

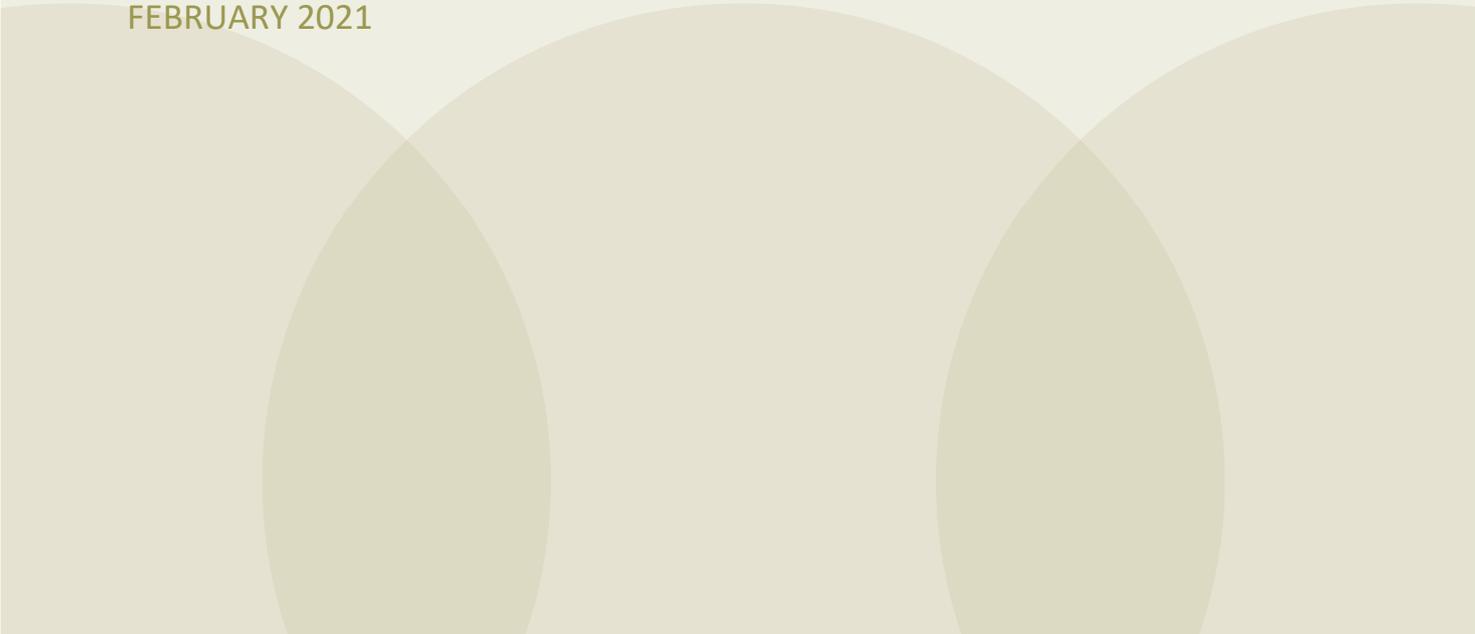
**Review of
Sexual Harassment
in Victorian Courts**

Preventing and Addressing
Sexual Harassment in
Victorian Courts and VCAT

Appendix 5:

**The current legal framework
for preventing sexual
harassment in Victoria**

FEBRUARY 2021



Introduction

Sexual harassment is prohibited in a range of different ways by different laws that apply in different contexts. The main legislation prohibiting sexual harassment in Victoria is the *Equal Opportunity Act 2010* (Vic) (**EO Act**) and *Sex Discrimination Act 1984* (Cth) (**SD Act**). Rather than providing that sexual harassment is unlawful whenever it occurs, these laws only prohibit sexual harassment in certain contexts, primarily in employment, education and the provision of goods and services. The prohibitions on, and remedies for, sexual harassment contained within the EO Act and the SD Act are very similar and operate concurrently. As such, it will often be the case that a victim-survivor may elect which of the two schemes they wish to pursue a matter under.

However, the prohibition on discrimination in employment under the SD Act does not apply in relation to an act committed by an employee of a State or of an instrumentality of a State.¹ Consequently Victorian public servants (including CSV staff) are not able to make a complaint of workplace sexual harassment under the SD Act against their colleagues, and must instead rely on the EO Act or other workplace laws. The SD Act prohibition on harassment in the provision of goods and services does however apply to certain activities by state employees so in some circumstances individuals outside the public service may be able to use the SD Act scheme to seek a remedy for sexual harassment.

The EO Act defines sexual harassment as:

- a person sexually harasses another person if he or she -
 - a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
 - b) engages in any other unwelcome conduct of a sexual nature in relation to the other person -
in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.²

The SD Act provides that, in defined circumstances, it is “unlawful” to sexually harass a person and the EO act similarly provides that in the defined circumstances a person “must not” sexually harass another person.³ These are civil provisions giving rise to civil remedies; sexual harassment, as defined under the SD Act and EO Act, is not a crime. However, conduct that constitutes sexual harassment will sometimes also be a criminal offence. Relevant offences include:

- Assault;⁴
- Sexual assault;⁵
- Assault with intent to commit a sexual offence;⁶
- Procuring sexual act by threat;⁷
- Administration of an intoxicating substance for a sexual purpose;⁸
- Sexual activity directed at another person (for example showing pornography);⁹
- Rape;¹⁰

¹ *Sex Discrimination Act 1984* (Cth) section 13(2). Section 12(1) also provides, “This Act binds the Crown in right of the Commonwealth but, except as otherwise expressly provided by this Act, does not bind the Crown in right of a State.”

² *Equal Opportunity Act 2010* (Vic) section 92. The *Sex Discrimination Act 1984* (Cth) section 28A contains substantively the same definition.

³ *Sex Discrimination Act 1984* (Cth) sections 28B-28L; *Equal Opportunity Act 2010* (Vic) sections 83-102

⁴ *Crimes Act 1958* section 31.

⁵ *Crimes Act 1958* section 40.

⁶ *Crimes Act 1958* section 42.

⁷ *Crimes Act 1958* section 44.

⁸ *Crimes Act 1958* section 46.

⁹ *Crimes Act 1958* section 48.

¹⁰ *Crimes Act 1958* section 38.

- Stalking;¹¹ and
- Using a carriage service to menace, harass or cause offence.¹²

Acts of sexual harassment may also constitute torts such as trespass to the person or intentional infliction of harm. A failure by an employer to take action to prevent or respond to sexual harassment within a workplace may constitute the tort of negligence.¹³ Under the EO Act and SD Act sexual harassment is also analogous to a tort in that the victim-survivor may recover for loss and damage that has occurred as a result of the sexual harassment.

Because the EO Act and SD Act only prohibit sexual harassment in certain circumstances, the nature of the relationship between the perpetrator and victim-survivor of the harassment dictates whether remedies will be available under either law. The significance of other causes of action is that damages may be obtained from a perpetrator even when the sexual harassment is not prohibited by either the EO Act or the SD Act. However, such alternative claims will typically be more legally complex and therefore entail greater legal costs and higher risk.

In addition to the EO Act and SD Act, other employment and occupational health and safety laws also provide a further means of preventing and responding to sexual harassment. Each of the relevant laws is discussed below.

In effect sexual harassment is regulated in the courts because they are a workplace for most court users. For employees and employers this extends beyond sexual harassment within court buildings to contact after hours such as at social events, travelling to and from work and phone calls, text messages and emails after hours.¹⁴ However where the prohibition on sexual harassment arises only because the perpetrator and victim share a workplace, such as a judge and an associate or a barrister and solicitor it is likely that only the harassment occurring within the physical workplace will be covered.

Further, notwithstanding that the prohibitions are created by reference to employment, under the EO Act but not the SD Act, this extends to volunteers and unpaid workers.¹⁵

Sexual harassment laws: Equal Opportunity Act 2010 and Sex Discrimination Act 1984 (Cth)

The Victorian EO Act and the Commonwealth SD Act (together with the *Australian Human Rights Commission Act 1986* (Cth)) create very similar and often overlapping schemes for prohibiting sexual harassment and resolving claims for sexual harassment when it does occur.¹⁶ Under the SD Act, a victim-survivor must make a complaint to the Australian Human Rights Commission, which seeks to conciliate the complaint. If conciliation is unsuccessful, the victim-survivor can then commence proceedings in the Federal Court or Federal Circuit Court. Under the EO Act, a victim-survivor can choose between commencing proceedings directly in VCAT, or seeking conciliation with VEOHRC (if unsuccessful, a victim-survivor can then commence in VCAT).

¹¹ *Crimes Act 1958* section 21A.

¹² *Commonwealth Criminal Code* section 474.17.

¹³ *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* (2007) 71 NSWLR 471 at 478 [25] per Spigelman CJ.

¹⁴ See generally Brook Hely, 'Open All Hours: The Reach of Vicarious Liability in "Off-Duty" Sexual Harassment Complaints' (2008) 36 *Federal Law Review* 173; *Lee v Smith* [2007] FMCA 59.

¹⁵ *Equal Opportunity Act 2010* section 4 definition of 'employee'.

¹⁶ The Australian Human Rights Commission's functions and the complaint mechanisms available to victim-survivors for complaints under the SD Act are set out in the *Australian Human Rights Commission Act 1986*.

The EO Act and SD Act prohibit sexual harassment by both employers and employees within an organisation.¹⁷ Under the EO Act an employee is defined to include anyone employed or engaged under a contract for service, a person employed under the *Public Administration Act 2004* or appointed to a statutory office¹⁸, for example a crown prosecutor.¹⁹ Similarly an employer includes anyone who employs another person under a contract of service.

As well as prohibiting sexual harassment within organisations the EO Act and SD Act also prohibit sexual harassment in common workplaces such as courts even when the perpetrator and the victim-survivor have different employers or are self-employed such as barristers.²⁰ Under the EO Act the 'workplace' is defined broadly to cover:

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.²¹

Even where there is not an employment relationship or a common workplace, sexual harassment is also prohibited in the course of providing, or offering to provide, receiving or selecting goods or services.²² This prohibition applies even if there is no payment for the good or service.²³ So for example, in a client lawyer relationship both the client and the lawyer are prohibited from sexually harassing the other.

Whilst there can be no doubt that legal services provided by private lawyers are a relevant service, the question of whether activities undertaken by the state may amount to the provision of services will depend on the specifics of the services being provided. In the case of the "services" provided by the courts and VCAT it is unlikely that this would apply to judicial officers but it is arguable that it may apply to some ancillary services provided by court staff.

The EO Act also provides that anyone who has a duty not to engage in sexual harassment also has a positive duty to take reasonable and proportionate steps to eliminate sexual harassment as far as possible.²⁴ This means that it is not just employers who are subject to this positive duty but also other employees and those who work in common workplaces where there is no one employer.

Whilst the scope of the EO Act positive duty appears broad, there are significant limitations in enforcing the duty. The EO Act does not invest VCAT with jurisdiction to hear claims from individuals for a breach of the duty.²⁵ However VCAT can hear matters referred to it by VEOHRC following a VEOHRC investigation including matters relating to a breach of the duty.²⁶

¹⁷ *Equal Opportunity Act 2010* section 93; *Sex Discrimination Act 1984* section 28B.

¹⁸ *Equal Opportunity Act 2010* section 3 definition of "employment".

¹⁹ *Public Prosecutions Act 1994* section 31A.

²⁰ *Equal Opportunity Act 2010* section 94; *Sex Discrimination Act 1984* section 28B (6). Note that the extent of the prohibition is more limited than applies to employees.

²¹ *Equal Opportunity Act 2010* section 94(3).

²² *Equal Opportunity Act 2010* section 99; *Sex Discrimination Act 1984* section 28G.

²³ *Equal Opportunity Act 2010* section 99(3).

²⁴ *Equal Opportunity Act 2010* section 15. There is no cognate positive obligation under federal law. The AHRC Respect@Work report recently recommended that an equivalent duty be inserted into the SD Act. See Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian workplaces* (2020) recommendation 17.

²⁵ VCAT lacks jurisdiction to hear an application for a contravention of section 15 because section 15(2) provides that section 122 which gives VCAT jurisdiction to hear and determine applications for alleged contraventions of Parts 4, 6 or 7 of the EO Act does not apply to section 15. See *Collins v Smith (Human Rights)* [2015] VCAT 1029 at [44]-[46].

²⁶ *Equal Opportunity Act 2010* section 139(2)(c).

The EO Act also prohibits anyone from requesting, instructing, inducing, encouraging, authorising or assisting another person to commit sexual harassment.²⁷ If as a result of any request, instruction, inducement, encouragement, authorisation or assistance the other person does commit sexual harassment a person may bring a dispute to the VEOHRC or make an application to VCAT against either or both the perpetrator of the sexual harassment or the person who requested, instructed, induced, encouraged, authorised or assisted the other person to commit the sexual harassment as well as anyone who is vicariously liable for the perpetrator's conduct.²⁸

The equivalent section in the SD Act dealing with the incitement of prohibited conduct does not apply to sexual harassment.²⁹

Workplace laws

All employers are subject to a common law duty of care to provide a safe working environment for their employees. In addition to this the *Occupational Health and Safety Act 2004 (OHS Act)*, provides that, "An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health."³⁰ An employer will breach this duty to provide a safe working environment if the employer fails to:

- maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;
- provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer; or
- provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.³¹

An employer must also ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.³² A breach of these obligations is punishable by a fine of up to \$297,396 for an individual and \$1,486,980 for a body corporate.

It is not just the ultimate employer but also any person who has, to any extent, the management or control of a workplace who must ensure so far as is reasonably practicable that, in relation to matters over which the person has management or control, the workplace and the means of entering and leaving it are safe and without risks to health."³³

The OHS Act also imposes a duty on self-employed persons such as barristers to, "ensure, so far as is reasonably practicable, that persons are not exposed to risks to their health or safety arising from the conduct of the undertaking of the self-employed person." The penalty for a breach of this duty is also a fine of up to \$297,396.³⁴

²⁷ *Equal Opportunity Act 2010* section 105.

²⁸ *Equal Opportunity Act 2010* section 106.

²⁹ *Sex Discrimination Act 1984* section 105 (sexual harassment is in division 3 of part II).

³⁰ *Occupational Health and Safety Act 2004* section 21(1).

³¹ *Occupational Health and Safety Act 2004* section 21(2)(c), (d) and (e).

³² *Occupational Health and Safety Act 2004* section 23.

³³ *Occupational Health and Safety Act 2004* section 26.

³⁴ *Occupational Health and Safety Act 2004* section 24.

The OHS Act also imposes a duty on employees to take reasonable care for their own health and safety and for the health and safety of persons who may be affected by the employee's conduct at a workplace.³⁵

'Workplace' means a place, whether or not in a building or structure, where employees or self-employed persons work, 'Employees' include independent contractors and any employees of the independent contractor and 'health' includes psychological health.³⁶ The effect of the broad obligations created by the OHS Act is that most, if not all, of those who work in the courts will be protected by the duties on either their employer or their workplace colleagues that not only not prohibit sexual harassment but also require them to take reasonable steps to prevent it from occurring.

WorkSafe Victoria recognises that gendered violence (including sexual harassment) is a serious work health and safety issue and has published a guide for employers to assist them meet their obligations. It says:

Sexual harassment is a common and known cause of physical and mental injury. Where there is a risk of work-related sexual harassment causing physical or mental injury employers have an obligation under the OHS Act to control that risk. This obligation is in addition to the obligation of employers under the EO Act.³⁷

It may be that the OHS Act provides a more effective means of enforcing the obligations on various workplace participants to prevent and respond to sexual harassment in the workplace because there are clear enforcement mechanisms for individual breaches of the positive duty through WorkSafe Victoria.

Finally, the *Fair Work Act 2009* (Cth) (**FW Act**) together with an applicable enterprise agreement may also offer a means of preventing and responding to sexual harassment in the workplace. The FW Act provides that:

An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.³⁸

The definition of adverse action includes action that "injures the employee in his or her employment" or "discriminates between the employee and other employees of the employer."³⁹ Whilst there are examples of sexual harassment forming the basis of a claim of adverse action in breach of the FW Act,⁴⁰ it is not clear whether sexual harassment could of itself constitute a breach of the FW Act. However, in addition to the protection against defined types of adverse action the FW Act makes contravention of an enterprise agreement a civil penalty provision.⁴¹ Modern enterprise agreements, including the 2020 Victorian Public Sector Enterprise Agreement, often include clauses relating to sexual harassment and an employer's obligation to prevent it from occurring in the workplace.

³⁵ *Occupational Health and Safety Act 2004* section 25.

³⁶ *Occupational Health and Safety Act 2004* section 5.

³⁷ WorkSafe Victoria, A Guide for Employers: Work-related Gendered Violence Including Sexual Harassment (March 2020) p3, available at <https://www.worksafe.vic.gov.au/resources/work-related-gendered-violence-sexual-harassment>.

³⁸ *Fair Work Act 2009* (Cth) section 351.

³⁹ *Fair Work Act 2009* (Cth) section 342 item 1(c) and (d).

⁴⁰ See for example *Ashby v Commonwealth of Australia (No 4)* (2012) 209 FCR 65.

⁴¹ *Fair Work Act 2009* (Cth) section 50.

The FW Act also contains a prohibition on bullying, which is defined as repeated unreasonable behaviour towards a worker that creates a risk to health and safety.⁴² A worker may commence proceedings in the Fair Work Commission for an order to stop the bullying and the Fair Work Commission may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work.⁴³ Sexual harassment that took the form of sexualised bullying would likely be covered by the FW Act's anti-bullying regime, although would not be applicable in one-off incidents given the requirement for repeated behaviour. Finally, if an employee was terminated because they were sexually harassed in the course of employment and then made a complaint about it, they would likely be able to avail themselves of the protections against unfair dismissal in the FW Act.⁴⁴

Where a person suffers an injury arising out of, or in the course of or due to the nature of, employment include where that injury is attributable to work-related sexual harassment, they may make a claim for compensation under the *Workplace Injury Rehabilitation and Compensation Act 2013* (WIRC Act). To make out a claim, the following must be answered:

- a) whether the alleged sexual harassment took place;
- b) if so, whether the victim-survivor suffered the claimed injury;
- c) if so, whether the incidents that occurred were a cause of the injury; and
- d) if so, whether the injury arose out of or in the course of employment.⁴⁵

At both the Victorian and federal level the law governing workplace sexual harassment is piecemeal. The occurrence of an incident of sexual harassment in a workplace could potentially enliven liability and remedies at common law (in contract and tort), under specific sexual harassment laws (the EO Act and SD Act), workplace health and safety law (OHS Act), employment law (FW Act) and workers' compensation law (WIRC Act). This complexity is yet another barrier to victim-survivors of sexual harassment vindicating their rights.

Sexual harassment in the courts

Sexual harassment by each of the four main court user groups, (judges and magistrates, lawyers, CSV staff, parties and accused persons and witnesses) is covered in different ways by different laws. The rules applying to each are set out below.

Conduct amounting to sexual harassment could also constitute a contempt of court. To be a contempt the conduct must interfere with the administration of justice. The conduct that might amount to a contempt is not fixed and the law of contempt is, "capable of adaptation and expansion to meet fresh needs".⁷² The Review is not aware of any examples of sexual harassment having been held to constitute a contempt and it is noted only as a possibility in the evolution of the law as there is greater recognition of the harmful effects of sexual harassment on court processes.

Judicial officers

⁴² *Fair Work Act 2009* (Cth) section 789FD.

⁴³ *Fair Work Act 2009* (Cth) section 789FC and FF.

⁴⁴ *Fair Work Act 2009* (Cth) section 385.

⁴⁵ See generally *Attanayake v Simplot Australia Pty Ltd* [2019] VSC 387, particularly at [28].

All Victorian judges, magistrates, coroners and VCAT members are appointed by the Governor on the advice of the Government.⁴⁶ Judges are not employees of the state.⁴⁷ Judicial officers are required to carry out their functions independently and are not subject to any direction from the executive.

Judges and magistrates can only be removed from office on the presentation to the Governor of an address from both Houses of Parliament. The address must be agreed to by a special majority on the ground of proved misbehaviour or incapacity following a report from an investigating panel concluding that facts exist that could amount to proven misbehaviour or incapacity such as to warrant the removal of that office holder from office.⁴⁸

Regulating judicial conduct

The SD Act does not apply to conduct by judicial officers in their capacity as judicial officers.

Judicial officers are also not expressly referred to in the EO Act. However, whilst it is unlikely that many of the EO Act prohibitions will apply to judicial officers, the prohibition on harassment within a “workplace”⁴⁹ is likely to apply. This means that conduct in the court precinct, in judges’ chambers and in court as well as certain activities outside court when travelling for work for example whilst on circuit, attending a view, mediation, judges’ meetings or conference sessions is likely to be covered by the prohibition.

Where sexual harassment by a judicial officer in a workplace is prohibited by the EO Act, judicial immunity is not likely to protect a judicial officer from being accountable for sexual harassment perpetrated in their workplace. Sexually harassing another person cannot be part of the performance of judicial duties or functions.

Guidelines for judicial officers’ conduct.

The Australasian Institute for Judicial Administration Guide to Judicial Conduct (**Guide**) was first published in 2002 on the initiative of the Council of Chief Justices of Australia. The Guide has been adopted by the Judicial Commission of Victoria as a guideline under section 134 of the *Judicial Commission of Victoria Act 2016*. However, the Guide is not binding and does not purport to be a code or to lay down fixed rules for judicial conduct.⁵⁰

The Guide covers most aspects of judicial office and sets out the general expectation for judges’ conduct. It provides that judges must not engage in conduct that diminishes public confidence in and respect for, the judicial office.⁵¹ In relation to staff the Guide notes that judges should treat staff “courteously and considerately” and that they “should be mindful that court staff may feel unable to differ from the judge.”⁵²

The Guide was amended in 2020 to specifically address sexual harassment. The amendment states:

⁴⁶ See section 75B (2) of the *Constitution Act 1975* (Vic). County Court Judges are appointed pursuant to the *County Court Act 1958*, s 8(1). Magistrates are appointed pursuant to s 7 of the *Magistrates’ Court Act 1989*. Coroners are appointed under section 94 of the *Coroners Act 2008*.

⁴⁷ Both the Victorian Supreme Court and the High Court have stated unequivocally that judges are not employees of a State, *Re Australian Education Union; Ex Parte Victoria* (1995) 184 CLR 188 at 233; *Austin v The Commonwealth* (2003) 215 CLR 185 at 219 [28] per Gleeson CJ; *Towie v State of Victoria* (2008) 19 VR 640 at 656 [60].

⁴⁸ *Constitution Act 1975* section 87AAB.

⁴⁹ *Equal Opportunity Act 2010* section 94.

⁵⁰ A copy of the JCV guideline is available at <https://www.judicialcommission.vic.gov.au/publications/guidelines>.

⁵¹ Guide at 2.3.

⁵² Guide at 5.16.

*Judges must conform to the standard of conduct required by law and expected by the community. They must treat others with civility and respect in their public life, social life and working relationships. It goes without saying that Judges must not engage in discrimination or harassment (including sexual harassment) or bullying. In relation to these matters, Judges must be particularly conscious of the effect of the imbalance of power as between themselves and others, especially their Chambers staff, Court staff and junior lawyers.*⁵³

CSV and other public sector staff

All CSV staff (including contactors such as court security officers) and other public sector staff, All CSV staff (including contactors such as court security officers) and other public sector staff, including crown prosecutors, Office of Public Prosecutions solicitors and Victoria Legal Aid solicitors are subject to the EO Act. In addition most public sector employees (but not judges, magistrates, coroners, the Solicitor-General, Director of Public Prosecutions or crown prosecutors⁵⁴) are subject to the *Public Administration Act 2004 (PA Act)* which sets out the “public sector values” and requires Victoria public servants to comply with the code of conduct.⁵⁵ The code of conduct provides not only that public servants must comply with laws relating to sexual harassment but also that they are expected to “create an environment that is free of discrimination, harassment and bullying”⁵⁶ and “report to an appropriate authority workplace behaviour that violates any law, rule or regulation.”⁵⁷

The 2020 VPS Enterprise Agreement (**2020 EA**), which covers CSV employees as well as other public sector employees who work in the courts, contains three clauses relevant to sexual harassment. These clauses primarily relate to the employers’ obligations to create safe workplaces that are free from discrimination and capable of responding to “negative workplace behaviour”. In particular the 2020 EA requires the public sector to:

- strive to create a diverse workforce and an environment that recognises, values, utilises and reflects the diverse society in which we live; and
- act in accordance with its obligations under:
 - the Equal Opportunity Act 2010 (Vic), and
 - the Victorian Charter of Human Rights and Responsibilities and
 - the Gender Equality Act 2020 (Vic).⁵⁸

Whilst the 2020 EA draws attention to the particular issues, articulates a process for systemic complaints to be made under the *Gender Equality Act 2020* and sets aspirational aims for improvements, it does not create any additional obligations for the prevention of sexual harassment or remedies for instances of sexual harassment.

The other significant public sector court user group is Victoria Police officers. Victoria Police officers including police prosecutors are also subject to the EO Act but are not subject to the PA Act.⁵⁹ Their

⁵³ AIIA Guide to Judicial Conduct, 2020, p 9

⁵⁴ *Public Administration Act 2004* section 106.

⁵⁵ *Public Administration Act 2004* section 61 provides for the Victorian Public Sector Commissioner to publish a code of conduct based on the public sector values that is “binding on any public official or class of public official to whom it applies.” Subsection (6) then provides that, “A contravention of a code of conduct by a public official who is bound by the code is capable of constituting misconduct.” In the case of contractors such as court security officers the provisions of the code of conduct are incorporated into the contract for services.

⁵⁶ Code of Conduct clause 6.4.

⁵⁷ Code of Conduct clause 3.6.

⁵⁸ Additionally, clause 28 deals with gender pay equity and Gender Equality Action Plans under the *Gender Equality Act 2020*. Clause 74 sets out aspiration goals for preventing and managing negative workplace behaviour, including by raising awareness of workplace duties and ensuring supervisor and manager capability to prevent and manage negative workplace behaviour.

⁵⁹ *Public Administration Act 2004* section 106.

conduct is governed by the *Victoria Police Act 2013* and the Chief Commissioner's instructions.⁶⁰ Victoria Police officers have a common law duty to prevent and detect crime.⁶¹ They also have an obligation to report conduct that they believe constitutes misconduct by other police officers.⁶² However, a victim-survivor (or their spouse or domestic partner) of sexual harassment does not have to report the harassment.⁶³

Lawyers

In addition to the EO Act and the SD Act which will only apply in certain circumstances,⁶⁴ all Victorian lawyers are subject to the binding conduct rules⁶⁵ for either solicitors or barristers. These rules explicitly prohibit sexual harassment.⁶⁶ The conduct rules provide that a lawyer must not engage in conduct which is:

- (a) dishonest or otherwise discreditable;
- (b) prejudicial to the administration of justice; or
- (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.⁶⁷

Under the heading *Anti-Discrimination and Harassment*, the rules also provide that a lawyer must not in the course of practice, engage in conduct which constitutes:

- (a) discrimination,
- (b) sexual harassment, or
- (c) workplace bullying.⁶⁸

In addition to the conduct rules, Office of Public Prosecutions, Victoria Legal Aid and all other government employed solicitors are also subject to the PA Act and the public sector code of conduct discussed above.

As part of the court's inherent power and authority over the conduct of its own officers the court has jurisdiction to discipline lawyers for breaches of the various common law duties owed to the court.⁷¹ Whilst there does not appear to be any cases indicating that the jurisdiction could be directly applicable to cases of sexual harassment, in the event that the harassment had an adverse effect on a specific proceeding then it is possible that the Court would have jurisdiction to both remedy the prejudice and potentially also to take some action against a practitioner.

Parties, accused persons and witnesses in court proceedings

⁶⁰ *Victoria Police Act 2013* section 60.

⁶¹ *DPP (Vic) v Zierk* (2008) 184 A Crim R 582 at [18].

⁶² *Victoria Police Act 2013* section 167(3).

⁶³ *Victoria Police Act 2013* section 167(3A).

⁶⁴ Note that there is some uncertainty about the extent of the operation of SD Act, The Law Council of Australia position is that the SD Act, "may not apply to sexual harassment that occurs between witnesses and lawyers; lawyers and judicial officers or court staff; solicitors and barristers; or between barristers." See Law Council of Australia, National Action Plan for Addressing Sexual Harassment in the Legal Profession (December 2020) at [27], available at https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf

⁶⁵ See *Legal Profession Uniform Law Application Act 2014* Schedule 1 Legal Profession Uniform Law sections 420 and 423.

⁶⁶ Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and Legal Profession Uniform Conduct (Barristers) Rules 2015.

⁶⁷ Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 rules 4 and 5; Legal Profession Uniform Conduct (Barristers) Rules 2015 rule 8.

⁶⁸ Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 rules 42; Legal Profession Uniform Conduct (Barristers) Rules 2015 rule 123.

Wherever a party to court proceedings has retained or been provided with a lawyer, the conduct between the lawyer and client will be subject to either or both the *EO Act* and the *SD Act*.

Whether the *EO Act* and the *SD Act* will apply to conduct between a party and the opposing party will depend upon whether the individuals involved are present as part of their employment or business or as individuals. Unless they are both there as employees it is unlikely that any harassment between them will be prohibited by the *EO* or *SD Acts* and the only remedy available will either be the criminal law or a common law action for damages.

Conduct between an accused and the prosecution is also unlikely to be covered by the *EO Act* or *SD Act*.

Conduct between a party, or their employee or lawyer, and a witness will depend on whether the witness is giving expert evidence and is being paid, in which case the *EO Act* or *SD Act* will apply.

The position for others involved in court proceedings such as social workers, interpreters and Corrections Victoria officers will also vary depending on the particular relationship between the people involved and the capacity in which they are in the court. As a general rule, as with other court users where the perpetrator and victim-survivor are both in the court as part of their employment or one party is providing a service to the other this will be covered by the *EO Act* or *SD Act*.

Responsibility for preventing sexual harassment in the courts

As set out above there are a range of different responsibilities on different court users. CSV is responsible for the administrative management of the courts (under the direction of the relevant head of jurisdiction and the Courts Council), however the majority of court users are not CSV employees. Nevertheless, both the *EO Act* and the *OHS Act* impose duties on CSV and CSV staff to ensure, so far as is reasonably practicable, that both CSV employees and other persons who work in the courts or VCAT are not exposed to sexual harassment in those environments.⁶⁹

For those subject to the *EO Act* duty to prevent sexual harassment, VEOHRC has recently published the *Guideline: Preventing and responding to workplace sexual harassment - Complying with the Equal Opportunity Act 2010 (VEOHRC guideline)* to assist with compliance with that duty.⁷⁰ The VEOHRC guideline states, "While it is not legally binding, [the guideline] is authoritative – a court or the Victorian Civil and Administrative Tribunal may consider whether employers have complied with this guideline when hearing a case of sexual harassment."⁷¹

The VEOHRC guideline focuses on what employers and managers can do to prevent sexual harassment, however elements can equally be applied to those in common workplaces who are also subject to the positive duty. The VEOHRC guideline identifies six minimum standards for compliance with the positive duty to prevent sexual harassment. These standards are (1) Knowledge; (2) Prevention Plan; (3) Organisational capability; (4) Risk management; (5) Reporting and response; and (6) Monitoring and evaluation.⁷²

The *SD Act* does not contain an equivalent proactive duty. However, like the *EO Act*, the *SD Act* does impose vicarious liability on employers if they have not taken reasonable steps to prevent sexual harassment from occurring. Vicarious liability under the *EO Act* and *SD Act* is discussed below.

⁶⁹ *Equal Opportunity Act 2010* section 15 and the *Occupational Health and Safety Act 2004* section 21.

⁷⁰ *Equal Opportunity Act 2010* section 148. A copy of the VEOHRC guideline is available at <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>.

⁷¹ VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment - Complying with the Equal Opportunity Act 2010* p10.

⁷² VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment - Complying with the Equal Opportunity Act 2010* p12.

As well as CSV, other court users may be subject to obligations to prevent sexual harassment themselves as well as being protected by obligations placed on their employers and others in the workplace. For example, under multiple Acts, including the EO Act and OHS Act,⁷³ as well as the common law,⁷⁴ employers are responsible for ensuring that their employees have safe workplaces. This means that law firms and public sector agencies such as the OPP and VLA have an obligation to protect their employed solicitors from sexual harassment in the courts as well as in their offices.

Sections 105 and 106 of the EO Act create a prohibition on requesting, instructing, inducing, encouraging, authorising or assisting another person to commit conduct that would breach various EO Act prohibitions including on sexual harassment and impose a liability on anyone who has breached that prohibition for the conduct of the other person. Whether this extends to liability for inaction in breach of section 105, for example for failing to act to prevent further harassment when there was a reasonable basis to suspect that an individual had committed, and continued to have a tendency to commit, sexual harassment is uncertain.

Complaints about sexual harassment in the courts

The current system depends upon victim-survivors coming forward and making complaints about the harassment they have suffered to the appropriate body. There are a range of different complaints mechanisms that each have different processes and potential outcomes.

The various complaints bodies only have jurisdiction to hear complaints about certain groups of perpetrators so where a complaint can be made will depend not only on what the victim-survivor wishes to achieve from making the complaint but also who the perpetrator is. Each of the main court user groups is described below.

It is important to recognise that there are not universal protections in place for complainants and where complaints are made will dictate whether or not or the extent of any protection from reprisal for complainants.

As set out above, conduct that is sexual harassment may also constitute a criminal offence. If the conduct is a criminal offence, irrespective of who the perpetrator is victim-survivors can report the matter to Victoria Police for investigation. This can be done at a local police station or by calling triple zero. Victims can also call *1800RESPECT* (1800 737 7327) to access help and support in reporting a criminal offence.

In the event that the harassment does not constitute a criminal offence or the victim-survivor does not want to report the matter to police and potentially be involved in a criminal trial, there are a range of other reporting options. For any sexual harassment that is prohibited by the EO Act or the SD Act a complaint can be made to VEOHRC or the AHRC respectively.

There are also other entities that can receive complaints about judicial officers and lawyers. Each of the complaints processes is discussed below.

VEOHRC

⁷³ *Equal Opportunity Act 2010* section 15; *Occupational Health and Safety Act 2004* section 21.

⁷⁴ See Kieran Pender and John Wilson, 'Contractual, Tortious and Statutory? The Employer's Duty to Provide a Safe Workplace' (2020) 258 *Ethos: Journal of the ACT Law Society* 18, 18-25.

VEOHRC is an independent statutory body that can receive complaints in relation to sexual harassment wherever that harassment is prohibited by the EO Act. Both Individuals and representative bodies can make complaints to the VEOHRC.⁷⁵

If a person experiences unfair treatment because they have made a complaint or acted as a witness to a complaint, they can make a separate complaint of victimisation. The protections for victim-survivors and witnesses are discussed further below.

VEOHRC provides a voluntary, free, confidential dispute resolution service.⁷⁶ Complaints to VEOHRC may result in a conciliated outcome that includes compensation, an apology, a commitment to change a policy or practice or a requirement that a person or group of people attend training. The dispute resolution process conducted by VEOHRC is voluntary and depends on the willingness of both parties to participate; VEOHRC cannot make binding orders.⁷⁷ For matters that do not resolve at VEOHRC, the matter may proceed to VCAT although a complaint need not have first been made to VEOHRC before a proceeding may be commenced in VCAT.⁷⁸

In limited circumstances VEOHRC may investigate a matter, including for example a breach of the positive duty to prevent sexual harassment.⁷⁹ However VEOHRC cannot investigate a single allegation of sexual harassment relating to only one victim-survivor. To be the subject of an investigation there must be reasonable grounds to suspect that there has been a breach of the EO Act, the investigation must advance the objectives of the EO Act, and the matter must:

- raise an issue that is serious in nature; and
- relate to a class or group of persons; and
- not reasonably be expected to be resolved by dispute resolution or by making an application to VCAT.⁸⁰

In conducting an investigation VEOHRC may:

- apply to VCAT for an order requiring a person to provide information or a document or both in their possession to the VEOHRC if the information or document is necessary for the conduct of the investigation;⁸¹ and
- apply to the VCAT for an order that a person attend before the VEOHRC to answer questions that are relevant to an investigation and the information is necessary for the conduct of the investigation.⁸²

At the conclusion of an investigation VEOHRC may take any action that it thinks fit including:

- entering into an agreement with a person about action required to comply with the EO Act;
- referring a matter to VCAT; and/or
- making a report with respect to the matter to the Attorney-General or the Parliament.⁸³

Victorian Civil and Administrative Tribunal

⁷⁵ *Equal Opportunity Act 2010* sections 113 and 114.

⁷⁶ The VEOHRC's functions in relation to dispute resolution are set out in the *Equal Opportunity Act 2010* section 111.

⁷⁷ *Equal Opportunity Act 2010* sections 112(d) and 118.

⁷⁸ *Equal Opportunity Act 2010* section 122.

⁷⁹ *Equal Opportunity Act 2010* section 15(4).

⁸⁰ *Equal Opportunity Act 2010* section 127.

⁸¹ *Equal Opportunity Act 2010* section 131.

⁸² *Equal Opportunity Act 2010* section 134.

⁸³ *Equal Opportunity Act 2010* section 139.

A person claiming to have suffered sexual harassment, or a representative body on behalf of named persons with a sufficient interest in the dispute, may make an application to VCAT in respect of an alleged contravention of the EO Act whether or not they have brought a dispute to the VEOHRC.⁸⁴

Following the hearing of the matter in VCAT, should the VCAT conclude that the sexual harassment has occurred in breach of the EO Act the following orders can be made:

- an order that the person refrain from committing any further contravention of the EO Act;
- an order that the person pay to the applicant, within a specified period, an amount the VCAT thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention; or
- an order that the person do anything specified in the order with a view to redressing any loss, damage or injury suffered by the applicant as a result of the contravention.⁸⁵

If the matter has been referred to VCAT by VEOHRC VCAT must conduct an inquiry into the matter and if it is satisfied that there has been a breach of the EO Act may make:

- (a) an order that the person refrain from acting in contravention of this Act; and/or
- (b) an order that the person do anything specified in the order with a view to eliminating future contravention of this Act or redressing circumstances that have arisen from the contravention.⁸⁶

Australian Human Rights Commission

Sexual harassment that is prohibited under the *SD Act* also amounts to unlawful discrimination as defined in the *Australian Human Rights Commission Act 1986*. As with complaints to VEOHRC, both individuals and representative bodies can make complaints to the AHRC about sexual harassment.⁸⁷

The AHRC may inquire into and attempt to resolve the complaint by conciliation.⁸⁸ If a complaint is not resolved or it is discontinued for another reason, it may be taken to the Federal Court of Australia or the Federal Circuit Court of Australia.⁸⁹

If the Federal Court or Federal Circuit Court concludes that there has been sexual harassment in breach of the *SD Act* it may make a range of orders including:

- an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
- an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
- an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent.⁹⁰

Compensation orders under the EO and SD/AHRC Acts

If loss or damage resulting from sexual harassment are proven the orders that the VCAT or courts can impose are limited to providing compensation. It is generally accepted that punitive or exemplary

⁸⁴ *Equal Opportunity Act 2010* sections 123 and 124.

⁸⁵ *Equal Opportunity Act 2010* section 125.

⁸⁶ *Equal Opportunity Act 2010* section 141(1).

⁸⁷ *Australian Human Rights Commission Act 1986* section 46P.

⁸⁸ *Australian Human Rights Commission Act 1986* section 46PF.

⁸⁹ *Australian Human Rights Commission Act 1986* section 46PO.

⁹⁰ *Australian Human Rights Commission Act 1986* section 46PO (4).

damages, which might have a deterrent effect, may not be awarded under anti-discrimination legislation.⁹¹ However aggravated damages, general compensatory damages awarded when the manner in which the harm has arisen is particularly insulting, humiliating or offensive, are available should the particular conduct warrant them.⁹² Since the landmark 2014 Federal Court decision in *Richardson v Oracle Corporation Australia Pty Ltd*,⁹³ the typical 'range' of compensatory damages awarded in sexual harassment litigation, in federal courts and in VCAT, has risen significantly.⁹⁴

WorkSafe Victoria

The OHS Act requires employers to "provide information to employees... concerning health and safety at the workplace, including the names of persons to whom an employee may make an enquiry or complaint about health and safety."⁹⁵

WorkSafe Victoria is responsible for monitoring and enforcing compliance with the OHS Act.⁹⁶ However the process for notifying incidents to WorkSafe is limited to physical injury from incidents such as building collapses.⁹⁷ There is no clear path for complaints relating to sexual harassment that breaches the OHS Act.

Judges, magistrates and VCAT members

The primary body for complaints about judicial officers and non judicial VCAT members' conduct is the Judicial Commission of Victoria (JCV). Complaints may also be made to the relevant head of jurisdiction although there is no formal framework for this to occur.

Judicial Commission of Victoria

The JCV is established under the *Constitution Act 1975*.⁹⁸ The JCV's functions include:

- Professional standards functions, being to 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;
- Complaints handling functions, being the receipt, investigation and referral of complaints and referrals regarding judicial officers and non-judicial VCAT members, including disclosures made under the Protected Disclosure Act 2012;
- To provide support to any investigating panel to assist the investigating panel in the performance of its functions; and
- To disseminate information and educate the public about the functions of the Judicial Commission and investigating panels.⁹⁹

The Board of the JCV consists of the Chief Justice, the Chief Judge, the Chief Magistrate, the President of the Children's Court, the State Coroner and the President of VCAT and four non judicial members.¹⁰⁰

⁹¹ Shi, Elizabeth; Zhong, Freeman, "Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach" (2020) 43(1) UNSW Law Journal 155 at 161 citing Beth Gaze, 'Damages for Discrimination: Compensating for Denial of a Human Right' [2013] (116) Precedent 20, 22; Carol Andrades, 'The Struggle to Restore Dignity: Remedies in Anti-Discrimination Law Part 1' (2012) 18(6) Employment Law Bulletin 85.

⁹² *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126.

⁹³ (2014) 223 FCR 334.

⁹⁴ Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (2021) 49 *Federal Law Review* (forthcoming).

⁹⁵ *Occupational Health and Safety Act 2004* section 22(1)(c).

⁹⁶ *Occupational Health and Safety Act 2004* section 7(1)(c).

⁹⁷ *Occupational Health and Safety Act 2004* section 37.

⁹⁸ *Constitution Act 1975* Section 87AAK.

⁹⁹ *Constitution Act 1975* section 87AAL.

¹⁰⁰ *Constitution Act 1975* sections 87AAO and 87AAN.

Complaints about the conduct, including in relation to sexual harassment, or capacity of Victorian judicial officers or VCAT members¹⁰¹ may be made to the JCV by individuals,¹⁰² and the Law Institute of Victoria and the Victorian Bar can also make complaints on behalf of their members without disclosing the identity of the complainant.¹⁰³

Complaints can also be referred by the head of jurisdiction of a court or the President of VCAT,¹⁰⁴ the Attorney-General¹⁰⁵ or the IBAC.¹⁰⁶

Upon receipt of a complaint or referral the JCV can either:

- dismiss the complaint;
- refer the matter to a head of jurisdiction for further action; or
- refer the complaint to an investigating panel (comprised of one current and one former judicial officer and one community member of high-standing¹⁰⁷) if the JCV is of the opinion that the complaint or referral could, if substantiated, amount to proved misbehaviour or incapacity such as to warrant the removal of the officer.¹⁰⁸

If the JCV is considering referring the complaint to either the relevant head of jurisdiction or to an investigation panel it must give the judicial officer who is the subject of the complaint the opportunity to respond to the matter.¹⁰⁹

If the JCV refers a matter to the relevant head of jurisdiction it must also provide the head of jurisdiction with a report that sets out:

- the findings of fact of the JCV in the matter; and
- the JCV's assessment of the appropriateness of the conduct that is the subject of the matter; and
- the JCV's recommendations in relation to the future conduct of the officer concerned; and
- any information that the JCV has that it considers may assist the nominated head of jurisdiction to deal with the matter.

If the matter is referred to an investigation panel, following an investigation by the panel the panel may either:

- dismiss the matter;
- refer the matter to the relevant head of jurisdiction; or
- prepare a report to the Governor in respect of a judicial officer if the investigating panel forms the opinion that facts exist that could warrant the removal of that judicial officer on the grounds of misbehaviour or incapacity.¹¹⁰

The investigation panel must give the judicial officer subject to the investigation, the complainant and the JCV written notice of the outcome of its investigation.¹¹¹

¹⁰¹ However, the JCV has no jurisdiction to investigate former or retired judicial officers or non judicial VCAT members.

¹⁰² *Judicial Commission of Victoria Act 2016* section 5.

¹⁰³ *Judicial Commission of Victoria Act 2016* section 6.

¹⁰⁴ *Judicial Commission of Victoria Act 2016* section 7.

¹⁰⁵ *Judicial Commission of Victoria Act 2016* section 8.

¹⁰⁶ *Judicial Commission of Victoria Act 2016* section 9.

¹⁰⁷ *Constitution Act 1975* section 87AAS.

¹⁰⁸ *Judicial Commission of Victoria Act 2016* section 13.

¹⁰⁹ *Judicial Commission of Victoria Act 2016* section 14.

¹¹⁰ *Judicial Commission of Victoria Act 2016* section 34.

¹¹¹ *Judicial Commission of Victoria Act 2016* sections 43 and 46.

If a report is provided to the Governor it must also be provided to the Attorney-General and then tabled in both houses of Parliament.¹¹² This is the only mechanism by which a judge can then be removed from office.

If the matter concerns a magistrate, coroner or VCAT member the relevant head of jurisdiction may stand the magistrate, coroner or VCAT member down at any time if they are satisfied that:

- the continued performance of the functions of the magistrate, coroner or VCAT member is likely to impair public confidence in the impartiality, independence, integrity or capacity of the magistrate, coroner or VCAT member or the court or tribunal to which the officer or member is appointed or assigned; and
- immediate action is required.¹¹³

If the matter concerns a judge or head of jurisdiction, the JCV or an investigation panel may recommend to the relevant council of judges¹¹⁴ that the judicial officer be stood down from office if the conduct under investigation, if proven, would warrant removal from office and:

- The judicial officer has been charged with, or convicted of an indictable criminal offence; or
- the Judicial Commission or the investigating panel believes that the continued performance of functions by the officer concerned is likely to impair public confidence in the impartiality, independence, integrity or capacity of the officer concerned or the court or tribunal to which the officer concerned is appointed or assigned.¹¹⁵

On receipt of a recommendation the relevant council of judges may stand the judicial officer down if the judicial officer has been charged or convicted of an indictable criminal offence or the council believes that:

the continued performance of functions by the officer concerned is likely to impair public confidence in the impartiality, independence, integrity or capacity of the officer concerned or the court or tribunal to which the officer concerned is appointed or assigned.¹¹⁶

Heads of jurisdiction

Complaints about the conduct of judicial officers or VCAT members may also be raised with heads of jurisdiction, although there is no formal statutory process for doing so.¹¹⁷

At common law, a Chief Justice has no inherent supervisory authority over other judges, however some legislation, convention and practice has established some degree of authority for the administration of courts in a range of ways.

The Chief Justice of Victoria is responsible for ensuring the effective, orderly and expeditious discharge of the business of the Court and has the power to do all things necessary or convenient to be done to perform the Chief Justice's responsibilities.¹¹⁸ Similar responsibility is given to the other heads of jurisdiction.¹¹⁹

¹¹² *Judicial Commission of Victoria Act 2016* section 39(2) and (3).

¹¹³ *Judicial Commission of Victoria Act 2016* section 97.

¹¹⁴ A council of judges for each court is established in the *Supreme Court Act 1986* section 28; *County Court Act 1958* section 87 and *Magistrates' Court Act 1989* section 15 respectively.

¹¹⁵ *Judicial Commission of Victoria Act 2016* section 98.

¹¹⁶ *Judicial Commission of Victoria Act 2016* section 98.

¹¹⁷ The Victorian Bar and the Supreme Court have a protocol in place for barristers to raise complaints about judicial conduct with the Chief Justice, see <https://www.vicbar.com.au/members/victorian-bar/ethics-complaints/judicial-conduct-policy>.

¹¹⁸ *Supreme Court Act 1986* section 28AAA.

¹¹⁹ *County Court Act 1958* section 8E; *Magistrates Court Act 1989* section 12A and 13; *Coroners Court Act 2008* section 95A; *Victorian Civil and Administrative Tribunal Act 1998* section 30.

The head of each jurisdiction is also responsible for directing the professional development and continuing education and training of judicial officers and may direct judicial officers to participate in a specified professional development or continuing education and training activity.¹²⁰

Whilst the power is expressed as a power to 'direct' indicating that compliance is required, there is no explicit consequence listed for non-compliance unlike for example in the Federal Court, where the Chief Justice has the explicit power to temporarily restrict a judge to non-sitting duties.¹²¹

Lawyers

Under the Legal Profession Uniform Law (Victoria) the Victorian Legal Services Board (VLSB) and Commissioner are responsible for the regulation of the legal profession and the maintenance of professional standards in Victoria, including the enforcement of the conduct rules that apply to all barristers and solicitors.

The VLSB must keep a register of Australian legal practitioners whose home jurisdiction is Victoria¹²² and maintain a register of disciplinary action taken under the Legal Profession Uniform Law (Victoria), or under a corresponding law.¹²³

Complaints about both barristers' and solicitors' conduct can be made to the Commissioner by any person.¹²⁴ The VLSB has a specialist sexual harassment complaints team and complaints can be made formally (this process is outlined below) or anonymously.¹²⁵

A formal complaint must be in writing and:

- identify the complainant; and
- identify the lawyer or law practice about whom the complaint is made; and
- describe the alleged conduct that is the subject of the complaint.¹²⁶

Complaints made to the Commissioner do not affect any other right of a person and may be made concurrently with complaints under the EO Act or SD Act or any action claiming damages arising from the conduct being complained of.¹²⁷

The Commissioner may also initiate an own motion complaint about sexual harassment by a lawyer.¹²⁸ After receiving a complaint, the Commissioner must conduct a preliminary assessment of the complaint.¹²⁹ If the VLSB decides to investigate the complaint they must provide the subject of the complaint with a summary or details of the complaint and a notice informing them of the right to make submissions.¹³⁰

If the Commissioner considers that the immediate suspension of the lawyer's practising certificate is warranted in the public interest because of the seriousness of the alleged conduct, the Commissioner may recommend to the VLSB that the certificate be suspended whether or not an investigation of the

¹²⁰ See section 28A of the *Supreme Court Act 1986*; section 17AAA of the *County Court Act 1958*; section 13B of the *Magistrates' Court Act 1989*; section 108 of the *Coroners Act 2008* and section 38A of the *VCAT Act 1998*.

¹²¹ *Federal Court of Australia Act 1976* section 15.

¹²² *Legal Profession Uniform Law Application Act 2014* section 150.

¹²³ *Legal Profession Uniform Law Application Act 2014* section 150B.

¹²⁴ *Legal Profession Uniform Law (Victoria)* section 266(1).

¹²⁵ See <https://lsbc.vic.gov.au/lawyers/practising-law/sexual-harassment/making-complaint-vlsbc-about-sexual-harassment>.

¹²⁶ *Legal Profession Uniform Law (Victoria)* section 267.

¹²⁷ *Legal Profession Uniform Law (Victoria)* section 275.

¹²⁸ *Legal Profession Uniform Law (Victoria)* section 266(2).

¹²⁹ *Legal Profession Uniform Law (Victoria)* section 276.

¹³⁰ *Legal Profession Uniform Law (Victoria)* section 279.

complaint has begun or been completed.¹³¹ Upon receipt of a recommendation from the Commissioner the VLSB may suspend the certificate.¹³²

In the event that a legal practitioner is found to have breached the applicable conduct rules the VLSB is responsible for prosecuting breaches. The VLSB may make findings of unsatisfactory professional conduct (Unsatisfactory professional conduct includes 'conduct of a lawyer 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 lawyer').¹³³

If the conduct is more serious the Commissioner may commence proceedings in VCAT for a finding of professional misconduct and more serious sanctions against the practitioner. Professional misconduct includes:

- unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.¹³⁴

In addition to a finding of unprofessional conduct or professional misconduct the sanctions available for a breach of the conduct rules include:

- the suspension, variation or cancellation of the lawyer's Australian practising certificate or Australian registration certificate;
- the refusal to grant or renew the lawyer's Australian practising certificate or Australian registration certificate;
- the removal of the lawyer's name from a Supreme Court roll.¹³⁵

It was recently observed in the Full Federal Court that sexual harassment by members of the legal profession was an abuse of their status in the community:

Society affords to the members of the legal profession privileges. These consist in the exercise of powers not possessed by the community at large: the power to transact, to act in litigation and to argue cases. The possession of these privileges is apt to confer status on those that hold them. But the status is not held for themselves but for the community which they serve. The use of this status for tawdry personal ends is an abuse of it. In this case, the trial judge was right to measure in general damages the power differential that lay between the Appellant and the Respondent not only by the fact that he was her employer but by the fact of his status as a solicitor.¹³⁶

Currently there is in place a delegation from the VLSB and Commissioner to the Victorian Bar to investigate complaints made against barristers.¹³⁷ The Commissioner retains oversight of the investigation and any action that is taken in response to a complaint is a decision of the VLSB and Commissioner; however, the initial responsibility for investigating the complaint lies with the Victorian Bar.¹³⁸

¹³¹ *Legal Profession Uniform Law (Victoria)* section 278.

¹³² *Legal Profession Uniform Law (Victoria)* section 82.

¹³³ *Legal Profession Uniform Law (Victoria)* section 296.

¹³⁴ *Legal Profession Uniform Law (Victoria)* section 297.

¹³⁵ See for example *Legal Services Commissioner v PLP (Legal Practice)* [2014] VCAT 793.

¹³⁶ *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 at [51].

¹³⁷ Victorian Legal Services Commissioner, *Instrument of Delegation* (28 August 2015).

¹³⁸ A copy of the Victorian Bar's Internal Grievance Process is available at

<https://www.vicbar.com.au/sites/default/files/Policy%20Against%20Sexual%20Harassment.pdf>.

Following the recommendation of the Royal Commission into the Management of Police Informants it is likely that the current delegation will be revoked and the VLSB+C will assume responsibility for investigating barristers' conduct.¹³⁹

Protection for victim-survivors and witnesses

The EO Act provides that a person must not subject or threaten to subject the other person to any detriment because the other person has made a complaint or otherwise participated in any of the processes for addressing sexual harassment under the EO Act.¹⁴⁰ Whilst a person may be able to obtain compensation for the loss or damage they have suffered as a result of victimisation from VCAT the EO Act does not impose any criminal sanctions for breaching the prohibition.

Similarly to the EO Act the SD Act also prohibits any person from subjecting, or threatening to subject, a person to any detriment because they have made a complaint to the AHRC about sexual harassment or participated in a related AHRC process, for example by providing evidence about the harassment.¹⁴¹ However, unlike the EO Act, the SD Act makes victimisation a criminal offence with a maximum penalty for an individual of a fine of up to \$5,500 or imprisonment for 3 months, or both and for a body corporate a fine of up to \$22,200.¹⁴²

Additionally for matters being dealt with under the EO Act, whether by VEOHRC or VCAT, VCAT may make an interim order to prevent any party from acting in a manner prejudicial to the VEOHRC dispute resolution process or to any decision or order the VCAT might subsequently make.¹⁴³ Whilst this can only act prospectively rather than being a direct means of addressing a previous reprisal it could for example be used to prevent the termination of employment for an employee who had made a complaint of sexual harassment.¹⁴⁴

For matters being dealt with under the SD Act the Federal Court and Federal Circuit Court have the jurisdiction to grant an interim injunction to maintain:

- the status quo, as it existed immediately before the complaint was lodged; or
- the rights of any complainant, respondent or affected person.¹⁴⁵

The OHS Act makes it an offence for an employer to dismiss or injure an employee or to alter the position of an employee to the employee's detriment or to threaten to do any of those things to an employee for the dominant reason that an employee has:

- assisted, or given any information to an inspector, the Authority, a union, a health and safety representative or a member of a health and safety committee; or
- raised an issue or concern about health or safety to the employer, an inspector, the Authority, a union, a health and safety representative, a member of a health and safety committee or an employee of the employer.¹⁴⁶

¹³⁹ Royal Commission into the Management of Police Informants Final report (November 2020) pp108-109 recommendation 88; Media Release – The Victorian Bar Supports the Findings of the Royal Commission into the Management of Police Informants 30 November 2020 available at <https://www.vicbar.com.au/news-events/media-release-%E2%80%93-victorian-bar-supports-findings-royal-commission-management-police>.

¹⁴⁰ *Equal Opportunity Act 2010* sections 103 and 104.

¹⁴¹ *Sex Discrimination Act 1984* section 94.

¹⁴² *Sex Discrimination Act 1984* section 94(1).

¹⁴³ *Equal Opportunity Act 2010* section 121.

¹⁴⁴ A VCAT order made under section 121 may be enforced in the Supreme Court as if it was an order of that court, *Victorian Civil and Administrative Tribunal Act 1998* section 122.

¹⁴⁵ *Australian Human Rights Commission Act 1986* (Cth) section 46PP.

¹⁴⁶ *Occupational Health and Safety Act 2004* section 76.

The maximum penalty for an individual is a fine of up to \$82,610 and for a corporation a fine of up to \$413,050.¹⁴⁷

Additionally, as outlined above, if an employer terminated or otherwise impacted the employment of the victim-survivor of harassment, or a witness to that harassment, the employee may have grounds to commence general protections proceedings under the FW Act.

Public Interest Disclosures Act 2012

Under the *Public Interest Disclosures Act 2012 (PID Act)*, complaints about judicial or other public sector officers may constitute public interest disclosures (**PID**).

The PID Act encourages and facilitates people to make disclosures about improper conduct or detrimental action involving public officers or public bodies. A PID is a complaint or allegation that shows (or that the discloser reasonably believes shows or tends to show) that a person has engaged, is engaging or proposes to engage in:

- improper conduct; or
- to take detrimental action in response to a PID.¹⁴⁸

Sexual harassment may constitute improper conduct which is defined by the PID Act to include:

- a criminal offence;
- serious professional misconduct;
- an intentional or reckless breach of public trust; or
- a substantial risk to the health or safety of one or more persons.¹⁴⁹

The PID Act provides that a disclosure regarding the conduct of, or actions taken by a court is not a public interest disclosure.¹⁵⁰ However, this does not mean that conduct or action taken by a judge is not covered by the PID Act. Whilst decisions or actions taken by a judge when the judge constitutes a court cannot be the subject of a PID, any other conduct of the judge, including for example sexual harassment could be the subject of a PID.

A PID may be made orally or in writing and may be made anonymously.¹⁵¹ Any person can make a PID, the discloser does not have to be a public servant or hold a public office.

PIDs relating to CSV staff (other than an associate, tipstaff or secretary to a judge or associate judge of the Supreme Court or County Court) can be made to either:

- CSV;
- the IBAC; or
- the Ombudsman; or
- the Victorian Inspectorate.

PIDs relating to Victoria Police or Protective Services officers must be made to the IBAC or Victoria Police.¹⁵² PIDs relating to an associate, tipstaff or secretary to a judge or associate judge of the Supreme Court or County Court must be made to the IBAC.¹⁵³ Complaints about a judicial officers or members of VCAT may be made to either the IBAC or the JCV.¹⁵⁴

¹⁴⁷ *Occupational Health and Safety Act 2004* section 76(4).

¹⁴⁸ *Public Interest Disclosures Act 2012* section 9.

¹⁴⁹ *Public Interest Disclosures Act 2012* section 4.

¹⁵⁰ *Public Interest Disclosures Act 2012* section 9(3)(c).

¹⁵¹ *Public Interest Disclosures Act 2012* sections 12 and 12A.

¹⁵² *Public Interest Disclosures Act 2012* section 14(d).

¹⁵³ *Public Interest Disclosures Act 2012* section 14(g)(xi).

¹⁵⁴ *Public Interest Disclosures Act 2012* section 14(c).

If a PID is made to CSV, Victoria Police, the Ombudsman, the JCV or the Victorian Inspectorate,¹⁵⁵ they will refer the PID to the IBAC for assessment.¹⁵⁶ The IBAC will then determine whether the matter is a PID and will notify the complainant of its decision.¹⁵⁷

If the IBAC determines that the matter is a PID it will then deal with it under the IBAC Act by either dismissing the complaint, referring the complaint to another entity for investigation or investigating the complaint itself if it is within its jurisdiction.¹⁵⁸

The PID Act provides protection against any adverse action that is taken against a person in reprisal for making or assisting with a PID¹⁵⁹ and creates criminal offences with a penalty of up to two years' imprisonment for conduct amounting to a reprisal against a person who has made a PID.¹⁶⁰

The PID Act also provides for IBAC to publish guidelines for protected disclosure welfare management.¹⁶¹ The guidelines state, "Public bodies have obligations to protect all disclosers and cooperators from detrimental action taken in reprisal for a public interest disclosure" and provide a detailed scheme for ensuring that the welfare of those who do make PIDs is looked after.¹⁶²

Vicarious liability of employers and principals for sexual harassment

Both the EO Act and the SD Act provide that if a person either in the course of their employment or while acting as an agent commits sexual harassment in breach of the prohibition under the relevant Act, both the person and their employer or principal will also be taken to also have breached the Act.¹⁶³

A person may bring a dispute against either or both the perpetrator or their employer or principal to the VEOHRC/AHRC for dispute resolution. Under the EO Act a person may make an application to the VCAT instead of going to the VEOHRC or under the SD Act if the matter has not been resolved by the AHRC the person may then make an application to either the Federal Court or the Federal Circuit Court.¹⁶⁴

However, an employer or principal will not be vicariously liable for sexual harassment by an employee or agent if the employer or principal proves that they had taken reasonable steps to prevent the sexual harassment from occurring.¹⁶⁵

Finally, in relation to judicial officers given that they are not employees and a finding of vicarious liability under s109 depends upon the conduct being in 'the course of' an employment relationship, it appears that the state will not be vicariously liable for sexual harassment committed by a judicial officer.

¹⁵⁵ If the complaint relates to the IBAC, an IBAC officer or the public interest monitor it will not be referred to IBAC, see *Public Interest Disclosures Act 2012* section 21(1)(a)(i)(B).

¹⁵⁶ *Public Interest Disclosures Act 2012* section 21.

¹⁵⁷ *Public Interest Disclosures Act 2012* sections 26, 28 and 29.

¹⁵⁸ *Public Interest Disclosures Act 2012* section 32; *Independent Broad-based Anti-Corruption Commission Act 2011* section 58.

¹⁵⁹ *Public Interest Disclosures Act 2012* section 43.

¹⁶⁰ *Public Interest Disclosures Act 2012* section 45.

¹⁶¹ *Public Interest Disclosures Act 2012* section 57.

¹⁶² IBAC, *Guidelines for public interest disclosure welfare management*, (January 2020) p6, a copy of the guidelines is available at <https://www.ibac.vic.gov.au/publications-and-resources/article/guidelines-for-protected-disclosure-welfare-management>.

¹⁶³ *Equal Opportunity Act 2010* section 109; *Sex Discrimination Act 1984* section 106.

¹⁶⁴ *Equal Opportunity Act 2010* section 109; *Sex Discrimination Act 1984* section 106.

¹⁶⁵ *Equal Opportunity Act 2010* section 110; *Sex Discrimination Act 1984* section 106(2).