

CONDUCT & VALUES POLICY – May 2018

Discrimination & Harassment: Information for Barristers.

There is an expectation from the legal profession and the public that barristers will at all times act with integrity and uphold the rule of law.

The legislation that governs barristers' conduct in the profession includes the following:

- Lawyers and Conveyancers Act 2006;
- Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;
- Human Rights Act 1993;
- Harassment Act 1997;
- Employment Relations Act 2000; and
- Health & Safety at Work Act 2015.

The Lawyers Conduct and Client Care Rules 2008 place particular professional obligations on all lawyers, including barristers, to act with the highest standards of integrity. In particular:

- The obligation to report misconduct to the Law Society, where there are reasonable grounds to suspect another lawyer has been guilty of misconduct (Rule 2.8);
- The obligation to treat a client with respect and courtesy and not to act in a discriminatory manner in contravention of the Human Rights Act 1993 (Rule 3.1);
- The obligation not to enter into an intimate personal relationship with a client where to do so would or could be inconsistent with the trust and confidence reposed by the client (Rule 5.7);
- The obligation to promote and maintain proper standards of professionalism in your dealings with other lawyers (Rule 10); and
- The obligation to treat other lawyers with respect and courtesy (Rule 10.1).

A lawyer who has reasonable grounds to suspect that another lawyer has been guilty of unsatisfactory conduct *may* make a confidential report to the Law Society. A lawyer who has reasonable grounds to suspect that another lawyer has been guilty of misconduct *must* make a confidential report to the Law Society at the earliest opportunity (Rule 2.9).

This Guide looks at the definitions of discrimination and harassment, avenues for complaint and support and the obligation to report matters to the New Zealand Law Society.

Defining Discrimination

The Human Rights Act sets out the prohibited grounds of discrimination including sex, marital status, religious or ethical belief, colour, race, ethnicity, disability, age, political opinion, employment or family status or sexual orientation.

The Employment Relations Act repeats the same prohibited grounds of discrimination for all employees, but also includes discrimination on the grounds of union involvement.

Both the Human Rights Act and the Employment Relations Act expressly include sexual and racial harassment as forms of unlawful discrimination. Both Acts make it clear that if a complaint of sexual or racial harassment is made to an employer, the employer must investigate the facts and, if they are satisfied that harassment occurred, they must take any reasonably practicable steps to prevent a recurrence of the behaviour.

Defining Sexual Harassment

Sexual harassment is defined in the Human Rights Act (s62) and the Employment Relations Act (s108), in similar terms. The Human Rights Act (s62) details sexual harassment as follows:

(1) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) to make a request of any other person for sexual intercourse, sexual contact, or other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.

(2) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) by the use of language (whether written or spoken) of a sexual nature, or of visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that—

(a) is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); and

(b) is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (3)."

Behaviour that may constitute sexual harassment includes:

- Words of a sexual nature including sexual innuendo;
- Sexual jokes;
- Repeated requests for dates;
- Requests for sexual activity;
- Exposure to sexual material in the form of emails, texts or other documents or images; or
- Physical touching or behaviour that is sexual in nature.

Defining Racial Harassment

Racial harassment is defined in both the Human Rights Act (s63) and the Employment Relations Act (s109). The Human Rights Act (s63) provides:

63 Racial harassment

"(1) It shall be unlawful for any person to use language (whether written or spoken), or visual material, or physical behaviour that—

(a) expresses hostility against, or brings into contempt or ridicule, any other person on the ground of the colour, race, or ethnic or national origins of that person; and

(b) is hurtful or offensive to that other person (whether or not that is conveyed to the first-mentioned person); and

(c) is either repeated, or of such a significant nature, that it has a detrimental effect on that other person in respect of any of the areas to which this subsection is applied by subsection (2)."

Behaviour that may constitute racial harassment includes:

- Racist remarks, jokes and innuendos;
- Offensive emails, texts or other documents or images; or
- Threatening behaviour on the basis of race.

Workplace Bullying

Bullying is not defined in the Human Rights Act or the Employment Relations Act. However, it is recognised as a form of harassment and will amount to a breach of employment and health and safety obligations.

WorkSafe New Zealand defines bullying as:

"Unreasonable and repeated behaviour towards a person or group that can lead to physical or psychological harm.

- *"Repeated behaviour" is persistent and can include a range of actions over time.*
- *"Unreasonable behaviour" covers actions which a reasonable person wouldn't do in similar circumstances, including victimising, humiliating, intimidating or threatening a person.*

A single incident isn't considered bullying but can escalate if ignored. Managing performance in line with business policies and processes is not bullying."

Examples of bullying may also include persistent verbal or physical abuse, exclusion or isolation and deliberately and unreasonably withholding necessary work information. Bullying will not include feedback on performance which is reasonable and appropriate.

Under the Health and Safety at Work Act, a person controlling a business or undertaking must ensure, so far as reasonably practicable, that hazards are avoided or minimised for employees. A hazard is defined as including behaviour that has the potential to cause illness or impact either physical and mental health.

Complaints processes available

All employers, including barristers and chambers who have employees or contractors, should establish procedures for dealing with complaints, so that complainants are able to come forward and be provided with options for dealing with their complaint, formally or informally.

Complainants should be provided with the opportunity to take independent legal advice before they determine which course of action they wish to take. Counselling should also be provided to complainants if they require this before making any decision about how they wish to proceed with their complaint.

Both the Human Rights Act and the Employment Relations Act enable employees to take legal action against their employer if they believe they have been discriminated against or sexually or racially harassed in their employment.

Under the Human Rights Act, the employee can make a complaint to the Human Rights Commission (within 12 months). Under the Employment Relations Act, an employee can raise a personal grievance (within 90 days). An employee can take action in one jurisdiction or the other, but not both.

Support available

The New Zealand Law Society offers the “Law Care” phone. Staff answering these calls have been specially trained in dealing with harassment complaints. It provides callers with options about the services they can seek support from, including:

- Registered counsellors or clinical psychologists with expertise in the area;
- Members of the Law Society’s National Friends Panel with specific expertise in sensitive issues;
- Information about the online reporting facility and the Law Society’s complaints process; and
- Other formal or informal avenues for resolving the issues.

The Law Care phone number is 0800 0800 28. Callers are also able to email their concerns to lawcare@lawsociety.org.nz and request a call back.

The Law Society has also provided a range of assistance and resources for the profession on in this area. This information can be found on the Law Society’s website:

<http://www.lawsociety.org.nz/practice-resources/bullying-and-harassment-in-the-legal-profession> .

The New Zealand Bar Association Bar Care Committee members are also available to listen to practitioner’s concerns and direct them to appropriate resources. Details of the Bar Care Committee members are on the Association’s website at <https://www.nzbar.org.nz/node/25716> .

Reporting wrongdoing by other lawyers.

All lawyers, including barristers, need to be aware of their obligations to report misconduct by other lawyers.

Rule 2.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides that

“Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of misconduct must make a confidential report to the Law Society at the earliest opportunity”.

Rule 2.8 leaves little room for discretion – all reasonably suspected misconduct *must* be reported, subject only to the obligation to protect privileged communications. Rule 2.8.1 expressly provides that the rule applies despite the lawyer’s duty to protect confidential non-privileged information. A failure to report misconduct by another lawyer may constitute unsatisfactory conduct, and a wilful or reckless failure to do so may constitute misconduct.

Misconduct is defined in section 7 of the Lawyers and Conveyancers Act 2006 and includes conduct that:

- would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable;
- consists of a wilful or reckless contravention of the Act or Rules; or
- would justify a finding that the lawyer or incorporated law firm is not a fit and proper person.

While the definition does not make express reference to discrimination, harassment or bullying, such behaviour is clearly capable of constituting misconduct. Harassment or discrimination of another lawyer will also contravene the obligation to treat other lawyers with respect and courtesy (Rule 10.1).

Rule 2.9 provides that a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of unsatisfactory conduct *may* make a confidential report to the Law Society. Note Rule 2.9 does not require mandatory reporting of unsatisfactory conduct by another lawyer.

The Law Society has provided guidance around when a report should be made. For more information see here: <http://www.lawsociety.org.nz/for-lawyers/confidential-report/when-should-i-submit-a-report>

Although confidential settlement agreements are often used to resolve employment related disputes, the NZBA notes that such agreements should not restrict lawyers' obligations under Rule 2.8 or otherwise prevent appropriate reporting of incidents of discrimination, harassment or sexual misconduct, whether to the Law Society or the Police or other authorities. The Law Society has stated that a confidentiality or non-disclosure clause does not absolve a lawyer from the obligation to report misconduct under [Rule 2.8](#). Failure to report a matter when required to do so under the Rules because it is covered by a non-disclosure agreement could result in disciplinary action being taken against the lawyers who were a party to the agreement. For more information see the Law Society's website: <http://www.lawsociety.org.nz/practice-resources/the-business-of-law/workplace-environment/bullying-and-harassment>

MODEL CHAMBERS CONDUCT & VALUES POLICY

1. This policy covers all those working in chambers, visiting chambers and providing services to chambers regardless of the size of the set. It covers, amongst others, barristers, junior barristers (both employed and on contract), members of staff and instructing solicitors.
2. **[Name of Chambers]** is committed to providing a work environment in which all individuals, clients and the public are treated with dignity and respect. **[Name of Chambers]** is determined to promote a work environment in which everyone is treated equally and with dignity and can flourish. This Conduct and Values Policy is a central plank of Chamber's commitment and will be applied rigorously.
3. Discrimination in any form will not be tolerated at **[Name of Chambers]**. The prohibited grounds of discrimination including sex, marital status, religious or ethical belief, colour, race, ethnicity, disability, age, political opinion, employment or family status or sexual orientation.
4. Sexual and racial harassment is unlawful discrimination under both the Human Rights Act 1993 and the Employment Relations Act 2000. Such behaviour may take many forms including:
 - Conduct which is unwanted by the recipient and perceived as offensive, hostile or threatening;
 - Conduct which gives rise to offense or a hostile or threatening work environment;
 - Conduct which creates an atmosphere in which it is feared that detriment will be suffered by the recipient if unwanted advances are rejected.
5. The following are examples of types of behaviour which may amount to harassment:
 - Unwanted touching;
 - Requests for sexual favours in return for career advancement;
 - Unnecessary physical contact;
 - Exclusion from social networks and activities or other forms of isolation;
 - Bullying;
 - Compromising sexual suggestions or invitations;
 - Sexually suggestive remarks or looks;
 - Display of offensive materials, including on a computer screen;
 - Sexual or racial jokes or verbal abuse, including any sent by email;
 - Offensive remarks or ridicule.
6. Complaints of harassment may be raised informally in the first instance with the member of Chambers responsible for Conduct & Values **[Name of Chambers member]**, the Head of Chambers or another senior member of chambers who will agree an appropriate response. Complainants will be entitled to seek their own independent legal advice and/or counselling before they determine how they wish to proceed with any complaint.
7. Discrimination or harassment may amount to unsatisfactory conduct or misconduct in breach of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

8. Allegations which may amount to misconduct by a barrister are required to be reported to the New Zealand Law Society under its reporting misconduct procedure, subject only to the obligation to protect privileged communications.¹
9. Chambers is committed to ensuring that no one who makes an allegation of harassment or discrimination in good faith should be subjected to any detriment or disfavour as a result. Any isolation or victimisation of a complainant, witness or anyone else involved in the investigation of a complaint may be viewed as a disciplinary matter within Chambers.
10. A copy of this policy and the New Zealand Bar Association - Conduct & Values Policy Statement dated May 2018, is provided to all those for whom Chambers constitutes a working environment, including members of chambers, junior barristers, employed barristers and other employees, temporary workers and work experience students.
11. This policy was adopted on **[date]** and will be reviewed on **[date]**.

¹ [Rule 2.8](#) Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008