

VICTORIAN BAR

GRIEVANCE PROTOCOL

Context

Instrument of delegation 28 August 2015 by Legal Services Commissioner (**LSC**) to the Victorian Bar
“*disciplinary matters*” that arise as a result of interactions between Victorian Barristers

“.....so much of a complaint about a lawyer or a law practice as would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct”: s 270, Sch.1 to the *Legal Profession Uniform Law Application Act 2014* (Vic) (**LPUL**)

Delegated Powers

- Initiate a complaint
- Make a preliminary assessment
- Close or proceed to investigate the complaint
- Extend the scope of an investigation

ss 266(2), 276, 277, 282 and 283

Barrister v Barrister Grievances

Options pre-Grievance Protocol

- Complaint to LSC: s 266
- Bar Conciliators
- Informal mechanisms

Grievance Protocol

- alleged discrimination, sexual harassment or workplace bullying (r 123, *Barristers Rules 2015*)
- other alleged conduct capable of constituting professional misconduct or unsatisfactory professional conduct (Div 1, Part 5.4, Sch.1 LPUL)

Guiding Principles

- Confidentiality
- No prejudice to other rights
- Promptness
- Flexibility

Raising a Grievance

- To Ethics Committee (**EC**) secretary or any member of the EC
- EC Chair/Deputy Chair nominates sub-committee with responsibility for investigation (the **ECSC**)

Investigation by ECSC

Obtaining information

- full details of the grievance
- confidential enquires of respondent

Investigation processes:

- opinion on merits
- encourage/facilitate resolution
- referral – conciliator, psychological support services, other DR
- advice on formal complaint processes under LPUL

Grievance Resolved

- No further action will be taken by the ECSC
- Outcome communicated to EC Secretary.

Grievance Not Resolved

If Grievance (if proven) would not amount to professional misconduct or unsatisfactory conduct

- Aggrieved barrister advised of ECSC view
- Aggrieved barrister may thereafter:
abandon grievance; or
pursue grievance elsewhere, including by lodging a complaint under s 266

Grievance Not Resolved

If grievance (if proven) may amount to professional misconduct or unsatisfactory professional conduct action taken in response will depend on:

- extent complainant wishes to pursue matter, and
- nature and seriousness of the conduct in issue.

If the aggrieved barrister wishes to lodge s 266 complaint

Aggrieved barrister:

- Lodges complaint to the LSC; or
- Requests that the ECSC apply to the Bar Council for a referral of the matter (in the manner described below)

If the aggrieved barrister does not wish to lodge s 266 complaint

And ECSC determines alleged conduct sufficiently serious to warrant recommendation to the Bar Council that a complaint be made by the Bar Council under s 266(2) of the Act:

- ECSC confidential memorandum to Bar Council with findings and recommendations (may exclude barristers' names); and
- Bar Council considers and determines whether to refer matter as a complaint to EC for investigation.

EC Protocol – where complaint delegated back to EC post-grievance

- Material generated during investigation (other than conclusion of ECSC) available to the EC to undertake its investigation of complaint
- Members of the ECSC responsible for the grievance recused

Withdrawal of Grievance

No further action except in “exceptional circumstances”, eg. where:

.....serious risk that the barrister concerned may engage in further conduct that amounts to or may amount to professional misconduct or unsatisfactory professional conduct

Finding the Grievance Protocol

<https://www.vicbar.com.au/member-resources/practice-information/grievance-protocol>

‘Workplace Bullying’ - Accepted Meaning

- WORKSAFE (Vic): Workplace bullying is characterised by **persistent and repeated** negative behaviour directed at an employee **that creates a risk to health and safety**. (*Bullying: Prevention and Response*)
- *FAIR WORK ACT* 2009 (CTH), S 789FD: **repeated** unreasonable behaviour towards a worker **that creates a risk to health and safety**

Workplace Bullying Under Rule 123

- Does not need to be repeated
- Does not need to create a risk to health or safety
- ‘In the course of practice’ – Rule 11?
- ‘To a person’
- ‘Working in a workplace’

FWC Jurisprudence – ‘Unreasonable Behaviour’

- ***Ms SB* [2014] FWC 2104 at [43]:**

‘Unreasonable behaviour’ should be considered to be behaviour that a reasonable person, having regard to the circumstances, may consider to be unreasonable. That is, the assessment of the behaviour is an objective test having regard to all the relevant circumstances applying at the time.

‘Unreasonable Behaviour’

Context – *Legal Profession Uniform Law 2014*:

- Section 3(b): an object of the Act is ‘ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services’
- Section 296: ‘**unsatisfactory professional conduct** includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
- *Legal Profession Uniform Conduct (Barristers) Rules 2015*:
 - Rules 3(a), 4(b) and (d) and 8(c).

SEX DISCRIMINATION ACT 1984 (Cth)

Section 5(1)

A discriminator discriminates against an aggrieved person on the grounds of sex if, by reason of:

- the sex of the aggrieved person
- a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- a characteristic that is generally imputed to persons of the sex of the aggrieved person,

the discriminator treats the aggrieved person less favourably than the discriminator would treat a person of a different sex

SEX DISCRIMINATION ACT 1984 (Cth)

Section 5(2)

A discriminator discriminates against an aggrieved person on the grounds of sex if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person

SEX DISCRIMINATION ACT 1984 (Cth)

Section 7B

Section 7B(1): Indirect discrimination: reasonableness test

- A person does not discriminate by imposing or proposing to impose a condition, requirement or practice, if the condition, requirement or practice is reasonable in the circumstances

Section 7B(2): Matters to be taken into account include:

- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice
- the feasibility of overcoming or mitigating the disadvantage
- whether the disadvantage is proportionate to the result sought

SEX DISCRIMINATION ACT 1984 (Cth)

Sections 28A(1)

A person sexually harasses another person if:

- the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- the person 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.

SEX DISCRIMINATION ACT 1984 (Cth)

Sections 28A(1A)

The circumstances to be taken into account include, but are not limited to, the following:

- 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;
- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- any disability of the person harassed;
- any other relevant circumstance.

SCENARIO 1 – DISCRIMINATION

In the context of counsel being engaged in a matter, a senior counsel suggests to a solicitor that a different junior counsel should be retained than that suggested by the solicitor, by reason that the suggested junior counsel has children and might not be "as available" as a junior counsel without children.

SCENARIO 2 – SEXUAL HARASSMENT

Senior Barrister A is having a conversation with Senior Barrister B and Junior Barrister C. Senior Barrister A mentions to Senior Barrister B that he has recently had Junior Barrister D, a friend of Junior Barrister C's, as his junior. He mentions that she is very attractive and has a nice figure. Senior Barrister B says that he will “have to watch out for Junior Barrister D in the future”.

SCENARIO 3 – BULLYING

Junior Barrister A is opposed to a senior counsel and a senior junior (Barristers B and C). While Junior Barrister A is making submissions, Barristers B and C engage in low but audible conversation commenting disparagingly about Junior Barrister A's submissions. The submissions being made by Junior Barrister A are legally sound. Barristers B and C engage in eye-rolling between themselves and their instructing solicitors and snort derisively at several of the points raised by Junior Barrister A.

SCENARIO 4 – BULLYING

Barrister A and Barrister B are opposed in a mediation that has been going all day. It is nearing 5pm, when Barrister A has another (work) commitment 10 minutes walk away. Barrister A lets Barrister B know that she will shortly need to leave in time to make her other appointment and that as they don't seem to be getting anywhere perhaps they should wind things up. Barrister B says to Barrister A that she won't be going anywhere until he says she has permission to leave.

SCENARIO 5 - DISCRIMINATION

Barristers A and B are women barristers working on a predominantly male floor. On the first Friday of each month, the male barristers on the floor have lunch together at the Melbourne Club. Barristers A and B have both been on the floor for one year and the only time that they have been invited to lunch was for the floor Christmas lunch.

SCENARIO 6 – BULLYING

Prior to a mediation, Stephen Junior calls Ann Junior and tells her that she has an absolutely hopeless case and the matter should clearly settle - even though he knows this is not in fact the case. Stephen then says “this will be a good test for you. If you can't get your client to accept my client's offer, maybe you should think about whether you are cut out for the Bar, or whether you should go back to being a solicitor”.

SCENARIO 6 – BULLYING cont.

During the mediation, in joint session, Stephen says to Ann's client, "look, this matter should clearly settle. I don't know what advice Ann here has given you, but you should really question it. Are you confident she knows what she is doing?" Ann asks Stephen to step outside for a quiet word. She says he should focus on the substantive legal issues rather than her years at the Bar. Stephen responds, "love, I'm just doing my job. I think you're being a bit sensitive. Don't take it personally – but it's not my fault if you're not up to the job."

SCENARIO 7 – BULLYING

Barrister A and Barrister B are opposed. Before court, Barrister A tells Barrister B in broad terms what submission he will be making on the application. Barrister B tells Barrister A that his proposed submission is ridiculous and that he obviously has no grasp of the law in this area. Barrister A's submissions are reasonable and have a sound basis in law. After court, Barrister A sends a series of emails to Barrister B typed in capital letters and with exclamation marks making disparaging comments about Barrister B's submissions and suggesting that if Barrister A continues with his proposed course of action he will be in breach of his obligations under the *Civil Procedure Act*.