

NEW/CHAMBERS

New Chambers 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:

- (a) 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;
- (b) Aids the promotion of compliance with Rule 123 of the Legal Profession Uniform Conduct (Barristers’) Rules (the **Barristers’ Conduct Rules**); and
- (c) Operates in conjunction with and furtherance of the New South Wales Bar Association Diversity and Equity Policy adopted by Bar Council in 2013.

The New South Wales Bar Association (the **Bar Association**) will, in accordance with this best practice guideline, 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

STRUCTURE OF THIS BEST PRACTICE GUIDELINE

2. 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 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

3. 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.
4. Orders are also available under the *Fair Work Act 2009* to stop workplace bullying where it occurs.
5. 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 123(c) (and associated definitions) of the Barristers' Conduct Rules.
6. Rule 123 of the Barristers' Conduct 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.
7. Workplace bullying can also constitute a breach of anti-discrimination, workplace safety and/or other laws where it amounts to discrimination, a workplace safety risk, a breach of an employment contract and/or breach of duty.

8. 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 sections Division 1, Part 5.4 of the Legal Profession Uniform Law (NSW) (the **Legal Profession Uniform Law**).

LIABILITY

9. 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, work health and safety legislation and/or other laws in certain circumstances for conduct of employees or agents engaging in workplace bullying.
10. Any legal practitioner may be:
 - a. Personally liable under the relevant laws as defined for conduct constituting unlawful discrimination, harassment, vilification, victimization and/or workplace bullying; 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, victimization 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 one of the Floor Contact Officers, Anthony McInerney SC, Kate Eastman SC, Sonia Tame and Marina Kortum; and
 - b. may seek guidance as to other avenues for assistance from the Bar Association Contact Officer, namely President of the New South Wales Bar Association or President's nominee.
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 and/or mediation on an informal and confidential basis.
16. Where appropriate, the Floor will address 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 Commissioner for Uniform Legal Services Regulation under the provisions of the *Legal Profession Uniform Law*;
 - 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: SPECIFIC STEPS LIKELY TO BE TAKEN BY A GRIEVANCE HANDLER AND IMPORTANT POINTS

21. As soon as practicable, and usually within 2 working days of the complainant making a Floor Contact Officer aware of his or her grievance, a Floor Contact Officer or his/her nominee 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 victimisation.
 - c. Decide if the Floor Contact Officer or his/her nominee 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. If the Floor Contact Officer or his/her nominee is not the appropriate person to handle the grievance, take steps immediately to appoint an appropriately qualified and experienced person to handle the grievance and provide that person with all information collected to date.
 - e. As soon as practicable, and usually within 2 working days, the person with responsibility to handle the grievance (**‘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.
 - f. 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. Report any findings to the Board of the Floor with any recommendations as to how the grievance may be resolved.
 - g. Within 2 days of receiving the grievance handler’s findings and recommendations, the Floor will take such measures as it considers appropriate to resolve the grievance, including if appropriate the matters set out on paragraph 23 below. The complainant and person/s about whom the grievance was made will be advised of the Floor’s decision.
22. The timeframes herein represent a best practice guideline. If not met, this Model Grievance Handling Best Practice Guideline is intended to remain applicable.
23. 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 Commissioner for Uniform Legal Services Regulation and/or any other relevant body where appropriate.
24. It will be a matter for the persons involved as to whether to make a complaint with the Commissioner for Uniform Legal Services Regulation.

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.

ADDITIONAL MATTERS

25. Participating Floors 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.

DATED: 19 June 2014 (updated March 2016)

SCHEDULE A: Definitions

Barrister means ‘barrister’ as defined in section 64 of the *Legal Profession Uniform Law*.

**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 unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate or cause serious offence to a person working in a workplace as defined by the Barristers’ Conduct.

*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)*