

The Winds of Change?¹

By Pauline Wright (President of the Law Council of Australia), Kylie Nomchong SC and Penny Thew,
with contributions from John McKenzie (NSW Legal Services Commissioner)



“Their accounts of their experiences at the time have been believed.”

“We’re ashamed that this could have happened ...”

The Honourable Susan Kiefel AC, Chief Justice of Australia, 22 June 2020

This statement by the Honourable Chief Justice Kiefel AC in response to the accounts of the women who were sexually harassed by former High Court Justice Dyson Heydon was a cathartic moment.

While it is not news to women in the legal profession that sexual harassment has and continues to be a pervasive part of their working life, this unconditional and public statement by the most senior member of the Australian judiciary illustrated the changing attitude to addressing it.

This issue is now front and centre. Peak bodies have called out as wholly unacceptable, the conduct of perpetrators of sexual harassment. All branches of the legal system have strengthened their policies and complaint-making procedures. While not perfect, the support being offered to those targeted for sexual harassment, bullying, discrimination and victimisation has increased.

Within days, the Honourable Chief Justice Bathurst QC of the Supreme Court of New South Wales, strengthened the Supreme Court Policy on Inappropriate Workplace

Conduct.² That policy encourages reporting (formally or informally) not only by complainants but also by witnesses to the conduct and those persons are offered anonymity, confidentiality and support without risk of adverse repercussions.

On 3 July 2020, New South Wales Attorney General, Mark Speakman SC launched a robust review into the handling of sexual harassment, grievances and complaints across State Courts and Tribunals.

However, the issue is wider than sexual harassment occurring only within the Courts and Tribunals, as recent and historical data clearly show. On 8 July 2020 the Law Council of Australia therefore initiated a virtual roundtable forum to identify legislative and policy strategies to address sexual harassment across the entire legal profession, the outcomes of which are described below.

In 2019, the Office of the Legal Services Commissioner (OLSC) had implemented bystander and anonymous reporting³ (links to which are at the conclusion of this article) in response to the alarming findings disclosed in the International Bar Association’s

‘Us Too? Bullying and harassment in the legal profession’ report (the **IBA Report**). The OLSC reporting mechanisms allow for a range of confidential, anonymous complaints to be made by those with any knowledge of sexual harassment, bullying and/or discrimination, including conduct that may be in breach of Rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (the **Barristers’ Conduct Rules**). The OLSC thereafter reported ‘receiving significantly more calls’ in relation to bullying and sexual harassment,⁴ with six specially trained staff of the OLSC positioned to receive such enquiries. From May 2019 to October 2020,⁵ the average number of such enquiries was about 4-6 per month, in contrast to the previous statistic of about 2-3 per annum, albeit with a negligible increase to the number of formal complaints.⁶

Further, in July this year the NSW Bar Association issued a comprehensive guide in *InBrief* to combat sexual harassment and bullying within the profession,⁷ and in October published in *InBrief* a guide to the OLSC anonymous reporting and formal complaint making mechanisms.⁸



In October 2020, the Australian Lawyers Alliance published its *Advancing Women in the Law* guide,⁹ which encouraged practitioners to ‘raise awareness of the issue of bullying and sexual harassment in the legal profession by distributing the IBA Report...’ and encouraged legal workplaces to provide bystander intervention training.¹⁰

These procedures and mechanisms seek to address this abhorrent behaviour, the statistics of which have been sadly consistent for over 35 years:

- In 1995, 39% of female solicitors and 59% of female barristers interviewed said that they had been subject to sexual harassment.¹¹
- In the 2014 the Law Council of Australia National Attrition and Re-engagement Study Report (NARS Report), showed that 55% of women barristers surveyed across Australia had experienced sexual harassment, and 80% had experienced bullying.
- A survey conducted with practising certificate renewals in 2014 by the NSW Bar Association showed that 42% of women barristers who responded to the survey said that they had experienced sexual harassment and 64% reported being bullied.¹²
- In 2018, 47% of Australian female respondents to the global survey underpinning the IBA Report said that

The Office of the Legal Services Commissioner strongly encourages the legal profession in its entirety to report any knowledge of sexual harassment, bullying and discrimination, using the OLSC anonymous, confidential link at: www.olsc.nsw.gov.au/Pages/inappropriate-personal-conduct.aspx.

they had experienced sexual harassment at work and 73% of women responding had been bullied.¹³ Overall, the IBA Report disclosed that Australian legal professionals reported ‘*significantly higher rates than global averages*’ of sexual harassment and bullying in a survey of 135 countries.¹⁴

- The Women Lawyers Association stated 71% of respondents to their 2018 survey reported being sexually harassed.¹⁵
- On 1 April 2020, the Victorian Legal Services Board released the results of its survey of 2,300 practitioners, with 61% of women reported as having experienced sexual harassment in the workplace.¹⁶

The manner in which the legal profession has addressed sexual harassment, discrimination and bullying over time has included warnings, regulations, education and mechanisms for complaint making.

As early as 1994, the OLSC issued a statement in its *Annual Report* that complaints of sexual harassment or discrimination may amount to professional

misconduct or unsatisfactory professional conduct (even in the absence of a rule then proscribing such behaviour).

By January 2014, Rule 117 of the former *New South Wales Barristers’ Rules* prohibited barristers engaging in sexual harassment, discrimination and/or workplace bullying in the course of practice. That rule has carried over into what is now Rule 123 of the *Barristers’ Conduct Rules*,¹⁷ which provides:

A barrister must not in the course of practice, engage in conduct which constitutes:

- discrimination,*
- sexual harassment, or*
- workplace bullying.*

A breach of Rule 123 can constitute professional misconduct or unsatisfactory professional conduct by operation of section 298 of the *Legal Profession Uniform Law*.

However, despite repeated recognition of the pervasive nature of the problem, as well as the implementation of rules prohibiting

it, sexual harassment, bullying and discrimination across the profession persists and remains grossly under-reported.¹⁸

At the NSW Bar, reporting mechanisms are available for individual chambers to adopt, being the Bar Association's Model Grievance Handling Best Practice Guideline (the Grievance Handling BPG).¹⁹ However, there will be occasions where those within chambers do not feel able to make a complaint internally within that workplace.

A reluctance to report is an issue facing workplaces universally and is not unique to the legal profession or the NSW Bar. The most commonly cited reason for legal professionals not reporting such conduct, according to the IBA Report, is fear of repercussion and a lack of confidence in reporting procedures,²⁰ with recommended solutions being enhanced reporting mechanisms, which include the availability of bystander and anonymous reporting.

Recognising what constitutes discrimination, sexual harassment and bullying is a first step.

What is discrimination?

Discrimination in breach of Barristers' Conduct Rule 123(a) is defined in Rule 125 as meaning:

'discrimination as defined under the applicable state, territory or federal anti-discrimination or human rights legislation and includes all forms of unlawful discrimination.'

In New South Wales, one state and six federal anti-discrimination or human rights acts and regulations apply.²¹

The overarching *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act) provides the legislative mechanism by which complaints are made under four other federal statutes (being the *Sex Discrimination Act 1984* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth)). The AHRC Act includes the definition of 'unlawful discrimination'²² which is broad and incorporates *inter alia* 'any acts, omissions or practices' proscribed by the operative provisions²³ of the said four Acts. It expressly includes victimisation,²⁴ sexual harassment,²⁵ racial hatred²⁶ and disability-based harassment.²⁷

Critically, as a result of amendments made in 2014,²⁸ for conduct to be captured by Barristers' Conduct Rule 123(a) it need only constitute discrimination as *defined* under state or federal anti-discrimination or human rights legislation, rather than discrimination that is 'unlawful' under such legislation, although it also extends to *include* all forms of 'unlawful discrimination'.

The result is that conduct capable of breaching Barristers' Conduct Rule 123(a) is far wider than conduct that could be in contravention of state or federal anti-discrimination legislation, intentionally excluding the statutory limitations inherent in that legislation. Importantly, none of the statutory exceptions, exemptions or limited defences apply.

Barristers' Conduct Rule 123(a) therefore proscribes both 'direct' and 'indirect' discrimination on numerous grounds, including:

- sex, sexual orientation, gender identity, transgender, intersex status, marital/domestic or relationship status, pregnancy or potential pregnancy, breastfeeding or family/carer's responsibilities, or a characteristic that appertains generally or is generally imputed to those persons;²⁹

The OLSC particularly encourages bystander witnesses to report, to assist in relieving the targeted person from bearing the heavy onus of doing so. Bystander witnesses can report at: www.olsc.nsw.gov.au/Pages/inappropriate-personal-conduct.aspx.

- disability, which is defined broadly³⁰ to include imputed disability, as well as a failure to make 'reasonable adjustments' in respect of a disability;
- race, colour, descent or national or ethnic origin or extraction;³¹ and/or
- age,³² and religion, political opinion, medical record, irrelevant criminal record, social origin and trade union activity.³³

Direct discrimination is generally defined under statute as less favourable treatment, by comparison to a real or hypothetical comparator, on one of the above grounds.³⁴ Indirect discrimination is generally defined as the imposition of a condition or requirement on a person that is not reasonable in the circumstances and that has or is likely to have the effect of disadvantaging persons with the same characteristic (as set out

above) as the aggrieved person.³⁵

The further broad conduct that is caught by Barristers' Conduct Rule 123(a), by reason of the expansive definition of 'unlawful discrimination' under section 3 of the AHRC Act combined with Rule 125, includes racial hatred,³⁶ sexual harassment,³⁷ homosexual vilification,³⁸ HIV/AIDS vilification,³⁹ disability-based harassment⁴⁰ and victimisation.⁴¹

What is sexual harassment?

Sexual harassment in breach of Barristers' Conduct Rule 123(b) is defined in Rule 125 as meaning:

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

In New South Wales, the *Sex Discrimination Act 1984* (Cth) and the *Anti-Discrimination Act 1977* (NSW) are relevantly applicable.

The conduct that is capable of constituting 'sexual harassment' in breach of Rule 123(b) is wider than the conduct that could be in contravention of state or federal anti-discrimination legislation, also as a result of amendments made in 2014. Crucially, the definition of 'sexual harassment' does not incorporate any of the statutory limitations on *who* can make a complaint of sexual harassment in breach of Rule 123(b), given the rule captures conduct 'defined' as sexual harassment rather than conduct that is 'unlawful' under the relevant provisions of the state or federal anti-discrimination legislation.

Under section 28A of the *Sex Discrimination Act 1984* (Cth), sexual harassment occurs where a person engages in unwelcome conduct of a sexual nature in circumstances in which a reasonable person, having regard to all of the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The circumstances to be taken into account are statutorily defined in section 28A(1A) non-exhaustively and would include any power imbalance between the alleged perpetrator and the person harassed.

What constitutes 'unwelcome conduct' that is 'of a sexual nature' has been judicially considered recently by the Full Court of the Federal Court of Australia in *Hughes trading as Beesley and Hughes Lawyers v Hill* (2020) 297 IR 323. In that case the principal of a law firm sent numerous emails to a junior solicitor containing declarations of love. His Honour Justice Perram held at [23] (with Collier and Reeves JJ agreeing) that whether conduct was unwelcome is ordinarily to

‘be proved by the person allegedly harassed giving evidence that the conduct was unwelcome’ but that ‘proof of this fact, like proof of any other fact, may be done by a variety of means.’ In that case, the Court concluded that ‘the unwelcome quality of the conduct’ engaged in by Mr Hughes toward his employed solicitor was ‘painfully obvious,⁴² given she had said so on multiple occasions (notwithstanding that silence is not necessarily an indication that the conduct is welcome). The Full Court found that the repeated emails, requests for a relationship, lying in wait dressed only in underwear, misuse of personal information and other conduct of the principal of the law firm readily fell within the meaning of ‘conduct of a sexual nature’, observing that the conduct of Mr Hughes was ‘despicable’ and that ‘*It was also in every sense improper*’.⁴³

Conduct of a sexual nature can also include questioning or comments about a person’s private life, gender based taunts or insults, sexually suggestive or lewd comments, jokes, pranks or remarks, exposure to sexually explicit or suggestive written or other published materials, including emails, videos and any other digital material, and physical conduct (including assault).

Almost 50 years ago, in *Bar Association of Queensland v Lamb* [1972] ALR 285, the High Court recognised that ‘sexualised’ solicitor-client conduct amounted to improper and unprofessional conduct by a solicitor seeking entry to the Queensland Bar. Similarly, in *PLP v McGarvie and VCAT* [2014] VSCA 253, a principal had his practising certificate cancelled for a period after being found to have sexually harassed a trainee by sexually explicit comments, up to 78 requests for sex and ‘cuddles’ in one day, and showing the trainee a pornographic video involving himself, giving rise to a finding of ‘professional misconduct’.⁴⁴

In jurisdictions outside Australia, sexualised conduct is increasingly recognised as unacceptable in the legal profession. In 2019, in the United States a Vermont practitioner (said to be the ‘stepson of former Vermont Attorney General Jerome Diamond’) was disbarred for ‘committing lewd acts around two female employees’.⁴⁵ In July 2020, a ‘high profile’ prosecutor agreed to be disbarred after a complaint of sexual harassment to the State Bar of Arizona was listed to be heard in November 2020.⁴⁶ In August 2020, the South Carolina Supreme Court disbarred a practitioner as a result of sexual misconduct including indecent exposure.⁴⁷



By January 2014, Rule 117 of the former New South Wales Barristers’ Rules prohibited barristers engaging in sexual harassment, discrimination and/or workplace bullying in the course of practice. That rule has carried over into what is now Barristers’ Conduct Rule 123.

What is bullying?

Workplace bullying in breach of Barristers’ Rule 123(c) is defined in Rule 125 as meaning:

‘unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate, or cause serious offence to a person working in a workplace.’

By contrast to the definition of discrimination and sexual harassment in Rule 125, the definition of workplace bullying does not rely upon any statutory formula. Most notably it is not defined by reference to the statutory meaning of ‘bullying’ in Part 6-4B of the *Fair Work Act 2009* (Cth), which provides that bullying

is constituted by unreasonable, repeated conduct that constitutes a risk to work health and safety.⁴⁸ As such, a single incident of ‘unreasonable’ conduct can constitute a breach of Rule 123(c).

There are few decided cases involving workplace bullying under Rule 123(c) or similar professional conduct rules. In 2016, the Victorian Legal Services Commissioner made a finding that a male barrister had engaged in verbal ‘intimidating and aggressive conduct’ toward a court volunteer and her manager, in contravention *inter alia* of Rule 123(c) of the *Victorian Legal Profession Uniform Conduct (Barristers) Rules 2015*, which in turn was found to constitute unsatisfactory professional conduct under section 298 of the *Legal Profession Uniform Law*.⁴⁹ The barrister’s conduct included

‘publicly’ telling the court volunteer (who was assisting a party appearing before the Federal Circuit Court) that she was an ‘interfering trouble maker’ who ‘had no place in court’ after the volunteer successfully obtained an adjournment.⁵⁰

In other jurisdictions workplace bullying has been held to be constituted by a wide range of conduct, including ‘aggressive managerial direction’, intimidating conduct and physical assault, as well as ‘coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination’. Such conduct has been categorized as bullying in a range of cases, including in one of the more extreme cases of *Nationwide News v Naidu* (2007) 71 NSWLR 471 and other cases such as *Swan v Monash Law Book Co-operative* (2013) 235 IR 63, *Wearne v State of Victoria* (2017) 268 IR 401 and *Mac v Bank of Queensland Limited* [2015] FWC 774.

What is conduct occurring in the course of practice?

To be in breach of Barristers’ Conduct Rule 123, conduct must occur ‘in the course of practice’. This can require a consideration of whether the ‘acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice... [or] manifest the ... absence of qualities which are incompatible with, or essential for, the conduct of practice’.⁵¹ In *Council of the New South Wales Bar Association v Franklin (No 2)* [2014] NSWCA 428, Meagher JA (Beazley P and Leeming JA agreeing) found that a barrister was not a fit and proper person to remain on the roll as a result of, *inter alia*, a conviction of aggravated sexual assault, observing:

‘Conduct may be contrary to the standard of conduct expected of members of a profession closely involved in the due administration of justice irrespective of whether it occurs in the course of professional practice.

....

Although his conduct in April 2007 did not take place in the practice of law, or directly involve any dishonesty, it included the most serious crime [of aggravated sexual assault] ...

The fact alone of his conviction of that offence was sufficient to justify disqualification from practice...⁵²

A breach of Barristers’ Conduct Rule 123 can constitute professional misconduct or unsatisfactory professional conduct by operation of section 298 of the Legal Profession Uniform Law.

Conduct capable of breaching Barristers’ Conduct Rule 123 is far wider than conduct that could be in contravention of state or federal anti-discrimination legislation, intentionally excluding the statutory limitations inherent in that legislation.

As such, conduct occurring in the ‘private domain’, outside of working hours and away from the workplace, can be sufficiently connected with the notion of ‘the course of practice’.⁵³

Outcomes of the Law Council of Australia’s National Roundtable Forum

Following the public statement by Chief Justice Kiefel regarding allegations of sexual harassment by former High Court Justice Dyson Heydon, the Law Council of Australia held a national forum on 8 July 2020. The event brought together experts from across the country to address the issue of sexual harassment in the profession, with the aim of providing a conducive forum for those with relevant expertise to refine policy positions for specific legislative reforms and to further develop approaches that can be adopted within the legal profession to address the issue. Inclusion and diversity representatives from legal professional associations, regulators, women lawyers’ associations, law student representatives and the Sex Discrimination Commissioner attended.

Across the roundtable there was broad consensus that the *Sex Discrimination Act 1984* (Cth) requires urgent amendment to extend the prohibition of sexual harassment to all areas, rather than confining its provisions to certain relationships and situations. This extension of the prohibition of sexual harassment beyond the current legislative parameters would enable those subjected to sexual harassment by judges and barristers to bring complaints under statute. Where the allegations are against a barrister, the amendments would mean that proceedings could be brought under the *Sex Discrimination Act 1984* (Cth) as well as a complaint under Barristers’ Conduct Rule 123.

Participants at the roundtable also agreed that the legal profession should act

upon key recommendations contained in the Australian Human Rights Commission’s *Respect@Work* Report released in March 2020.⁵⁴ Other areas identified as requiring law reform included defamation laws, professional conduct rules, occupational health and safety laws, and time limits to make complaints.

The Law Council roundtable acknowledged that law reform must be accompanied by cultural change in the legal profession, which could be achieved through measures including: a national model sexual harassment policy and guidelines; a centralised source of information and suite of educational tools; the facilitation of consistent complaints processes across Australia; and the development of appropriate training.

There was also consensus that a Federal Judicial Commission, which has been long called for by the Law Council, should be established. There has been continued consultation with constituent member associations, as the Law Council moves to develop these measures as mentioned above, into a blueprint for action to address sexual harassment in the legal profession.

How can anonymous, confidential reports of sexual harassment, discrimination and bullying be made?

The key to eradicating this embedded conduct is reporting it. As co-regulator of the legal profession in New South Wales, the OLSC is empowered to deal with conduct alleged to constitute a breach of the Barristers’ Conduct Rules. The legal profession in its entirety is encouraged to report any knowledge at all of sexual harassment, bullying and discrimination. The OLSC particularly encourages bystander witnesses to report, to assist in relieving the targeted person from bearing the heavy onus of doing so on every occasion themselves. **BN**

Anonymous, confidential reports of alleged sexual harassment, bullying and/or discrimination, including from bystander witnesses, can be made using the links at www.olsc.nsw.gov.au/Pages/inappropriate-personal-conduct.aspx or by phoning the trained Personal Conduct Team on (02) 9377 1849 during business hours.

An information sheet about Barristers' Conduct Rule 123 and consequences of breach is also available on that webpage.

ENDNOTES

- 1 Related articles: 'Us Too: Findings on bullying and harassment in the legal profession' [2019] *Bar News* (Winter) 10; 'Us Too: One year on from the IBA's damning report' [2020] LSJ (Issue 68) 76; 'How to make an anonymous or bystander report' *Lawyers Weekly*, 26 September 2020; 'The other pandemic: sexual harassment and bullying in the law', *Lawyers Weekly*, 14 October 2020; 'Stopping sexual harassment, discrimination and bullying: how to make anonymous, bystander or formal complaints to the OLSC', *InBrief*, 14 October 2020.
- 2 http://www.supremecourt.justice.nsw.gov.au/Documents/Home%20Page/Announcements/2020_07_02_Workspace%20Conduct%20Policy_v4.0_FINAL.pdf?fbclid=IwAR059qxArMOBKgSbbSGzQtuiizQXsY9lEQzkkouN4ZMumVLRWbPwjmxQ#:~:text=The%20Court%20does%20not%20tolerate,unlawful%20discrimination%2C%20vilification%20and%20violence.
- 3 at www.olsc.nsw.gov.au/Pages/inappropriate-personal-conduct.aspx
- 4 OLSC Annual Report 2018-2019, p4.
- 5 Although with a dip in enquiries between about March and June 2020 during the lockdown: Legal Services Commissioner, 29 October 2020.
- 6 Data published with the authority of the Legal Services Commissioner.
- 7 <https://nswbar.asn.au/the-bar-association/publications/inbrief/view/08b347d11316f1372f3414b4c41fa57c> accessed 26 October 2020.
- 8 <https://nswbar.asn.au/the-bar-association/publications/inbrief/view/08b347d11316f1372f3414b4c4348c80> accessed 26 October 2020.
- 9 'Bystander training, briefs overhaul included in new legal gender equality policy'. *Lawyers Weekly*, 26 October 2020.
- 10 At clause 13: <https://www.lawyersalliance.com.au/documents/item/1990> accessed 26 October 2020.
- 11 NSW Ministry for the Status and Advancement of Women: 'Gender Bias and the Law' 1995.
- 12 *NSW Bar Association 2014 Member Profile Report* (Urbis Pty Ltd, March 2015).
- 13 IBA Report, p87.
- 14 IBA Report, p87.
- 15 Women Lawyers Association of New South Wales, *Submission to the National Enquiry into Sexual Harassment in Australian Workplaces* (Australian Human Rights Commission), 28 February 2019, p9.
- 16 <https://lsc.vic.gov.au/news-updates/news/sexual-harassment-victorian-legal-workplaces-common-and-disproportionally-affects> accessed 27 October 2020.
- 17 A similar provision is contained in rule 42 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015
- 18 Legal Services Council, 'Lawyers encouraged to blow #MeToo whistle on harassers', *Australian Financial Review*, 22 March 2018.
- 19 Available with the other three BPGs at <https://nswbar.asn.au/bar-standards/best-practice-guidelines> accessed on 26 October 2020.
- 20 IBA Report, p106.
- 21 *The Sex Discrimination Act 1984* (Cth) (the SD Act), the *Racial Discrimination Act 1975* (Cth) (the RD Act), the *Disability Discrimination Act 1992* (Cth) (the DD Act), the *Age Discrimination Act 2004* (Cth) (the AD Act), the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act), the *Australian Human Rights Commission Regulations 2019* (Cth) (the AHRC Regulations) and the *Anti-Discrimination Act 1977* (NSW) (the NSW Anti-Discrimination Act).
- 22 Section 3 of the AHRC Act.
- 23 Part II of the SD Act, Part II or IIA of the RD Act, Part 2 of the DD Act and/or Part 4 of the AD Act.
- 24 Contained in (ca), (d)-(f) of the definition of 'unlawful discrimination' in section 3 of the AHRC Act, namely Div 2 of Part 5 of the AD Act, Div 4 of Part 2 of the DD Act, subsection 27(2) of the RD Act and section 94 of the SD Act.
- 25 By reference to Part II of the SD Act.
- 26 By reference to Part IIA of the RD Act.
- 27 By reference to Part 2 of the DD Act; relevantly sections 35 and 39 of the DD Act.
- 28 Adopted by the New South Wales Bar Council. The amendments were made to the definition of 'discrimination', 'sexual harassment' and 'workplace bullying' contained in Barristers Rule 119, being the predecessor to Barristers' Conduct Rule 125.
- 29 Sections 5-7A of the SD Act and Pt 3, Pt 3A, Pt 4, Pt 4B and Pt 4C of the NSW Anti-Discrimination Act.
- 30 'Disability' is defined under sections 4, 5 and 6 of the DD Act to include a total or partial loss of the person's bodily or mental functions; or a total or partial loss of a part of the body; or the presence in the body of organisms causing disease or illness; or the presence in the body of organisms capable of causing disease or illness; or the malfunction, malformation or disfigurement of a part of the person's body; or a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that presently exists, previously existed but no longer exists, may exist in the future (including because of a genetic predisposition to that disability), or is imputed to a person. Also see Pt 4A of the NSW Anti-Discrimination Act.
- 31 Section 9 of the RD Act and Pt 2 of the NSW Anti-Discrimination Act. See also Section 3 of the definition of 'discrimination' (as opposed to 'unlawful discrimination') under the AHRC Act combined with regulation 6 of the *Australian Human Rights Commission Regulations 2019* (Cth).
- 32 'Age' is defined under sections 5, 14 and 15 of the AD Act, to include 'age group', a characteristic that appertains generally to persons of the age of the aggrieved person; or a characteristic that is generally imputed to persons of the age of the aggrieved person. See also Pt 4G of the NSW Anti-Discrimination Act.
- 33 Section 3 of the definition of 'discrimination' (as opposed to 'unlawful discrimination') under the AHRC Act combined with regulation 6 of the Australian Human Rights Commission Regulations 2019 (Cth).
- 34 Section 5(1) of the SD Act (direct sex discrimination); section 9(1) of the RD Act (direct racial discrimination); section 5 of the DD Act (direct disability discrimination); section 14 of the AD Act (direct age discrimination); section 7(1)(a) and (b), 24(1)(a), 38B(1)(a) and (c), 39(1)(a), 49B(1)(a), 49T(1)(a), 49ZG(1)(a), 49ZV(1)(a), 49ZV and 49ZYA(1)(a) of the NSW Anti-Discrimination Act (respectively, under NSW State law: direct race, sex, transgender, marital/domestic, disability, carer's responsibilities, homosexuality, compulsory retirement and age discrimination).
- 35 Section 5(2) of the SD Act (indirect sex discrimination); section 9(1A) of the RD Act (indirect racial discrimination); section 6 of the DD Act (indirect disability discrimination); section 15 of the AD Act (direct age discrimination); section 7(1)(c), 24(1)(b), 38B(1)(b), 39B(1)(b), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b) of the NSW Anti-Discrimination Act (respectively, under NSW State law: indirect discrimination on the grounds immediately above).
- 36 Part IIA of the RD Act and Part 2 Div 3A of the NSW Anti-Discrimination Act.
- 37 Part II, Div 3 of the SD Act and Part 2A of the NSW Anti-Discrimination Act.
- 38 Section 49ZT of the NSW Anti-Discrimination Act.
- 39 Section 49ZXB of the NSW Anti-Discrimination Act.
- 40 Part 2, Div 3 of the DD Act.
- 41 Under Div 2 of Part 5 of the AD Act, Div 4 of Part 2 of the DD Act, subsection 27(2) of the RD Act, section 94 of the SD Act and section 50 of the NSW Anti-Discrimination Act. 'Victimisation' under these provisions is generally defined to mean subjecting a person to a detriment (or threatening to do so) inter alia because the person does (or proposes to) make a complaint/bring proceedings/assert rights/provide information under anti-discrimination or human rights legislation.
- 42 At [23] per Perram J (Collier and Reeves JJ agreeing).
- 43 At [8] per Perram J (Collier and Reeves JJ agreeing).
- 44 Under section 4.4.3(1)(b) of the former *Legal Profession Act 2004* (Vic), which encompassed conduct whether or not it was 'in connection with the practice of law'.
- 45 https://www.caledonianrecord.com/news/local-lawyer-disbarred-by-supreme-court/article_ddb06c0-2958-5262-a8c5-27e97c31b7ca.html accessed 27 October 2020.
- 46 <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/juan-martinez-disbarred-no-longer-able-to-practice-law-in-arizona> accessed 27 October 2020.
- 47 <https://www.abajournal.com/news/article/attorney-disbarred-after-history-of-indecent-exposure-voyeurism> accessed 27 October 2020.
- 48 See section 789FD(1) of the Fair Work Act 2009 (Cth).
- 49 *Commissioner Determination (intimidating and aggressive conduct)* [2016] VLSC 30 at [47]-[48].
- 50 At [25]-[28], [39].
- 51 As observed by Spigelman CJ in *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at 56.
- 52 At [34], [36]-[37] (Beazley P and Leeming JA agreeing), referring to *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279; *A Solicitor v Council of the Law Society of NSW* (2004) 216 CLR 253.
- 53 See also for instance *Reyes v Dental Board of South Australia* [2002] SASC 239, in which a dental practitioner's name was removed from the register as a result of sexual harassment of a female employee and criminal convictions after a finding of 'unprofessional conduct'.
- 54 <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020> accessed 1 November 2020.