

# Bar Association launches updated Best Practice Guidelines

By Winnie Liu

On 2 June 2022, the New South Wales Bar Association launched the updated Best Practice Guidelines (the guidelines). The guidelines assist chambers and floors with the elimination and prevention of all forms of unlawful harassment, discrimination, vilification, victimisation and bullying. By adopting the guidelines, chambers and floors can clearly articulate their intention to adhere to the relevant laws, including the Uniform Law and the Barristers' Conduct Rules, and to minimise the risk of unacceptable conduct. Further, the guidelines provide a framework, and options, for dealing with complaints and is intended to operate in conjunction with, and in furtherance of, policies adopted by the Bar Association.

The Bar Association encourages chambers and floors to conduct internal consultation processes and seek legal advice in respect of adopting the updated Best Practice Guidelines. CPD and training events, particularly in relation to grievance handling, will be arranged in due course to assist chambers and floors with the implementation of the updated guidelines. Chambers and floors are asked to advise the Bar Association when they have adopted the updated Best Practice Guidelines by emailing [dppa@nswbar.asn.au](mailto:dppa@nswbar.asn.au).

## Brief history of the Best Practice Guidelines

The Best Practice Guidelines were first endorsed by the Bar Council 2014 in response to the report of the National Attrition and Re-engagement Strategy (NARS) conducted by the Law Council which contained concerning statistics on the prevalence of harassment and bullying experienced by members of the bar. NARS reported that 80 per cent of the women surveyed reported bullying or intimidation, 84 per cent report experiencing discrimination due to gender and 55 per cent reported having experienced sexual harassment. In the legal profession generally, one in two women, and at least one in three men reported experiencing bullying or intimidation in their current workplace; half of all women reported experiencing



discrimination due to their gender and one in four women experienced sexual harassment in their workplace. However, female barristers more often reported experiencing almost every form of discrimination or type of harassment at work when compared to their counterparts in private practice or in-house legal roles.

The guidelines were designed to serve as a voluntary framework to assist barristers to (1) comply with their legal obligations, (2) allow barristers and chambers to manage risk and (3) provide guidance on complying with laws and a mechanism for addressing complaints and grievances in a manner that reflects best practice. 50 chambers and floors adopted the guidelines, and an additional six developed their own policies that reflected the guidelines.

## Need for review

Since their publication, Bar Council has been monitoring, discussing and analysing the impact of the guidelines, and other initiatives, to address inappropriate behaviour at the bar. As with any policy, regular review and reflection on the guidelines is essential.

Update to the guidelines was required in light of recent legislative changes including amendments to the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, specifically rules 123 and 125, and the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

A number of reports focussing on bullying,

discrimination and, in particular, sexual harassment in the workplace had also been published to which Bar Council had regard including *Disrupting the System: Preventing and responding to sexual harassment in the workplace* (Champions of Change Coalition), *Respect@Work Report: Sexual Harassment National Inquiry Report* (AHRC) and the Law Council of Australia's *National Model Framework Addressing Sexual Harassment for the Australian Legal Profession*. In summary, the key features of the recommendations made by the reports, particularly in respect of appropriate grievance procedures, are that:

- a. a robust complaints process needs to be accessible, must clearly define what conduct constitutes misconduct and must provide access to advice (including through external avenues) about options for making a complaint;
- b. the complainant needs to be reassured that there will be no repercussions to their career or otherwise for making reports and that they will be provided with support;
- c. there should be no barriers to chambers and floors responding to behaviours that undermine a culture of civility and respect. This is necessary because much bullying and sexual harassment in the legal profession occurs at the lower end of the severity scale, which may not give rise to legal liability but has adverse individual and workplace consequences;
- d. policies should be alert to the variable work environments of legal professionals, which might include client offices, other legal workplaces, chambers and courts within which bullying or sexual harassment could occur;
- e. the complaints process should include options for bystanders to make complaints or reports;
- f. the complaints process should allow for anonymous reporting capable of resolution outside of formal investigation and disciplinary processes;
- g. there should be a range of informal responses aimed at early intervention and resolution in appropriate cases rather than substantiation of the allegation, which could include facilitated discussions,

mediation, private reprimand, or counselling; and  
h. sanctions for perpetrators should be proportionate, including those that retire or resign before the process has finalised, and should include organisational review to determine if there are systemic problems within the workplace that require correction.

In addition to the above developments, some heads of chambers had also raised with Bar Council the need to review the guidelines to resolve practical issues that had arisen, particularly in relation to the grievance handling framework.

### The review process

In response to these developments and the feedback received, Bar Council formed a working group to review and update the guidelines.<sup>1</sup> The working group drew upon the expertise and leadership of its members in anti-bullying, harassment and discrimination space.

The Women Barristers Forum and a number of committees, including the First Nations Committee, Wellbeing Committee, Industrial Employment Health and Safety Committee, New Barristers Committee, IT Committee and Diversity and Equality Committee, provided input to the updates to the Best Practice Guidelines. The Accessibility Panel also considered the updates and intends to develop separate, targeted guidance for chambers on disability discrimination.

The guidelines were approved by Bar Council in March 2022 and separate Bar Association Conduct Guidelines were approved by Bar Council in May 2022.

### Updates to the Best Practice Guidelines

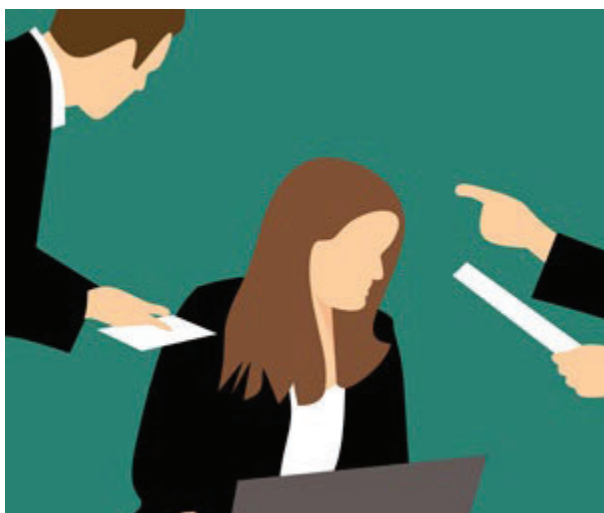
The updated Best Practice Guidelines comprise five documents:

- i. the Model Harassment, Discrimination and Bullying Best Practice Guideline and its two supporting documents;
- ii. Model Grievance and Complaints framework; and
- iii. Guidance Materials;
- iv. the Model Parental and other Extended Personal Leave Guidelines;
- v. the Bar Association Conduct Guidelines which govern interactions between barristers and Bar Association staff and which are to be adopted by the Bar Association.

The updated guidelines are intended to provide a framework for chambers and floors to prevent and eliminate all forms of harassment, discrimination, vilification and bullying. The guidelines have adopted

a trauma-informed approach to grievance handling by highlighting the need to consult with the person affected by inappropriate conduct and the importance of sensitivity, respect and confidentiality. They also set out the positive duties of chambers and certain mandatory reporting obligations.

Adoption of the Guidelines allows chambers and floors clearly to demonstrate an intention to adhere to relevant laws,



including the Legal Profession Uniform Law and the Barristers' Conduct Rules, and to minimise the risk of unlawful conduct. The guidelines also provide a framework, and options, for dealing with allegations of wrongful or unlawful conduct and operate in conjunction with, and in furtherance of, any policies adopted by the Bar Association.

One significant change is to encourage chambers and floors to nominate at least two respectful relations officers to receive reports from complainants about potential breaches of the Model Harassment, Discrimination and Bullying Best Practice Guide. The position replaces that of the floor contact officers under the existing grievance framework.

The Model Parental and other Extended Personal Leave Guidelines provide a framework in which parental and other extended personal leave (including in connection with illness or injury) can be facilitated. These guidelines will continue to operate in conjunction with the Bar Association's Diversity and Equity policy.

The Bar Association intends to arrange CPDs to assist chambers and floors with the implementation of the updated guidelines.

The Bar Association conduct guidelines are adopted by the Bar Association rather than by chambers or floors, although they are applicable to individual barristers at Bar Association events and committee and other meetings. The Bar Association conduct guidelines complement its employment

policies, and govern and provide pathways for redress for Bar Association employees. Anyone engaging in sexual harassment, harassment, discrimination, vilification, victimisation or bullying in the course of working for or with the Bar Association, or while attending a Bar Association event, contravenes the conduct guidelines. Any issues, concerns or complaints can be reported to Chief Operating Officer Elizabeth Wing or made confidentially to the sexual harassment officer or via the online reporting tool, Spot.

### Other initiatives of the Bar Association to target harassment, discrimination and bullying at the bar

In around 2020, Bar Council engaged Dr Sarah Branch and Dr Robyn Holder of Griffith University to work with the Bar Association to carry out background research regarding current policies and practices in relation to informal sexual harassment complaints in the legal and comparable professions. The report made a number of recommendations which resulted in the Bar Association introducing a number of new initiatives including the introduction of:

- i. a new independent sexual harassment officer position currently held by Jenny Houen, to provide confidential support to anyone who has experienced or witnessed discrimination, bullying or harassment at the bar;
- ii. an online reporting tool called 'Spot' that allows anyone to make a confidential record of an incident of sexual harassment, discrimination and/or workplace bullying and, if they wish, to submit the report anonymously to the sexual harassment officer;
- iii. the Elker platform which is an anonymous and confidential reporting platform that is available 24/7. The Elker platform is a joint initiative of the Bar Association, the Office of the Legal Services Commissioner and the Law Society of NSW. The Elker platform will be managed by the Office of the Legal Services Commissioner. **BN**

 **Elker**

### ENDNOTES

- <sup>1</sup> The working group was composed of Gaby Bashir SC, Kate Eastman SC, Kylie Nomchong SC, Elizabeth Raper SC (as her Honour then was), Sera Mirzabegian SC, Yaseen Shariff SC, Melanie Cairns, Catherine Gleeson, Zoë Hillman, Bronwyn Byrnes and Winnie Liu.