



Australian
Bar Association

Ms Kate Jenkins
Sex Discrimination Commissioner
Australian Human Rights Commission
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Dear Ms Jenkins

ABA submission to the National Inquiry into Sexual Harassment in Australian Workplaces

The Australian Bar Association (ABA) is the peak body representing nearly 6000 barristers throughout Australia. Established in 1963, the ABA is committed to serving our members, improving our profession, and promoting the rule of law and the effective administration of justice.

The ABA welcomes an opportunity to make a submission to the National Inquiry into Sexual Harassment in Australian Workplaces. This submission offers barrister-specific insights which were prepared by the ABA's Diversity & Inclusion Committee and approved by the ABA Executive. The Committee conducted a comparative analysis of State and Territory legislation to inform the following observations and recommendations.

The ABA refers to the submissions of its constituent bodies and its detailed review of the experience of women barristers and relevant research. The ABA submission will not repeat the matters set out in those submissions but support the recommendations made by them.

Yours sincerely

Jennifer Batrouney QC
President

1. The National Inquiry into Sexual Harassment in Australian Workplaces Terms of Reference includes a review of *'the current legal framework with respect to sexual harassment'*. The ABA's submission is focused on how the current legal framework applies to barristers, as self-employed legal practitioners. The ABA has focused on this aspect of the Terms of Reference because the *Sex Discrimination Act 1984 (SDA)* does not always apply to the working environment and the conditions under which barristers work.
2. These submissions are not intended to be a comprehensive review of the SDA or the relevant State and Territory laws. Rather the ABA has sought to highlight some of the areas of inconsistency and a lack of uniformity in the sexual harassment laws in Australia. These inconsistencies have an impact on barristers and the extent to which barristers are protected by or have immunity from sexual harassment laws.
3. The experience of barristers is likely to be relevant to other professions. The following insights and recommendations may also be relevant to the so called "gig economy" and other self-employed persons.
4. The ABA recommends that steps be taken to harmonise Commonwealth, State and Territory legislation in relation to what constitutes sexual harassment, when sexual harassment is unlawful and when a complaint may be made about it.

Australian Barristers

5. A 'barrister' is an independent specialist advocate and advisor in law. Their highly competitive training, together with their specialist knowledge and experience, can make a substantial difference to the outcome of legal proceedings.
6. A barrister is best known for his/her advocacy before the courts but it is true to say that a barrister's strength lies in dispute resolution, both judicial (before courts or tribunals) and non-judicial (through negotiation, mediation or arbitration). A barrister has the training and experience to anticipate the range of likely outcomes and to work with the solicitor and their client to choose the most appropriate path. A barrister's advice at this time can help to clarify the management of the entire dispute resolution process and empower clients to make informed decisions. Early advice can often save clients the cost and worry of an unnecessary trial.
7. Barristers are often referred to as junior or senior barristers. A limited number of senior barristers receive 'silk' - becoming Queen's Counsel or Senior Counsel - as a mark of outstanding ability. Both types are collectively known as "senior counsel." Senior counsel are barristers of seniority and eminence. The designation of senior counsel provides a public identification of barristers whose standing and achievements justify

an expectation that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.

8. Before a barrister is appointed (made) senior counsel, he or she must possess a high degree of skill and learning, integrity and honesty, independence, diligence and experience. They are normally instructed in very serious or complex cases. Most senior judges once practised as QCs or SCs. Senior counsel are also colloquially known as “silks.” This is because their robes include a gown made of silk – junior counsel wear gowns made of cotton. The only difference between a QC and SC is the name. Up to and including 1992, senior counsel in New South Wales were known as Queen's Counsel. From 1993 and onwards, senior counsel in New South Wales were known as Senior Counsel (note the capital letters). Some States and Territories still use the title Queens Counsel.

The working environment of barristers in Australia

9. To be eligible to practise as a barrister in Australia, a person must:
 1. be admitted as a lawyer in an Australian jurisdiction;
 2. hold a practising certificate issued in an Australian jurisdiction.
3. Each State and Territory determines the requirements for admission and issuing of practising certificates. However, there are now national uniform conduct rules for barristers.
4. Barristers are required by legislative and other requirements to work in a particular and unique way. With a few exceptions,¹ barristers are self-employed and sole practitioners. Barristers at the private Bar are not permitted to be employees.² Barristers do not work in law firms. Barristers are not permitted to form any business association or partnership.³ However, barristers may work together. It is common for a Senior Counsel to appear in court hearings leading a junior barrister.

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

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

3 Rule 12(a), (d) and (e), *ibid*.

5. In 2015, the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (**Barristers Rules**) provided for uniform conduct rules for barristers. The Barristers Rules⁴ set out the work a barrister may do. A barrister's work is:⁵
 - (a) appearing as an advocate,
 - (b) preparing to appear as an advocate,
 - (c) negotiating for a client with an opponent to compromise a case,
 - (d) representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution,
 - (e) giving legal advice,
 - (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs,
 - (g) carrying out work properly incidental to the kinds of work referred to in (a)–(f), and
 - (h) such other work as is from time to time commonly carried out by barristers.
6. A barrister generally receives her or his work by way of a referral from a solicitor. This is commonly described as a 'brief' either to advise or appear in court or other forum. The barrister then works with the solicitor and the client in the preparation of the case.
7. One specific and unique feature of barristers' work is the 'cab rank' rule, pursuant to which a barrister cannot refuse to advise or represent a person (subject to specified exceptions).⁶ The rationale for the rule is to ensure that every person may obtain legal advice and representation.
8. Barristers have no entitlements to paid annual leave, sick leave or parental leave. Barristers have limited or no supervision of their work. They are not permitted to advertise. They have no formal process for performance reviews or protections against unfair dismissal. They are paid only for the work they perform. The employment laws, such as the Fair Work Act 2009 (Cth) provide no legal protection to barristers.

Professional conduct and sexual harassment

9. The application of the SDA and State/Territory laws addressing sexual harassment are relevant to a barrister's professional conduct and inform the way these rules operate.
10. Rule 123 of the Barristers Rules provides:

Rule 123

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

5 Rule 11 of the Barristers Rules.

6 Rule 17 of the Barristers Rules.

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

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

11. For the purpose of Rule 123, 'sexual harassment' is defined to mean anything that constitutes sexual harassment "*under the applicable state, territory or federal anti-discrimination or human rights legislation*": see Rule 125.
12. The Barristers Rules prohibit conduct that would amount to sexual harassment defined by the SDA or relevant State or Territory law.
13. However, Rule 123 confines an application to any conduct "*in the course of practice*". The essential question is whether the conduct is in the course of the barrister's professional work.⁷ The practice of a barrister, of its nature, may take him or her to any number of locations including court, chambers, client's offices, seminars and conferences. Likewise, it covers conduct by a barrister towards any person, be it a client, solicitor, another barrister, chambers staff, court staff or any other person encountered incidentally in the course of practice.

Concept and definitions of sexual harassment in the SDA

14. Section 28A of the SDA states:

28A Meaning of sexual harassment

*(1) For the purposes of this Division, a person sexually harasses another person (the **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 in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (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;*
- (d) any other relevant circumstance.*

(2) In this section:

⁷ Eastman SC, Callan, Rao, "Crossing the Line: Barristers behaving Badly" [2017] (summer) *Bar News* p 38ff.

conduct of a sexual nature includes 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.

15. Section 28A is substantially similar to the definitions of sexual harassment in:
 1. s 58 of the *Discrimination Act 1991* (ACT);
 2. s 119 of the *Anti-Discrimination Act 1991* (Qld);
 3. s 22A of the *Anti-Discrimination Act 1977* (NSW);
 4. s 92 of the *Equal Opportunity Act 2010* (Vic);
 5. s 87(9) of the *Equal Opportunity Act 1984* (SA).
16. There are some differences.
17. Section 22(2) of the *Anti-Discrimination Act* (NT) provides that a complainant may prove either that it occurred in circumstances where a reasonable person would have anticipated they would have been offended, humiliated or intimidated (s 22(2)(e)(ii)) **or** that the perpetrator intended to offend, humiliate or intimidate them (s 22(2)(e)(i)). A complainant also has to prove that she reasonably believed she would be subjected to a detriment if she objected to the conduct (s 22(2)(f)).
18. Section 17 of the *Anti-Discrimination Act 1998* (Tas) includes circumstances where a reasonable person would be 'offended, humiliated, intimidated, insulted or ridiculed' (s 17(3)).
19. Section 24 of the *Equal Opportunity Act 1984* (WA) contains subjective elements of the conduct which require a complainant to prove:
 1. the conduct was unwelcome (s 24(3)); and
 2. that they had 'reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage [them] in any way in connection with [their] employment or work or possible employment or possible work' (24(3)(a)); or
 3. 'as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work' (s 24(3)(b)).
20. The ABA notes these differences may result in different standards applying to barristers, depending on where a barrister practises.
21. The ABA also notes the findings reported in *Everyones Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* at [2.4] that there is still a lack of understanding among Australians as to what behavior constitutes sexual harassment. If the lack of awareness stems in part from confusion about the legal elements of the

definition in s 28A, consideration should be given to amending the SDA to provide a clearer definition.

How does s 28A of the SDA apply to barristers?

22. Under s 28B of the SDA, it is unlawful for someone to sexually harass their *employee* or *prospective employee* (s 28B(1)), a *fellow employee* or *prospective employee* (s28B(2)), or a *commission agent* or *contract worker* or *prospective commission agent* or *contract worker* (s 28B(3)).
23. It is also unlawful for a commission agent or contract worker to sexually harass a colleague (s 28B(4)) and for a partner in a partnership to sexually harass another partner or prospective partner (s 28B(5)). It is further unlawful for a 'workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons' (s 28B(6)).
24. Barristers are not employees, contract workers, commission agents or workplace participants. Other than barristers who are employers of support staff or paralegals etc, s 28B of the SDA has no application.
25. Corresponding legislation is the same in ACT⁸, NSW⁹ and WA¹⁰ operates in a similar way.
26. Other States and the Northern Territory have taken a different approach, which means barristers will be subject to sexual harassment laws in the workplace
27. In South Australia the prohibition against sexual harassment in s 87(1) of the *Equal Opportunity Act 1984* (SA) is not limited by the employment status of the perpetrator or victim. It states that:

It is unlawful for a person to subject to sexual harassment—

- (a) a person with whom he or she works; or*
- (b) a person who is seeking to become a fellow worker,*

while in attendance at a place that is a workplace of both the persons or in circumstances where the person was, or ought reasonably to have been, aware that the other person was a fellow worker or seeking to become a fellow worker.

⁸ s 59(6) of the *Anti-Discrimination Act 1991* (ACT)

⁹ s 22B(6) of the *Anti-Discrimination Act* (NSW)

¹⁰ 24 of the *Equal Opportunity Act 1984* (WA)

28. Section 87(9)(c) then states that 'a person "works with another" if both carry out duties or perform functions, in whatever capacity and whether for payment or not, in or in relation to the same business or organisation'.
29. In Victoria, the prohibition on sexual harassment is not limited by the status of the persons involved but on where the conduct takes place. For example, s 94(1) of the *Equal Opportunity Act 2010* (Vic) states that '*a person must not sexually harass another person at a place that is a workplace of both of them*'.
30. It is irrelevant whether each person is an employer, an employee or neither, and if they are employees, whether their employers are the same or different (s 94(2)). 'Workplace' is also defined broadly to mean 'any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment (s. 94(3)). This appears to provide comprehensive protection for barristers, and people who may be in contact with barristers, in all aspects of a barrister's practice.
31. In Tasmania, s 17(1) and (2) of the *Anti-Discrimination Act 1998* (Tas) states:
 - (1) *A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f) , (fa) , (g) , (h) , (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.*
 - (2) *A person must not sexually harass another person.*

....
32. These subsections are not limited by employment status or place. This provision appears to provide comprehensive protection for barristers, and people who may be in contact with barristers, in all aspects of a barrister's practice.
33. In the Northern Territory, the prohibition of sexual harassment applies to employment activities by s 22(1) of the *Anti-Discrimination Act* (NT). It is not clear how harassment fits into the prohibition on discrimination in work under s 31 but the definition of 'work' in s 4 is quite broad including, relevantly, a relationship of employment, under a contract for services and under a statutory appointment.
34. The prohibition of sexual harassment in the *Anti-Discrimination Act 1991* (QLD) does not appear to be limited to any particular area of life and does not seem to be covered

by the prohibition on discrimination in work and work-related areas in Division 2 of Part 4 of that Act.

35. For barristers and those persons working with barristers there are different obligations and protections depending on where the sexual harassment occurs. It also means the Barristers Rules will apply differently to barristers across Australia, depending on location.
36. The ABA submits the inconsistency between the SDA, State and Territory laws should be addressed to ensure consistency and uniformity of the obligations for barristers and the protection of persons working with barristers in Australia.
37. This could be done by amending Part II, Division 3 of the SDA to apply to persons self-employed or members of a profession. Any amendment should provide protection to barristers from sexual harassment but also provide protections for persons who are sexually harassed by barristers, in the course of their professional dealings.
38. Alternatively, s 28B of the SDA could be amended to mirror the provisions in the Queensland, Victorian or Tasmanian statutes whereby the protections are not limited by the status of the persons involved but on where the conduct takes place.

Definition of “services”

39. While the employment/workplace provisions have not application to barristers, the barristers provide legal services, so s 28G of the SDA will apply. Section 28G of the SDA provides:
 - (1) *It is unlawful for a person to sexually harass another person in the course of providing, or offering to provide, goods, services or facilities to that other person.*
 - (2) *It is unlawful for a person to sexually harass another person in the course of seeking, or receiving, goods, services or facilities from that other person.*
40. The terms ‘goods’ or ‘facilities’ are not defined. However, ‘services’ is defined in s 4 and includes:
 - (a) *services relating to banking, insurance and the provision of grants, loans, credit or finance;*
 - (b) *services relating to entertainment, recreation or refreshment;*
 - (c) *services relating to transport or travel;*
 - (d) *services of the kind provided by the members of any profession or trade; and*
 - (e) *services of the kind provided by a government, a government authority or a local government body.*

41. The definition of 'services' is not an exclusive list. The case law confirms that 'services' should be interpreted broadly. So barristers have legal obligations and legal protection if they are sexually harassed by their solicitors or clients while they are providing them with legal services.
42. However, there are some gaps in the coverage of s 28G to barristers.
43. First, s 28G may not cover circumstances when a barrister is sexually harassed by a clerk or other chambers staff or a person on the board of their chambers in the course of such persons providing them, or offering to provide them, with services. Such services could include clerical tasks such as typing, filing and taking calls and other services such as pushing a trolley to court, or delivering a brief.
44. Secondly, s 28G may not cover circumstances whereby a barrister sexually harassed a clerk, secretary or other person who was not the barrister's employee or contractor, but was working at the same work location as the barrister because they may not be 'services of the kind provided by the members of any profession or trade'.
45. The definition of 'services' in the SDA is not materially different (in terms of its ambiguity as to whether it protects barristers receiving services from a chambers) from the definitions of 'services' in the *Equal Opportunity Act 1984* (WA), *Anti-Discrimination Act 1991* (NSW), *Discrimination Act 1991* (ACT) and the *Equal Opportunity Act 1984* (SA). 'Services' is not defined in the *Anti-Discrimination Act 1991* (QLD).
46. However, the definition of 'services' in s 4 of the *Anti-Discrimination Act* (NT) includes, relevantly:

...

(g) *services of any profession, occupation, trade or business; and*

...
47. The definition of 'services' in s 3 of the *Anti-Discrimination Act 1998* (Tas) includes, relevantly, services:

...

(e) *relating to any profession, trade or business; or*

...
48. In s 4 of the *Equal Opportunity Act 2010* (Vic) 'services' includes, relevantly:

... *without limiting the generality of the word—*

...

(e) **services** of any profession, trade or business, including those of an employment agent;

...

49. Of these alternate definitions, the term ‘business’ seems to be the most appropriate description of the services offered by a chambers and its staff to a barrister.
50. The ABA submits the definition of ‘services’ in s 4 of the SDA be expanded to protect barristers and people working with barristers, as follows:
“services” includes, without limiting the generality of the word—
...
(d) services of any profession, occupation, trade or business, including those of an employment agent; and