

**Review of  
Sexual Harassment  
in Victorian Courts**

Preventing and Addressing  
Sexual Harassment in  
Victorian Courts and VCAT

**Appendix 4:**

**Review to Address Sexual  
Harassment in Courts and  
Law Memorandum**

Fiona McLeod AO SC  
FEBRUARY 2021

**REVIEW TO ADDRESS SEXUAL HARASSMENT IN COURTS AND LAW  
MEMORANDUM OF ADVICE**

1. I have been asked to advise the Review to Address Sexual Harassment in Courts and Law (**Review**) Advisory Committee in relation to certain issues concerning the application of sexual harassment laws to judicial officers. These questions have been refined after a conference of 11 December, 2020.
2. I am asked to advise on:
  - a. the application of ss 15, 93, 94, 99, 105 and 109 of the *Equal Opportunity Act 2010* (Vic) (**EO Act**) in the context of sexual harassment by judicial officers;
  - b. the application of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) to sexual harassment by judicial officers; and
  - c. the application of the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**) to sexual harassment by judicial officers.

3. In summary, in my opinion:

***EO ACT***

- a. It is unlikely that sections 93 or 99 of the EO Act will ordinarily apply to the conduct of a judicial officer.
- b. Whilst there is scope for section 94 of the EO Act to apply to the conduct of a judicial officer, such application is limited to sexual harassment occurring in a workplace of both parties.
- c. A breach of the EO Act may expose a person with knowledge of the essential elements of the conduct to a breach of s105 of the EO Act.
- d. A breach of the EO Act is unlikely to expose the Courts or relevant government department employer to vicarious liability under s109.
- e. There is an obligation upon an employer to take reasonable and proportionate steps to eliminate sexual harassment under s15.
- f. The Review should consider supporting the proposal of the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) relating to own motion investigations.
- g. The Review may recommend an amendment to the EO Act to expressly capture sexual harassment by a judicial officer. Alternate options for amendment are set out in Attachment A.

***CHARTER***

- h. The Charter of Human Rights and Responsibilities Act is unlikely to apply to sexual harassment by judicial officers for several reasons including that judicial officers are

unlikely to be public authorities; they are likely to be acting privately; and further, it is uncertain that sexual harassment falls within a right protected by the Charter.

### ***OHS ACT***

- i. A judicial officer is likely to be a person with requisite management and control over the activities of a worker in the workplace under the OHS Act.
  - j. The OHS Act could, in theory, be amended to clarify the application of the Act to sexual harassment by judicial officers although it would need to single out the management and control of judicial officers. Such specific focus is feasible but not consistent with the scheme of the legislation. A draft amendment is noted in Attachment A.
4. I am asked additional questions concerning judicial immunity. In short, judicial immunity is unlikely to apply to a case of sexual harassment except in very limited circumstances, although the immunity may present an initial procedural hurdle in terms of a challenge to proceeding under both the EO Act and the OHS Act.
  5. Regardless of findings under either the EO Act or the OHS Act, the conduct may form the subject of a complaint to the Judicial Commission Victoria (JCV).

### ***General Observations***

6. Research indicates sexual harassment within the justice system, including by judicial officers, is prevalent.<sup>1</sup> In this context, the Review is examining sexual harassment in Victorian Courts involving judges, VCAT members and magistrates, Court Services Victoria employees and those working in Court and Tribunal precincts.
7. The Review is conscious of judicial independence and the need to navigate claims of judicial immunity of judicial officers while protecting the interests of those working with and for judicial officers.
8. Judicial independence is a foundation of our justice system and the constitutionally enshrined separation of powers. Judges are not ‘employed’ but rather, Supreme Court justices are appointed by the Governor by commission on the advice of the executive council. The commission of a judge continues, relevantly, until retirement, resignation or by removal from office pursuant to s77(4)(aaa) of the *Constitution Act (Vic)* (**Constitution**). Different provisions relate to reserve judges and other judicial officers. Although magistrates and VCAT members are not appointed by commission, nevertheless the principle of non-interference extends to them also protecting them against executive interference in the discharge of their duties.<sup>2</sup>

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<sup>1</sup> Law Council of Australia, *National Attrition and Re-engagement Study* 2014; VEOHRC *Changing the rules: the experiences of female lawyers in Victoria* 2012; International Bar Association *Us Too? Bullying and Harassment in the Legal Profession* 2019; Victorian Legal Services Commissioner *Sexual Harassment in the Victorian Legal Sector 2019 study of legal professional and legal entities* 2020.

<sup>2</sup> *Kable v Director Public Prosecutions (NSW)* (1966) 189 CLR 51; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163; *Cornack v Fingelton* [2002] QSC 391 [34]; *Carmody v Information Commissioner* [2018] QCATA 14 [47]-[48].

9. S87AAB of the Constitution provides for the removal from office of a judicial officer on the presentation to the Governor of an address from both Houses of the Parliament agreed to by a special majority in the same session for ‘proved misbehaviour or incapacity’. Such resolution depends upon the finding of an investigating panel of facts that could amount to proved misbehaviour or incapacity such as to warrant removal of the judicial officer from office. S87AAB(4) provides:

Except as provided by this Part, no holder of a judicial office can be removed from that office

10. As contemplated by s87AAB(2), the JCV has the power to receive, investigate and refer complaints against judicial officers. It may also make guidelines regarding the standards of ethical and professional conduct and general standards of appropriate conduct expected of judicial officers and non-judicial members of VCAT<sup>3</sup>. It is governed by the heads of jurisdiction and non-judicial members.
11. The JCV must dismiss a complaint if satisfied, inter alia, the matter relates to conduct alleged to have taken place before appointment or where the matter relates to the ‘private life’ of the officer concerned which could not be reasonably considered to affect the performance of the officer’s functions or suitability to hold office.<sup>4</sup> The head of jurisdiction has a power to counsel the judicial officer and make recommendations concerning future conduct or otherwise refer the matter to the Attorney General.<sup>5</sup>
12. While there is nothing to prevent an inquiry into sexual harassment by a judicial officer being investigated and referred by the JCV, it is not clear whether it would do so without a complaint having proceeding first to VEOHRC and then to VCAT for determination.
13. It is also unclear whether sexual harassment relates to the private life of a judicial officer which could not be reasonably considered to affect the judicial officer’s performance or suitability to hold office. As unlawful sexual harassment may be constituted by a range of unwelcome sexual behaviours,<sup>6</sup> and there is uncertainty concerning the requisite workplace relationship or connection as discussed below, there appears to be scope for the JCV to dismiss a complaint despite being satisfied unlawful conduct has occurred.
14. The JCV website discloses that it has in recent times recommended action by judicial officers in respect of allegations of bullying and non-disclosure of personal interest. In respect of the first of these matters, the recommendation that a judicial officer undertake training was accepted.
15. I am unaware of any instance of referral of a judicial officer in Victoria to the Attorney General for removal on the grounds of misbehaviour constituted by sexual harassment.
16. As noted, the heads of jurisdiction have limited powers to discipline judicial officers within their Courts. The Chief Justice has rank and precedence above other judges of the Court, and certain administrative duties, but in other respects is a ‘first amongst equals’.<sup>7</sup> Likewise the President of the Court of Appeal, the Chief Judge of the County Court, the President of

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<sup>3</sup> s87AAL Constitution.

<sup>4</sup> s16(3) JCV Act.

<sup>5</sup> S115 *Judicial Commission of Victoria Act*.

<sup>6</sup> S92 of the *Equal Opportunity Act*.

<sup>7</sup> *Supreme Court Act* s28AAA.

VCAT, Chief Magistrate, Coroner and Chief Judge of the Children’s Court similarly have no powers of discipline.<sup>8</sup> There may be limited power to control the allocation of cases to the judicial officer and provide directions concerning education, but it is generally accepted that there is no power in a head of jurisdiction to suspend, fine, censure or otherwise penalise a judicial officer for misconduct.<sup>9</sup>

17. Judicial immunity is closely linked to the notion of judicial independence and may protect a judicial officer from a complaint under protective legislation. In order to attract the immunity, the judicial officer must be acting in a judicial capacity or performing administrative duties associated with that capacity. Conduct of a private nature – such as the commission of an offence or unlawful conduct such as sexual harassment would ordinarily not attract judicial immunity depending upon the context of the conduct.
18. In general terms, judicial officers are subject to the operation of the criminal law and other Acts proscribing unlawful behaviour. Judicial immunity does not render lawful an unlawful act or transform a private act into a judicial act as discussed below.<sup>10</sup>
19. The challenge therefore is to protect the rights and dignity of individuals working for or with judicial officers who are subjected to sexual harassment. In some cases, those individuals will not be employed by the judicial officers but will be working at their direction and largely subject to their control as is the case with associates. In other cases, they will be Court staff, those conducting litigation or socialising with judicial officers including barristers and solicitors.

## ***A. The EO Act***

20. The EO relevantly provides:

### **93 Harassment by employers and employees**

- (1) An employer must not sexually harass—
  - (a) a person seeking employment with that employer; or
  - (b) an employee of that employer.
- (2) An employee must not sexually harass—
  - (a) another person employed by his or her employer; or
  - (b) his or her employer; or
- (c) a person seeking employment with his or her employer.

...

### **94 Harassment in common workplaces**

- (1) A person must not sexually harass another person at a place that is a workplace of both of them.
- (2) For the purposes of this section it is irrelevant—

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<sup>8</sup> *County Court Act* s8E, *Magistrates Court Act* s12A, *Coroners Court Act* s95A, *VCAT Act* s 30 noting broader powers for the Chief Magistrate and President of VCAT. The head of jurisdiction may, however, direct judicial officers participate in professional development or education: s28A *Supreme Court Act 1986*; s17AAA *County Court Act 1958*; s13B *Magistrates’ Court Act 1989*; s108 *Coroners Act 2008* and s38A *VCAT Act 1998*.

<sup>9</sup> The Council of Chief Justices of Australia and New Zealand have established a Guide to Judicial Behaviour. The guidelines urge judicial officers to observe standards of integrity and personal behaviour and offers guidance, but they are not enforceable.

<sup>10</sup> As to limitations of the immunity and vicarious liability for the conduct of judicial officers see *Towie v State of Victoria* (2008) 19 VR 640 (*Towie*).

- (a) whether each person is an employer, an employee or neither; and
  - (b) if they are employees, whether their employers are the same or different.
- (3) In this section **workplace** means any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment.

**99. Harassment in the provision of goods and services**

- (1) A person must not sexually harass another person in the course of providing, or offering to provide, goods or services to that other person.
- (2) A person must not sexually harass another person in the course of receiving or selecting goods or services provided by that other person.
- (3) This section applies whether or not the goods or services are provided or received for payment

21. Section 93 of the EO Act prohibits harassment by “employees” and “employers”. The definition of “employee” contained in section 4 of the EO Act might arguably capture a judicial officer in the case of an officer appointed to a statutory office namely, a Magistrate or non-judicial member of VCAT. Other judicial officers will not be caught by the definition.
22. Likewise, the definition of “employer” contained in section 93 is unlikely to apply to a judicial officer in ordinary circumstances. Personal staff of judicial officers are not employed by them, although they are typically subject to their direction and control. An exception may arise for a retired judicial officer appointed to office, for example, as a member of a Board of Inquiry or Royal Commissioner.
23. As a consequence, section 93 of the EO Act is unlikely to apply to many judicial officers.
24. Section 94 of the EO Act operates irrespective of the employment status of the relevant individuals providing the harassment occurs in a workplace of both parties.
25. This section may therefore not extend to all places where harassment may occur. This will depend on the meaning breadth of the term ‘workplace’, and establishing that both persons are attending a place to carry out functions in relation to work.
26. A workplace, as defined by the equivalent Commonwealth legislation is ‘a place at which a workplace participant works or otherwise carries out the functions in connection with being a workplace participant.’<sup>11</sup> In *Erwin v Vergara (No 3)*, Bromberg J emphasised that the sections are ‘cast in wide terms’:<sup>12</sup>

A ‘workplace’ is not confined to the place of work of the participants but extends to a place at which the participants work or otherwise carry out functions in connection with being a workplace participant. ... That wide approach recognises that work or work based functions are commonly undertaken in a wide range of places (including on various means of transport) beyond the principal or ordinary place or places of work ... Such places would commonly include the premises of clients, suppliers, associated businesses, conference halls and other venues where work functions are held and in transportation vehicles during work related travel. The underlying policy objective is accommodated by such a construction and such a construction is also consistent with the scope of the other subsections of s 28B. ... The objective of eliminating sexual harassment in the workplace would be significantly undermined if associated common areas such as entrances, lifts, corridors, kitchens and toilets were construed as falling beyond the geographical scope intended by s 28B(6).<sup>13</sup>

<sup>11</sup> S28B(7) of the Sex Discrimination Act.

<sup>12</sup> *Erwin v Vergara (no 3)* [2013] FCA 1311; [2013]238 IR 118

<sup>13</sup> At 129-130.

27. Places that have fallen within this broad definition of workplace include: <sup>14</sup>

- a hotel attended to continue a discussion begun at the principal workplace;
- a motel bedroom where the employer provided the accommodation;
- a motel suite where the employee was convinced the trip was a work trip; and
- a street, taxi and office used to travel and attend to clients.

28. In *Comcare v PVYW*, a worker's compensation matter considering whether an injury was compensable because it arose 'out of or in the course of employment', the High Court said:<sup>15</sup>

...the employer's inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity, is effectively the source of the employer's liability, the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. It is to be inferred from the factual conditions stated in *Hatzimanolis* that for an injury to be in the course of employment, the employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs.

29. Accordingly, it is possible that the concept of a "workplace" will capture a hotel, if the judicial officer and employee were on circuit, for instance, and may also include online activity and "approved" functions to the extent that attendance at those social or educational functions is encouraged.

30. There are any number of possible situations that may fall within the definition of a workplace in this context – activity in the Court precinct, in judges' chambers and in Court would clearly be consider a workplace. Activities conducted online or outside Court when travelling for work, attending a view, mediation, circuit sittings, judges' meetings or conference sessions for example, will likely also be caught. Potentially attendance at professional social events will not captured unless it can be shown the attendance is a performance of work functions.

31. The operation of s 99 of the EO Act depends upon whether or not a service is offered or has been provided. It is unlikely that the functions of a judicial officer will be considered a "service" provided or offered to another person for the purposes of s99(1). In *IW v The City of Perth*, <sup>16</sup> the Court found there is a difference between activities which involve providing a "service" and those involving the performance of a "duty". Whilst those two concepts may overlap, not every process or activity will be a "service" and it is difficult to see how a judicial officer could be viewed as providing or offering a service to the other person.

32. While the conduct of Court staff and contractors performing their duties may be considered a 'service', s99(2) requires that the service be 'received' or 'selected' by the judicial officer. If the services are delivered or offered for selection through an employer, such as the Court or government department, it is uncertain but unlikely this provision applies.

33. Thus, it is unlikely that either sections 93 or 99 of the EO Act will apply to the conduct of a judicial officer. Whilst there is scope for section 94 of the EO Act to apply, such application is limited to conduct in a workplace.

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<sup>14</sup> *Erwin v Vergara* (no 3) above n11; *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402; *Cross v Hughes* (2006) 233 ALR 108.

<sup>15</sup> *Comcare v PVYW* [2013] HCA 41 at [35].

<sup>16</sup> (1997) 191 CLR 1.

### ***Judicial Immunity***

34. In light of the potential application the EO Act to the conduct of a judicial officer, my instructors have also sought advice as to whether there are any limitations on the extent to which those obligations could be enforced against a judicial officer.

35. The Supreme Court Act provides:

#### **S24D Immunity and protection of Judge of Court extends to administrative functions**

Without limiting any other law, whether written or unwritten, the immunity and protection that a Judge of the Court has in the performance of his or her duties as Judge extends and applies to the performance or exercise of an administrative function or power conferred on the Judge or on the Court by or under any Act or any other law.

Sections 24E and 24F extend the immunity to Associate Judges and other specified officers.

36. S9A of the County Court Act and s14 (and s24 in the case of registrars) of the Magistrates Court Act provide for the immunity in similar terms.

37. In *Tomie*, the Court held that judicial immunity protected the relevant judicial officers from a claim under the EO Act for acts done that are subject to the immunity.

Kyrou J said at [13] –[16] -

13. .... Correctly interpreted, the effect of s24 is that the principal registrar, a registrar and a deputy registrar have, in respect of their duties in that position, the same degree of protection and immunity as a Supreme Court Judge has in respect of his or her duties. The protection or immunity relates to all the duties of the principal registrar, registrar or deputy registrar, not only to some of them. But **the protection and immunity only applies to the person when performing the duties of the relevant office – not when acting in some private or unofficial capacity.**

14. The protection or immunity which a Supreme Court Judge has in performing his or her duty as a Judge is protection from civil suit in relation to hearing or determining a case in respect of which the court has general authority and where the Judge has a bona fide belief that there is jurisdiction to hear and determine the matter. The protection or immunity, then, is from civil suit.

15. The rationale for the protection and immunity given to a Supreme Court Judge applies equally to the protection and immunity given to these court staff when carrying out their official duties. It is given so that official duties can be carried out with independence and without fear. I cannot see why the same protection and immunity should not apply to these court staff in respect of claims under the EO Act, and for the same rationale.

16. Since under s24 of the Magistrates' Court Act the relevant court staff have a protection or immunity from claims under the EO Act, those staff cannot breach the EO Act, and the State cannot be vicariously liable for such a breach.

And at [56] – [57], [59] – [60], [62]

56 I do not accept Mr Nash's submission that the immunity available to registry staff under s 24 of the MC Act is confined to conduct in the performance of judicial duties and duties which directly relate to the exercise of judicial duties. **It extends to conduct in the performance**

**of all their duties irrespective of whether they are characterised as judicial, administrative or otherwise**

57 I also do not accept Mr Nash's submission that the immunity of registry staff is confined to the lawful performance of their duties. **The immunity extends to all conduct in the performance of the duties of the registry staff, whether or not such conduct is in breach of the court rules or any other law.**

...

59 ... A judge of a superior court is immune from suit in respect of acts done in the performance of judicial duties and administrative **functions intimately associated with judicial duties.** From the cases cited above, it is clear that the immunity is an immunity from being personally sued and being held personally liable. The immunity also extends to protect a judge from being compelled to disclose any aspect of his or her decision-making process (but not the record upon which the judge acted insofar as it does not reveal any aspect of the decision-making process). Further, the immunity extends to the revelation, by whatever means (such as the evidence of another person or a subpoena to produce the judge's notes), of any aspect of the judge's decision-making process.

60 The State cannot be vicariously liable for a judge's or other judicial officer's acts falling within the immunity. This is not because the judge's immunity extends to the State. Rather, it is because judicial officers, in performing acts falling within the immunity, are not acting as employees or agents of the State but as independent judicial officers.

...

62 None of the cases on judicial immunity that have been referred to me have stated that the principle has the effect of converting an act which, in the absence of the immunity, would be a breach of the law, into an act that is not in breach of the law.

(emphasis added)

38. The exercise of judicial duties and functions is likely to capture the work of judicial officers in Court, online or in chambers, including undertaking research and preparation of judgments, on circuit, attending educative programs or other related administrative duties.

39. However, the immunity is not likely to protect the judicial officer, even in those settings, from proceedings for unlawful conduct including sexual harassment. It is difficult to imagine a situation where a judicial officer might successfully claim that they were performing judicial duties or functions whilst sexually harassing another person except in a contextual sense, as in the case of unwelcome sexual conduct by way of staring or leering, suggestive comments, questions or jokes, or comments about a person's body for example.

40. Even if the immunity does apply to conduct which might be said to contravene the EO Act, it was held in *Towie* that the immunity does not negate the existence of a contravention of a law. That is, the behaviour will remain unlawful, regardless of whether or not the remedies under the EO Act are available. As such, an allegation of a contravention of the EO Act will permit a complaint to be made to the JCV.

#### ***Liability of Person who authorises or assists***

41. I am asked to consider the operation of ss 105 or 109 of the EO Act.

42. The EO Act provides:

**105 Prohibition of authorising or assisting discrimination**

A person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 4 or 6 or this Part

**106 Liability of person who authorises or assists**

If, as a result of a person doing any of the things specified in section 105, the other person contravenes a provision of Part 4 or 6 or this Part, a person may—

- (a) bring a dispute to the Commission for dispute resolution; or
- (b) make an application to the Tribunal—

against either the person who authorises or assists or the person who contravenes a provision of Part 4 or 6 or this Part or both of those persons

**109 Vicarious liability of employers and principals**

If a person in the course of employment or while acting as an agent—

- (a) contravenes a provision of Part 4 or 6 or this Part; or
- (b) engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of Part 4 or 6 or this Part—

both the person and the employer or principal must be taken to have contravened the provision and a person may bring a dispute to the Commission for dispute resolution or make an application to the Tribunal against either or both of them.

43. Section 105 of the EO Act does not depend upon an employer/employee relationship. Thus, there is scope for a third party, including the employer of Court personnel, to be held liable for contravening conduct of a judicial officer.

44. In order to breach s105, there must be a positive act or, at least, sufficient knowledge of essential elements of the conduct in order to constitute constructive authorisation or assistance. Thus, in order to be responsible for the conduct of a judicial officer, it seems likely that:

- a. an employer must at least be aware of the ‘essential facts’ that constitute the contravention, and
- b. must do something prior to the contravention occurring that encourages or otherwise induces the person doing the relevant act; and/or
- c. in cases of inaction, there must be a reasonable expectation that the employer would, in fact, take some action.<sup>17</sup>

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<sup>17</sup> I am unaware of any binding authority on the operation of s105, however, I note the decisions of Deputy Presidents of VCAT and the Victorian Anti-Discrimination Tribunal consistent with this interpretation as detailed by my instructors in my Brief.

45. As my instructors note, the primary conduct which is ‘authorised’ must itself contravene the EO Act.<sup>18</sup> Therefore, there must be a primary contravention of the EO Act by a judicial officer, before any employer could be exposed to liability under s106.
46. While a person may be directly liable under s106 as a person who authorises or assists a contravention, a finding of vicarious liability under s109 depends upon conduct in ‘the course of’ an employment relationship between the agent/judicial officer and the principal. The nature of judicial appointment by commission noted above would appear to preclude a finding of vicarious liability.

### ***Duty to Eliminate Discrimination, Sexual Harassment***

47. Section 15 of the EO Act provides:

#### **Duty to eliminate discrimination, sexual harassment or victimisation**

- (1) This section applies to a person who has a duty under Part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation.
  - (2) A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.
  - (3) Part 8 does not apply to a contravention of the duty imposed by subsection (2).
  - (4) A contravention of the duty imposed by subsection (2) may be the subject of an investigation undertaken by the Commission under Part 9.
  - (5) The duty imposed by subsection (2) is in addition to—
    - (a) a duty under Part 4, 6 or 7; and
    - (b) in the case of a person who is a public authority, a duty under section 38 of the Charter of Human Rights and Responsibilities.
  - (6) In determining whether a measure is reasonable and proportionate the following factors must be considered—
    - (a) the size of the person's business or operations;
    - (b) the nature and circumstances of the person's business or operations;
    - (c) the person's resources;
    - (d) the person's business and operational priorities;
    - (e) the practicability and the cost of the measures.
48. Thus, the section applies to a person who has a duty under Part 4, 6, or 7 of the Act not to engage in conduct including sexual harassment. While sexual harassment has been considered to be a form of gender discrimination, for the purposes of this advice I have considered that Part 6 is the relevant Part in this context.
49. Section 15 requires a person who has a duty not to engage in sexual harassment to take reasonable and proportionate measures to eliminate that conduct, including conduct in breach of s94. This requirement extends to the employer of Court personnel and exists regardless of the operation of judicial immunity.

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<sup>18</sup> See *Weber v Deakin University* [2014] VCAT 1440; *Djime v Kearns (No 2)* [2015] VCAT 2055; *Cobaw* [2014] VSCA 75.

50. Action to minimise or eliminate a breach of the Act need to be reasonable and proportionate to the size of the operations, the nature and circumstances of operations, resources and operational priorities and practicality but it is not required to do everything possible. What is judged to be reasonable and proportionate however, may also be informed by knowledge of past events, likelihood of breach and seriousness of consequences.
51. Practically, this requires a proactive risk-based strategic approach to be undertaken by the Courts and the government as employer of non-judicial Court personnel.

***VEOHRC proposed further enforcement powers***

52. The VEOHRC has recommended that the EO Act be amended to allow it to:
- d. Undertake own-motion public inquiries with consent of the Board (Pt 9, new section);
  - e. Investigate serious matters that indicate a possible contravention of the EO Act (section 217), without the need for a reasonable expectation that the matter cannot be resolved by dispute resolution or VCAT, and with the introduction of a ‘reasonable expectation’ that the matter relates to a class of group of people;
  - f. Compel attendance, information and documents for an investigation of public inquiry without the need for an order from VCAT (sections 129-134); and
  - g. Seek enforceable undertakings and issue compliance notices as potential outcomes of an investigation or a public inquiry (section 139, new sub-section).
53. It is well documented that complainants are reluctant to bring complaints in relation to sexual harassment generally, and particularly so in the case of harassment by judicial officers.
54. In addition to the reluctance of complainants to pursue complaints, there is little in the initial stages of the process to act as a general deterrent. Complaints to VEOHRC and to the JCV proceed to investigation and/or conciliation in private. There is little on the public record, beyond media reports, concerning complaints against judicial officers that might encourage reporting and discourage offending behaviour.
55. With this in mind, there may be a valuable role for own-motion public inquiries to be conducted by VEOHRC and a power to investigate matters that do not meet, individually or as a group, the thresholds concerning prospects of resolution. The role would complement the power in s15 to investigate a contravention of a duty to eliminate sexual harassment as far as possible, would assist in the development of appropriate law reform and reduce the burden upon individual complainants to address systemic reform.
56. Similar recommendations to allow the Australian Human Rights Commission to initiate inquiries to address systemic change have noted the difficulties in addressing pervasive systemic discrimination relying only on a complaints based statutory framework.<sup>19</sup>

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<sup>19</sup> Recommendations of Australian Law Reform Commission 1994 *Equality Before the Law Part 1* Recommendations 3.3 to 3.5; Law Council of Australia *Submission to the Senate Standing Committee on legal and Constitutional Affairs Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equity* 15 August 2008; *Respect@Work: Sexual Harassment National Inquiry Report* Australian Human Rights Commission 2020 Recommendation 19.

### ***Potential Amendments***

57. As noted above, the coverage of the EO Act is not comprehensive.
58. Likewise, the Commonwealth Sex Discrimination Act (**SDA**) does not expressly capture sexual harassment by judicial officers.
59. The Law Council of Australia has recommended amendments to s 105 of the SDA as follows:

#### **SEX DISCRIMINATION ACT 1984 - SECT 105**

##### **Liability of persons involved in unlawful acts**

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 ~~or~~ 2, or 3 of Part II shall, for the purposes of this Act, be taken also to have done the act.

Part 3 of the SDA relevantly is concerned with sexual harassment.

60. Two models for potential adoption in Victorian may be found in the legislation of South Australia and Queensland.
61. The South Australian *Equal Opportunity Act* model of prohibited conduct is similar to the Victorian EO Act in that it addresses work related situations but makes specific provision for judicial officers.

Section 87 of the South Australian Act provides:

- (6a) It is unlawful for a judicial officer to subject to sexual harassment a judicial or non-judicial officer, or a member of the staff, of a court of which the judicial officer is a member.
- (6b) Subsection (6a) does not apply in relation to anything said or done by a judicial officer in court or in chambers in the exercise, or purported exercise, of judicial powers or functions or in the discharge, or purported discharge, of judicial duties (but conduct occurring in such circumstances may be the subject of a complaint under the *Judicial Conduct Commissioner Act 2015*).

62. By comparison, sections 118-120 of the Queensland *Anti-Discrimination Act 1991* provide comprehensive cover making sexual harassment unlawful in all fields of activity.

Section 118 of the Queensland Act provides:

A person must not sexually harass another person.

63. The advantage of such provision is that it would extend the application of the current proscriptions against sexual harassment beyond specified workplace situations to cover all participants in all areas of public life in Queensland.
64. I am not aware of any case of sexual harassment brought under either Act against a judicial officer.

65. In my opinion the Review should recommend an amendment to the EO Act, consistent with the Equal Opportunity Act of South Australia. Proposed amendments to the EO Act are included in Attachment A.

### ***B. The application of the Charter***

66. The purpose of the Charter is to protect and promote certain human rights, relevantly by imposing an obligation on public authorities to act in a way that is compatible with a protected right: s1(2)(c).

67. The Charter has no application in the context of sexual harassment by judicial officers because:

- a. a Court or Tribunal is not a public authority subject to the Charter except when it is acting in an administrative capacity: s 4(1)(j);
- b. while the Charter applies to Courts and Tribunals to the extent they have functions under Part 2 (Human Rights) and Div 3 of Part 3 (Interpretation of Laws), it does not apply generally to the broader conduct of judicial officers;
- c. private acts or decisions of public authorities are expressly excluded from the operation of the Charter: s38(3); and
- d. leaving aside the possible interpretation of the right to equality and non-discrimination, sexual harassment is not expressly noted as a protected right under the Charter: Part 2.

### ***C. The OHS Act***

68. Under the OHS Act and at common law, employers must, so far as is reasonably practicable, provide and maintain a work environment that is safe and without risk to the health of their employees. 'Employees' include independent contractors, as well as employees of the independent contract.

69. Sexual harassment may constitute a breach of the duty to provide a safe workplace. However as far as I am aware, no legislation in Australia includes an express provision defining, preventing or responding to sexual harassment as a workplace health and safety issue.

70. Section 26 of the OHS Act sets out the duties of a person who manages or controls a workplace, as follows:

- (1) a person who (whether as an owner or otherwise) has, **to any extent**, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it area safe and without risks to health.

(emphasis added)

71. The question of ‘control’ in the context of section 26 of the OHS Act has been repeatedly litigated, primarily in relation to independent contractor’s work.<sup>20</sup> Appellate courts have consistently concluded that it is sufficient if a person had a ‘right to control’ the particular matter or activity giving rise to the risk, whether or not control was in fact being exercised.<sup>21</sup> However, it must be actual control over the particular matter affecting safety, rather than a general responsibility for, or control over the workplace.<sup>22</sup> This has often been interpreted to exclude responsibility for the work of specialist contractors (who are not ordinarily susceptible to direction on how to perform their work).<sup>23</sup> Additionally, even if an independent contractor is susceptible to some direction regarding safety measures, it will always be a question of fact and degree as to whether it is reasonably practicable for an employer to exercise such a power of direction.<sup>24</sup>
72. In my view, it is possible that this section may apply to the conduct of a judicial officer. Whilst it will depend upon the precise nature of the particular workplace (noting that different courts have different arrangements in place regarding judicial assistance staff, including associates), it seems that judicial officers have at minimum some degree of control over associates’ workloads and how that work should be undertaken. Whilst associates may also be subject to policies and procedures developed by their actual employer that does not alter the fact that judicial officers also exercise some level of control. In my view, it is not materially different to a situation where a third party contractor may be subjected to requirements of its employer and a head contractor. Both will be exercising a level of control over the contractor.
73. Again, conduct that occurs during the exercise of a judicial duties and functions may attract claims to the protections of judicial immunity, whereas behaviour which occurs outside of formal court hearings or in private, and not in the course of exercising a judicial function, are less likely to attract such claims.
74. As noted above, in my view, a judicial officer engaging in unlawful conduct would not be protected by the immunity regardless of the context of judicial activity.
75. One difficulty is that section 26 of the OHS Act captures conduct which occurs in a “workplace”. As with the EO Act, the definition of “workplace” in the OHS Act is defined to mean a “place, whether or not in a building or structure, where employees or self-employed persons work”. Whilst worded somewhat differently to the provisions of the EO Act, it still requires, in effect, conduct to occur at the place where persons work. Like the EO Act, it does not contemplate non-work environments.
76. Thus, whilst the immunity may not protect a judicial officer from the consequences of conduct that occurs outside of their judicial functions, the conduct itself may also not amount to a contravention of the OHS Act in any event.
77. As with a breach of the EO Act, a breach of the OHS by a judicial officer or conduct of a judicial officer exposing an employer to a complaint of breach of OHS duties may, of itself, found a complaint to the JCV.

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<sup>20</sup> And in particular, in cases where an independent contractor has been injured whilst undertaking work at a third party site, and a prosecution is brought against the third party, rather than the independent contractor itself.

<sup>21</sup> See for example, *Keillor Melton Quarries v The Queen* [2020] VSCA 169; *Baiada Poultry v the Queen* [2012] HCA 14, 246 CLR 92 and *Reilly v Devcon Australia Pty Ltd.* [2008] WASCA 84; 36 WAR 492.

<sup>22</sup> *Reilly v Devcon Australia Pty Ltd.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Baiada.*

78. Irrespective of whether or not a judicial officer will owe a duty under section 26 of the OHS Act, the employer will still owe duties to employees (including contractors), who might be affected by the conduct of a judicial officer.<sup>25</sup> As such, employers will have obligations to the other users of the Court to ensure their health and safety so far as is reasonably practicable, including by ensuring workplaces are free from discrimination and harassment.
79. With this in mind, I have drafted a proposed amendment to the OHS Act to specifically conduct by a judicial officer set out in Attachment A. I note however that this amendment would represent a departure from the otherwise generalised operation of the OHS Act and would thus be inconsistent with general drafting principles and the scheme of the OHS Act.
80. For this reason, my recommendation would be not to amend the OHS Act but, if it was thought desirable to harness the enforcement machinery of the OHS Act, to consider instead introducing a new Chapter into the OHS regulations addressing sexual harassment.



18 December 2020

F McLeod AO SC

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<sup>25</sup> See for examples sections 21 and 23 of the OHS Act.

## ATTACHMENT A

### Proposed Amendments

Amend the **Equal Opportunity Act 2010 (Vic)** by inserting:

#### **102A. Harassment by a judicial officer**

- (1) It is unlawful for a judicial officer to subject to sexual harassment a judicial or non-judicial officer, or a member of the staff, of a court of which the judicial officer is a member.
- (2) Subsection (1) does not apply in relation to anything said or done by a judicial officer in court or in chambers in the exercise, or purported exercise, of judicial powers or functions or in the discharge, or purported discharge, of judicial duties (but conduct occurring in such circumstances may be the subject of a complaint under the *Judicial Commission Act of Victoria (2016)*).

#### **Into s 4**

“court” includes a tribunal

“judicial officer” means a member of a court or tribunal

Alternatively, by inserting:

#### **92A Sexual Harassment**

A person must not sexually harass another person.

And deleting ss93-102.

Amend s26 of the **Occupational Health and Safety Act 2004 (Vic)** by inserting:

#### **26 Duties of persons who manage or control workplaces**

- (2A) A judicial officer may exercise management and control of a non judicial officer, or a member of staff, of a court of which the judicial officer in a member.
- (2B) Subsection (2A) does not apply in relation to anything said or done by a judicial officer in court or in chambers in the exercise, or purported exercise, of judicial powers or functions or in the discharge, or purported discharge, of judicial duties (but conduct occurring in such circumstances may be the subject of a complaint under the *Judicial Commission Act of Victoria (2016)*).

#### **Into s5**

“court” includes a tribunal

“judicial officer” means a member of a court or tribunal