Switching Track

Workplace Bullying Summit

Management Systems Approach - Discussion

CultureSafe NZ
+ creating positive work environments

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Prepared by CultureSafeNZ Ltd
Bob Brown

Peer reviewed by;
Allan Halse and Karen Hammond

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WORKPLACE BULLYING DISCUSSION – 'SWITCHING TRACK' MANAGEMENT SYSTEMS APPROACH

18th October 2015 – Verandah Function Centre, Hamilton Lake

1. Introduction – Mental Wealth

If as Gandhi suggests '*it is health that is real wealth and not pieces of gold and silver',* is it appropriate then to trade our health for work? Is there a mutually exclusive and inversely proportional relationship between physical / mental health and wellbeing with work? Or should they, as intended complement each other in a mutually constructive and inclusive relationship?

In a toxic workplace environment it is predominantly mental wealth which is expended for commercial gain by the employer. The intellectual capacity and knowledge of an employee are exploited, mined to exhaustion until they eventually leave of their own conscious volition or because they have unwittingly become broken and are no longer of any use.

We are not allowed to intentionally or unintentionally hurt somebody physically without risk of criminal prosecution yet current legislation provides no real deterrent to an employer to mentally hurt somebody to the point where the employee may also then hurt themselves.

In an economy based upon primary industries i.e. extraction of raw materials and milk production it is easy to understand how this extractive and exploitative philosophy translates into the employment relationships in the workplace. However, it is often argued that NZ is missing the trick through reliance upon these methods and should focus instead on added value products created from local resources. A similar argument now also needs to be presented for a more mature attitude to employment relations and in particular to the mental health of employees.

Can NZ continue to fritter away its mental wealth?

2. Introduction – Management issues

The reliance upon employment relations legislation to manage workplace bullying as opposed to it being regarded as a hazard under the health and safety legislation is an issue which has been raised with Minister for Workplace Relations and Safety – the aim of this workshop to make recommendations to him to rectify the situation.

The Ministry of Business, Innovation and Employment (MBIE) and the government department responsible for workplace health and safety, Worksafe New Zealand, both share the CultureSafe view that existing legislation is only adequate in principle, but has been in place for many years.

In addition these agencies share with the victims of workplace bullying the same expectations about what should take place when workplace bullying is reported, however, they appear to be unaware or apparently unable to acknowledge that these expectations are not met in reality.

There are serious deficiencies which need to be addressed as a matter of urgency and which do not require any changes to legislation, but which will require clarification of definitions, regulations and their application.

If we are all able to accept that there is not a 'loophole' in the legislative framework, then it is the technicalities of application processes and interpretation of the existing legislation which require attention. In particular, the point at which Worksafe NZ may be reliably expected to intervene.

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However there remains a disconnect between the reformed Health and Safety at Work Act 2015 and its relationship with both the Employment Relations Act 2000 and the Mental Heath (Compulsory Treatment and Assessment) Act 1992. The current state of the health and safety reform presents an opportunity to attempt to address some of these deficiencies in the regulations that will support the new Act but in the longer term this alone may not be sufficient.

There is a wide consensus that there needs to be a shift of emphasis away from reliance upon the Employment Relations Authority to resolve workplace bullying and that a mechanism is required for Health and Safety recommendations regarding workplace bullying situations to be made and which can be enforced.

An obvious solution might be for example, that the ERA to refer to District Court and instruct Worksafe NZ to investigate? However, while this may address the absence of any health and safety consideration, it would increase the length of the process and continue to deflect attention of any investigation away from the root cause of any complaint or incident (as defined under H&S) i.e. the workplace bullying which would be permitted to continue. A more effective and efficient alternative to the current process is required.

3. Existing barriers to natural justice for victims of workplace bullying

Currently there exists an expectation of, and a reliance upon MBIE facilitated mediation taking place before Worksafe NZ will consider any obligation to investigate a bullying complaint.

There is often a lengthy process which an employee required to go through while experiencing the stresses of an employment relations situation before mediation can be arranged by MBIE. The Health and Safety in Employment Act 1992 requires that intervention should be timely in order for it to be effective. The ability of Worksafe NZ not to intervene until the facilitated approach has been attempted means that Worksafe NZ are often unable to act in a timely fashion. An employer not acting in good faith has the ability to exploit this opportunity and will frustrate the employee's attempts to seek assistance.

In many cases this can be a delay of anything between 6 months and a year. During this time period the employer is able to refuse to investigate a complaint of workplace bullying and allow it to continue, despite the best practice expectations of external agencies and the victim of workplace bullying and **also despite medical evidence and even notification of serious harm.**

This 'technicality' means that the bullying complaint is managed as an employment issue under the Employment Relations Act 2000 instead, where consensus indicates that is should, as a serious hazard under the Health and Safety in Employment Act 1992. In addition employers are also able to insist upon assessment of a complainant under the Mental Heath (Compulsory Treatment and Assessment) Act 1992 before any action might be considered.

These 'technicalities' enable an employer to reduce an employee to such a state of poor mental health by ignoring complaints of bullying or abuse of due process such that it can then use the 'illness' to further justify its actions. Worse, individuals who do 'raise the flag' regarding the impact of the workplace behaviours upon their health can expect no respite, until or unless they

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take action themselves, either to resign, remove themselves from the place of work or in extreme cases commit suicide. There is unfortunate and very recent local experience of all three of these scenarios. New Zealand cannot afford to wait for a threshold quota of lives to be lost for it to act.

The MBIE support the view that the Employment Relations Act is intended 'to balance the needs of both employees and employers (while acknowledging there is a power imbalance)' and appear to be content that this condition is satisfied. In reality the experience for the employee is most often, that this intent does not translate into practice.

The apparent reliance upon the ability of an employee to raise personal grievance and to have arranged mediation and for it to have failed before Worksafe NZ will intervene, places an employee at significant immediate disadvantage in that the employee is 'damned if they do and damned if they don't'. Internal management processes are exactly that, 'management' and there is instant bias and a predilection to dismiss and trivialise any complaint and to identify the victim as 'the problem'. In the absence of appropriate and timely external intervention the employer has control of the situation and can generate a time delay to exploit to its advantage.

Again, these 'technicalities' are exacerbated by the ability of an employer to ignore a complaint of workplace bullying indefinitely, even when serious harm has occurred and to continue to 'exit' a person, now 'the problem' from the workplace. Evidence is available of many situations in which complaints of workplace bullying do not trigger the appropriate internal response but are encouraged to escalate until the health of the victim is impacted.

At the point at which Worksafe NZ (DoL) have been informed the issue is usually referred back to the employer, not as a Health and Safety issue but one of Employment Relations. Unfortunately the reality is often that a victim of workplace bullying is not taken seriously, just as many victims of abuse are disbelieved.

At this point a staff member can only raise Personal Grievance, but often this is after significant harm has been done and when it is too late to address the cause. This ability of Worksafe NZ to 'bounce back' a bullying complaint to the realm of the alleged bully places the employee at further significant disadvantage due to the time that is allowed to elapse between an employee raising an initial complaint, which is also basis for Personal Grievance and intervention of Worksafe NZ being too great. An employee who notifies an incidence of Serious Harm does so with the expectation that an external and independent agency will investigate the situation before it deteriorates further.

4. The scale of the problem

Recent enquiries of the Chief Inspector – Response and Investigations at Worksafe NZ indicate that the number of complaints of workplace bullying that have been investigated since the introduction of the Best Practice Guidelines in February has declined to 11% from 41% because internal reporting criteria have changed:

> *"Since WorkSafe New Zealand introduced its Best Practice Guidelines: Preventing and Responding to Workplace Bullying in February 2014 until the end of May 2015, it received 19*

complaints about workplace bullying. WorkSafe subsequently investigated two of these complaints. In the 2 years prior to the release of the Guidelines (that is, between 13 February 2012 and 29 January 2014) there were 46 bullying complaints, of which 19 were investigated.

It is difficult to compare the two sets of figures as the decision-making criteria for what is described as a workplace investigation changed from 1 July 2013. Prior to that date decisions on whether to investigate were made by local offices. However, from 1 July 2013, the decision making process was centralised, and all decisions to investigate are now made by a specialist response team using standardised criteria."

It is **very important to note** that this is a reduction in investigations of workplace bullying which have been reported to the authorities. These figures are considerably lower than expected as they also do not include the cases which are not formally notified but which employment relationship advocates and legal practitioners work with on a daily basis.

Research by Professor Tim Bentley, Director of AUT University's NZ Work Research Institute Unit suggests that New Zealand stacks up as one of the worst countries in the prevalence of workplace bullying. Internationally 2% to 20% of workers reported workplace bullying, while 18% of those surveyed in New Zealand reported the behaviour. In the public sector, other researchers have found 30% or more.

5. The systems approach to management of workplace bullying

There is currently a serious disconnect between management processes which support the compliance by employers to complimentary mandatory legislation. This reinforces the ability of an employer to avoid obligations due to the conflicting state of its internal processes which is further reinforced by the legal practice of examination of detail in isolation.

Many employers struggle with the concepts or fail to appreciate the tangible benefits that a holistic systems approach can provide when applied to the legal framework within which it is required to operate. Initially this approach was used to form the basis of the British Environmental standard which then became adopted as the international standard ISO14001 to ensure compliance with environmental legislation. This approach has since been adopted in Health and Safety management with a similar standard OHSAS 18001. Often employers will combine these responsibilities under one post holder due to the similarity in approach.

Adaptation of this approach to the frameworks within which workplace bullying is currently managed suggests that closer alignment of legislation with management best practice, investigations and improvement processes could provide part of the solution. Consider that the aspects of Government Legislation and Commercial Operational management both have three tiers as follows;

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Governance – legal requirements and national objectives

1. Legislation - a law or a body of laws enacted
2. Regulation - rules or directive, maintained by an authority e.g. codes of practice
3. Guideline - a general rule, principle, or piece of advice to support legislation

Commerce – operational compliance

1. Policy - a course or principle of action adopted by an organization or individual
2. Procedure - an established or official way of doing something.
3. Instruction - detailed information about how something should be done.

Holistic alignment

1. Organisation policy is determined by legislation
2. Organisation procedure describes how regulation is complied with
3. Organisation instruction details process steps for compliance with guidelines.

Delivery elements of the action plan

A. This approach suggests that government and the legal profession should review current legislation and with support of a working group generate regulations in support of the Health and Safety reform process.
B. Concurrently management systems professionals are encouraged to review standards and generate best practice procedures which can be adopted without any reliance upon regulation but which can contribute, via the working group to the eventual regulations which are due to be available by 4 April 2016.
C. Aspects to consider in the development of this approach are a Third Party Accreditation body(s) which can verify the conduct and capabilities and certify independent investigators able to specialise in sensitive workplace bullying investigations.
D. The second key and controversial element of this systems approach is the requirement to conduct external impartial and independent investigation supported by good evidence based process. Draft processes have been suggested to Worksafe and are attached as Appendix 9.

6. The focus of this discussion workshop - a solution is required

Despite the assurances of both the MBIE and the Minister, the question still remains; is the Employment Relations Authority and the Employment Court the appropriate jurisdiction within which to address the Health and Safety aspects of workplace bullying where it is recognised as a known, identifiable and manageable hazard? The infographic at Appendix 9 demonstrates the emphasis currently placed upon Employment Relations to avoid Health and Safety obligations.

The current treatment of complaints of workplace bullying increases and continues the harm experienced by an employee. As previously explained this creates significant and unfair bias in favour of the employer who is able to sidestep the issue of workplace bullying and the damage it causes and also to ignore its obligations to create a safe workplace environment.

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6.1. If the ERA and the EC are no longer considered to be the appropriate jurisdiction, then it follows that workplace bullying must be regarded as a criminal offence (to be dealt with by the Crimes Act or the new Health and Safety at Work Act 2015) and that employees and advocates who are encouraged to employ the Employment Relations Act processes are effectively being misled.

6.2. Further, if workplace bullying and the health and safety impacts should be regarded as a criminal issue which does not fall under the jurisdiction of the Crimes Act or Health and Safety at Work Act 2015, which jurisdiction should deal with workplace bullying and how can matter be brought to the attention of the appropriate persons in order that natural justice can be achieved?

6.3. There waas an obligation placed directly upon the Crown to promote best practice regarding workplace health and safety as outlined in the Health and Safety in Employment Act 1992, though this has been amended during the reform process it remains in principle.

7. **Workshop Objectives**

7.1. As indicated in the introduction there is a reform process underway before the current legislation is replaced. The Health and Safety Reform Bill has been passed by Parliament and it will come into effect on 4 April 2016. In order for it to be effective it will be supported by a raft of regulations and so this is the milestone date for inclusion of our recommendations for necessary changes.

7.2. Part 8 of the Worksafe NZ Act 2013 refers to advisory groups which may be formed by Worksafe NZ to inform the development of the regulations required to support the new Health and Safety at Work Act. As a result there are two immediate opportunities for effective input on new regulations for

- General risk and workplace management
- Engagement, worker participation and representation, although this already appears to be a 'done deal'

7.3. In its current state the legislation considers the range of injuries or illnesses which would be required to be notified and potentially investigated being predominantly of a physical nature but Section 23 (e) permits "*any other injury or illness declared by regulations to be a notifiable injury or illness for the purposes of this section*". This approach is carried through in what should also be considered notifiable incidents or events.

7.4. The regulations should expand upon the mental health aspects of workplace related stress caused by bullying **before** they are manifested in physical symptoms, i.e. early intervention and prevention.

7.5. These regulations also provide the opportunity to include definitions of workplace bullying and to formalise the guidelines that have already been developed by Worksafe but which do not yet have any legislative means of enforcement.

7.6. There is potential for the development of a commercially acceptable best practice standard which could form an additional work-stream as an outcome from this event.

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8. Appendices – Legislation

8.1. Reform Bill process from http://www.business.govt.nz/worksafe/about/reform

The new law will be called the Health and Safety at Work Act.

A series of regulations are being developed to support the new Act. These include:

General risk and workplace management

Major Hazard Facilities

Asbestos

Engagement, worker participation and representation (available shortly for public consultation)

More information is on the Ministry of Business Innovation and Employment webpage.

Once the regulations are finalised, WorkSafe will issue formal guidance to support the Act and regulations. This formal guidance will start to become available in 2016. In the meantime WorkSafe will develop general information on the new legislation to help people prepare. This general information will help explain your responsibilities under the new Act, and will provide examples and case studies to assist you. However, this guidance does not provide specific guidance for every business activity in New Zealand.

PCBUs and their workers have the best knowledge about the specific risks arising from their work. They are best placed to provide solutions about how to manage those risks.

Until the new Act comes into effect in April 2016, the current Health and Safety in Employment Act 1992 remains in force.

8.2. Worksafe NZ Act Part 8

http://www.legislation.govt.nz/act/public/2013/0094/latest/DLM5302052.html

Advisory groups

(1) WorkSafe New Zealand may establish an advisory group—

(a) to provide a forum for dialogue and co-operation between the Government, employers, and workers on workplace health and safety matters; and

(b) to provide advice to WorkSafe New Zealand that represents the views of the Government, employers, and workers on workplace health and safety matters.

(2) WorkSafe New Zealand may establish 1 or more other advisory groups to provide advice to it on matters relating to its functions.

(3) An advisory group referred to in subsection (1) or (2) may (but is not required to) be established in accordance with clause 14(1)(a) of Schedule 5 of the Crown Entities Act 2004.

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8.3. Health and Safety at Work Act 2015

Section 23 Meaning of notifiable injury or illness

(1) In this Act, unless the context otherwise requires, a notifiable injury or illness, in relation to a person, means—

(a) any of the following injuries or illnesses that require the person to have immediate treatment (other than first aid):

(i) the amputation of any part of his or her body:

(ii) a serious head injury:

(iii) a serious eye injury:

(iv) a serious burn:

(v) the separation of his or her skin from an underlying tissue (such as degloving or scalping):

(vi) a spinal injury:

(vii) the loss of a bodily function:

(viii) serious lacerations:

(b) an injury or illness that requires, or would usually require, the person to be admitted to a hospital for immediate treatment:

(c) an injury or illness that requires, or would usually require, the person to have medical treatment within 48 hours of exposure to a substance:

(d) any serious infection (including occupational zoonoses) to which the carrying out of work is a significant contributing factor, including any infection that is attributable to carrying out work—

(i) with micro-organisms; or

(ii) that involves providing treatment or care to a person; or

(iii) that involves contact with human blood or bodily substances; or

(iv) that involves handling or contact with animals, animal hides, animal skins, animal wool or hair, animal carcasses, or animal waste products; or

(v) that involves handling or contact with fish or marine mammals:

(e) any other injury or illness declared by regulations to be a notifiable injury or illness for the purposes of this section.

(2) Despite subsection (1), notifiable injury or illness does not include any injury or illness declared by regulations not to be a notifiable injury or illness for the purposes of this Act.

(3) In this section,—

animal has the same meaning as in section 2(1) of the Animal Welfare Act 1999

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fish has the same meaning as in section 2(1) of the Fisheries Act 1996

marine mammal has the same meaning as in section 2(1) of the Marine Mammals Protection Act 1978.

Section 24 Meaning of notifiable incident

(1) In this Act, unless the context otherwise requires, a notifiable incident means an unplanned or uncontrolled incident in relation to a workplace that exposes a worker or any other person to a serious risk to that person's health or safety arising from an immediate or imminent exposure to—

(a) an escape, a spillage, or a leakage of a substance; or

(b) an implosion, explosion, or fire; or

(c) an escape of gas or steam; or

(d) an escape of a pressurised substance; or

(e) an electric shock; or

(f) the fall or release from a height of any plant, substance, or thing; or

(g) the collapse, overturning, failure, or malfunction of, or damage to, any plant that is required to be authorised for use in accordance with regulations; or

(h) the collapse or partial collapse of a structure; or

(i) the collapse or failure of an excavation or any shoring supporting an excavation; or

(j) the inrush of water, mud, or gas in workings in an underground excavation or tunnel; or

(k) the interruption of the main system of ventilation in an underground excavation or tunnel; or

(l) a collision between 2 vessels, a vessel capsize, or the inrush of water into a vessel; or

(m) **any other incident declared by regulations to be a notifiable incident for the purposes of this section.**

(2) Despite subsection (1), notifiable incident does not include an incident declared by regulations not be a notifiable incident for the purposes of this Act.

Section 25 Meaning of notifiable event

In this Act, unless the context otherwise requires, a notifiable event means any of the following events that arise from work:

(a) the death of a person; or

(b) a notifiable injury or illness; or

(c) a notifiable incident.

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8.4. **Mental Heath (Compulsory Treatment and Assessment) Act 1992**
http://www.legislation.govt.nz/act/public/1992/0046/latest/DLM262181.html

8.5. Supporting Legislation and Definitions

8.5.1. **Employment Relations Act 2000** – Interpretation (definitions)

http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58337.html

8.5.2. **Health and Safety in Employment Act 1992** – Interpretation (definitions)

http://www.legislation.govt.nz/act/public/1992/0096/latest/DLM278835.html

NOTE: 'significant' is replaced with 'notifiable' in 7.5.3 below

8.5.3. Health and Safety at Work Act 2015

http://www.legislation.govt.nz/act/public/2015/0070/latest/DLM5976687.html?search=qs_act%40bill%40regulation%40deemedreg_definitions_resel_25_h&p=1

8.5.4. **WorkSafe New Zealand Act 2013** - Interpretation (definitions)

http://www.legislation.govt.nz/act/public/2013/0094/latest/DLM5302026.html

8.5.5. **Protected Disclosures Act 2000** - Interpretation (definitions)

http://www.legislation.govt.nz/act/public/2000/0007/latest/DLM53471.html?search=ts_act%40bill%40regulation%40deemedreg_protected+disclosures+act_resel_25_h&p=1

8.5.6. **Human Rights Act 1993**- Interpretation (definitions)

http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304217.html

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9. Appendices – Current bias

Route to justice for a victim of workplace bullying and harassment resulting in serious harm to health

Victim of workplace bullying attempts informal resolution directly with employer

Employer **avoids** bullying as Health & Safety issue and delegates to Human Resources

Employer no longer required to conduct a Health and Safety **investigation**

Victim must report Serious Harm

Worksafe NZ

Health & Safety in Employment Act

Evades Workplace Bullying as a Health & Safety issue

Fails to investigate

Regards bullying as an employment issue - directs victim to Employment Mediation

Mediation not suitable forum - Fails

Victim must raise Personal Grievance

Employment Relations Authority

Human Rights Act or **Employment Relations Act**

Unjustified Disadvantage Personal Grievance (Bullying and harassment)

Employee suffers retaliatory action - dismissal

Bullying and Heath & Safety **evaded** if victim is dismissed – bullying evidence then ignored

Victim of workplace bullying is denied access to justice at the District Court

Unjustified Dismissal Personal Grievance

Predominantly compliance or process failures

Includes H&S issues	Statement of Problem
Discounts H&S	Determination

Employment Court

Challenge avoidance of H&S	Statement of Claim
Fails to acknowledge H&S	Determination

Victim of workplace bullying is denied access to justice

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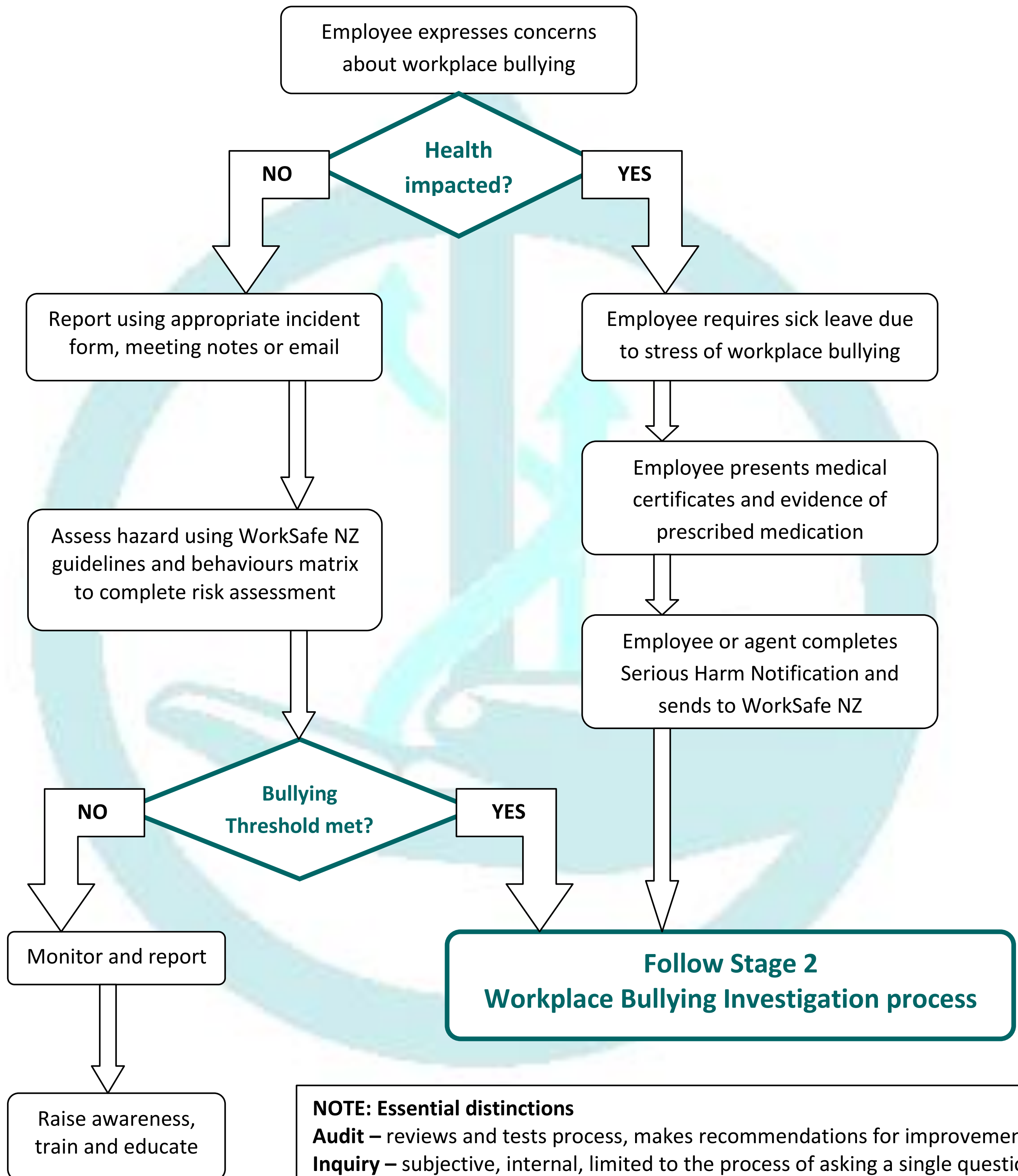
10. Appendices – Proposed Investigation Procedure



NOTE: Essential distinctions
Audit – reviews and tests process, makes recommendations for improvement
Inquiry – subjective, internal, limited to the process of asking a single question
Investigation – thorough multiple inquiries, objective and therefore external careful search or examination in order to discover all relevant facts.

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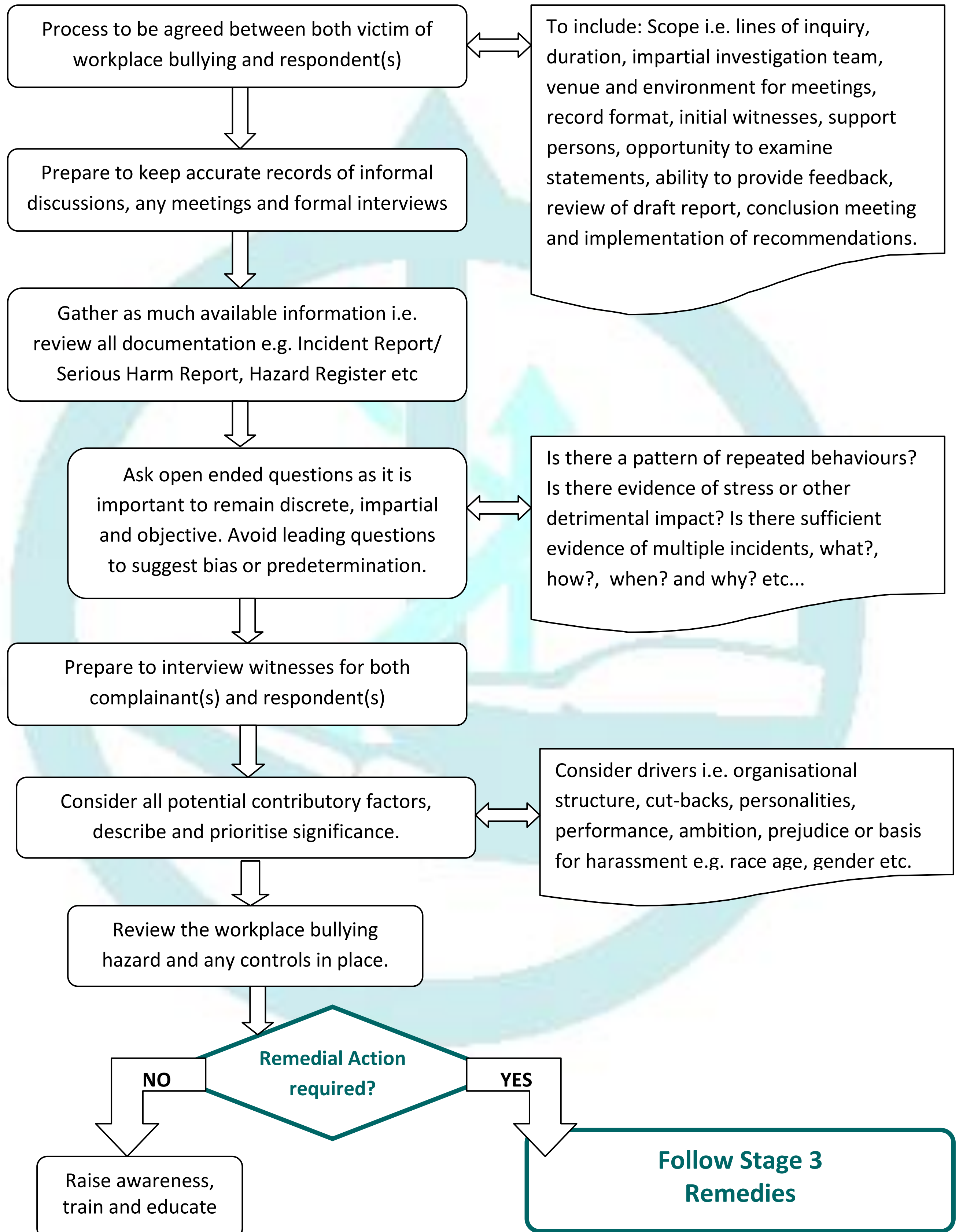
STAGE 2 INVESTIGATIONS



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