



NEW SOUTH WALES
BAR ASSOCIATION

MODEL BEST PRACTICE GUIDELINE: GRIEVANCE AND COMPLAINT FRAMEWORK

1. Together with the Model Best Practice Guideline on Harassment, Discrimination and Bullying (the **HDB BPG**), this Grievance and Complaint Framework was approved by Bar Council on 24 March 2022 for adoption by individual chambers/floors of the private Bar.
2. The purpose of the HDB BPG is to:
 - a. assist with the elimination and/or prevention of all forms of harassment, discrimination, vilification, victimisation and/or bullying on this Chambers, including through education;
 - b. promote the dignity and respect of every person in relation to all protected attributes;
 - c. record that this Chambers has adopted this Guideline, 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 this Guideline;
 - e. operate in conjunction with and in furtherance of any other policies adopted by the New South Wales Bar Association;
 - f. clearly articulate the Chambers' 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**).
3. The New South Wales Bar Association encourages each set of chambers/floors to seek independent legal advice with respect to the application of the HDB BPG to its chambers, members and staff. Nothing in the Guideline or this Framework 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

4. The purpose of this Framework is to provide prompt, effective and equitable means of resolving concerns about conduct that potentially breaches the Model Best Practice Guideline on Harassment, Discrimination and Bullying (**HDB BPG**).
5. The Chambers is committed to ensuring that all persons raising concerns under the HDB BPG are treated with respect and sensitivity.

APPLICATION

6. This Framework applies to all concerns raised under the HDB BPG. It applies to members, licensees, readers, door tenants and ‘floaters’ of this Floor (**Residents of the Chambers**), and all employees, volunteers, students and independent contractors engaged by the Chambers. It also extends to solicitors, clients and barristers in connection with working with one or more barristers of the Chambers, court and tribunal staff and other people present at the place of work or at work-related functions.
7. In the HDB BPG and this Framework, the following definitions apply:
 - a. **Affected Person:** a person who is the target or focus of conduct alleged to raise a concern under the HDB BPG (namely, sexual harassment, harassment, discrimination, vilification, victimisation or bullying), who may or may not also be a Complainant.¹
 - b. **Bystander:** a person who:
 - i. has directly witnessed an incident that raises a concern under the HDB BPG; and/or
 - ii. has direct knowledge of an incident that raises a concern under this Guideline, 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 the HDB BPG. 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.

¹ This Framework uses the term ‘the 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.

- e. **Respectful Relations Officers:** at least two nominated persons in Chambers, ideally of different genders, who have received training in complaint handling and receive reports from Complainants about potential breaches of the HDB BPG.
- f. **Respondent:** a person alleged to have engaged in conduct that is in breach of the HDB BPG.

CHOICE OF RESOLUTION PATHWAYS

- 8. The Chambers is committed to ensuring there are prompt, effective and equitable means to resolve concerns raised under the HDB BPG.
- 9. To that end, the Chambers can facilitate a range of resolution pathways to resolve concerns raised under the HDB BPG 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 New South Wales Bar Association, the Law Society of New South Wales, the Judicial Commission of New South Wales, 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, the New South Wales Anti-Discrimination Board and the Australian Human Rights Commission.
- 10. To the extent possible, the Chambers 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.
- 11. However, there may be times when the circumstances mean that it is appropriate for the Chambers to 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 (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.

EARLY INTERVENTION AT THE TIME OF CONDUCT THAT IS IN BREACH

12. All residents of the Chambers are encouraged, and will be supported, to directly raise conduct of the Respondent that obviously breaches the HDB BPG at the time of such a breach.
13. 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 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.
14. If proposing to act immediately after the incident has occurred, a Bystander should speak to the Affected Person before doing so 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.
15. The objective of early intervention is to let a person know their behaviour is offensive, to seek to have the behaviour stop and prevent escalation or repeat behaviour. Early intervention does not preclude further steps being taken.

REPORTING CONDUCT

16. All persons working in Chambers are strongly encouraged to make a complaint or report any conduct which may breach the HDB BPG. Such complaints may be made by Affected Persons and/or Bystanders. There will be no repercussions for those who report concerns in good faith.
17. Initial reports can be made to one of the Chambers' nominated Respectful Relations Officers. The Chambers' Respectful Relations Officers will receive complaints about any incident that has occurred that potentially breaches the HDB BPG and there are no time limitations between the incident and reporting a concern to the Floor.
18. The Chambers' Respectful Relations Officers will take a record of the complaint which will be kept in a confidential file. This will assist in ensuring that the Complainant does not have to retell their story to multiple people in the Chambers.
19. Once a report has been made to one of the Chambers' Respectful Relations Officers, 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.

20. If the Affected Person does not want a report to be pursued, 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 29 to 31 below).
21. 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 and the Complainant (who is not also the Affected Person) will be notified of this but not the details of the discussions with the Affected Person.
22. Complaints ought to be dealt with in a manner which is culturally competent having regard to the cultures of each person involved in any handling of a grievance.

COMPLAINTS AGAINST THE JUDICIARY

23. If a person is subject to or witnesses unacceptable conduct by a member of the judiciary in NSW, they may pursue the anonymous reporting and informal or formal reporting options outlined in this Framework. Informal or formal complaints may also be made via the NSW Bar Association's judicial complaint protocols. Further, formal complaints may be made to the Judicial Commission of NSW.
24. The NSW 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 NSW Bar Association website [here](#) and [here](#).
25. The Judicial Commission has published an information guide about the process which is available on its website [here](#). A flowchart illustrating how the complaints process works is available [here](#).
26. There is also information about the issue of judicial bullying in the [Handbook for Judicial Officers](#).
27. 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.
28. 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

29. An anonymous report can be made by any Complainant without identifying the Affected Person by contacting either Craig Lenehan SC or Emma Bathurst. Anonymous reports can also be made to the NSW Bar Association's Sexual Harassment Officer on 0427 317 958 or at sexualharassmentofficer@nswbar.asn.au, and online via the anonymous reporting platform, Spot: www.talktopot.com/nswbar.

30. Once a report has been submitted on an anonymous basis to the Sexual Harassment Officer, the person making the report can seek support and advice on an anonymous basis by speaking to the Officer via the Spot portal.
31. The recipient of the anonymous report may use this information to inform itself 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.
32. 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 via [Elker](#).

INTERIM ACTION

33. Prior to engaging in informal or formal resolution pathways, the Chambers' Respectful Relations Officers may take interim action in the interests of health and safety of its members, employees, and contractors without making conclusions about whether the conduct occurred or whether it breaches the HDB BPG.
34. Interim action could include arranging for persons not to interact with one another in Chambers or arranging for training or awareness raising activities for all members and employees of the Chambers.

INFORMAL RESOLUTION PATHWAYS

35. An informal resolution pathway is generally most appropriate for less serious potential breaches of the HDB BPG. There will be no decision made about what did or did not occur, but rather the Respectful Relations Officers attempt to facilitate an outcome that is acceptable to all parties.
36. If the Complainant elects to resolve their complaint informally, they will be given the choice of the following informal resolution pathways:
 - (a) the Respectful Relations Officers (Craig Lenehan SC or Emma Bathurst) 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 a different 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 Chambers initiating further reviews to understand any underlying cultural issues and taking preventative action such as education or awareness-raising activities.
37. The Complainant may also wish to make an informal complaint to the OLSC via [Elker](#).
38. If the Complainant is content with the resolution achieved informally, the Respectful Relations Officers 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

39. A formal resolution pathway conducted by the Chambers 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.
40. External referrals: Upon receipt of a complaint or on conclusion of the formal resolution pathway conducted by the Chambers, the Respectful Relations Officers (Craig Lenehan SC and Emma Bathurst) in Chambers may consider whether to make any appropriate reports to the OLSC, New South Wales Bar Association, 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, as far as possible, considering mandatory reporting obligations.
41. Preliminary assessment: If a Complainant elects for a formal resolution pathway to be conducted by the Chambers, the Respectful Relations Officers 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 HDB BPG. The outcome of the assessment will be communicated to the Affected Person and the Complainant (if the Complainant is not also the Affected Person).
42. 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 in a different Chambers 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 one of the Chambers' Respectful Relations Officers who will appoint an alternative investigator if a conflict or a perceived conflict exists.
43. Interview with the Affected Person: The investigator will ordinarily 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 a support person for this interview. A written statement of the Affected Person's account may be recorded by the investigator.

44. 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. The Respondent will be offered a support person.
45. 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).
46. 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 HDB BPG. 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.
47. Outcomes: The <insert nominated personnel> in Chambers will consider the investigator's finding and determine appropriate outcomes of the investigation. Where complaints are substantiated:
 - a. Disciplinary outcomes for the Respondent could include: mandatory training, verbal or written warnings, suspension of Chambers privileges, being asked to leave Chambers, termination of employment.
 - b. Remedial action could include: a verbal or written apology, extra security measures, mentoring, and/or support to pay Chambers fees if their ability to work has been impacted.
48. Report back: All parties involved will be kept informed to the extent possible. At the conclusion of the investigation, the Chambers' Respectful Relations Officers 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.
49. Review: Following the determination of a complaint, the Chambers' Respectful Relations Officers 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 Chambers' Respectful Relations Officers may suggest improvements in response to systemic issues to the Board of the Chambers, without disclosing details of individual complaints.
50. Follow up: A nominated member of the Chambers 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.
51. Time period: All investigations should be conducted within as quick a timeframe as possible and where possible within 90 days.

52. 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 not available for general access.

EXTERNAL PATHWAYS

53. A Complainant may decide, at any time, to report the incident to an independent, expert body that may be able to assist the Chambers and the parties to reach an outcome or resolution.
54. A Complainant may at any time make a complaint to the OLSC or 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.
55. 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 the NSW Bar Association. 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.
56. Informal complaints to the OLSC may be made by a Complainant via [Elker](#).
57. The Australian Human Rights Commission deals with complaints made under Federal anti-discrimination laws, including the *Sex Discrimination Act 1984* (Cth), and the Anti-Discrimination Board 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).
58. 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.
59. Responding to issues through external pathways may include:
- (a) participating in mediated 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

60. The Chambers is committed to creating an environment where its members and associates feel confident to talk about their experience of sexual harassment, discrimination and bullying and 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.
61. 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.
62. Additional reporting obligations may also be triggered, depending on who a report is made to.
63. As designated local regulatory authorities, **the OLSC and the Bar Council** have an obligation 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, the Executive Director or the Director of Professional Conduct.
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 5 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).
66. The most serious sexual harassment, harassment and bullying may also be considered an offence under criminal law. In that instance, a member of the Chambers may be required to refer the issue to the NSW Police. Further, if there is reason to believe that a person is a risk to themselves or others, the Chambers may need to notify the appropriate authorities, including the police. Depending on the wishes of the Affected Person, the Chambers will either contact the police directly or accompany the Affected Person to the police so that they can make the report themselves.