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PREVENTING AND DEALING WITH HARASSMENT AND BULLYING

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NZLS National Survey

The New Zealand Law Society is to conduct a national survey of New Zealand lawyers to assess workplace environments in the legal profession. As well as seeking information on harassment and bullying, the Workplace Environment Survey will also include questions on stress and wellbeing. The Law Society has commissioned research firm Colmar Brunton to carry out the survey, which will be sent to over 13,000 practising lawyers in New Zealand on 6 April.



Introducing



Steph Dyhrberg, Susan Hornsby-Geluk & Hamish Kynaston



Introduction – why this webinar?



- Recent events tell us there is a serious problem with harassment and bullying in the profession
- People stay silent because of fear and a lack of power
- The tide is turning
- We should see this as a positive opportunity for change
- This is a practical session to help the profession
- Make sure everyone is safe at work



What is Harassment?

Harassment covers a wide range of behaviours:

- Bullying
- Racial harassment
- Sexual harassment
- Stalking
- Cyber bullying
- Victimisation



Legal Framework

Employment Relations Act 2000

- Good faith obligations
- Defines sexual and racial harassment

Health and Safety at Work Act 2015

- Obligation to provide a safe workplace

Human Rights Act 1993

- Defines sexual and racial harassment and victimisation

Choice of procedures required between ERA and HRA



Bullying

Not defined in statute

- WorkSafe
 - repeated and unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety
- In case law and policies
 - broadly, unreasonable, unwarranted behaviour (actions a reasonable person would see as unreasonable) which causes the subject distress and impacts their employment. It includes victimising, humiliating, intimidating, or threatening a person



Bullying

cont'd

- Firm but fair management or performance management is not bullying
- Unjustified or harsh feedback can be bullying
- Examples in a legal context
- Many small actions can add up – the behaviour is not always extreme
- Bullying has a serious impact on the person involved, eg stress and anxiety, often resulting in resignation



Racial Harassment

Anyone directly or indirectly, through language (written or spoken), or visual material, or physical behaviour:

- Expresses hostility against, or brings into contempt or ridicule, any person on the ground of colour, race, ethnic or national origins; and
- Is hurtful or offensive to that person (whether or not they convey this); and
- Is either repeated, or of such a significant nature, that it has a detrimental effect on that other person, or, under the ERA, on their employment, job satisfaction or performance



Racial Harassment

cont'd

Under ERA:

- If an employer or their representative directly racially harasses an employee, the employer is liable
- If the conduct is by a co-worker, client or customer, the employer is **required** to investigate take appropriate steps to prevent repetition
- If substantiated and the employer fails to act, the employer is liable



Racial Harassment

cont'd

Under HRA:

- Same as ERA, *but*
- Employers are vicariously liable for a first occurrence of harassment if the employer can't prove it has taken reasonably practicable steps to **prevent** such conduct occurring



Sexual Harassment – 2 categories



The employer or a representative of the employer seeks to sexually coerce an employee:

- Directly or indirectly requests some form of sexual activity
- With an implied or overt promise of a benefit if they comply, or a threat of a disadvantage if they refuse

Anyone

- By the use of language (written or spoken), visual material or physical behaviour of a sexual nature
- Directly or indirectly subjects the employee to behaviour that is unwelcome or offensive
- Either by its nature or by repetition, has a detrimental effect on that employee's employment



Sexual Harassment

cont'd

ERA and HRA

- Failure by an employer to investigate and act on a complaint about such behaviour by a co-worker, client or customer will result in liability if the behaviour is repeated

HRA

- An employer will be liable the first time sexual harassment by a co-worker, client or customer occurs, if they have not taken reasonably practicable steps to **prevent** such conduct occurring



Sexual Harassment **cont'd**

Examples in a legal context



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Harassment incl Digital Communications



- Harassment Act 1997 covers behaviour in the nature of stalking
- A pattern of behaviour towards a person, involving at least two actions within a 12 month period which makes the person feel distressed or unsafe eg:
 - watching the person, loitering near their home or workplace etc
 - following, accosting
 - making repeated contact by phone, in person, email, letters, social media
 - subjecting the person to offensive material or making offensive material available eg by social media
 - acting in any way which causes the person to fear for their safety, objectively viewed



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Harassment incl Digital Communications **cont'd**

- Harassment can be a criminal offence, and victim can obtain restraining order
- In the workplace could occur between colleagues, by a client, customer or supplier
- If an employee reported such conduct associated with the workplace, the employer would have a good faith and health and safety obligation to support them, investigate and act on the allegations
- Harmful Digital Communications Act 2015, online and digital bullying and harassment



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Victimisation

Illegal to victimise people for making, supporting or participating in a process to investigate, a complaint of harassment under the HRA, or a protected disclosure

- Treating people worse than others, dismissing them, offering them different terms and conditions of employment or failing to offer promotion or other benefits
- Similarly grounds for personal grievance under the ERA

what are other words for victimisation?

victimization, exploitation, using, persecution, pursuit, chase, chasing.



Workplace Culture – can it happen here?

- Law firms and other legal workplaces are hugely diverse
- The broad culture of the law can be disempowering, and can protect the people who behave badly
- Traditionally male-dominated
- Law is fiercely competitive
- Qualities of a top fee earner are not necessarily consistent with high EQ and good people management skills
- Self-regulation by the Law Society has not been effective
- Lack of confidence in the process and outcome



Workplace Culture – can it happen here? cont'd

- Significant power imbalance between those at the top, and those lower down
- Policies and procedures to report the behaviour
 - don't exist, or are not used because of the inherent power imbalance
 - fear of not being believed
 - victimisation and damage to one's professional career



Workplace Culture – can it happen here? cont'd

The hallmarks of environments which may not be safe include:

- Hierarchical organisations with significant power imbalances
- Elitist culture
- Discouragement of debate and challenge
- Emphasis on outputs/fees, less emphasis on people management
- Promotion based on outputs, rather than qualitative criteria
- Absence of external mentors or coaches
- Work hard, play hard mentality
- High stress, limited support to deal with it
- Social and client activities involve freely available alcohol and limited supervision
- Low level of appreciation of personal responsibility for health and safety
- Isolation of vulnerable staff





HOW CAN YOU WORK OUT WHETHER BULLYING IS OCCURRING?

To work out whether bullying or other unreasonable behaviour is occurring in your business, you could look at the following sources of information:

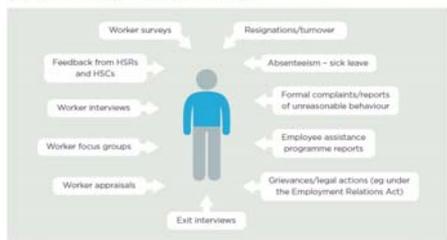
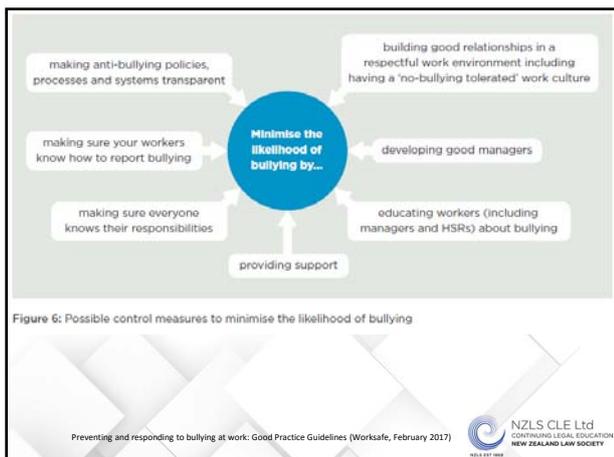
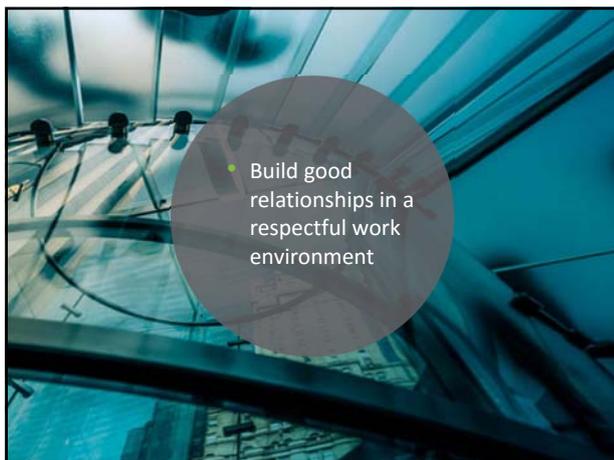


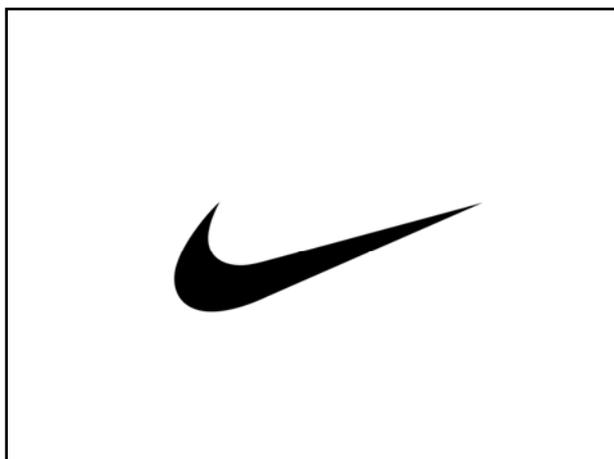
Figure 2: Sources of information about bullying prevalence

Note: More information about these information sources can be found in WorkSafe's good practice guidelines *Preventing and Responding to Bullying at Work*.









Your voice matters.
Your actions make it real.
STAND TOGETHER AGAINST SERIAL HARASSMENT

TAKE ACTION

#BreakTheSilence with a simple question:
Are you #HeForShe?

Be the Change

Discussing inequality at work can be difficult, but doing something about it can feel even harder. Here are some tips to help you root out gender bias on the job.

<p>Don't Laugh</p> <p>Some jokes just aren't funny. Confront biased speech by refusing to respond, politely turning away, or reminding the speaker that offensive language creates a toxic environment for everyone.</p>	<p>Pitch In</p> <p>Not all men want to do physical work. Not all women want to take notes. Rotate responsibilities for common tasks and make sure everyone has a chance to pitch in.</p>	<p>Open the Door</p> <p>When hiring, insist on seeing diverse candidates for every position. Then be aware of how names and other identifying information can produce a subtle bias in hiring decisions.</p>
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BROKEN WINDOWS
Fixing gender discriminatory behaviours in the workplace.

#CallOutForChange

CMI
WOMEN

A blueprint for balance: time to fix the broken windows. (CMI Women, January 2018)

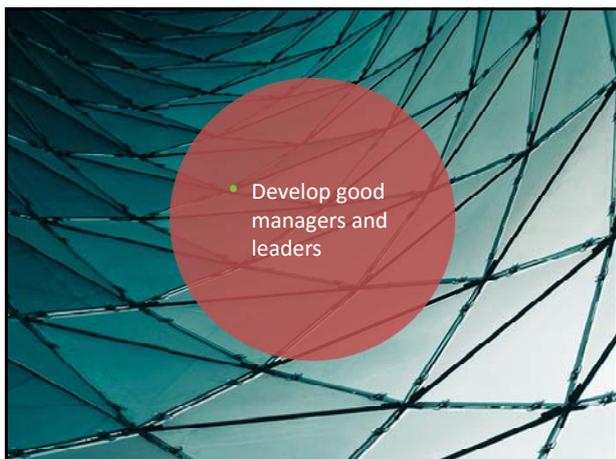
FIXING THE BROKEN WINDOWS

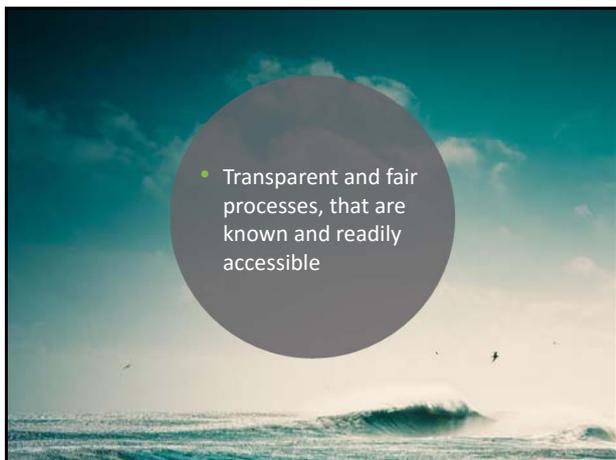
- **Call out, challenge, change behaviours** – too many “broken windows” behaviours pass unchallenged. Make 2018 the year for action. Every manager has a role to play.
- **Share stories** – listen to the day-to-day experiences of women in your organisation. Share your experiences of broken windows to find the best ways of addressing them and evolve a more inclusive culture.
- **Match reality with rhetoric** – leaders and middle managers alike need to be aligned in their behaviour to change to make sure that policies and practices deliver real change.
- **Make it a business issue** – leaders need to make gender balance a bigger management priority. Measure it, set targets and report on progress. Empower line managers to make change, and make them accountable for their actions.
- **Reinforce the business case** – win the argument about whether enough has been done on gender by highlighting the business case for your organisation. Use the evidence that diversity delivers results and show how gender initiatives address key business needs. Be helping to attract and retain talent or improving how far leadership teams reflect your customers.
- **Make change personal** – tap into people’s emotional connections and motivations to accelerate progress towards gender balance. Leaders should open up about their personal motivations for promoting the gender agenda, as well as making the business case.
- **Work with men as change agents** – show how advances for women are advances for men too. Work with men to role model the behaviours needed to change cultures. Use using flexible working for family reasons, to make these behaviours the norm and not the exception.

Give nothing to racism

Brand Partnership Guidelines

Racism starts small. Sometimes it lives in everyday actions and comments that we laugh off, nod in agreement to, excuse, and therefore accept. But we don't have to. We can stop casual racism from growing into something more extreme. We can give it no encouragement. No respect. No place. No power. We can give it nothing.







Deal with complaints

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Options Available to Employees

- Direct approach
- Informal and supported intervention
- Facilitation
- Mediation
- Formal complaint and investigation

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Making Complaints

- What is a formal complaint?
- Can complaints be made anonymously?
- What steps can an employer take based on an anonymous complaint?
- Investigating rumour or gossip
- Undertaking an “environmental audit”

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Investigating Complaints

Legislative Framework

Employment Relations Act

- Section 116 no account to be taken of complainant's sexual experience/reputation
- Section 117 employer must inquire into the facts

Human Rights Act

- Section 69 employer must inquire into the facts

Health and Safety at Work Act

- Obligation to take all reasonably practicable steps



Investigation Process

- Identify the allegations
- Select potential Investigator
- Draft terms of reference
- Make respondent aware of complaint
- Consult with complainant and respondent about process and investigation



Investigation Process cont'd

- Confirm terms of reference and investigator
- Undertake investigation
- Draft report
- Provide key parties with opportunity to comment on draft report
- Finalise report and provide to decision maker



Investigation Outcomes

- Investigation is fact finding process
- Standard of proof is balance of probabilities
- A disciplinary process is a separate step
- Assessment as to breaches of employment obligations and outcome is generally left to decision maker
- Range of disciplinary outcomes depends on seriousness of offending
- Complainant entitled to know whether complaint upheld



Privacy Considerations

- Application of privacy principles
- Section 4(1A)(c) ERA requires provision of all relevant information to respondent
- Requirement of confidentiality and enforcement of this
- What should be provided and to whom?
- Right of respondent to personal information about them



Reporting Misconduct to NZLS

- Rule 1.4 – Law Society may discipline lawyer for misconduct or unsatisfactory conduct
- “Misconduct” includes conduct which is unconnected with the provision of services but which would justify a finding that the lawyer is not a fit and proper person
- Rule 2.8 – lawyers have duty to report if have reasonable grounds to suspect a lawyer is guilty of misconduct



Criminal Conduct

- Complaints of sexual assault, rape and blackmail may give rise to criminal charges
- Complainants should be supported and informed of their options and left to make own decision about whether to refer matter to Police
- Employees have a qualified privilege against self incrimination – not a complete right to silence
- Disciplinary process may need to be put on hold, or could proceed in more limited way



Protected Disclosures Act 2000

- Disclosure protected if:
 - relates to serious wrongdoing
 - employee believes on reasonable grounds true or likely to be true
 - employee wants it investigated
- “Serious wrongdoing” includes conduct which amounts to an “act, omission or course of conduct that constitutes an offence”
- Must use best endeavours not to reveal identity of complainant



Pastoral Care

- Supporting employee and ensuring their safety is the first priority
- This needs to be done with care
 - ensure people know what to do and say
- Get some training or expert assistance
- Make sure staff and partners/managers have access to policies and procedures
- EAP is a worthwhile investment



Pastoral Care

cont'd

- Continue to support and focus on the wellbeing and needs of people who experience bullying or harassment
- Avoid any suggestion of focus on damage control
- Run the proper processes
- Inform the complainant – ensure they feel safe



Questions

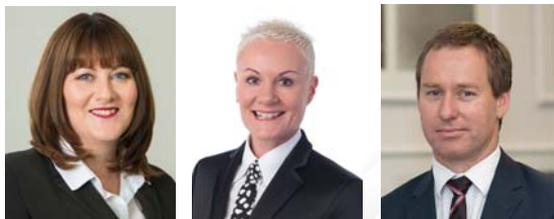


Obligation to Report

It may be that you are concerned about something related to the conduct of another lawyer. If you are, and you believe this may constitute misconduct, or unsatisfactory conduct, then please be aware of your obligations to report under section 2.8 and 2.9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) Rules 2008.



Thank You



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