



Bar Council Equality and Diversity Guides Tackling Sexual Harassment: Information for Chambers

What you should do when an allegation of sexual harassment has been made against a member of chambers, a member of chambers' staff or against any other person whose conduct chambers may have some responsibility for or influence over (including instructing solicitors).

Executive Summary

Allegations of sexual harassment are a serious matter. It is incumbent on Chambers, as a matter of fairness and to uphold the integrity of the profession, to treat the complainant and alleged perpetrator justly. This Guide considers the definition of sexual harassment, the requirement on Chambers to have a proper procedure for handling complaints of sexual harassment, advice for those making a complaint, the duties of Heads of Chambers¹ and the obligations to report certain matters to the BSB².

Allegations of sexual harassment should be handled promptly and sensitively. A written harassment procedure is a mandatory requirement for Chambers. Following receipt of an allegation a proportionate investigation must be conducted. Confidentiality should be maintained to protect the reputation of both complainant and alleged perpetrator, particularly while facts are yet to be established. Once the investigation is complete, if an allegation is admitted or upheld, appropriate sanctions should be taken against the harasser and appropriate support given to the victim.

Definition: Sexual Harassment

The definition of sexual harassment is contained in section 26 of the Equality Act 2010. This provides that:

[...] (2) A also harasses B if—

- (a) A engages in unwanted conduct of a sexual nature, and
- (b) the conduct has the purpose or effect referred to in subsection (1)(b) [namely conduct which has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B].

(3) A also harasses B if—

- (a) A or another person engages in unwanted conduct of a sexual nature or that

¹ Listed on page 5 of this guide

² www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/. Note: The Code of Conduct has been replaced with the Handbook.

- is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of, or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

Understanding Sexual Harassment

Chambers are encouraged not to take an overly legalistic approach to allegations of sexual harassment. However, referring to the definition of sexual harassment within the Equality Act 2010 and the approach taken by the courts may prove helpful for Chambers.

There will be a spectrum of conduct that falls within the definition of sexual harassment. As a guide, the Equality Act 2010 describes it as unwanted conduct of a sexual nature (or related to gender assignment or sex) which has the purpose or effect of violating the victim's dignity or which creates an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

Under the Equality Act 2010, determining whether unlawful sexual harassment has taken place involves an objective and a subjective element; analysis must be made both of the factual event which took place but also of the victim's perception of that event. Those in Chambers with responsibility for receiving and investigating allegations of sexual harassment will similarly wish to take into account the perception of both the complainant and all the other relevant circumstances, including the conduct and point of view of the alleged perpetrator and, possibly, of any witnesses.

What may to the investigator appear, superficially, to have been innocuous conduct by the alleged harasser, might from the perspective of the victim be more serious. Particularly if, for example, the victim is a more junior member of chambers than the alleged perpetrator or in some other way vulnerable. Chambers will also need to deal carefully with situations in which a complainant has had an unreasonably sensitive reaction to objectively inoffensive behaviour from an alleged harasser.

In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, EAT; Underhill P said that the requirement to consider whether it is "reasonable for the conduct to have that effect" of harassing the complainant is there to deal with unreasonable proneness to offence (and may be affected by the harasser's purpose). While harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

One-off conduct can amount to harassment.

Relevant BSB Rules

rC14 – "You must not discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender re-assignment, sexual orientation, marital or civil partnership status, disability, age, religion or belief, or pregnancy and maternity."

Relevant Core duties are:

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| CD3 | You must act with honesty and integrity |
| CD5 | You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession |
| CD8 | You must not discriminate unlawfully against any person |

TIP

In developing a policy and agreeing procedures consider the following scenarios as you may need to develop slightly differing approaches for each:

- A tenant alleges harassment from another tenant;
- A pupil alleges harassment by a tenant or a member of chamber's staff;
- A member of staff alleges harassment by a tenant;
- A pupil or tenant alleges harassment by a member of staff (i.e. clerk); and
- A tenant/pupil/member of staff alleges harassment from a solicitor who instructs chambers.

In relation to allegations against staff, Chambers should also have a disciplinary process through which appropriate action can be taken.

Where an allegation is made against a solicitor Chambers will have to consider whether it needs to report the matter to the SRA³ and must take the allegations seriously regardless of whether this affects the relationship of Chambers with the solicitor.

Victimisation

Rule rC69 creates an obligation on all barristers not to victimise anyone for making in good faith a report of serious misconduct. This means anyone making an allegation of having been sexually harassed or a person who witnesses sexual harassment and reports it must not suffer any disadvantage as a result of making a complaint. As already noted, it should be made clear to a complainant that they will not suffer any detriment because they have made a complaint or chosen to go down the formal route rather than ask for the matter to be dealt with informally. It should also be made clear to any witness who reports harassment or who provides evidence about what they witnessed that they will suffer no detriment.

³ Solicitors Regulation Authority

Handling Complaints of Sexual Harassment in Chambers

1. The BSB Handbook provides that Chambers must have an anti-harassment policy which, as a minimum, states that “harassment will not be tolerated or condoned and that managers, employees, members of chambers, *pupils* and others temporarily in *chambers or any BSB authorised body* such as mini-pupils have a right to complain if it occurs”. You must also set out how the Policy will be communicated and the procedure to be followed (C110-iiii). A sample harassment policy is provided in Appendix 1.
2. Where an allegation of harassment is made it is the duty of Chambers to properly investigate and consider what appropriate steps should be taken internally.
3. You need to recognise in the case of an allegation against a tenant that the victim may be in a vulnerable position. In particular, a pupil may fear that their prospects of tenancy will be damaged if a complaint is made; while a member of staff may be concerned about future employment prospects.
4. As a Chambers, you should make it clear that harassment will not be tolerated in any circumstances and that complaints by pupils and staff will be taken seriously.
5. If you are handling an allegation of sexual harassment of a pupil by a pupil supervisor, consideration should immediately be given as to whether the pupil should be moved from the harasser to another supervisor. It must also be made clear that this does not affect the pupil’s position in Chambers.
6. Where harassment is admitted the seriousness of the conduct must be considered and the sanction may involve anything from a reprimand to expulsion from Chambers. Your Chambers’ constitution should cater for these eventualities.
7. Where harassment is not admitted, an investigation should be carried out (this should be provided for by your Chambers’ constitution); this should consist of taking evidence from the victim, harasser and anyone else who can shed light on the allegation, such as witnesses.
8. The decision maker(s) established by your chambers’ harassment policy should consider all the evidence and decide whether the allegation is proven. If proven the seriousness of the conduct must be considered. Again, the sanction may involve anything from a reprimand to expulsion from Chambers and as mentioned in point 6, your chambers’ constitution should cater for this.
9. Given the seriousness of any allegation to both the complainant and the alleged perpetrator, there should be an appeal process.

Even if there is no Chambers Constitution there must be a written procedure for dealing with harassment.

TIP: Informal vs. Formal Complaints handling

We recommend that Chambers consider handling complaints informally in certain circumstances. In the first instance, it may be sensible to ask the complainant if s/he wishes the matter to be dealt with informally whilst at the same time making it clear that there is a formal route, which can be immediately followed or taken up if the informal route does not resolve the matter.

Allegations of sexual harassment are however extremely serious and we recommend they are always managed by following formal policy and procedures with appropriate documentation (held confidentially) of the steps that have been taken and procedures that have been followed.

WARNING

In some circumstances allegations may be so serious you need to consider involving the police.

TIP

The Bar Council recommends any Head of Chambers (and managers in Chambers) are aware of their responsibility to ensure, so far as they are able:

- Policy is translated into practice;
- Members of Chambers are aware of the policy including Chamber's stance on sexual harassment (zero tolerance);
- An investigation takes place into any allegation of sexual harassment;
- Those reporting sexual harassment are not victimised for so doing; and
- All allegations and investigations are kept confidential.

Making a complaint to Chambers

There must be a mechanism for an alleged victim (or witness to an incident of sexual harassment) to make a complaint to Chambers. This may be informal or formal and should be provided for in your harassment policy (see an example in paragraph 6 of a sample policy attached to this document).

Duties of the Head of Chambers

The duties of the Head of Chambers (or anyone in a management role) used to be set out in much greater detail in the Code of Conduct. There is less detail provided in the current Handbook. In dealing with harassment (like other Equality & Diversity issues) a Head of Chambers can expect to be supported by their Equality & Diversity Officer.

Key responsibilities can be summarised as follows:

- To ensure there are robust anti-harassment policies in Chambers.
- To report harassment (as amounting to serious misconduct) to the BSB (see above).

Reporting to the Bar Standards Board (BSB)

BSB Rules

Barristers have a duty to report their own serious misconduct (rC65), and serious misconduct by others (rC66-rC68). Guidance identifies the reason for this, and examples of what the BSB regards as serious misconduct (see gC95-gC96).

Harassment is defined by the BSB as serious misconduct that must be reported (BSB Handbook, gC96.2) and there is a specific duty on the part of the Head of Chambers to report incidents of harassment to the Bar Standards Board.

The BSB provides guidance on the duties for those making a complaint to the BSB both in the Handbook (gC97-gC99) and in separate BSB guidance on the topic which is available on their website⁴. The latter guidance also identifies the outcomes which the BSB is seeking to achieve, and explains the BSB's approach to issues of discrimination.

Paragraph 16⁵ of this guidance, indicates that the BSB appreciates the sensitivity of sexual harassment issues. It states:

"If the matter relates to conduct which affects you personally, or relates to sexual or other harassment, you still remain under an obligation to report serious misconduct to the BSB. However, the BSB will treat any report of discrimination, harassment (whether of a sexual nature or otherwise), or victimisation as sensitively as possible and will not act without first consulting with any alleged victim. Given the sensitivity of this issue, the BSB would not ordinarily expect to take disciplinary action for failing to comply with the duty to report if you believe you are a victim of the misconduct in question. Nevertheless, you should consider the risk that if the matter is not reported, you or others may suffer from similar treatment in the future."

It is important to note that a barrister has a duty to report the conduct of a fellow barrister where serious conduct is alleged.

We advise:

- Where the allegation is admitted then it should normally be reported as soon as possible to the BSB.

⁴ The BSB Guidance on Reporting Serious Conduct of others states that there is an *obligation* to report the serious misconduct of others
https://www.barstandardsboard.org.uk/media/1666565/reporting_serious_misconduct_of_others__august_2015_.pdf

⁵

https://www.barstandardsboard.org.uk/media/1666565/reporting_serious_misconduct_of_others__august_2015_.pdf, Paragraph 15

Tip

Where the allegation is admitted, encourage the person who has committed the harassment to self-report to the BSB

- Where the allegation is denied and an investigation is going to be carried out, the Guidance states that it will normally be the position that the matter should be reported to the BSB⁶. However, this may await the outcome of an internal investigation.
- Consideration should be given to whether it is more sensible to delay reporting to the BSB until after an investigation, which is likely to shed further light and clarification on the allegation. If the allegation is found to be not proven by Chambers it may still be necessary to report the incident to the BSB in view of a complaint by the alleged victim.

Victim support

The victim of harassment must be given support by Chambers. In some cases this may only entail making it clear to the victim that they are fully supported and will not suffer any detriment as a result of the complaint. In more serious cases this may involve consideration of whether some form of outside counselling or victim support is appropriate.

Examples of scenarios you might face in chambers

Scenario 1:

A pupil complains they have been sexually harassed by their pupil supervisor and raises this with the senior clerk, the Head of the Pupillage Committee and a fellow pupil in chambers. The clerk tells her to ignore it. The Head of Pupillage acknowledges there are rumours about the supervisor and transfers the pupil to another pupil supervisor. The Head of Chambers reports the matter to the BSB. The pupil then leaves chambers uncomfortable about continuing to practice alongside her harasser and Chambers' decision to leave the complaint to the BSB's disciplinary process.

What chambers did right? The Head of the Pupillage Committee was correct to transfer the pupil. The Head of Chambers was correct to report to the BSB.

What chambers could have done better? However, the procedure adopted by Chambers was wholly inadequate. The alleged harasser was not subjected to any process and the pupil may feel justified in thinking that the issue had been 'brushed under the carpet'. The nature and seriousness of the harassment should be considered as well as whether the pupil supervisor is a repeat offender, as the rumours appear to indicate. Simply moving the pupil, who was in a position of vulnerability is not a sufficient response to

⁶ Information on how to make a report to the BSB can be found on the BSB website <https://www.barstandardsboard.org.uk/complaints-and-professional-conduct/concerns-about-a-barrister/reporting-concerns-of-serious-misconduct/>

the allegations. Where a complaint is made it must be investigated properly and the alleged perpetrator dealt with.

Scenario 2:

At a Chambers' party a male barrister aggressively attempts to kiss a female member of staff after she has made it clear that his attentions are unwelcome. This is reported to the Head of Chambers. The male barrister is immediately asked to stay away from chambers and is clerked from home pending an investigation. Statements are taken from everyone affected and notes kept. The complaint is reported to the BSB. Chambers creates a panel to investigate the claims and determine what action needed to be taken against the barrister. On completion of the investigation the barrister is asked to leave Chambers. Chambers' investigation is kept separate to the BSB investigation.

What chambers did right? This is a very serious incident and Chambers have taken every step to ensure that staff and other tenants are protected by requiring the tenant to work from home.

What chambers could have done better? In the circumstances set out above, it will be important to hear from the perpetrator as to whether there are any mitigating circumstances, though this may be difficult to envisage. The BSB may decide to take further action but the action already taken by Chambers would appear to be a reasonable response to the facts.

Further Advice

If you require additional assistance, or have any queries on handling cases of sexual harassment, the Head of Equality & Diversity at the Bar Council can offer advice. Please call 020 7611 1321

**Equality, Diversity and Social Mobility Committee
December 2015**

MODEL POLICY⁷

MODEL ANTI-HARASSMENT POLICY FOR CHAMBERS

1. This policy covers all those working in chambers, visiting chambers and providing services to Chambers. It covers, amongst others, tenants, pupils, 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 Anti-Harassment Policy is a central plank of Chamber's commitment and will be applied rigorously.
3. Harassment in any form will not be tolerated at *[Name of Chambers]*. Harassment includes any unwanted conduct related to sex, race, disability, gender re-assignment, religion or belief, sexual orientation or age. Such behaviour may take many forms including:
 - Conduct which is unwanted by the recipient and perceived as hostile or threatening;
 - Conduct which gives rise to a hostile or threatening work environment;
 - Conduct which creates an atmosphere in which it is feared that rejection or submission will be used as a basis for decisions which have an impact on the recipient at work such as an allocation of work or tenancy decision.
4. The following are examples of types of behaviour which may amount to harassment:
 - Physical or sexual assault;
 - 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 suggestions or invitations;
 - Suggestive remarks or looks;
 - Display of offensive materials, including on a computer screen;
 - Tasteless jokes or verbal abuse, including any sent by email;
 - Offensive remarks or ridicule;
 - Dealing inappropriately or inadequately with complaints of harassment.
5. Harassment is unlawful under the Equality Act 2010. In addition to the above unwanted conduct, it can arise where a person engages in any kind of unwanted sexual behaviour (or gender reassignment or sex related behaviour).
6. Complaints of harassment may be raised informally in the first instance with the Equality and Diversity officer *[Name of Chambers' Equality and Diversity Officer]*, the Head of Chambers or another senior member of chambers who will agree an

⁷ Note that this document is a statement of Policy and is predicated on there being a Grievance and Disciplinary Procedure in Chambers.

appropriate response. Formal complaints should be made under the *[Name of Chambers]*' Grievance procedure.

7. Harassment is misconduct or gross misconduct for employees or a breach of the Bar Code of Conduct for barristers. Allegations of harassment will be dealt with under the *[Name of Chambers]*' Disciplinary procedure.
8. Allegations which may amount to serious misconduct by a barrister may be reported to the BSB under its reporting procedure.
9. Chambers is committed to ensuring that no one who makes an allegation of harassment in good faith should be subjected to any detriment as a result. Any victimisation of a complainant, witness or anyone else involved in the investigation of a complaint will be viewed as a disciplinary matter.
10. A copy of this policy is provided to all those for whom chambers constitutes a working environment, including members of chambers, pupils, squatters, clerks and other employees, temporary workers, those who provide services to chambers such as contract cleaners, accountants and IT consultants, and mini-pupils and work experience students.
11. This policy was adopted on *[date]* and will be reviewed on *[date]*.

(Source: BSB Handbook's Supporting Information Document⁸ - as amended)

⁸ https://www.barstandardsboard.org.uk/media/1596730/bsb_equality_rules_handbook_june_2014.pdf