



Law Council
OF AUSTRALIA

Australian Solicitors' Conduct Rules- further revisions to Rule 42

Public Consultation

Legal Profession Uniform Law, Section 427

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Call for submissions

The Law Council of Australia invites comments and submissions on a proposal to amend Rule 42 of the Australian Solicitors' Conduct Rules. The proposed amendment will make clear the profession's view that the ethical duty set out in Rule 42 to not engage in conduct that constitutes discrimination and harassment applies not only to conduct occurring directly in the course of legal practice, but also to such conduct occurring in any situation or setting connected with legal practice.

Submissions can be sent to the Law Council on or before **7 May 2021** by email to: tarryn.gaffney@lawcouncil.asn.au.

Context

The [Australian Solicitors' Conduct Rules](#) are a uniform set of ethical and professional conduct principles governing the conduct of Australia's solicitors, especially in their relations with clients, the courts, fellow legal practitioners and regulators.

The Australian Solicitors' Conduct Rules (**ASCR**) are developed by the Law Council of Australia (**Law Council**) which represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Law Council's Constituent Bodies. The ASCR reflect the considered view of the legal profession about the appropriate standards of ethical and professional conduct expected of legal practitioners.

The ASCR have been adopted and presently apply as the professional conduct rules for solicitors in: South Australia,¹ Queensland,² New South Wales and Victoria (and shortly Western Australia),³ Tasmania,⁴ and the Australian Capital Territory.⁵

The Law Council periodically reviews the ASCR, and in 2020 we concluded a review of the entirety of the Rules (**ASCR Review**). This review commenced with the public release of a Consultation Discussion Paper on 1 February 2018, and concluded with the lodgment of a Final Report with the Legal Services Council on 23 December 2020. The Law Council is now working with the states and territories regarding the implementation of ASCR Review.

In July 2020, and separately to the ASCR Review, the Law Council held a *National Round Table Addressing Sexual Harassment*, which led to the development and release on 23 December 2020 of the Law Council's [National Action Plan to Reduce Sexual Harassment in the Australian legal profession](#) (**National Action Plan**).

In developing the National Action Plan, strong support was shown for revising [Rule 42 \(Anti-Discrimination and Harassment\)](#) of the ASCR to better express the profession's view that the ethical proscription of discrimination and harassment must apply beyond the legal practice workplace, to any setting or situation connected with the practice of law. Accordingly, subsequent to the ASCR Review the Law Council has proposed further amendments to Rule 42 (**Rule 42 Review**), reflecting the consultations informing the National Action Plan.

¹ Effective from July 2011 as the *Law Society of South Australia, Australian Solicitors' Conduct Rules*.

² Effective from June 2012, as the *Australian Solicitors' Conduct Rules 2012*.

³ Effective 1 July 2015, as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

⁴ Effective 1 October 2020, as the *Legal Profession (Solicitors' Conduct) Rules 2020*.

⁵ Effective 1 January 2016, as the *Legal Profession (Solicitors) Conduct Rules 2015*.

The Law Council is required under section 427 of the Uniform Law to undertake public consultations on proposed legal profession conduct rules, and is inviting consultation comments and submissions from interested organisations, members of the profession and others on the proposed amendment to Rule 42 of the ASCR.

What is the issue?

Rule 42 as presently promulgated is as follows:

- 42. ANTI-DISCRIMINATION AND HARASSMENT**
- 42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:
- 42.1.1 discrimination;
 - 42.1.2 sexual harassment; or
 - 42.1.3 workplace bullying.

The ASCR Glossary definition of ‘sexual harassment’ is as follows:

“sexual harassment” means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.

An issue raised during Roundtable discussions was whether Rule 42 of the ASCR ought to be amended so that it would:

1. capture some of the problematic conduct currently occurring in the profession that is not currently captured by the Rule; and
2. make clear the profession’s view that discrimination and harassment (particularly sexual harassment) are unacceptable conduct for members of the profession.

While recommendations were made during the ASCR Review to revise Rule 42, the consultations and sequent recommendations did not consider the issues later raised at the Roundtable and in the NAP consultations.

Discussion

Ethical principles

The Australian Solicitors’ Conduct Rules (**ASCR**) set out standards of professional conduct to be “observed or approved of by members of the profession of good repute and competency”. The ASCR reflect ethical principles developed and settled over many years in consideration of the professional, fiduciary and other duties of solicitors and the common law. To the extent that common law or legislation sets a higher standard of conduct than that required by the Rules, a solicitor is required to comply with that higher standard. Conversely, where the Rules set a higher standard of conduct than prescribed in legislation or under the common law, a solicitor is required to comply with the higher standard set by the Rules.

Rule 42 as presently promulgated refers to discrimination, sexual harassment and workplace bullying “in the course of practice”. Arguably, this expression places a limitation on the scope of the Rule to discrimination and sexual harassment only where there is a clear connection with a legal workplace or other setting in which legal services are being provided. An issue raised in consultations is that while the Rule as currently promulgated addresses situations arising in a legal workplace context (for example), it will not respond when the same degree of harassment occurs *outside* of a legal practice context. For example, Rule 42 as presently promulgated will not clearly respond to a scenario such as

a casual after-work drinks or a legal industry networking function, where there is nevertheless a connection with legal practice.

The Law Council considers such an outcome to be inconsistent with the profession's view that discrimination and harassment, particularly sexual harassment, are unacceptable conduct for members of the legal profession.

Professional discipline

An issue raised in earlier consultations was that Rule 42, as presently formulated, limits the range of available regulatory responses to conduct by legal practitioners involving discrimination and harassment, particularly sexual harassment.

The statutory scheme for professional discipline is based on the key concepts of *unsatisfactory professional conduct* and *professional misconduct*. In the *Legal Profession Uniform Law*,⁶ for example, these are defined as:⁷

Unsatisfactory professional conduct includes conduct of a lawyer⁸ 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 Australian legal practitioner.

Professional misconduct includes—

- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
- (b) conduct of an Australian legal practitioner, whether occurring in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

The statutory scheme further identifies kinds of conduct that are *capable* of constituting *unsatisfactory professional conduct* or *professional misconduct*, including a contravention of a legal profession rule.⁹

Accordingly, a breach of a legal profession conduct rule can, by extension, raise a question of professional conduct;¹⁰ which then allows for a consideration in a disciplinary context of whether the relevant conduct amounts to either 'unsatisfactory professional conduct' or 'professional misconduct' (as defined above).

However, the initial breach is still determined by the thresholds within the relevant conduct rule, and in the case of Rule 42, the conduct is restricted to conduct *in the course of practice*. That is, the Rule is arguably limited in its application only to discrimination and harassment that has a clear connection with a legal workplace or other setting in which legal services

⁶ Substantially similar definitions are to be found in the legal profession laws of jurisdictions that have not adopted the Uniform Law.

⁷ See:

- [Section 296 \(Unsatisfactory professional conduct\) Legal Profession Uniform Law](#); and
- [Section 297 \(Professional misconduct\) Legal Profession Uniform Law](#).

⁸ The term "lawyer" is defined in section 261 of the Uniform Law for the purpose of the professional discipline provisions to include an Australian legal practitioner and an Australian-registered foreign lawyer.

⁹ *Legal Profession Uniform Law*, section 298(b). See also ASCR [Rule 2.3](#):

- 2.3 A breach of these Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority, but cannot be enforced by a third party.

¹⁰ *Ibid.*

are being provided. [Rule 5 of the ASCR](#) (Dishonest and disreputable conduct), also can respond to sexual harassment and is not limited to conduct occurring in the course of legal practice:

- 5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:
 - 5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice, or
 - 5.1.2 bring the profession into disrepute.

However, the Law Council has been advised in its consultations to date that Rule 5 has in practice been applied differently across jurisdictions. Some jurisdictions have interpreted Rule 5 through the lens of its common law underpinnings in professional misconduct, with a focus on whether the practitioner is a fit and proper person to practice law.¹¹

In case law such as *Ziems v Prothonotary of the Supreme Court of NSW* it was made clear that for conduct not occurring within legal practice to meet this threshold, it had to be of a particularly severe nature.¹² The Law Council was further informed in consultations that, in practice, this required problematic considerations such as what degree of sexual assault was severe enough to meet the thresholds for “professional misconduct” and/or Rule 5, so that conduct occurring outside of a legal practice setting could be appropriately dealt with as a disciplinary matter.

That is to say: conduct not ‘severe’ enough to meet the thresholds in Rule 5 (not being limited to conduct in the course of legal practice) may fall into a regulatory gap if it does not meet the ‘in the course of practice’ threshold in Rule 42.

The Law Council notes that it has recently been advised that at least one jurisdiction has determined that conduct that:

- did not occur in the course of legal practice; and
- did not meet the ‘fit and proper person’ threshold in a Barrister’s Rule equivalent to Rule 5;

nevertheless “[brought] the profession into disrepute”.¹³

While this conduct was not considered to warrant a finding of professional misconduct, this approach allowed for the sanctioning of the conduct as unsatisfactory professional conduct due to a breach of a professional conduct rule.¹⁴

Notwithstanding this, noting a lack of consensus of approach to date the Law Council considers that Rule 42 ought to be reformulated to ensure that:

- the aforementioned regulatory gap is addressed in all ASCR jurisdictions; and
- that conduct connected to legal practice can be addressed as either unsatisfactory professional conduct or professional misconduct, according to the circumstances and gravity of the particular case.

¹¹ This issue similarly arises when professional regulatory or disciplinary bodies consider sanction directly through statutory definitions of professional misconduct, for example in [Section 297\(1\)\(b\)](#) of the Uniform Law.

¹² *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46, [5], per Fullagar J.

¹³ For example, see *Council v New South Wales Bar Association v EFA* [2021] NSWCATOD 21,[83]-[84].

¹⁴ Pursuant to [s298\(b\) of the Uniform Law](#).

What is the proposed response?

The proposed amendment to Rule 42 is intended to:

- express the profession’s collective view that discrimination and harassment (and in particular sexual harassment) are unacceptable conduct when occurring in any situation connected to the practice of law;
- remove doubts about whether discrimination and harassment by legal practitioners can be appropriately dealt with as *unsatisfactory professional conduct* or *professional misconduct*;
- align with the amended Rule 2.3 from the recent Review of the ASCR:
2.3 A breach of these Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority.
- align with Rule 5 (Dishonest and disreputable conduct):
5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:
5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice, or
5.1.2 bring the profession into disrepute.

Following consultations with its Constituent Bodies and the development of the NAP, in December 2020 Law Council Directors endorsed the following proposed reformulation of Rule 42:

42. ANTI-DISCRIMINATION AND HARASSMENT

42.1 A solicitor must not in the course of, or in connection with, legal practice, engage in conduct which constitutes:

- 42.1.1 discrimination;
- 42.1.2 sexual harassment;
- 42.1.3 any other form of unlawful harassment; or
- 42.1.4 workplace bullying.

“**sexual harassment**” means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation, including sexual harassment.¹⁵

¹⁵ Conduct relevant to Rule 42 must meet the thresholds imported through the relevant ASCR Glossary definitions. The Glossary definition draws from the federal, state and territory definitions of ‘sexual harassment’, which incorporate thresholds which are some variation of conduct that a *reasonable person* considers would *offend, humiliate or intimidate*. The relevant conduct must meet the thresholds within the Glossary definitions in addition to the thresholds in the balance of the Rule. See also:

- [Equal Opportunity Act 2010 \(Vic\)](#) – Section 92;
- [Equal Opportunity Act 1984 \(WA\)](#) – Section 24 (repeated in Sections 25 and 26);
- [Equal Opportunity Act 1984 \(SA\)](#) – Section 87;
- [Anti-Discrimination Act 1991 \(QLD\)](#) – Section 119;
- [Anti-Discrimination Act 1998 \(Tas\)](#) – Section 17;
- [Anti-Discrimination Act 1977 \(NSW\)](#) – Part 2A;
- [Anti-Discrimination Act 1992 \(NT\)](#)- Section 22; and
- [Discrimination Act 1991 \(ACT\)](#)- Section 58.

The Law Council considers that the above reformulation clarifies that conduct occurring outside the legal practice workplace, but which is nevertheless connected to the practice of law, can be regarded as conduct that falls short of the standards of competence and diligence that a member of the public is entitled to expect of a lawyer.

The above reformulation is also proposed to afford regulators greater discretion to sanction problematic behaviour as is appropriate in the circumstances of a particular case. The Law Council considers that regulators should also have the appropriate range of disciplinary avenues available to them, so that they can properly and fairly address the various degrees of conduct that may arise.

The Law Council hopes that by affording regulators an appropriate range of remedies, problematic behaviour will be deterred earlier, and that this amendment will send a clear message to the profession that all forms and degrees of sexual harassment are unacceptable.

The Law Council also proposes to provide further guidance to the profession regarding Rule 42 and sexual harassment through an expanded *Commentary* to the ASCR.¹⁶

Consultation questions

The Law Council would appreciate receiving views on:

1. Does the proposed Rule adequately address the issues identified in this paper?
2. Does the proposed Rule adequately address sexual harassment occurring in the context of the legal profession?
3. Does the inclusion of the phrase “*in connection with, legal practice*” adequately capture the regulatory gap discussed in this paper?
4. Is the word “unlawful” in Rule 42.1.3 unnecessary given the wording of the Glossary definition?
5. Is the reference to “including sexual harassment” in the Glossary definition required, given the wording of Rule 42.1.2?
6. Are there any circumstances related to the application of the proposed revised Rule 42 that might be usefully addressed in *Commentary* to the proposed Rule?

¹⁶ The Law Council’s *Commentary* to the ASCR provides further guidance to and explanation of the application of the ASCR in practice.