

YouthLaw Aotearoa

Submission for MBIE Consultation on Bullying and Harassment at work

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"If you don't do anything to stop it, it will keep happening."

"Allow a holistic view to come into play. If you need to heal your wairua, that's what you need."

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Workplace Bullying and Sexual Harassment

"WE NEED TO
BE TREATED
WITH DIGNITY."

"We need culturally
competent support
people."

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Contents

Introduction	4
Who we are	4
Structure of the submission	4
Our Experience with Youth and Workplace Bullying and Sexual Harassment	6
Typical workplace bullying and/or sexual harassment client	6
Prevention	7
Were you surprised to hear the 1/5 people in NZ have said that they were bullied at work?	7
Do you think that New Zealand has a problem with workplace bullying or sexual harassment?	8
Age and experience	8
Culture	8
Disability	8
Bullying vs Banter.....	9
Lack of Knowledge	9
Would you know what to do if you/friends/family were being bullied?	10
Response	11
Is the current system working?	11
What could be done to help people reach out for help if they are being bullied and/or sexually harassed at work?	12
What could be done to help young people, Maori and LGBTQIA+ people if they are being bullied and/or sexually harassed at work?	12
Holistic and healing approach.....	12
Culturally responsive	13
Need to feel heard and taken seriously	13
What do you think the government could do to stop workplace bullying and sexual harassment?	14
What do you think YouthLaw could do?	14
	16

Introduction

Who we are

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are a charity and part of the nationwide network of twenty-four community law centres throughout Aotearoa / New Zealand.

Our service provides free legal advice and advocacy specifically for children and young people under 25 years of age. We help young people with issues of workplace bullying and harassment in several ways:

- Our lawyers in the legal advice team support youth and/or their supporters with information and advice to help them navigate workplace bullying and harassment issues.
- We run legal education workshops, including sessions on workplace bullying and harassment, for children and young people and those supporting them.
- We publish youth-friendly information, resources, undertake research, and make submissions on law and policy affecting children and young people.

This submission is informed by YouthLaw Aotearoa's insights from working with children and young people across New Zealand for over thirty years.

It has been prepared by Sarah Butterfield, a solicitor on our legal team and our YouthLaw staff and board. It also includes contributions from our Youth Advisory Committee and The Project Team. The Youth Advisory Team is a group of young people who contribute to our law reform, advocacy work, the development of our services, projects, organisational

policies, and plans. The Project Team is a group of young creatives from South Auckland who have been working with us to transform our legal information into creative mediums to engage and teach young people about their rights.

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Structure of the submission

On 10 March 2021, we hosted a consultation evening at YouthLaw Aotearoa's office in Manukau. We also hosted an online consultation at the same time for those that were unable to make the meeting or who are based outside of Auckland. In total, we had six young people attend in person and five young people attend via zoom. We also had three staff members and three law reform volunteers in attendance.

The purpose of the consultation was to discuss workplace bullying and sexual harassment and possible solutions. We started the evening with an explanation of the climate of workplace bullying and sexual harassment in New Zealand, then briefly explained the current legal avenues to pursue employment grievances. After this, we discussed the questions with the young people.

We adjusted the MBIE consultation questions into a more "youth friendly" format and reduced the number of questions from 17 to 9 by summarising and broadening the questions. The submission questions are structured under the headings of "prevention" and "response". We have done this to reflect the MBIE consultation areas. The questions we asked were:

Prevention:

1. Were you surprised to hear that 1/5 people in NZ have said that they were bullied at work?
2. Do you think that New Zealand has a problem with workplace bullying and sexual harassment?
3. Do you think people know what bullying and/or sexual harassment is?
4. Would you know what to do if you, or your friends, or your family were being bullied/harassed?

Our submission will begin with a discussion of the most common workplace bullying and sexual harassment clients that we see, followed with the consultation questions that we asked the young people and their responses.

Response:

5. Is the current system working?
6. What could be done to help people reach out for help if they are being bullied and/or sexually harassed at work?
7. What do you think could be done to help young people, Maori, and LGBTQIA+ people if they are being bullied and /or sexually harassed at work?
8. What do you think the government could do to stop bullying and sexual harassment in the workplace?
9. What do you think YouthLaw could do to help?

Our Experience with Youth and Workplace Bullying and Sexual Harassment

Typical workplace bullying and/or sexual harassment client

The typical young person (under 25) that approaches us for legal advice about workplace bullying and sexual harassment is:

- The victim of workplace bullying and/or sexual harassment.
- Usually angry or upset about how they have been treated yet may struggle to articulate or identify the bullying/harassment that has occurred.
- May struggle to recognise certain behaviours as inappropriate, or a form of bullying and/or harassment.
- Often has other employment issues beyond sexual harassment and/or bullying.
- Has not told their employer about the workplace bullying/sexual harassment.
- There has been no investigation by their employer into the bullying/sexual harassment.
- Likely to have not attended work in a while, if they have not already resigned, or been dismissed.
- Suffering from stress, anxiety, and/or depression (usually undiagnosed), because of their employment issues.

Unfortunately, we cannot provide specific details of the age, gender, ethnicity, or employment industry of our clients because of confidentiality. However, we can say that most of our clients dealing with workplace bullying and/or sexual harassment range from 17 – 24 years old and tend to work in service industries.

Prevention

Below is a summary of the responses we received from young people. During the in-person and zoom consultations, our staff recorded the young people's direct quotes that were made in response to the focus questions. We have not revealed the identity of who said the quotes, nor what consultation they attended. The quotes are unedited except for full stops and square brackets to identify what the topic is.

Were you surprised to hear the 1/5 people in NZ have said that they were bullied at work?

"With NZ's mental health crisis, no not surprised."

"No, thought it would be higher."

"No, there are so many toxic boss stories from students alone."

"No – quite prevalent in the workplace"

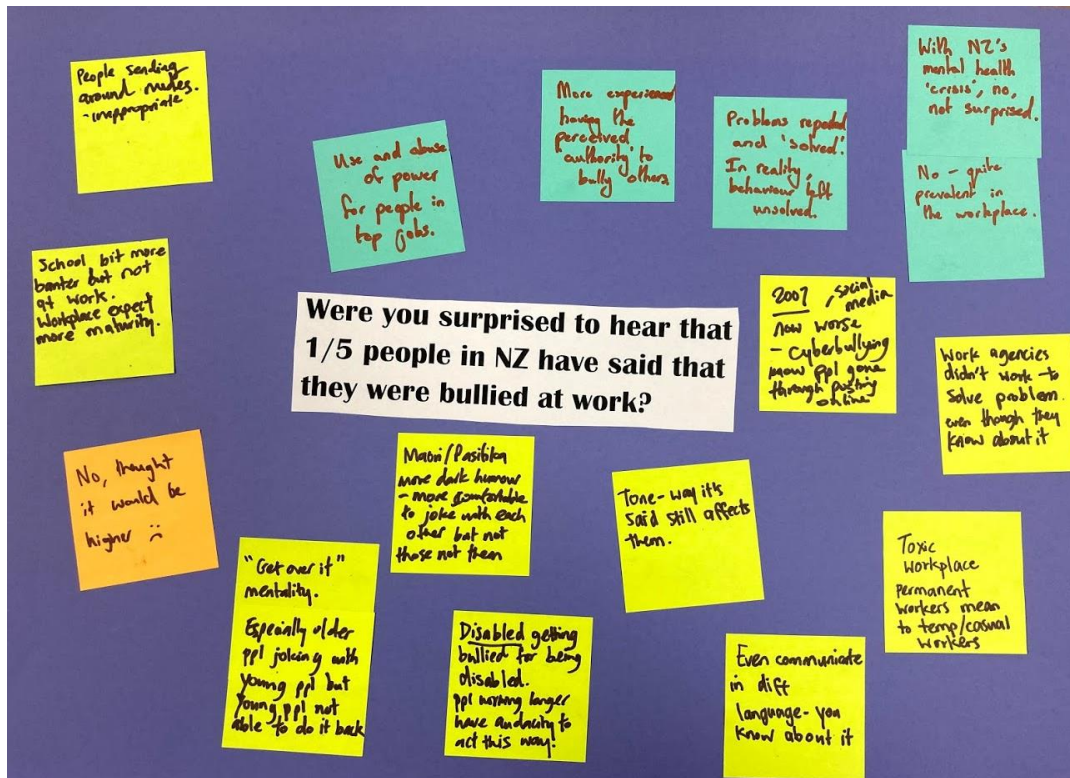
"It surprised me until I realised how wide the definition of bullying is"

The young people told us that they were not surprised by the 1/5 figure. Many of them were shocked that the figure was from a 2005 study and suggested that if the same study were to be undertaken today, it would be worse.

Often it is difficult for our legal team to question clients about their experiences. Clients may struggle to recall months or even years of bullying and/or harassment. Also, traumatised clients may have repressed memories of bullying/harassment.

"There are some cultures where you are taught not to complain regardless of the job you have."

Many clients have told us that the behaviours in question are part of their workplace culture or industry.



Do you think that New Zealand has a problem with workplace bullying or sexual harassment?

“Yes, especially where young people are concerned as many experience a form of “just deal with it” attitudes from people in positions of power.”

“Yes – embedded into NZ culture people take it too far.”

Young people told us that they believed that New Zealand has a serious problem with workplace bullying and sexual harassment. According to the young people, some of the potential reasons behind this are:

Age and experience

““Get over it” mentality. Especially older people joking with young people not able to joke back.”

“Toxic workplace; permanent workers mean to temporary/casual workers.”

“More experienced having the perceived authority to bully others”.

“Use and abuse of power for people in top jobs.”

Young people told us that bullying and/or sexual harassment could be due to an age or experience gap - older and more experienced employees bullying/harassing younger and less-experienced employees.

Culture

“Maori/Pacifica more dark humour – more comfortable to joke with each other.”

“Pacifica’s joke around a lot but don’t realise their jokes are triggering.”

It was also identified that workplace bullying could be more significant between people of the same culture or ethnicity.

Disability

“Disabled getting bullied for being disabled.”

“Disability – said it colloquially – just talking about someone is bullying.”

Of concern, we were told that it is common to witness disabled people being bullied in the workplace. We were also told that this type of bullying is so common in some workplaces that it has become an accepted behaviour.

Do you think people know what bullying or sexual harassment is?

“No, I think people are too limited on their belief of what bullying is.”

“Not really. If I was speaking from a Pacific Islander’s perspective, they have many thoughts but don’t actually know the definition of sexual harassment or bullying.” Verbal comments are also considered as bullying but not many people know about it.”

These quotes reflect a common experience amongst our clients. Often, bullying and/or harassment will not be the main reason why young people have reached out to us. It is not until we have questioned these young people about their issues, that we will realise that they may have been bullied or sexually harassed at work. Our clients may articulate how they felt in the workplace, but struggle to identify the bullying/harassment behaviours/incidents that made them feel that way. Many clients will not recognise certain workplace behaviours as inappropriate or a form of bullying and/or harassment. Many clients will also not recognise bullying/harassment/inappropriate behaviours by a co-worker, manager etc. Clients usually do not recognise put-downs, aggressive words, shouting, throwing things, suggestive comments, aggressive tones of voice, inappropriate discussions about sex lives, inappropriate relationships and swearing as manifestations of workplace bullying and/or sexual harassment.

Bullying vs Banter

We were also told by young people that New Zealanders may not always recognise the line between “joking” or “banter” and bullying.

“[in reference to the focus question] I personally don’t believe they do because people also take bullying as a joke.”

“Not exactly. Especially with the mocking culture in NZ.”

“When banter goes too far – if you say something and it becomes hurtful.”

“School bit more banter but not at work. Workplaces expect more maturity.”

We discussed how “banter” is prized in New Zealand culture and how people are honoured/respected for having “good banter”. It was also identified that there is a point when banter becomes bullying. The young people gave an example of when banter becomes bullying as the Tik Tok “It’s the” challenge.¹ This is a challenge which encourages people to follow “it’s the” with a hurtful comment about the other person.

Lack of Knowledge

It was also identified that people may not know what bullying or sexual harassment is:

“Some people genuinely don’t know what sexual harassment is and there is a huge international debate around this.”

The young people identified that this ignorance could be a result of a “generational difference”, which is that older and younger people may have different understandings what behaviour is and is not acceptable:

“Generational difference. Possibly older and younger people have different connotations.”

¹ Hossam Rashid “It’s the” (3 September 2020) Tik Tok <<https://vm.tiktok.com/ZSJjeV53Q/>>

Would you know what to do if you/friends/family were being bullied?

At the consultation, young people told us that they knew they could seek help from:

"Unions."

"Disability advocacy."

"Not officially, maybe talk to HR etc."

"Mental health support workers."

"Youth law – but takes a while to get back."

However, the overwhelming response that we received from young people was that they are their friends and family would not know what to do:

"Not really."

"Nope."

"Hard to know what to do."

"Turn around and hit them [the bully]."

We were also told why they might not reach out for help:

"Culture of being hard."

"Young people suffer in silence, don't feel listened to."

"People saying we'll do something but nothing done."

"PI/Maori don't reach out for help. Lots of them don't know of Youth Law."

"Might not seek help – rather just sit back as they feel they aren't listened to."

"Fear of other institutions like the government."

"Slap in the face if they [the employer] don't listen."

"Want them to seek advice – from higher up. Cultural disconnect between individuals and help."

"Don't reach out. Not much help in South Auckland."

"[bullying] Embedded in kiwi culture."

It is very typical for us to hear from our clients that they have not reported the bullying and/or sexual harassment to their employer. An obvious reason for this is that our clients do not recognise sexual harassment and/or bullying until they have spoken to us.

Another reason employees may not report inappropriate behaviour to their manager is because they feel unsafe or fear the repercussions. It is also very common for the bully/harasser to be their employer, particularly in small businesses. In this case, there is no one above their employer to report the behaviour to and reporting the behaviour will almost always result in more bullying, harassment, or a disciplinary response.

Even when employees have reported the behaviour to their employer, our clients will tell us that they are unhappy with how their employer dealt with the situation.

Young people also told us that they were generally unhappy with the state of things, and were concerned that the bullying would become a cycle:

"If you don't do anything to stop it, it will keep happening."

Response

Is the current system working?

We were told:

“No, because most people don’t know what the system is.”

“It feels like we live in a sick system.”

“No.”

When we asked the young people why they believed the current system was failing, they told us:

“The bureaucratic process is dehumanising and completely denies the victim solace or compensation for any emotional or financial turmoil.”

“Nope, because we’re not personally aware of it at this stage.”

“Support systems are less accessible for students because they depend on the security of a job to support themselves. Complaining about bullying might feel like a sure-fire way to lose that job.”

We agree with young people that the current system is failing. We submit that there are three main reasons for this failure: knowledge, accessibility, and trauma.

Knowledge - People do not have sufficient knowledge about their legal rights to be safe from bullying and sexual harassment at work. Employees also may not recognise certain behaviours as bullying and sexual harassment, know who to reach out to for support, and are unaware of what the current legal complaint process is. Employers may also lack knowledge of what workplace bullying and sexual harassment is.

Accessibility - Accessibility is another significant issue. It is extremely difficult for people to complain to their employer about

workplace bullying and/or sexual harassment. It is also very difficult for the employee to complain if the employer is responsible for the harassment or bullying. This difficulty is exacerbated by cultural or age difference between the employee and the employer.

Trauma - The current system can also be a traumatic process for victims of workplace bullying and/or sexual harassment. Victims must relive their past experiences of bullying and/or sexual harassment through the employment dispute process of raising a personal grievance, mediation, or when dealing with the Employment Relations Authority. Having their experiences minimised and disregarded by their employer, or their employers’ lawyer can further traumatise or distress victims. Often, our clients will tell us that they cannot progress with their employment dispute because the dispute process is too traumatising or upsetting.

What could be done to help people reach out for help if they are being bullied and/or sexually harassed at work?

When we asked young people, this question they had several suggestions:

“Employers should be made to inform employees of the ways they can find support.”

“Methods of accountability for all businesses.”

“Accessible info made by the people, for the people.”

“Advocacy. Pay people from the community to work with the people they care about.”

The importance of financial support during the employment complaint process was also identified by the young people:

“Paid “grievance” leave.”

“Monetary compensation.”

“Getting an income.”

What could be done to help young people, Maori and LGBTQIA+ people if they are being bullied and/or sexually harassed at work?

We had long discussions with the young people about this question. Three main themes were identified: the need for a “holistic” and healing approach, a more culturally responsive approach, and for people to feel that their issues were heard and taken seriously.

Holistic and healing approach

“Allow a holistic view to come into play. If you need to heal your wairua, that’s what you need.”

“If family support is available, allow the family to support.”

“Equal support - counselling, paid leave etc. no matter of the situation or who they are.”

“People need to want to change.”

In relation to the young people’s comments about holistic and healing mechanisms, we question whether restorative justice could be considered by MBIE. However, the greatest



barrier for that option, is that restorative justice requires the perpetrator to acknowledge the harm that they have done and take responsibility for it. This goes against the legal advice that most legal advisors give to employers, which focuses on protecting the employer against claims.

Culturally responsive

“Consultation and advocacy from people who look and have been through the same things as them.”

“A way out, supported by the government or an independent advocacy agency.”

“Culturally competent support people”

Need to feel heard and taken seriously

“They need to be treated with dignity.”

“Have more independent groups who the victims are able to confide in/find help through (make them more representative etc).”

“The workplace didn’t resolve the issue, that invalidated their feelings.”

“More young people to reach out to. Agency feel they can relate and vice versa”

“Easier process”

The MBIE consultation document advised that a low-level dispute resolution service was being considered as a potential solution. However, YouthLaw Aotearoa is concerned by this proposal. Whilst we do in principle support the concept of employment disputes being resolved at the earliest point, we are concerned that this does not reflect the reality of the employment disputes that we see. Currently, by the time our clients have reached out for support, the bullying and/or sexual harassment has escalated to the point that “low-level” resolution will not solve the issue. By that point, our clients may also have resigned, been dismissed, be on stress leave or have abandoned their employment. Even if the employee were still employed, we are

concerned that accessing low-level dispute resolution could place them at risk of retaliation by their employer.

In some situations, a low-level dispute service may also be inappropriate. For example, requiring someone to disclose harassment in the presence of their harasser. We are concerned that a low-level disputes resolution body could result in further trauma.

MBIE has stated that mediation focuses on settlements and lawyers, rather than resolution. However, the reality is (at least in the cases that we see), people have often left their workplaces by the time the issue reaches mediation. In that situation, victims do not want to return to the workplace that makes them feel unsafe. Instead, in our experience at least, they would rather move on to a new job with compensation and an apology.

We submit that MBIE needs to identify exactly what “low level” issues would be and how they would be dealt with. We also question whether employers would be willing to participate in a low-level dispute resolution process. A low-level dispute resolution service could be useful in cases concerning small businesses and employees who are still employed.

We also question whether MBIE staff will be trained to recognise when the bullying and/or sexual harassment is beyond their expertise. For example, if an employee has been sexually harassed or bullied to the extent that it crosses into criminal territory, we question whether MBIE staff will be prepared to deal with those issues appropriately. In this case, a phone line dispute resolution service may be inappropriate.

What do you think the government could do to stop workplace bullying and sexual harassment?

We commend MBIE for undertaking this consultation. The consultation is an important first step towards preventing and responding to bullying and sexual harassment in the workplace. When we asked the young people this question, the need for the government to listen and consult was emphasised. The young people told us that they wanted the government to:

“Worry about all their workers instead of engaging in favouritism and also being too concerned about the company’s reputation.”

“Make their consequences equal (within what the situation allows).”

“Don’t pick sides.”

“Talk to real people about their issues and really listen.”

“Don’t shy away from using the words Bullying and Sexual Harassment.”

“Talk about it.”

“They need to work on their own idea of harassment.”

“Review HR SOP regarding bullying (like the random MPI audits).”

YouthLaw Aotearoa also submit that education about workplace bullying and sexual harassment is needed for employers. This education could take the form of in-person and online training courses offered by MBIE. Training should also be available for employees about acceptable conduct at work. Currently, we provide LRE for young people about employment, but we do not specifically focus on workplace bullying and sexual harassment. MBIE could fund us to specifically deliver this training to groups of young adults that we already service.

What do you think YouthLaw could do?

As a final question, we asked the young people what YouthLaw Aotearoa could do to help, and we were told:

“Make the process shorter.”

“More YouthLaw Centres in New Zealand.”

We also submit that the following are barriers to the reporting and prevention of workplace bullying and sexual harassment:

- The 90-day personal grievance process does not acknowledge that people who have been bullied or sexually harassed may need time to recover before they can consider raising a personal grievance. We ask that MBIE consider how this deadline could be adjusted for bullying/sexual harassment claims.
- Sexual harassment and bullying are not “typical” employment issues and should not be treated as such. It is unfair to require employees to agree to not discuss the bullying or sexual harassment they faced to receive a settlement. This bar can stop employees from healing and moving forward.
- A review of the ERA is required. We are concerned to hear that ERA proceedings may be further re-traumatising victims of workplace bullying and/or sexual assault. We are also concerned that the timeframes to get to the ERA may be causing further trauma. The Employment Court has also recognised

that the ERA needs to be reviewed.² Since coming into existence 20 years ago, the ERA's conferred powers have not been the subject of much analysis or discussion.

² *Dollar King Limited v Hyowon Jun* [2020] NZEmpC 91 [29 June 2020], at [10].

