



NEW SOUTH WALES  
BAR ASSOCIATION

## MODEL HARASSMENT, DISCRIMINATION, VILIFICATION AND VICTIMISATION BEST PRACTICE GUIDELINE

This model harassment, discrimination, vilification and victimisation 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 resolving any matters of harassment, discrimination, vilification and/or victimisation 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 and victimisation.

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 *harassment*, *vilification*, *direct discrimination*, *indirect discrimination* and *victimisation* 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.

### Application of this Best Practice Guideline

This best practice guideline is applicable to:

1. Participating Floors in respect of:
  - a. the members and/or licensees of the Floor (paying and non-paying), including all readers; and

- 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.
2. The Bar Association, in respect of all services it provides, including events, functions and/or seminars it convenes in relation to any matter on any premises, including in respect of all social functions, all continuing professional development seminars, the Bar Practice Course and associated seminars and the bar examinations.
3. 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

Structure of this best practice guideline:

4. Part A below applies to Participating Floors, floor members/licensees and the workers/employees of those floors.
5. Part B below applies to the Bar Association event attendees, Bar Association committee members, Bar Association examination candidates and the services provided by the Bar Association as described above at paragraph 2.

## The Law

6. 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.

7. Rule 117(a) and (b) of the New South Wales Barristers' 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.
8. Discrimination and/or harassment can also constitute a breach of other New South Wales Barristers' Rules.
9. 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.
10. 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

11. 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: Best Practice Guideline for Participating Floors

12. 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.

13. 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:

- c. any member and/or licensee of this Floor;
- d. any worker engaged by this Floor or engaged by any barrister on this Floor; or
- e. 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.

14. 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

15. 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 advice 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

16. 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

17. 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.

## Part B: Best Practice Guideline Applicable to the New South Wales Bar Association

18. The New South Wales Bar Association is committed to ensuring that:
  - a. its employees and any other workers engaged by it in any capacity (including contractors, casuals, volunteers, students and/or trainees);
  - b. barristers (including readers) attending the Bar Association premises and any premises on which Bar Association events, functions and/or seminars are convened, including all social functions, continuing professional development seminars, the Bar Practice Course and associated seminars, including for the purposes of assisting with the conduct of any such events, functions and/or seminars;
  - c. barristers (including readers) who are members of any Bar Association committees and sections; and
  - d. any other visitors to the Bar Association premises and any premises on which Bar Association events, functions and/or seminars are convened, including all social functions, continuing professional development seminars, the Bar Practice Course and associated seminars,

are free from harassment, vilification, discrimination and/or victimisation, including in connection with:

- e. All services provided by the Bar Association, including events, functions and/or seminars it convenes in relation to any matter on any premises, including all social functions and in respect of all continuing professional development seminars, the Bar Practice Course and associated seminars and the bar examinations, and
  - f. The interactions of the members of all Bar Association committees and sections and any events, functions and/or seminars convened by such committees and sections.
19. Harassment, discrimination, vilification and/or victimisation engaged in by any barristers (including readers) attending the Bar Association premises and any premises on which Bar Association events, functions and/or seminars are convened, including all social functions, continuing professional development seminars, the Bar Practice Course and associated seminars, including for the purposes of assisting with the conduct of any such events, functions and/or seminars, **toward any person** constitutes a contravention of this best practice guideline and will not be tolerated.

### Purpose of this Best Practice Guideline

20. 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 within the Bar Association and at all Bar Association events, functions and/or seminars;
  - b. record that the Bar Association 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 procedure below; and
  - d. enable the Bar Association to, where necessary, seek advice from the EO Committee in respect of the implementation and/or management of this best practice guideline.

### Grievance/Complaints Procedure

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

## Contravention of this Best Practice Guideline

22. Conduct found to have occurred in contravention of this best practice guideline may result in disciplinary action including up to termination of employment or engagement in respect of any worker engaged by the Bar Association.

Dated: 19 June 2014

## SCHEDULE A: Definitions

*\*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 above) 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 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).



*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'.
- 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 X-rated videos.
- Putting sexually suggestive, offensive or degrading/insulting material on walls, computer screen savers, faxes, e-mail, and so on.
- Unwelcome practical jokes.
- Displaying or circulating racist, sexist (and so on) cartoons or literature.
- 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)