
Bullying – when does WorkSafe New Zealand intervene and how does that intersect with employment law obligations



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Part I: when WorkSafe intervenes

In 2021, the most recent year for which complete data is available, WorkSafe New Zealand received over 7,000 reports regarding health and safety concerns.¹ These can be broken down into several categories, the most general of which relates to fears about unsafe or potentially unsafe conditions and/or practices. In 2021, there were 2,864 concerns received within this category, which is also the context in which issues about mentally healthy work are generally raised.

Mentally healthy work

In 2020, WorkSafe established a Mentally Healthy Work team of subject matter experts to provide support and direction in relation to psychosocial hazards. In addition, Kaimahi Hauora was created, which is a small team of specialist health inspectors with a dedicated focus on health, including mentally healthy work. Notably, in 2021 the Kaimahi Hauora team responded to 134 mentally healthy work concerns – a figure which rose to 229 in 2022.

These concerns are received via the same channels as other concerns, including the use of a dedicated mentally healthy work form available on the WorkSafe website. Whichever route is used to raise a concern, all information is initially handled in the National Response Centre (NRC). The NRC then acknowledges receipt of information, creates an entry in the notification database, and triages the concern to the appropriate team, while indicating a suggested prioritisation category. Most mentally healthy work concerns are triaged directly to the Kaimahi Hauora team for review.

The Kaimahi Hauora process is guided by a mentally healthy work pathway which outlines and, as far as possible, standardises the steps taken when responding to concerns. All notifications received are reviewed by a multi-disciplinary team and are carefully considered to determine what regulatory response is appropriate to the circumstances.

WorkSafe intervention

WorkSafe's operational policy, *When we intervene*,² sets out how intervention decisions are made once a health and safety risk or harm has been identified. The policy points out that it is necessary for WorkSafe to make deliberate choices about when and how to intervene given limited resources and a desire to have the maximum impact on work-related health and safety in New Zealand. The intervention criteria identified in this document are:

- the risk or harm sits within WorkSafe's area of responsibility;
- WorkSafe is best placed to intervene if there is an overlap with another agency's responsibility;
- the significance of the risk or harm means that it warrants intervention; and
- intervention is an effective use of resources.

WorkSafe does not only focus on compliance with the rules, but also works to promote and embed positive health and safety practices across the motu. To do this, it collaborates with businesses, workers, health and safety representatives, industry bodies, and others. Its activities go beyond enforcement (which refers to more than prosecution) and into engagement and education to achieve long-term and sustainable change for businesses for the benefit of all those involved in work.

WorkSafe does have an enforcement function and while a breach of duty resulting in psychosocial harm is yet to be prosecuted, a number of Improvement Notices have been issued and responded to by the organisations concerned. Such notices require the business to take corrective action within a specified timeframe and can result in financial penalties for a business that does not comply. Notices issued to date have required businesses to improve psychosocial risk monitoring and data recording, develop and update policy portfolios relating to mentally healthy work, review risk reporting systems, etc. So far, all Notices have been complied with.

1. Detailed data about the number of notifications made to WorkSafe can be accessed via Data Centre <data.worksafe.govt.nz>.

2. *When we intervene* (WorkSafe, Policy, July 2021) www.worksafe.govt.nz/dmsdocument/43777-when-we-intervene/latest.

For clarity, a WorkSafe intervention into a mentally healthy work matter will not:

- require a person to be disciplined or dismissed;
- prove whether a person is a bully (for example);
- mediate between parties;
- restore working relationships to a friendly/positive state;
- provide legal advice or counselling;
- award compensation; or
- deal with employment-related matters or discrimination.

The WorkSafe position statement, *Supporting mentally healthy work*,³ sets out what is expected of persons conducting a business or undertaking (PCBUs) in supporting mentally healthy work. It provides a definition of mentally healthy work, a clear indication that the Health and Safety at Work Act 2015 (HSWA) requires businesses to provide and maintain a work environment that is without risks to safety and health, and an indication of what WorkSafe will do if it becomes aware of mental health issues. It also states that it is unlikely that WorkSafe will intervene for one-off notifications. Many factors are considered when making this decision, including the risk of injury, the seriousness of the harm and the compliance history of the business or undertaking. There is also a clear statement regarding which situations might prompt WorkSafe to consider intervening, these are:

- multiple events arising at one PCBU;
- a high level of harm resulting from the failure to manage risks; and/or
- industry-wide or organisation-wide failings.

What we know about bullying

The WorkSafe “New Zealand National Psychosocial Survey 2021: Overview”⁴ explored worker exposure to offensive behaviours, specifically:

- bullying;
- cyberbullying;
- sexual harassment;
- threats of violence; and
- physical violence.

The results show that over one-third of workers report being exposed to at least one of the five offensive behaviours in the previous 12 months. This is consistent with statistics reported over recent years by the Massey University Workplace Barometer study⁵, the Human Rights Commission,⁶ Diversity Works⁷ and others.

“Exposure” in this case refers to either direct experience or witnessing it occurring to others. While some offensive behaviours are more common in certain industries, it does appear that each of the offensive behaviours is experienced across all sectors. All behaviours, except for bullying, were more commonly experienced by younger workers, and all behaviours were experienced more by Māori workers.

During the period between 1 July 2021 and 30 June 2022, the Kaimahi Hauora team received 153 mentally healthy work notifications. A majority of these related to bullying (118 notifications – 77 per cent) and the remainder related to other concerns – e.g. work stress and fatigue (35 notifications – 23 per cent).

Data from WorkSafe’s 2020 *Segmentation and insights program: Employers and workers*⁸ is consistent with other extant data that shows approximately 15 per cent of workers (about 430,000 individuals) report an experience of bullying in any 12-month period. These are estimates based on self-reported data which can often yield an overestimate. However, if even a small portion of these meet WorkSafe’s widely accepted definition of (experiencing) bullying, this would equate to many thousands of workers each year.

Challenges of regulation and intervention

An issue of this magnitude cannot easily be resolved one case at a time. High-level prevention programmes addressing the reasons why some people bully are needed, as well as the implementation of systems for early/transparent reporting and resolution. As in all areas of health and safety, instead of waiting for the harm to happen before we act, we must design and put into effect work systems which address the contextual factors which can lead to bullying.

In most cases, WorkSafe will expect that, prior to any notification, the worker has attempted to resolve their difficulties within the workplace by talking with a senior

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3. *Supporting mentally healthy work* (WorkSafe, Position Statement, September 2020) www.worksafe.govt.nz/dmsdocument/32324-worksafe-position-on-supporting-mentally-healthy-work/latest.
 4. “New Zealand Psychosocial Survey 2021: Overview” (Research, WorkSafe, June 2022) www.worksafe.govt.nz/dmsdocument/51481-new-zealand-psychosocial-survey-2021/latest.
 5. Darryl Forsyth and others *The New Zealand Workplace Barometer: Psychosocial safety climate and worker health – findings from the 2020 NZ Workplace Barometer* (Healthy Work Group and Massey University, Report, June 2021).
 6. “Experiences of Workplace Bullying and Harassment in Aotearoa New Zealand” (Research, New Zealand Human Rights Commission, 2022) <https://tikatangata.org.nz/cms/assets/Documents/Experiences-of-Workplace-Bullying-and-Harassment-in-Aotearoa-New-Zealand.pdf>.
 7. *New Zealand Workplace Diversity Survey 2021* (Diversity Works, 2021) <https://diversityworks.nz.org.nz/media/4750/0521-diversity-survey-report-final.pdf>.
 8. *Segmentation and insights programme: Employers and workers* (WorkSafe, Final Report, March 2020) www.worksafe.govt.nz/dmsdocument/28655-segmentation-and-insights-programme-employers-and-workers-2020/latest.

colleague, manager, Health and Safety Representative (HSR), or by using existing resolution channels.

Where issues arise from employment or contractual matters — e.g. disagreements which are primarily based around working hours, fulfilment of work contract commitments, etc — or where the solution to a problem may rest within the employment contract domain, WorkSafe will usually advise the parties to seek support from the appropriate agency — usually the Ministry of Business, Innovation and Employment (MBIE) — or another source of mediation support.

Sometimes it can be unclear whether the origins and resolution of an issue rest within the realm of People and Culture (Human Resources) or Health and Safety because there are elements of both, and successful assessment and resolution can involve an ability to bridge both domains. Of course, it is also acknowledged that it is not always possible, or even advisable, for a worker to make attempts to resolve difficulties using established workplace processes, especially if they are poorly designed or implemented.

Summary

The mental health of workers is not a new consideration within our work health and safety framework; notwithstanding this fact, it has not previously been afforded the attention it is receiving at the present time. It is possible that the COVID-19 pandemic and exhortations to be kind and “look after each other” may have focused our attention on the occasions when we are not kind to our fellow workers. High (media) profile cases of unacceptable behaviour in some workplaces may also have led to recognition that psychosocial hazards are present in all workplaces, and harm is present in most.

Now we have the data and insights about when and where the risks exist, we need to focus on building interventions that both support businesses to operate and be productive, while also prioritising the safety and health, including mental health, of all workers.

Part II: the intersection between employment law and the regulatory process

Health and safety and employment go hand in hand. This portion explores the intersection between employment law and regulatory defence when health and safety concerns — or even WorkSafe intervention — arise out of a bullying allegation.

Legal obligations

Where the issue is limited to an employee raising a complaint internally, the employer is obliged to address the issue and take appropriate action (which we have set out in more detail below). In our view, where there is a joint process of an employment complaint and a WorkSafe inves-

tigation, the method in which the employer addresses the complaint would likely not change.

Nonetheless, the intersection between employment law and the regulatory framework can be challenging. A particular tension arises in the context of s 168 of the HSWA, primarily in relation to WorkSafe exercising its powers to require a PCBU to produce information⁹ and to present at a duty holder interview.¹⁰ The reality is that the information required, and questions put to the employer, will often extend beyond addressing the complaint made by the complainant. An exploration of wider practices, policies and history of similar issues within the business will typically occur. In these circumstances, the employer may lose a significant amount of control over information, and this can give rise to risk in both the employment and regulatory contexts, whereas in employment only processes, that control largely sits with the employer.

Addressing a complaint

The nature of the complaint will often inform the level of formality required in the employer’s response to it. On one end, a complaint that involves relatively low-level alleged conduct (such as one-off instances of swearing or raised voices) may warrant a discussion, meeting, facilitation or other informal resolution. On the other end, a more serious or complex complaint (harassment or continued bullying) or involving multiple complainants or respondents will usually warrant a formal investigation, carried out internally or externally.

An entire article could be written on the various steps necessary for a full and fair formal investigation, but in summary an employer ought to:

- clearly frame the allegations and terms of investigation from the outset;
- engage with the complainant and respondent regarding the approach to the investigation, proposed witnesses and proposed investigator;
- obtain consent from the complainant to provide details of the complaint to the respondent and other parties (otherwise risking a claim under the Privacy Act 2020);
- ensure the complainant and respondent are advised of their right to support and representation;
- ensure any external investigator is either a registered lawyer or is licensed in accordance with the Private Security Personnel and Private Investigators Act 2010;
- investigate the complaint with a focus on impartiality and evidential scrutiny; and
- obtain feedback from the complainant and respondent on any resulting investigation report prior to it being finalised.

Where a WorkSafe investigation is ongoing or reasonably anticipated, employers should treat all statements, correspondence and investigation reports as discoverable by WorkSafe.

9. Health and Safety at Work Act 2015, s 168(1)(e).

10. Health and Safety at Work Act, s 168(1)(f).

Managing concurrent personal grievances and a WorkSafe investigation

Seldom does an employer manage a complaint of bullying (whether informally or formally) without a personal grievance being raised by either the complainant or respondent. Furthermore, situations can and do arise where a complainant is dissatisfied with their employer's response to their complaint and so turns to WorkSafe as a means of escalating it. Therefore, having heard from WorkSafe about its approach to psychosocial hazards in the section above, it is essential to consider the possibility of a personal grievance being lodged in the employment jurisdiction concurrently with an ongoing WorkSafe investigation.

In respect of relevant timeframes:

- WorkSafe will have one year from the date of receipt of the complaint to determine whether it will prosecute.¹¹
- The employee has 90 days, from the date the issue arose, to raise a personal grievance and three years from the date of raising the personal grievance to file a statement of problem in the Employment Relations Authority (Authority).¹²
- Typically, cases will be set down in the Authority within one year of filing of a statement of problem.

Where concurrent processes do occur, the difficulty rests in the magnitude of "worst case scenarios" in each process. Employment claims may garner awards of \$20,000 to \$30,000 as compensation, three months' lost wages (where a resignation or dismissal has occurred) and modest tariff costs. In contrast, prosecutions under the HSWA can — depending on the charges filed — attract conviction, potentially have a maximum fine of \$500,000,¹³ \$1,500,000¹⁴ or \$3,000,000,¹⁵ lay charges against officers,¹⁶ make orders for reparation (this will vary depending on the degree of harm suffered) and incur prosecutor costs.

If there were Authority proceedings on foot concurrent with a WorkSafe investigation, it would likely be appropriate to seek adjournment of the Authority's proceedings until the WorkSafe process had concluded.

The realistic risk of prosecution

No prosecutions have been brought in respect of issues relating to bullying, harassment and intimidation in New Zealand by WorkSafe. Indeed, WorkSafe has taken a more

holistic approach in addressing concerns raised regarding mentally healthy work, as described in the section above. Notwithstanding this, our own experience tells us that WorkSafe has investigated allegations of bullying by an individual and reached a duty holder interview stage. At the same time, a personal grievance claim was timetabled for a hearing in the Authority.

Again, based on our own experience, we know that in matters where WorkSafe has proceeded with an investigation, its examination has been thorough and wide-reaching, covering years of records requiring substantial allocation of client resources to attend to requirements to produce information. For example, an employer or PCBU will be required to produce years' worth of any bullying complaints received, in addition to evidence/documentation of how the PCBU triaged and addressed those complaints.

While the type of information requested is not at odds with an employer's relevant obligations in employment law, the concern relates to how extensive and far-reaching these requests can be. An employment process is focused on particular individuals. In contrast, WorkSafe is looking for a PCBU to demonstrate it has robust and effective bullying policies and procedures in place, that workers are aware of how to raise complaints appropriately, and that the PCBU can demonstrate it follows its own policies. WorkSafe can, and has, taken enforcement action short of prosecution in these investigations, such as the issuing of improvement notices under s 101 of the HSWA.

While a prosecution based on psychosocial risk or harm has not yet eventualised in New Zealand, it is certainly feasible. In South Australia, which operates under a similar legislative framework,¹⁷ a prosecution has successfully been brought regarding the bullying of a young apprentice.¹⁸ The particular conduct in that case was egregious, namely by squirting and lighting flammable liquid onto the victim's clothing. There is no reason why WorkSafe would not bring a prosecution for similar conduct.

Conclusion

We consider a New Zealand prosecution for psychosocial risk or harm related to bullying is a matter of when, not if. As with any litigation risk, the best way to mitigate liability is early intervention and prevention.

Balancing a PCBU/employer's obligations, and applied specifically to this issue, employers should consider:

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11. Health and Safety at Work Act, s 146.
 12. Employment Relations Act 2000, s 114.
 13. Health and Safety at Work Act, s 49 for offences that concern only a breach of a person conducting a business or undertaking's (PCBU) duty under the Health and Safety at Work Act.
 14. Health and Safety at Work Act, s 48 for offences that concern a breach of duty and, as a result of that breach, exposure of an individual to a risk of death, serious injury or serious illness.
 15. Health and Safety at Work Act, s 47 for offences concerning a breach of duty and recklessness as to the risk to an individual of death, serious injury or serious illness.
 16. Health and Safety at Work Act, s 50 for which corresponding charges can be filed under ss 47-49.
 17. Work Health and Safety Act 2012 (SA).
 18. *Campbell v Tad-Mar Electrical Pty Ltd* [2019] SAET 225.

- developing tailored policies that denounce bullying, intimidation, harassment and other offensive behaviour, as well as prescribing procedure for complaints to be raised and dealt with;
- training employees and management on working in a manner consistent with such policies, including refresher training throughout employment;
- establishing lines of communication for employees to report any related issues;
- ensuring that each complaint received is considered and addressed with appropriate weight;
- ensuring the triaging of complaints is compliant with employment law principles; and
- where a complaint is upheld against an employee, ensuring that appropriate corrective or disciplinary action occurs.