



Responding to Sexual Harassment at the Bar – Frequently Asked Questions

Part 1: What to do when sexual harassment occurs?

The focus of these FAQs is to assist barristers, clerks and staff in barristers' chambers who experience sexual harassment and bystanders of the conduct in understanding:

- What is and what is not sexual harassment, sex based harassment and sex discrimination;
- An overview of the key legal provisions contained in the *Sex Discrimination Act 1984* (Cth) (**SDA**), the *Anti-Discrimination Act 1977* (NSW) (**ADA**) and the Barrister Rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*;
- What to do if an issue of sexual harassment arises in chambers, in court, by solicitors, by clerks or in a social setting;
- What can the New South Wales Bar Association do – Bar Care, Best Practice Guideline complaint and the police;
- What options are available and where to seek advice;
- The role of bystanders; and
- Privacy and confidentiality.

This document is intended as a guide for barristers, clerks and chambers staff. If you require more information or information specific to your circumstances, you may wish to seek independent legal advice or contact the Chair of the Association's Diversity and Equality Committee for a confidential discussion.

Q: What is sexual harassment?

A: Sexual harassment has a specific legal meaning set out in NSW *ADA* and the Commonwealth *SDA*. There are three limbs to determine generally whether one has experienced sexual harassment:

1. Has a person made a sexual advance, a request for sexual favours or engaged in any conduct of a sexual nature in relation to the person harassed;
2. Is the sexual advance, a request for sexual favours or engaged in any conduct of a sexual nature unwelcome to the person harassed; and

3. Would a reasonable person, having regard to all the circumstances, have anticipated the possibility that the person harassed would be offended, humiliated or intimidated by the unwelcome conduct.

Sexual conduct may include:

1. Intrusive questions about a person's private life, body or clothing;
2. Insults or taunts based on sex;
3. Sexually explicit physical contact;
4. Sexually explicit emails or text or photo messages.

Sexual harassment may be a single incident or occur because of repeated behaviour over a period of time.

In addition to sexual harassment, there are other forms of harassment that may arise that adversely impact on a person because of sex, pregnancy, LGBTI status and gender identity. This form of harassment does not meet the definition of sexual harassment but may still be unlawful as a form of discrimination.

Q: What does unwelcome conduct mean? And do you have to tell somebody that the conduct is unwelcome?

A: Unwelcome conduct of a sexual nature is any conduct that is uninvited or unsolicited. Whether the sexual conduct is unwelcome to a particular person is a subjective test. On occasions the sexual conduct itself will be obviously unwelcome or a lack of reciprocity or response may indicate that the conduct is unwelcome.

Whether all conduct of a sexual nature is unwelcome when it occurs can be a grey area if the recipient has participated in banter and not complained or expressly made it plain to the other person his conduct is unwelcome. If there is some doubt, the question is whether it would have been apparent to the harasser that his conduct was unwelcome.

Q: How does the reasonable person test work? Is the reasonable person a woman?

A: The reasonable person test is not directed to whether the person engaging in sexual conduct acted reasonably. It is clear from the law that there does not have to be an intention or a motivation to cause any one of the three elements: humiliation, offence or intimidation. It is not directed to asking how a 'reasonable woman' should have responded. Rather, the inquiry is whether a reasonable neutral person would anticipate no more than the possibility that a person to whom the sexual conduct was directed would be offended or humiliated or intimidated by the sexual conduct.

The *SDA* was amended in 2011 to have the words "anticipated the possibility" that the person would be offended. The NSW *ADA* does not have the words "the possibility" in it so the *ADA* has a tougher test.

Q: Where will sexual harassment be unlawful?

A: In New South Wales, not all sexual harassment is unlawful. Whether sexual harassment is unlawful will depend on the relationship between the parties and the situation where sexual harassment occurs. Sexual harassment in some working relationships will be unlawful. This includes employees who work for you, people who enter the workplace but might not be an employee, so a contractor or solicitor in your workplace. It is the same test that applies to workplace health and safety.

Other areas include in the provision of goods and services, business accommodation and training or education.

If you have experienced indecent or sexual assault you may wish to contact the Police and if a sexual offence has been reported to you, you may have an obligation to report it to the Police.

Q: How and when will the *SDA* and *ADA* apply to barristers?

A: The *SDA* and *ADA* will apply to barristers in relation to their employed staff and when barristers provide or receive legal services. The first category is based on the employment relationship between the harasser and the person harassed. The second category is based on when and where legal services are provided or received. For example, a barrister who is sexually harassed by an instructing solicitor, client or support staff is covered under the ‘services’ area.

However, there are a number of gaps and in these situations the *SDA* and *ADA* does not apply:

1. a barrister sexually harassed by another barrister in chambers; and
2. a barrister sexually harassed by a judge, arbitrator, court or tribunal staff, solicitor instructing an opponent or a witness.

Generally, the definition of ‘workplace participant’ under the *SDA* does not protect a sole practitioner from sexual harassment.

A recommendation in the [New South Wales Bar Association’s submission](#) to the Australian Human Rights Commission’s *National Inquiry into Sexual Harassment in Workplaces* is to extend the definition of ‘workplace participant’ so that the only requirement is that the conduct takes place at work.

Q: How does Rule 123 operate in light of those gaps in the *ADA* or the *SDA*? What are the differences?

A: Rule 123 of the Barristers Rules set out as follows:

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

- (a) discrimination;
- (b) sexual harassment; or
- (c) workplace bullying.

The expression ‘sexual harassment’ incorporates the definition under the applicable state, territory or federal anti-discrimination or human rights legislation, namely the *ADA* and *SDA*.

The key words in Rule 123 are *in the course of practice*. The expression *in the course of practice* bears its ordinary meaning and so it will cover circumstances where a barrister practises and who a barrister associates with in practice. It is the relationship that matters, and if the reason for the connection is that you are a barrister that may be enough. The expression *in connection with the practice of law* is used to define unsatisfactory professional conduct and professional misconduct.

Rule 123 is intended to supplement those more general concepts of professional misconduct and they are also identical. The intention appears that the phrase should be interpreted in the same way, although it is arguable that the words *in the course of practice* impose a much narrower connection than *in connection with*.

Q: If someone is sexually harassed or believes they have been sexually harassed what should they do?

A: There are a number of options available if someone has been or believes she has been sexually harassed. What a person should do depends on the workplace, the nature of the relationships at work and the grievance procedures available to the person. Other factors that may have a bearing on what steps can be taken will be whether you can deal with the situation yourself and whether there are members on your chambers or another chambers whom you may be able to turn to for assistance.

First, consider whether it is open for you to go to someone senior on your chambers in an informal and confidential way. If this is not possible, or you do not wish to take this pathway, your chambers may have a formal grievance procedure that you may wish to commence. If so, consult the relevant policy, as there may be an appropriate grievance contact person you may wish to speak to before committing a complaint in writing. The grievance contact may be able to provide you with advice and may be aware of the context of chambers and have advice as to how you may be able to handle the situation yourself without commencing a formal process.

However, if you do wish to start a formal grievance process, each chambers should have a policy which outlines how this may be initiated.

If you feel that you have conveyed that the conduct is not welcome and the conduct is continuing, you may want to raise it with someone who can assist you to raise it on your behalf.

After considering the above options, if you are working in an environment where you do not feel comfortable about commencing a grievance process to be handled by chambers, then you can bring a complaint to the Australian Human Rights Commission, the New South Wales Anti-Discrimination Board or Legal Services Commissioner. These options need to be carefully considered because each differ with respect to the time limits for making complaints, the complaints processes and remedies.

Q: Sexual harassment can be a one off incident or it might involve a course of conduct over a period of time. If I am in court and my opponent makes a lewd, crude, sexist remark to me which I find to be conduct of a sexual nature that is unwelcome how do I deal with that in the circumstances?

A: This depends on a few factors:

1. Have you dealt with this barrister before?
2. Are you working with a senior barrister who may be able to help you by calling out that behaviour for you?
3. What is the history of the relationship between you?
4. Do you feel comfortable raising it with that person?

Those factors can have a bearing on whether you feel comfortable with handling the situation yourself.

If you are unsure or you are not comfortable about raising it with your opponent, you can wait till you return to chambers and consult with a senior member of chambers about the options available to you. One of those options may be to report the conduct to the Association's Professional Conduct Department.

The Association has processes for when things happen in chambers and when they happen at an Association premise or event but in other circumstances it is not clear.

Q: What happens if I am sexually harassed at a function such as chambers drinks which occur at a bar?

A: The Association has developed and adopted the [Best Practice Guidelines](#). The Association and chambers who have adopted the Best Practice Guidelines make a commitment that people coming onto the premises or attending their events will be free from harassment and discrimination. All Association functions which are either held at the Association or at another location such as a function centre or hotel are subject to the Best Practice Guidelines. The Best Practice Guidelines also includes a grievance handling process which sets out the steps that should be taken in the event of a grievance arising.

Rule 123 refers to *in the course of practice*. Readers' dinners, the Bench and Bar dinner or lunches generally fall under that category.

The Association can investigate complaints of professional misconduct where it is alleged that the barrister is not a fit and proper person to engage in legal practice. It should be noted that the Association is not limited to considering events or conduct which operate in connection with the practice of law. The conduct can occur anywhere.

Additionally, Rule 8 of the Barristers Rules sets out that a barrister must not engage in conduct which is dishonest or otherwise discreditable to a barrister, prejudicial to the administration of justice or likely to diminish public confidence in legal practice.

Q: Does the reasonable person test vary in a social setting compared to a more formal work environment?

A: The reasonable person test is contextual. There are listed relevant circumstances to take into account and can include:

1. The sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

2. The relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
3. Any disability of the person harassed;
4. Any other relevant circumstance.

Workplace culture can also be a factor.

Q: Why does it always have to be the person who is harassed who makes the complaint? What is the responsibility of a bystander or a witness to do something if they see sexual harassment occurring?

A: If a particular act is offensive or humiliating or intimidating to a person even if it is not directed at them that can still be the basis of a complaint. If you are a bystander, you can also speak up and in some cases intervene.

There are accessory liability provisions in the *SDA* and the *NSW ADA*. Under the *SDA* it is not unlawful to cause, instruct, induce, aid or permit sexual harassment but it is unlawful if a person permits discrimination. However, the *NSW ADA* makes it unlawful to cause, instruct, induce, aid or permit sexual harassment. So, if there is a known harasser and other persons or chambers knowingly allow a woman to be placed in a situation where sexual harassment will occur, those persons or chambers will be accessories.

If there is an incident that occurs in chambers, in a social or professional setting, it may be relevant for the chambers to consider what steps they should or would take in those circumstances to ensure the safety of all participants.

A bystander may have obligations under section 316 of the *Crimes Act 1900* (NSW).

Q: If a member of chambers becomes aware of sexual harassment occurring to another member of chambers or a visitor to chambers, what should that barrister do and do the Best Practice Guidelines make any difference in terms of obligations?

A: Any person can make a complaint under the *Legal Profession Uniform Law* (NSW). The person experiencing the harassment does not have to be the person who makes a complaint under the legislation.

If your Chambers has adopted the Best Practice Guidelines you may avail yourself of the grievance process set out by the Best Practice Guidelines and seek assistance from the Association. While the Association cannot go into chambers and take over the matter, you can seek assistance, ask questions, receive guidance and we can refer matters to the Diversity and Equality Committee to get specialist advice.

The person handling the grievance within chambers will at some point have to decide whether they are the right person to continue handling the matter or whether they need an external third party to intervene, assist and/or investigate and possibly mediate.

Q: Do bystanders have a responsibility to speak out?

A: If you are in a leadership or management position in your chambers and an alleged incident of sexual harassment has been brought to your attention and you choose not to take action to stop the conduct or prevent such conduct from occurring again, there may be liability under the *SDA*, work health and safety laws or a common law duty of care.

A bystander may have an obligation under section 316 of the *Crimes Act 1900* (NSW). If a chambers or barrister knows or believes that an incident of sexual harassment that amounts to a serious indictable offence such as a sexual touching, indecent assault or sexual assault has occurred, and that they have information that might be of material assistance in securing the apprehension or prosecution of the person, and that information has not been obtained within the operation of legal profession privilege, pursuant to section 316 of the *Crimes Act 1900* (NSW), the chambers, through its office holders, or barrister may be required to report the matter to the police.

Q: If I want to take a complaint to an external body like the Australian Human Rights Commission or the Anti-Discrimination Board, how do I do it? How much is it going to cost me and how long will it take?

A: If you wish to make a complaint to an external body such as the Australian Human Rights Commission (**AHRC**) or Anti-Discrimination NSW (**AD**), you may wish to visit their respective websites to obtain more information.

Generally, a complaint of alleged sexual harassment must be lodged with the AHRC within 6 months of the alleged conduct occurring (12 months with the AD). The AHRC and AD may investigate and attempt to work with the parties to conciliate the complaint so that the parties may reach a mutually agreeable, confidential resolution.

If the complaint does not resolve, the complainant may be able to take the matter to the next step which is either to file in the Federal Court of Australia or Federal Circuit Court of Australia (if you complained to the AHRC) or the NSW Civil and Administrative Tribunal (if you complained to the AD).

You do not need a legal representative to access the AHRC or the AD but you have the option of a legal representative if you would like one.

If the incident involves assault, you can go to the police.

Q: If I take my matter to the AHRC and then to the Federal Court of Australia what sort of remedies can I expect from the court process of at some point earlier in the process?

A: Conciliation is an informal process which is conducted by experienced conciliators at the AHRC or AD. The remedies that a person can obtain through conciliation may be remedies that a court cannot award such as a statement of regret or apology, asking for the conduct to stop, change in policy and training. An applicant may also seek compensation.

Q: If we become aware of a colleague who experiences sexual harassment and wants to do something about it or Chambers are aware of it, how can we as barristers and the Bar more generally support those colleagues?

A: Members have access to [Bar Care](#) which is a confidential service and it is important that members refer others to the confidential service if required.

Q: What do you do in circumstances if you are the recipient of an informal complaint?

A: There are informal and formal ways of resolving a complaint. If you have been informed of a complaint, you are not a bystander and are responsible for assisting the individual through the matter. First, you should inform the individual that you will keep matters confidential, however, be clear if you must inform other members of the Board, the Clerk or a Head of Chambers. You may then want to clarify with the individual as to what outcome they want. It is recommended that you also consult with the chambers grievance policy which may set out a process in handling these matters.

For more information, the Association’s CPD on *Responding to Sexual Harassment at the Bar – What to do when Sexual Harassment Occurs?* can [be viewed here](#).

The Association has also prepared a factsheet entitled “[Who can I talk to about sexual harassment at the Bar?](#)” and a [comprehensive guide to support services and information](#).