

HARASSMENT, DISCRIMINATION, VILIFICATION AND VICTIMISATION – BEST PRACTICE GUIDELINE

INTRODUCTION

This harassment, discrimination, vilification and victimisation best practice guideline was approved by the members of Ninth Floor Selborne Chambers on 20 July 2020.

This best practice guideline:

Provides a structure to assist in resolving issues of workplace bullying and to assist in minimizing any associated liability;

1. Promote the dignity and respect of every person in relation to all protected attributes;
2. Provide a framework, and options, for dealing with alleged contraventions of this Guideline;
3. Clearly articulate the Chamber's attitude against bullying;
4. Aids the promotion of compliance with Rule 123 of the Legal Profession Uniform Conduct (Barristers') Rules (the Barristers' Conduct Rules); and
5. Operates in conjunction with and furtherance of the New South Wales Bar Association Diversity and Equity Policy adopted by Bar Council in 2013 (as subsequently modified).

DEFINITIONS

The terms *harassment*, *vilification*, *direct discrimination*, *indirect discrimination* and *victimisation* as used in this best practice guideline are defined at Schedule A.

THE LAW

The New South Wales *Anti-Discrimination Act 1977* 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 discrimination, harassment, vilification and victimisation in most areas of work and in the provision of services.

Rule 123(a) and (b) of the Barristers' Conduct Rules relevantly provide that a barrister must not in the course of practice, engage in conduct which constitutes (a) unlawful discrimination; or (b) unlawful sexual harassment.

Discrimination and/or harassment can also constitute a breach of other Barristers' Conduct Rules including but not limited to Rules 8(a) and 8(c).

Discrimination and/or sexual harassment, including where it constitutes a breach of the Barristers' Conduct Rules, can constitute professional misconduct and/or unsatisfactory professional conduct within the meaning of Division 1, Part 5.4 of the Legal Profession Uniform Law (NSW) (the Legal Profession Uniform Law).

Sexual harassment

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.

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.

“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.

The recent amendments to the Sex Discrimination Act 1984 (Cth) also provide that it is unlawful to harass a person on the ground 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 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 prohibition against sexual harassment to all workplaces and workers, so that barristers are now included within the scope of the Act.

Harassment more generally

Harassment is not limited to sexual harassment and includes disability-based harassment and racial, transgender, HIV/AIDS and/or homosexual vilification.

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.

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.

LIABILITY

A Floor, employer, principal or legal practitioner who fails to take all reasonable steps to prevent employees, agents or fellow workplace participants from engaging in unlawful discrimination, harassment, vilification and/or victimisation may be vicariously liable for such acts or treated as permitting those acts to have occurred.

Any legal practitioner may be:

1. Personally liable under the relevant laws as defined for conduct constituting unlawful discrimination, harassment, vilification and/or victimisation; and/or
2. Found to have engaged in professional misconduct and/or unsatisfactory professional conduct within the meaning of Division 1, Part 5.4 of the Legal Profession Uniform Law by reason of having engaged in conduct constituting unlawful discrimination, harassment, vilification and/or victimisation.

BEST PRACTICE GUIDELINE

1. The members and licensees of this Floor are committed to ensuring that each other and any worker engaged by and/or working on the Floor in any capacity (including employees, contractors, casuals, volunteers, students and/or trainees, whether engaged by the Floor or directly by barristers on the Floor), solicitors, clients, other visitors and/or other barristers working with members of this Floor are free from harassment, vilification, discrimination and/or victimisation whilst on the Floor.
2. Harassment, discrimination, vilification and/or victimisation engaged in:
 - a. By any member and/or licensee of this Floor, or
 - b. By any worker engaged by this Floor or engaged by any barrister on this Floor, toward:
 - i. Any member and/or licensee of this Floor,
 - ii. Any worker engaged by this Floor or engaged by any barrister on this Floor, or
 - c. Any person visiting the Floor including solicitors, workers engaged by those solicitors and/or clients,

constitutes a contravention of this best practice guideline and will not be tolerated.
3. Members and licensees of this Floor, and workers engaged by and on this Floor, have a responsibility to help maintain a work environment that is free from all forms of harassment, discrimination, vilification and/or victimisation.

PURPOSE OF THIS BEST PRACTICE GUIDELINE

3. The purpose of this best practice guideline is to:
 - a. Assist with the elimination and/or prevention of all forms of harassment, discrimination, vilification and victimisation on this Floor;
 - b. Record that this Floor has adopted this best practice guideline, including for the purposes of assisting to minimise the risk of liability associated with any contravention of the relevant laws;
 - c. Implement a procedure whereby any complaint relating to conduct in contravention or alleged contravention of this best practice guideline and/or the relevant laws can be dealt with in accordance with the Model Grievance Handling Best Practice Guideline; and
 - d. Enable any Floor adopting this best practice guideline to, where necessary, seek relevant referrals from the Bar Association Equal Opportunity Committee (EO Committee) in respect of the implementation and/or management of this best practice guideline.

GRIEVANCE/COMPLAINTS PROCEDURE

1. Any enquiry, concern or complaint made in respect of this best practice guideline should be made in accordance with the Ninth Floor Selborne Chambers' Grievance Handling Best Practice Guideline.
2. 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.
3. 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. These are also limitations associated with bringing a bullying claim under the Fair Work Act 2009 (Cth).
4. Complaints can also be made without the Affected Person being identified by contacting 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.talkspot.com/nswbar.
5. Alternatively, either formal or informal complaints may be made to the OLSC. The Legal Services Commissioner will only investigate formal complaints. Informal complains to the OLSC may be made by the Affected Person or a Bystander via Elker.
6. There will be no repercussions for those who report issues in good faith.
7. Repercussions are unlawful as well as against the values and policies of the Chambers.
8. 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 investigations; and
 - c. facilitating a timely and objective process.

CONTRAVENTION OF THIS BEST PRACTICE GUIDELINE

9. Conduct found to have occurred in contravention of this best practice guideline may result in:
 - a. disciplinary action by any employing entity up to and including termination of employment; and/or
 - b. a complaint being made to the Legal Services Commissioner and/or other relevant body where appropriate.

ADDITIONAL MATTERS

10. Ninth Floor Selborne Chambers will:
 - a. Publish this best practice guideline in a place accessible to relevant persons;
 - b. Inform new floor members, licensees and/or workers of this best practice guideline upon that person joining the floor;
 - c. Provide appropriate training in and information about the operation and effect of this best practice guideline;
 - d. Regularly remind floor members, licensees and/or workers of their obligations under this best practice guideline;
 - e. Review the content and operation of this best practice guideline from time to time as necessary.

SCHEDULE A: Definitions

Affect Person means, a person who is the target or focus of conduct alleged to raise a concern under the Guideline (namely sexual harassment, harassment, discrimination, vilification, victimization or bullying), who may or may not also be a Complainant

Barrister means ‘barrister’ as defined in section 6 of the *Legal Profession Uniform Law*.

Bystander means, a person who:

- i. has directly witnessed an incident that raises a concern under the HDB BPG; and/or
- ii. 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.

Complainant means , a person who makes a complaint under the HDB BPG. The person may be an *Affected Person* or a *Bystander*.

Cultural Competency is 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.

Direct discrimination is less favourable treatment on the ground of the following actual, imputed or appertaining characteristics as defined under the relevant legislation: 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.

Disability -based harassment is disparaging or other comments made to the aggrieved person in relation to his or her disability.

Discrimination means direct or indirect discrimination.

Harassment includes sexual harassment, disability-based harassment and racial, transgender, HIV/AIDS and/or homosexual vilification.

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 characteristics including those described immediately above. It is unlawful to require a person with a particular characteristic (as defined above in relation to the definition of ‘direct discrimination’) to comply with an unreasonable requirement or condition where the person with the characteristic cannot comply.

Repeated behaviour refers to the persistent nature of the behaviour and can involve a range of behaviours over time.

Respondent means a person alleged to have engaged in conduct that is in breach of this Guideline.

Sexual harassment is unwelcome conduct of a sexual nature that a reasonable person would anticipate would possibly offend, intimidate or humiliate the person harassed.

Victimisation is subjecting a person to a detriment or adverse treatment because they have done or propose to do any of the following things: make a complaint under anti-discrimination legislation or a complaint about conduct that would constitute unlawful discrimination under anti-discrimination legislation, provide any information or document in relation to an investigation of such conduct, propose to attend a conciliation conference or hearing in relation to a discrimination complaint, or supported someone else lodging a discrimination complaint.

Vilification (meaning racial, transgender, HIV/AIDS and homosexual vilification) is any public act (by speech, publication, conduct or otherwise) which is reasonably likely, in all the circumstances, to offend, insult, humiliate, intimidate or incite hatred, serious contempt, or severe ridicule against another person or group of people, because of their race (including ethno-religious origin), homosexuality, transgender status and/or HIV/AIDS status defined in s 20C, s 38S and s 49ZT of the *Anti-Discrimination Act 1977* (NSW).

Worker includes common law employees, persons who are self-employed, contractors, sub-contractors, employees of sub-contractors, casuals, volunteers, students and/or trainees as defined in s 7(1) of the *Work Health and Safety Act 2011* (Cth) adopted by s 789FC of the *Fair Work Act*.

Some examples of sexual, race-based, disability and other unlawful harassment

- Sexual or suggestive remarks
- Making fun of someone because of their sex, race, colour, ethnic or ethno-religious background, descent or nationality, marital status, pregnancy and potential pregnancy, disability, age, homosexuality (male or female, actual or presumed), transgender and/or responsibilities as a carer
- Imitating someone's accent or disability
- Unwanted sexual propositions
- Repeated, unwelcome invitations to go out with someone
- Spreading sexual rumours about someone
- Obscene or racist, sexist, anti-gay, ageist telephone calls, letters, faxes, or e-mail messages
- Obscene or racist, sexist, anti-gay (and so on) language or illustrations in a work-based publication

- Offensive jokes
- Repeated, unwelcome questions about someone else's personal life
- Sexual, sexist, racist, anti-gay (and so on) threats or insults
- The use of language that is not suitable in the workplace-for example, sexual, sexist, racist, anti-gay (and so on) name calling
- Referring to a person who is transgender by their previous name or gender, or calling him or her 'it'
- Downloading pornography from the Internet
- Displaying any pornography (soft or hard) or any sexual or naked pictures anywhere that any other employee, customer, client or visitor to our workplace can see them
- Stalking another employee, customer, client or workplace visitor
- Showing of X-rated videos
- Putting sexually suggestive, offensive or degrading/insulting material on walls, computer screen savers, faxes, e-mail, and so on
- Suggestive looks or leers
- Unwelcome practical jokes
- Displaying or circulating racist, sexist and so on cartoons or literature
- Mimicking someone with a disability
- Ignoring someone, not sharing information with someone, or being particularly cold or distant with them
- Offensive hand or body gestures
- Unnecessarily leaning over someone or standing too close to them
- Wolf whistling
- Continually ignoring or dismissing someone's contribution in a work meeting or discussion
- Unnecessary physical contact-pinching, patting, brushing up against a person, touching, kissing, hugging against a person's will
- Pushing, shoving or jostling.

*these definitions reflect the provisions as used Federal and New South Wales laws and seek to consolidate the definitions used in:

- *Racial Discrimination Act 1975 (Cth)*
- *Sex Discrimination Act 1984 (Cth)*

- *Disability Discrimination Act 1992 (Cth)*
- *Age Discrimination Act 2004 (Cth)*
- *Australian Human Rights Commission Act 1986 (Cth)*
- *Australian Human Rights Commission Regulations 1989 (Cth)*
- *Fair Work Act 2009 (Cth)*
- *Anti-Discrimination Act 1977 (NSW)*