

New South Wales Bar Association

Submission to the National Inquiry into
Sexual Harassment

18 February 2019

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Introduction

1. The New South Wales Bar Association (**NSWBA**) welcomes the opportunity to provide a submission to the National Inquiry into Sexual Harassment.
2. The announcement of the National Inquiry has caused the NSWBA, principally through the Diversity and Equality Committee, to examine the unique nature of the way barristers work and the structures of the Bar. The Sex Discrimination Act 1984 (Cth) (**SDA**) provides limited coverage for barristers and the National Inquiry provides a timely opportunity to review how the Commonwealth laws might provide better and more comprehensive coverage for barristers (and other self-employed legal practitioners). To this end, the NSWBA suggests five recommendations to enhance the application and operation of the SDA.
3. In preparing our submission, we have endeavoured to draw together the relevant and available research. However, there is little reliable data and the processes for addressing sexual harassment, sex-based harassment and sex discrimination at the Bar is an issue in itself which should be addressed by the legal profession as a whole.
4. This submission addresses the following issues:
 - the history, composition and culture of the New South Wales Bar, including the experience of women who have been admitted to the Bar, particularly over the past 30 years;
 - prevalence of sexual harassment at the New South Wales Bar and reasons why sexual harassment may occur;
 - application of the SDA to the Bar and the areas where barristers do not have legal protection;
 - the New South Wales Bar's response to sexual harassment to date; and
 - recommendations with respect to the SDA.

The Bar in New South Wales

5. The legal profession in New South Wales is divided into two branches – solicitors and barristers. Barristers are professional advocates. There are two classes of barristers – the majority of barristers are 'juniors' while a smaller group, referred to as 'silks', are barristers who have been appointed to the rank of Senior Counsel (SC) or formerly Queens Counsel (QC). Barristers are readily identified as they often may wear wigs and gowns¹ when they appear in court. This practice occurs in all criminal jurisdictions of superior courts and in some civil jurisdictions of superior courts.
6. The New South Wales Bar has a long history. In 1824, Saxe Bannister aged 34 was the first man to practise as a barrister in New South Wales.² In July 1896 an association of barristers was

¹ http://archive.nswbar.asn.au/docs/about/what_is/gowns.pdf;

² Chambers J "The First Woman to Clear the Bar in New South Wales" [2010-2011] (summer) *Bar News* Summer p.99.

formed in New South Wales to consider and report upon all matters of current legislation, to enunciate and enforce rules of professional discipline and to foster social and professional liaison among the members of the Bar.

7. On 9 June 1902, following Federation, the old association was dissolved and the first annual meeting of a new body took place. It was called the Council of the Bar of New South Wales.
8. On 22 October 1936, the NSWBA was incorporated and the first meeting of the Council of the NSWBA took place. The NSWBA is governed by the Constitution of the NSWBA.³
9. Currently, the NSWBA's governing body is its Bar Council, comprising 21 barristers (from both the junior and senior ranks) elected by members of the Association. It is the designated local regulatory authority for a range of functions under the Legal Profession Uniform Law.
10. The objects of the NSWBA are relevantly to:
 - promote the administration of justice;
 - promote, maintain and improve the interests and standards of Local Practising barristers;
 - make recommendations with respect to legislation and law reform; and
 - seek to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community.
11. As at November 2018, there are 2409 barristers practising in New South Wales.⁴ The majority are based in Sydney, with barristers also practising in Parramatta, Newcastle, Wollongong, Dubbo, Lismore and Orange.

Women barristers in New South Wales

12. In 1902 Miss Ada Evans was Australia's first female law graduate, having attended the University of Sydney. She was not a "person" for the purposes of the *Legal Practitioners Act 1898* (NSW) and was barred from admission and practice as a barrister or solicitor because she was a woman.
13. Between February 1904 and 1917, Ada Evans and others commenced a campaign to change the law and have women recognised as "persons". On 26 November 1918, the *Women's Legal Status Act* was enacted to remove any disqualification from women holding positions or practising professions including local government, justices, magistrates and legal practitioners. We refer to the research undertaken by Tony Cunneen⁵ and a recent speech by the Hon Justice

³ https://www.nswbar.asn.au/docs/webdocs/Constitution_as_at_2_Nov_2017.pdf

⁴ <https://www.nswbar.asn.au/the-bar-association/statistics>

⁵ Cunneen T *One of the 'Laws Women Need' - The Women's Legal Status Act of 1918:* <http://www.forbessociety.org.au/wordpress/wp-content/uploads/2013/03/tony9.pdf>; *Battles Overseas and At Home: The New South Wales Legal Profession in 1917:* http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/The%20War%20Memorial%20Project/Cunneen_Law%20at%20War_1917.pdf

Virginia Bell AC to the Forbes Society in May 2018, *By the Skin of Our Teeth – The Passing of the Women's Legal Status Act 1918*.⁶

14. Following the passage of the Women's Legal Status Act, Ada Evans registered as a student-at-law in 1919. In 1921, she was the first woman admitted to the New South Wales Bar. She was immediately offered briefs but she declined to practice. In 1924, Mrs Sybil Morrison was admitted to the New South Wales Bar and became the first practicing barrister.⁷
15. During the first 50 years (1918 – 1968) in which women were eligible to practise law in New South Wales, 21 women were admitted to the New South Wales Bar but not all practised. Notable women barristers admitted during this period include:
 - Elizabeth Evatt AC, who became the first Chief Justice of Family Court in Australia in 1976 and the first woman President of the Australian Law Reform Commission in 1988; and
 - Mary Gaudron, who was the first woman Solicitor General in New South Wales and the first woman appointed to the High Court of Australia in 1987.
16. The past 35 years have witnessed more rapid changes in the legal profession for women. By the mid-1990s women were graduating from law schools in equal numbers to men. Women now outnumber male graduates in Australian law schools and women law students have tended to outperform male law students academically.⁸
17. The 'firsts' for women barristers in New South Wales continued – to name a few:
 - in 1985, Priscilla Fleming QC was appointed the first woman QC from the private bar;
 - in 1987, Jane Matthews AO was appointed the first female judge of the Supreme Court of New South Wales. Justice Mathews retired in May 2018;
 - the Hon Margaret Beazley AO was the first woman appointed to the New South Wales Court of Appeal in 1996 and the first female President of the New South Wales Court of Appeal in 2013;
 - the Hon Patricia Bergin SC was the first woman appointed Chief Judge of the Equity Division of the New South Wales Supreme Court in 2009.
 - Of the 41 Presidents of the Association, there have been 3 women presidents – Ruth McColl AO (1999 – 2001), Anna Katzmann (2007 – 2009) and Jane Needham (2014-2015).
18. In the past 50 years (1968 – 2018), 990 women have been admitted to practice as barristers. On the basis of available information, the total number of women admitted to the New South Wales Bar since 1924 is 1011, but not all of these women have practised as barristers.

⁶ <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bellj30May2018.pdf>

⁷ <https://www.plc.nsw.edu.au/microsites/archives/stories-from-the-archives>

⁸ <https://law.unimelb.edu.au/alumni/mls-news/issue-13-june-2015/balancing-act;>
[https://aic.gov.au/sites/default/files/publications/proceedings/downloads/16-anleu.pdf;](https://aic.gov.au/sites/default/files/publications/proceedings/downloads/16-anleu.pdf)
<http://rightnow.org.au/opinion-3/women-in-the-institutions-of-the-law/>

19. As at November 2018,⁹ there are 556 women barristers in practice. Women barristers now comprise 23.08% of the Bar with the largest number of women barristers in their first five years of practice. However, the number of women practising as barristers lags substantially behind women practising as solicitors. Over 50% of solicitors in New South Wales are women.¹⁰ Since 1995, the number of female solicitors has increased by 300.4% (from 3,554 to 14,230) while the number of male solicitors has increased by only 59.1% (9,243 to 14,705).¹¹ However, 46.7% of all barristers are men over the age of 50.¹² By comparison, male solicitors over the age of 50 comprise around 19% of all solicitors in New South Wales.¹³

‘Employment’ status of barristers

20. With a few exceptions,¹⁴ barristers are self-employed and sole practitioners.

21. To be eligible to become a barrister in New South Wales a person must:

- be admitted as a lawyer in an Australian jurisdiction. The Legal Profession Admission Board is the admitting authority in NSW;
- sit and pass the Bar to the required standard; and
- complete the reading program which includes registration and satisfactory participation in the Bar Practice Course and one year of readership under the supervision of a tutor.¹⁵

22. Barristers are required by legislative and other requirements (**Barristers Rules**¹⁶) to work in a particular and unique way.

23. Barristers at the private Bar in New South Wales are not permitted to be employees.¹⁷ They do not work in law firms and they are not permitted to form any business association or partnership.¹⁸ They are not permitted to employ another legal practitioner.¹⁹ However, barristers may work together. It is common for a senior barrister (QC/SC) to appear in court hearings leading a junior barrister.

⁹ <https://www.nswbar.asn.au/the-bar-association/statistics> (16 October 2018).

¹⁰ <https://www.lawsociety.com.au/sites/default/files/2018-04/NATIONAL%20PROFILE%20OF%20SOLICITORS%202016.compressed.pdf>;
<https://www.lawsociety.com.au/sites/default/files/2018-07/201806%20Practising%20Solicitor%20Statistics%20-%20Jun%202018.pdf>

¹¹ <https://www.lawsociety.com.au/advocacy-and-resources/advancement-of-women/gender-statistics>

¹² <https://www.nswbar.asn.au/the-bar-association/statistics>

¹³ <http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/1394900.pdf>

¹⁴ Certain barristers, such as public defenders and Crown prosecutors are statutory appointees.

¹⁵ *Guide to becoming a barrister in New South Wales*:

https://www.nswbar.asn.au/docs/webdocs/BAR_BecomBarrister_A5_10Aug17_e.pdf

¹⁶ <https://www.legislation.nsw.gov.au/inforce/5a7fbcd4-700d-45da-84dc-b6f6b0fb2870/2015-243.pdf>
<https://www.legislation.nsw.gov.au/inforce/5a7fbcd4-700d-45da-84dc-b6f6b0fb2870/2015-243.pdf>

¹⁷ Rule 12(c) of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) (**Barristers Rules**).

¹⁸ Rule 12(a), (d) and (e), *ibid*.

¹⁹ Rule 12(b), *ibid*.

24. The Barristers Rules set out the work a barrister may do. A barrister's work is:²⁰
- (a) appearing as an advocate,
 - (b) preparing to appear as an advocate,
 - (c) negotiating for a client with an opponent to compromise a case,
 - (d) representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution,
 - (e) giving legal advice,
 - (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs,
 - (g) carrying out work properly incidental to the kinds of work referred to in (a)–(f), and
 - (h) such other work as is from time to time commonly carried out by barristers.
25. A barrister generally receives her or his work by way of a referral from a solicitor. This is commonly described as a 'brief' either to advise or appear in court or other forum. The barrister then works with the solicitor and the client in the preparation of the case.
26. One specific and unique feature of barristers' work is the 'cab rank' rule, pursuant to which a barrister cannot refuse to advise or represent a person (subject to specified exceptions).²¹ The rationale for the rule is to ensure that every person may obtain legal advice and representation.
27. The majority of barristers at the NSW Bar work in private practice. Some barristers also hold statutory appointments such as Public Defenders, Crown Prosecutors and tribunal members.
28. While barristers are sole practitioners, they commonly practise in chambers comprising barristers with a range of experience, from reader level through to senior counsel. Chambers commonly have a head of chambers (who is normally a very senior barrister) and the day to day management of chambers is conducted by a clerk with the assistance of staff. The clerk's role varies within chambers but typically involves diary management, help in obtaining briefs and assisting barristers in their relationships with solicitors.²² The clerk sometimes provides work directly to barristers and is considered integral to a barrister's ability to manage his or her practice. Each chambers operates autonomously and the NSWBA has little or no control, or oversight of, the various chambers.
29. Given the nature of barristers' work, industrial and discrimination laws, including the SDA, have limited operation and application to them. This has an impact on the coverage of sexual harassment laws as discussed in this submission at [72]-[82] below. Barristers have no entitlements to paid annual leave, sick leave or parental leave. Barristers have limited or no supervision of their work. They are not permitted to advertise. They have no formal process for

²⁰ Rule 11 of the Barristers Rules.

²¹ Rule 17 of the Barristers Rules.

²² *Guide to becoming a barrister in New South Wales:*

https://www.nswbar.asn.au/docs/webdocs/BAR_BecomBarrister_A5_10Aug17_e.pdf

performance reviews or protections against unfair dismissal. They are paid only for the work they perform.

Sexual harassment at the Bar

30. Both men and women lawyers need protection from sexual harassment. Sexual harassment of women lawyers has historically been a particular problem, given that men historically dominated the profession. In the twenty-first century, the Bar remains a male-dominated workplace.
31. Sexual harassment of women lawyers has been a recurrent and persistent feature of many women's experiences in legal practice.²³ Ada Evans recorded being subjected to sexist remarks and bullying when she attended law school in 1900 – 1902.
32. However, there has been very little research into the working conditions of barristers and their experience of sexual harassment.²⁴ There is also limited data. Anecdotal evidence indicates that many women barristers in New South Wales have experienced sexual harassment, with women barristers who have experienced sexual harassment reporting being subjected to a wide range of behaviours extending to conduct such as:
 - sexual advances from male judges, barristers, solicitors and/or clients;
 - requests for sexual favours in return for work from solicitors, other barristers and clerks;
 - being forcibly kissed, touching breasts, smacked on the bottom, patted and hugged;
 - being photographed and the photographs being used in lewd ways;
 - being 'sledged' in court with sexually explicit language;
 - being subjected to sexist remarks and taunts in court by male barristers;
 - being asked about their private life, marital status and sexual history by male barristers in chambers, by male instructing solicitors and clients;
 - being exposed to pornography in chambers by male barristers;
 - being the subject of sexual and sexist gossip;
 - having comments made about their bodies and attire (including from judges);
 - comments and slurs about women barristers' sexual orientation and marital status; and
 - lewd comments about women who are pregnant.
33. The above list is compiled from personal experiences of sexual harassment provided by a number of barristers who approached the NSWBA, on a confidential basis, in the course of

²³ See *After Ada*, Law Society of New South Wales 2002 page 40: <https://womenlawyersnsw.org.au/wp-content/uploads/026534.pdf>

²⁴ Eastman, K "Sex Discrimination in the Legal Profession" (2004) 27(3) *University of New South Wales Law Journal* 866.

preparing this submission. The NSWBA acknowledges the courage of these barristers in coming forward to tell their stories and is grateful for their contributions. The reported conduct has occurred in a wide range of places and circumstances, in private and in public – in chambers, in solicitors’ offices, in a mediation, in court, during seminars, online and at social functions.

34. We have also received first hand reports of barristers, predominantly male, who have engaged in sexual harassment of women at all levels of the legal system.
35. Many women barristers also have experienced sex-based harassment and sex discrimination. Sex-based harassment is unwelcome conduct amounting to harassment but may not involve requests for sexual favours or conduct of a sexual nature. We note that the characterisation of behaviour being ‘sexual harassment’ as defined in s 28A of the SDA is not always clear. We are aware that some barristers have not understood the specific definition and elements of sexual harassment and confused bullying or ‘sex-based harassment’ as sexual harassment.
36. We are aware of reports of male and female barristers experiencing sexual harassment because of the barrister’s homosexuality or sexual orientation, particularly verbal sexualised abuse. We have also heard reports of sexual harassment and sex-based harassment being experienced with adverse treatment because of the barrister’s race. Our evidence is entirely anecdotal. We are not aware of data addressing intersectionality and sexual harassment.

Research about the prevalence of sexual harassment at the Bar

Keys Young Report 1995

37. In 1995, the Keys Young report on *Gender Bias in the Legal Profession* identified a number of areas where women legal practitioners did not have the same opportunities as men in the legal profession. One of the areas addressed in the report was sexual harassment.²⁵ Keys Young reported that:
 - 39% of women barristers experienced unwelcome sexual advances or comments by solicitors;
 - 59% reported experiencing unwelcome comments by another barrister; and
 - 35% from both solicitors and barristers.
38. At that time, women barristers comprised around 12% of all barristers in New South Wales.
39. In response to the Keys Young report, on 2 June 1995, the Bar Council resolved to implement an equal opportunity policy. In the policy, the Bar Council condemned all forms of sexual harassment, discrimination on the grounds of sex or sexual preference and sexist behaviour of any kind.

²⁵ Keys Young, *Research on Gender Bias and Women Working in the Legal System*, Report (6 March 1995). See also NSW Government, Department for Women, *Response to Gender Bias and the Law - Women Working in the Legal Profession in NSW* (October 1995) and NSW Attorney-General's Department, Department for Women, *Gender Bias and the Law: Women Working in the Legal Profession - Report of the Implementation Committee*, 1 October 1996.

40. The Resolution provided that additional procedures to give effect to the 'principles' set out in the resolution should be considered by the then Gender Issues Committee and that the Committee report back to Council by early July 1995. It was also proposed that there would be a more detailed code of conduct and/or procedures to give effect to the 'principles'. However, there were no specific mechanisms for dealing with complaints of sexual harassment when it came to the attention of the NSWBA. The practice at the time was that an issue concerning sexual harassment would be dealt with informally.
41. On 17 June 2004, the Bar Council approved a model sexual harassment and discrimination policy for adoption by individual sets of chambers.
42. In 2013, the Bar Council adopted a Diversity and Equity Policy.²⁶

National Attrition and Re-engagement Study Report 2014

43. In February 2014, the Law Council of Australia released the *National Attrition and Re-engagement Study Report (NARS Report)*. Sexual harassment was identified as a significant barrier to women's participation in the profession with 80% of women barristers experiencing bullying or intimidation. Women barristers were twice as likely as those in private practice or in-house roles to believe they have *ever* experienced sexual harassment at their workplace. Significantly, not one woman lodged a formal complaint.
44. In response to the NARS Report, the then President of the NSWBA, Jane Needham SC, established a working group to respond to the findings and recommendations.²⁷ On the issue of sexual harassment, discrimination and bullying, the NSWBA committed to developing a communications strategy to promote awareness of sexual harassment and bullying, and development of procedures for the management of complaints concerning harassment and bullying.

2015 Practising Certificate Renewal Survey

45. Barristers must hold a Practising Certificate (PC). The certificate is renewed and issued annually. In 2015, when barristers applied to renew their certificates, the NSWBA included a voluntary survey to collect data relevant to the NARS Report and recommendations (**the PC Renewal Survey**).
46. The results of the PC Renewal Survey were (as at June 2015):
 - 42% of all women barristers who responded said they had experienced sexual harassment compared with only 3% of male barristers; and
 - 64% of women barristers reported experiencing bullying at the Bar.

²⁶ <https://www.nswbar.asn.au/docs/webdocs/diversity1.pdf>

²⁷ <http://138.25.65.17/au/journals/NSWBarAssocNews/2014/22.pdf>

47. The majority (85%) of women who experienced sexual harassment indicated that the source of harassment was a fellow barrister, while men who experienced sexual harassment were more likely to report the source of harassment as a client (59%) or solicitor (41%).
48. Despite the high level of reports of sexual harassment, over half (56%) of females and close to half of males (49%), took no action, with only a minority raising the issue with a colleague or a clerk. Not one person (male or female) made a formal complaint of sexual harassment.

Reluctance to complain

49. The reasons for a victim's reluctance to make a complaint or take action are complex.
50. All victims of sexual harassment have agency, in the sense that an individual has the ability to make effective choices and to transform those choices into desired outcomes. There is no obligation to report sexual harassment, make a complaint or take action.
51. However, those barristers who have experienced sexual harassment have indicated that their reluctance to make a complaint is due to embarrassment, trauma, the absence of relevant or effective policies or processes to make a complaint, fear of retribution, damage to professional reputation, the cost, the risk of adverse financial outcomes if the barrister loses work, publicity, threats of defamation, the absence of an effective remedy.²⁸ If a woman barrister makes a complaint, she also risks being accused of "playing the gender card" or not being "robust". Clearly, these concerns are not specific to women barristers.
52. Conversely there have been some very well publicised (if not notorious) events where a person has either elected not to make a complaint alleging sexual harassment, or has made such a complaint confidentially in circumstances that were later made public beyond that person's control.²⁹ Whilst these events occurred outside the legal industry, they are likely to have wider implications for any person considering taking action in relation to sexual harassment.

How does New South Wales compare to other Australian Bars

53. Based on the information available to us and discussion with other barristers around Australia, the experience of women barristers in New South Wales is not materially different to other States or Territories.
54. Although it is dated, in 1998 Hunter and McKelvie published *Equality of Opportunity for Women at the Victorian Bar: A Report to the Victorian Bar Council* (1998).³⁰ The research was not confined to sexual harassment but reported on the experience of women barristers. Women described the courtroom as being 'sexualised' with respect to the manner in which they were

²⁸ <https://www.collaw.edu.au/news/2018/01/16/crossing-the-line-no-longer-kate-eastman-sc-on-sexual-harassment-in-the-law>

²⁹ <https://www.abc.net.au/news/2018-09-18/catherine-marriott-on-alleged-sexual-harassment-by-barnaby-joyce/10255518>; <https://www.abc.net.au/news/2018-11-08/luke-foley-nsw-labor-leader-abc-harassment-allegations/10432098>; <https://www.smh.com.au/national/nsw/geoffrey-rush-accuser-made-complaint-off-the-record-at-a-bar-court-20180926-p5061u.html>

³⁰ See also Justice Kenny *Women's Law Collective: Experiences of Women in the Courtroom*: www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kenny/kenny-j-20030811

addressed and treated. They noted the expressions by which some women barristers had been addressed by magistrates or judges, such as “girlie”, “love”, “young lady”, or “having a cat fight are we ladies?” Women barristers' concerns about sexual harassment ranged from inappropriate remarks, suggestive comments, unwelcome requests for dates and inappropriate conduct during the course of barristers' working relationships.

55. There are other, more recent reports. In 2012, the Victorian Human Rights and Equal Opportunity Commission published *Changing the rules: The experiences of female lawyers in Victoria*.³¹ The report focused on women solicitors rather than the Bar in Victoria. However, the findings and recommendations were relevant to the experience of women barristers.
56. In May 2018, a survey of the New Zealand legal profession³² found:
 - About 18% of lawyers (31% women and 5% men) reported having been sexually harassed during their working life;
 - 10% of lawyers (17% women and 3% men) had been sexually harassed in the past five years, and 28% of lawyers have seen sexual harassment in a legal environment during their working life (to date).
 - In the past five years, 33% of female lawyers also experienced crude or offensive behaviour, such as sexually suggestive comments or jokes that made them feel offended.
57. On 10 October 2018, at the International Bar Association (IBA) Conference in Rome, the IBA revealed some preliminary findings from its survey into bullying and sexual harassment in the legal profession. The findings are not specific to independent referral bars. By October 2018, over 5,000 lawyers from 120 jurisdictions had responded to the survey. Approximately one in two females and one in three males have been bullied (43% of respondents). With respect to sexual harassment, 25% of lawyers had been sexually harassed – 1 in 3 female lawyers and 1 in 15 male lawyers.³³
58. The IBA's research suggests that workplaces that have policies alone does not make a material difference to the reports of harassment and bullying. However, those workplaces that have policies and implement training for employees have better outcomes. The IBA has found that, although the frequency of reporting harassment is not increased with training, those at workplaces that implement training, are:
 - less likely to have been bullied or sexually harassed within the last year;

³¹ <https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/reports/item/487-changing-the-rules-the-experiences-of-female-lawyers-in-victoria>; <https://www.abc.net.au/news/2016-10-27/female-lawyers-routinely-subjected-to-sexual-harassment-at-work/7964328>

³² https://www.lawsociety.org.nz/_data/assets/pdf_file/0009/122679/Report-28-May-2018.pdf

³³ <https://www.lawyersweekly.com.au/biglaw/24234-iba-43-of-lawyers-bullied-and-25-sexually-harassed>. Copy of the “Headline” findings presented at the IBA Rome Conference provided to the President and Chair of the DEC.

- less likely to have been bullied by their line manager, but more likely to have been bullied by someone of equal seniority or more junior;
- more likely to have reported incidents of bullying and more likely to use internal workplace channels to do so;
- more likely to believe the perpetrator of bullying will be sanctioned;
- less likely to have been sexually harassed by their line manager;
- less likely to cite: '*Unaware of the correct protocols/ reporting procedure*'; '*Lack of confidence in protocols/ reporting procedure*' or '*Fear of not being believed*' as a reason for not reporting harassment but '*Incident endemic to the workplace I perceived as acceptable*'; '*Profile/status of the perpetrator (e.g. senior member of the workplace)*' and '*Fear of repercussions for self*' all remain common reasons for not reporting;

59. The IBA has found that it appears that training has more impact than policies, reducing instances of bullying and harassment by line managers in particular. The main barriers to reporting sexual harassment appear to remain even after training.

What do we know from the available research and data?

60. We acknowledge the limited research and data. However, based on the anecdotal evidence and the available research, we know:
- many women barristers have experienced sexual harassment;
 - women and some male barristers have experienced sexual harassment by other barristers, solicitors, clerks, clients and judges;
 - the reported prevalence of sexual harassment coupled with bullying and intimidation is high for women barristers;
 - sexist attitudes and comments about women barristers diminish their standing in the eyes of the community;
 - sexual harassment and gendered bullying have been given as reasons for women leaving the Bar;
 - there has been a reluctance amongst victims of sexual harassment to lodge formal complaints or take other action.

Reasons for sexual harassment at the Bar

61. There has been no relevant research as to why barristers (predominantly men) might engage in sexual harassment.
62. Having regard to available research and the reported experiences of women barristers, we have addressed the question as to whether there are any particular features of the Bar that might

explain why sexual harassment occurs. We have also considered whether the Bar is different to other workplaces and whether those differences may account for why sexual harassment occurs.

63. Anecdotal evidence and experience show sexual harassment by barristers and towards barristers bears the same features and causes as other professions. There are similarities to other historically hierarchical male dominated professions. We gave particular attention to the Report of the *Expert Advisory Group on discrimination, bullying and sexual harassment Advising the Royal Australasian College of Surgeons* to the Royal Australian College of Surgeons (2015) which found:

Issues of discrimination, bullying and sexual harassment are enmeshed with questions about the culture of surgical practice, as well as the culture of medicine and the healthcare sector more widely. There was general consensus that the worst offenders were a few people who held power and exercised it to retain it. Most participants noted that there were many in the profession who were good role models and also recognised the importance of the College's decision to establish and resource the EAG.

...

– There was a strong sense that 'known bullies' are untouchable (by the College/ societies and in the workplace) and that bullying has become normalised as a culturally accepted behaviour.

64. To a significant degree, the Bar remains male dominated and retains a hierarchical structure.³⁴ The QCs/SCs (predominantly men) sit at the top of this structure, followed by junior counsel ranked according to their years of seniority at the Bar. For some purposes, it is common for both solicitors and other barristers to assess a barrister according to the number of years they have been at the Bar, and there is a 'pecking order' based on seniority.
65. The culture of the Bar is adversarial. While barristers, as members of chambers, operate as a collective of practitioners, as sole practitioners they remain in competition with every other barrister. The adversarial nature of the work barristers do in court also permeates the interactions of barristers outside of court.
66. A distinguishing feature of the Bar (when compared with other professions) is the fact that barristers are not permitted to advertise their services. Barristers are predominantly dependent upon solicitors as their source of work. Barristers may rely on patronage from more senior colleagues to be introduced to solicitors or by way of recommendation or referrals. Junior barristers are generally dependent on more senior colleagues for introductions to solicitors and junior briefs.
67. Depending to a significant degree on the area of practice and the nature of the Brief, stereotypical views continue about lawyers, particularly women barristers; and women still experience discrimination when decisions are made about engaging barristers. In the early days, women barristers were expected to practice in women's areas – family law and matters concerning children.³⁵ While the areas where women now practice have expanded, the legacy of the "women's work" remains and the structure of the legal profession continues to present

³⁴ <http://theconversation.com/australian-women-must-hold-their-nerve-until-justice-is-served-21464>

³⁵ Chambers J "The First Woman to Clear the Bar in New South Wales" [2010-2011] (summer) *Bar News* p.99.

barriers for women. The nature of practice and the demands on lawyers can be challenging for women who are still the primary carers of children.

68. A recent Harvard Business Review article *Sexual Harassment is Rampant in Health Care. Here's how to stop it*, by Jane van Dis, Laura Stadum and Esther Choo, 1 November 2018, noted that "*many factors make an organization prone to sexual harassment: a hierarchical structure, a male dominated environment, and a climate that tolerates transgressions - particularly when they are committed by those in power.*"
69. Having regard to these factors, organisations like the NSWBA need to be on the front foot in addressing the issue of sexual harassment.
70. There appears to be reluctance on the part of some barristers to speak out in relation to any issue that may arise in chambers or at the Bar or to report inappropriate conduct on the part of other barristers, particularly silks, because it is likely to harm their career prospects or practice. In Precedent (Issue 144 February 2018), Catherine Branson QC, retired Federal Court Judge and former President of the AHRC said:

Too often women offended by unacceptable conduct find themselves facing passive aggression and are asked if they can't take a compliment, or recognise a joke, or are told to 'lighten up'. How much more powerful would it be if others took the initiative to challenge and deprecate such conduct; if others made it plain that conduct that demeans women is not acceptable within the profession: it is not a joke, or a compliment?
71. Reluctance of this kind extends not only to those harassed but also to bystanders and witnesses to sexual harassment. The 'usual suspects' may be able to engage in inappropriate conduct because no one has stopped them. This may breed a culture of silence, in turn creating a culture of complacency when it comes to tolerating sexual harassment. In those ways, those engaging in sexual harassment may be protected by a culture of inaction.³⁶

Application of the Sex Discrimination Act 1984 (Cth) to barristers

72. One particular concern for barristers is the patchy coverage of Commonwealth and New South Wales laws proscribing sexual harassment, relevant to their workplaces and professional relationships.
73. Barristers are required to comply with the SDA and the Anti-Discrimination Act 1977 (NSW) (**ADA**) when they employ support staff or when they provide or receive legal services.
74. The SDA and ADA also apply to the NSWBA as a professional and qualifying body. For those chambers that provide 'business accommodation' and 'services' to their members, the SDA will apply.
75. However, the SDA and ADA provide little or no protection for barristers in chambers or in court. Barristers are not employees. This means that none of the provisions concerning sex

³⁶ See e.g. Cunningham G: <https://theconversation.com/why-bystanders-rarely-speak-up-when-they-witness-sexual-harassment-85797>

discrimination in employment (s 14 of the SDA) or the prohibition on sexual harassment (s 28B of the SDA) apply to barristers.

76. For example, s 28B of the SDA, which prohibits sexual harassment at work, states that it is unlawful for someone to sexually harass actual or prospective: employees; commission agents; contract workers; and partners in a partnership. However, none of these categories capture barristers, particularly vis a vis other barristers.
77. Section 28B(6) also makes it “unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons”.
78. However, the definition of “workplace participant” in s 28B(7) only includes: employers; employees; commission agents; contract workers; and partners in a partnership.
79. This can be contrasted with the definition of “workplace participant” in s 22B(6) of the ADA which includes, amongst other things: a person who is self-employed; and a volunteer or unpaid trainee. This captures the majority of barristers working in NSW but still fails to protect barristers who are statutory appointees such as Crown Prosecutors, Public Defenders and tribunal members.
80. The SDA does provide protection to barristers in the following circumstances:
 - A barrister sexually harassed by their instructing solicitor in the course of the solicitor seeking, or receiving ‘services’ from the barrister (s 28G(2) of the SDA);
 - A barrister sexually harassed by their client in the course of the solicitor seeking, or receiving ‘services’ from the barrister (s 28G(2) of the SDA);
 - A barrister sexually harassed by a legal researcher or other support staff they have employed in the course of the employee providing ‘services’ to the barrister (s 28G(1) of the SDA);
 - A barrister sexually harassed by their clerk or other chambers support staff in the course of the clerk or other staff member providing ‘services’ to the barrister (s 28G(1) of the SDA);
 - A barrister sexually harassed by the directors of any company that operates chambers and provides business accommodation and/or services to the barrister (see s 28G(1) and s 28H(1) of the SDA);
 - A barrister sexually harassed by NSWBA staff while their practising certificates are being conferred, renewed, extended, revoked or withdrawn (pursuant to s 28C of the SDA); and
 - A barrister, or prospective barrister, sexually harassed by NSWBA staff during the Bar Exams or Bar Readers Course (pursuant to s 28F of the SDA *if* the NSWBA is an “educational institution”).
81. These protections apply whether the sexually harassing behaviour occurs in chambers, in court, online or at a professional or social function.

82. However, the SDA does not expressly cover the following circumstances:

- A barrister sexually harassed by another barrister in chambers, in court, in mediation, in arbitration, online, or at a professional or social function;
- A barrister sexually harassed by a judge, an arbitrator, tribunal member or mediator in court, online, or at a professional or social function;
- A barrister sexually harassed by a court or tribunal staff (unless those persons are providing “services” to the barrister as defined by s 4 of the SDA);
- A barrister sexually harassed by a solicitor instructing an opponent;
- A barrister sexually harassed by a witness; or
- A barrister sexually harassed by a member of the public in a court room.

Regulation of sexual harassment as professional misconduct

83. In the early 1990s there was a debate about whether sex discrimination and/or sexual harassment should be governed by the SDA/ADA or professional conduct rules.³⁷

84. In 1994, Regulation 69B of the Legal Profession Regulation 1994 (NSW) was introduced. It provided that:

A legal practitioner must not, in connection with the practice of law, engage in any 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.

85. There were various iterations of this rule over the past 14 years.

86. On 6 January 2014, Rule 117 of the NSW Bar Rules came into effect. It proscribed sexual harassment, discrimination and bullying. Breach of the rule is a disciplinary matter and is dealt with by the professional conduct procedures adopted by the Association.

Current Rules

87. In 2015, the Legal Profession Uniform Conduct (Barristers) Rules 2015 (**Barristers Rules**) provided for uniform conduct rules for barristers. Rule 123 provides:

Rule 123

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

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

³⁷ Eastman K, Nomchong K, Seemann J “Sex discrimination and sexual harassment: should there be a professional conduct and practice rule?. -Yes and no cases” Vol. 33, No. 11, Dec 1995 *Law Society Journal* 48-50.

88. For the purpose of Rule 123, 'sexual harassment' is defined to mean anything that constitutes sexual harassment "under the applicable state, territory or federal anti-discrimination or human rights legislation": see Rule 125. The Barristers Rules accordingly prohibit conduct that would amount to sexual harassment under the SDA and/or ADA, being conduct where the person:
- (a) *makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
 - (b) *engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*
- in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.*
89. Rule 123 applies to any conduct "in the course of practice", a phrase that bears its ordinary meaning. The practice of a barrister, of its nature, may take him or her to any number of locations including Court, chambers, client offices, seminars and conferences, and so on. Likewise, it covers conduct by a barrister towards any person, be it a client, solicitor, another barrister, chambers staff, court staff or any other person encountered incidentally in the course of practice. The essential question is whether the conduct is in the course of the barrister's professional work.³⁸
90. A question of the proper interpretation or limits of the expression 'in the course of practice' does not appear to have arisen for authoritative determination in a curial contest in any public forum yet. It is reasonable to suppose that this phrase will be interpreted taking into consideration analogous concepts within the SDA – in particular, the way that the SDA has been interpreted when questions arise whether sexual harassment has occurred 'in connection' with employment. Having regard to the case law, the line between the private domain and work may be blurred.³⁹
91. The prohibition upon sexual harassment "in the course of practice" supplements but does not displace general concepts of professional misconduct which arise in the broader disciplinary context.
92. Some commentators⁴⁰ have pointed to the discussion in *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at [56] where Spigelman CJ (Mason P and Handley JA agreeing) addressed the distinction between personal misconduct and 'professional misconduct', in particular, noting that professional misconduct may not be limited to conduct that is 'directly' referable to professional work. That appears to have been picked up in s 297(1)(b) of the *Uniform Law* which provides that professional misconduct includes "conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in

³⁸ Eastman SC, Callan, Rao, "Crossing the Line: Barristers behaving Badly" [2017] (summer) *Bar News* p 38ff.

³⁹ See *Lee v Smith & Ors* [2007] FMCA 59, (2007) EOC ¶193–456; *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402; *Smith v The Christchurch Press Company Limited* [2001] 1 NZLR 407; *Chief Constable of the Lincolnshire Police v Stubbs* [1999] ICR 547; [1999] IRLR 81, Hely B "Open All Hours: The Reach of Vicarious Liability in 'Off-Duty' Sexual Harassment Complaints" (2008) 36(2) *Federal Law Review* 173.

⁴⁰ Eastman SC, Callan, Rao, "Crossing the Line: Barristers Behaving Badly" [2017] (summer) *Bar News* p 39.

connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice”.

93. Given the distinction between unsatisfactory professional conduct and professional misconduct, conduct may be so egregious or dishonourable that it may disqualify a person even if it is not engaged in “in the course of practice”. Rule 8 of the Barristers Rules provides:

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.

94. Like tax evasion, physical violence or dishonesty, depending of course on the gravity of the conduct, there is no reason why sexual harassment might not (in a given case) amount to professional misconduct and render a person unfit to practice as a barrister. The public would be entitled to expect that barristers conduct themselves with respect and courtesy for others.

95. This may be seen as a natural evolution of existing professional conduct principles stemming from the historically rooted requirement that members of a profession are to be of ‘good fame and character’, ‘fit and proper’, and that lawyers in particular will abide by the law. “Fit and proper” is a prerequisite for the grant or renewal of an Australian practising certificate: section 45 of the *Uniform Law*. In considering whether or not a person is fit and proper, regard may be had to, inter alia, whether the person is of good fame and character, is currently subject to an unresolved complaint, investigation, charge or order under an Australian law relating to the legal profession or has been subject of disciplinary action under an Australian law relating to the legal profession: rule 13 of the Barristers Rules.

96. Rule 123 is framed as a general prohibition upon the conduct that is sought to be discouraged. The point has been made that the Rule does not require that the victim of the harassment be the complainant. A person who is a witness to sexual harassment or who has received a report of sexual harassment may make a complaint against a barrister for contravening Rule 123. Dispute resolution and professional discipline is set out in Chapter 5 of the *Uniform Law*.

97. Rule 123 creates a legal standard by which barristers are to be judged by their governing disciplinary body and to which they will be held accountable in the event of a complaint. There is no reported case law on Rule 123. Further, because s 462 of the *Uniform Law* generally prevents disclosure of any information directly or indirectly obtained in the execution or administration of the *Uniform Law* or the *Uniform Rules* (including the handling of complaints) by persons such as the local regulatory authority, there is no evidence (anecdotal or otherwise), of either the frequency of complaints with respect to breaches of Rule 123, or the consequences to the legal practitioner alleged to have breached the rule (see ss 299 to 302 of the *Uniform Law*).

98. As for sanctions, in its discretion, in some instances where sexual harassment has occurred the Association has required the perpetrator to undergo anti-harassment awareness courses or training as both a disciplinary and an educational measure.

99. Further, s 299(1) of the Uniform Law provides that any of the following orders may be made against a barrister found to have engaged in unsatisfactory professional conduct (but not professional misconduct):

- (a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;
- (b) an order reprimanding the respondent or a legal practitioner associate of the respondent law practice;
- (c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;
- (d) an order requiring the respondent or a legal practitioner associate of the respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;
- (e) an order requiring—
 - (i) the respondent lawyer; or
 - (ii) the respondent law practice to arrange for a legal practitioner associate of the law practice to undertake training, education or counselling or be supervised;
- (f) an order requiring the respondent or a legal practitioner associate of the respondent law practice to pay a fine of a specified amount (not exceeding \$25,000) to the fund referred to in s 456 of the LPUL;
- (g) an order recommending the imposition of a specified condition on the Australian practising certificate or Australian registration certificate of the respondent lawyer or a legal practitioner associate of the respondent law practice.

100. If, in disciplinary proceedings before a tribunal or court, a barrister is found to have committed unsatisfactory professional conduct or professional misconduct, then in addition to any order under s 299, the barrister may also be subjected to the following orders under s 302 of the Uniform Law:

- (a) an order that the lawyer do or refrain from doing something in connection with the practice of law;
- (b) an order that the lawyer cease to accept instructions as a public notary in relation to notarial services;
- (c) an order that the lawyer's practice be managed for a specified period in a specified way or subject to specified conditions;
- (d) an order that the lawyer's practice be subject to periodic inspection by a specified person for a specified period;
- (e) an order that the lawyer seek advice in relation to the management of the lawyer's practice from a specified person;

- (f) an order recommending that the name of the lawyer be removed from a roll kept by a Supreme Court, a register of lawyers kept under jurisdictional legislation or the Australian Legal Profession Register;
- (e) an order that the lawyer seek advice in relation to the management of the lawyer's practice from a specified person;
- (f) an order recommending that the name of the lawyer be removed from a roll kept by a Supreme Court, a register of lawyers kept under jurisdictional legislation or the Australian Legal Profession Register;
- (g) an order directing that a specified condition be imposed on the Australian practising certificate or Australian registration certificate of the lawyer;
- (h) an order directing that the lawyer's Australian practising certificate or Australian registration certificate be suspended for a specified period or cancelled;
- (i) an order directing that an Australian practising certificate or Australian registration certificate not be granted to the lawyer before the end of a specified period;
- (j) an order that the lawyer not apply for an Australian practising certificate or Australian registration certificate before the end of a specified period;
- (k) a compensation order against the lawyer in accordance with Part 5.5; or
- (l) an order that the lawyer pay a fine of a specified amount not exceeding \$100,000 if the lawyer is found guilty of professional misconduct.

101. However, there are very few instances of disciplinary action being taken. We note that in the Queensland case of *Legal Services Commissioner v Nguyen* [2015] QCAT 211, Mr Nguyen, a barrister, twice sexually assaulted a legal secretary who was instructing him at court on a sentencing hearing. He pleaded guilty to two charges of sexual assault, for which he was initially convicted and sentenced to three months' imprisonment, suspended. On appeal the sentence was reduced to a fine of \$2,000 with no conviction recorded.

102. The Legal Services Commission pursued disciplinary proceedings on grounds including that Mr Nguyen had engaged in sexual harassment in breach of the then Rule 127 of the Barristers' Rules 2004 (Qld). It was the first case of its kind.⁴¹ Mr Nguyen's conduct was described as "*near the lowest possible edge of seriousness for such offences*"⁴² and reference was made to Mr Nguyen's "*mistaken belief... that his flirtatious behaviours were not unwelcome*". The Tribunal found he had engaged in unsatisfactory professional conduct, rather than professional misconduct.⁴³ By the time of the disciplinary hearing, Mr Nguyen had addressed his "*identified deficiency in ... perceptual awareness, and thus his ability to communicate and respond appropriately to women,*"⁴⁴ obviating the need for any prospective conditions.

⁴¹ *Legal Services Commissioner v Nguyen* [2015] QCAT 211 at [66].

⁴² at [19].

⁴³ at [37]-[40].

⁴⁴ at [44].

103. Mr Nguyen was publicly reprimanded and fined \$20,000. The Tribunal considered general deterrence a significant consideration in the punishment imposed. The Tribunal member said:

... the Bar cannot be the last bastion where sexual harassment and assault is countenanced in the workplace. Whilst it is not suggested that this is the case, such conduct must be strongly deterred....[Sexual harassment and sexual assault] is conduct which must be discouraged.

104. A decade earlier, in 2004, a Victorian barrister was suspended from practice for six months for making sexual advances toward a client during a pre-trial conference. The Legal Profession Tribunal found the barrister guilty of unsatisfactory conduct. The barrister was also reprimanded.⁴⁵
105. Some comparable cases in overseas jurisdictions concerning sexual harassment by lawyers were recently summarised and noted in *Bar News*.⁴⁶

Bystanders: Those who know of or witness sexual harassment

106. The response to sexual harassment has focused on the victim and imposed on him or her the obligation to make a complaint and pursue action. Not only does the victim suffer the effects of being sexually harassed, he or she must also bear the burden of addressing the inappropriate conduct. He or she may incur costs and have to devote time which would ordinarily be devoted to practice.
107. The course of our research and consideration has raised the question of the role of bystanders or witnesses.⁴⁷ In August 2013, Chief of the Army, Lieutenant-General David Morrison highlighted the importance of bystanders in breaking the culture of complacency and the culture of silence that contributed to scandals in the Australian Defence Force wherein women were demeaned and harassed. He discussed the importance of upholding the values of the ADF. He said *"The standard you walk past is the standard you accept"*⁴⁸ noting the importance of leaders calling out unacceptable behaviours.
108. Rule 123 does not extend to conduct that amounts to 'victimisation' within the meaning of s94 of the SDA or accessory liability as defined by s 105 of the SDA. There is no obligation on bystanders to report conduct that may be in contravention of Rule 123.
109. If incidents of sexual harassment involve conduct of such gravity that they may amount to a serious indictable offence, s 316(1) of the Crimes Act 1900 applies. Section 316(1) makes it an offence for a person to fail to report conduct which amounts to a serious indictable offence, liable to imprisonment for two years. A "serious indictable offence" is defined as an indictable offence which is punishable by imprisonment for life or for a term of five years or more, but

⁴⁵ <http://www.theage.com.au/articles/2004/04/25/1082831435141.html>. See also

http://www.olsc.nsw.gov.au/Documents/civility_professionalism_standards_courtesy.pdf

⁴⁶ Eastman SC, Callan, Rao, "Crossing the Line: Barristers behaving Badly" [2017] (summer) *Bar News* p 38 ff.

⁴⁷ See McDonald and Flood, *Encourage. Support. Act!: Bystander Approaches to Sexual Harassment in the Workplace* (2012) <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/encourage-support-act-bystander-approaches-sexual>

⁴⁸ <https://www.youtube.com/watch?v=QaqpoeVgr8U>

section 316(1) does not require that a person knows the relevant conduct amounts to a serious indictable offence, only that it is an offence.

110. The elements of the section are:

- a person (including a company) has committed a serious indictable offence;
- another person (including a company) knows or believes that the offence has been committed;
- that other person has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender; and
- that other person fails, without reasonable excuse, to bring that information to the attention of a member of the Police Force or other appropriate authority.

111. Further, s 465 of the Uniform Law imposes an obligation on the NSWBA to report a serious offence (as noted below, the ‘serious offence’ is different to a ‘serious indictable offence’ in s. 316 of the Crimes Act (NSW)). The section provides:

465 Duty to report suspected offences

- (1) *This section applies if a relevant person suspects on reasonable grounds, after investigation or otherwise, that a person has committed a serious offence (except in the case of an offence against this Law for which the relevant person is the appropriate prosecuting authority).*
- (2) *The relevant person must—*
 - (a) *report the suspected offence (if it has not already been reported) to the police or other appropriate investigating or prosecuting authority; and*
 - (b) *make available to the police or authority the information and documents relevant to the suspected offence in the possession of, or under the control of, the person (regardless of who reported it).*
- (3) *The obligation under subsection (2)(b) to make available the information and documents continues while the relevant person holds the relevant suspicion.*
- (4) *In this section—*

relevant person means—

 - (a) *the Council or the Commissioner; or*
 - (b) *the Admissions Committee; or*
 - (c) *a local regulatory authority; or*
 - (d) *a delegate of the Council, the Commissioner or a local regulatory authority.*

112. A “serious offence” is defined by s 6 of the Uniform Law to mean:

An indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily); or

An offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia).

113. Consequently, sexual assault and common assault are serious offences within the meaning of the Uniform Law.⁴⁹
114. The NSWBA has had occasion to report allegations of sexual misconduct to the New South Wales police. If this occurs and a professional conduct complaint is already on foot in relation to the same allegations, then the professional conduct investigation may need to be suspended so as not to interfere with police inquiries.

What does the Bar Association do to address sexual harassment?

115. In April 2018, the NSWBA developed a draft six-point strategy to deter and deal with sexual harassment at the NSW Bar. In the strategy, the Association says sexual harassment is not tolerated and it is committed to ensuring that the NSW Bar is free from harassment.
116. The draft strategy has six components:
- i. Professional Disciplinary Action;
 - ii. Police Referral;
 - iii. Reports to anti-discrimination authorities;
 - iv. Best Practice Guidelines for chambers;
 - v. Continuing Professional Development; and
 - vi. The Association's Diversity and Equality Committee.



⁴⁹ See *Crimes Act 1900 (NSW)* sections 61, 61I; *Criminal Procedure Act 1986 (NSW)* sections 3, 5, schedule 1 tables 1 and 2.

117. Professional disciplinary action, police referral and reporting to anti-discrimination authorities are largely reactive measures while the Best Practice Guidelines, Continuing Professional Development and Diversity and Equality Committee are initiatives that are both proactive and reactive.
118. Which measure(s) is most appropriate in any particular case will depend on the facts of each individual case. The action taken by the Association in response to a complaint or enquiry will generally depend on:
- the nature and gravity of the conduct reported;
 - the extent to which the aggrieved person wishes to make a complaint; and
 - the Association's compulsory obligations to report certain criminal conduct by law.
119. The NSWBA has promoted the Best Practice Guidelines, provided a number of seminars addressing sexual harassment and published articles in *Bar News*.

Best Practice Guidelines (BPGs)

120. The Bar Council approved a Model Best Practice Guideline for Harassment, Discrimination, Vilification and Victimisation, and for Bullying (**Harassment BPG**).⁵⁰ The Harassment BPG was designed to be adopted by chambers and the NSWBA with respect to all its services, committees, events, seminars and courses.
121. At the time, the NSWBA expressly acknowledged that further consideration of means to prevent harassment and bullying was required. In particular, it said it was necessary to give consideration of appropriate means to provide confidential advice and support for barristers, staff of the Association and staff of chambers (clerks, receptionists, office juniors, research assistants) who experienced discrimination and harassment. To that end, the Bar Council approved a Model Best Practice Guideline for Grievance Handling (**Grievance Handling BPG**) to provide a procedure for handling complaints of offending conduct confidentially, impartially and promptly. The guideline also contains anti-victimisation procedures.⁵¹
122. The BPGs have been adopted by 39 of the 75 chambers in NSW which equates to about 52% of chambers at the New South Wales Bar.⁵² We know a number of chambers have utilised the Grievance Handling BPG to address incidents of sexual harassment that have arisen in a chambers setting. In some instances, the BPG has assisted in a speedy resolution of the issue.

⁵⁰ https://www.nswbar.asn.au/docs/webdocs/BN02_2016_bpg.pdf

⁵¹ https://www.nswbar.asn.au/docs/webdocs/BN02_2016_bpg.pdf

⁵² <https://www.nswbar.asn.au/coming-to-the-bar/bpg>

123. However, we are also aware that the BPG has some limitations, including the following issues which have been raised in the preparation of this submission:

- there are problems with delay and cost where an external agency is engaged to conduct an investigation;
- communication with floor members and staff is difficult if the chambers wishes to maintain confidentiality of the investigation;
- poor management of complaints and communication leads to reputational damage: suspicion that the floor is doing nothing and not taking the sexual harassment seriously;
- many chambers have no power to ‘suspend’ a member pending an investigation and even if it did, there may be significant disruption to the barrister’s practice;
- where both the complainant and the perpetrator remain members of chambers, most chambers have no way of ‘supervising’ or managing the contact between the barristers. This creates further discomfort and risk;

The Bar Practice Course and Guidelines for Readers and Tutors

124. Persons who wish to practice as a barrister in New South Wales must complete a reading program which commences with the attendance at and the satisfactory completion of the Bar Practice Course. All readers participating in the Bar Practice Course attend a session on the work of the Diversity and Equality Committee. The session places particular emphasis on Rule 123 of the Bar Rules and the standard of conduct expected when the reader commences practice.

125. The NSWBA has published on-line and in print a set of guidelines to provide assistance of a general and specific nature to readers and tutors in their participation of the reading program. Both are encouraged to, and are expected to be familiar with the guidelines. One of the specific areas addressed in the Guidelines is behaviour and conduct at the Bar. In particular, the Association’s [Bar Reader/Tutor Guidelines](#) contain the following observations and references:⁵³

- Tutors and readers need to discuss their mutual expectations of the relationship from the outset. Areas that should be discussed include, expectations as to behaviour/conduct in the course of practice, especially by reference to Bar Rule 123 (concerning the prohibition against engaging in conduct which constitutes discrimination, sexual harassment or workplace bullying) and, to the NSWBA’s Best Practice Guidelines;⁵⁴
- sexual harassment, bullying and discrimination will not be tolerated at the NSW Bar;⁵⁵
- A barrister breaching Bar Rule 123 (relating to discrimination, harassment and bullying) may be found to have engaged in professional misconduct (section 298(b) of the Uniform Law). Importantly, where a reader or tutor is from a floor that has implemented the

⁵³ New South Wales Bar Association, *Bar Reader/Tutor Guidelines* (March 2018) <https://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/BAR_Reader_Tutor_Guidelines_10Mar18.pdf>

⁵⁴ [31(g)].

⁵⁵ [44(c)].

NSWBA's Best Practice Guidelines, failure to follow those Guidelines can result in a breach of these Rules. In this context, it is important to note that the Guidelines prohibit discrimination, harassment and bullying in relation to employees, contractors, casuals, volunteers, students and/or trainees, whether engaged by the Floor or directly by Barristers on the Floor, as well as at NSWBA events and social functions. Situations involving allegations that could constitute discrimination, harassment and bullying require careful consideration that may warrant the advice of a senior barrister with expertise in discrimination, harassment and bullying;⁵⁶

- All barristers are expected to treat their colleagues at the bar with professionalism, dignity and courtesy;⁵⁷
- Readers and tutors are reminded that Rule 123 of the Bar Rules provides that a barrister must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying. A breach of these rules may constitute unsatisfactory professional conduct or professional misconduct (section 298 of the Uniform Law)⁵⁸; and
- Reference is also made to the Association's Best Practice Guidelines, including the Harassment BPG and the Grievance Handling BPG (to which reference has been made above) and their general operation in the context of discrimination, harassment and bullying.

Statements from the President of the Bar Association and other matters

126. In August 2017, the President broadcast the following message via *InBrief*:⁵⁹

Conduct at functions associated with the Bar Association

The NSWBA organises, or is associated with, a number of social functions to which barristers are invited. I wish to remind members of the need for exemplary conduct when attending such functions. By all means enjoy yourself, but be mindful that your conduct must not cause harm to, or negatively impact, others.

I would like to bring to your attention some provisions of the Barristers' Rules that you must keep in mind at such events. Under Rule 8 of the Legal Profession Uniform Conduct (Barristers) Rules 2015, a barrister must not engage in conduct which is dishonest or otherwise discreditable to a barrister or is likely to diminish public confidence in the legal profession. In addition, Rule 123 of the Barristers Rules provides that a barrister must not in the course of practice, engage in conduct which constitutes discrimination, sexual harassment, or workplace bullying. Both these Rules are relevant to your conduct at such events which are work events. In addition, if the Bar Council suspects on reasonable

⁵⁶ [61]. The Guidelines also include a list of senior counsel who have agreed to discuss such matters on a confidential basis.

⁵⁷ [100].

⁵⁸ [102].

⁵⁹ 'Message from the President Arthur Moses SC', *InBrief* (25 August 2017) <<http://inbrief.nswbar.asn.au/articles/4df95d7a2fb43495d59665ad062328a9>>.

grounds that a person has committed a serious offence as defined in section 6 of the Legal Profession Uniform Law (NSW)), then section 465 of the Legal Profession Uniform Law (NSW) imposes on the Bar Council an obligation to report the suspected offence (if it has not already been reported) to the police or other appropriate investigating or prosecuting authority.

The fact that your conduct may become the subject of complaint, or referred to the police or other relevant authority, is not in itself the reason why proper behaviour is expected of barristers. However, a general awareness that unacceptable behaviour may lead to these consequences should be borne in mind...

127. In *Precedent* (Issue 144 February 2018), Catherine Branson QC made some important suggestions. She said:

Although our profession today is more enlightened, we should be prepared for renewed criticism that it is still insufficiently proactive in ensuring the sexual safety of its younger members.

A particular responsibility rests with those who hold positions of influence, such as those who control the Law Council of Australia, the Law Societies and the Bar Associations. Should they commission a prevalence study of sexual harassment within the profession, broadly comparable with the study undertaken for Universities Australia? With the benefit of the results of such a survey, they could seek expert advice about what, if anything, should be done next.

Those in charge of law firms and other places where young lawyers are employed carry responsibility to provide a safe work environment. Are they are doing all they can? Do they have safe internal complaints procedures? What about when their staff leave the office? By way of example, while it may be better than nothing for an employer to warn a female solicitor that she should try to avoid being alone with a particular barrister, surely the preferable, and more principled, option is for the employer to cease briefing any barrister who it has reason to believe may pose a sexual threat to its staff? To help ensure that their solicitors enjoy a safe working environment, should those who control firms and offices that brief the bar seek feedback from their instructing solicitors, not only about the professional competence of the barristers they have retained, but also about the appropriateness of their personal behaviour?

128. Bar Care is available to assist barristers. Bar Care is an independent, professional counselling service. The NSWBA's sole involvement is to fund and promote the service to ensure assistance is available to all members in need. No information is provided to the NSWBA without the express permission of the barrister.
129. Some barristers have had the benefit of assistance from the benevolent fund to assist them with expenses, which may arise if the barrister requires treatment or to relocate chambers at short notice.

Recommendations

130. As noted above, the focus of this submission is the experience of barristers in New South Wales and the application of the SDA to the day to day work of barristers.
131. However, the following recommendations are intended to improve the SDA generally and are not intended to be limited to barristers in New South Wales. These recommendations will enhance the operation of the SDA for particular occupations or professions where its members are self-employed.

Recommendation 1

132. The SDA currently proscribes sexual harassment in defined areas. One of those areas is employment whereby the provisions are directed to either the working relationship or the workplace. In the latter category, s. 28B(6) makes it unlawful for “a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons.” However, the definition of workplace participant is currently limited to employers, employees, commission agents, contract workers and partners in a partnership. As such, self employed persons such as barristers are not ‘workplace participants’. This is in contrast to broader provisions found in some State anti-discrimination legislation.

133. Section 94 of the Equal Opportunity Act 2010 (Vic) states:

Harassment in common workplaces

- (1) *A person must not sexually harass another person at a place that is a [workplace](#) of both of them.*
- (2) *For the purposes of this section it is irrelevant—*
 - (a) *whether each person is an employer, an employee or neither; and*
 - (b) *if they are employees, whether their employers are the same or different.*
- (3) *In this section “workplace ” means any place where a person attends for the purpose of carrying out any functions in relation to his or her [employment](#), occupation, business, trade or profession and need not be a person’s [principal](#) place of business or [employment](#).*

134. Section 118 of the Anti-Discrimination Act 1991 (Qld) and section 17(2) of the Anti-Discrimination Act 1998 (Tas) both provide:

A person must not sexually harass another person.

135. Section 87(1) of the Equal Opportunity Act 1984 (SA) is similarly not limited to the employment status of the perpetrator or the victim and states:

“It is unlawful for a person to subject to sexual harassment-

- (a) *A person with whom he or she works; or*
- (b) *A person who seeking to become a fellow worker, while in attendance at a place that is a workplace of both the persons or in circumstances where the person was, or ought reasonably to have been, aware that the other person was a fellow worker or seeking to become a fellow worker.*

136. The NSWBA recommends that Part II, Division 3 of the SDA be amended to reflect the provisions of s 94 of the Equal Opportunity Act 2010 (Vic) and s 87(1) of the Equal Opportunity Act 1984 (SA) whereby the protections are not limited by the status of the persons involved but directed to the circumstances where the conduct takes place – i.e. at work.

Recommendation 2

137. It is unlawful for a person to sexually harass another person in the course of providing (or offering to provide) or receiving services from that other person: s28G SDA.

138. Currently, the term ‘services’ is defined in the SDA as:

"services" includes:

- (a) *services relating to banking, insurance and the provision of grants, loans, credit or finance;*
- (b) *services relating to entertainment, recreation or refreshment;*
- (c) *services relating to transport or travel;*
- (d) *services of the kind provided by the members of any profession or trade; and*
- (e) *services of the kind provided by a government, a government authority or a local government body.*

139. The definition captures any services that relate to the areas mentioned in paras (a), (b) and (c) or which are of a kind provided by government (para (e)). In addition to those fields, the definition is expressed to capture services of a kind provided by the members of any ‘profession or trade’. Unlike some state and territorial legislation, (see Anti-Discrimination Act (NT) s 4; Anti-Discrimination Act 1998 (Tas) s 3 and Equal Opportunity Act 2010 (Vic) s 4) the definition does not expressly capture services provided in the market place that are outside of the areas mentioned and which are provided by persons who are not involved in a ‘profession or trade’. While the definition of ‘services’ is not exhaustive, difficult questions about its reach may arise and it is prudent to make its reach clear. It is suggested that the definition of ‘services’ in s 4 of the SDA be expanded by amending both the opening words and paragraph (d) to read as follows:

“services” includes, without limiting the generality of the word—

...

- (d) *services of any profession, occupation, trade or business, including those of an employment agent; and*

140. This reflects the definition of ‘services’ in the Equal Opportunity Act 2010 (Vic) which appears to be the most comprehensive definition in Australian discrimination laws.

Recommendation 3

141. Section 105 of the SDA deems the conduct of persons who cause, instruct, induce, aid or permit an unlawful act of discrimination to have engaged in that same conduct. Section 105 was included in the original version of the SDA and the unlawful conduct to which this deeming provision attached was directed to Divisions I and II of Part 3 of the SDA which, at that time were the only divisions containing unlawful discriminatory conduct.
142. Division 3 of Part II of the SDA was amended on 16 December 1992 to expand the operation of and the test for sexual harassment. Prior to this time, the legislation required proof that the complainant had suffered disadvantage, or that the complainant had reasonable grounds for believing that she or he would suffer detriment, if she or he objected to the harassment. The new provisions expanded the group of persons who could claim sexual harassment and replaced the test for sexual harassment to one including an objective element that a reasonable person, having regard to all the circumstances, would have anticipated that the complainant would be offended, humiliated or intimidated by the conduct that is the subject of the complaint.
143. There was, however, no concomitant addition to section 105 to include Division 3 conduct as being covered by the aiding and permitting provision. It may have been a drafting anomaly.
144. In *Elliott v Nanda* (2001) 111 FCR 240, the Court found that the CES had knowledge that several young women who had been placed for employment with the respondent had complained that they had been sexually harassed. It was pleaded that this was sex-based discrimination. Moore J held that the CES had 'permitted' the discrimination to take place as the number of complaints of sexual harassment from that workplace should have alerted the CES to the distinct possibility that any young woman sent to work for the respondent was at risk of sexual harassment and therefore discrimination on the grounds of sex. In this regard, his Honour placed reliance on the decision in *Cooper v Human Rights and Equal Opportunity Commission* [1999] FCA 180; (1999) 93 FCR 481
145. There does not appear to be any viable policy basis to exclude sexual harassment from the coverage of s. 105 of the SDA. Moreover, extending the coverage of s. 105 of the SDA would be consistent with the comparable provision in s 122 of the *Disability Discrimination Act, 1992* (Cth) which applies to discrimination and harassment, and also s. 56 of the *Age Discrimination Act 2004* (Cth).
146. The NSWBA recommends s 105 of the SDA be amended to include Division 3 conduct as follows:

Liability of persons involved in unlawful acts

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1, 2, or 3 of Part II shall, for the purposes of this Act, be taken also to have done the act.

Recommendation 4

147. The NSWBA recommends the introduction of a new provision in the SDA to provide for positive measures to be taken to eliminate sexual harassment.

148. We note s 15 of the Equal Opportunity Act 2010 (Vic) provides a model for such a clause. When s 15 was introduced, the Explanatory Memorandum said:

"The duty will mean that duty holders will need to think proactively about their compliance obligations rather than waiting for a dispute to be brought to elicit a response. It may involve organisations doing such things as -

- *identifying potential areas of non-compliance;*
- *developing a strategy for meeting and maintaining compliance (such as undertaking training or establishing policies);*
- *reviewing and improving compliance where appropriate."*

149. The NSWBA recommends the following provision:

Measures to eliminate discrimination, sexual harassment or victimisation

- (1) *This section applies to persons to whom Part II, Divisions 1, 2 and 3 of this Act applies.*
- (2) *A person should take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.*
- (3) *In determining whether a measure is reasonable and proportionate the following factors must be considered—*
 - (a) *the size of the person's business or operations;*
 - (b) *the nature and circumstances of the person's business or operations;*
 - (c) *the person's resources;*
 - (d) *the person's business and operational priorities;*
 - (e) *the practicability and the cost of the measures.*
- (4) *A failure to comply with sub-section (2):*
 - (a) *is not unlawful discrimination; but*
 - (b) *may be the subject of an investigation by the Australian Human Rights Commission*

Recommendation 5

150. The NSWBA recognises that a person who is sexually harassed may experience trauma which impairs the person's ability to lodge a complaint with the AHRC within 6 months. The decision whether to lodge a complaint is not always an easy one. For others who may access grievance procedures within their chambers or elsewhere, the process may take time. A person should

not be at risk of forgoing a subsequent complaint to the AHRC because of the delay involved in pursuing a grievance at a local level.

151. The NSWBA recommends amending s 46PH(1)(b) of the Australian Human Rights Commission Act 1986 (Cth) to extend the period of time from 6 months to 18 months for lodging a complaint.