



Implications of high rates of bullying, harassment and discrimination

Penny Thew
State Chambers

Historically, surveys of the Australian legal profession have shown consistently high rates of bullying, sexual harassment and discrimination.¹

Recent key data in the 2014 Law Council of Australia *National Attrition and Re-engagement Study* ('2014 LCA NARS report'),² the 2019 International Bar Association *Us Too: Bullying and Sexual Harassment in the Legal Profession* report ('2019 IBA 'Us Too?' report')³ and the 2023 University of Sydney–Australian National University *Designing Gender Equality into the Future of Law* report ('2023 Gender Equality report')⁴ show:

1. that rates of bullying and harassment in the Australian legal profession are higher than both national Australian and global averages, with the 2019 IBA 'Us Too?' report finding that 'bullying and sexual harassment are rife in Australian legal workplaces ... [the rates of both] are significantly higher than global averages': at 87;
2. a significant increase in rates of bullying (from 50% to 73%) and sexual harassment (from 24% to 47%) in the Australian legal profession between 2014 and 2019 that appear to have remained at about the same level (in relation to bullying) until late 2023.⁵

On 22 May 2024, SafeWork NSW released its *Psychological Health and Safety Strategy 2024–2026*⁶ ('SafeWork NSW Strategy'), which:

1. is applicable to persons conducting a business or undertaking ('PCBU') as defined under s 5 of the *Work Health and Safety Act 2011* (NSW) ('WHS Act'): at 17; barristers, barristers' chambers and the NSW Bar Association are PCBUs, and the obligations under the *WHS Act* apply to each separately;
2. named bullying, harassment, exposure to traumatic events and high job demands as psychosocial hazards: at 5–6; psychosocial hazards include those arising from, or relating to, a work environment or workplace interactions or behaviours that may cause harm, while psychosocial risks arise from those hazards: cls 55A and 55B of the *Work Health and Safety Regulation 2017* (NSW): at 17;
3. stated that the legal obligation of workplaces is to prevent workplace psychological injuries (including arising from psychosocial hazards) and that should be the primary focus of

workplaces: at 6;

4. referred to the 2021 *SafeWork NSW Code of Practice for Managing Psychosocial Hazards at Work*⁷ as a free tool to assist in reducing psychosocial hazards: at 7, 17;
5. found that psychological injuries had risen by 30% between 2018–19 and 2022–23 (at 7) and that the cost of psychologically unsafe workplaces to New South Wales (including the cost of lost productivity) is \$2.8 billion per annum (at 8).⁸

In 2021, SafeWork NSW declared the legal profession a ‘high risk profession’, partly due to the exposure of legal practitioners to bullying and harassment (as well as exposure to traumatic events, among other things).⁹ In May 2024, when releasing the *SafeWork NSW Strategy*, SafeWork NSW said that it was ‘pledging to crack down on big businesses caught doing the wrong thing by failing to protect the wellbeing of staff under the state’s workplace laws’, identifying ‘bullying, harassment, exposure to traumatic events, work isolation and poor support’ as constituting psychological injury hazards and saying ‘big businesses’ can ‘expect compliance checks’.¹⁰

In May 2024, SafeWork NSW made ‘enquiries’ with Corrs Chambers Westgarth over allegations of ‘psychological hazards’ said to be constituted by bullying and inappropriate conduct.¹¹ In 2021, SafeWork NSW issued two large law firms (one national and one international) with compliance notices in relation to extreme working hours.¹²

Bullying, harassment and discrimination data

The following outlines the rates over time of bullying, harassment and discrimination in the Australian legal profession:

1. The 2014 *LCA NARS report* (based on data from about 4,000 legal professionals, said to represent about 10% of the Australian legal profession) found (at 4):
 - a) 50% of Australian women legal professionals surveyed reported being bullied, 47% reported being discriminated against on the basis of sex and 24% had experienced sexual harassment: at 32;
 - b) 80% of women barristers surveyed across Australia had experienced bullying, 84% reported being discriminated against on the basis of sex and 55% had experienced sexual harassment: at 80.

2. In 2014, a survey conducted by the NSW Bar Association with practising certificate renewals showed that 64% of women barristers who responded to the survey reported being bullied and 42% reported experiencing sexual harassment in the 12 months before the survey.¹³
3. The 2019 *IBA ‘Us Too?’ report* (based on data from 6,890 legal professionals from 135 countries, 6% of whom were from barristers’ chambers) found (at 8, 26):
 - a) 73% of Australian women legal professionals surveyed reported being bullied and 47% reported being sexually harassed throughout their legal career: at 40 (bullying), at 53 (sexual harassment) and: at 87 (percentages);
 - b) globally, barristers’ chambers were said to be the location second most likely for bullying and/or sexual harassment to occur, after ‘government’: at 51;
 - c) legal professionals at workplaces with policies and training were just as likely to be bullied or sexually harassed as those at workplaces without: at 9.
4. In 2022, the International Bar Association follow-up report, *Beyond Us Too? Regulatory Responses to Bullying and Sexual Harassment in the Legal Profession* (‘2022 *IBA ‘Beyond Us Too?’ report*’), found (based on surveys of 70 legal regulatory or disciplinary bodies: at 7) that:
 - a) bullying and harassment in the legal profession was endemic, cultural and societal, that a reluctance to report was a major hurdle, that ‘every member of the legal profession has an obligation to contribute’ to positive change: at 50;
 - b) in Australia, both the Office of the NSW Legal Services Commissioner (‘NSW OLSC’) and Victorian Legal Services Board (‘VLSB’) had introduced anonymous, informal reporting portals as a means of overcoming reluctance to formally complain, allowing data to be obtained with the potential for further systemic action: at 16–17.
 - c) In 2022, a survey conducted by the NSW Bar Association with practising certificate renewals showed that 22.5% of those responding (both women and men) reported being bullied and almost 6% reported experiencing a form of harassment in the 12 months before the survey.¹⁴



In 2021, SafeWork NSW declared the legal profession a ‘high risk profession’, partly due to the exposure of legal practitioners to bullying and harassment.

There is no breakdown by sex available for this data, and the steep decline from the 2014 practising certificate renewal survey (by a factor of almost 3 for bullying and a factor of about 7 for harassment) could be in part due to the data containing results of both women and men, rather than only women. The 2023 and 2024 renewal survey results are not yet available.

4. In late 2023, a *Lawyers Weekly* survey found that, of the almost 800 legal professionals responding, 72% said they had been bullied. While this is not empirical data given it was an online survey, Law Council of Australia president Luke Murphy said that such surveys were ‘very important to be able to quantify and understand the extent of the problem’.¹⁵

The increases above from the 2014 *LCA NARS report* to the 2019 *IBA ‘Us Too?’ report* – from 50% of Australian women legal professionals indicating they had been bullied to 73% and from 24% indicating they had been sexually harassed to 47% – may have been attributable to the intervening ‘MeToo’ movement in 2018, which improved awareness and willingness to disclose.

This was considered in the 2022 *‘Beyond Us Too?’ report*, in which significant increases were observed in complaints and survey responses following the ‘MeToo’ movement in England and Wales, New Zealand, Australia, Ontario and some European countries: at 12–14. Between 2021 and 2023, the shift to online work, including as a result of the pandemic, was reported to have resulted in an increase in workplace bullying in the legal profession.¹⁶

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The NSW Bar Association's Mental Health First Aid course is specifically designed to combat bullying.

Initiatives

During the above period, the NSW Bar Association took steps, including in 2014 launching the Model Best Practice Guidelines ('2014 BPGs') (adopted by over 50% of chambers at the NSW private Bar), in 2021 launching the record keeping online portal 'Spot' (for complainants and bystanders to maintain records and obtain complaint-making information from the director of BarCare), in 2022 (in conjunction with the NSW OLSC and the Law Society of NSW) launching the anonymous informal reporting portal 'Elker' and, also in 2022, launching the revised Model Best Practice Guidelines (together, with the 2014 BPGs, adopted by about 65% of chambers at the NSW private Bar).¹⁷

In 2015, the prohibition on discrimination, harassment and bullying contained in former r 117 of the *NSW Barristers Rules 2014* carried over into r 123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. In 2022, Bar r 123 was amended to add Bar r 123(2), extending coverage.

However, also in 2015, the mandatory three-yearly education and training of New South Wales legal professionals in respect of equal opportunity, workplace health and safety, and discrimination and harassment required under former reg 176 of the *Legal Profession Regulations 2005* (NSW) was omitted from the new Uniform Law regime. There has been no mandatory education and training implemented in New South Wales to replace it.

Between 2021 and 2023, following the *Respect@work* report¹⁸, the *Sex Discrimination Act 1984* (Cth) ('SD Act') was amended to introduce additional prohibitions, including on sex-based harassment and workplace environments hostile on the grounds of sex, as well as a positive duty on PCBUs and employers (enforceable as of December 2023) to take reasonable and proportionate measures to eliminate, as far as possible, certain forms of discriminatory conduct.¹⁹



NSW Bar Association Wellbeing course

In December 2023, the NSW Bar Council adopted the Mental Health First Aid Course to enhance barrister wellbeing ('the Wellbeing Course'), a primary aim of which is to equip participants with the skills to listen and connect.²⁰

Having regard to the powerful obligations on PCBUs under the *WHS Act* and the *SafeWork NSW Strategy* to prevent psychosocial and psychological hazards and risks (primarily, workplace bullying and harassment), and the legal profession being declared a high-risk profession, the Wellbeing Course is well positioned either as a tool to eliminate such hazards and risks or as a complement to such a tool.

The Wellbeing Course is specifically designed to combat bullying by fostering open, transparent communication, creating a supportive and inclusive workplace, providing guidance to perpetrators and support for targets and encouraging bystander intervention.²¹ The guidance that can be provided to perpetrators includes redirecting and helping them to understand the impact of their behaviour.²²

The Wellbeing Course is ideal to raise awareness and educate chambers and barristers on their obligations to reduce harm in the form of bullying and harassment, in line with the strategic goals and actions in the *SafeWork NSW Strategy*: at 10. It can be dovetailed with online New South Wales Government tools, including the Workplace Wellbeing Assessment tool, 2021 *SafeWork NSW Code of Practice for Managing Psychosocial Hazards at Work* and Leading a Mentally Healthy Workplace course.²³

It can constitute a safe system of work practice (or operate in conjunction with one) aimed at managing hazards such as bullying and harassment (2021 *SafeWork NSW Code of Practice for Managing Psychosocial Hazards at Work*: at 21–22), including by identifying those more likely to perpetrate it, the 'triad' traits of whom are said to be recognisable in respect of perpetrators of bullying.²⁴

A further consideration when implementing the Wellbeing Course is that PCBUs such as barristers, barristers' chambers and the NSW Bar Association have additional obligations on them operating

in conjunction with their obligations under the *WHS Act*. For barristers, that includes obligations under Bar r 123(1)(a) in particular not to discriminate, with the definition of ‘discrimination’ under Bar r 125 encompassing all forms of ‘unlawful discrimination’ under pt II of the *SD Act*. This includes, for instance, victimisation under s 47A of the *SD Act* and creating a workplace environment hostile on the ground of sex under s 28M of the *SD Act*.

Care needs to be taken to minimise the risk of allegations of victimisation (for instance) when implementing the guidance from the Wellbeing Course, particularly in the context of pre-existing or simultaneous complaints of bullying, harassment and/or discrimination.

Economic cost

The significant cost to economies and workplaces of practices and conduct constituting bullying, sexual harassment and/or discrimination is well traversed and documented.²⁵

These generally include costs resulting from loss of individual productivity, lowered team performance, turnover costs (ie leaving the profession), litigation, insurance and damage to brand perception and reputation. For sex-based harassment, this cost was found in

2005 to be at least US\$6 million annually per Fortune 500 company (in respect of absenteeism, lost productivity and turnover only).²⁶

Similar costs were said to be associated with workplace bullying, although for both bullying and harassment additional costs can be added for grievance procedures, downtime in dealing with complaints, employee assistance programs (the equivalent of BarCare), obtaining evidence in litigation, cultural reviews and others.²⁷ Overall, bullying is said to contribute to workplace dysfunction and affect productivity and profitability (*2019 IBA ‘Us Too?’ report*: at 17).

Ballard and Bozin estimated the 2023 cost to the Australian economy of workplace bullying to be a conservative \$10 to \$60 billion annually, based on a rate of bullying of 3.5% to 15%, and an annual minimum of \$30 billion when using bullying rates of 10%: at 192.²⁸ Those rates of bullying are far lower than those recorded at any point in the Australian legal profession or at the NSW Bar.

To this must be added the annual cost to the Australian economy of workplace sexual harassment, said by Deloitte Access Economics in 2018 to be \$3.8 billion: at 192. Between 2001 and 2011, the cost to the Australian economy in respect of racial discrimination alone was \$45 billion.²⁹

Conclusion

It may be that since about 2021, as a result of major legislative changes to the *SD Act* in particular, rates of harassment and bullying in the Australian legal profession have finally started to drop from the highest rates globally, which could be truer of harassment than bullying. They remain, according to the available data, unacceptably high.

Nonetheless, as is evident, even low rates of each cost workplaces and the Australian economy staggering amounts and give rise to significant potential liability, including under the *WHS Act* and *SafeWork NSW Strategy*. The Wellbeing Course is one tool to assist in compliance with such obligations, perfectly designed to tackle bullying and harassment in particular.

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ENDNOTES

- See ‘Bullying, harassment and discrimination data’ section of this article; see also Pauline Wright et al, ‘Winds of Change?’ [2020] (Summer) *Bar News* 6.
- <<https://lawcouncil.au/docs/a8bae9a1-9830-e711-80d2-005056be66b1/NARS%20Report.pdf>>; see also *ibid*.
- <<https://www.ibanet.org/MediaHandler?id=B29F6FEA-889F-49CF-8217-F8F7D78C2479>>.
- University of Sydney, *The Australian Centre for Gender Equality and Inclusion @ Work* (Web Page) <<https://www.sydney.edu.au/business/our-research/the-australian-centre-for-gender-equality-and-inclusion-at-work.html>>.
- Other than as indicated in the 2022 practising certificate renewal survey.
- <<https://www.safework.nsw.gov.au/resource-library/mental-health/psychological-health-and-safety-strategy-2024-2026>>.
- <<https://www.safework.nsw.gov.au/resource-library/list-of-all-codes-of-practice/codes-of-practice/managing-psychosocial-hazards-at-work>>.
- Citing Centre for Health Economics Research and Evaluation (CHERE), ‘Mentally healthy workplaces: A return-on-investment study’ (University of Technology Sydney, 2017) 7.
- Hannah Wootton, ‘Law deemed a high-risk job: SafeWork’, *Australian Financial Review* (10 June 2021) <<https://www.afr.com/companies/professional-services/long-hours-high-demands-makes-law-a-high-risk-job-safework-20210607-p57yrz#:~:text=Lawyers%20working%20long%20hours%20for,workers%2C%20according%20to%20SafeWork%20NSW>>.
- Tamsin Rose and Charlotte Thou, ‘Claims for psychological injury at work surge in NSW at triple the rate of physical harm’, *The Guardian* (21 May 2024) <<https://www.theguardian.com/australia-news/article/2024/may/22/psychological-injury-claims-safework-nsw-rise-mental-health-statistics>>.
- Christine Caulfield, ‘Corrs Chambers Westgarth faces enquiries from SafeWork NSW over ‘psychosocial hazards’’, *Lawyerly* (24 May 2024).
- Maxim Shanahan, ‘Bullying allegation at Corrs prompts regulator to get involved’, *Australian Financial Review* (23 May 2024) <<https://www.afr.com/companies/professional-services/bullying-allegation-at-corrs-prompts-regulator-to-get-involved-20240522-p5jfp>>.
- Urbis Pty Ltd, *NSW Bar Association 2014 Member Profile Report* (Report, March 2015).
- Gabrielle Bashir SC, President’s Message in *InBrief* (Web Page) <<https://nswbar.asn.au/the-bar-association/publications/inbrief/view/7fe49807df877cb7bb81940d2e5aed03>>.
- Lauren Croft, ‘Bullying still way too commonplace in Australia’s legal profession’ *Lawyers Weekly* (13 December 2023) <<https://www.lawyersweekly.com.au/biglaw/38687-bullying-still-way-too-commonplace-in-australia-s-legal-profession>>.
- Jerome Doraisamy, ‘Did workplace bullying worsen during Covid-19?’ *Lawyers Weekly* (25 March 2021); *ibid*.
- NSW Bar Association (Web Page) <<https://nswbar.asn.au/bar-standards/sexual-harassment-at-the-bar>>.
- Australian Human Rights Commission, *Respect@ Work: Sexual Harassment National Inquiry Report* (Report, 2020).
- For a description of the impacts of these amendments on the Bar, see Thew et al, ‘New prohibition against hostile workplace environments and a positive duty’ [2023] (Autumn) *Bar News* 64; P Thew & J Hogan-Doran SC, ‘New accessorial liability for barristers under the *Sex Discrimination Act 1984* (Cth) and fresh obligations under Bar Rule 123’ [2022] (Winter) *Bar News* 62.
- Mental Health First Aid Australia (Web Page) <<https://www.mhfa.com.au/>>.
- The Mental Health Coach, *Addressing Workplace Bullying Through Mental Health First Aid Training: Create a Supportive and Empowering Environment* (Web Page, June 2024) <<https://thementalhealthcoach.com.au/addressing-workplace-bullying/>>.
- Ibid*.
- New South Wales Government (Web Page) <<https://www.nsw.gov.au/mental-health-at-work/free-training-and-coaching/training#:~:text=Leading%20a%20Mentally%20Healthy%20Workplace,safe%20and%20positive%20work%20environment.&text=how%20to%20design%20healthier%20workplaces,%2C%20job%20roles%2C%20and%20education>>.
- Lauren Croft, ‘Key ‘precursor factors’ to bullying in legal workplaces’ *Lawyers Weekly* (12 June 2024), citing Nadia Sojanova, ‘Regulating to Prevent Workplace Bullying: Options for Reform’ (Thesis, La Trobe Law School, La Trobe University, 2023) 7.
- P Thew & B Tronson, ‘What is the economic cost of discrimination?’ [2019] (Autumn) *Bar News* 67.
- International Center for Research on Women, *The costs of sex-based harassment to businesses* (Report, 2018), 1, 6.
- A Ballard & D Bozin, ‘The true (financial) costs of workplace violence in Australia’ (2023) 48(3) *Australian Law Journal* 191, 192–193.
- Ibid*.
- A Elias, ‘Measuring the economic consequences of racial discrimination in Australia’ (Thesis, Faculty of Arts and Education, Deakin University, 2015).