



NEW SOUTH WALES
BAR ASSOCIATION

MODEL BEST PRACTICE GUIDELINE: HARASSMENT, DISCRIMINATION AND BULLYING

1. This Best Practice Guideline on Harassment, Discrimination and Bullying (the **HDB BPG / this Guideline**) was approved by Bar Council on **24 March 2022** for adoption by individual chambers/floors of the private Bar.
2. The New South Wales Bar Association encourages each set of chambers/floors to seek independent legal advice with respect to the application of the HDB BPG to its chambers, members and staff. Nothing in this Guideline should be taken as legal advice with respect to the obligations imposed on chambers, members and staff under Commonwealth or New South Wales law.

INTRODUCTION

3. This Chambers is committed to ensuring that every person engaged by and/or working on the floor (in any capacity) is able to do so in a work environment that is safe and free from harassment, discrimination, vilification, victimisation and/or bullying.
4. This Chambers is committed to taking all reasonably practicable steps to eliminate or minimise risks to health and safety, including psychological health, of every person engaged by and/or working in Chambers (in any capacity).
5. All members, licensees, readers, door tenants and ‘floaters’ of this Chambers (**Residents of the Chambers**) have a responsibility to ensure these commitments are adopted and implemented.
6. Clients, colleagues, other members of the Bar and solicitors are all people of value to our Chambers. Offensive behaviour towards them or by them to people working in our Chambers is unacceptable.
7. There may be occasions where Residents of the Chambers or other persons who work in Chambers (as employees, contractors or in other capacities including work experience students and volunteers) are the subject of harassment, discrimination, vilification, victimisation or bullying by third parties including instructing solicitors, clients, members or employees of other floors, or other visitors. If this occurs,

Residents of the Chambers have a responsibility to the Chambers (and other residents of the Chambers), and may have an obligation at law to ensure that the conduct is reported, that it cease, and that you take steps to ensure (so far as is reasonably practicable) that those persons are not exposed to further risk of harm.

8. The Chambers undertakes to take appropriate steps to periodically publicise the Guideline and associated documents together with the identity of the Chambers' Respectful Relations Officers.

PERSONS TO WHOM THIS APPLIES

9. This Guideline applies to:
 - (a) Residents of the Chambers;
 - (b) persons who work in the Chambers as employees, contractors or in other capacities including work experience students and volunteers; and
 - (c) third parties including instructing solicitors, clients, witnesses, members or employees of other floors, or other visitors.

PURPOSE

10. The purpose of this Guideline is to:
 - (a) assist with the elimination and/or prevention of all forms of harassment, discrimination, vilification, victimisation and/or bullying on this Chambers, including through education;
 - (b) promote the dignity and respect of every person in relation to all protected attributes;
 - (c) record that this Chambers has adopted this Guideline, including for the purposes of minimising the risk of liability associated with any contravention of the relevant laws;
 - (d) provide a framework, and options, for dealing with alleged contraventions of this Guideline;
 - (e) operate in conjunction with and in furtherance of any other policies adopted by the New South Wales Bar Association;
 - (f) clearly articulate the Chambers' attitude against harassment, discrimination, vilification, victimisation and/or bullying; and
 - (g) promote adherence to all relevant laws including the *Legal Profession Uniform Law (NSW)* (**Uniform Law**) and the Legal Profession Uniform Conduct (Barristers') Rules (the **Barristers' Conduct Rules**).

CONTRAVENTION AND CONSEQUENCES OF A FAILURE TO COMPLY WITH THIS GUIDELINE

11. Anyone engaging in sexual harassment, harassment, discrimination, vilification, victimisation or bullying contravenes this Guideline.
12. Complaints about sexual harassment, harassment, discrimination, vilification, victimisation or bullying will be addressed by reference to the Grievance and Complaints Framework. The key aspects of the Grievance and Complaints Framework are summarised in paragraphs 40 to 52 below.
13. Conduct found to have occurred in contravention of this Guideline may result in disciplinary action taken against the person found to have engaged in the conduct. If the person is an employee, this may include termination of employment. If the person who engaged in the conduct is a barrister, the disciplinary action could result in a determination being made by a relevant authority such as the Bar Association or a disciplinary tribunal that the person engaged in unsatisfactory professional conduct or professional misconduct (see '**The Law**' below).

THE LAW

14. The *Anti-Discrimination Act 1977* (NSW) and Federal discrimination laws including the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004* and the *Fair Work Act 2009* (the **relevant laws**) make it unlawful to engage in conduct constituting sexual harassment, discrimination, vilification, victimisation and/or bullying in most areas of work and in the provision of services.
15. The relevant laws give rise to potential legal liability for individuals and the Chambers.
16. Employers can also be responsible for breaches of the relevant law that occur in Chambers and may be liable for failing to prevent or properly respond, unless they have taken all reasonable steps to prevent the unlawful conduct.
17. Rule 123 of the Barristers Conduct Rules imposes a personal obligation on each and every barrister not to, in the course of, or in connection with legal practice or their profession, engage in conduct which constitutes:
 - (a) discrimination, (b)
 - sexual harassment, or (c)
 - bullying.

Rule 123 states that conduct in connection with a barrister's profession includes, but is not limited to:

- (a) conduct at social functions connected with the bar or the legal profession, and

- (b) interactions with a person with whom the barrister has, or has had, a professional relationship.
18. Rule 125 of the Barristers Conduct Rules defines bullying as “unreasonable behaviour that could reasonably be expected to intimidate, degrade, isolate, alienate or cause serious offence to a person” and defines sexual harassment as “sexual harassment as defined under applicable state, territory or federal anti-discrimination or human rights legislation”.
 19. Conduct that contravenes Rule 123, including sexual harassment, discrimination, vilification, victimisation and/or bullying may amount to professional misconduct and/or unsatisfactory professional conduct within the meaning of Division 1, Part 5.4 of the Uniform Law.
 20. Discrimination, harassment and bullying may also constitute a breach of Rules 8(a) or 8(c) of the Barristers Conduct Rules.
 21. Any complaints made to the Office of the Legal Services Commissioner (**OLSC**) against a barrister for contravening a provision of the Barristers Conduct Rules may result in an investigation of the complaint by the OLSC or the NSW Bar Association. Depending upon the outcome of that investigation, the barrister may face disciplinary action.
 22. The OLSC and Bar Council, (as designated local regulatory authorities), and their delegates, have an obligation to report to the NSW Police any person suspected on reasonable grounds to have committed a ‘*serious offence*’, being an indictable offence, and to make available to the NSW Police the documents or information relevant to the offence under their control.
 23. In addition, members of the NSW Bar (as well as all other residents in NSW) may be obliged under s 316 of the *Crimes Act 1900* (NSW) (**Crimes Act**) to report material information relating to ‘*serious indictable offences*’ (as defined by s 4 of the Crimes Act) to NSW Police or appropriate authorities.
 24. Further, under the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking; and that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. This includes psychological health arising from sexual harassment, discrimination, vilification, victimisation and/or bullying. In addition, under the WHS Act each worker at a workplace must take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons who are at that workplace.
 25. A “person conducting a business or undertaking” includes sole traders and unincorporated associations. In practical terms, this means all Barristers. In addition, a sole trader is a ‘worker’ under the WHS Act, which means that barristers may have additional duties under sections 19 and 28 of the WHS Act.

WHAT IS HARASSMENT INCLUDING SEXUAL HARASSMENT?¹ Sexual harassment

26. Under the *Sex Discrimination Act 1984* (Cth), a person sexually harasses another person (**person harassed**) if:
- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
 - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed, in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
27. The *circumstances* to be taken into account include, but are not limited to:
- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
 - (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct; (c) any disability of the person harassed; and (d) any other relevant circumstance.
28. “*Conduct of a sexual nature*” includes:
- (a) making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing;
 - (b) any gestures of a sexual nature; or
 - (c) making or attempting physical interactions of a sexual nature.
29. The recent amendments to the *Sex Discrimination Act 1984* (Cth) also provide that it is unlawful to harass a person on the grounds of their sex (**sex-based harassment**). Sex-based harassment is defined as unwelcome conduct of a seriously demeaning nature by reason of the person’s sex in circumstances in

¹ This Guideline draws on the recommendations, and model policy, included in “*Disrupting the System: Preventing and responding to sexual harassment in the workplace*” published by the Male Champions of Change incorporating recommendations from the National Inquiry into Sexual Harassment in Australian Workplaces led by Sex Discrimination Commissioner Kate Jenkins, and the Respect@Work: Sexual Harassment National Inquiry Report (2020). It also uses the definitions in the Law Council of Australia *National Model Framework Addressing Sexual Harassment for the Australian Legal Profession*, December 2021.

which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. The amendments also:

- (a) extended the accessory/ancillary liability provisions in the Act so that a person who causes, instructs, induces, aids or permits another person to engage in sexual harassment or sex-based harassment can also be found liable for the conduct; and
- (b) expanded the coverage of the protection against sexual harassment to all workplaces and workers, so that barristers are now included within the scope of the Act.

Harassment more generally

- 30. Harassment is not limited to sexual harassment and includes disability-based harassment and racial, transgender, HIV/AIDS and/or homosexual vilification.
- 31. Race-based harassment means acts reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people done because of the race, colour, national or ethnic origin of the other person or some or all of the people in the group.
- 32. Disability-based harassment includes the making of disparaging or other comments to a person in relation to that person's disability whether the disability is physical, intellectual, psychiatric, sensory or neurological.

WHAT IS DISCRIMINATION?

- 33. Discrimination on a prohibited ground is unlawful under state and/or federal legislation and is not acceptable. Discrimination may be direct or indirect as follows:
 - (a) *Direct discrimination* is less favourable treatment on the ground of the following actual, imputed or appertaining characteristics: race, nationality, colour, descent, ethno-religious origin, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy, breastfeeding, status as a parent or carer, sexual orientation/homosexuality, disability, age, industrial activity, religious beliefs or activities, political beliefs or activities, criminal record, medical record (**particular characteristics**).
 - (b) *Indirect discrimination* is constituted by policies or procedures that appear to be neutral on their face but have a disproportionate adverse impact on persons with a particular characteristic, such those described immediately above. It is unlawful to require a person with a particular characteristic (as set out above) to comply with an unreasonable requirement or condition where the person with the characteristic cannot comply.

WHAT IS BULLYING?

34. Bullying is repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety.²
35. “Repeated behaviour” refers to the persistent nature of the behaviour and can involve a range of behaviours over time.
36. “Unreasonable behaviour” means behaviour that a reasonable person, having considered the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening.

WHAT IS VILIFICATION?

37. Vilification is a public act (by speech, publication, conduct or otherwise) which is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people which is done because of the race, colour, religion or national or ethnic origin of the person or of some or all of the people in the group.
38. Vilification also refers to such conduct engaged on the grounds of homosexuality, gender identity or HIV/AIDS.

WHAT IS VICTIMISATION?

39. Victimisation occurs when a person is treated adversely or subjected to a detriment because that person has, in respect of any sexual harassment, discrimination, vilification or bullying, made a complaint or allegation, proposes to make a complaint, has brought proceedings, or has given information or document/s in relation to a complaint or proceedings, has attended any conference in relation to a complaint or has appeared (or has proposed to appear) as a witness or has asserted rights under the relevant laws.

² This is the definition set down under the SafeWork Australia “*Guide for Preventing and Responding to Workplace Bullying*” (May 2016).

GRIEVANCE AND COMPLAINTS FRAMEWORK

40. If you have been subjected to harassment, discrimination or bullying in connection with your profession, you can obtain help from BarCare (0427 317 958) or the Sexual Harassment Officer (sexualharassmentofficer@nswbar.asn.au). You can also seek support from 1800RESPECT (www.1800respect.org.au) as well as your GP. If you are in danger, call 000.
41. As explained in paragraph 12 above, the Grievance and Complaints Framework addresses complaints about sexual harassment, harassment, discrimination, vilification, victimisation or workplace bullying. Key aspects of the Grievance and Complaints Framework are summarised below.

Application, definitions and general principles

42. The Grievance and Complaints Framework applies to all concerns raised under this Guideline, be they harassment, bullying, vilification, discrimination and/or victimisation. There will be varying levels of application having regard to the concern raised.
43. In this Guideline and the Grievance and Complaints Framework, the following definitions apply:
- a. **Affected Person:** a person who is the target or focus of conduct alleged to raise a concern under this Guideline (namely, sexual harassment, harassment, discrimination, vilification, victimisation or bullying), who may or may not also be a Complainant.³
 - b. **Bystander:** a person who:
 1. has directly witnessed an incident that raises a concern under the HDB BPG; and/or
 2. has direct knowledge of an incident that raises a concern under this Guideline, such as Human Resources personnel, a manager or a clerk or person in chambers to whom the conduct has been reported.
 - c. **Complainant:** a person who makes a complaint under the HDB BPG. The person may be an Affected Person or a Bystander.
 - d. **Cultural competency:** a set of congruent behaviours, attitudes, and policies that come together in a system, agency, or among professionals that enables that system, agency, or those professionals to work effectively in cross-cultural situations. Further, cultural competency is the willingness and ability of a system to value the importance of culture in the delivery of services to all segments of the population.

³ This Guideline uses the term 'Affected Person' in place of the term 'the Targeted Person' in the Law Council of Australia *National Model Framework Addressing Sexual Harassment for the Australian Legal Profession*, December 2021.

- e. **Respectful Relations Officers:** at least two nominated persons in Chambers, ideally of different genders, who have received training in complaint handling and receive reports from Complainants about potential breaches of the HDB BPG.
 - f. **Respondent:** a person alleged to have engaged in conduct that is in breach of this Guideline.
44. The Grievance and Complaints Framework is guided by the following general principles.
- a. Confidentiality will be maintained to the extent possible having regard to mandatory reporting and procedural fairness obligations (see “**The Law**” above).
 - b. Complaints ought to be dealt with in a manner which is culturally competent having regard to the cultures of each person involved in any handling of a grievance under this Guideline.
 - c. Issues raised will be taken seriously and viewed with integrity and impartiality. In some circumstances the Chambers may take interim action in the interests of health and safety that is supportive and sensitive to the possibility that the reported behaviour occurred, without making conclusions. The Chambers may also take proactive steps to address issues of sexual harassment, harassment, discrimination, vilification, victimisation or bullying when they arise and not rely on a complaint being made by the Complainant. The Chambers may take such steps after taking into account the views of the Complainant and if the Complainant is not the Affected Person, the Affected Person. The Chambers will seek to ensure that the Affected Person does not have to retell their story to multiple people.
 - d. All parties involved will be kept well-informed and supported throughout the process to the extent possible.
 - e. All complaints will be dealt with as quickly as practicable.
 - f. Investigations (as applicable) will be concluded as quickly as possible while ensuring the approach is ethical.
 - g. There are a number of ways the Chambers can help to resolve the issue depending on the wishes of the Complainant, the Affected Person (if the Complainant is not the Affected Person), the context and circumstances. The various resolution pathways used by the Chambers are set out in detail in the Grievance and Complaints Framework.
 - h. To the extent possible the Chambers will support the Complainant’s wishes to progress from one pathway to another once the process has commenced if the person feels that is a more appropriate way for the issue to be resolved, for example, starting out wishing for an informal process and then deciding that a more formal investigation would be preferable. However, there may be times when the circumstances of the conduct mean the Chambers must take more formal steps to resolve the issue, such as a formal investigation or referring the matter to the NSW Police. Decisions to escalate issues will be made after consideration of the wishes

of the Affected Person, the seriousness of the behaviour, the context, the impact on the Affected Person, the risk to the psychological and physical safety of others, and the likelihood the behaviour is also a criminal offence. In resolving the issue, the Chambers may also have regard to any other relevant Chambers policy or policies.

Reporting conduct

45. There are multiple pathways for reporting conduct. The Chambers can facilitate a range of resolution pathways to resolve concerns depending on the Complainant's election and the seriousness of the alleged conduct. These include:
 - (a) Early intervention techniques;
 - (b) Interim action;
 - (c) Informal pathways including counselling and mediation (where appropriate);
 - (d) Formal pathways including investigations leading to formal disciplinary outcomes, referral to external bodies, including the OLSC, the NSW Bar Association, the Law Society of NSW, the Judicial Commission of New South Wales, Worksafe and the NSW Police, and remedial steps; and
 - (e) External pathways including complaints and conciliation and other processes initiated by organisations such as the Fair Work Commission, the New South Wales Anti-Discrimination Board and the Australian Human Rights Commission.
46. Time limitations may apply for lodging a complaint with an external body. For example, within 24 months of the incident if you wish the Australian Human Rights Commission to assist for complaints relating to the *Sex Discrimination Act 1984* (Cth) and six months for other complaints. There are also limitations associated with bringing a bullying claim under the *Fair Work Act 2009* (Cth).
47. Issues, concerns and complaints can be reported to the Respectful Relations Officers. There are no time limitations between the incident and reporting the issue to the Respectful Relations Officers. Letting the Chambers know about the conduct does not necessarily trigger a formal investigation, although that may be appropriate in some cases. Support, advice and early intervention may resolve the issue and it will also help the Chambers understand what is happening in Chambers and in the work environment.
48. Complaints can also be made without the Affected Person being identified by contacting <insert Chambers specific anonymous reporting avenue>, the NSW Bar Association's Sexual Harassment Officer on 0427 317 958 or at sexualharassmentofficer@nswbar.asn.au, and online via the anonymous reporting platform, Spot: www.talktopspot.com/nswbar.

49. Alternatively, either formal or informal complaints may be made to the OLSA. The Legal Services Commissioner will only investigate formal complaints. Informal complaints to the OLSA may be made by the Affected Person or a Bystander via [Elker](#).
50. There will be no repercussions for those who report issues in good faith.
51. Repercussions are unlawful as well as against the values and policies of the Chambers.

Procedural fairness and natural justice

52. Where it is appropriate or necessary for the Chambers to undertake an investigation, the investigation will be conducted to ensure there is procedural fairness and natural justice for all parties involved. This includes:
 - a. giving the Respondent the opportunity to understand the allegations made against them and to respond;
 - b. providing appropriate trauma-informed support for all individuals involved and in particular, the Affected Person during complaint handling and investigation; and
 - c. facilitating a timely and objective process.