



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:

- (a) 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;
- (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 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.

STRUCTURE OF THIS BEST PRACTICE GUIDELINE

2. Structure of this best practice guideline:
 - a. Part A below applies to Participating Floors, floor members/licenseses and the workers/employees of those floors.

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. 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.
5. Discrimination and/or harassment can also constitute a breach of other Barristers' Conduct Rules.
6. 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**).

LIABILITY

7. 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.
8. Any legal practitioner may be:
 - a. Personally liable under the relevant laws as defined for conduct constituting unlawful discrimination, harassment, vilification and/or victimization; 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.

PART A: BEST PRACTICE GUIDELINE FOR PARTICIPATING FLOORS

9. 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.

10. 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.

11. 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

12. 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

13. 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

14. 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

15. 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

**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.

**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)*