourself as well and as fairly as you ought to. Talk to a trusted colleague to get a more independent perspective.

Engage appropriately with the complainant. "Heat of the moment" complaints will sometimes be retracted or pulled back. Both parties should have opportunities to reflect.

Ask for a formal investigation.

Provide evidence to show you have acted fairly and reasonably; suggest witnesses, provide documentation. Respond professionally and co-operate with the investigation: if you overreact/emotive/angry/attacking etc – it makes it look like it is probably true. Employers can investigate whether complaints of bullying have been made in good faith, and take action against the complainant if this is found not to be the case.

25. How important is it to have an external agency available for complainants to approach for assistance and support?

Crucial. NZLS has put measures in place, and others are available. See the helpful resources section.

26. Often it can be more than one person though. What is the best course of action to take when the bullying is from a tight group of colleagues?

Complain formally if it's serious. Get support from colleagues to call it out and point out how unfair and childish it is. Talking openly about the impact it is having on the victim may also cause the harassers to reflect on what they are doing.

27. Question for Susan, how do you go about investigating historic sexual harassment complaints and what remedies are available?

Same as any investigation. May be difficult if evidence/witnesses are not available. 90 day time limit for raising personal grievance; 12 month discretionary limit for Human Rights matters.

28. What's the cost of mediation?

It is free through MBIE.

29. Very useful but employer is responsible in tort and employment laws?

Unsure what this relates to? References? See above. Employers are vicariously liable for the actions of their managers who "stand in the employer's shoes".

30. What do you do about bullying from clients? Some client behaviour is abysmal, but solicitors have a duty to complete an engagement.

Deal with as above. Rule 4.2.1 of the rules allows for disengagement where good reason. Disrespectful, unsafe behaviour could qualify. Refer to an ethics person on Friends Panel, senior colleague or Law Society if unsure.

31. Section 68 of the HRA says no liability for employers if they took reasonable steps. What would those be in the case of sexual harassment?

Education, having and promoting a policy, demonstrating zero tolerance of such conduct, record of acting on complaints, taking appropriate action if issues raised.

32. Is it permissible to keep a record of informal complaints, where complainants don't want the accused person to be told, to see whether there are repeat complaints against the same person?

Yes. Retention, use, and the requirement to disclose to the accused person, if requested, will be governed by Privacy Act. See Susan's part of the paper.

33. Can employer be still held liable despite undertaking investigation in good faith?

Could be if steps taken are not sufficient, or if insufficient attention to empowering the complainant to raise any recurrence.

34. We struggle with balancing ethical obligation to complete work with "firing" a client who can be abusive. Any tips?

See above. Refer to Chapter 4 of the Conduct and Client Care rules and ask the Friends Panel and NZLS if in doubt.

35. What practical action can a firm take once they have identified a problem person but the behaviour isn't bad enough to report to NZLS? (Maybe that would be a good topic for a follow up session?)

If there is sufficient evidence (eg after an investigation), raise it formally with the person as a performance issue or in a disciplinary process. If formal action is not warranted, raise it informally. If receptive, provide coaching/mentoring. If not receptive/no acknowledgement, set expectations and give an informal caution “if this were ever to happen, we would take it very seriously”. Monitor the situation closely. In a general way, make sure other staff know what the expected standard of behaviour is, what the policy and process are, and that they can raise issues at work if they ever feel unsafe or uncomfortable (without breaching privacy). Provide general training, raise awareness across the workplace.

36. If (for example) a blond joke is made by a blond person (or a joke by someone of a group that can be discriminated against) this sort of self-deprecating behaviour, that has the side effect of discriminating against people in their own group, is really difficult to deal with.

It can be useful to take them aside and ask whether they have thought about how that sort of humour may make other people feel. If they say no, or it's just a joke, say “if anyone else said it, I would be having this talk with them”.

Or just say very seriously “Please don't run yourself down”. May make them think.

If serious, for example racist/sexist, may result in an investigation and disciplinary consequences regardless of the person's intent.

37. How can a small business (2-3 people, owner “on the tools”) undertake such an investigation?

Keep it very simple and clear and get some external advice. Or hire a good HR consultant to do it. Employment lawyers know who these people are.

The employer/owner will ultimately still need to make the decision as this responsibility cannot be contracted out.

38. How can employers protect their companies from people who lie and make false allegations for money or as revenge or just to cause trouble?

Run good recruitment processes to hire good staff. Role model good behaviour. Treat employees fairly and reasonably, hold them accountable for their own conduct. Have proper policies and systems. Conduct meetings professionally. Keep notes and good records. If someone seems disaffected, be even more careful. If an employee is underperforming or causing difficulties, get advice and conduct fair performance management or disciplinary processes. Take complaints seriously, and have them investigated professionally. Engage representation if things get sticky.

If a person is found to have knowingly made a false allegation, this can be grounds for disciplinary action.

- 39. How does this apply to relationships outside employers/employees? - for example bullying in barristers' chambers or witnessing bullying within a firm that you might not be part of.**

Many barristers' Chambers have rules, expectations or an agreement that applies to the tenants. Those can be enforced, including by requiring someone leave the Chambers if they breach the rules. Lawyers can and should raise issues with the partners of other firms, and report misconduct they witness to the Law Society.

- 40. Is part of the issue in the legal profession that we have so many lawyers in management positions? Seems you want someone trained and qualified as a manager to manage people.**

Yes: lawyers don't necessarily have the skills to manage others, don't get enough training in this, and may be temperamentally unsuited to managing others. We tend to learn to supervise on the hoof – from those who have supervised us. The Stepping Up programme now includes aspects of managing people. There are courses on being a good supervisor or effective delegation. There are many bad managers who are not lawyers: taking management away from lawyers probably isn't the answer.

- 41. If a lawyer sees misconduct and reports to NZLS, are they essentially making a complaint against the other lawyer and then have to personally follow it through? Will the reporting lawyer's name be on the complaint?**

No, they are making a report under Rule 2.8 of the Conduct and Client Care Rules. When a report is made any investigation will be at the discretion of a Lawyers Standards Committee. The reporting lawyer is not a party and will not be advised of the outcome. If the committee considers it may need to disclose the details of the report or identity reporter as part of any investigation it will contact the lawyer who reported it to discuss this beforehand. If the lawyer wishes to be involved as a party and be advised of the outcome, they can choose for the report to be treated as a complaint. Details on the process and guidance can be found at: <https://www.lawsociety.org.nz/for-lawyers/confidential-report>