# The pursuit of excellence: the Bar Association's Best Practice Guidelines

By Penny Thew and Ingmar Taylor SC[1]

The future of a strong and independent bar in New South Wales depends upon the pursuit of excellence so as to retain essential public confidence in it. That requires not only the attraction of the best practitioners drawn from the widest possible pool but, just as importantly, their retention within the profession. To assist to achieve these ends the bar must strive to ensure that all who practise are free from harassment, discrimination, vilification, victimisation and bullying and that appropriate steps are taken whenever a grievance arises in those areas. For these reasons the adoption of the Bar Association's *Model Best Practice Guidelines* (BPGs) [2] and the adherence to them are fundamental steps which should be taken by chambers. Important protective legal effects arise for those who do so.

In the context of the Bar Association's current second annual review of the BPGs, it is timely to consider the impetus for their creation and adoption by Bar Council on 19 June 2014, as well as their operation and desired effect, which provide the reasons for the Bar Association's ongoing strong recommendation that they be adopted and implemented by chambers.

## Why the BPGs were developed

Several events came together in 2014 to trigger the re-evaluation of the Bar Association's then *Model Sexual Harassment and Discrimination Policy*[3] which led to a decision to provide members with comprehensive guidelines that could be adopted, in line with recent Federal Court of Australia authority.[4]

The prime mover was the introduction on 6 January 2014 of former Rule 117 of the *New South Wales Barristers' Rules*,[5] now Rule 123 of the *Legal Profession Uniform Conduct (Barristers') Rules 2015*,[6] which proscribed (for the first time) discrimination, sexual harassment and workplace bullying by barristers. Until then, discriminatory and bullying conduct between barristers had been largely unregulated in New South Wales,[7] since anti-discrimination legislation[8] generally does not cover conduct *between* self-employed persons such as barristers.[9] Regulation 175 of the *Legal Profession Regulation 2005* (NSW) (now repealed) proscribed discriminatory conduct, but only conduct that breached the NSW AD Act.[10] In contrast Rule 123, discussed below in more detail, specifically covers all discriminatory[11] or bullying conduct in the practise of law by barristers, including conduct not otherwise caught by anti-discrimination legislation.

Second, in tandem with the introduction of Rule 117, in February 2014 the Law Council of Australia released its widely publicised National Attrition and Re-engagement Study Report (NARS Report) which contained some startling findings.[12] Arising out of a study of 3960 men and women participants

Launch of the best practice guidelines in August 2014 with Jane Needham SC (then president of the Bar Association) in foreground and Major General Morrison (retired) (2016 Australian of the Year).

in the legal profession across Australia, the NARS Report disclosed 'a very high level of discrimination and harassment at work' among both men and women legal practitioners,[13] with half of all women respondents reporting having experienced sex discrimination[14] and one in two women, and more than one in three men, reporting having been bullied or intimidated in their current workplace.[15] The 'unsustainability' of the 'pressure, stress and poor work/life balance' were said to be the drivers for those leaving the profession altogether.[16]

Third, only days before the introduction of Rule 117[17] (which included a provision proscribing 'workplace bullying'), amendments were made to the *Fair Work Act 2009* (Cth) (FW Act) implementing Australia's first dedicated, statutory anti-bullying regime. The regime applies to workers[18] 'at work' at a constitutional corporation.[19] While the anti-bullying regime in the FW Act does not apply to interactions between individual barristers,[20] it does apply to workers engaged by barristers' chambers (or engaged directly by barristers who are members of those chambers) where those chambers are operated by constitutional corporations,[21] as is usually the case.

This meant that with the introduction of Rule 117 on 6 January 2014, many barristers were required to comply with two new and different proscriptions against workplace bullying,[22] depending upon how a barrister's chambers operations happen to be structured. This has continued to be the case under Rule 123 since it commenced operation on 27 May 2015. This duplication in standards applicable to many barristers was a further driver to the introduction by the Bar Association of the BPGs.

These factors, combined with the effect of successive decisions of the Federal Court of Australia heralding an upward shift in awards of general damages in harassment cases generally[23] and an apparent increased willingness of courts and tribunals to impose disciplinary penalties on legal practitioners as a result of findings of sexual harassment,[24] led the Bar Association to encourage members and chambers to adopt new equality, diversity and anti-discrimination standards.

## Aims of the BPGs

The BPGs aim to:

(a) assist members to be aware of, and comply with, their obligations under the Rules and Legal Profession Uniform Law (NSW) generally, as well as under Commonwealth and state anti-discrimination and employment legislation in a barrister's capacity as an employer or service provider;

(b) assist in the management of risk by providing a pro forma policy reflecting the requirements set out in the Federal Court of Australia authority;[25]

(c) provide a uniform benchmark to be used for guidance in complying with various obligations; and

(d) provide a mechanism for addressing and managing grievances, while taking into account the particular features of a barrister's practice.

The Bar Association encourages members and chambers of the private bar to implement the BPGs as a means to assist with achieving best practice in professional conduct and in minimising exposure to the risks outlined above.

It is best practice for any organisation that employs or engages staff to avoid exposure to risk by implementing appropriate workplace policies. In particular, their adoption reduces the likelihood of the employer or principal being liable where an employee or agent discriminates against or harasses a person, since such liability is more likely to be established where the employer or principal failed to take 'all reasonable steps'[26] to prevent the impugned conduct.[27]

Taking 'all reasonable steps' requires an employer or principal to, at the least, formulate, implement and train employees in appropriate and specifically worded workplace policies. It has been held that to be legally effective such policies must: include statements that the proscribed conduct (such as sexual harassment) is unlawful; identify the legislative foundation of the prohibition of the conduct; state that the conduct is against company policy; and state that the employer may be vicariously liable for the conduct.[28] This applies to any employing entity,


Cartoon: By Mike Flanagan / CartoonStock.com

including any entity or principal by which chambers staff are engaged, and to any barristers who are themselves employers or principals.

The *Model Harassment, Discrimination, Vilification and Victimisation BPG* has been specifically drafted to take into account the particular obligations falling on chambers and barristers as employers or principals to assist in minimising the risk of findings of vicarious liability for discriminatory conduct.[29]

## Obligations under the rules and otherwise

The reach of Rule 123 is broad. It provides:

> A barrister must not in the course of practice, engage in conduct which constitutes:
>
> (a) discrimination;
>
> (b) sexual harassment; or
>
> (c) workplace bullying.

A breach of Rule 123 potentially has serious consequences because conduct amounting to a breach of the Rule is capable of constituting professional misconduct or unsatisfactory professional conduct by operation of section 298(b) of the Legal Profession Uniform Law (NSW).

The extensive breadth of Rule 123 is a result of the definition of 'discrimination' under Rule 125. That definition significantly extends the reach of Rule 123(a) so as to catch not only 'unlawful discrimination' but also all forms of unlawful harassment,[30] vilification[31] and victimisation.[32] This is because 'unlawful discrimination' is defined in section 3 of the AHRC Act to include all 'acts, omissions or practices that are unlawful'

under the operative provisions of Commonwealth anti-discrimination legislation.

The reach of Rule 123(a) and (b) is broadened further still by deliberately capturing discriminatory conduct *between* barristers. This is as a result of the definition of 'discrimination' and 'sexual harassment' contained in Rule 125 specifically including conduct that is *defined* as such under anti-discrimination legislation, rather than only conduct that is *unlawful* under such legislation.[33]

The scope of Rule 123(c), 'workplace bullying', is likely sufficiently wide to capture conduct not caught by Rule 123(a) or (b). The term 'workplace bullying' for the purposes of Rule 123(c) is defined in Rule 125 to mean 'unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate or cause serious offence to a person working in a workplace.'

That captures a wider class of conduct than is caught by the FW Act where three distinct elements need to be established, namely: that the conduct was unreasonable; repeated; and constituted a risk to health and safety.[34] Rule 123(c) requires satisfaction of only the first of these elements (namely that the conduct be unreasonable), so presents a significantly lower hurdle for complainants in establishing bullying by a barrister. In addition, there is no exception to the bullying proscription under the Rules, whereas the FW Act contains a carve-out for reasonable management action carried out in a reasonable manner.[35]

The apparent breadth of Rule 123, including compared to its predecessor, increased the obligations of barristers substantially and increased the importance of appropriate standards to assist with compliance.

## Operation of the BPGs

The *Model Harassment, Discrimination, Vilification and Victimisation BPG,* the *Model Bullying BPG* and the *Model Grievance Handling BPG* are similarly structured. Each is internally separated into two operative parts, Parts A and B. Part A sets out best practice for participating floors and Part B sets out best practice applicable to the Bar Association.

Part A of these three BPGs applies where adopted by participating floors, which can be done either in the form set out in the BPG (as recommended) or in a modified form.

Part B to these three BPGs applies now to all barristers as a consequence of its adoption by Bar Council. Its provisions apply to:


Cartoon: By Loren Fishman / CartoonStock.com

(a) 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);

(c) all examination candidates while sitting the bar examinations conducted by the Bar Association (Bar Association examination candidates); and

(d) the Bar Association (and its employees and other workers) 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.

The *Model Grievance Handling BPG* also contains a Part C, which describes the suggested steps likely to be taken by a grievance handler in respect of a grievance and the importance of dealing with any grievance confidentially, impartially, promptly and without repercussion.

The *Model Parental and Other Extended Leave Best Practice Guideline* is structured differently from the other BPGs. It provides a guideline for chambers members and licensees,[36] as well as a guideline to be applied to chambers staff[37] where those staff are entitled to the minimum standards provided under the National Employment Standards (NES) of the FW Act.[38] The NES are minimum standards that apply to employees in NSW[39] and cannot be excluded by the provisions of awards or other industrial instruments.[40] A failure to comply with the NES can attract pecuniary penalties.[41]

Barristers of the private bar, not being employees, are not entitled to the protections of the NES. The *Model Parental and Other Extended Leave BPG* recognises this and makes provision, at clauses 11–14, for benefits that a participating chambers may choose to make available to its members as a matter of best practice. These provisions are included as options that chambers can adopt, recognising that continuing to have to pay floor fees and other costs of practice during a period of parental leave can impose a significant burden. Those chambers who are adopting these provisions are doing so in the view it will assist them to attract and retain the requisite diversity of talent.

## Implementing the BPGs

If a set of chambers decides to implement the BPGs, particular steps should be taken to promulgate them and ensure chambers' members and staff are educated and trained in their operation. The law is clear that policy adoption is insufficient to avoid findings of vicarious liability under anti-discrimination legislation in the absence of comprehensive education, training and dissemination of relevant policies. Also, the policies are only going to be effective if all floor members and staff are aware of them.

Guidance from the Bar Association can be obtained by chambers in respect of the education, training and dissemination of the BPGs.

In taking steps to educate and train chambers members and staff of their rights and obligations as explained under any particular BPG, it is prudent to ensure that no steps are taken that would inadvertently incorporate a part or the whole of a BPG into a chambers member's conditions of membership of the floor, or a chambers staff member's contract of employment unless that is the intention of the floor. This principle applies to any written or unwritten policy or procedure applicable in any chambers. A policy document will not have contractual force unless certain conduct occurs that clearly incorporates by reference that policy document into a written or verbal contract, *and* the policy that has been incorporated is by its own wording promissory and binding in nature rather than explanatory and aspirational.[42] Further, a mechanism for precluding incorporation by reference of written or verbal policies into contractual arrangements is to include in any contract a clause expressly excluding any such policy (or part of it), and advising members and staff during any education and training forums that written or verbal policies and procedures form no part of any agreement binding on them. Giving policies contractual force runs the risk that a failure to abide by them creates a breach of a legal obligation. That would be counter-productive given the intention of the BPGs is to reduce liability, not increase it.

The BPGs are not statutory instruments and have not been made pursuant to any legislative provision. Hence it is only if they are made contractual obligations by some deliberate act that they create legal obligations. They were not drafted to create legal obligations. Rather they are explanatory and aspirational educative tools and guidelines to assist with compliance with various laws, the Rules and best practice which, if followed, will minimise liability, discourage discrimination and encourage diversity at the bar.

## Annual review

The BPGs are currently undergoing an annual review for the purpose of taking into account relevant legislative changes, as well as members' submissions as to their effect and practical operation. A primary outcome of the first annual review of the BPGs in 2015 was to incorporate the amendments introduced by the commencement of the Legal Profession Uniform Law (NSW) and to amend the BPGs to enhance uniformity.

A foreshadowed outcome of the current 2016 annual review is the incorporation of the BPGs into an equity and diversity handbook produced by the Bar Association. It is intended to be in digital and hard copy form, in a not dissimilar format to that used by bars in other common law jurisdictions,[43] to continue to reflect best practice and meet community expectations as to appropriate workplace and professional standards of conduct.[44]

## Conclusion

The landscape covered by the myriad Commonwealth and state anti-discrimination and workplace legislation and the legislation and rules governing the conduct of barristers is

demonstrably detailed and technical. The BPGs are designed to assist chambers with compliance with these provisions in a real and substantive way. They seek to do as their name suggests - guide best practice for chambers wanting to take all reasonable steps in an effort to prevent the occurrence of potentially contravening conduct.

The adoption and implementation of the BPGs by individual chambers is not only good for their members, but is ultimately good for the strength of the whole profession given the role they undoubtedly play in attracting and retaining the best of talent.

## Endnotes

1. The authors are grateful to and would like to kindly acknowledge Anthony McGrath SC for his valuable input and comments on, and careful reading of, this article.
2. Consisting of the Bar Association's Model Harassment, Discrimination, Vilification and Victimisation Best Practice Guideline; Model Bullying Best Practice Guideline; Model Parental and Other Extended Leave Best Practice Guideline; Model Grievance Handling Best Practice Guideline. Each will be described using the shorthand BPG for the balance of this article.
3. Adopted by Bar Council on 17 June 2004.
4. See for instance *Richardson v Oracle Corporation Australia Pty Limited* (2013) 232 IR 31 at [154]–[164] per Buchanan J. The findings at [154]–[164] were not overturned on appeal: (2014) 312 ALR 285.
5. Rule 117 commenced operation on 6 January 2014.
6. Rule 123 commenced operation on 27 May 2015.
7. Although as early as 1995 the then New South Wales Office of the Legal Services Commissioner issued a statement advising 'It is the Commissioner's position that complaints of discrimination or sexual harassment may amount to professional misconduct or unsatisfactory professional conduct regardless of whether or not there is a rule against such conduct': Office of the Legal Services Commissioner Annual Report 1994–95, Sydney p19.
8. Consisting of (1) federal legislation: the *Racial Discrimination Act 1975* (Cth) (RD Act), the *Sex Discrimination Act 1984* (Cth) (SD Act), the *Disability Discrimination Act 1992* (Cth) (DD Act), the *Age Discrimination Act 2004* (Cth) (AD Act), the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), the *Australian Human Rights Discrimination Regulations 1989* (Cth); and (2) New South Wales legislation: *Anti-Discrimination Act 1977* (NSW) (NSW AD Act).
9. Although Commonwealth and state anti-discrimination legislation does proscribe discrimination (including various forms of harassment, vilification and victimisation) in the areas of employment and the provision of services, including in respect of barristers in their capacity as employers and/or service providers (see below).
10. Former Regulation 175 provided that 'conduct, whether consisting of an act or omission, that constitutes unlawful discrimination (including unlawful sexual harassment) under the *Anti-Discrimination Act 1977* against any person must not be engaged in (a) by a local legal practitioner, in connection with the practise of law in this or any other jurisdiction,…'. Regulation 175 was repealed on 1 July 2015 and no similar regulation has been enacted.
11. Including sexual harassment and all other forms of unlawful harassment and vilification, for the reasons below.
12. A study undertaken by the Law Council of Australia to investigate and analyse the drivers of attrition of women from the legal profession in Australia: LCA, NARS Report, 2014, p6.
13. LCA, NARS Report, 2014, p4.
14. LCA, NARS Report, 2014, p6.
15. LCA, NARS Report, 2014, p6.
16. LCA, NARS Report, 2014, p7.
17. Sub-rule (c) of which proscribed workplace bullying.
18. Defined to include employees, contractors or subcontractors, labour hire employees, apprentices or trainees, work experience students and volunteers: section 789FC(2) of the FW Act.
19. Section 789FD provides that a worker is 'bullied at work' if the bullying occurs while at work at a 'constitutionally covered business', which is in turn defined to primarily include a constitutional corporation. A constitutional corporation is a corporation to which paragraph 51(xx) of the Constitution applies (section 12 of the FW Act), which includes a corporation that trades.
20. Because barristers do not fall within the definition of 'worker' and are not constitutional corporations.
21. Part 6-4B of the FW Act does not specify that a worker must be employed or engaged by a constitutional corporation, but only that the bullying must occur while the worker is 'at work' at the constitutionally covered business. Therefore employees or others performing work for barristers who are members of chambers that are operated by constitutional corporations could be caught by Part 6–4B of the FW Act. As such, the FW Act anti-bullying regime applies in respect of such chambers to both interactions between barristers and staff, as well as between staff members.
22. The definition of 'workplace bullying' associated with Rule 117(c) (now Rule 123(c)) was amended in 2015 to assist in aligning it more closely with the statutory definition of 'bullying at work' contained in section 789FD(3) of the FW Act.
23. See for instance *Richardson v Oracle Corporation Australia Pty Limited* (2014) 312 ALR 285 in which Kenny J (with Besanko and Perram JJ agreeing) increased an award of general damages from $18,000 to $100,000 by reference to 'general standards prevailing in the community': at [90]–[118], especially [95].
24. See for instance *PLP v McGarvie and VCAT* [2014] VSCA 253.
25. As referenced at footnote 4 above, see the findings of Buchanan J in *Richardson v Oracle Corporation Australia Pty Limited* (2013) 232 IR 31 at [154]–[164] (this aspect not overturned on appeal: (2014) 312 ALR 285).
26. This requirement is differently worded under section 123 of the DD Act and section 57 of the AD Act, requiring the employing corporation to have taken 'all reasonable precautions and exercised due diligence to avoid the conduct.'
27. Section 106 of the SD Act; section 123 of the DD Act; sections 18A and 18E of the RD Act; section 57 of the AD Act; section 53 of the NSW AD Act.
28. *Richardson v Oracle Corporation Australia Pty Limited* (2013) 232 IR 31 at [154]–[164] and particularly [163] per Buchanan J. This aspect was not overturned on appeal: (2014) 312 ALR 285.
29. Notably, employer (body corporate) liability will be automatic in the circumstances set out under section 793 of the FW Act in respect of any discrimination claim made under section 351 of the FW Act. In such a case, it will not matter whether an employer or principal has taken 'all reasonable steps' or any precautions at all in minimising risk.
30. Including sexual harassment as defined under section 28A of the SD Act and relevantly proscribed in the areas of employment and the provision of goods and services under sections 28B and 28G respectively (which is in any event proscribed under Rule 123(b)), and disability-based harassment as relevantly proscribed in the areas of employment and the provision of goods and services under sections 35 and 39 respectively of the DD Act.
31. Including racial vilification as defined under Part IIA of the RD Act and racial, transgender, homosexual and HIV/AIDS vilification under Part 2, Div 3A; Part 3A, Div 5; Part 4C, Div 4; and Part 4F respectively of the NSW AD Act.
32. Defined generally as subjecting a person to a detriment because they have done or propose to inter alia make a complaint under anti-discrimination legislation or a complaint about unlawful discrimination generally.
33. In this way Rule 123 captures conduct between barristers not necessarily unlawful under anti-discrimination legislation. This is because it is generally only discriminatory conduct (as defined) occurring within specified areas of public life, such as the areas of employment or the provision of services, that is unlawful

under anti-discrimination legislation. Self employment is not included in the definition of employment under such legislation.

34. Section 789FD(1) of the FW Act.
35. Section 789FD(2) of the FW Act.
36. Clauses 11–14 of the Model Parental and Other Extended Leave BPG.
37. Clauses 15–18 of the Model Parental and Other Extended Leave BPG.
38. The NES are contained in Part 2-2 of the FW Act.
39. They apply to 'national system employees' defined in section 13 of the FW Act to be an individual 'usually employed' by a 'national system employer', which is in turn defined in section 14 as including constitutional corporations. A constitutional corporation is a 'trading corporation', or a corporation to which paragraph 51(xx) of the Constitution applies (see above). Hence they apply to all employees in NSW other than those employed by the Crown or local government entities.
40. Section 59 of the FW Act.
41. Section 44 and Part 4-1 of the FW Act.
42. See for instance *Westpac Banking Corporation v Wittenberg* (2016) 256 IR 181 particularly at [108]–[114] per Buchanan J with McKerracher and White JJ agreeing at [334], [336]–[337], [341]. Significantly, the employer in *Wittenberg* conceded that the policy in question had been incorporated, meaning the issue did not need to be decided: see [114] per Buchanan J; [338] per McKerracher J; [344]–[345] per White J.
43. For instance, the United Kingdom's Bar Standards Board provides its Equality and Diversity Rules of the BSB Handbook in hard copy and digital form (by way of an App) and produces webinars and podcasts on the applicable Equality Rules: https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/equality-and-diversity-rules-of-the-bsb-handbook/.
44. In line with the objectives described in the BPG Explanatory Memorandum, [5] and [8].

# The High Court hits 'reset' on the advocate's immunity

By Justin Hewitt

## Introduction

On 4 May 2016, the High Court handed down a decision reconsidering the scope of the advocate's immunity from suit. A majority of the High Court (French CJ, Kiefel, Bell, Gageler and Keane JJ) held that the advocate's immunity from suit does not extend to negligent advice given by a lawyer which leads to the settlement of a case by agreement between the parties embodied in consent orders. The appeal from the decision of the NSW Court of Appeal in *Jackson Lalic Lawyers Pty Limited v Attwells* [2014] NSWCA 335 was allowed.

At the hearing of the special leave application on 7 August 2015 (before Bell, Gageler and Gordon JJ) special leave was granted to allow the appellant to seek a reconsideration of the advocate's immunity and the principles in *Giannarelli v Wraith* (1988) 165 CLR 543 and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1: [2015] HCATrans 176. However, the High Court ultimately declined unanimously to reconsider its previous decisions on the advocate's immunity. Nevertheless, the majority clarified and restated the scope of the immunity under the tests stated in *Giannarelli* and *D'Orta*.

The court held, by majority, that the respondent was not immune from suit because the advice to settle the proceedings was not intimately connected with the conduct of the case in court in that it did not contribute to a judicial determination of issues in the case. This conclusion was not affected by the circumstance that the parties' settlement agreement was embodied in consent orders.

Decisions concerning the advocate's immunity require line drawing between work related to court proceedings that is and is not covered by the immunity. At the heart of the immunity is work done in court. The precise scope of the immunity for out of court work turns upon the connection required between the conduct of a case in court and other work performed in preparing and conducting the case. After *Giannarelli* and *D'Orta*, the application of the advocate's immunity hardened into a rule which treated the immunity as applying to 'work done out of court which leads to a decision affecting the conduct of the case in court': see *D'Orta* at [86]–[87]. The majority judgment in *Attwells*, while reaffirming the immunity for which *Giannarelli* and *D'Orta* stands, has restated the applicable rule in a manner which narrows the scope of the immunity significantly.

## The facts in Attwells

The case was determined based on a statement of agreed facts which were prepared at first instance to resolve the question whether the respondent was immune from suit by virtue of the advocate's immunity.

Mr Attwells and another person guaranteed payment of advances made by the ANZ bank to a company. The company