

CPD FOR UPDATED BEST PRACTICE GUIDELINES



NEW SOUTH WALES
BAR ASSOCIATION

12 MARCH 2023

Acknowledgment of country

- We are meeting together today from many different places. We acknowledge each of the First Nations Peoples who are the traditional custodians of the land on which we are meeting and pay our deep respects to all Elders past, present and future.

Introduction to the Updated BPGs

- 5 documents
 - Model Harassment, Discrimination and Bullying Best Practice Guideline
 - Model Grievance and Complaints Framework
 - Guidance Materials
 - Model Parental and Other Extended Personal Leave Guidelines
 - Bar Association Conduct Guidelines
- Find the Updated BPGs here: [Best Practice Guidelines | New South Wales Bar Association \(nswbar.asn.au\)](https://www.nswbar.asn.au)

Structure of the CPD

- History of the BPGs, why chambers should adopt them and the key aspects of the Model Harassment, Discrimination and Bullying BPG
- Guidance Materials and Bar Association Conduct Guidelines
- Model Grievance and Complaints Framework, Model Parental and Other Extended Personal Leave Guidelines and judicial bullying
- Questions

History of the BPGs

- First approved by Bar Council in June 2014 and subsequently adopted by many chambers
- Issues identified with operation of BPGs in practice plus increased focus on prevalence of bullying, discrimination and sexual harassment in various professions
- Bar Council initiated a review of the BPGs
- Updated BPGs approved by Bar Council in March and April 2022 and officially launched in June 2022

Why should chambers adopt the updated BPGs?

- Obtain independent legal advice
- Everyone is expected to behave in ways that are safe, respectful and inclusive
- Everyone has a role to play in preventing and responding to harassment, discrimination, vilification, victimisation and/or bullying
- BPGs developed to assist with the elimination and/or prevention of all forms of harassment, discrimination, vilification, victimisation and/or bullying in chambers
- BPGs promote the dignity and respect of every person
- BPGs provide a framework and options for dealing with unlawful conduct
- BPGs clearly articulate the attitude of each chambers to harassment, discrimination, vilification, victimisation and/or bullying ie that this kind of behaviour is unacceptable and will not be tolerated

Model Harassment, Discrimination and Bullying BPG – key aspects

- [9]: persons to whom the Guideline applies
- [10]: purposes of the Guideline
- [11]-[13]: consequences of failing to comply with the Guideline
- [14]-[25]: law on harassment, discrimination and bullying

Model Harassment, Discrimination and Bullying BPG – key aspects cont'd

- Relevant Laws:
 - *Anti-Discrimination Act 1977* (NSW)
 - *Racial Discrimination Act 1975* (Cth)
 - *Sex Discrimination Act 1984* (Cth)
 - *Disability Discrimination Act 1992* (Cth)
 - *Age Discrimination Act 2004* (Cth)
 - *Fair Work Act 2009*
- Professional conduct obligations
 - Rules 123 and 125, recently amended

Model Harassment, Discrimination and Bullying BPG – key aspects cont'd

- Amended r 123:
 - (1) A barrister must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes:
 - (a) discrimination,
 - (b) sexual harassment, or
 - (c) ~~workplace~~-bullying.
 - (2) For the purposes of subrule (1), conduct in connection with a barrister's profession includes, but is not limited to:
 - (a) conduct at social functions connected with the bar or the legal profession; and
 - (b) interactions with a person with whom the barrister has, or has had, a professional relationship.

Model Harassment, Discrimination and Bullying BPG – key aspects cont'd

- Definitions – amended r 125:

~~*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~~.

sexual harassment means sexual harassment as defined under applicable state, territory or federal anti-discrimination or human rights legislation

Model Harassment, Discrimination and Bullying BPG – key aspects cont'd

- [23]: reporting obligation under s 316, *Crimes Act 1900* (NSW)
- [24]-[25]: obligations under the *Work Health and Safety Act 2011* (NSW) which apply to sole traders ie barristers
- [26]-[39]: what is meant by harassment, discrimination, bullying, vilification and victimisation
 - Guideline includes definitions
 - Examples in Guidance Materials
 - Read the Guideline with the Guidance Materials

BPG Guidance Materials

- Intended to be read with the Guideline.
- Provides further guidance to chambers and floors about particular aspects of the Guideline.

Sexual Harassment

Some aspects of recent amendments to the *Sex Discrimination Act 1984* (Cth) include:

- making it unlawful to harass a person on the grounds of their sex;
- extending the accessorial/ancillary liability provisions in the Act;
- expanding the coverage of the protection against sexual harassment to all workplaces and workers so as to include barristers within the scope of the Act.

Sexual Harassment

- Can occur even when the conduct is unintended or not directed at the person.
- A lack of objection does not mean behaviour was welcomed or acceptable.
- A one-off incident or a pattern of behaviour can constitute sexual harassment.
- What may not offend one person, may still offend another and meet the definition of sexual harassment.

Sexual Harassment

- Consumption of alcohol or any other substance is not an excuse or an extenuating circumstance.
- Some behaviours may be serious enough to constitute criminal offences.
- Sexual harassment in all its forms is an abuse of power, unethical and unlawful.

Sexual Harassment

- Sexual harassment is particularly prevalent where hierarchical structures and general inequality exists.
- Context is essential.

Sexual Harassment

Relevant contextual factors may include:

- any power disparity between the parties;
- history of the relationship;
- previous patterns of behaviour between the parties;
- tones, verbal and non-verbal cues;
- position or level of seniority;
- employment status;
- where and when the incident took place; and
- personal characteristics of the person subject to sexual harassment.

Discrimination

- Discrimination may be direct or indirect.
- **Direct discrimination** – a person or a group of people may be discriminated against directly if they are treated less favourably than others because of their personal characteristics.
- **Indirect discrimination** – arises when a rule or policy has the effect of disadvantaging a person or group of people because of a particular characteristic.

Bullying

Rule 125 of the Barristers Conduct Rules defines bullying as:

unreasonable behaviour that could reasonably be expected to intimidate, degrade, isolate, alienate or cause serious offence to a person.

Bullying

Rule 123(2) of the Barristers Conduct Rules provides that conduct in connection with a barrister's profession includes, but is not limited to:

- a) conduct at social functions connected with the bar or the legal profession, and
- b) interactions with a person with whom the barrister has, or has had, a professional relationship.

Bar Association Conduct Guidelines

The Guidelines apply to:

- all members of the Bar Association;
- persons who work for or with the Bar Association as employees, contractors or in other capacities including work experience students and volunteers; and
- third parties who attend Bar Association Events.

Bar Association Conduct Guidelines

Purpose includes (amongst other things):

- to assist with the elimination or prevention of all forms of harassment, discrimination, vilification, victimisation and bullying for persons working for or with the Bar Association or attending Bar Associations Events; and
- to promote adherence to all relevant laws including the Uniform Law and Barristers' Conduct Rules.

Bar Association Conduct Guidelines

- The framework for handling complaints is set out in Appendix A to the Conduct Guidelines.
- Conduct in contravention of the Conduct Guidelines may result in disciplinary action.
- If the respondent is an employee of the Bar Association, the matter will be addressed in compliance with the Bar Association's Workplace Policies.

Model BPG: Grievance and Complaints Framework

The Framework's:

- Aim is to provide a prompt and equitable resolution of concerns about potential breaches of the Model BPG on Harassment, Discrimination and Bullying
- Content includes recommended processes for Chambers to handle complaints
- Approach is a trauma-informed approach to grievance handling

Who is covered by the Framework?

The Framework has broad application to persons who attend Chambers for work, including:

- all residents of chambers: members, licensees, readers, door tenants and ‘floaters’;
- all employees, volunteers, students and contractors engaged by Chambers;
- all solicitors, clients and barristers working with a barrister of the Chambers; and
- any court and tribunal staff or others present at the Chambers or at a work-related function.

Respectful Relations Officers (RROs)

- The Framework recommends the appointment of two (or more) RROs.
- Function of an RRO is to receive any report from a complainant (person affected or by-stander) about an alleged breach of the HDB BPG.
- If possible, RROs should be of different genders.

Four types of resolution pathways

1. Early intervention techniques
2. Interim action
3. Informal pathways
4. Formal pathways

Under the Framework, Chambers will support a complainant's wish to proceed under a certain path to the extent possible.

Complaints against the Judiciary

If a person is subject to or witnesses unacceptable conduct by a member of the judiciary in NSW, they may pursue one or more of:

1. Anonymous reporting (SPOT or Sexual Harassment Officer)
2. Informal reporting (NSWBA)
3. Formal reporting (NSWBA or Judicial Commission of NSW)

Model Parental & Other Extended Personal Leave BPG

Parental Leave – birth or adoption of a child

Carer's Leave – to care for a dependent

Other Extended Personal Leave – own illness, injury or disability or of spouse/de facto partner or child

Aim:

1. to provide a framework in which parental and other extended personal leave can be facilitated by Chambers; and
2. to assist with elimination and prevention of discrimination based on pregnancy, gender and family/carer responsibilities.

*Applies to members/licensees (incl readers) and eligible employees

*Options suggest different structures for different Chambers