



NEW SOUTH WALES  
BAR ASSOCIATION

## BAR ASSOCIATION CONDUCT GUIDELINES

1. These New South Wales Bar Association Conduct Guidelines (**Conduct Guidelines**) were approved by Bar Council on 28 April 2022.
2. Nothing in these Conduct Guidelines should be taken as legal advice with respect to the obligations imposed on chambers, members and staff under Commonwealth or New South Wales law.

## INTRODUCTION

3. The New South Wales Bar Association (**Bar Association**) is committed to ensuring that every person:
  - a. engaged by and/or working with or for the Bar Association (in any capacity); and, or
  - b. attending any event organised or hosted by the Bar Association (**Bar Association Event**),including interactions online or over the phone, is able to do so in an environment that is safe and free from harassment, discrimination, vilification, victimisation and/or bullying.
4. The Bar Association is committed to taking all reasonably practicable steps to eliminate or minimise risks to health and safety, including psychological health, of every person engaged by and/or working with or for the Bar Association (in any capacity) as well as those who attend Bar Association Events.
5. All members of the Bar Association have a responsibility to ensure that in any work they perform with or for the Bar Association, and in their conduct at any Bar Association Event, these commitments are adopted and implemented.
6. Persons working for or on behalf of the Bar Association, other members of the Bar Association, and guests attending Bar Association Events are all people of value to the Bar Association. Offensive behaviour towards any of those persons is unacceptable to the Bar Association.
7. If a person working with or for the Bar Association, or attending a Bar Association Event, is the subject of harassment, discrimination, vilification, victimisation or bullying by a member of the Bar Association, members of the Bar Association, and Bar Association officers and employees are supported by these Conduct Guidelines to enable such conduct to be reported to the Bar Association.
8. The Bar Association will respond to such reports by taking such steps as are available to it to ensure (so far as is reasonably practicable) that such conduct ceases, and that those persons are not exposed to further risk of harm.
9. Depending on the conduct that has occurred, members of the Bar Association may have an obligation at law to ensure that the conduct is reported to regulatory and other authorities. Members of the Bar Council, the Executive Director of the Bar Association, and other delegates of Bar Council (including the Director of Professional Conduct) have additional reporting obligations and responsibilities as the designated local regulatory authority for the purposes of the *Legal Profession Uniform Law 2014* (NSW).
10. The Bar Association undertakes to take appropriate steps to periodically publicise the Guideline and associated documents together with the identity of the Bar Association's Chief Operating Officer or any other persons nominated by the Bar Association to deal with complaints under these Guidelines.

## PERSONS TO WHOM THIS APPLIES

11. These Conduct Guidelines apply to:
  - a. members of the Bar Association;
  - b. persons who work for or with the Bar Association as employees, contractors or in other capacities including work experience students and volunteers (including, without limitation, persons who are members of any Bar Association committee); and
  - c. third parties who attend Bar Association Events.
12. These Conduct Guidelines are complementary to the Bar Association Workplace Policies, which govern and provide pathways for redress for Bar Association employees.

## PURPOSE

13. The purpose of these Conduct Guidelines are to:
  - a. assist with the elimination and/or prevention of all forms of harassment, discrimination, vilification, victimisation and/or bullying for persons working for or with the Bar Association or attending Bar Association Events, including through education;
  - b. promote the dignity and respect of every person in relation to all protected attributes;
  - c. record that the Bar Association has adopted these Conduct Guidelines, including for the purposes of minimising the risk of liability associated with any contravention of the relevant laws;
  - d. provide a framework, and options, for dealing with alleged contraventions of these Conduct Guidelines;
  - e. operate in conjunction with and in furtherance of any other policies adopted by the Bar Association;
  - f. clearly articulate the Bar Association's attitude against harassment, discrimination, vilification, victimisation and/or bullying; and
  - g. promote adherence to all relevant laws including the *Legal Profession Uniform Law (NSW)* (**Uniform Law**) and the Legal Profession Uniform Conduct (Barristers') Rules (the **Barristers' Conduct Rules**).

## CONTRAVENTION AND CONSEQUENCES OF A FAILURE TO COMPLY WITH THESE CONDUCT GUIDELINES

14. Anyone engaging in sexual harassment, harassment, discrimination, vilification, victimisation or bullying in the course of working for or with the Bar Association or whilst attending a Bar Association Event contravenes these Conduct Guidelines.
15. Complaints about sexual harassment, harassment, discrimination, vilification, victimisation or bullying will be addressed by reference to the **Framework in Appendix A**.
16. Conduct found to have occurred in contravention of these Conduct Guidelines may result in disciplinary action taken against the person found to have engaged in the conduct. If the Respondent is:
  - a. an employee, the matter will be addressed in compliance with the current Bar Association Workplace Policies;
  - b. a barrister, the matter will be addressed in accordance with these Conduct Guidelines; or
  - c. neither of the above (such as where the Respondent is a solicitor), the matter will be addressed in compliance with the current Bar Association Workplace Policies.
17. If the person who engaged in the conduct is a barrister, disciplinary action could result in a determination being made by a relevant authority such as the Bar Association or a disciplinary tribunal that the person engaged in unsatisfactory professional conduct or professional misconduct (see ‘**The Law**’ below).

## THE LAW

18. The *Anti-Discrimination Act 1977* (NSW) and Federal discrimination laws including the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004* and the *Fair Work Act 2009* (the **relevant laws**) make it unlawful to engage in conduct constituting sexual harassment, discrimination, vilification, victimisation and/or bullying in most areas of work and in the provision of services.
19. The relevant laws give rise to potential legal liability for individuals, their Chambers, and the Bar Association.
20. The Bar Association can also be responsible for breaches of the relevant law that occur at a Bar Association Event and may be liable for failing to prevent or properly respond, unless it has taken all reasonable steps to prevent the unlawful conduct.
21. Rule 123 of the Barristers Conduct Rules imposes a personal obligation on each and every barrister not to, 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.

Rule 123 states that 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.
22. Rule 125 of the Barristers Conduct Rules defines bullying as “unreasonable behaviour that could reasonably be expected to intimidate, degrade, isolate, alienate or cause serious offence to a person” and defines sexual harassment as “sexual harassment as defined under applicable state, territory or federal anti-discrimination or human rights legislation”.
23. Conduct that contravenes Rule 123, including sexual harassment, discrimination, vilification, victimisation and/or bullying may amount to professional misconduct and/or unsatisfactory professional conduct within the meaning of Division 1, Part 5.4 of the Uniform Law.
24. Discrimination, harassment and bullying may also constitute a breach of Rules 8(a) or 8(c) of the Barristers Conduct Rules.
25. Any complaints made to the Office of the Legal Services Commissioner (**OLSC**) against a barrister for contravening a provision of the Barristers Conduct Rules may result in an investigation of the complaint by the OLSC or the Bar Association. Depending upon the outcome of that investigation, the barrister may face disciplinary action.
26. The OLSC and Bar Council, (as designated local regulatory authorities), and their delegates, have an obligation to report to the NSW Police any person suspected on reasonable grounds to have committed a ‘*serious offence*’, being an indictable offence, and to make available to the NSW Police the documents or information relevant to the offence under their control.
27. In addition, members of the NSW Bar (as well as all other residents in NSW) may be obliged under s 316 of the *Crimes Act 1900* (NSW) (**Crimes Act**) to report material information relating to ‘*serious indictable offences*’ (as defined by s 4 of the Crimes Act) to NSW Police or appropriate authorities.
28. Further, under the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking; and that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. This includes psychological health arising from sexual harassment, discrimination, vilification, victimisation and/or bullying. In addition, under the WHS Act each worker at a workplace must take reasonable care that

his or her acts or omissions do not adversely affect the health and safety of other persons who are at that workplace.

29. A “person conducting a business or undertaking” includes sole traders and unincorporated associations. In practical terms, this means all Barristers. In addition, a sole trader is a ‘worker’ under the WHS Act, which means that barristers may have additional duties under sections 19 and 28 of the WHS Act.

## WHAT IS HARASSMENT INCLUDING SEXUAL HARASSMENT?<sup>1</sup>

### Sexual harassment

30. Under the *Sex Discrimination Act 1984* (Cth), a person sexually harasses another person (**person harassed**) if:
- (a) the person 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 where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
31. The *circumstances* to be taken into account include, but are not limited to:
- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
  - (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
  - (c) any disability of the person harassed; and
  - (d) any other relevant circumstance.
32. “*Conduct of a sexual nature*” includes:

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<sup>1</sup> These Guideline draws on the recommendations, and model policy, included in “*Disrupting the System: Preventing and responding to sexual harassment in the workplace*” published by the Male Champions of Change incorporating recommendations from the National Inquiry into Sexual Harassment in Australian Workplaces led by Sex Discrimination Commissioner Kate Jenkins, and the Respect@Work: Sexual Harassment National Inquiry Report (2020). It also uses the definitions in the Law Council of Australia *National Model Framework Addressing Sexual Harassment for the Australian Legal Profession*, December 2021.

- (a) making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing;
  - (b) any gestures of a sexual nature; or
  - (c) making or attempting physical interactions of a sexual nature.
33. The recent amendments to the *Sex Discrimination Act 1984* (Cth) also provide that it is unlawful to harass a person on the grounds of their sex (**sex-based harassment**). Sex-based harassment is defined as unwelcome conduct of a seriously demeaning nature by reason of the person's sex in circumstances in which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. The amendments also:
- (a) extended the accessory/ancillary liability provisions in the Act so that a person who causes, instructs, induces, aids or permits another person to engage in sexual harassment or sex-based harassment can also be found liable for the conduct; and
  - (b) expanded the coverage of the protection against sexual harassment to all workplaces and workers, so that barristers are now included within the scope of the Act.

### **Harassment more generally**

34. Harassment is not limited to sexual harassment and includes disability-based harassment and racial, transgender, HIV/AIDS and/or homosexual vilification.
35. Race-based harassment means acts reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people done because of the race, colour, national or ethnic origin of the other person or some or all of the people in the group.
36. Disability-based harassment includes the making of disparaging or other comments to a person in relation to that person's disability whether the disability is physical, intellectual, psychiatric, sensory or neurological.

### **WHAT IS DISCRIMINATION?**

37. Discrimination on a prohibited ground is unlawful under state and/or federal legislation and is not acceptable. Discrimination may be direct or indirect as follows:
- a. *Direct discrimination* is less favourable treatment on the ground of the following actual, imputed or appertaining characteristics: race, nationality, colour, descent, ethno-religious origin, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy, breastfeeding, status as a parent or carer, sexual orientation/homosexuality, disability, age, industrial activity, religious beliefs or activities, political beliefs or activities, criminal record, medical record (**particular characteristics**).

- b. *Indirect discrimination* is constituted by policies or procedures that appear to be neutral on their face but have a disproportionate adverse impact on persons with a particular characteristic, such those described immediately above. It is unlawful to require a person with a particular characteristic (as set out above) to comply with an unreasonable requirement or condition where the person with the characteristic cannot comply.

38. Discrimination does not need to be repeated behaviour.

### **WHAT IS BULLYING?**

- 39. Bullying is repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety.<sup>2</sup>
- 40. “Repeated behaviour” refers to the persistent nature of the behaviour and can involve a range of behaviours over time.
- 41. “Unreasonable behaviour” means behaviour that a reasonable person, having considered the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening.

### **WHAT IS VILIFICATION?**

- 42. Vilification is a public act (by speech, publication, conduct or otherwise) which is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people which is done because of the race, colour, religion or national or ethnic origin of the person or of some or all of the people in the group.
- 43. Vilification also refers to such conduct engaged on the grounds of homosexuality, gender identity or HIV/AIDS.

### **WHAT IS VICTIMISATION?**

- 44. Victimisation occurs when a person is treated adversely or subjected to a detriment because that person has, in respect of any sexual harassment, discrimination, vilification or bullying, made a complaint or allegation, proposes to make a complaint, has brought proceedings, or has given information or document/s in relation to a complaint or proceedings, has attended any conference in relation to a complaint or has appeared (or has proposed to appear) as a witness or has asserted rights under the relevant laws.

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<sup>2</sup> This is the definition set down under the SafeWork Australia “*Guide for Preventing and Responding to Workplace Bullying*” (May 2016).



## APPLICATION, DEFINITIONS AND GENERAL PRINCIPLES

45. If you have been subjected to harassment, discrimination or bullying, you can obtain help from BarCare (0427 317 958) or the Sexual Harassment Officer ([sexualharassmentofficer@nswbar.asn.au](mailto:sexualharassmentofficer@nswbar.asn.au)). You can also seek support from 1800RESPECT ([www.1800respect.org.au](http://www.1800respect.org.au)) as well as your GP. If you are in danger, call 000.
46. The **Complaints Framework at Appendix A** addresses complaints about sexual harassment, harassment, discrimination, vilification, victimisation or bullying.
47. The Complaints Framework applies to all concerns raised under these Conduct Guidelines, be they harassment, bullying, vilification, discrimination and/or victimisation. There will be varying levels of application having regard to the concern raised.
48. In these Conduct Guidelines and the Complaints Framework, the following definitions apply:
  - a. **Affected Person:** a person who is the target or focus of conduct alleged to raise a concern under these Conduct Guidelines (namely, sexual harassment, harassment, discrimination, vilification, victimisation or bullying), who may or may not also be a Complainant.<sup>3</sup>
  - b. **Bystander:** a person who:
    1. has directly witnessed an incident that raises a concern under these Conduct Guidelines; and/or
    2. has direct knowledge of an incident that raises a concern under these Conduct Guidelines, such as Human Resources personnel, a manager or a clerk or person in chambers to whom the conduct has been reported.
  - c. **Complainant:** a person who makes a complaint under these Conduct Guidelines. The person may be an Affected Person or a Bystander.
  - d. **Cultural competency:** a set of congruent behaviours, attitudes, and policies that come together in a system, agency, or among professionals that enables that system, agency, or those professionals to work effectively in cross-cultural situations. Further, cultural competency is the willingness and ability of a system to value the importance of culture in the delivery of services to all segments of the population.
  - e. **Chief Operating Officer:** the person employed in this position at the Bar Association at the relevant time, who is nominated by the Bar Association from time to time to receive reports from Complainants about potential breaches of these Guidelines, or his or her delegate.

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<sup>3</sup> These Conduct Guidelines use the term 'Affected Person' in place of the term 'the Targeted Person' in the Law Council of Australia *National Model Framework Addressing Sexual Harassment for the Australian Legal Profession*, December 2021.

- f. **Respondent:** a person alleged to have engaged in conduct that is in breach of these Conduct Guidelines.

## REPORTING CONDUCT

49. The Bar Association can facilitate a range of resolution pathways to resolve concerns raised, following consideration of the Affected Person's wishes and with regard to the seriousness of the alleged conduct, including:
  - a. Early intervention techniques;
  - b. Interim action;
  - c. Informal pathways including counselling and mediation (where appropriate);
  - d. Formal pathways including investigations leading to formal disciplinary outcomes, referral to external bodies, including the OLSC, the NSW Bar Council, the Law Society of NSW, the Judicial Commission of New South Wales, Worksafe and the NSW Police, and remedial steps; and
  - e. External pathways including complaints and conciliation and other processes initiated by organisations such as the Fair Work Commission, Anti-Discrimination NSW and the Australian Human Rights Commission.
50. Time limitations may apply for lodging a complaint with an external body. For example, within 24 months of the incident if you wish the Australian Human Rights Commission to assist for complaints relating to the *Sex Discrimination Act 1984* (Cth) and six months for other complaints. There are also limitations associated with bringing a bullying claim under the *Fair Work Act 2009* (Cth).
51. Issues, concerns and complaints can be reported to the Chief Operating Officer. There are no time limitations between the incident and reporting the issue to the Chief Operating Officer. Support, advice and early intervention may resolve the issue. Reporting the conduct will also help the Bar Association understand whether harassment, discrimination, vilification, victimisation and/or bullying is happening at Bar Association Events, in the Bar Association's work environment and in other interactions between barristers and staff who have professional relationships. Letting the Bar Association know about the conduct does not necessarily trigger a formal investigation, although that may be appropriate in some cases.
52. Complaints can also be made without the Affected Person being identified by contacting the NSW Bar Association's Sexual Harassment Officer on a confidential basis on 0427 317 958 or at [sexualharassmentofficer@nswbar.asn.au](mailto:sexualharassmentofficer@nswbar.asn.au), and online via the anonymous reporting platform, Spot: [www.talktospot.com/nswbar](http://www.talktospot.com/nswbar). Any complaints made via the Spot reporting platform will remain confidential and will not be investigated or lead to formal disciplinary outcomes.

53. Alternatively, either formal or informal complaints may be made to the OLSC. The Legal Services Commissioner will only investigate formal complaints. Informal complaints to the OLSC may be made by the Affected Person or a Bystander online via [Elker](#).
54. There will be no repercussions for those who report issues in good faith.

#### **PROCEDURAL FAIRNESS AND NATURAL JUSTICE**

55. Where it is appropriate or necessary for the Bar Association to undertake an investigation, the investigation will be conducted in a manner which ensures there is procedural fairness and natural justice for all parties involved. This includes:
  - a. giving the Respondent the opportunity to know the allegations made against them and to respond;
  - b. providing appropriate trauma-informed support for all individuals involved and in particular, the Affected Person during complaint handling and investigation; and
  - c. facilitating a timely and objective process.

## APPENDIX A: COMPLAINTS FRAMEWORK

### INTRODUCTION

1. The purpose of this Framework is to provide prompt, effective and fair means of resolving concerns about conduct that potentially breaches the Conduct Guidelines
2. This Complaints Framework is guided by the following general principles.
  - a. Confidentiality will be maintained to the extent possible having regard to mandatory reporting and procedural fairness obligations (see “**The Law**” above).
  - b. Reasonable attempts will be made to deal with complaints in a manner which is culturally competent, having regard to the cultures of each person involved in any handling of a grievance under the Conduct Guidelines.
  - c. Issues raised will be taken seriously and viewed with integrity, impartiality, respect and sensitivity. In some circumstances the Bar Association may take interim action in the interests of health and safety that is supportive and sensitive to the possibility that the reported behaviour occurred, without making conclusions. The Bar Association may also take steps to address issues of sexual harassment, harassment, discrimination, vilification, victimisation or bullying when they arise and not rely on a complaint being made by the Complainant. The Bar Association may take such steps after taking into account the views of the Complainant and if the Complainant is not the Affected Person, the Affected Person. The Bar Association will seek to ensure that the Affected Person does not have to retell their story to multiple people.
  - d. To the extent possible, all parties involved will be kept -informed and supported throughout the process
  - e. All complaints will be dealt with as quickly as practicable.
  - f. Investigations (as applicable) will be concluded as quickly as possible while ensuring the approach is ethical and fair.
  - g. There are a number of ways the Bar Association can help to resolve the issue depending on the wishes of the Complainant, the Affected Person (if the Complainant is not the Affected Person), the context and circumstances. The various resolution pathways used by the Bar Association are set out in detail in this Appendix.
  - h. To the extent possible the Bar Association will support the Complainant’s wishes to progress from one pathway to another once the process has commenced if the person feels that is a more appropriate way for the issue to be resolved, for example, starting out wishing for an

informal process and then deciding that a more formal investigation would be preferable. However, there may be times when the circumstances of the conduct mean the Bar Association must take more formal steps to resolve the issue, such as a formal investigation or referring the matter to the police. Decisions to escalate issues will be made after consideration of the wishes of the Affected Person, the seriousness of the behaviour, the context, the impact on the Affected Person, the risk to the psychological and physical safety of others, and the likelihood the behaviour is also a criminal offence. In resolving the issue, the Bar Association may also have regard to any other relevant Bar Association policy or policies.

### **CHOICE OF RESOLUTION PATHWAYS**

3. The Bar Association is committed to ensuring there are prompt, effective and equitable means to resolve concerns raised under the Conduct Guidelines.
4. To that end, the Bar Association can facilitate a range of resolution pathways to resolve concerns raised under the Conduct Guidelines, depending on the Complainant's election and the seriousness of the alleged conduct. These include:
  - a. Early intervention techniques;
  - b. Interim action;
  - c. Informal pathways including counselling and mediation (where appropriate);
  - d. Formal pathways including investigations leading to formal disciplinary outcomes, referral to external bodies, including the Office of the Legal Services Commissioner (OLSC), the NSW Bar Council, the Law Society of New South Wales, the Judicial Commission of NSW, Worksafe and the police, and remedial steps; and
  - e. External pathways including complaints and conciliation and other processes initiated by organisations such as the Fair Work Commission, Anti-Discrimination NSW and the Australian Human Rights Commission.
5. To the extent possible, the Bar Association will support the Complainant's wishes to progress from one pathway to another, including by transitioning to a formal pathway after an informal pathway has been initiated.
6. However, there may be times when the circumstances mean that it is appropriate for the Bar Association to take more formal steps to resolve the issue, such as a formal investigation or referring the matter to the police. Mandatory reporting obligations may apply (refer to paragraphs 63 and 64 below).
7. Decisions to escalate issues will be made after consideration of the wishes of the Affected Person, the seriousness of the behaviour (including the likelihood the behaviour is a criminal offence) and any risk to the psychological and physical safety of the Affected Person and others, including any Bystanders.

8. Further, the Bar Association is aware of and endorses the adoption by Chambers of Best Practice Guidelines, a Best Practice Grievance Framework and supporting Guidance Materials, which facilitates Chambers to adopt prompt, effective and equitable means to resolve concerns its members, staff or third parties visiting Chambers may have in relation to harassment, discrimination or bullying.
9. It is possible that an incident or alleged conduct in the nature of harassment, discrimination or bullying could arise for consideration under either a Chambers Best Practice Guideline or the Bar Association Complaint Guidelines. In that circumstance, the Bar Association recommends that a Complainant raise the conduct under one or other of the Chambers Framework or this Bar Association Framework. Ensuring that an issue is resolved through only one of either the Chambers Best Practice Guideline or the Bar Association Conduct Guidelines is important both from the point of view of minimising the impact of any investigation upon an Affected Person and to afford fairness to the Affected Person, the Complainant and the Respondent.
10. Additionally, if the conduct the subject of a complaint is conduct engaged in by an officer or member of staff of the Bar Association, that conduct is to be dealt with under the Bar Association Workplace policies and employees' contracts.

#### **EARLY INTERVENTION AT THE TIME OF CONDUCT THAT IS IN BREACH**

11. All persons who work for or with the Bar Association, or attend a Bar Association Event, are encouraged to directly raise conduct of the Respondent that obviously breaches the Conduct Guidelines at the time of such a breach.
12. If acting at the time such behaviour is occurring, one of the following steps may be appropriate for either the Affected Person or a Bystander:
  - a. speak up in the moment and address the behaviour;
  - b. intervene in a way that is comfortable for the Affected Person and redirect the conversation or stop the behaviour;
  - c. if safe to do so, separate or remove the Respondent from the situation; and/or
  - d. encourage the Respondent to reflect on their behaviour including by apologising to the Affected Person and any other person impacted.
13. If proposing to act immediately after the incident has occurred, a Bystander should speak to the Affected Person before taking any action, in order to ascertain their wishes. An Affected Person or Bystander may raise the issue directly with the Respondent immediately after the conduct but only if they feel comfortable and safe doing this.
14. The objective of early intervention is to let a person know their behaviour offended the Conduct Guidelines, to seek to have the behaviour stop and prevent escalation or repeat behaviour. Early intervention does not preclude further steps being taken.

## REPORTING CONDUCT

15. All persons working for or with the Bar Association or attending Bar Association Events are strongly encouraged to make a complaint or report any conduct which may breach the Conduct Guidelines. Such complaints may be made by Affected Persons and/or Bystanders. There will be no repercussions for those who report concerns in good faith.
16. Initial reports can be made to the Chief Operating Officer. They will receive complaints about any incident that has occurred that potentially breaches the Conduct Guidelines and there are no time limitations between the incident and reporting a concern to the Bar Association.
17. The Bar Association's Chief Operating Officer will take a record of the complaint. This will assist in ensuring that the Complainant does not have to retell their story to multiple people in the Bar Association.
18. Once a report has been made to, the Chief Operating Officer, the range of resolution pathways will be discussed with the Complainant and subject to legal obligations, will only progress in consultation with, and with the consent of, the Affected Person.
19. If the Affected Person does not want a report to be pursued, subject to legal obligations, the complaint will be treated as if it was an anonymous report and the Complainant (if he or she is not the Affected Person) will be informed of this outcome but not the details of the discussions with the Affected Person (see for example, paragraphs [28] to [31] below).
20. If the Affected Person does want a report to be pursued, the report will be treated as though it was initiated by the Affected Person. A Complainant who is not also the Affected Person will be notified of this but not the details of the discussions with the Affected Person.
21. Reasonable attempts will be made to deal with complaints in a manner which is culturally competent, having regard to the cultures of each person involved in any handling of a grievance under the Complaint Guidelines.

## COMPLAINTS AGAINST THE JUDICIARY

22. If a person is subject to or witnesses unacceptable conduct by a member of the judiciary in NSW, they may, with the support of the Chief Operating Officer, pursue the anonymous reporting and informal or formal reporting options outlined in this Framework. Informal or formal complaints may also be made via the Bar Association's judicial complaints protocols. Further, formal complaints may be made to the Judicial Commission of NSW.
23. The Bar Association has protocols in place with the Supreme Court of NSW and Federal courts to facilitate the raising of concerns about members of the judiciary. Further details about these protocols are available on the Bar Association website [here](#) and [here](#).

24. The Judicial Commission has published an information guide about the process for formal complaints which is available on its website [here](#). A flowchart illustrating how the complaints process works is available [here](#).
25. There is also information about the issue of judicial bullying in the [Handbook for Judicial Officers](#)
26. The Judicial Commission can only examine complaints about the ability and behaviour of current New South Wales judicial officers. A New South Wales judicial officer means: a magistrate; a judge of the District Court; a judge of the Supreme Court; a judge of the Land and Environment Court; the President of the Civil and Administrative Tribunal; and a Commissioner of the Industrial Relations Commission.
27. The Judicial Commission has no power to examine complaints against a retired New South Wales judicial officer, a tribunal member, a federal judicial officer, a legal practitioner, a court officer or a police officer.

### **ANONYMOUS REPORTING**

28. An anonymous report can be made by any Complainant without identifying the Affected Person by contacting the NSW Bar Association's Sexual Harassment Officer on 0427 317 958 or at [sexualharassmentofficer@nswbar.asn.au](mailto:sexualharassmentofficer@nswbar.asn.au). The Sexual Harassment Officer can provide support and advice.
29. Affected Persons can also make reports online via the anonymous reporting platform, Spot: [www.talktospot.com/nswbar](http://www.talktospot.com/nswbar). Any complaints made via the Spot reporting platform will remain confidential and will not be investigated or lead to formal disciplinary outcomes. Reports made via Spot can be submitted on an anonymous basis to the Sexual Harassment Officer. The person making the report can then seek support and advice on an anonymous basis by speaking to the Officer via the Spot portal.
30. The recipient of the anonymous report may use this information to inform themselves of trends and areas of concern and take steps to mitigate the risk of harassment, discrimination and bullying occurring. However, an anonymous report cannot lead to an informal or formal resolution pathway.
31. Alternatively, either formal or informal complaints may be made to the OLSC. The Legal Services Commissioner will only investigate formal complaints. Informal complaints to the OLSC may be made by the Affected Person or a Bystander [online](#).

### **INTERIM ACTION**

32. Prior to engaging in informal or formal resolution pathways, the Bar Association's Chief Operating officer may take interim action in the interests of health and safety of its members, employees, contractors and volunteers without making conclusions about whether the conduct occurred or whether it breaches the Conduct Guidelines.
33. Interim action could include arranging for persons not to interact with one another at Bar Association Events or arranging for training or awareness raising activities for all members and volunteers undertaking work for the Bar Association (for example, on a Bar Association committee).



## INFORMAL RESOLUTION PATHWAYS

34. An informal resolution pathway is generally most appropriate for less serious potential breaches of the Conduct Guidelines. There will be no decision made about what did or did not occur, but rather the Chief Operating Officer will attempt to facilitate an outcome that is acceptable to all parties.
35. If the Complainant elects to resolve their complaint informally, they will be given the choice of the following informal resolution pathways:
  - a. the President, Executive Director or Chief Operating Officer of the Bar Association speaking to the person alleged to have engaged in the conduct about their alleged behaviour and/or respectful behaviours;
  - b. a facilitated or mediated, open and respectful conversation between the parties at a location of their choice, or online;
  - c. where the alleged conduct occurred at a location connected to another organisation (for example, in Chambers, in Court or at an event held by a professional organisation), notifying the other organisation of an anonymous complaint being made and informing the other organisation of their obligations in respect of addressing harassment, discrimination and bullying;
  - d. putting system changes in place to prevent further issues; and
  - e. the Bar Association initiating further reviews to understand any underlying cultural issues and taking preventative action such as education or awareness-raising activities.
36. The Complainant may also wish to make an informal complaint to the OLSC online via [Elker](#).
37. If the Complainant is content with the resolution achieved informally, the Chief Operating Officer will consider the report finalised. If the Complainant is not satisfied with the resolution achieved, they can elect to engage a formal resolution pathway.

## FORMAL RESOLUTION PATHWAYS

38. A formal resolution pathway conducted by the Bar Association involves initiating a fair and confidential investigation aimed at establishing whether the complaint is substantiated and, where complaints are substantiated, ensuring there are proportionate disciplinary and appropriate remedial consequences. It is appropriate for (i) more serious alleged incidents, (ii) where an informal resolution pathway has not resulted in an acceptable outcome for a Complainant or (iii) where a Complainant wishes to take formal action.
39. External referrals: Upon receipt of a complaint or on conclusion of the formal resolution pathway conducted by the Bar Association, the Bar Association may consider whether to make any appropriate

reports to the OLSC, Bar Council, Worksafe and/or the police. The wishes of the Affected Person will be taken into account prior to making a referral and will only be referred with the consent of the Affected Person to the extent possible considering mandatory reporting obligations.

40. Preliminary assessment: If a Complainant elects for a formal resolution pathway to be conducted by the Bar Association, the Chief Operating Officer will assess whether there are adequate facts to investigate the complaint and whether the alleged conduct falls within the definition and thresholds outlined in the Conduct Guidelines. The outcome of the assessment will be communicated to the Affected Person and the Complainant (if the Complainant is not also the Affected Person).
41. Appointment of investigator: If the matter can proceed to a formal investigation, an investigator will then be appointed. This could be an experienced workplace relations barrister or a specialised workplace investigator. The investigator will be independent and impartial and avoid all actual or perceived conflicts of interest. If the Affected Person believes the investigator is not impartial and independent, they should notify the Bar Association's Chief Operating Officer who will appoint an alternative investigator if a conflict or a perceived conflict exists.
42. Interview with the Affected Person: The investigator may wish to speak to the Affected Person to ascertain further details of the incident(s) including who was involved, what happened, where the incident(s) occurred and whether there were any witnesses. The Affected Person will be offered the opportunity to have a support person present in the interview, but who will not otherwise participate. A written statement of the Affected Person's account may be recorded by the investigator.
43. Notify the Respondent: The investigator will then notify the Respondent of the substance of the allegations in writing. A reasonable opportunity will be provided to the Respondent to respond either orally or in writing. If responding orally, the Respondent will be offered the opportunity to have a support person present, but who will not otherwise participate
44. Obtain further evidence: The investigator may gather other relevant documentary evidence of a corroborating or other nature, and speak to other witnesses to ascertain their accounts of the incident(s).
45. Decision: The investigator will weigh up all the evidence and make a decision as to whether, on the balance of probabilities, the conduct occurred and whether it breaches the Conduct Guidelines. An investigator should assess the credit of the Complainant, the Respondent and any witnesses and determine whether the conduct is more likely than not to have occurred even where there is no documentary evidence and/or conflicting factual statements.
46. Outcomes: The Bar Association's Chief Operating Officer will consider the investigator's finding, and the President or Executive Director will determine appropriate outcomes of the investigation. It is important to understand that the Bar Association's ability to impose an outcome on the Respondent will depend upon the legal relationship between the Bar Association and the Respondent. Where complaints are substantiated, outcomes may include:

- a. Disciplinary outcomes for the Respondent: in instances where a Respondent serves on a Bar Association committee, a requirement that the Respondent undertake mandatory training in order to retain their committee position, verbal or written warnings, suspension from a committee, or being asked to leave a committee. In instances where the conduct took place at a Bar Association Event, the Respondent may be prohibited from attending future Bar Association Events for a period of time or at all.
  - b. Remedial action: a formal request may be made by the Bar Association to the Respondent that the Respondent provide a verbal or written apology, or, if the Respondent serves on a Bar Association committee, mentoring and support for the Respondent in that role.
47. Report back: All parties involved will be kept informed to the extent possible. At the conclusion of the investigation, the Bar Association's Chief Operating Officer will inform the Affected Person and the Complainant (if the Complainant is not also the Affected Person) of the outcomes arising from the investigation. This may or may not include a copy of the investigator's findings.
  48. Review: Following the determination of a complaint, the Bar Association's Chief Operating Officer will consider whether the complaint reflects a systemic issue that requires further consideration and redress; and whether any element of the complaints handling, assessment or investigation process could be better managed in future complaints. The Bar Association's Chief Operating Officer may suggest improvements in response to systemic issues to Bar Council, without disclosing details of individual complaints.
  49. Follow up: The Bar Association Chief Operating Officer will follow up with the Affected Person and the Complainant (if the Complainant is not also the Affected Person) six months after the conclusion of the investigation to check they have not suffered any adverse consequences as a result of reporting the incident.
  50. Time period: All investigations should be conducted within as quick a timeframe as possible and where possible within 90 days.
  51. Document management: All documents and records associated with the report and investigation will be kept in a confidential file marked "personal and sensitive" that is only accessible by the Chief Operating Officer and Executive Director.

## **EXTERNAL PATHWAYS**

52. A Complainant may decide, at any time, to report the incident to an independent, expert body that may be able to assist the parties to reach an outcome or resolution.
53. A Complainant may at any time make a complaint to the OLSC or may make a formal complaint of unsatisfactory professional conduct or professional misconduct to the NSW Bar Association against a barrister for contravening a provision of the Barristers Conduct Rules including Rule 123 which prohibits barristers from engaging in conduct that constitutes discrimination, sexual harassment or bullying.

Conduct that contravenes Rule 123 can amount to professional misconduct and/or unsatisfactory professional conduct within the meaning of Division 1, Part 5.4 of the Uniform Law.

54. Any complaints made against a barrister for contravening a provision of the Barristers Conduct Rules may result in an investigation of the complaint by the OLSC or by one of the Professional Conduct Committees of the NSW Bar Association. An investigation by a Professional Conduct Committee is separate to and distinct from the forms of resolution pathway available under this Framework. Depending upon the outcome of that investigation, the barrister may face disciplinary action. The OLSC and the NSW Bar Association have an obligation to report to the police any person suspected on reasonable grounds to have committed a serious offence being an indictable offence.
55. Informal complaints to the OLSC may be made by a Complainant online via [Elker](#).
56. The Australian Human Rights Commission deals with complaints made under Federal anti-discrimination laws, including the *Sex Discrimination Act 1984* (Cth), and Anti-Discrimination NSW deals with complaints made under the *Anti-Discrimination Act 1977* (NSW). The Fair Work Commission deals with complaints of bullying, discrimination and sexual harassment under the *Fair Work Act 2009* (Cth).
57. It is important to note that there are time limitations for lodging a complaint with external bodies, for example, within 24 months of the incident if you wish the Australian Human Rights Commission to assist for complaints relating to the *Sex Discrimination Act 1984* (Cth) and six months for other complaints.
58. Responding to issues through external pathways may include:
  - a. participating in mediated or conciliated discussions;
  - b. parties agreeing to outcomes or resolutions, including compensation;
  - c. escalating the issues to a formal Court or Tribunal if the matter cannot be resolved by conciliation;  
and
  - d. findings and determinations by a Tribunal or Court that are usually made public.

## CONFIDENTIALITY AND MANDATORY REPORTING OBLIGATIONS

59. Noting the mandatory reporting obligations below, the Bar Association is committed to creating an environment where those who work with or for the Bar Association, and those attending Bar Association Events, feel confident to talk about their experience of sexual harassment, discrimination and bullying and the Bar Association will maintain confidentiality as far as possible, limiting disclosure of information to those who need to know about it in order to resolve the complaint.
60. It may be necessary to disclose to the Respondent and other witnesses aspects of the information reported in order to properly investigate or otherwise resolve the complaint and to afford procedural fairness.
61. Additional reporting obligations may also be triggered, depending on who a report is made to and the nature of the alleged conduct.
62. As designated local regulatory authorities, **the OLSC and the Bar Council** have an obligation under the *Legal Profession Uniform Law* to report to the police or other appropriate investigating or prosecuting authority any person suspected on reasonable grounds to have committed a 'serious offence', being an indictable offence, and to make available to the police or other authority the documents or information relevant to the offence under their control. For practical purposes, the Bar Council may delegate the way in which the actual report is made, for example, to the Executive of Bar Council, the Executive Director or the Director of Professional Conduct.
63. The most serious sexual harassment, harassment and bullying may also be considered an offence under criminal law. In that instance, the Bar Association may be required to refer the issue to the police. Further, if there is reason to believe that a person is a risk to themselves or others, the Bar Association may need to notify the appropriate authorities, including the police. Depending on the wishes of the Affected Person, the Bar Association will either contact the police directly or accompany the Affected Person to the police so that they can make the report themselves.
64. Individuals may also have reporting obligations which are akin to mandatory reporting under s 316 of the *Crimes Act 1900* (NSW). Where a member of the Chambers knows or believes that someone has committed a *serious indictable offence* (including sexual touching and assault occasioning actual bodily harm), and that person knows or believes that he or she has information that might be of material assistance in securing the apprehension of the alleged offender or the prosecution of that the alleged offender for the offence, it is an offence to fail without reasonable excuse, to bring that information to the attention of the police or other appropriate authority. Failure to report to the police without reasonable excuse in such circumstances risks imprisonment for up to five years.
65. However, a person has a reasonable excuse if the information relates to a sexual offence and the alleged victim was an adult at the time the person obtains the information and the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to the police or other authority: s 316(1A) of the *Crimes Act 1900* (NSW).