



NEW SOUTH WALES
BAR ASSOCIATION

MODEL GRIEVANCE HANDLING BEST PRACTICE GUIDELINE

This Model Grievance Handling Best Practice Guideline was approved by Bar Council on 19 June 2014 for adoption by individual chambers/floors of the private Bar and to be applicable in the additional circumstances described below. This best practice guideline provides a structure to assist in dealing with and/or resolving any enquiries, concerns or complaints of harassment, discrimination, vilification, victimisation and/or workplace bullying that may arise and to assist in minimising any associated liability.

The New South Wales Bar Association (the **Bar Association**) will, in accordance with this best practice guideline and with clause 176 of the *Legal Profession Regulation 2005*, organise CPD seminars relating to unlawful harassment, discrimination, vilification, victimisation and workplace bullying.

The Bar Association encourages each set of chambers/floors to seek independent legal advice with respect to the application of the model best practice guideline to its chambers, members and staff. Nothing in this model best practice 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

Definitions

The terms *direct discrimination*, *indirect discrimination*, *harassment* (including sexual harassment and harassment on other grounds), *vilification*, *victimisation*, *workplace bullying*, *worker* and *barrister* as used in this best practice guideline are defined at Schedule A. Hereinafter, the term *Floor* is used to describe chambers and/or floors of the private Bar. The term *Participating Floor* is used to describe a Floor that has adopted this best practice guideline.

What is a Grievance

A grievance is an enquiry, concern or complaint made under or related to the following Bar Association policies:

1. Model Harassment, Discrimination, Vilification and Victimisation Policy;
2. Model Bullying Policy; and/or
3. Model Parental and Other Extended Leave Policy.

The purpose of this Model Grievance Handling Best Practice Guideline is to assist with the resolution of any such grievance.

Application of this Best Practice Guideline

This best practice guideline is applicable to:

1. Participating Floors of the private bar in respect of:
 - a. the members and/or licensees of the Floor (paying and non-paying), including all readers;
 - b. all workers 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 the Floor; and
2. Bar Association event attendees, committee members and examination candidates as follows:
 - a. all barristers attending any event, function and/or seminar convened by the Bar Association, including barristers attending any social function, any continuing professional development seminars, the Bar Practice Course and associated seminars (**Bar Association event attendees**);
 - b. all barrister members of Bar Association committees and sections while attending any such committee or section meetings, events, functions and/or seminars convened by such committees and sections and/or while undertaking any committee or section duties or functions (**Bar Association committee members**); and
 - c. all examination candidates while sitting the bar examinations conducted by the Bar Association (**Bar Association examination candidates**).

Structure of this Best Practice Guideline

3. Structure of this best practice guideline:
 - a. Part A below provides a grievance best practice guideline for Participating Floors, floor members/licensees and the workers/employees of those floors.
 - b. Part B below provides a grievance best practice guideline for Bar Association event attendees, Bar Association committee members and Bar Association examination candidates.

- c. Part C below sets out the specific steps likely to be taken in respect of a grievance as well as important points applicable to all grievances.

The Law

4. 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.
5. Orders are also available under the *Fair Work Act 2009* to stop workplace bullying where it occurs.
6. The definition of workplace bullying relevant for this Model Grievance Handling Best Practice Guideline and the associated Model Bullying Best Practice Guideline is that contained in Rule 117(c) of the New South Wales Barristers' Rules.
7. Rule 117 of the New South Wales Barristers' Rules provides that a barrister must not in the course of practice, engage in conduct which constitutes (a) discrimination; (b) sexual harassment; or (c) workplace bullying.
8. Under the *Legal Profession Regulation 2005*, a legal practitioner who, in connection with the practice of law, engages in any conduct that constitutes unlawful discrimination (including unlawful sexual harassment) under the *Anti-Discrimination Act 1977* against any person can be liable for professional misconduct.
9. Discrimination and/or sexual harassment, including where it constitutes a breach of the New South Wales Barristers' Rules and/or Regulation 175 of the *Legal Profession Regulation 2005* (NSW), can constitute professional misconduct and/or unsatisfactory professional conduct within the meaning of sections 496 and 497 of the *Legal Profession Act 2004* (NSW).

Liability

10. A Floor, employer, principal or legal practitioner:
 - a. 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;

- b. may be liable under the common law in certain circumstances for conduct of employees or agents engaging in unlawful discrimination, harassment, vilification, victimisation and/or workplace bullying.

PART A: Procedure for Participating Floors

11. Any member or licensee on, or worker engaged by, a Participating Floor can take the steps set out below in the event of a grievance.
12. As a first step, where appropriate the complainant should attempt to sort it out with the person or people involved. This should be done as soon as possible.
13. If the complainant needs or would prefer to have assistance,
 - a. s/he can talk to the Floor Contact Officer, namely [*name to be inserted by Participating Floor; ordinarily Head of Chambers*] (for the purposes of Part A and Part C, ‘the **grievance handler**’); and
 - b. may seek guidance as to other avenues for assistance from the Bar Association Contact Officer, namely [**Executive Director of the New South Wales Bar Association.**]
14. The action taken in response to a grievance will depend on the nature and gravity of the conduct reported and the extent to which the aggrieved person wishes to make a complaint.
15. In general, the Floor will endeavour to resolve any grievance by consultation/mediation on an informal and confidential basis.
16. Where appropriate, the Floor will investigate the allegations by making confidential enquiries of those alleged to be involved. As a first step, this will involve obtaining full details of the complainant’s grievance as soon as possible.
17. If satisfied that conduct has occurred in contravention of any Floor policy, the Floor will take such steps as are deemed appropriate and having regard to all the circumstances to ensure that the conduct ceases and will not reoccur.
18. Where the matter is particularly serious or for any other reason, the complainant or the Floor may:
 - a. make a complaint to the Legal Services Commissioner under the provisions of the *Legal Profession Act 2004*;

- b. speak with any relevant external agency, such as the NSW Anti-Discrimination Board, the Australian Human Rights Commission, the Fair Work Commission and/or the Fair Work Ombudsman; and/or
 - c. seek independent legal advice and/or pursue remedies that may be available, including under the relevant laws.
19. The obligation under the relevant laws on a Floor to take ‘all reasonable steps’ to prevent discrimination, harassment, vilification and/or victimisation in order to minimise the risk of a finding of liability may require Floor members to be proactive in addressing issues when they arise and not rely on a complaint being made by the person affected by the conduct.
20. Subjecting a person to a detriment because that person has made or proposes to make a complaint under this best practice guideline or the relevant laws, or has made or proposes to make a complaint about conduct that would constitute a contravention of this policy or the relevant laws constitutes victimisation in contravention of the Discrimination, Harassment and Victimisation Best Practice Guideline and the relevant laws.

PART B: Procedure for Bar Association Events Attendees, Committee Members and Examination Candidates

21. Any Bar Association event attendee, Bar Association committee member or Bar Association examination candidate can take the steps set out below in the event of a grievance.
22. As a first step, where appropriate the complainant should attempt to sort it out with the person or people involved. This should be done as soon as possible.
23. If the complainant needs or would prefer to have assistance, he or she may talk to the Bar Association contact officer, namely [**Executive Director of the New South Wales Bar Association**] (for the purposes of part B and part C, ‘the **grievance handler**’).
24. The action taken in response to a complaint or enquiry made under this best practice guideline will depend on the nature and gravity of the conduct reported and the extent to which the aggrieved person wishes to make a complaint.
25. As a first step, the Bar Association will investigate the allegations by making confidential enquiries of those alleged to be involved. As a first step, this will involve obtaining full details of the complainant’s grievance as soon as possible.
26. If satisfied that conduct has occurred in contravention of the relevant policy, the Bar Association will take such steps as are deemed appropriate and having regard to all the circumstances to ensure that the conduct ceases and will not reoccur.

27. In general, the Bar Association will endeavour to resolve any issues by consultation/mediation on an informal and confidential basis.

28. Where the matter is particularly serious or for any other reason, the complainant may:

- a. make a complaint to the Legal Services Commissioner under the provisions of the *Legal Profession Act 2004*; and/or
- b. speak with any relevant external agency, such as the NSW Anti-Discrimination Board, the Australian Human Rights Commission, the Fair Work Commission and/or the Fair Work Ombudsman; and/or
- c. seek independent legal advice and/or pursue remedies that may be available, including under the relevant laws.

29. Subjecting a person to a detriment because that person has made or proposes to make a complaint under this policy or the relevant laws, or has made or proposes to make a complaint about conduct that would constitute a contravention of this policy or the relevant laws constitutes victimisation in contravention of the Discrimination, Harassment and Victimisation Best Practice Guideline and the relevant laws.

PART C: Specific Steps likely to be taken by a Grievance Handler and Important Points

30. As soon as practicable, and usually within 2 working days of the complainant making a grievance handler aware of his or her grievance, a grievance handler will:

- a. get full information from the complainant about the grievance and what will resolve it from his or her perspective and whether the sought outcome is available and/or achievable;
- b. explain how the grievance best practice guideline works including what will be done to protect the complainant from victimization;
- c. decide if the grievance handler is the appropriate person to continue handling the grievance. Issues such as the gravity of the complaint and the identity of those against whom the complaint is made will be taken into consideration in this respect;
- d. as soon as practicable, and usually within 2 working days, the grievance handler will put the information they received from the complainant to the person/people about whom the complaint is made and get their side of the story;

- e. where practicable, within 5 working days of interviewing the person/people about whom the complaint is made, and no later than four weeks from the date the complainant first approached the Contact Officer, the grievance handler will:
 - i. work out whether they have enough information to know whether the matter(s) alleged in the grievance occurred. If it is unclear whether the alleged conduct occurred, the grievance handler may speak to witnesses;
 - ii. decide how the grievance should be resolved and advise everyone involved of the outcome.
31. Conduct found to have occurred in contravention of the relevant Bar Association Model 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 any other relevant body where appropriate.
32. The grievance handler will advise the complainant (and the person(s) about whom the complaint is made if necessary) if it appears to him or her that the matters raised by the grievance may necessitate disciplinary action. At his or her discretion, the grievance handler may also provide such advice to any employing entity and/or relevant Floor.
33. It will be a matter for the persons involved as to whether to make a complaint with the Legal Services Commissioner.
34. Generally speaking, a minor grievance where the issues are not in dispute will be mediated.

Important Points

Any grievance will be dealt with confidentially, impartially, promptly and without repercussion.

Confidentiality

Where possible, only people directly involved in the grievance or in its attempted resolution will have access to information about the grievance. There are circumstances where information may not be able to be kept confidential, such as if physical threats are involved or the law otherwise requires it.

Impartiality

Involved parties will have a chance to tell their story. No assumptions will be made and no action taken until all relevant information is collected and considered.

No repercussions

No action will be taken against anyone for making or helping someone to make a genuine grievance. Subjecting a complainant or person assisting a complainant to a detriment because they have made a complaint or said that they will make a complaint constitutes victimisation, which constitutes an offence under the relevant laws.

Promptness

All complaints will be dealt with as quickly as practicable.

Dated: 19 June 2014

SCHEDULE A: Definitions

Barrister means ‘barrister’ as defined in section 4 of the *Legal Profession Act 2004* (NSW).

**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.

**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.

**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 described in the definition of direct discrimination) to comply with an unreasonable requirement or condition where the person with the characteristic cannot comply.

**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 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 that incites 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 as 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 2009* (Cth).

Workplace bullying means behaviour that could reasonably be expected to offend, intimidate, degrade, humiliate, isolate or alienate a person working in a workplace as defined by the New South Wales Barristers Rules dated 6 January 2014.

*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)