

# Judicial Conduct Guideline

## Sexual Harassment

Section 134 (1) *Judicial Commission of Victoria Act 2016*

22 February 2022

## Message from the Chair of the Judicial Commission Board, the Chief Justice of Victoria

As judicial officers<sup>1</sup> we hold ourselves to high standards of ethical and professional conduct. Sexual harassment breaches those standards. It is harmful to those impacted, to our culture and effective operation, and to the community's respect for our institutions.

Each and every judicial officer has a role to play in eliminating sexual harassment from the courts and VCAT. Our actions contribute to the culture of our courts and VCAT. How we behave, and react to the behaviour of others, sets the tone, and sends a message about what behaviours will be tolerated.

The systems we create to support those impacted by sexual harassment and how we respond to allegations, will encourage those impacted by sexual harassment to come forward. They will also act as a deterrent to unacceptable behaviour.

I am grateful for the support that I and the other heads of jurisdiction have had from judicial officers in our efforts to address this issue. It is not an easy thing to do. I hope this guideline is useful for all judicial officers to know the standards expected of them and possible outcomes for those that engage in or fail to report this behaviour.



The Honourable Chief Justice Anne Ferguson

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<sup>1</sup> Throughout this guideline, reference to judicial officers should be taken as referring to both judicial officers and non-judicial members of the Victorian Civil and Administrative Tribunal (VCAT).

## 1. Introduction

### Context

**1.1** The Judicial Commission of Victoria (the **Commission**) is a statutory entity established to investigate complaints about the conduct and capacity of judicial officers. This includes complaints about sexual harassment.

**1.2** The Commission also has professional standards functions, being to make guidelines regarding the standards of conduct expected of judicial officers. This guideline is made pursuant to s 134(1) of the *Judicial Commission of Victoria Act 2016* (the **Act**).

**1.3** The Commission has adopted the Australasian Institute for Judicial Administration's Guide to Judicial Conduct<sup>2</sup> (the **Guide**) as the principal source of guidelines for judicial conduct in Victoria. The following statement from the Guide serves as the starting point for this guideline:

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.<sup>3</sup>

**1.4** This guideline supplements the Guide.

**1.5** While this guideline deals specifically with sexual harassment, it is important for judicial officers to recognise there can be strong connections between sexual harassment and other behaviours such as bullying, disrespectful conduct, victimisation, sexism, and other forms of unlawful discrimination.

**1.6** Judicial officers have a responsibility to model appropriate respectful workplace behaviour, and to challenge and actively discourage poor behaviour in others and encourage the reporting of sexual harassment which occurs in the workplace.

**1.7** As was noted in the Report of the Review of Sexual Harassment in Victorian Courts and VCAT:<sup>4</sup>

*When a judicial officer or VCAT member acts inappropriately, it undermines the credibility and legitimacy of the justice system as a whole. This perception is reinforced if judicial officers and VCAT members are not seen to be held accountable for their actions.<sup>5</sup>*

### Application

**1.8** When investigating a complaint about a judicial officer relating to sexual harassment or victimisation,<sup>6</sup> the Commission will apply this guideline which sets out the standards expected and the potential outcomes for any breach of those standards.

**1.9** The guideline is not intended to be an exhaustive list of the standards of expected (or prohibited) conduct.

<sup>2</sup> Council of Chief Justices of Australia and New Zealand, Guide to Judicial Conduct (Australasian Institute of Judicial Administration, 3rd ed, 2017, revised November 2020).

<sup>3</sup> The Guide (n 2) 9.

<sup>4</sup> Helen Szoke, Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT: Report and Recommendations (March 2021) (the Szoke Report)

<sup>5</sup> Szoke Report (n 4) 58.

<sup>6</sup> For the purposes of this guideline, victimisation is to be interpreted in the context of sexual harassment.

## 2. Meaning of sexual harassment and the standards expected of Judicial Officers

### What is sexual harassment?

**2.1** A person sexually harasses another person if they:

- make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
- engage 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 the possibility that the other person would be offended, humiliated or intimidated.

**2.2** Examples of sexual harassment may include, but are not limited to:

- unwelcome physical contact of a sexual nature;
- comments or questions of a sexual nature about a person's private life or their appearance;
- sexually suggestive behaviour, such as leering or staring or offensive gestures;
- brushing up against someone, touching, fondling or hugging;
- sexually suggestive comments or jokes;
- displaying offensive screen savers, photos, calendars or objects;
- repeated dating requests;
- unwanted displays or declarations of affection;
- requests for sex;
- sexually explicit emails, text messages or posts on social networking sites and social media;
- sexual assault, indecent exposure, physical assault and stalking (also criminal offences); or
- actions or comments of a sexual nature in a person's presence (even if not directed at that person).

**2.3** The conduct can be physical, verbal or written (including electronic communication).

**2.4** The harasser's motivation or intention is irrelevant and sexual harassment may be a one-off incident, or it may be repeated or continuous.

### What is victimisation?

**2.5** Victimisation, in the context of sexual harassment, means treating or threatening to treat someone less favourably because:

- they have made a complaint of sexual harassment;
- it is believed they might make a complaint of sexual harassment;
- they have assisted someone else to make a complaint of sexual harassment;
- they gave or will give evidence in support of another person's complaint of sexual harassment; or
- they refused to do some act because it would amount to sexual harassment or victimisation.

### The standards of behaviour expected of judicial officers

**2.6** Judicial officers must not engage in sexual harassment or victimisation. To engage in that behaviour in the workplace is unlawful.<sup>7</sup>

**2.7** Whilst the courts and VCAT are the primary workplace for judicial officers, the workplace can extend to other locations where they carry out their functions including circuit locations, speaking engagements, and attending social functions in their professional capacity.<sup>8</sup>

<sup>7</sup> Sexual harassment and victimisation are unlawful under the *Equal Opportunity Act 2010* (Vic) and the *Sex Discrimination Act 1984* (Cth). The *Equal Opportunity Act 2010* (Vic) prohibits, amongst other things, a person sexually harassing another person in their common workplace (regardless of employment arrangements).

<sup>8</sup> The Commission considers the definition of workplace outlined in s 94 of the *Equal Opportunity Act 2010* (Vic) to be appropriately adopted for this guideline.

**2.8** This guideline is intended to apply to all judicial officers:

- undertaking any work-related activities, including interactions with legal practitioners, court users and court staff;
- whether working at their respective court or tribunal or from another location (including from home);
- attending work related events such as: conferences, training programs or social functions (regardless of whether they occur during normal work hours or outside those hours);
- engaging in professional support of junior staff or lawyers, for example, in the role of mentor or referee; and
- participating as member of a committee or working group.

**2.9** The courts and VCAT are also the workplace of court staff, contractors, barristers, solicitors, police, and others who attend to carry out the functions of their occupation. Sexual harassment in any context is contrary to the requirement to treat others with civility and respect. It is behaviour that will not be tolerated.

### 3. Bystander conduct

**3.1** A bystander is a person who witnesses an incident or incidents of sexual harassment and/or victimisation or hears about an incident/s after it has occurred.<sup>9</sup>

**3.2** Judicial officers are expected to act if they witness sexual harassment (or victimisation) by another judicial officer, or any other person in the workplace, or if it is reported to them, having regard to the circumstances and the wishes of the victim. Failure to do so may be considered conduct infringing the standards generally expected of a judicial officer.

**3.3** Judicial officers are leaders and how they respond to instances or allegations of sexual harassment sets the tone for expected standards of behaviour. The conduct of judicial officers has the potential to instil confidence that people will not be sexually harassed or be penalised or victimised for speaking up. Given the most serious instances of sexual harassment are often not witnessed by others, challenging the behaviours that are witnessed is crucial.

**3.4** In circumstances where a judicial officer witnesses or becomes aware of sexual harassment, the judicial officer should refer to and act in accordance with the relevant Court Services Victoria (CSV) sexual harassment policies applicable to their court or tribunal. The judicial officer should also report the matter to their head of jurisdiction.

### 4. Personal relationships in the workplace

**4.1** The Commission acknowledges that personal relationships can occur in a workplace and take various forms, including sexual or nonsexual relationships. Reference in this guideline to a sexual relationship between a judicial officer and another person refers to any consensual sexual relationship regardless of whether it was a single encounter or is a casual, periodic or ongoing relationship, and may or may not constitute a primary relationship.

**4.2** Judicial officers must recognise how factors such as gender and power imbalances can impact on how people respond to unwanted sexual advances.<sup>10</sup> Professional admiration, deference to a judicial officer's position or attempts to please or be appreciated in the workplace, do not amount to romantic attraction, nor indicate consent to unwelcome conduct of a sexual nature. It is important that any sexual relationship is entered into without the other party feeling any pressure or influence as a result of the power imbalance brought about by the judicial officer's position.

<sup>9</sup> This definition of bystander, as it relates to sexual harassment, is taken from the 'Glossary of terms' of the Szoke Report (n 4) 9.

<sup>10</sup> As outlined in Recommendation 13 of the Szoke Report (n 4) 19.

**4.3** The risk of the other party feeling pressured or influenced is greater where there is a significant disparity or power imbalance between the position of the judicial officer and the other party. The greater the disparity (including in age) or power imbalance, the greater the risk.

**4.4** For example, a sexual relationship between a judicial officer and person they are mentoring or an associate or clerk, will ordinarily be considered improper because there will be a perception that the relationship arises from circumstances in which 'there is an almost inevitable unfair usage of the judge's position of prestige and trust.'<sup>11</sup>

### Managing sexual relationships between judicial officers and CSV employees

**4.5** Where a judicial officer is in a sexual relationship with a CSV employee, the employee will be bound by CSV and Victorian Public Sector policies and guidelines. These policies outline the standard of conduct expected of CSV employees.

**4.6** A CSV employee is required to declare a sexual relationship where there is:

- a hierarchical working relationship; *and*
- an actual, potential or perceived conflict of interest.

**4.7** Where a judicial officer is in a sexual relationship with a CSV employee, both parties are expected to act professionally at all times.

**4.8** Judicial officers should be aware of these requirements and ensure they do not encourage or support conduct that breaches them or engage in conduct that could amount to victimisation of a CSV employee for making a disclosure in accordance with their obligations. Such conduct may be considered to infringe the standards of conduct generally expected of a judicial officer.

**4.9** Judicial officers should declare to their head of jurisdiction a sexual relationship with a CSV employee where there is a hierarchical working relationship and an actual, potential or perceived conflict of interest.<sup>12</sup> The head of jurisdiction can then work with the judicial officer to put in place arrangements to avoid actual, potential or perceived conflicts.

**4.10** Where any doubt exists as to whether the relationship is one that should be declared, judicial officers should adopt a cautious approach and declare the relationship to their head of jurisdiction.

**4.11** For example, where a judicial officer is in a sexual relationship with an associate or court clerk that does not ordinarily sit with the judicial officer, but who might be assigned to that judicial officer in temporary circumstances, that judicial officer should declare that relationship to their head of jurisdiction.

### Managing conflicts of interest arising from other relationships

**4.12** In the event a judicial officer has a relationship (sexual or otherwise) with other persons that may enter the workplace, for example a legal practitioner, the judicial officer has an obligation to ensure the appropriate management of any conflict of interest that might arise from the relationship. This is to be applied to actual, potential or perceived conflicts of interest.

**4.13** It is expected that judicial officers will consider the impacts of any sexual relationship, for example with a legal practitioner, regardless of whether it was a single encounter or is a casual, periodic or long term relationship, and regardless of whether it may or may not constitute a primary relationship.

<sup>11</sup> James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 51 [4.47].

<sup>12</sup> Judicial officers should be aware that in some situations relationships between judicial officers may give rise to a potential or perceived conflict of interest (for example where judicial officers are in a relationship and both are sitting in the same regional location or same list). Therefore, the requirement to declare a relationship to the head of jurisdiction may include a relationship with another judicial officer.

- 4.14** Additional considerations relating to conflicts of interests that might arise during the conduct of court proceedings is addressed at Chapter Three of the Guide. Failure by a judicial officer to declare a conflict of interest when required to do so may amount to conduct infringing the standards of conduct generally expected of a judicial officer.
- 4.15** A judicial officer must ensure they themselves comply with any conflict of interest obligation arising from any relationship. Where that obligation arises from for example, a sexual relationship with a legal practitioner, the judicial officer must not assume that such responsibility can or should be adequately dealt with by the other party, especially where there is a power disparity in the relationship and the judicial officer is the more senior of the parties.

## 5. Sexual harassment of judicial officers

- 5.1** Judicial officers may experience sexual harassment or victimisation.
- 5.2** If a judicial officer experiences sexual harassment or victimisation by another judicial officer, a complaint can be made to the Commission.
- 5.3** Support is available to judicial officers through [this page](#).

## 6. Complaints about sexual harassment or victimisation by Judicial Officers

### Complaints to the Judicial Commission of Victoria

- 6.1** Any person can make a complaint to the Commission about sexual harassment (or victimisation) by a judicial officer. A complaint can be made by the person who has experienced the sexual harassment or by a third party who has witnessed or becomes aware of sexual harassment by a judicial officer. For example, a principal of a law firm may make a complaint to the Commission about the conduct of a judicial officer towards a junior lawyer from the firm. The conduct may have been witnessed by the principal or they may have been told about it.
- 6.2** Complaints can be made via the Commission's online portal. Alternatively, the Commission can arrange a time for a specially trained complaints officer or a Commission lawyer to discuss a potential complaint either over the telephone, or in person.
- 6.3** The Law Institute of Victoria or the Victorian Bar can make a complaint on behalf of one of their members. A complaint made by either body is taken to be a complaint from that body rather than the individual.<sup>13</sup>
- 6.4** Under the Act, a head of jurisdiction may make a referral to the Commission about the conduct of a judicial officer.<sup>14</sup> Where a head of jurisdiction witnesses or becomes aware of sexual harassment by a judicial officer, a referral may be made to the Commission.

<sup>13</sup> *Judicial Commission of Victoria Act 2016 (Vic) s 6.*

<sup>14</sup> *Judicial Commission of Victoria Act 2016 (Vic) s7.*

## Potential outcomes

**6.5** Sexual harassment and victimisation infringe the standards of conduct expected of judicial officers and can amount to misbehaviour such as to warrant the removal of a judicial officer from office.

**6.6** Factors which may contribute to the conduct falling into the latter category include behaviour that:

- amounts to criminal conduct;
- is repeated or continuous;
- persists despite refusals or requests for it to stop;
- could be considered predatory;
- exploits a power imbalance;
- causes the recipient significant humiliation, offence, or intimidation; or
- amounts to adverse treatment towards someone who has called out or made a complaint about sexual harassment.

**6.7** Where the Commission is of the opinion that a complaint (or referral) could, if substantiated, amount to proved misbehaviour such as to warrant the removal of the judicial officer from office, the matter will be referred to an investigating panel. In circumstances where the Commission does not dismiss the matter or refer the matter to an investigating panel, the matter will be referred to the head of jurisdiction.

**6.8** The Act sets out each of these processes.