



Best Practice Guide to Barristers and Meeting the Positive Duty

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Introduction

Prior to 2021, the *Sex Discrimination Act 1984* (Cth) (**SDA**) had limited application to barristers and the work performed by barristers. Following amendments to the SDA in September 2021,¹ the SDA now provides rights and obligations for barristers who experience or engage in sexual harassment, sex-based harassment and some forms of sex discrimination. In 2021, the Australian Bar Association released a series of four podcasts discussing the changes for barristers.²

Barristers also have obligations as a person conducting a business or undertaking and must comply with the SDA, including a new positive duty to take reasonable and proportionate measures to eliminate, as far as possible, sexual harassment, sex-based harassment, sex discrimination, conduct creating a workplace environment that is hostile on the ground of sex, and related acts of victimisation.³

The basis of the positive duty is to encourage employers to take proactive measures in preventing workplace sexual harassment, as an improvement on the prior nature of the anti-discrimination framework, which focused primarily on providing remedies in a reactive manner after the harassment had occurred.⁴

The obligations of the positive duty under the SDA commenced on 12 December 2022. From 12 December 2023, the Australian Human Rights Commission (**AHRC**) may exercise its powers to enforce compliance with the positive duty.⁵

How can a barrister comply with the positive duty?

1. Knowing your legal and professional obligations

The starting point is to be aware of the requirements of the SDA but also to understand why sex discrimination, sexual harassment and victimisation occurs in workplaces. This means understanding and acknowledging the workplace culture. The Respect@Work Report (2020)⁶ examined the causes of sex discrimination, sexual harassment and victimisation. Sex discrimination, sexual harassment and victimisation cannot be explained by a 'few bad apples'.

¹ See ss 28AA, s 28AB and 2B(3) – (7) of the *Sex Discrimination Act 1984* (Cth), inserted by *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) sch 1 item 63.

² See ABA Podcasts #1 – #4 at Australian Bar Association, *Podcasts* (Web Page, 16 November 2021) <<https://austbar.asn.au/news-media/podcasts>>.

³ See s 47C of the *Sex Discrimination Act 1984* (Cth), inserted by *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).

⁴ See Amy Dale, 'Higher standards needed under positive duty laws to prevent sexual harassment' (2020) 65 *Law Society Journal* 22; Prabha Nandagopal, 'Positive duty on employers to prevent sexual harassment', *Law Society Journal* (Online journal, April 2023) <<https://lsj.com.au/articles/positive-duty-on-employers-to-prevent-sexual-harassment>>.

⁵ *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) s 2 item 5: Schedule 2, Part 2, Division 2 commences 12 months after Royal Assent, on 12 December 2023.

⁶ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Final report, 5 March 2020).

The Bar prides itself on independence but it is traditionally hierarchical and has been a male-dominated profession. We need to reflect on and understand the historical, structural and attitudinal features of the Bar and how power operates in our workplaces.

Checklist:

- *Are you aware of and understand your personal obligations under the Sex Discrimination Act?*
- *Are you aware of and understand your personal obligations under Rule 123 of Legal Profession Uniform Conduct (Barristers) Rules?*
- *Do you know or have access to information that explains these obligations, including Bar Association policies, seminars, on-line resources or key people to assist you?*
- *Have you thought about how your behaviour or manner affects other people?*
- *Have you thought about how your behaviour or manner may need to change?*

2. Knowing and identifying the risk factors

Complying with the positive duty means we cannot be complacent or assume that sex discrimination, sexual harassment and victimisation has not or will not occur. We need to be aware of the risk that people with whom we work may experience sex discrimination, sexual harassment and victimisation.

Checklist:

- *Are you aware of and understand if your personal behaviour or the behaviours of others you work with creates a risk of sex discrimination, sexual harassment and victimisation?*
- *If you employ an assistant or provide work experience for students and volunteers, what measures have you taken to provide each of them a safe working environment?*
- *Do you know or have access to information that explains the risk factors, including Bar Association policies, seminars, online resources or key people to assist you?*

3. Knowing what to do to prevent inappropriate conduct

We also need to know what steps we should individually, in chambers and collectively take when engaging with clients, solicitors, other legal practitioners, judges, mediators, arbitrators and witnesses to prevent sex discrimination, sexual harassment and victimisation.

Checklist:

- *Are you aware of and understand if your personal behaviour or the behaviours of others you work with creates a risk of sex discrimination, sexual harassment and victimisation?*
- *Have you reflected on what practical steps you can take to prevent inappropriate conduct in your workplace, including chambers, in court, attending conferences, mediations or other professional engagements?*
- *Do you understand what it means to be a bystander?*

4. Knowing what to do if inappropriate conduct occurs

Sex discrimination, sexual harassment and victimisation are unlawful. It is also unlawful to cause, instruct, induce, aid or permit another person to engage in sex discrimination, sexual harassment and victimisation.

Checklist:

- *Do you know what to do or who to speak to if you experience, witness or become aware of inappropriate behaviour?*
- *Do you know what to do if a person discloses they have experienced sexual harassment, sex discrimination or victimisation?*
- *Do you know where to find relevant information or resources if you experience sexual harassment, sex discrimination or victimisation?*
- *Are you aware of your chambers and/or Bar Association's policies for dealing with complaints?*
- *Do you know if you have an obligation to report certain conduct, including to the police?*

How can chambers comply with the positive duty?

Like barristers, chambers also have obligations under the SDA. Chambers may employ a clerk/practice manager, support staff, provide services and business accommodation to its members, licensees, readers and associate members. Chambers may engage with a wide range of visitors, including clients, solicitors, students and other barristers. Chambers may also host functions in chambers or elsewhere.

1. Chambers policies and information

Chambers should have a relevant and up to date policies to address workplace sexual harassment and discrimination. Its policies should be based on a best practice approach to ensure the policies are clear, concise and can be easily understood by everyone who may have rights or obligations under the policy.

An 'off-shelf' policy may be a helpful starting point but any policy must reflect the particular risks and circumstances relevant to the workplace. Chambers should review and consider where and why there may be particular risks that should be addressed.

Checklist for chambers:

- *Does chambers have and maintain relevant policies that are based on up-to-date information about sexual harassment, sex discrimination and victimisation?*
- *Has chambers clearly set expectations about what behaviour is acceptable in chambers?*
- *What actions does chambers take to demonstrate it is committed to creating a safe, respectful, diverse and inclusive workplace?*

2. Leadership in chambers

One of the standards identified in the AHRC guidance and resources is the importance of leadership to set the tone for respectful and safe workplaces. It is the leaders in chambers, including the clerk, that must set clear expectations about what behaviour is acceptable in chambers.

Checklist for chambers:

- *Does chambers have key personnel with relevant training and/or experience to manage the response?*
- *Are there readily identified leaders/persons in chambers with responsibility for managing the positive duty and respectful behaviours?*
- *Are all members of the board/management committee and the clerk/practice manager sufficiently equipped and skilled to manage an issue of concern or a complaint?*

3. Risks in chambers

A board or management committee must be aware of the circumstances and risks of inappropriate conduct occurring in chambers. It must ensure its policies and practices are responsive and aim to prevent the risks as far as possible.

Checklist for chambers:

- *Are there risks that arise because of the physical layout or arrangements in chambers?*
- *Are there risks that arise out of ordinary business hours?*
- *Are there risks associated with social engagements, including functions where alcohol is served?*
- *Do the insurance policies impose any particular obligations?*

4. Approach to addressing concerns and complaints

Anyone who wants to raise a concern or complaint should feel safe to do so. They must also understand what to expect if they raise a concern or complaint and be aware of the available pathways to address such concerns or complaints, including the right to lodge external complaints with the AHRC or other state bodies.

Checklist for chambers:

- *Has chambers provided information to its employees about:*
 - a. their rights and obligations*
 - b. how to raise concerns or make complaints*
 - c. where to seek and obtain support?*

- *Has chambers provided information to its members, licensees, readers and associate members about their rights and obligations – when they join chambers and on an ongoing basis – about:*
 - a. *their rights and obligations*
 - b. *how to raise concerns or make complaints*
 - c. *where to seek and obtain support?*
- *Are chambers practices and procedures accessible and clear for any person who seeks information, wishes to raise a concern or wishes to make a complaint?*
- *What action will chambers take to respond to a concern or complaint, including:*
 - a. *giving support for all individuals*
 - b. *taking a trauma-informed approach*
 - c. *considering escalation of a report to police or professional standards bodies?*
- *Does chambers assure a complainant they will not be victimised if they raise a concern or complaint?*
- *How does chambers manage conflicts of interest?*
- *What record keeping practices and confidentiality arrangements are in place?*
- *Does chambers, if its members, licensees, readers and associate members engage in unlawful behaviour, take action that is consistent across different incidents and appropriate in the circumstances?*

5. Continuous improvement

The positive duty is ongoing and will require continuous improvement. Chambers should have a plan to support everyone in its workplace to remain aware of their obligations, the risks and effective responses.

Checklist for chambers

- *Does chambers have a plan to review and check whether its commitments, policies and practices are working and updating/changing the approach if necessary?*
- *Will chambers provide refreshers and information or training on an annual basis?*
- *Will chambers provide relevant and regular updates for its staff and members?*

How does the ABA comply with the positive duty?

The ABA has released a policy statement titled 'Harassment including Sexual Harassment' in combination with 'Diversity and Inclusion Principles'.⁷ The Diversity and Inclusion Principles state that laws and Conduct Rules protect individuals from sexual harassment, and the policy statement outlines the ABA's commitment to zero tolerance of any form of harassment or victimisation.

The ABA reiterates its zero tolerance of any form of harassment or victimisation and, in giving effect to its positive duty, continues to develop its practices and procedures to eliminate as far as possible, sexual harassment, sex-based harassment, sex discrimination, conduct creating a workplace environment that is hostile on the ground of sex, and related acts of victimisation at what have been identified by the ABA as potential risk points, those being ABA conferences, advocacy training courses and relations between staff and directors.

Further information about the positive duty

The AHRC has published information online to assist a person conducting a business or undertaking to comply with the positive duty.⁸ This includes:

- [Guidelines for Complying with the Positive Duty](#);
- [Information Guide on the Positive Duty](#);
- [A Quick Guide for Complying with the Positive Duty](#);
- [Resource for Small Business on The Positive Duty](#);
- [Factsheet on Causes and Risk Factors](#);
- [Factsheet on Effective Education and Training](#);
- [Factsheet on Person-centred and Trauma-informed Approaches](#); and
- [Factsheet on Counselling and Support Services](#).

For further information on the positive duty, the AHRC can be contacted in the following ways:

- Respect@Work Information Service: 1300 656 419 (Option 1); TTY: 1800 620 241 (toll free); email: respect@humanrights.gov.au.
- Respect@Work website: <https://www.respectatwork.gov.au/>.

⁷ Australian Bar Association, *Harassment including Sexual Harassment* (Statement, August 2020) <https://austbar.asn.au/policy/a-statement-of-the-abas-position-on-harassment-including-sexual-harassment>; Australian Bar Association, *Diversity and Inclusion* (Principles, February 2020) <<https://austbar.asn.au/policy/diversity-and-inclusion>>.

⁸ Australian Human Rights Commission, *The Positive Duty under the Sex Discrimination Act* (Web Page, August 2023) <<https://humanrights.gov.au/our-work/sex-discrimination/projects/positive-duty-under-sex-discrimination-act>>.

- AHRC's National Information Service: 1300 656 419 (Option 2); 02 9284 9888; email: infoservice@humanrights.gov.au.