

Dear Members,

Bar Council has approved for use at The Western Australian Bar a Procedure for grievances concerning sexual harassment, workplace bullying and discrimination.

Bar Council was prompted to hasten the introduction of this Procedure after the statement made by The Hon. Susan Kiefel AC, Chief Justice of the High Court of Australia on 22 June 2020 and the independent investigation referred to in the statement.

A copy of the Procedure is attached. A list of Grievance Stewards is also attached. The Procedure and list will be published on our website.

Is there a problem?

Bar Council has no information that indicates there is any significant problem of sexual harassment, bullying or discrimination at The WA Bar.

In the time since the statement made by the Chief Justice was issued, there have been reports suggesting that conduct of this type, in particular sexual harassment, are widespread within the legal profession generally.

If that is so, then on the information available, the standard of conduct set and maintained by the members of The WA Bar is a matter to our credit.

That no significant problem exists at The WA Bar seems intuitively correct, not just on the information available, but having regard to the close correlation between power imbalance and the incidence of behaviours like sexual harassment and bullying which is the higher the power imbalance, the higher the incidence of those behaviours.

As between members of a set of chambers and within the bar generally, there is usually no or little power imbalance. We are each sole practitioners, all of us running our own practices and financially independent of each other. Independence from each other and all others is a central and essential feature of an independent bar.

In obvious contrast is the high level of power imbalance that exists between a High Court judge and his staff. In contrast also is the high level of power imbalance that exists in almost all of the other forms in which lawyers commonly practice.

To the extent there is information available in relation to The WA Bar, it is consistent with very low incidence.

As best as can be ascertained there has never been a referral of any of these types of conduct to the Disciplinary Committee.

It is known that from time to time over the years matters were raised and dealt with informally, but it seems these were very few.

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The only available resource on matters handled informally is institutional memory, which, means our own memories. In the 20 years since I joined The WA Bar - which included 14 years as a member of Bar Council and 15 years on the board of FBC, six of those as Chairman, and therefore many years where I was well placed to hear about these things - there are only five matters that came to my notice.

Three involved conduct arguably capable of constituting sexual harassment. The most public of these concerned a barrister inviting a receptionist out; the invitation was unwelcome; the head of the chambers issued his own invitation, which was to the barrister to resign from his chambers; it was not an invitation easily declined; and it was duly accepted. The other two involved conduct arguably capable of constituting bullying. Neither was taken further by the complainants beyond the levelling of the complaint.

My memory of the level of incidence is consistent with the memories of others who have been at The WA Bar for a long time.

So on analysis, there is a significant good news story for The WA Bar in the very low incidence of these types of behaviour.

An important strategic goal of The WA Bar is to grow. So if you are asked about these topics by people outside the Bar, or when you otherwise have an opportunity, tell this story.

Do we need a procedure?

The questions "Do we have a problem?" and "Do we need a procedure?" are separate and distinct questions and they permit of different answers. As is apparent from the introduction of the Procedure, these questions have been answered differently. Some have asked the question why, if there is no problem, we should have a procedure. There are a number of answers.

First, the absence of complaints does not always mean an absence of any grievance. The complaints history is over a period of time during which there was no easy or obvious pathway to raise matters of this type. The potential effect of an absence of a pathway for a complaint on the incidence of complaints is obvious.

Second, with the introduction of the Procedure, which imposes no limitation of time within which complaints must be made, we may turn up grievances from the past. So a purpose the Procedure serves, is as a means of finding out if there are problems we have not yet heard about.

Third, there have been relevant and material shifts in attitudes. The lens through which things are viewed now is different to the lens of the past. That points to at least a possibility that things were not complained about, and so never came to notice. It also means behaviour tolerated or thought unremarkable in the past, might not be treated the same way now, and for that reason there might be work for the Procedure to do.

Fourth, the Chief Justice's statement concerned very serious matters. The statement generated significant media interest.

There is no doubt that we were all shocked by the nature of the conduct described, by the extent of the conduct reported and, perhaps most, by the effect and the consequence of the conduct on those recounting how for them it was experienced.

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The Bench and the Bar have a close and vital connection. As is obvious, those who are coupled together get the rough with the smooth. The matters referred to in the statement put our profession, in particular its higher echelons, the Bench and the Bar, in the spotlight on this subject.

I have mentioned that a strategic goal of The WA Bar is to grow. Joining the Bar is a significant decision for any lawyer, especially for younger lawyers, which is the way our demographic is moving. We do not want any lawyer to hesitate about joining The WA Bar for want either of a strong message on this subject or of a procedure for dealing with any problem of this type.

By the introduction of this Procedure we tell people the standards our Bar sets and the conduct our Bar requires, and we say something to those considering joining us about how life at the Bar is to be experienced.

What if there is a problem?

It is possible that by the introduction of this Procedure we uncover problems we have not yet heard about.

If that is the case, then we identify the problems, we fix them to the extent that we can, and by finding out about whether a problem exists we put ourselves in a position to work out how to stop the problem continuing, for the future.

The Procedure gives us a way to tackle, or begin to tackle, any problems that do exist.

Why is the Procedure in this form?

There are aspects of the Procedure that may strike some as novel or look unfamiliar.

We should remember that the events referred to in the Chief Justice's statement emanate from the calm, refined, scholarly environment occupied by the intelligent, well educated, empowered men and women who serve as the Judges at the peak of our legal system and by the intelligent, well educated, empowered men and women who serve as their staff.

Yet prior to these recent reports, no one, in any way that changed the course of things, knew anything, or did anything, or said anything, to anyone, about any of the matters the reports of which we have now heard.

That ought convince each of us that on this issue, to find out if we have a problem, if we do, to so solve the problem, or even just to protect against risk of the problem arising, we can permit the novel and unfamiliar to be among the methods we adopt.

To whom should we say thank you?

The member of Bar Council who took the stewardship of the development of the Procedure for grievances concerning sexual harassment, workplace bullying and discrimination is Elspeth Hensler.

It is the result of considerable work by Elspeth, which was also done quickly. Elspeth is the person to whom the credit for the introduction of the Procedure is due.

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I offer to Elspeth, on behalf of us all, our thanks for this tangible, important and necessary improvement to The Western Australian Bar.

Regards

Stephen Davies SC

President

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GRIEVANCE STEWARDS

September 2020

David Bayly (Central Law Chambers)

Penelope Giles (Murray Chambers)

Elsbeth Hensler (Francis Burt Chambers)

Rachel Joseph (Francis Burt Chambers)

Bettina Mangan (Francis Burt Chambers)

Felicity Maher (Quayside Chambers)

Neil Morrissey (Albert Wolff Chambers)

Brian Nugawela (Sir Clifford Grant)

Helen Prince (Equus Chambers)

Julie Taylor SC (Francis Burt Chambers)

Steven Wong (Quayside Chambers)