

## **PARENTAL AND OTHER EXTENDED LEAVE – BEST PRACTICE GUIDELINE**

### **INTRODUCTION**

This Parental and Other Extended Leave Best Practice Guideline was approved by members of Ninth Floor Selborne Chambers on 20 July 2020.

This best practice guideline:

- (a) Provides a framework in which parental and other extended personal leave (including in connection with illness or injury or in the case of First Nations people, cultural rites and practices associated with the death of a member of that person’s family or kinship group) can be facilitated and to assist in minimising any associated liability;
- (b) Aids the promotion of compliance with Rule 123 of the Legal Profession Uniform Conduct (Barristers’) Rules (the **Barristers’ Conduct Rules**);
- (c) Operates in conjunction with and furtherance of the New South Wales Bar Association Diversity and Equity Policy adopted by Bar Council in 2013; and
- (d) Promotes the dignity and respect of every person in relation to all protected attributes.

### **DEFINITIONS**

The terms *parental leave*, *dependant*, *child*, *extended leave*, *eligible employee* and *discrimination* as used in this best practice guideline are defined at **Schedule A**.

### **THE LAW**

Under Part 2-2, Divisions 4 and 5, of the *Fair Work Act 2009* (Cth) (the **FW Act**), Floors employing eligible employees owe those employees specific obligations in respect of parental and other leave, as well as the right to request flexible workplace arrangements.

The New South Wales *Anti-Discrimination Act 1977* as well as the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* (Cth) and the FW Act (the **relevant laws**) make it generally unlawful to discriminate on the grounds of pregnancy, sex, family responsibilities and/or carers' responsibilities, as well as on the basis of disability, 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.

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**).

Nothing in this best practice guideline affects any rights or entitlements under the federal Government paid parental leave scheme.

## **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 may be vicariously liable for such acts or treated as permitting those acts to have occurred.

Any legal practitioner may be:

- a. Personally liable under the relevant laws as defined for conduct constituting unlawful discrimination, harassment, vilification and/or victimisation; and/or
- b. 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 victimization.

## **BEST PRACTICE GUIDELINE – MEMBERS AND LICENSEES**

1. In the event that any member or licensee of this Floor decides to take parental, carer's or other extended leave, including in connection with the birth or adoption of a child, the care of a child or dependant, or in connection with the illness or injury of a Floor member/licensee:
  - a. That member or licensee is permitted to sub-licence his or her room for the duration of the leave. Such sub-licence will be in accordance with the usual procedures relevant to any applicant seeking accommodation on the Floor.
  - b. Any room or space occupied by a member or licensee of this Floor, prior to the member or licensee taking leave, will remain open for a minimum of one year during the period of leave. This applies to each pregnancy and/or adoption in relation to parental leave.
  - c. The member or licensee may, at the Floor's discretion, be offered a period of six months free of rent and chambers fees during the period of leave.
2. At the Floor's discretion extended leave taken in connection with illness or injury of a Floor member/licensee may be subject to the provision of supporting medical documentation.
3. All members and/or licensees on leave:
  - a. Are encouraged to maintain contact with chambers and will continue to receive all Floor emails and communications while on leave.
  - b. The Clerk and/or Floor contact officer, John Kelly SC or the head of chambers from time to time, will ensure that any changes and/or decisions relevant to the Floor likely to affect the member/licensee on leave are communicated to the member/licensee in a timely manner.
  - c. Will be offered opportunities to receive appropriate work, where such work is available, while on leave and where requested. The onus is on the member and/or licensee taking the leave to advise the Clerk and/or Floor contact officer, John Kelly SC or the head of chambers from time to time, if and when she or he is available to accept work and to ensure that she or he maintains a current practising certificate and insurance.
  - d. Will be invited to and notified of social functions, events and continuing professional development events arranged by the floor.
  - e. Will be offered the opportunity and have assistance with setting up home-based work arrangements including remote access to work email accounts, receiving scanned briefs and access to clerk services where requested.
4. Upon returning to the Floor after a period of leave, the member and/or licensee:

- a. may be offered appropriate work, where such work is available and where requested, for the purpose of assisting with re-establishing the member's/licencee's practice.
- b. may be provided the opportunity to return to chambers on a part time basis where requested and will be offered the opportunity and have assistance with setting up home-based work arrangements including remote access to work email accounts, receiving scanned briefs and access to clerk services.
- c. at the Floor's discretion, may be provided the opportunity to room share with another part-time licencee where requested for a period of time as agreed to by the floor. Any part-time licencee will be in accordance with the usual procedures relevant to any applicant seeking accommodation on the Floor.

### **BEST PRACTICE GUIDELINE – FLOOR EMPLOYEES**

- 5. All eligible employees of this Floor will be provided parental leave, associated entitlements and the right to request flexible workplace arrangements in accordance with Part 2-2, Divisions 4 and 5, of the FW Act.
- 6. All eligible employees on leave are encouraged to maintain contact with chambers, including as contemplated under section 79A of the FW Act, and will continue to receive all Floor emails and communications while on leave.
- 7. All employees of the Floor have the protections afforded to them in respect of periods of leave taken because of illness or injury under section 352 of the FW Act.
- 8. Employees of the Floor are entitled to:
  - a. paid personal/carer's leave under Part 2-2, Division 7 of the FW Act – other than casual employees; and
  - b. unpaid carer's leave and other relevant unpaid leave under Part 2-2, Division 7 of the FW Act.

### **PURPOSE OF THIS BEST PRACTICE GUIDELINE**

- 9. The purpose of this best practice guideline is to:
  - a. Provide a framework in which parental and other extended leave can be facilitated on this Floor;
  - b. Assist with the elimination and prevention of unlawful pregnancy, sex, family responsibilities and carers' leave discrimination on this Floor;
  - c. Record that this Floor has adopted this best practice guideline, including for the purposes of assisting to minimize the risk of liability associated with any contravention of the relevant laws;

- d. 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 Procedure; and
- e. 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**

- 10. Any enquiry, concern or complaint made in respect of this best practice guideline should be made in accordance with the Bar Association Model Grievance Handling Best Practice Guideline.

### **CONTRAVENTION OF THIS BEST PRACTICE GUIDELINE**

- 11. 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 Commissioner for Uniform Legal Services Regulation under Part 5.2 of the Legal Profession Uniform Law and/or other relevant body where appropriate.

### **ADDITIONAL MATTERS**

- 12. Ninth Floor Selborne Chambers will:
  - a. Publish this best practice guideline in a place accessible to relevant persons;
  - b. Inform new floor members, licencees 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, licencees 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

Sections 13 and 60 of the FW Act provides the definition of employee for the purposes of that employee's entitlement under Part 2-2 of the FW Act to parental leave, carer's leave and/or personal leave.

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

*Child* has the meaning in section 17 of the FW Act.

*Dependant* means:

- any child or step-child of the person (whether or not under the age of 18 years) who is (i) wholly or substantially dependent on the person, or (ii) in need of care or support, or
- any child or adult who is in need of care or support and:
  - of whom the person is guardian, or
  - for whom the person has parental responsibility under a law of the Commonwealth or this State, or
  - in relation to whom the person is an authorised carer within the meaning of the Children and Young Persons (Care and Protection) Act 1998 , or
- any immediate family member of the person who is in need of care or support, being one of the following:
  - a spouse or former spouse of the person or of a spouse or former spouse of the person,
  - a grandchild or step-grandchild of the person or of a spouse or former spouse of the person,
  - a parent or step-parent of the person or of a spouse or former spouse of the person,
  - a grandparent or step-grandparent of the person or of a spouse or former spouse of the person; or
- a brother or sister, or step-brother or sister, of the person or of a spouse or former spouse of the person. in respect of a First Nations person, any family member of the person who is in need of care or support referred to in the above dot points as well as any person to whom, by reason of familial connection or kinship, that person is obliged to provide care or support.

*\*Discrimination* means direct or indirect discrimination.

*\*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, and can include discrimination on the ground of industrial activity, religious beliefs or activities, political beliefs or activities, criminal record, medical record.

*\*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.

*Eligible employee* in respect of parental leave and requests for flexible work arrangements under Part 2-2, Divisions 4 and 5 of the FW Act, means:

- an employee, other than a casual employee, who has completed at least 12 months continuous service with the employer immediately before the relevant date under Part 2-2, Divisions 4 and/or 5, of the FW Act; or
- an employee who is a long term casual employee with a reasonable expectation of continuing employment by the employer on a regular and systematic basis (but for the birth of the relevant child, the taking of leave or the placement of the adopted child).

*Extended leave* means a period of leave of up to 12 months (and longer at the discretion of the Floor) taken by a Floor member or licensee other than in connection with the birth or adoption of a child and/or the care of a dependant, taken in connection with the illness or injury of the Floor member/licensee.

*Parental leave* in respect of eligible employees has the meaning given in Part 2-2, Division 5, of the FW Act.

*Parental leave* (other than in respect of an eligible employee) means a period of leave of up to 12 months (and longer at the discretion of the Floor) that is associated with:

- the birth of a child of a Floor member/licensee or a Floor member’s/licensee’s spouse or de facto partner; or
- the placement of a child with the Floor member/licensee, or a Floor member’s/licensee’s spouse or de facto partner, for adoption; or
- or in the case of a member/licensee who is a First Nations person, the death of a member of the member/licensee’s kinship group,

where the Floor member/licensee has or will have a responsibility for the care of the child.

\*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)*
- *Work Health and Safety Act 2011 (NSW)*