



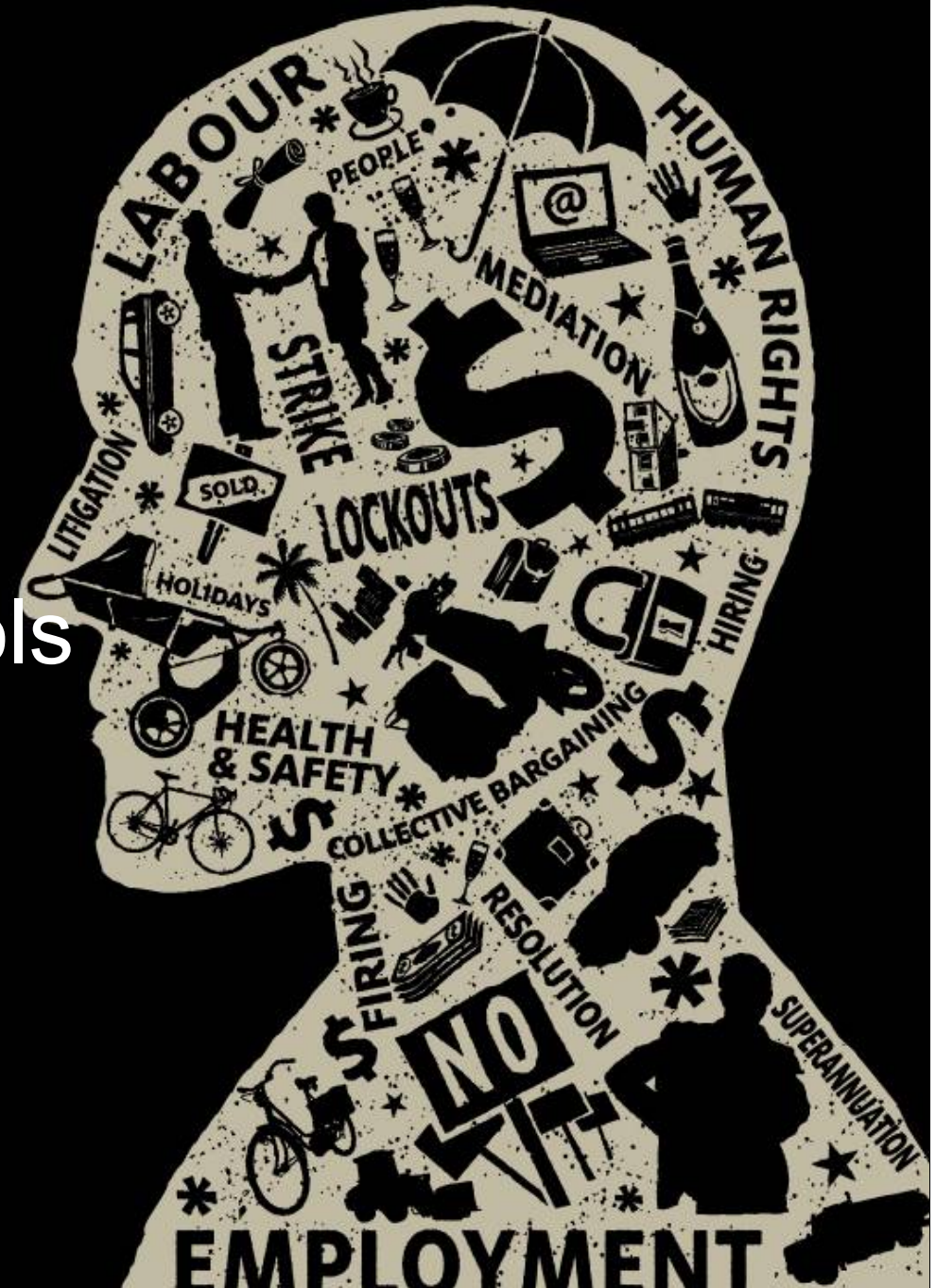
# Independent Schools of New Zealand

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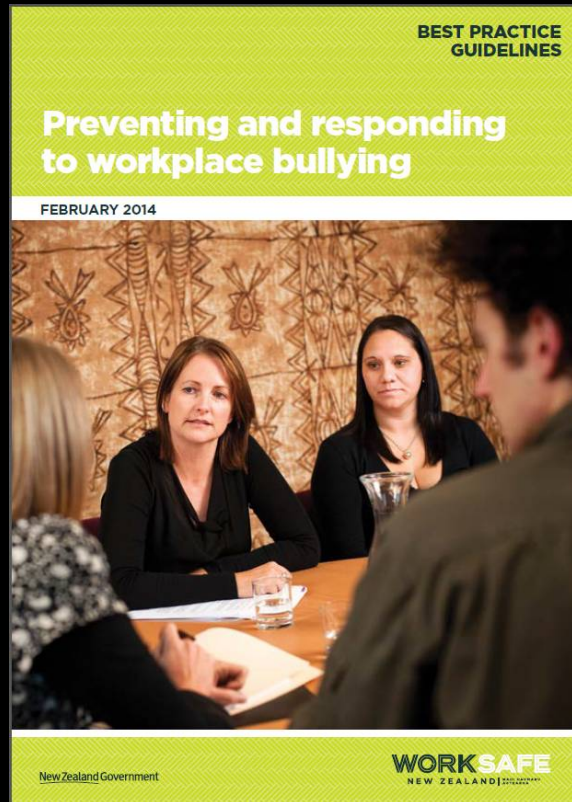


# Overview

- WorkSafe New Zealand Guidelines:  
*“Preventing and responding to bullying in the workplace”*
- Update on the most recent sleepovers case
- Health and Safety update



# Best practice guidelines – “*Preventing and responding to workplace bullying*”



# Overview

- Guidelines only
- Guidelines provide practical information for both employees and employers



# No change in law

- Bullying in the workplace remains a legal action by way of:
  - the Health and Safety in Employment Act 1992 ('hazard');
  - The Human Rights Act 1993 (complaints can be taken to the Human Rights Tribunal); and
  - The New Zealand Bill of Rights Act 1990
- The guidelines do not affect these laws



# Renewed focus on bullying?

- Workplace hazard
- Employers have a duty to control all workplace hazards, including bullying
- Affects people physically and mentally resulting in increased stress levels, decreased emotional wellbeing, reduced coping strategies
- Rise in bullying, especially in social media context





# Guidelines have separate definition of workplace bullying

- Guideline definition:
  - bullying is **repeated** and **unreasonable behaviour** directed towards a worker or group of worker that creates a **risk to health and safety**
- Repeated behaviour is “persistent”
- Unreasonable behaviour covers actions which a reasonable person would not do in similar circumstances, includes:
  - Victimising, humiliating, intimidating, or threatening



# Legal definition

- “Bullying” no statutory or set definition in law;
  - “Bullying” not defined in statute
  - Common law has not developed a singular definition but there exists case law that has deliberately kept the concept open and developed “intention to cause fear”
- Guidelines do not regard the legal developments and instead provide a new definition
- Uncertainty over the position of legal definition moving forward





# Guidelines: “bullying is not...”

- One-off or occasional instances of forgetfulness, rudeness or tactlessness;
- Setting high performance standards;
- Constructive feedback and legitimate advice or peer advice;
- A manager requiring reasonable verbal or written work; or
- Warning or disciplining employees.



# Advice for employees

- The Guidelines provide advice to employees who think they might be bullied
- Several detailed flow charts on how to assess whether they are being bullied, and if so, the steps available to resolve the issue



## WHAT CAN I DO ABOUT BEING BULLIED?

### Think carefully about your situation

Find out what your internal policies are and follow them. If you don't have any follow the advice in this guidance. Consider:

- > what you want the outcome to be
- > the power balance between you and the person
- > the other person's intent
- > whether you have contributed to the situation
- > the consequences of each approach
- > the likely reaction of your manager and the person you make your report to.

### Try a low key solution

There are many low key solutions. Some examples are on [pages 19-22](#) of this guideline.

- > Refer to your company code of conduct
- > Talk to the person directly
- > Talk to someone you trust to decide on a course of action.

Did a low key solution work?

YES

Situation resolved

NO

### Get expert advice

- > You may want to seek advice from Citizens Advice Bureau, health and safety workplace representatives or designated contact person, EAP counsellor, Union, GP or lawyer.

Did seeking expert advice resolve the situations?

YES

Situation resolved

NO

### Talk to your manager or Human Resources

- > Your manager may help you address the issue.
- > If your manager is the problem, you can talk to Human Resources about the correct process to follow.
- > MBIE offers a early assistance through the Mediation Service.

Did talking to your manager or Human Resources work?

YES

Situation resolved

NO

### Lay a complaint

Refer to the behaviour when making a complaint rather than using the word bullying.

- > investigation completed by an independent person and recommendations made
- > mediation through MBIE or workplace.

Did the complaint work?

YES

Situation resolved

# Example of flowchart



# Bullying hotline for employees

- 0800 number to report bullying to directly to WorkSafe
- Complaint will be given to the “Health and Safety response team”
- Uncertainty around the effects of this feature



# Advice for employers

- Aim: preventing bullying in your workplace
- Advice on:
  - Building good relationships in a respectful environment
  - Build managers who are leaders
  - Make your workplace culture clear
  - Provide a designated contact person
  - Employ staff who understand your culture
  - Assessing your workplace culture



# Measuring bullying

Staff  
complaints

Productivity  
loss

Staff surveys

Exit  
interviews

Grievances

EAP reports

String of  
resignations

Legal actions

Analysis of  
staff turnover



# Dealing with reports of bullying

- Detailed guidance about:
  - dealing with reports of bullying;
  - roles and responsibilities for preventing and managing bullying; and
  - useful tools for preventing and managing bullying





# Sleepovers update



# *Law v The Board of Trustees of Woodford House and The Trustees of Iona College*

- Applied and built on *Idea Services Limited v Dickson*
- Key points:
  - Minimum Wage Act 1983 (**MWA**) work groups applies to salaried employees
  - Averaging cannot be used to assess compliance with MWA



## *Idea Services – recap*

- “Work” under MWA?
  - Impact sleepover had on freedom of worker to otherwise do as they pleased
  - Nature and extent of responsibilities of worker
  - Importance of sleepover to worker
- Averaging
  - Does not comply with MWA
  - **But** facts related to waged employee, not salaried



# *Law v BOT of Woodford House & ors*

## *Applied Idea Services*

1. Significant constraints on plaintiffs
2. Significant and extensive responsibilities (“teenaged girls”)
3. Lawful and practical requirement they were there – couldn’t operate without them



# Rejection of averaging approach

- As in *Idea Services*, applied strict wording of MWA and relevant Minimum Wage Order
  - Payment should be made for, and identified with, each period of work
  - Under MWO, relevant periods of work are: hourly, daily, weekly, **not** yearly
  - Cannot average over more than a week in assessing whether MWA complied with



# Minimum Wage Order 2013, cl 4

The following rates are the minimum rates of wages payable to an adult worker:

- (a) for an adult worker paid by the hour or by piecework, \$13.75 per hour:
- (b) for an adult worker paid by the day,—
  - (i) \$110 per day; and
  - (ii) \$13.75 per hour for each hour exceeding 8 hours worked by a worker on a day:
- (c) in all other cases,—**
  - (i) \$550 per week; and**
  - (ii) \$13.75 per hour for each hour exceeding 40 hours worked by a worker in a week.**

(\$14.25 from 1 April 2014)



# Rejection of averaging approach

- Discounted argument that because employees did no work for 10 weeks of the year (school holidays), should deduct 10 weeks' from averaging figure
- Held was “*additional, albeit generous leave*”
- Could still be called in to work during school holidays
- Still came back to fact that cannot average over more than a week





# Impact

- Potential claims in a wide-ranging number of fields, for example:
  - where sleeping on site may be part of employment, eg ships, armed forces, hospitals; or
  - where the balance of hours and salary may be heavily imbalanced;
    - *eg* earn \$35k per year = may work 49 hours per week @ minimum wage. For every hour worked after 49, entitled to receive minimum wage.
- Back pay up to 6 years



# Health & Safety Reform Bill 2014 Update



# Overview

- Introduction to the primary duty holder – ‘Person conducting a business or undertaking’ (PCBU)
- Key duties of a PCBU:
  - engagement
  - worker participation practices
- Liabilities of certain office holders
- Due Diligence duties
- Meaning of worker
- Work groups
- Health and Safety representatives
- Increased penalties
- Timeline for the near future



# Primary duty holder – PCBU

- PCBU is required, so far as is “reasonably practicable”, to ensure the safety of workers engaged by the PCBU or workers whose activities are influenced or directed by the PCBU
- Broad definition of PCBU:
  - includes individuals and body corporates
  - whether or not the business is for profit
  - excludes volunteer associations and certain home occupiers



# Duties of a PCBU: “Engagement”

- Requirement for PCBU to engage with workers on health and safety matters
- Engagement requires:
  - Sharing relevant H&S information with workers
  - Giving workers an opportunity to express views and contribute to decision-making process
- Unclear how far this duty will extend - do PCBUs have to consult with all workers or only those it directly engages?
- Australian counterparts have experienced difficulties with the consultation requirements



# Duties of a PCBU: Worker participation practices

- A PCBU must have worker participation practices that provide reasonable opportunities for workers to participate in improving H&S on an on-going basis
- Establishing appropriate practices will depend on:
  - the nature of the business
  - the number of workers
  - the type and level of risk
  - the nature of employment arrangements



# Who is an 'Officer'?

- Definition includes:
  - Company directors, partners and persons in comparable positions in other bodies or organisations
  - any other person who makes decisions that affect the whole, or a substantial part, of the business of the PCBU
- No longer includes persons who merely “participate in” making these decisions
- Exemption from liability: appointed or elected trustees of a school board do not commit an offence for failure to comply with their officer duties (clause 47)





# Due Diligence Obligations (clause 39)

1. Keep **up-to-date** with health and safety matters

2. Ensure the person running the business has **appropriate resources and processes** to manage risks to health and safety

3. **Understand** the nature of the business and its hazards and risks

4. Ensure there are appropriate **reporting and investigation** processes in place

5. Put in place **monitoring** regimes to ensure that the above matters are effective

6. Verify



# School boards & trustees exempted

- s47 liability of certain office holders
- some office holders do not commit offences for failure to comply with duties of officers, includes:
  - s47(2)(d) a trustee of board of a school appointed or elected under the Education Act 1989
- board and trustee, in relation to a school, have the same meanings as in section 92(1) of the Education Act 1989



# Meaning of Worker (clause 14)

In this Act, unless the context otherwise requires, a **worker** means, a person who carries out work in any capacity for a PCBU, including work as-

- (a) an employee; or
- (b) a contractor or subcontractor; or
- (c) an employee of a contractor or subcontractor; or
- (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
- (e) a ~~homeworker~~ outworker (including a homeworker); or
- (f) an apprentice or trainee; or
- (g) a person gaining work experience (~~for example~~, or undertaking a work trial; or
- (h) a volunteer; or
- (i) a person of a prescribed class.



# Duties of workers (clause 40)

- Only have to take reasonable care
- For their own safety and towards others
- Comply as far as reasonably able with instructions
- Co-operate with policies and procedures that have been notified



# Work Groups

- PCBU is required to facilitate determination of work groups
- No clear definition of 'work group' provided in Bill
- Work groups are intended to facilitate representation by deciding:
  - the number of workers to be represented by one or more H&S representatives
  - which workplace or workplaces the work groups apply to



# Health and Safety Representatives

- Workers can request (or PCBU can initiate) the election of one or more H&S representatives
- H&S representatives have wide functions, including:
  - investigating H&S complaints by workgroup members
  - inquiring into anything that appears to be an H&S risk
  - monitoring and reporting to PCBU on compliance with Act
- Broad range of powers, including to:
  - enter and inspect workplace at any reasonable time
  - request any information necessary to perform functions
  - attend interviews between workers and PCBU or inspector



# Penalties

- Bill introduces a three tiered penalty regime
- Significantly increased penalties - highest for reckless conduct in respect of H&S duty (clause 42):
  - a fine up to \$3,000,000 for a body corporate
  - a fine up to \$600,000 or 5 years' imprisonment (or both) for an individual who is a PCBU or an officer
- Bill contains over 40 clauses that have penalty provisions, fines range from \$5,000 to \$500,000 per offence



# Other potential consequences

- Bill amends the Employment Relations Act 2000 (ERA) to enable workers to raise personal grievances based specifically on health and safety reasons
- Role of H&S representatives is expected to impact the ERA





# Timeline for the near future

- Bill is currently before a Select Committee (report July 2014)
- Bill expected to pass into law by the end of the year and be in force by April 2015
- Two sets of regulations supporting the Bill are expected to be released for consultation soon





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