New accessorial liability for barristers under the Sex Discrimination Act 1984 *(Cth) and fresh obligations under Bar Rule 123*[1,2]

'The standard you walk past is the standard you accept'[3]

Executive summary

1. From its commencement in September 2021, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (the **Amendment Act**)[4] introduced significant changes to the *Sex Discrimination Act 1984* (Cth) (**SD Act**) which had immediate impact on the New South Wales Bar.[5] Importantly, these changes were also absorbed into Rule 123[6] of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (the **Barristers' Rules**).[7]
2. The Amendment Act introduced at least three important changes which have consequence for the Bar. First, it introduced the terms 'worker' and 'PCBU' (persons conducting a business or undertaking), thereby extending coverage of the SD Act[8] to self-employed workers, including barristers at the private Bar in New South Wales (see [5] to [7] below).
3. Second, the Amendment Act introduced an additional prohibition of harassment on the ground of sex (or 'sex-based harassment'), which operates alongside the prohibition against sexual harassment.[9]
4. Third, accessorial liability under section 105 of the SD Act now attaches to both sexual harassment and the newly inserted prohibition against sex-based harassment,[10] giving rise for the first time to the potential for liability for barristers who 'permit'[11] such conduct.

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[1] This article is not intended to constitute a complete statement of, or advice on, the matters herein. The Bar Association (**Association**) encourages members to make any necessary further enquiries, including with the Association's Sexual Harassment Contact Officer, a member of the Association's Diversity and Equality Committee (including the Chair) and/or a member of Bar Council. Liability for reliance on the views expressed herein is excluded.

[2] By Penny Thew and Justin Hogan-Doran SC. The authors gratefully acknowledge the invaluable assistance and feedback of Kate Eastman AM SC, Kylie Nomchong SC, Reg Graycar, Brenda Tronson, Catherine Gleeson as well as other preeminent Senior Counsel. In 2014, Kate Eastman AM SC, Justin Hogan-Doran SC and Penny Thew proposed amendments (adopted by Bar Council) to Rule 123 and associated definitions within Rule 125.

[3] Chief of Army Lieutenant General David Morrison, International Womens' Day Conference, 8 March 2013.

[4] Flowing from the *Respect@Work Report,* 29 January 2020.

[5] See also submissions made by the Australian Bar Association and Law Council to the Senate Committee: Submissions – Parliament of Australia (aph.gov.au), Australian Bar Association's podcast: ABA | ABA Podcast #4 (austbar.asn.au) and the podcast given by Michael McHugh SC and Kate Eastman AM SC in October 2021: https://cpd-streaming.nswbar.asn.au/watch/555.

[6] Set out in full at the conclusion of this article.

[7] Given all forms of 'unlawful discrimination' as defined in section 3 of the *Australian Human Rights Commission Act 1986* (Cth) (the **AHRC Act**) are expressly incorporated into the rule by reason of the associated definitions contained in Rule 125. Amendments to section 105 of the SD Act, while not caught by the definition of 'unlawful discrimination', are likely also to have been incorporated: see [32] herein.

[8] See [5] and associated footnotes herein.

[9] Section 28B of the SD Act, with that term defined in section 28AA.

[10] Accessorial liability under section 105 of the SD Act continues to attach as well to sex discrimination in proscribed areas of public life, including employment under section 14 of the SD Act.

[11] Within the meaning of section 105 of the SD Act as that term is likely to be interpreted in respect of barristers, dealt with further herein.

Expansion of the SD Act – coverage of barristers

5. The SD Act's coverage is extended by new section 28AB, which inserts the definition of a 'worker' in a 'PCBU'. While these definitions are said to apply to the whole of the SD Act,[12] the extension of the coverage appears to be limited to sexual and sex-based harassment.[13]
6. The extended coverage is achieved by adoption of the terms 'worker' and 'PCBU' used in sections 5 and 7 of the *Work Health and Safety Act 2011* (Cth) (the **WHS Act**)[14] to reflect 'the evolving world of work'.[15]
7. The meaning of 'worker' in section 7 of the WHS Act is interpreted extremely broadly to capture any person who carries out work in any capacity for a PCBU. [16] Both terms ('worker' and 'PCBU') capture barristers in respect of the prohibition of sexual and sex-based harassment in section 28B of the SD Act. Barristers are thereby both protected as well as prohibited from engaging in this conduct.

New prohibition against sex-based harassment

8. The new prohibition against sex-based harassment[17] generally codifies legal authority which provides that conduct falling short of sexual harassment may nevertheless constitute sex discrimination if it amounts to less favourable treatment on the basis of sex.
9. The scope of new section 28AA of the SD Act is said to be intended to apply to the same *level* of conduct as existing section 28A, which provides the definition of sexual harassment, but noting that section 28A requires conduct to be 'of a sexual nature' while section 28AA requires conduct to be 'seriously demeaning in nature'[18] (emphasis original in Revised EM). This means that harassing conduct on the ground of sex would need to be sufficiently serious or sustained to meet the threshold of offensive, humiliating, or intimidating, as well as seriously demeaning.

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[12] By the words '[f]or the purposes of this Act' in section 28AB. See also Revised EM, [1] (in PDF version), [13], [15]-[16], [169]. By contrast see Revised EM [11], [12] (in PDF version) which states that the expanded coverage is limited to sexual and sex-based harassment.

[13] The definition of 'employment' in section 4 of the SD Act, for the purposes of the prohibition against sex discrimination in the area of employment under section 14, may not incorporate the broad definition of work introduced by the new definition of 'worker' in section 4. Therefore, notwithstanding section 28AB of the SD Act stating that the definition of 'worker' applies 'for the purposes of this Act', it appears not to be applicable to the prohibition against sex discrimination in employment under section 14 but instead limited to sexual and sex-based harassment. See also Revised EM [11], [12] (in PDF version). However, all 'unlawful discrimination' under the SD Act (as defined under section 3 of the AHRC Act) applies to barristers under Rule 123 for the reasons in footnote 7.

[14] In sections 4, 28AB and 28B(3)-(6) of the SD Act; Revised EM[77]-[79].

[15] Revised EM, [79].

[16] See for instance *Bibawi v Stepping Stone Clubhouse Inc* (2019) 285 IR 190 at [18]: 'The definition of "worker" in s 7(1) of the WHS Act is very broad, in that a person need only perform work "in any capacity for" the other person conducting the business or undertaking in order to satisfy the definition. The definition was expressly described as "broad" in the Explanatory Memorandum to the Fair Work Bill 2013 which added Pt 6-4B to the FW Act'; *Respect@work Report*, p467.

[17] In the area of work this is contained in section 28B of the SD Act; however, the prohibition also extends to other areas of public life (sections 28C to 28L of the SD Act) that could be applicable to barristers and which are also absorbed into Rule 123 by reason of constituting 'unlawful discrimination' within the meaning of section 3 of the AHRC Act.

[18] Revised EM, [158]-[159].

10. As stated in the Revised EM at [158], the provision is not intended to capture mild forms of inappropriate conduct, however depending on the circumstances, conduct that is in prima facie breach of section 28AA of the SD Act may include:
    (a) Asking intrusive personal questions based on a person's sex.
    (b) Making inappropriate comments and jokes to a person based on their sex.
    (c) Displaying images or materials that are sexist, misogynistic or misandrist.
    (d) Making sexist, misogynistic or misandrist remarks about a specific person.
    (e) Requesting a person to engage in degrading conduct based on their sex.

Accessorial liability newly linked to the prohibition against sexual harassment and sex-based harassment

11. Accessorial liability under section 105 now extends for the first time to both sexual harassment and harassment on the ground of sex.[19] Section 105 provides:

    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.

12. Each of *Cooper v Human Rights & Equal Opportunity Commission*,[20] *Elliott v Nanda & Commonwealth*[21] and *Rossi v Qantas Airways Limited (No 2)*[22] have discussed the meaning of 'permits' in the context of section 105 of the SD Act and its equivalent under section 122 of the *Disability Discrimination Act 1992* (Cth) (the **DD Act**). In each case, the court drew upon the discussion of the ordinary meaning of 'permits' in non-industrial contexts in the judgments of the dissentients in the matter of *Adelaide City Corporation v Australasian Performing Rights Association Ltd* (1928) 40 CLR 481 and *Broad v Parish* (1941) 64 CLR 588.[23] In the former, Isaacs J at 490-91 said that "the word 'permits' is of very extensive connotation... the primary [dictionary] meaning of 'permit' is: 'to allow, suffer, give leave; not to prevent', and a person having the *legal* power to prevent is just an illustration.[24] In the latter, Rich ACJ said at 594 that 'apart from any arbitrary definition [the word permit] connotes an authorization by a person who has at least *de-facto* control', while Starke J at 595 said it 'means intentionally allow'.
13. These cases indicate that the power to prevent is not merely one of direct intervention, but also of 'not creating a situation where it will or may take place or altering a situation so it will not continue' or if one 'knowingly places the victim…in a situation where there is a real, and something more than a remote, possibility that the unlawful conduct will occur', especially if the person can put or can require measures to be put in place to prevent such conduct.[25]

[19] By linking to Division 3, Part II of the SD Act.
[20] (1999) 93 FCR 481 at 494 [41] per Madgwick J (section 105 SD Act).
[21] (2001) 111 FCR 240 at [161] per Moore J (section 105 SD Act).
[22] [2020] FCA 1080 at [58] per Gleeson J (section 122 DD Act), citing *Cooper* at [41].
[23] Both cited in *Cooper* at [41].
[24] See also the four part test posited by Knox CJ to assess whether a person has by indifference or omission 'permitted' something to occur.
[25] See Moore J in *Elliott v Nanda & Commonwealth* (2001) 111 FCR 240 at [163].

14. Further, whilst circumstances of *de jure* (in the form of contractual or even statutory) power of management to prevent and control breaches in an employment setting easily illustrate the circumstances in which liability may arise, there is no reason in principle why, in the context of less formally structured workplaces such as the Bar, a failure to exercise *de facto* power may not similarly give rise to liability.
15. These principles are also reflected in the Revised EM, in that the concept of having some authority, by reason of being in a managerial or supervisory position, is incorporated in the following terms (at [168]; see also [207], [209]):

> *This effectively creates a form of accessory or ancillary liability in relation to specific provisions under the SD Act. For example, a supervisor is informed that a junior employee is harassing another employee on the basis of their sex. The supervisor does not take any action, and instead jokes and encourages the conduct. In these circumstances, the supervisor may be held liable as an accessory to the harassment as they aided and permitted its continuation.*

16. Therefore, in corporate environments for instance where individuals are commonly engaged under common law contracts of employment, the obligations (including in respect of the word 'permits') under section 105 of the SD Act are graduating. They are likely to be higher for those with greater power, authority or seniority; and conversely, they are likely to be lower or non-existent for those who do not have such seniority or authority.[26]
17. While yet untested in respect of the newly linked accessorial liability to sexual and sex-based harassment, it is likely that these principles would transpose to fit the nuances of the Bar, rendering the obligations under section 105 of the SD Act far higher in certain circumstances for senior barristers by comparison to entry level readers or those in their early years. Senior Counsel and senior juniors in particular may find themselves under an obligation to act ('not to permit'), whether under section 105 of the SD Act or Rule 123[27] if they know or have reason to know of conduct that will or may occur, directed at or perpetrated by a more junior barrister, and they nevertheless disregard whatever legal power (*de facto* or *de jure*) they may have and allow the conduct to happen, either by not preventing, or by allowing, the situation to occur.
18. The circumstances that might give rise to an obligation to act could include when leading a junior, especially in respect of his or her treatment of other counsel, instructors, clients or others involved in the matter. Whilst today Senior Counsel and other senior barristers have perhaps less say than they once did in the choice of juniors, there could be circumstances – of course, fact-dependent - in which in a practical sense the senior barrister has this *de facto* or *de jure* authority over the initial or ongoing retention of a junior colleague. In any complaint of breach of section 105 of the SD Act and/or the equivalent principle as absorbed into Rule 123, a senior barrister may be held to have de facto power which could suffice for the purposes of the SD Act and/or Rule 123.

[26] See also for instance *Matthews v Hargreaves (No 4)* (2015) 274 FLR 138 at [97]-[99], [111]-[112], although in respect of section 123 of the DD Act. Section 122 of the DD Act, relevantly identical to section 105 of the SD Act, was not considered: [135].
[27] See [32] herein.

19. A barrister directly employing or engaging any employee or broader category of worker[28] would be far more clear cut, given such arrangements would be categorised as employment or, more broadly, work arrangements and therefore subject to the established principles distilled in applicable authorities including those at [12] above.
20. Tutors are in a clearer position of de facto authority. Tutoring contains elements of mentoring[29] and tutors are expected to instruct readers in the ethical standards required of a barrister, including under the Barristers' Rules.[30] As stated in paragraph 6(b) of the Association's *Reader/Tutor Guidelines*:[31]

    > *If the tutor becomes aware of the reader behaving in ways which may discredit the reader in the eyes of his or her peers or judicial officers, it is the role of the tutor to bring the matter, tactfully and promptly, to the attention of the reader.*

21. Ultimately, at the conclusion of the readership year, the tutor is required to certify whether a reader is fit to practise as a barrister without restriction, or require further reading. The tutor should consider her or his obligations both as a tutor and under the Barristers' Rules in giving such certification where she or he observes or is aware of the reader transgressing the SD Act and/or the Rules.
22. Heads or governing bodies[32] of chambers are also likely to have de facto as well as *de jure* authority over the conduct of members and/or staff, including conduct perpetrated by and/or toward each other.
23. The scope of a potential obligation to act in certain circumstances may be informed not only by discrimination law principles, but also by the general obligations under the Barristers' Rules. The objects of the Barristers' Rules include (rule 3(a), (c)) ensuring that barristers act in accordance with the general principles of professional conduct, to recognise and discharge their obligations in relation to the administration of justice. The principles underlying the Rules include (rule 4(a), (b) and (d)) a belief that barristers must maintain high standards of professional conduct, and owe duties to their barrister and solicitor colleagues. Rule 8 expressly requires that a barrister not engage in conduct which is (a) 'otherwise discreditable to a barrister' and (c) 'likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.'
24. As is said by Dal Pont,[33] '*a lawyer is ethically obliged to recognise the essential dignity of each individual and the principles of equal rights and justice, an obligation that applies to lawyers' relationships. Their status as professionals coupled with their responsibility to protect individual rights, means that lawyers should lead by example in non-discriminatory conduct. This is reflected in professional rules, which proscribe a lawyer engaging in conduct that constitutes discrimination and sexual harassment, defined by reference to applicable anti-discrimination or human rights statutes*.'[34]

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[28] Whether described as a legal assistant (for instance a law student), paralegal, personal assistant, secretary, practice manager or even a clerk.
[29] NSW Bar Association, 'Reader / Tutor Guidelines' (7 ed), 2020, para 24.
[30] Ibid, para 22(a)(iv).
[31] Ibid, para 6.
[32] Such as statutory boards.
[33] Dal Pont, *Lawyers' Professional Responsibility,* 7th ed, 2021 [21.175].
[34] While Dal Pont was talking here about solicitors' responsibilities under rule 42.1.1 and 42.1.2 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, the wording and obligations under Rule 123(a) and (b) is relevantly identical.

25. Dal Pont in addition observes,[35] in respect of lawyers' self-regulation, that '*the attribute of a profession that it be autonomous and independent of outside control does not stand alone, but is a corollary of it supplying a public service and requiring special skill and learning. Only those occupations and callings that exhibit the requisite skill and learning and, importantly, engage primarily in public service so as to attract the confidence of the community merit self regulation. What is at issue in 'professionalisation' is, in the words of one commentator, 'the belief that people who have the expertise to provide services ought to be entrusted with a substantial measure of control over those services and the working conditions in which they have provided*.'' [36]
26. These principles may be relevant in considering the scope of the obligation to act now imposed under section 105 of the SD Act and/or Rule 123.[37] As Dal Pont says at [25.90], the 'duty to be vigilant is stricter [if the lawyer] is aware of factors that may indicate to a reasonable person so positioned that greater supervision is required.' A partner in a law firm (aware that his partners had perpetrated gross breaches of fiduciary duty 'cannot absolve himself by saying that he obtained verbal assurances [that no more such loans would occur]; he had to look' at the partnership accounts.[38] Indeed, a solicitor who trusted his partner, despite having reason to be apprehensive about misuse of the trust account, was found to have shown 'complete indifference … to the performance of statutory obligations' which resulted in a finding of professional misconduct.[39] While distilled in the context of the performance of legal services by solicitors, the obligations on whom are somewhat different to those on barristers, such principles may be apposite.

Changes to the objects of the SD Act and implications for damages

27. Amendments to the objects of the SD Act are in addition said to be aimed at making 'it clear that in addition to the elimination of discrimination and harassment, the SD Act aims to achieve, so far as practicable, equality of opportunity between men and women'.[40]
28. These amendments have implications for the quantum of damages in respect of breaches of the SD Act, as was made clear in *Friend v Comcare* (2021) 308 IR 445 at [81], where Rares J observed:

> *As Perram J, with whom Collier and Reeves JJ agreed, asked rhetorically in Hughes (t/as Beesley and Hughes Lawyers) v Hill (2020) 277 FCR 511 at 521 [47], in a case of sexual harassment contrary to s 28A of the SDA,* ***"what is the ruin of a person's quality of life worth?"*** *(see too at 511 [47]–[48]). His Honour also affirmed that****, in assessing statutory damages for unlawful discrimination in accordance with s 46PO(4)(d), the statutory objects of the SDA, and I would add the DDA, are relevant considerations, including the object of the elimination of such discrimination.*** *Such awards can have a public vindicatory effect both for the*

[35] Ibid [1.40].
[36] Citing Birchenbach, 'The Redemption of the Moral Mandate of the Profession of Law' (1996) 9 Can J of Law and Juris 51 at 52.
[37] For example, the principles applicable in considering a solicitor's failure to properly supervise an unqualified clerk's conduct of matters: *Law Society of NSW v Foreman* (1991) 24 NSWLR 238, cited by McClellan CJ at CL in *Bechara v Legal Services Commissioner* (2010) 79 NSWLR 763 at [44] (McColl and Young JJA agreeing).
[38] *Bridges v Law Society of NSW* [1983] 2 NSWLR 361 at 369, cited in Dal Pont, id, [25.90].
[39] *Re Mayes* [1974] 1 NSWLR 19 at 25-26, cited in Dal Pont, id, [25.90].
[40] Revised EM, [6].

applicant affected and the public at large. Here, the SDA included the following objects in s 3(a), (b), (c) and (d)… (emphasis added)

Amendments captured by Rule 123

29. As stated above, all conduct falling within the definition of 'unlawful discrimination' within the meaning of section 3 of the *Australian Human Rights Commission Act 1986* (Cth) (the **AHRC Act**) is caught by Rule 123 by reason of the definitions of discrimination and sexual harassment in Rule 125 of the Barristers' Rules, which are as follows:

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

30. Federally, the AHRC Act provides the legislative mechanism by which complaints are made under the SD Act by way of the overarching definition of 'unlawful discrimination,'[41] which is extremely broad and incorporates *inter alia* 'any acts, omissions or practices' proscribed by the operative provisions[42] of, relevantly, the SD Act. It expressly includes all forms of direct and indirect sex discrimination, sexual and sex-based harassment[43] as well as victimisation (generally described as subjecting a person to a detriment because they have or intend to make a complaint about a prima facie breach of anti-discrimination legislation).[44]
31. Critically, as a result of the amendments to the definitions contained in Rule 125 made in 2014,[45] for conduct to be captured by Rule 123(a)-(b), that conduct (assuming it is in the course of, or in connection with, legal practice or their profession), need only constitute discrimination or sexual harassment as *defined* under state or federal anti-discrimination or human rights legislation, rather than discrimination or sexual harassment that constitutes a breach of such legislation, although it also extends to include all forms of 'unlawful discrimination'. However, the amendments make the breadth of Rule 123 less critical, given barristers will be covered not only by Rule 123, but also at least[46] by the sexual and sex-based harassment provisions of the SD Act.
32. In addition, conduct giving rise to accessorial liability under section 105 of the SD Act has been held to constitute 'unlawful discrimination' within the meaning of section 3 of the AHRC Act (despite not falling within Part II of the SD Act), meaning that such conduct may also be caught by Rule 123.
33. Moreover, to the extent that any statutory defences and/or exemptions apply under the SD Act, those are unlikely to be caught by Rule 123, given the conduct caught by the definitions in Rule 125 need only constitute discrimination as *defined*, rather than constitute a breach, as stated above.

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[41] Section 3 of the AHRC Act.
[42] Including relevantly Part II of the SD Act.
[43] By reference to Part II of the SD Act.
[44] Contained in (ca), (d)-(f) of the definition of 'unlawful discrimination' in section 3 of the AHRC Act, which captures *inter alia* newly inserted section 47A of the SD Act (victimisation), but now precludes pre-existing section 94 of the SD Act, which provides for penalties in respect of the offence of victimisation.
[45] See footnote 2.
[46] See [5] herein.

34. Finally, and critically, while conduct alleged to be in breach of Rule 123 must have occurred 'in the course of, or in connection with, legal practice or their profession' (as recently amended) to be caught by Rule 123, there is no such limitation under the SD Act, thereby giving it broader scope still than the Rule.

Implications of the amendments to the SD Act and Rule 123

35. There is no impediment to any person making a complaint against one or more barristers for an alleged breach of Rule 123 simultaneously with commencing proceedings against that barrister in the Federal Court of Australia or Federal Circuit and Family Court of Australia in respect of an alleged breach of any one or more of the provisions of the SD Act, including alleging primary, vicarious or accessorial liability.
36. While it is the case that any underpinning complaint to the Australian Human Rights Commission[47] can be terminated by the President of the AHRC[48], that merely lays the foundational jurisdiction for the complainant to elect to proceed to the FCA or FCAFCOA in respect of the terminated complaint (although leave of the court is required in certain circumstances).[49]
37. The result is that the same or similar impugned conduct substantiated against a barrister(s) could give rise to disciplinary proceedings against that barrister(s) simultaneously with what could transpire to be substantial damages, given the amendments to the objects of the SD Act and recent judicial treatment of those objects.

Judicial recognition of shift in community standards

38. Recent appellate authority highlights judicial recognition of the significant shift in community standards in respect of the treatment and value of women in the workplace and generally.
39. In *Beesley and Hughes Lawyers v Hill* (2020) 277 FCR 511, Perram J held (with Collier and Reeves JJ agreeing) at [8] that the conduct of the perpetrator (found to constitute sexual harassment) was 'despicable' and that 'It was also in every sense improper.'
40. Similarly, in *Vitality Works Australia Pty Ltd v Yelda (No 2)* (2021) 307 IR 443 the Court of Appeal had little trouble concluding that conduct of both the employer, Sydney Water, plus corporate wellbeing consultancy Vitality Works Australia Pty Limited, engaged in unwelcome conduct of a sexual nature amounting to sexual harassment in contravention of the *Anti-Discrimination Act 1977* (NSW) when both exhibited an image of a Sydney Water employee on a work health and safety poster under the heading 'Feel great – lubricate!'.
41. At the conclusion of a judgment in which McCallum J (as her Honour then was) agreed with the findings of Bell P (as his Honour then was) and Payne JA, her honour went on to make the following significant observation at [125]:

> *…It was common ground that the poster depicting Ms Yelda was designed for the purpose of conveying a work safety message in what was established to be a male-*

[47] Where proceedings alleging a breach of the SD Act must be commenced before electing to proceed to a court: section 46PO(1) of the AHRC Act.
[48] For any one or more of the reasons encapsulated by section 46PH(1)(d) to (g) of the AHRC Act (on the basis, generally, that there is a more appropriate remedy or that the complaint has or could be dealt with by another statutory authority).
[49] Section 46PO(1) of the AHRC Act.

dominated workplace. One of the arguments in support of ground 5(a) was that the depiction in that context of a woman feeling great because she lubricates could not amount to sexual harassment because its sexualised message was not "explicit". The sexualisation of women in the workplace often isn't. Innuendo, insinuation, implication, overtone, undertone, horseplay, a hint, a wink or a nod; these are all devices capable of being deployed to sexualise conduct in ways that may be unwelcome. The power of implication is well understood in the field of defamation: cf Favell v Queensland Newspapers Pty Ltd (2005) 221 ALR 186; [2005] HCA 52 at [8]- [12]. In the nature of things, sexual implication is perhaps the most powerful of all. The suggestion that conduct cannot amount to sexual harassment unless it is sexually explicit overlooks the infinite subtlety of human interaction and the historical forces that have shaped the subordinate place of women in the workplace for centuries. The scope of the term "conduct of a sexual nature" in s 22A of the Anti-Discrimination Act is properly construed with an understanding of those matters.

Conclusion

42. The full implications of these amendments are yet to be seen, but have the real potential to be profoundly impactful and far-reaching for the Bar.
43. Not only are all barristers, regardless of seniority, now subject for the first time to at least the prohibition against sexual harassment and sex-based harassment under the SD Act, and therefore capable of being primarily liable for damages in respect of conduct in which they engage; in addition, more senior barristers in a position to prevent such conduct may be liable where they cause, instruct, induce, aid or permit conduct constituting a breach of those provisions, without taking a step to prevent and/or stop it.
44. Barristers may be simultaneously the subject of disciplinary action as a result of any finding of a contravention of Rule 123 in respect of the same or aspects of the same conduct. Similarly, the scope of the conduct for which barristers could be liable for damages (under the SD Act) or subject to disciplinary proceedings (under Rule 123), has broadened with the addition of the proscription of sex-based harassment.
45. The linking for the first time of the accessorial liability provisions to sexual harassment and sex-based harassment has, in particular, rendered more crucial than ever the well-known adage attributed to Chief of Army Lieutenant General David Morrison of 'the standard you walk past is the standard you accept.' [50]
46. The amendments to the SD Act, now largely or entirely swept up into Rule 123, were designed to be momentous with the express design of addressing historical gender inequality and deficiencies in workplace practice and culture. Those amendments are equally capable of addressing historical and long-standing gender inequality and deficiencies at the New South Wales Bar.

Rule 123 (incorporating amendments as at 4 March 2022)**:**

Anti-discrimination and harassment

[50] Above note 3.

(1) A barrister must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes:
(a) discrimination,
(b) sexual harassment, or
(c) bullying.
(2) For the purposes of subrule (1), conduct in connection with a barrister's profession includes, but is not limited to:
(a) conduct at social functions connected with the bar or the legal profession, and
(b) interactions with a person with whom the barrister has, or has had, a professional relationship.