



Responding to Sexual Harassment at the Bar - Frequently Asked Questions

Part 2: Responding to sexual harassment complaints: Barristers and Chambers

The focus of these FAQs is to assist barristers and chambers when complaints of sexual harassment are raised in chambers. This FAQ covers issues such as:

- Why sexual harassment occurs;
- Strategies for preventing sexual harassment in chambers;
- How to respond to complaints – individuals and chambers;
- Victimisation;
- What options are available and where to seek advice;
- Privacy and confidentiality.

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

Q: Why does sexual harassment occur in the legal profession?

A: There are characteristics of some workplaces that increase the likelihood of sexual harassment occurring. These tend to be workplaces which are less diverse and thereby less inclusive. Hierarchy and power (both in experience, rank and age) are also factors, as well as the use of alcohol in work social functions. In addition, the structure of the Bar, in which all barristers are sole practitioners without conventional centralised workplace controls or accountability measures, is another factor that increases the risk of sexual harassment occurring.

Q: What are the particular issues for barristers in chambers in relation to the *Sex Discrimination Act 1984* (Cth) and the *Anti-Discrimination Act 1997* (NSW)? Do these laws address the chambers setting?

A: Barristers and chambers are required to comply with both the *Sex Discrimination Act 1984* (Cth) (*SDA*) and the *Anti-Discrimination Act 1997* (NSW) (*ADA*) when they employ staff or when they provide or receive services. This applies where:

- a) a barrister experiences sexual harassment from a solicitor or client, or vice versa; and
- b) where chambers or barristers employ staff.

Whilst chambers are responsible for the staff they employ, it is not as well known that chambers may be accessorially liable for the conduct of a barrister towards staff, clients, or solicitors that constitutes discrimination or sexual harassment.

However, an area where the legislation is of little or no application and where the risk of sexual harassment is particularly acute is where such conduct occurs from one barrister to another. There are also instances of sexual harassment from a Judge, an Arbitrator, a Mediator, by Court staff, by a solicitor who may be instructing your opponent or even a witness or member of the public. While legislation does not cover these situations, barristers may find themselves in breach of Barristers Rules 8 and/or 123.

Barrister Rule 123 is as follows:

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

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

Barrister Rule 8 is as follows:

8. A barrister must not engage in conduct which is:

- (a) dishonest or otherwise discreditable to a barrister;*
- (b) prejudicial to the administration of justice; or*
- (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.*

Q: When might a Chambers (employer) be liable for the conduct of a particular individual?

A: There are accessorial 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. The *NSW ADA* does make it unlawful to cause, instruct, induce, aid or permit sexual harassment which means that if someone is involved in a situation and does not do anything and allow a, there is a possibility of liability under the accessorial liability provisions.

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.

Q: What are some practical, reasonable steps a chambers can take to prevent sexual harassment in the day to day working of chambers or at chambers social functions?

A: The first step any chambers should take is to establish as part of its values that sexual harassment or discrimination of any kind will not be tolerated. This can be done in the first instance by adopting and implementing policies to deal with misconduct of this kind. Taking this step demonstrates leadership and defines values and culture.

Second, policies should be continually reviewed and updated to ensure that they are consistent with the development of the law and social norms of the times. All policies should be kept on display in a visible location, as well as being provided to new barristers and staff members. The policies should also be published or at least referred to on the chambers website so that they are accessible to external chambers users (such as solicitors) who may wish to make a complaint if they experience sexual harassment in chambers.

Third, chambers should provide regular (perhaps annual) practical training on issues that cover its policies and sexual harassment and discrimination prevention (such as awareness training). Studies have shown that policy adoption is more effective at reducing incidents of sexual harassment when paired with an ongoing practical training program.

Fourth, chambers should consider how alcohol is consumed on the premises and at chambers functions. In all circumstances where alcohol is involved it should be consumed responsibly, and people should be brave or courageous enough to identify when someone has had enough and put a stop to it before it escalates. Other useful measures are to have an end time to chambers functions. Where staff are involved, the chambers should also make sure that they are appropriately supervised and that they are sent home in an Uber or taxi.

In relation to staff it is important that chambers regularly meet with their staff to monitor their welfare. If the chambers does not have a staff committee, they should have one. They should meet with the Clerk and the other support staff and be made to feel secure enough to disclose issues of concern. It would also be helpful to meet with the other chambers staff (such as juniors and reception staff) separately from the Clerk. There are things that staff may wish to say to a staff committee that they would not want to say in the presence of the Clerk.

Q: If an allegation (not a formal complaint) is made to Chambers, how should it be handled? What happens if a complaint is raised by a person and that person does not want you to do anything about it and for it to remain confidential?

A: Whether a complaint is made formally or informally, because it is an allegation, it still needs to be treated with the same amount of seriousness.

First, refer to the chambers' policy as to how to deal with these matters. Abide by the policy. If your chambers does not have policies at a later point the chambers should consider developing them but in the interim, you should make a plan for how the complaint will be addressed.

Second, you should speak to the complainant and find out what the details of the complaint are and what they want to happen. A chambers should have a dedicated contact person to liaise with the complainant. The complainant may have a desire for anonymity or confidentiality, including because of the impact the complaint could have on their reputation and professional relationships. The contact person should be clear about what the chambers can and cannot do in addressing a complaint. For example, it may be necessary as a matter of procedural fairness to put the allegation to the alleged perpetrator or to consult a witness where it will not be possible to maintain a complainant's desire for confidentiality.

If the complainant, in making the complaint, also does not wish for anything to be done, that may not be possible if the nature of the complaint gives rise to a reporting obligation.

You should also inform the complainant what their options are. The options include making a complaint themselves to the New South Wales Bar Association (**the Association**) under Rule 123, or to the Australian Human Rights Commission (**AHRC**), but the complainant may say that they would like chambers to deal with it.

Third, if it is the case that the complainant wishes for the chambers to deal with the complaint rather than the Association, the chambers should, as soon as practicable and where appropriate, initiate an investigation (as to this, see further below). If this is the case, establish the facts and particulars underlying the complaint. Then, as quickly as possible, speak to the person who is the subject of the complaint. Keep notes.

The key is to act quickly so that the matter is resolved without undue delay. The longer a complaint is not dealt with the greater risks of relationship breakdown and of broader harm to the affected parties.

A good way of remembering the process is with the acronym TRICK:

T – Treat all matters seriously;

R – Risks, consider all risks both legal and reputational and respond quickly;

I – Investigate impartially;

C – Caution in relation to confidentiality and also against victimisation; and

K – Keep notes.

It is strongly advised that where appropriate, chambers seek external advice and/or assistance to investigate a complaint. This may expedite the process of addressing a complaint and take the pressure off the chambers officeholders who are acting in those roles essentially as volunteers.

The chambers environment is typically populated with close, longstanding interpersonal relationships that can heighten the difficulty of conducting an investigation. External assistance can mitigate the impact of that issue.

Throughout this process, support and care should be offered to the affected parties. Bar Care can assist with this.

Q: Should chambers always conduct an internal or external investigation? And if so what not to do in that circumstance?

A: It may not always be necessary to conduct an investigation. It may be possible to resolve some complaint on a more informal basis (such as mediation). It will depend on the seriousness of the complaint and to an extent, the wishes of the complainant. If the complainant says that they just want you to hear the complaint and do nothing, you will need to explain to the complainant that that might not be an option. For example, if you form the view that a policy demands a response because the conduct is serious, or if a crime has possibly been committed, those are circumstances in which it will be necessary to act. If the matter is referred to the police then you should normally wait for them to complete their investigation unless there is an immediate issue in chambers that needs to be addressed.

Q: What happens if sexual harassment occurs in chambers and the person who has engaged in the sexual harassment is a barrister or staff member of chambers?

A: If an incident of sexual harassment has been found to have occurred in chambers by a member, licensee, reader or staff member then the chambers needs to take action. Taking action is difficult but necessary and is a good thing for the victim, the chambers (including because of the accessorial liability issue set out above) and the profession generally.

In circumstances where the alleged perpetrator is a staff member, any response to the conduct should take into account any policies maintained by the chambers, the staff member's employment contract, and any relevant provisions of the *Fair Work Act 2009* (Cth) and *SDA*. Disciplinary action up to and including termination of employment may be necessary.

Where the alleged perpetrator is a barrister (either a member, licensee, or reader) it will also be necessary to take into account any relevant provisions of the chambers shareholders agreement and/or constitution, and where applicable, licence agreement. Chambers should give consideration to the drafting of their existing agreements and whether they provide adequate measures to give ultimate redress to a complaint that is upheld.

If you are setting up chambers you have the ability to put mechanisms in place which are much harder for established chambers. For example, you may provide in a shareholders agreement a provision which leads ultimately to the chamber buying someone out if their conduct is found to be either seriously or continuously in breach of a chambers' policy or which brings the chambers into disrepute. Similar relevant provisions could also be added to licence agreements.

Including a full list of all circumstances in which a person agrees that they can be asked to leave the chambers is helpful but at the same time, it is important to provide the chambers with flexibility to allow the Board to develop policies that are reflective of the times.

Finally, 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: You have the task of telling one of your colleagues that he is the subject of a complaint of sexual harassment or the complaint comes by contact from the Professional Conduct Unit at the New South Wales Bar Association. What should you do?

A: The individual should be told the details of the complaint (to the extent you are able to), what options are available to them and what chambers are intending to do in their investigation of the complaint. The options available to the individual include seeking their own advice about what they should do and seeking support through [Bar Care](#). Being the subject of a complaint can be very distressing so it is important that you encourage the person to take external legal advice (rather than deal with it themselves) and seek other support through Bar Care.

You may also need to inform them that they are not permitted to disclose the complaint to others, or that they are not to speak to the complainant.

You should also be prepared for the person to respond in a manner which accepts or freely admits what they have done and in such cases, this may mean you treat the matter differently to a complaint which needs to be further investigated.

Q: What if the person says that it was just or joke or he or she cannot remember or did not mean to cause offence

A: In these situations one should bear in mind the definition of “unwelcome conduct” in the *SDA: see Fact Sheet 1*. At the very least, if the complaint is upheld the person should be directed to participate in awareness training as part of the remedial measures put in place in response to the misconduct.

Q: Does the Clerk have a role to play?

The Clerk works for every barrister in chambers. Generally, in situations where a chambers is investigating the conduct of one of its own members, the Clerk should not be involved (unless they are a party to the complaint in some way or are a witness) so that they are able to remain impartial.

Q: Does the barrister who is alleged to have engaged in sexual harassment or confesses to sexually harassing someone have to disclose his or her conduct to the New South Wales Bar Association?

A: No. There are no mandatory disclosure requirements.

Q: If the New South Wales Bar Association does become aware of the conduct or someone reaches out to the Association, what is the role of the Association? Can the President or the Executive Director go into Chambers and require Chambers to respond in a particular way? What can the Bar Association do?

A: The Association can provide assistance to any person who has been the subject of sexual harassment. They can provide guidance on the options that might be available to that person for dealing with a particular complaint, but it also should be recognised that it is not only those people who are victims of sexual harassment who might be able to make a complaint to the Association about the behaviour of the barrister. It may also be a person who was a witness of the sexual harassment, or has received a report of the sexual harassment who decides that they also would like to make a complaint to the Association about the behaviour of a particular barrister.

The Association can initiate investigations of professional misconduct, unsatisfactory professional conduct, with potential disciplinary consequences for a barrister. It can also refer matters to the Police, make reports to the AHRC or Anti-Discrimination NSW.

The Association can in its discretion require perpetrators of sexual harassment to undergo anti-harassment awareness courses or training as an educational measure.

Q: What are the best measures to protect a complainant, particularly a junior complainant, members of staff or people on the chamber who might be at risk of some further form of sexual harassment?

A: Hierarchy and seniority are cultural features of the structure of the Bar but they should play no role in the handling of a sexual harassment complaint. Complaints should be taken seriously and investigated properly and in accordance with policy. Re-victimisation or any action taken as a result of making a complaint is where a chambers needs to be uncompromising in the way it enforces its policies, otherwise it will affect the integrity of the entire system and result in members feeling like they are unable to complain about a person's conduct.

For more information, the Association's CPD on *Responding to Sexual Harassment at the Bar – Barristers and Chambers?* 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](#).