



Bar Council Equality and Diversity Guides
Discrimination, Harassment, Bullying and Inappropriate Behaviours:
Information for Barristers

This guide provides a legal definition for discrimination, including harassment, and lists the types of inappropriate behaviours that cause concern.

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Discrimination

1. Direct discrimination occurs where one person is treated less favourably than another was or would be treated in the same or similar circumstances because of a protected characteristic.
2. Indirect discrimination occurs where an apparently neutral provision, criterion or practice puts the victim and those with whom the victim shares a protected characteristic at a particular disadvantage when compared with others who do not share it, and where the provision, criterion or practice is not a proportionate means of achieving a legitimate aim (for example, holding an internal Chambers training seminar at a time when a particular group of members will find it difficult to attend and when the meeting could reasonably be held at some other time which would not exclude any particular group).
3. Victimisation occurs when a person is subject to detrimental treatment because he or she has brought proceedings under the anti-discrimination legislation, given evidence or information in connection with such proceedings or has alleged that unlawful discrimination has occurred (or is suspected of doing or believed to have done any of the above).

The protected characteristics and the definition of discrimination is contained in the Equality Act 2010. This provides that:

Chapter 1

4 The protected characteristics

The following characteristics are protected characteristics—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

Chapter 2

13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

19 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

Harassment

4. There is a spectrum of conduct that can be properly described as harassment. As a guide, the Equality Act 2010 describes it as unwanted conduct 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. A single incident can constitute harassment.

5. Under the Equality Act 2010, determining whether unlawful 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 both the alleged perpetrator's intention and the victim's perception of that event. Even if the alleged perpetrator's intention was not to harass or cause offence, where their conduct has had this effect – whether on the target or a witness – appropriate action should be taken.

6. What may 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. Equally, the fact that an individual has a long-standing reputation which is a bit of a joke in chambers (“oh that's just so-and-so, he's harmless”) does not mean that their conduct should be excused or overlooked.

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

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (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).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that 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.
- (5) The relevant protected characteristics are—
- age;
 - disability;
 - gender reassignment;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

7. Examples of inappropriate behaviours include:

- Sexist, suggestive or sexual comments, “jokes” or “banter”
- Sexual innuendo
- Sexist, sexual or offensive comments regarding someone’s appearance
- Overly personal comments or over-familiar behaviour, including questions about someone’s relationships, sex life or gender identity
- Continued suggestions for social activity after it has been made clear that such suggestions are unwelcome
- Racist, sexist, anti-LGBT+ or ageist jokes, or derogatory or stereotypical remarks about a those of a particular ethnic or religious group, gender, gender identity or sexual orientation
- Outing or threatening to out someone as gay, lesbian, transgender or any form of LGBTQI+¹
- Knowingly mis gendering someone
- Offensive or intimidating comments or gestures

¹ Lesbian, Gay, Bisexual, Transgender, Queer, Intersex

- Insensitive jokes or pranks
- Mocking, mimicking or belittling a person's disability
- Exclusion from social networks or activities, or other forms of isolation
- Staring or inappropriate/suggestive looks
- Invading someone's personal space
- Sexual or offensive gestures
- Inappropriate sexual advances or repeated unwelcome sexual advances
- Inappropriate or unwelcome physical contact
- Suggesting that sexual favours or a sexual relationship may result in favourable treatment, provide work opportunities or career advancement, or suggesting that refusing such may lead to less favourable treatment, the loss of work opportunities or damage career advancement
- Displaying or sending or pornographic or sexually suggestive pictures or written material
- Initiating or continuing sexual contact with someone who is unable, for example through drink, to give truly informed consent
- Sexual and physical assault
- Dealing with complaints of harassment inappropriately or inadequately

Examples of sexual harassment (IBA Report)

- ✓ Sexist comments, including inappropriate humour or jokes about sex or gender
- ✓ Sexual or sexually suggestive comments, remarks or sounds
- ✓ Being looked at in an inappropriate manner, which made you feel uncomfortable
- ✓ Inappropriate physical contact, for example patting, pinching, brushing up against the body and any inappropriate touching or feeling
- ✓ Sexual propositions, invitations or other pressure for sex
- ✓ Seriously inappropriate physical contact, for example, kissing, fondling or groping
- ✓ Receiving sexually explicit content or propositions via email or social media
- ✓ Implicit or explicit demands for sexual favours in exchange for employment or promotion
- ✓ Implicit or explicit demands for sexual favours in exchange for work opportunity (i.e., to be involved in a matter)
- ✓ Receiving sexually explicit presents, cards or letters
- ✓ Being the subject of sexist behaviour on work WhatsApp groups
- ✓ Physical assault or rape
- ✓ Implicit or explicit demands for sexual favours in exchange for a favourable performance appraisal

(in order of most common) See Page 56, <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>

Reporting to the Bar Standards Board (BSB)

8. When any allegation of harassment by a barrister is made, a decision must be made as to whether it is to be reported to the BSB or not.

Relevant BSB Rules

rC12 – "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:

- 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

rC65 You must report to the BSB promptly if you have committed serious misconduct.

rC66 You must report to the BSB if you have reasonable grounds to believe that there has been serious misconduct by a barrister.

gC96.2 Serious misconduct includes harassment.

9. Barristers have a duty to report harassment to the Bar Standards Board (BSB).

10. The BSB provides guidance on the reasons for and scope of the reporting obligation, as well as how to make a report, in the Handbook (gC97-gC99) and in separate BSB guidance available on their website².

11. The guidance notes that whether misconduct is "serious" may be a question of degree and is a matter of judgment (paras 6 & 7), and notes that discrimination, which includes harassment, can constitute serious misconduct depending on its severity and impact (para 8). This means that there may be instances of inappropriate conduct at the lesser end of the spectrum which do not mandate a BSB report.

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https://www.barstandardsboard.org.uk/media/1687156/bsb_guidance_on_reporting_serious_misconduct_of_others_-_external_produced_by_reg_pol.pdf

12. Whilst the duty to report strictly applies to a victim of harassment, the guidance has recently been amended to state that the BSB has a policy not to take enforcement action against victims who do not report their harassment (para 16). The guidance also notes that the BSB will treat any report of harassment as sensitively as possible and, importantly, will not act without first consulting the victim.

Bullying

13. Examples of bullying may include:

- Shouting at someone
- Being sarcastic towards, ridiculing or demeaning someone
- Overbearing or intimidating levels of supervision
- Inappropriate and/or derogatory remarks about someone's performance
- Abuse of authority or power by those in positions of seniority
- Deliberately excluding someone from meetings or communications without good reason

14. A resource on the Wellbeing at the Bar website³ outlines other examples of potentially bullying behaviours:

- An unreasonable exchange outside court
- unreasonable pressure to concede a point or accept an offer during negotiations
- unwanted physical contact
- unwelcome remarks about a person's age, dress, appearance, race or marital status, jokes at personal expense, offensive language, gossip, slander
- isolation or non-cooperation and exclusion from social activities
- improper pressure to take on work you cannot accommodate
- improper pressure to reduce fees
- personal intrusion from pestering, spying and stalking
- failure to safeguard confidential information
- shouting and/or directed angry outbursts either in front of others or one to one
- setting unrealistic deadlines
- persistent unwarranted criticism
- personal insults

15. If a barrister has been bullied by a judge, the behaviour may include:

- shouting at them
- deliberately saying things to embarrass or humiliate them
- asking them to justify themselves in circumstances that are unfair
- calling them names

³ <https://www.wellbeingatthebar.org.uk/problems/bullying-barristers/>

- calling into question their professionalism in circumstances that are unfair
- accusing them of incompetence in circumstances that are unfair
- using various facial expressions to demean or intimidate them
- setting unrealistic time frames
- making them work through lunch breaks
- refusing to give them time to formulate an argument or response in circumstances where it is unfair to do so

Examples of Bullying (IBA Report)

- ✓ Ridicule or demeaning language
- ✓ Overbearing supervision, undermining of work output or constant unproductive criticism
- ✓ Misuse of power or position
- ✓ Being deliberately given too much or too little work, or work inadequate to the position
- ✓ Exclusion or victimisation
- ✓ Malicious rumours
- ✓ Implicit or explicit threats, other than relating to the categories above
- ✓ Unfounded threats or comments about job security
- ✓ Being blocked from promotion or training opportunities due to a protected characteristic (such as race, sex, religion)
- ✓ Other Violence, threatened or actual
- ✓ Exclusion from or bullying via social media, including work WhatsApp groups

(in order of most common) Page 39, <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>

Useful Resources

16. Whether or not you are comfortable raising a concern within Chambers, confidential advice in relation to harassment, bullying and inappropriate behaviour can be sought at any time from the confidential Bar Council E&D Helpline 0207 611 1426. You will reach Sam Mercer, who is supportive, knowledgeable and helpful, or a member of her team, and they will provide you with support and advice and discuss your options. You need not give your name or the names of anyone else involved, or identify your chambers, unless you are comfortable doing so.

17. Alternatively, from October 2019, you can make a report of your experience on the TalktoSpot.com platform. Spot helps you talk through and record contemporaneously inappropriate moments at work, including court. You can then choose to print the report and send it to your chambers, your employer (if you are an employed barrister), the BSB or JCIO, and/or to submit the report to Bar Council or to

simply save the report for your own reference/use later. You can always edit your responses before submitting a report to Bar Council e.g. to remove names, identifiable details (though it is more helpful if Bar Council has this detail so we can map issues and hotspots). Any report submitted to Bar Council will be treated as strictly confidential and will be seen by the Equality & Diversity Policy Team only. If you choose, the Equality & Diversity Policy Team can also communicate with you through Spot but without knowing your identity or personal contact details if that is your preference.

IBA report – for useful background on harassment and bullying in the legal profession

<https://www.ibanet.org/bullying-and-sexual-harassment.aspx>

Wellbeing at the Bar (resources for Barristers' wellbeing; sources of advice and support

<https://www.wellbeingatthebar.org.uk/> Assistance Programme

<https://www.wellbeingatthebar.org.uk/ap/>

Lawcare (free and confidential helpline for lawyers, providing wellbeing and mental health support), T: 0800 2796888

Bar Council Guidance for chambers re sexual harassment

<https://www.barcouncilethics.co.uk/subject/developing-equality-diversity-policies-for-chambers/>

And for individual barristers <https://www.barcouncil.org.uk/supporting-the-bar/equality-and-diversity/bullying-and-harassment/>

BSB Guidance re reporting requirements

https://www.barstandardsboard.org.uk/media/1687156/bsb_guidance_on_reporting_serious_misconduct_of_others_-_external_produced_by_reg_pol_.pdf

BSB serious misconduct reporting form

https://www.barstandardsboard.org.uk/media/1702477/140619_-_pg22_-_procedure_for_dealing_with_reports_of_serious_misconduct_-_annex_a_-_form_-_live_updated_october_2015_.pdf

Bar Council Equality and Diversity Helpline T: 0207 611 1426

BSB Information Line T: 0207 6111 444

Bullying <https://www.wellbeingatthebar.org.uk/problems/bullying-barristers/>

Judicial Conduct Investigations Office <http://judicialconduct.judiciary.gov.uk/making-a-complaint/> (note: complaints should preferably be lodged within 3 months of the incident)

You may need to check online for up-to-date web addresses and telephone numbers.