

Review of Sexual Harassment in Victorian Courts

Preventing and Addressing
Sexual Harassment in
Victorian Courts and VCAT

Appendix 1:

Summary Review of Interventions to Prevent and Respond to Sexual Harassment in Courts

FEBRUARY 2021



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All errors are our own.

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GLOSSARY

The below glossary terms are taken verbatim from Helen Campbell and Suzi Chinnery, 'What Works? Preventing and Responding to Sexual Harassment in the Workplace: A Rapid Review of Evidence', *Care Australia*, (November 2018), except where indicated.

Discrimination	Discrimination is rooted in prejudice and occurs when a person or a group of people, is treated less favourably than another person or group because of their race, colour, national or ethnic origin, sex pregnancy or marital status, age, disability, religion or sexual preference.
Sexual Harassment	Sexual harassment is any unwanted, unwelcome or uninvited behaviour of a sexual nature which could be expected to make a person feel humiliated, intimidated or offended.
Gender-Based Violence	Any act that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. The violence is specifically 'directed against a woman because she is a woman or that affects women disproportionately' (CEDAW, Article 1).
Gender harassment	A broad range of verbal and nonverbal behaviours not aimed at sexual cooperation but convey insulting, hostile, and degrading attitudes based on one's gender (Leskinen, E & Cortina, L., 2014).
Gender norms	A subset of social norms (see below) about socially shared expectations about behaviour that apply to individuals based on socially identified sex.
Gender related judicial integrity issue¹	Describes a range of conduct, including sextortion, sexual harassment, sex discrimination, gender bias, unequal gender representation, gender stereotyping and other forms of inappropriate sexual conduct, that is incompatible with the principles of judicial ethics.
Harasser	Person or people who sexually harasses another person.
Organisational Culture	A set of shared assumptions that guide what happens in organisations by defining appropriate behaviour for various situations. Organisational culture affects the way people and groups interact with each other, with clients, and with stakeholders. It can also affect how much employees identify with their organisation.
Sextortion²	'Sextortion' is a term coined by the International Association of Women Judges (IAWJ) to describe "the abuse of power to obtain a sexual benefit or advantage ... In effect, sextortion is a form of corruption in which sex, rather than money, is the currency of the bribe." ³

¹ This definition summarises that contained in UNODC, Global Judicial Integrity Network (GJIN), *Gender-related Judicial Integrity Issues* (24-26 February 2020) https://www.unodc.org/documents/ji/knowledge_products/gender_paper.pdf accessed on 26 January 2021, 5.

² This definition is taken from Ibid, 4, citing International Association of Women Judges, *Toolkit on Naming, Shaming and Ending Sextortion* (2012), available at: https://www.unodc.org/ji/resdb/data/2012/_80_/naming_shaming_and_ending_sextortion.html?lng=en&match=toolkit%20on%20naming.

³ International Association of Women Judges, *Toolkit on Naming, Shaming and Ending Sextortion* (2012), available at: https://www.unodc.org/ji/resdb/data/2012/_80_/naming_shaming_and_ending_sextortion.html?lng=en&match=toolkit%20on%20naming accessed on 26 January 2021, 5.

Social norms	Social norms are behavioural rules constructed and shared by a group and are different from individually held beliefs and attitudes. A social norm is made up by one's beliefs about what others do and by one's beliefs about what others think one should do.
Target	Person or people who have experienced some form of sexual harassment. The word victim is problematic as it perpetuates stereotypes about lack of agency or resilience of people targeted by these behaviours.
Workplace	A workplace covers any site or location that a person attends to carry out their work or trade. A workplace includes any online activity which relates to work, including on- and off-site work-related events including social events, emailing, texting, tweeting or other social media activity, and any other activities that have a connection to the workplace.

Introduction

There is no silver bullet when it comes to ending sexual harassment and no one-size fits all approach. The drivers of sexual harassment are multifaceted, complex and vary from workplace to workplace. As a result, strategies to prevent sexual harassment must be tailored to the culture, idiosyncrasies and specific risk factors of each organisation and its workforce.

However, particular sectors and institutions, such as courts and tribunals, often share idiosyncrasies and risk factors. As a result, effective interventions in other jurisdictions may be transplantable to the Victorian judiciary and court administration. This paper attempts to identify some of these interventions for that purpose.

There are also common drivers of sexual harassment, including gender inequality, intersectional discrimination, abuse of power, and permissive cultures and organisational climates. Lessons can be learned from interventions that aim to address these drivers, particularly within a workplace context.

The traditional organisational responses to sexual harassment have not worked. Sexual harassment at work remains widespread and pervasive even though sexual harassment policies, training and complaint processes have been common place within organisations for decades.⁴ As a result, some of the interventions detailed in this paper may be unfamiliar to organisational leaders in the context of dealing with sexual harassment. However, they show promise for having a positive effect.

Effective prevention strategies require more effort than simply developing a policy and providing some training. The prevention of sexual harassment requires a deep knowledge of the organisation and its values, culture and risks factors. It requires planning and allocation of resources to identify and implement a range of interventions that are complementary and mutually reinforcing.

There are a number of frameworks and guidance materials that can be utilised by public sector organisations in Victoria to form a strong foundation for any sexual harassment prevention and response planning and action. These resources are outlined in section 2.b.

Committed leadership, gender equality and a positive and diverse organisational culture are all important elements when it comes to preventing sexual harassment. Accountability is also critical. In the context of an independent judiciary, these aspects of sexual harassment prevention work are complex and raise issues of judicial impartiality, democracy, legitimacy, public confidence and equality. While it is a complex undertaking, it also presents an important opportunity to consider these issues and institutional norms through a different lens.

It is hoped that interventions that are implemented to address gender equality and sexual harassment will be effective at achieving these goals and result in a range of other benefits too. This may not always happen, however, or there may be unintended negative consequences. As a result, ongoing monitoring, evaluation and, when necessary, adaptation of interventions is vital.

Review scope and limitations

This is a rapid review of evidence and does not purport to comprehensively cover all available literature. This review draws on research across disciplines and from a range of sources, including academic literature and industry journals, as well as reports and reviews conducted by both

⁴ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020), 12 (**AHRC, Respect@Work**). Note that the citations in this paper correlate to the Word version of this report, which is available at <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>> accessed on 26 January 2021.

government and non-government agencies. It also draws on knowledge and expertise that has been generously shared by experts (named in the acknowledgement above) during interviews.

This Paper aims to answer the following questions:

What interventions and strategies have been effective at:

1. preventing sexual harassment by judges and others in a court-related context;
2. improving the organisational culture of courts to reduce incidents of sexual harassment and sex discrimination;
3. responding to sexual harassment perpetrated by judges and others in a court-related context; and
4. better supporting victims and increasing the reporting of sexual harassment by judges and others in court-related contexts?

In some instances, this paper extends beyond these specific questions, either because we considered the broader context to be important or because there is limited information about interventions in a court-specific environment and potentially transplantable interventions were identified.

We confined our research to resources published in English in the past five years that are available through the following databases: Hein Online; Westlaw AU; Westlaw UK; AGIS; Lexis Advance; and Oxford Law Journals. (These are the databases that the authors were able to access through the Law Library of Victoria, and identified as being most relevant to our research). We have considered additional resources that have been suggested or sent to us by experts who we interviewed during the Review.

This report draws heavily on other recent reports and guidelines about preventing and responding to sexual harassment. The following reports, in particular, have been highly instructive. In some instances, significant sections of the below reports have been reproduced in this paper (as referenced) to avoid unnecessary duplication of work.

- Australian Human Rights Commission, [*Respect@Work*](#) (2020)
- Global Judicial Integrity Network, [*Gender-Related Judicial Integrity Issues*](#) (2020)
- CARE Australia, [*What Works? Preventing & Responding to Sexual Harassment in the Workplace A Rapid Review of Evidence*](#) (2018)
- Victorian Equal Opportunity and Human Rights Commission, [*Guideline - Preventing and Responding to Sexual Harassment*](#) (2020)
- International Bar Association, [*Us Too? Bullying and Sexual Harassment in the Legal Profession*](#) (2019)
- UN Women, [*What Will It Take? Promoting Cultural Change to End Sexual Harassment*](#) (UN 2019)

This report is informed by an understanding of sexual harassment drivers and risk factors, particularly in a court context, and the relevant legal regulatory landscape in Victoria. This understanding has been necessary to determine the focus of this paper. However, this paper does not discuss sexual harassment drivers and risk factors or the regulatory landscape in any detail. This work is covered by the Review's final report and other documents that the Review has prepared and made available on its website: <https://www.shreview.courts.vic.gov.au/>

This paper uses binary terms like 'men/women' to reflect the existing evidence about key drivers of violence against women, including sexual harassment, at the population level. However, we acknowledge that sexual harassment and other forms of violence are experienced at high rates by people whose life and/or identity do not conform to binary definitions of sex and gender.

A. PREVENTING SEXUAL HARASSMENT

In 2016 the US Equal Employment Opportunity Commission (**EEOC**) completed a comprehensive study of harassment in the workforce and found that there are two critical components to effective prevention of harassment, including sexual harassment, within a workforce:⁵

1. Strong leadership and a diverse and respectful workplace culture:

workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment... [L]eadership and commitment to a diverse, inclusive, and respectful workplace in which harassment is simply not acceptable is paramount. And...this leadership must come from the very top of the organization.

2. Effective systems of accountability – for both harassers and those whose job it is to prevent and respond to sexual harassment:

a commitment (even from the top) for a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have *systems* in place that hold employees *accountable* for this expectation. These accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment, directly or indirectly, are rewarded for doing that job well, or penalized for failing to do so.

The EEOC concludes that “[t]hese two sides of the coin - leadership and accountability - create an organization's culture.”⁶ Leadership, culture and accountability are themes that appear repeatedly throughout the literature on how to effectively prevent and respond to sexual harassment. These themes also illustrate that effective prevention of sexual harassment requires multi-pronged and organisation-wide interventions that are mutually reinforcing. For example, strong leadership can result in more effectively holding managers and perpetrators accountable, and improved accountability mechanisms can result in more effective leadership.

Part 1 below addresses concepts of leadership and culture, and touches on accountability, which is discussed in further detail in section D, *Ensuring Accountability*. Notably, this paper does not discuss in any detail how to balance the need for both judicial independence and accountability, as this is covered in detail in a separate paper that is available on the Review website.⁷

Parts 2 and 3 consider another strong theme in the prevention literature, which is the role that improved gender equality and diversity can play in reducing incidents of sexual harassment. These parts consider ways in which this change can be supported both within an organisation and on the bench.

To effectively prevent sexual harassment, it is necessary to understand the nature of the problem and its causes within the organisation. Part 4 looks at ways to achieve this, including through the use of surveys and work, health and safety systems.

⁵ Chai Feldblum and Victoria Lipnic, Equal Employment Opportunity Commission (US), ‘Select Task Force on the Study of Harassment in the Workplace’ (June, 2016), <<https://www.eeoc.gov/select-task-force-study-harassment-workplace>>, accessed on 18 October 2020.

⁶ Ibid.

⁷ For a discussion of the organisational structure of Victoria’s courts and Court Services Victoria, which is highly relevant to this section although now somewhat dated, see Tin Bunjevica, ‘Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the Court Services Victoria Act 2014 (Vic)’ 41 *Monash University Law Review* 2 (2015), 299-328.

Part 5 considers the plans, policies, standards and judicial guidance materials that form the foundation of sexual harassment prevention and response strategies in courts.

1. Culture and leadership

a. Organisational culture and climate

Empirical evidence shows that sexual harassment is more likely to occur in organisations with tolerant climates, where it is perceived that complaining involves taking a personal risk and complaints are not taken seriously.⁸ Organisational climate is determined by the values of the organisation and the behaviours that are formally and informally rewarded.⁹ In organisations with a climate of “general derision and disrespect”, harassing behaviours are tolerated and “uncivil behaviours can often ‘spiral’ into harassing behaviours”.¹⁰ As a result, workplace incivility has been described as a “‘gateway drug’ to workplace harassment”.¹¹ Sexual harassment has also been characterised as a form of uncivil and unethical behaviour. As both a subset and a symptom of uncivil and unethical behaviour, it shares many of the organisational antecedents to these behaviours, including a conducive organisational climate.¹² It is therefore helpful to consider the overlap between these behaviours and the interventions that can successfully address them and help to create more a positive organisational culture and climate.

i. Incivility

Incivility is the subject of a number of studies on workplace harassment. The definitions of “incivility” for the purposes of these studies vary but generally includes behaviour that is rude and disrespectful, but does not necessarily involve malicious intent. For example, definitions include: “rude, condescending, and ostracizing acts that violate workplace norms of respect, but otherwise appear mundane.”¹³ and “rude and discourteous behavior that lacks intent to harm.”¹⁴

A 2005 study of US federal judiciary staff by Lim and Cortina found that almost all women who had been subjected to gender harassment or sex harassment had also experienced general incivility (but not vice versa). The study concluded that “[i]t appeared that sexual harassment often took place against a backdrop of generalized disrespect in the workplace.”¹⁵ Lim and Cortina noted that:

The association and co-occurrence between sexual harassment and general incivility fall in line with feminist theories of sexual aggression, which argue that sexuality and dominance are interconnected. In fact, we suspect that the perpetrators of the different forms of mistreatment could often be the same person(s). That is, the same aggressors may instigate

⁸ Belinda Smith, Melanie Schleiger and Liam Elphick, ‘Preventing Sexual Harassment at Work: Exploring the Promise of Work Health and Safety Laws’, 32 *Australian Journal of Labour Law* 218 (2019), 224.

⁹ Feldblum and Lipnic, above n 5.

¹⁰ Ibid, citing Sandy Lim and Lilia M Cortina, ‘Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment’, 90 *Journal of Applied Psychology* 483 (2005).

¹¹ US Equal Employment Opportunity Commission, ‘EEOC Launches New Training Programme on Respectful Workplaces’ (Press Release, 4 October 2017) www1.eeoc.gov/eeoc/newsroom/release/10-4-17.cfm accessed 20 January 2021.

¹² Jonny Gifford, Melanie Green, Eric Barends, Barbara Janssen, Alessandra Capezio, and Nguyen (Paul) Ngo, *Rotten Apples, Bad Barrels and Sticky Situations: An evidence review of unethical workplace behaviour*, (April 2019), https://www.cipd.co.uk/Images/unethical-behaviour-in-the-workplace_report-2_tcm18-57022.pdf, accessed on 26 November 2020.

¹³ LM Cortina, D Kabat-Farr, VJ Magley, K Nelson, ‘Researching rudeness: The past, present, and future of the science of incivility’, 22 *Journal of Occupational Health Psychology* 3 (2017), 55.

¹⁴ James Campbell Quick and M Ann McFadyen, ‘Sexual Harassment: Have We Made Any Progress?’, 22 *Journal of Occupational Health Psychology* 3 (2017) 286-298, 292, citing LM Cortina, D Kabat-Farr, VJ Magley, EA Leskinen, M Huerta, ‘Selective incivility as modern discrimination in organizations: Evidence and impact’, 39 *Journal of Management*, (2013), 1579–1605 <<http://dx.doi.org/10.1177/0149206311418835>> and E Leskinen, L Cortina, and D Kabat, ‘Gender harassment: Broadening our understanding of sex-based harassment at work’ 35 *Law & Human Behavior* (2011) 25–39 <<http://dx.doi.org/10.1007/s10979-0109241-5>>.

¹⁵ Sandy Lim and Lilia M Cortina, ‘Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment’, 90 *Journal of Applied Psychology* 483 (2005), 492.

multiple forms of mistreatment—both sexualized and generalized—in efforts to debase women and reinforce or raise their own social advantage. The result of such aggressor behavior would be a combined manifestation of sexualized harassment, gender harassment, and incivility within the targets’ experiences—exactly what we found. This would argue against notions that sexual harassment is merely natural sexual attraction or innocent flirting.¹⁶

In line with Lim and Cortina’s observations, the Law Council of Australia has acknowledged that sexual harassment is predominantly “a question of power and not sex.”¹⁷ Disparities in power, whether due to gender inequality, race, LGBTQI status, disability or the harasser’s age, seniority, position of influence or value to the organisation, is central to understanding what causes sexual harassment.¹⁸ As UN Women state, “sexual harassment expresses and reinforces inequalities of power”¹⁹; “people are targeted for their membership of groups which are relatively less powerful than the aggressor”.²⁰

Lim and Cortina observed that in organisations where management overlooks sexual harassment and has a tolerant climate, it is even less likely that general incivility will be addressed.²¹ Lim and Cortina conclude that organisational responses to sexual harassment that fail to address general incivility are likely to have limited impact due to the highly interrelated nature of general, gendered and sexualised varieties of interpersonal mistreatment.²² As indicated further below, promoting diversity, inclusion and respectful behaviour is therefore essential to prevent sexual harassment.

The complexity and challenges involved in achieving change cannot be overstated. A recent analysis of *Interventions for prevention of bullying in the workplace* found that there are very few organisational and individual interventions that have been rigorously proven as effectively preventing bullying behaviours in the workplace.²³ This is partly due to the enormous challenges involved in evaluating such interventions, such as how to establish a control group.²⁴ However, two studies have indicated that the Civility, Respect, and Engagement in the Workforce (CREW) intervention produced a small increase in civility, being an improvement of 5% after 6-12 months compared to the baseline, decreased co-worker and supervisor incivility and reduced time off work.²⁵

ii. Strategies to improve organisational culture and climate

Nonetheless, there is evidence to show that certain organisational characteristics and interventions can help to create a more positive culture. While “incivility, even if expressed without any discriminatory intent, tends to alienate women and people of color in the workplace,”²⁶ a culture of diversity and inclusion can be protective against sexual harassment. Johnson, Widnall and Benya conclude that:

Environments with organizational systems and structures that value and support diversity, inclusion, and respect are environments where sexual harassment behaviors

¹⁶ Ibid, 492-3.

¹⁷ Law Council of Australia, ‘National Inquiry into Sexual Harassment in Australian Workplaces’ (Submission to Australian Human Rights Commission) 26 February 2019, 26.

¹⁸ AHRC, *Respect@Work*, 148-9.

¹⁹ Purna Sen, Eunice Borges, Estefania Guallar and Jade Cochran (UN Women), *Towards an End to Sexual Harassment: The Urgency and Nature of Change in the Era of #MeToo* (November 2018) 10.

²⁰ Purna Sen (UN Women), *What Will it Take? Promoting Cultural Change to End Sexual Harassment* (2019) 14.

²¹ Lim and Cortina, *above* n 15, 493.

²² Ibid, 494.

²³ Patricia Gillen, Marlene Sinclair, W George Kernohan, Cecily M Begley, Ans Luyben, ‘Interventions for prevention of bullying in the workplace’, *1 Cochrane Database of Systematic Reviews* (2017), <<https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD009778.pub2/full#CD009778-sec1-0007>>, accessed on 9 November 2020.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Quick and McFadyen, *above* n 14.

are less likely to occur. Sexual harassment often takes place against a backdrop of incivility, or in other words, in an environment of generalized disrespect. A culture that values respect and civility is one that can support policies and procedures to prevent and punish sexual harassment, while a culture that does not will counteract efforts to address sexual harassment.²⁷

*Rotten apples, bad barrels and sticky situations: an evidence review of unethical workplace behaviour*²⁸ supports the view that the consistent implementation of clear and fair policies and procedures is essential to creating an ethical organisational culture. This report is a rapid evidence assessment of numerous studies on the causes of ethical and unethical workplace behaviour and evidence-based initiatives to create more ethical organisational cultures and climates.²⁹ One significant form of unethical conduct considered by the report is ‘counter-productive work behaviour’, which includes bullying and harassment.³⁰

The *Rotten Apples* report acknowledges the importance of organisational culture, but recommends instead focussing on changing ‘organisational climate’. According to the report, ‘ethical culture’ is determined by the ‘systems, procedures, and practices for guiding and supporting ethical behavior’, whereas “‘ethical climate’ is the organisational norm, or shared understanding, of ‘what is correct behaviour, and how ethical decisions should be handled in an organization’.”³¹ The interrelationship between these concepts is discussed further below in the excerpt from the *Rotten Apples* report.

What do we mean by culture and why does it matter?

[Excerpt from Gifford et al, *Rotten Apples*³²] [Footnotes omitted]

A strong ethical culture develops when employers send ‘clear and targeted messages to employees about behavioral expectations via multiple organizational mechanisms. In other words, culture and climate must be consistent with one another.

Ethical climate and culture do have some overlap, and both can be measured (although this can be a difficult area to navigate, as there are various measures that vary in robustness). Which should organisations focus on? The best evidence suggests that measures of ethical climate are the more powerful – that is to say, they do a better job of explaining workplace behaviour, and climate can more readily influence perceptions of workplace practices.

Three important types of ethical climates, taken from Victor and Cullen’s Ethical Climate Questionnaire, are:

- Egoistic or instrumental climates, where acting in self-interest is the norm. An example of a survey measurement is an agree/disagree item of: ‘In this organization, people protect their own interests above other considerations.’
- Benevolent climates, where acting in the interest of others is the expected way of doing things. For example, ‘People in this organization are actively concerned about the customer’s and public’s interest.’

²⁷ Paula A Johnson, Sheila E Widnall, and Frazier F Benya (eds), Committee on the Impacts of Sexual Harassment in Academia and Committee on Women in Science, Engineering, and Medicine, Policy and Global Affairs, The National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (2018), <<https://pubmed.ncbi.nlm.nih.gov/29894119/>> accessed on 26 January 2021.

²⁸ Gifford et al, above n 12.

²⁹ Ibid.

³⁰ Ibid, 8.

³¹ Ibid, 15-16.

³² Gifford et al, above n12, 15-16.

- Principled climates, when sticking to rules and regulations is the norm. For example, 'It is important to follow strictly the organization's rules and procedures.'

Shaping ethical norms is crucial to ensuring ethical behaviour. In order to do this effectively, references to 'culture' need to be made concrete and specific. A good starting point is to identify the above aspects of climate or social norms within an organisation and recognise that focusing on culture should lead to more, not less, focus on systems and processes. Employers can then turn to the question of how leadership, management practices and HR interventions can shape ethical climate for the better.

The *Rotten Apples* report identifies nine actions that have the most positive impact on the ethical climate of an organisation:³³

1. Consistently and fairly enforce codes of conduct. The codes of conduct must be accessible, use concrete examples of ethical behaviour, clearly set out what is and is not acceptable, and be reinforced through training.
2. Carefully communicate the extent of ethical issues, with transparency but without creating the impression that "everybody else is doing it". Senior leaders must lead by role-modelling desired behaviour, using consistent messaging and reminding everyone of the importance of ethical behaviour, especially those in high-risk situations.
3. Improve the organisational climate by first understanding it (e.g., egoistic, benevolent or principled) and then addressing the systems, procedures and informal practices that shape it.
4. Promote organisational fairness and address unhealthy political behaviour.
5. Understand and manage the impact of personality and mood on decision-making.
6. Understand the risk factors for specific jobs and situations and target interventions, including through job design.
7. Ensure that performance targets are realistic and not only linked to hard to achieve and short-term goals.
8. Create management structures that create accountability and consider how to monitor behaviour constructively, without micromanagement or eroding trust.
9. Provide safe, clear and effective methods for people to raise concerns and support and train all employees to raise ethical issues.

In *Respect@Work* the AHRC identified similar strategies to influence positive culture. These include:³⁴

- building leadership capability and engagement around organisational values, gender equality and diversity
- engaging workers through education, interaction, performance management and remuneration systems
- recognising and rewarding positive behaviour, and acting on aberrant conduct
- supporting a speak-up culture.

In its submission to the AHRC inquiry, Consult Australia states that building a positive culture that is open, supportive and collaborative requires ongoing effort and deliberate action, including "regular team building and social events, rewards and recognition initiatives, regular surveys on engagement and

³³ Ibid, 3-6.

³⁴ AHRC, *Respect@Work*, 719.

workplace culture, flexible working arrangements, and regular communications with and access to senior leaders.”³⁵

The Chartered Accountants Australia New Zealand, the Ethics Centre, Governance Institute of Australia and Institute of Internal Auditors Australia have jointly produced *Managing culture—a good practice guide*, which identifies the following ‘crucial influences’ on improving organisational culture:³⁶

- good governance
- monitoring, evaluating and reporting on culture
- incentivising cultural improvement, for example with remuneration
- performance management, training, recruitment, induction, and other human resources activities.

Incentivise positive behaviour

A number of sources have indicated that linking remuneration and other performance incentives with the success of efforts to prevent and respond to sexual harassment can positively influence behaviour, especially among leaders, and help create a more respectful workplace culture.³⁷ The AHRC noted that “‘respect for others’ can be a key organisational value and performance reviews can assess behaviour against that value.”³⁸ McDonald et al suggest considering incentivising accurate internal reporting and giving credit to supervisors who take effective action.³⁹ Campbell and Chinnery similarly urges organisations to consider workplace performance imperatives that drive middle management, as performance imperatives can help to shift behaviour and norms.⁴⁰

Identify organisational readiness

According to a report by Campbell and Chinnery for CARE Australia, the starting point for planning cultural change is to consider organisational readiness and motivation for change. It is essential to identify an organisation’s readiness to engage with the practical measures that are envisaged and the learning required to do so in order to plan an achievable program of work to create organisational change.⁴¹ Whether the organisation is “compliant, reactive or proactive” is also important, as compliant and reactive organisations respond to regulatory requirements and management direction, whereas proactive organisations are more inclined to support diversity because it is productive and valuable.⁴² Workplace surveys, focus groups, observations and audits can help to determine organisational readiness and motivation.⁴³

b. Importance of well-informed leaders who set the tone

There is universal support for the proposition that leaders play a critical role in any efforts to prevent sexual harassment and create cultural change. Conversely, certain leadership styles – such as authoritarian or laissez-faire styles of leadership – can contribute to increased incidents of harassment

³⁵ Ibid, 705, citing Organisation, Submission 301, 8,

³⁶ As cited in AHRC, *Respect@Work*, 706.

³⁷ AHRC, *Respect@Work*, 708; Jane van Dis, Laura Stadum and Esther Choo, ‘Sexual Harassment Is Rampant in Health Care. Here’s How to Stop It.’, *Harvard Business Review* (News Article, 1 November 2018) <hbr.org/2018/11/sexual-harassment-is-rampant-in-health-care-heres-how-to-stop-it> accessed on 26 January 2021.

³⁸ AHRC, *Respect@Work*, 708.

³⁹ Paula McDonald, Sara Charlesworth, Tina Graham, ‘Developing a framework of effective prevention and response strategies in workplace sexual harassment’, 53 *Asia Pacific Journal of Human Resources* (2015) 44.

⁴⁰ Helen Campbell and Susan Chinnery, CARE Australia, ‘What Works? Preventing and Responding to Sexual Harassment in the Workplace’ (November 2018), 42.

⁴¹ Ibid, 39 and 44.

⁴² Ibid, 44.

⁴³ Ibid and AHRC, *Respect@Work*, 719.

and bullying.⁴⁴ According to the AHRC, leaders “should be visible and proactive in their efforts to address sexual harassment, challenge inappropriate conduct and celebrate positive behaviour in the workplace, and be transparent about the organisation’s shortcomings.”⁴⁵ The Global Judicial Integrity Network (GJIN) likewise asserts that leaders, including senior judges and judges in supervisory roles, play a key role in preventing sexual harassment and must lead by example.⁴⁶

However, the first step required may involve building leadership support for change which, according to Campbell and Chinnery, “requires consistent focus and effort”.⁴⁷ Change initiatives to prevent violence against women in Australia have been pitched as a business case, a legal case, a moral case, or all three, but ultimately the most effective rationale depends on the individual organisation and what will most motivate its leadership.⁴⁸ Leaders are more likely to support organisational change if they can see how it will result in organisational benefits that also benefit them as leaders.⁴⁹ In its report on shifting public attitudes on equality, *Equally Ours* cites Antoine de Saint-Exupery in this regard:⁵⁰

If you want to build a ship, don’t drum up people to collect wood and don’t assign them tasks and work, but rather teach them to long for the endless immensity of the sea.

It is important to identify the potential organisational benefits, translate these to leadership benefits, and decide which benefits or rationale will most likely motivate behavioural change within the organisation.

The *Rotten Apples* report finds that the leadership of managers is one of the most fundamental determinants of organisational climate.⁵¹ Ethical and purposeful leaders role model ethical behaviour and act with respect and care for others, including stakeholders. While influencing the rest of the organisation to do the same is a major challenge, and employees ‘on the ground’ may remain focussed on concrete targets, ethical leadership creates “social norms that give cues as to what behaviour is acceptable and rewarded.”⁵² Research shows that employees are more likely to behave ethically if they view their leader as moral, whereas “abusive supervision makes unethical behaviour highly likely by activating [Machiavellian] traits”.⁵³

The *Rotten Apples* report also finds that leaders influence organisational climate and culture by driving accountability: “leaders play a crucial role in reinforcing messages on ethical conduct and making sure that ethical codes are adhered to and behaviour rewarded or reprimanded as appropriate.”⁵⁴ This is also connected to the degree of trust and sense of fairness within an organisation, a lack of which is linked to counter-productive workplace behaviour.⁵⁵

The AHRC and the EEOC have identified the following measures for leaders who want to create meaningful organisational change to stop sexual harassment:⁵⁶

⁴⁴ Campbell and Chinnery, above n 40, 40, citing C Hunt, S Davidson, S Fielden, and H Hoel, ‘Reviewing sexual harassment the workplace – an intervention model’, 39 *Personnel Review* 5 (2010), 655-673.

⁴⁵ AHRC, *Respect@Work*, 683.

⁴⁶ GJIN, above n 1, 11.

⁴⁷ Campbell and Chinnery, above n 40, 40.

⁴⁸ Ibid, 40, citing S Holmes and M Flood, ‘Genders at Work: Exploring the Role of Workplace Equality’, *White Ribbon Campaign* (2013) <https://www.whiteribbon.org.au/wpcontent/uploads/2016/10/WRIB-470_Genders_At_Work_Paper_v03.pdf>.

⁴⁹ Ibid.

⁵⁰ *Equally Ours, How to Shift Public Attitudes on Equality* (2019) <<https://www.equallyours.org.uk/wp-content/uploads/2019/11/Talking-about-equality-guide.pdf>> accessed on 26 January 2021, 10.

⁵¹ Gifford et al, above n 12, 16.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Feldblum and Lipnic, above n 5.

- Establish a **sense of urgency** about preventing harassment. Visibly state the importance of a diverse and inclusive workplace free from harassment and set the foundation for change within the organisation.⁵⁷ Remind all office-holders and employees that sexual harassment is unacceptable and such behaviour does not meet the expectations of the organisation.⁵⁸
- Take proactive steps to **address known risk factors**, such as employees working in isolation or young adults entering the workforce.⁵⁹
- Be **transparent about mistakes and shortcomings**, and how the organisation plans to address them, including by making a public statement, such as that made by Victoria Police in 2017.⁶⁰
- Conduct **climate surveys** of employees to check if harassment exists and is being tolerated, then repeat them to monitor the effectiveness of sexual harassment plans.⁶¹
- Implement **effective policies and procedures** and conduct **effective training**. Ensure **reporting systems** are conducted consistently, effectively and safely, and periodically tested.⁶²
- **Hold leaders at all levels of the organisation to account** for their own behaviour, for creating a positive work culture, and for responding to incidents that arise.⁶³ It is critical that everyone in a workplace is subject to the same processes for investigation and discipline, irrespective of rank, and that complainants are not simply ‘moved on’ as a response.
- Praise and **reward managers and workers who take positive steps** to prevent and respond to sexual harassment.⁶⁴
- Efforts must be backed up by **money and time** for employees to believe that the efforts of leaders are authentic. This means money in the budget for complaint procedures and time scheduled in calendars for training and, when required, investigations.⁶⁵
- Any team that is leading the effort to stop sexual harassment must have the **power and authority to make change happen**.

Campbell and Chinnery recommend that organisations educate their leaders about the link between sexual harassment and violence against women, and ultimately gender equality.⁶⁶ However, a careful balance is required between doing so to the extent necessary to support the change required, and messaging any change initiatives in a way that does not inadvertently alienate those who are unmotivated by the end goal of gender equality. Wider communications about change initiatives should be informed by what is most likely to persuade the target audience to adopt the changes, with an emphasis on the salient benefits and importance of those initiatives, as discussed further below in parts 1.b. *Importance of well-informed leaders who set the tone*, 1.c. *Shifting norms and behaviours* and 1.d. *Effective messaging*.

Day-to-day, mid-level leadership and supervision can have the most material impact on an employee’s experience of incivility and their organisation’s response to inappropriate behaviour. Accordingly, leaders at all organisational levels, including judges, managers and supervisors, must drive change and be held accountable for doing so.

⁵⁷ Ibid.

⁵⁸ AHRC, *Respect@Work*, 684.

⁵⁹ Feldblum and Lipnic, above n 5.

⁶⁰ AHRC, *Respect@Work*, 684.

⁶¹ Feldblum and Lipnic, above n 5.

⁶² Ibid.

⁶³ AHRC, *Respect@Work*, 684.

⁶⁴ Feldblum and Lipnic, above n 5.

⁶⁵ Ibid.

⁶⁶ Campbell and Chinnery, above n 40, 39.

c. *Shifting norms and behaviours*

Peer pressure and social norms are powerful influences on our behaviour. According to the *Rotten Apples* report:⁶⁷

Social norms are a key mechanism of influence as they provide clues as to what behaviour is acceptable or not. When it seems ‘everybody else is doing it’, we reach a tipping point where unethical behaviour is contagious and it becomes easier to claim ignorance or justify misdemeanours. One practical implication of this is that employers need to strike a balance between, on the one hand, being transparent about ethical issues in their organisation and, on the other hand, creating an impression that unethical behaviour is the norm... [Footnote omitted]

Tankard and Paluck, leading academics in this area, point out that it is critical to distinguish between changing norms and changing attitudes. Actions aimed at changing norms focus on perceptions of others’ feelings or behaviours whereas actions aimed at changing attitudes focus on changing the way *you* feel about behaviour.⁶⁸ According to Tankard and Paluck, “normative perceptions can be more malleable than attitudes”, and “changed attitudes are not always reliable precursors to changed behaviours” in any event.⁶⁹

Based on their research, Tankard and Paluck conclude that interventions to shift norms and behaviours are likely to be more effective under the following five conditions:⁷⁰

- Individuals identify with the relevant reference group and source of normative information.
- The new normative information is closer to their personal views, or if they are already in favour of the norm.
- The norm is seen as being so strong that they will be punished for deviating from the norm.
- The new normative information is widely shared among reference group members.
- Context for the norm is provided that focusses on the desired behaviour in a nuanced way that doesn’t inadvertently result in negative changes in behaviour (for example, among people who were already engaging in the desired behaviour more often than the average).

Campbell and Chinnery discuss research on shifting social norms but note that there is limited academic or rigorous analysis of the effectiveness of efforts to shift workplace norms in workplace settings so their examples are mostly from community contexts.⁷¹ They nonetheless draw on the research of Tankard and Paluck and the UK Department for International Developments (**DFID**) *Guidance Note on Social Norms*⁷² and reach the following key findings:⁷³

- Social norms are dynamic, subjective and public
- Social norms can be shaped by sharing information about what others do or believe
- Socially powerful individuals can be key to modelling new norms
- New norms need to be shaped by avoiding reinforcing old norms
- Social sanctions and social rewards are powerful levers for change

⁶⁷ Gifford et al, above n12, 16.

⁶⁸ Margaret E Tankard and Elizabeth Levy Paluck, ‘Norm Perception as a Vehicle for Social Change’, 10 *Social Issues and Policy Review* 1 (2016) 181-211, 183.

⁶⁹ Ibid.

⁷⁰ Tankard and Paluck, above n 68, 195-201.

⁷¹ Campbell and Chinnery, above n 40, 18.

⁷² Ibid, 20, citing M Alexander-Scott, E Bell, and J Holden, *DFID Guidance Note: Shifting Social Norms to Tackle Violence Against Women and Girls (VAWG)* (2016) https://www.oecd.org/dac/genderdevelopment/VAWG%20HELPDESK_DFID%20GUIDANCE%20NOTE_SOCIAL%20NORMS_JA_N%202016.pdf

⁷³ Campbell and Chinnery, above n 40, 20.

The DFID framework for changing social norms is reproduced below.⁷⁴

Change social expectations	Dispel misconceptions and reframe issue
	Shift individual attitudes towards harmful behaviours
	Promote public debate and deliberation about the norm
	Promote a positive alternative
	Provide opportunities for public and collective change
Publicise the change	Publicise role model and benefits of new behaviour
	Avoid reinforcing negative behaviour
	Develop a strategy to extend norm change beyond people directly involved in the program.
Catalyse and reinforce new positive behaviours and norms	Provide opportunities for new behaviour (social practices)
	Create new rewards and sanctions

Table 5: The DFID Framework for implementing programs to change social norms

Campbell and Chinnery recommend integrating interventions to change perceived norms with other interventions aimed at addressing sexual harassment, such as training, awareness raising efforts, leadership coaching, the work of informal leaders or champions, a responsive complaint system and any communications about a broader sexual harassment response strategy.⁷⁵ The potential effectiveness of this approach is demonstrated by Ely and Meyerson's study of extraordinary cultural change at an offshore oilrig. This was a male-dominated workplace that radically changed and improved its unsafe and 'macho' culture by releasing its workers from the "societal and occupational imperatives for manly behavior".⁷⁶

The authors conclude that the company achieved this almost incidentally by making a strong and clear organisational commitment to a culture that prioritises worker safety and wellbeing above all else and promoting this message widely.⁷⁷ The company made it clear that safety was its highest priority by posting goal statements in every meeting room, through company policies that prioritised safety over production, and through training. They also consistently reminded new starters about safety procedures while on the job.⁷⁸ The company also linked the work to larger goals that promote the collective good, infusing operational values with social values. These goals were compelling enough for workers to prioritise achieving them over pursuing masculine self-image concerns.⁷⁹ Excerpts from the study are contained below, given that the legal profession, like offshore oil platforms, also tends to "lionize

⁷⁴ M Alexander-Scott, E Bell, and J Holden, *DFID Guidance Note: Shifting Social Norms to Tackle Violence Against Women and Girls (VAWG)* (2016) https://www.oecd.org/dac/genderdevelopment/VAWG%20HELPDESK_DFID%20GUIDANCE%20NOTE_SOCIAL%20NORMS_JA_N%202016.pdf, as cited in *ibid*, 21.

⁷⁵ Campbell and Chinnery, above n 40, 51.

⁷⁶ Robin J Ely, Debra E Meyerson, 'An organisational approach to undoing gender: The unlikely case of offshore oil platforms', *Research in Organizational Behavior* 30 (2010) 3-34, 8.

⁷⁷ *Ibid*, 15.

⁷⁸ *Ibid*, 23.

⁷⁹ *Ibid*, 23.

members who exhibit prototypical masculine traits, such as assertiveness, decisiveness, control, and risk-taking”.⁸⁰

Excerpts from Ely and Meyerson, ‘An organisational approach to undoing gender: The unlikely case of offshore oil platforms’, *Research in Organizational Behavior* 30 (2010) 3-34⁸¹

“This paper presents a case study of two offshore oil production platforms—high-hazard, male-dominated workplaces that, by all accounts, were high-functioning, high-reliability organizations. We systematically examined how men behaved in these settings and found that company efforts to enhance safety and performance had the unintended effect of encouraging men to deviate from conventional masculine scripts. We then compared this case to 10 published field studies of dangerous workplaces to build theory about how organizations can disrupt conventional masculinity’s negative elements.”⁸²

“Organizations import occupational norms, and most occupations are associated with a gender, envisioned in culturally prescribed forms. Occupations conceived of as masculine require qualities that men ideally possess and that women supposedly lack. The masculine identity of such occupations is further enhanced by men’s numerical dominance in them. Organizations conflate masculine characteristics with the skills required to do these jobs, defining competence in part by how well an incumbent fits the desired masculine image.”⁸³

“Professions that lionize members who exhibit prototypical masculine traits, such as assertiveness, decisiveness, control, and risk-taking, are examples. “Rambo litigators” are trial attorneys celebrated for their extreme confidence, forcefulness, and ability to take command of a courtroom (Pierce, 1995)”⁸⁴

“Men’s attempts to achieve or maintain masculine status is often costly for both individuals and organizations, as such attempts “often entail excessive risk-taking (Barrett, 1996); lead to poor quality decisions (Maier & Messerschmidt, 1998); interfere in recruits’ training (Chetkovich, 1997; Prokos & Padavic, 2002); marginalize women workers (Britton, 1997; Gray, 1984; Padavic, 1991; R.J. Ely, D.E. Meyerson/*Research in Organizational Behavior* 30 (2010) 3–344 1 See Deutsch (2007) and Jurik and Siemsen (2009) for discussions of this view’s pervasive impact on the contemporary study of gender. Prokos & Padavic, 2002); violate civil and human rights (Schultz, 1998); and alienate men from their health, emotions, and relationships with others (Messner, 2005).”⁸⁵

“In sum, men in dangerous, male-dominated work settings typically gained respect and avoided ridicule by demonstrating and defending their masculine image, defined as appearing physically, technically, and emotionally invulnerable, and training and socialization reinforced this tendency.”⁸⁶

“We studied two offshore oil production platforms designed for high-reliability to develop theory about how an organization’s culture can release men from societal and occupational imperatives for manly behavior. We first identified whether and how men in these settings were “undoing” gender—that is, disregarding conventional masculine scripts in their day-to-day interactions. We then identified how features of the platforms’ culture may have supported and sustained men’s disregard for such scripts.”⁸⁷

“Our key insight is that cultural practices on Rex and Comus, largely stemming from the organization’s safety initiative, directed men away from the goal of proving masculinity and oriented them instead toward goals that were incompatible with upholding a masculine image—the safety and well-being of their co-workers and advancing the company’s mission. The pursuit of these goals released men from the performance of masculinity commonly associated with dangerous work: in contrast to other dangerous

⁸⁰ Ibid, 4.

⁸¹ Ibid, 15.

⁸² Ibid, 5.

⁸³ Ibid, 4.

⁸⁴ Ibid, 4.

⁸⁵ Ibid, 4-5.

⁸⁶ Ibid, 8.

⁸⁷ Ibid, 8.

workplaces, including platforms of an earlier era, platform workers readily conceded their physical limitations, publicly revealed their mistakes and shortcomings, and openly shared their fears and anxieties while demonstrating sensitivity to others'. We call this second set of goals "collectivistic" goals because they involve contributing to the well-being of the whole rather than garnering acceptance or admiration for the self"⁸⁸

"[I]n laboratory studies, when people perceived that something larger than the self was at stake, learning took precedence over image protection"⁸⁹

"We surmise that by putting safety front and centre, the company inspired among workers a positive sense of shared fate or humanity and a willingness to transcend personal image goals in favor of collective purposes. As a result, when demonstrating or protecting one's masculine image would have undermined safety, community, or the company's mission, men were willing to deviate from conventional masculine scripts."⁹⁰

"In sum, the platform culture consistently, unambiguously, and relentlessly forwarded a set of goals that gave men a collective purpose. Such goals were sufficiently compelling that men were unwilling to compromise them for the sake of appearing masculine."⁹¹

"Displays of masculinity held little currency on these platforms, which instead reinforced skills and behaviors that would enable workers to contribute safely and effectively to the work at hand. Thus, cultural practices not only gave workers the motivation to pursue collectivistic goals, they also made clear the qualities required to accomplish them. Company norms did not esteem workers who were "the biggest, baddest roughnecks," but rather the "mission driven" people who "care about their fellow workers," are "good listeners," "thoughtful," and "willing to learn," as these were the qualities deemed necessary to perform work safely and effectively. Co-workers who behaved too aggressively failed to move up in the company, we were told, because their behavior made it unsafe for others to express themselves openly."⁹²

"In sum, cultural practices and symbols that communicated acceptance of fallibility and encouraged learning from mistakes, failures, and setbacks, along with leaders who modelled both, made the platforms safe for men to deviate from conventional masculine scripts. By facilitating interactions in which men routinely experienced each others' vulnerabilities, as well as their capacity for growth and development, the platform's learning orientation may also have imparted more expansive, less gender-stereotypic conceptions of self; these self-conceptions in turn may have given men more latitude to deviate from conventional masculine scripts, without experiencing such deviations as an indictment of their manhood."⁹³

d. Informal leaders and people in positions of influence

Informal leaders may be able to shift workplace norms and contribute to the sense that their organisation is committed to preventing sexual harassment. Tankard and Paluck's work on changing perceived social norms has shown that popular or influential individuals can help to shape other's understanding of social norms.⁹⁴ These individuals drive change by having a high number of connections throughout a group; they do not need to be high in status or leaders to be effective.⁹⁵ However, the Campbell and Chinnery note that "[t]here is little evidence about the effectiveness of engaging informal champions of change for

⁸⁸ Ibid, 15.

⁸⁹ Ibid, 17.

⁹⁰ Ibid, 22.

⁹¹ Ibid, 23.

⁹² Ibid, 23.

⁹³ Ibid, 26-7.

⁹⁴ Tankard and Paluck, above n68, 185.

⁹⁵ Ibid.

gender equality in workplaces” and caution that such programs can suffer from poor screening of ambassadors, as occurred with the White Ribbon organisation in Australia.⁹⁶

There is also limited evidence about the effectiveness of strategies that aim to shift men’s gender relations in workplaces, including strategies aimed at fostering male advocates in the workplace, promoting men’s role in the home, and addressing sexist and disrespectful behaviours.⁹⁷

e. Effective messaging

Effective messaging is an essential part of shifting social or workplace norms. However, developing the right messages requires an understanding of existing norms and the reference group.⁹⁸ This can be achieved by conducting targeted surveys and testing messages. During testing, messages should be evaluated for effectiveness and refined for future use. There should be an emphasis on the rationale and benefits to everyone with compelling, real life stories from within the organisation that demonstrate the problem and the solutions.⁹⁹

For example, framing gender equality in terms of shared values of occupational health and safety using phrases such as ‘standing together’ and ‘leaving no one behind’ had particular resonance in a union context.¹⁰⁰ The Ely and Meyerson study above is a further example of this.

VicHealth has developed a *Framing Masculinity Message Guide*, which provides guidance on persuasive public messaging about masculinities, including a compelling narrative structure to help tell a convincing story about the benefits of freeing men from restrictive gender stereotypes and harmful traditional masculinities, common words and phrases to avoid, and more effective alternatives.¹⁰¹ The four tips provided include:

- **Don’t pander to the vocal majority:**¹⁰² even though about 25% of the population is attracted to regressive messages about masculinity, they are mostly persuadable with only about 8% representing a hard opposition. It is this minority that tends to dominate online discussions on these topics and decry the ‘feminist war on men’. Engaging with this group on these debates simply gives them more airtime and strengthens these frames in people’s minds, including some members of the weak opposition. The same holds true for attempts to reframe oppositional language and concepts, using statements such as ‘real men don’t hit women’ or ‘it takes strength to cry’. The unintended effect is to strengthen the regressive narratives being challenged.

Instead, simply tell a progressive story of masculinity that frees men from unhealthy masculine stereotypes and expectations.

⁹⁶ Campbell and Chinnery, above n40, 42.

⁹⁷ Ibid, 27, citing S Holmes and M Flood, ‘Genders at Work: Exploring the Role of Workplace Equality’, *White Ribbon Campaign* (2013) <https://www.whiteribbon.org.au/wpcontent/uploads/2016/10/WRIB-470_Genders_At_Work_Paper_v03.pdf>.

⁹⁸ Ibid, 51, citing D Chung, C Zufferey, and A Powell, VicHealth, *Preventing violence against women in the workplace (An evidence review: full report)* (2012) https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/Economicparticipation/2015-workplace/Creating-Healthy-Workplaces_Preventing-violence-againstwomen_Final-Report.pdf?la=en&hash=FF866E1F1D4F375EE90DF03FD14F7A5C0156F368).

⁹⁹ Ibid, 41.

¹⁰⁰ Ibid.

¹⁰¹ VicHealth, *Framing Masculinity Message Guide* (2019), 6.

¹⁰² Ibid, 7.

IN PRACTICE:

Resist the temptation to pander to traditionally masculine language or engage in myth-busting. Instead focus on telling your progressive story to the vast majority of people who are persuadable on the issue.

FROM Men are not naturally violent. They have been taught to use violence. → **TO** Men have been taught to use violence.

FROM Real men show their emotions. → **TO** It's healthy to show your emotions.

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- **Don't box men in:**¹⁰⁴ It seems that most Australians are not ready to let go of concepts of masculinity and femininity, however there is a high level of support for the idea that men should be supported to break free from traditional and problematic forms of masculinity. There is significant support for the notions that being a good man means just being a good person and that people should be free to explore and develop who they are without the pressure of gender stereotypes. The report concludes that “most Australians are ready for a conversation about masculinity, the harms it causes and the need to move beyond gender stereotypes” and such conversations can be highly persuadable if they are well-framed.

IN PRACTICE:

When explaining why masculinity is a problem, frame it as gender stereotypes that constrain men. When talking about the solution, instead of framing this as seeking new or better forms of masculinity, frame it as freedom from gender stereotypes altogether.

FROM It's time we redesigned masculinity for the 21st century. → **TO** It's time we freed men from outdated masculine stereotypes.

FROM There is more than one way to be a man. → **TO** Men shouldn't be shackled to any gender stereotype.

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- **Be solutions focused:**¹⁰⁶ Conversations should be framed in terms of the behaviour we want to see, rather than problem-focused framing. For example, more men agree with positive, action focussed ideas like, it is important to teach boys that it is okay to cry, and there are things ‘all men can do to help prevent violence against women’, compared to statements of the existing problem, such as ‘good men sometimes do or say things that make other men think sexist behaviour is acceptable’.

¹⁰³ Ibid, 7.

¹⁰⁴ Ibid, 8.

¹⁰⁵ Ibid, 8.

¹⁰⁶ Ibid, 9.

IN PRACTICE:

Spend more time talking about men's role in the solution and less time talking about their role in the problem, in order to avoid activating shame and defensiveness.

FROM	All men do things that contribute to a culture of violence against women.	→	TO	There are things all men can do to end the culture of violence against women.
FROM	Men trapped by traditional masculine stereotypes suffer worse physical and mental wellbeing.	→	TO	Men freed from traditional masculine stereotypes enjoy better physical and mental wellbeing.

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- **Use the power of social norming:**¹⁰⁸ "People are more likely to accept an idea if they believe most other people accept it too. This tendency to follow the herd is particularly true among persuadable audiences who do not already hold strong opinions one way or another on an issue. One way to increase support for an idea, therefore, is to point out that other people already support it. This is often referred to as social norming."

IN PRACTICE:

Don't imply traditional masculine norms are 'dominant' or widely accepted. Instead, point out that most people think traditional masculine stereotypes are harmful and believe men should be freed from them.

FROM	Challenging these outdated ideas of what it means to be a man is difficult because they are so deeply embedded in our culture.	→	TO	The vast majority of Australians do not agree with these outdated attitudes and are ready for change.
FROM	Most people expect men to be strong, independent and in control.	→	TO	Most people want men to be respectful, caring and loving above all else.

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The VicHealth report also recommends the following narrative structure to engage audiences on the topic of masculinity:¹¹⁰

1. **Vision:** Articulate a values-based vision that combines aspiration and common sense. For example:
 - "Everyone should be free to explore and develop who they are without the pressure of gender stereotypes."
 - "Overwhelmingly, people want the men in our lives to be respectful, caring and loving."
2. **Barrier:** Explain "what stands between us and the vision we seek." Frame the barrier as being external to men so it does not create blame and defensiveness. For example:
 - "There's still a lot of pressure on men to live up to traditional masculine stereotypes."

¹⁰⁷ Ibid, 9.

¹⁰⁸ Ibid, 10.

¹⁰⁹ Ibid, 10.

¹¹⁰ Ibid, 11-13.

- “It’s unhealthy for anyone to live a lesser life because they have to hide their true selves.”
 - “Masculine stereotypes trap men in boxes and stop them from living full and happy lives.”
3. **Action:** Explain what needs to happen to remove the barriers that stand in our way. The report notes that the metaphors “breaking free” and “letting go” of gender stereotypes are effective, and it important to describe the benefits to everyone. For example:
- “It’s time we allowed men to move on from gender clichés.”
 - “If we want boys and young men to live happy and fulfilled lives and be caring and respectful in relationships with women, they need role models who show them that being a good man is really just about being a good person.”
 - “Boys and men need healthier role models to break free from harmful masculine stereotypes.”
 - “We’ll all be better off if we let go of narrow gender stereotypes and let people be themselves.”
 - “Breaking free of traditional masculine stereotypes will improve the health and wellbeing of both men and women.”
 - “Everyone should feel comfortable being themselves and carve out their own unique path in life.”

The following is an example of what a persuasive Vision-Barrier-Action message around masculinity might look like in practice:

What we value in people should be the same whether you’re a man or a woman. Because, after all, being a ‘good man’ or a ‘good woman’ is really just about being a good person.

Unfortunately, there’s still a lot of pressure on men to live up to traditional masculine stereotypes and to suppress parts of themselves that don’t fit the cliché. It’s unhealthy for anyone to live a lesser life because they have to hide their true selves. Not only do these outdated ideas of manhood lead to high rates of depression and suicide in men, they also contribute to violence against women.

If we want boys and young men to live happy and fulfilled lives, they need role models who show them that being a good man is really just about being a good person. It’s time we freed everyone from the shackles of narrow stereotypes and allowed people to just be themselves.

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Based on testing about effectiveness, VicHealth also provides the following list of words to use and lose when publicly discussing the topic of masculinity.¹¹²

¹¹¹ Ibid, 11-13.

¹¹² Ibid, 14.

LOSE	USE	WHY
Masculinity, Masculinities	<ul style="list-style-type: none"> • Masculine stereotypes • Gender stereotypes • Old ideas about masculinity 	Many people don't know what masculinity is and conflate it with men. Referring to masculinity instead as a stereotype or an outdated set of ideas implies that it is both something <i>undesirable</i> and <i>external</i> to men. Both versions tested well in our research.
Toxic / unhealthy masculinities	<ul style="list-style-type: none"> • Unhealthy/harmful masculine stereotypes 	As above.
Healthier masculinities	<ul style="list-style-type: none"> • Freedom from unhealthy masculine stereotypes 	As above.
Dominant masculinity	<ul style="list-style-type: none"> • Traditional masculine stereotypes (or 'outdated' when engaging with young men) 	Referring to unhealthy masculinity as dominant implies it is accepted by the majority of people. We want to show that the opposite is true.
There are many ways to be a man	<ul style="list-style-type: none"> • Men should be free to be themselves, and not be judged by outdated ideas of masculinity 	Our testing suggests messaging that reaffirms the importance of being a man (of one kind or another) does not activate progressive attitudes.
Men and women	<ul style="list-style-type: none"> • Everyone • People 	Avoid unnecessarily reinforcing gender binaries when talking about things that apply equally to all genders. Exceptions to this would include situations in which it is important not to ignore the reality of inequalities between genders.
Manhood	<ul style="list-style-type: none"> • Adulthood 	'Manhood' panders to the notion of gender binaries and implies the characteristics of men are naturally different to those of women.
Real men	<ul style="list-style-type: none"> • Decent men • Good human beings 	'Real men' panders to oppositional frames that suggest there is one ultimate way of being for men – typically associated with traditional masculine stereotypes.

Equally Ours has also published a highly accessible and practical guide on effective communication techniques in *How to Shift Public Attitudes on Equality*.¹¹³

2. Gender equity and diversity within organisations

a. Diversity and inclusion plan

According to the EEOC, organisations that lack diversity have higher instances of harassment.¹¹⁴ The EEOC recommends that harassment prevention plans should be part of an organisation's overall diversity and inclusion plan¹¹⁵ because in order to create a workplace free of harassment an organisation must place a high value on diversity and inclusion – including the belief that all people deserve respect regardless of their race, religion, sex, pregnancy, sexual orientation, gender identity, age or disability.¹¹⁶ The AHRC similarly found “that diverse and inclusive, gender-equal workplaces that had cultures of respect, integrity and trust were most effective at preventing and responding to sexual harassment.”¹¹⁷

¹¹³ Equally Ours, above n 50.

¹¹⁴ Feldblum and Lipnic, above n 5.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ AHRC, *Respect@Work*, 702, citing Paula McDonald, 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14(1) *International Journal of Management Reviews* 1, 6; Australian Human Rights Commission, *Change the Course: National report on sexual assault and sexual harassment at Australian universities* (2017); Royal Australasian College of Surgeons (RACS), *Expert Advisory Group*; Australia Human Rights Commission, *Review into the Treatment of Women in the*

In their report on sexual harassment in academic sciences, engineering and medicine, Johnson, Widnall and Benya also link the prevention of sexual harassment with diversity initiatives, which “hold great promise for creating academic environments where women are not disadvantaged and where they are not seen as less valuable or less capable because of their gender.”¹¹⁸ That is, such initiatives can address one of the root causes of sexual harassment – inequality.

The National Association for Presiding Judges and Court Executive Officers (United States) has published various materials to combat systemic racism in trial courts through organisational interventions, including guidelines for staff discussions and a strategic plan that includes initiatives to address systemic racism.¹¹⁹

b. Addressing intersectional discrimination

Diversity and inclusion initiatives are also crucial to address other forms of discrimination, including intersectional discrimination. The AHRC survey identified that:

“people who experience multiple forms of discrimination and inequality—for example, on the basis of their race, cultural or linguistic diversity, sexual orientation, gender identity, disability, immigration status or visa conditions—have a higher risk of experiencing workplace sexual harassment and may face additional barriers to reporting and seeking support.”

According to the AHRC survey, young women, Aboriginal and Torres Strait Islander people, LGBTQI people and people with a disability experience sexual harassment at significantly higher rates.¹²⁰ The 2018 International Labour Conference observed that exposure to harassment is highly contextual, and the intersection of factors such as race, age or disability “makes violence and harassment more possible, and, in fact, makes this experience of violence and harassment unique”.¹²¹ For example: for First Nations women and women of colour, “the intersectional experience is greater than the sum of racism and sexism;”¹²² young female workers can be at increased risk of sexual violence;¹²³ and LGBTI people experience sexual harassment in the same ways and additional ways to heterosexual people.¹²⁴

Diversity and inclusion plans and sexual harassment prevention strategies should therefore “look at the ways discrimination and risk factors intersect to both increase the risk of sexual harassment for some groups of workers and affect how they experience sexual harassment.”¹²⁵ This is essential to ensure that initiatives are targeted and to keep every worker safe. This may require, for example, the development of culturally appropriate reporting systems, or the provision of information in accessible formats or languages other than English, as well as other diversity and inclusion initiatives.

Australian Defence Force Audit Report (2014); US Equal Employment Opportunity Commission, *Task Force on the Study of Harassment in the Workplace* (Report, June 2016) 31.

¹¹⁸ Johnson et al, above n27, 41.

¹¹⁹ National Association for Presiding Judges and Court Executive Officers (United States), *Webinar: Meaningful Strategies to Combat Systemic Racism in Trial Courts – Part III*, (24 September 2020), <https://napco4courtleaders.org/2020/09/webinar-meaningful-strategies-to-combat-systemic-racism-in-trial-courts-part-iii/> accessed on 26 January 2021.

¹²⁰ AHRC, *Respect@Work*, 186-192

¹²¹ International Labour Organization, *Ending Violence and Harassment in the World of Work*, Report V(1), International Labour Conference, 108th session, Agenda Item 5, Geneva, ILC.108/V/1 (2019), 30.

¹²² Ibid, citing K Crenshaw, ‘Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’, in 1(8) *University of Chicago Legal Forum*, (1989) 140.

¹²³ Ibid.

¹²⁴ Australian Human Rights Commission, ‘Email Newsletter – Everyone’s Business: National Workplace Sexual Harassment Inquiry’ (28 February 2018) <https://mailchi.mp/humanrights.gov.au/reminder-to-register-national-inquiry-intoworkplace-sexual-harassment-hobart-consultation-267825?e=b8f7865e5d> accessed 5 April 2019, as cited in Kieran Pender (International Bar Association), *Us Too? Bullying and Sexual Harassment in the Legal Profession* (2019), 31.

¹²⁵ AHRC, *Respect@Work*, 161-162.

c. Gender equality plan

Gender equality plans are a subset of diversity and inclusion plans, or sometimes incorporated within diversity and inclusion plans, as discussed above. Given that gender inequality is a driver of sexual harassment, it is imperative that organisations implement effective gender equality strategies to meaningfully prevent sexual harassment. This is also a legal requirement for Victorian public sector organisations, which are required by the *Gender Equality Act 2020* (Vic) to develop a Gender Equality Action Plan every four years and complete workplace gender audits and progress reports.

There are a number of resources that are available to assist organisations that wish to improve gender equality and prevent workplace sexual harassment. These include:

- VEOHRC [*Gender Equality Framework*](#)¹²⁶ and [*Guideline: Preventing and responding to workplace sexual harassment*](#)¹²⁷
- Tools that will soon be released by the [*Commission for Gender Equality in the Public Sector*](#)
- Our Watch's [*Workplace Equality and Respect Standards*](#)¹²⁸
- Workplace Gender Equality Agency, [*Gender Strategy*](#),¹²⁹ including *Gender Equality Strategy Guide*¹³⁰ and *Gender Equality Diagnostic Tool*¹³¹ and [*Gender Equality Strategy Toolkit*](#)
- VicHealth's [*Equal Footing toolkit*](#)¹³²
- Public Sector Commission [*Respectful Workplaces Framework and Prevention of Sexual Harassment – Model Action Plan*](#),¹³³ including *Respectful Workplaces Framework* and *Sexual Harassment Model Action Plan*

These resources combine organisational cultural change theory, discussed above, with knowledge of structural and systemic barriers to gender equality to create frameworks that help organisations develop action plans. For example, Our Watch's Workplace Equality and Respect (WER) Standards set goals and guide workplaces through an organisational change process in the areas of leadership, strategy and

¹²⁶ VEOHRC, *Gender Equality Framework* (August 2020), <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/> accessed on 3 December 2020.

¹²⁷ VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment* (August 2020) <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>, accessed on 3 December 2020.

¹²⁸ Our Watch, *Workplace Equality and Respect Standards* (2018), https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2019/10/29045029/OurWatch_WER_Standards_2019-April-final.pdf accessed on 29 January 2021.

¹²⁹ Workplace Gender Equality Agency, *Gender strategy* (website) <https://www.wgea.gov.au/topics/gender-strategy> accessed on 29 January 2021.

¹³⁰ Workplace Gender Equality Agency, *Gender Equality Strategy Guide* (October 2019), https://www.wgea.gov.au/sites/default/files/documents/2019_WGEA_GE_Strategy_Guide.pdf accessed on 29 January 2021.

¹³¹ Workplace Gender Equality Agency, *Gender Equality Diagnostic Tool* (October 2019), <https://www.wgea.gov.au/topics/gender-strategy/gender-equality-diagnostic-tool> accessed on 29 January 2021.

¹³² Victorian Health Promotion Foundation (VicHealth), 'Equal Footing Toolkit', *Violence against Women* (Web Page, 7 December 2018) <www.vichealth.vic.gov.au/media-and-resources/publications/equal-footing-toolkit> accessed on 29 January 2021.

¹³³ Public Sector Commission, *Circular 2019-09: Respectful workplaces framework and prevention of sexual harassment – model action plan* (website, July 2019), <https://www.vichealth.vic.gov.au/media-and-resources/publications/equal-footing-toolkit> accessed on 29 January 2021.

norms to address gender inequality and prevent violence against women.¹³⁴ The WER Standards are intended to help:¹³⁵

- secure the commitment of leaders and staff
- ensure conditions support gender equality
- reject sexist and discriminatory culture
- support staff and stakeholders who experience violence
- integrate gender equality into...core business.

The WER Standards read:¹³⁶

1. We are committed to preventing violence against women and have structures, strategies and policies that explicitly promote gender equality.
2. We embed gender equality in our recruitment, remuneration and promotion processes and men and women utilise flexible work options without penalty.
3. All staff feel safe and confident in the workplace, and we actively challenge gender stereotypes, roles and norms. Staff can raise concerns about gender inequality and potential discrimination without adverse consequences.
4. We have the structures, practices and culture to respond appropriately to staff and stakeholders affected by violence, bullying and sexual harassment.
5. The work we do and the way we promote it aligns with our commitment to gender equality and the prevention of violence against women.

Organisations have many levers to control risk factors that contribute to discrimination and sexual harassment. As indicated above, leadership, culture, working conditions and support for those who experience violence are all areas where organisations can make changes to improve equality and create an organisational climate that more effectively prevents sexual harassment and other forms of violence against women.

For example, the AHRC notes that the risk of hiring a person with a history of sexual harassment can be reduced by emphasising the importance of a harassment-free workplace and asking referees questions that elicit information relevant to sexual harassment. According to the AHRC: “This might include information about a candidate’s people management and interpersonal skills, or support for gender equality and respectful behaviours, for example, through questions about an applicant’s values and their understanding of anti-discrimination laws.”¹³⁷

Case study: Philippines

The Philippines Supreme Court has a comprehensive gender and development plan for mainstreaming gender within the judiciary’s policies, programmes and structures. Components of the plan include:¹³⁸

- gender sensitivity training conducted by the Philippine Judicial Academy for judges, lawyers and court personnel;
- evaluation of the effectiveness of the training and developing new training content and approaches in response;

¹³⁴ Our Watch, *Workplace Equality and Respect Standards* (2018), <https://d2bb010tdzqaq7.cloudfront.net/wp-content/uploads/sites/2/2019/10/29045029/OurWatch_WER_Standards_2019-April_final.pdf>, accessed on 30 November 2020, 2.

¹³⁵ Ibid, 18.

¹³⁶ Ibid, 25.

¹³⁷ AHRC, *Respect@Work*, 718.

¹³⁸ GJIN, above n1 59.

- adopting rules with additional guidance on handling sexual harassment cases and the use of gender-fair language;
- undertaking a gender audit of the judiciary, which will examine decisions by the Court of Appeals and then other jurisdictions to determine gender sensitivity.

d. Backlash

Campbell and Chinnery caution that initiatives to prevent violence against women at work (including sexual harassment) can be met with a range of responses, including outright hostility, passive resistance or support. To succeed, change initiatives

require...men who are leaders to recognise and relinquish their power as men, which may be intertwined with their professional profile and character, in a very public way.¹³⁹

Johnson, Widnall and Benya similarly note that diversity initiatives may threaten both the sense of self and organisational belonging that majority members expect to enjoy. This is because diversity initiatives usually aim to increase underrepresented staff numbers and create synergy between people from different backgrounds.¹⁴⁰ A study by Kuchynka et al found that in workplaces with stronger ‘masculinity contest cultures’¹⁴¹ men were even more likely to believe that women’s status gains correspond directly with men’s status losses. The study also found that men are less likely to support gender fair workplace policies when they feel that the gender status hierarchy is threatened.¹⁴² The AHRC also found that in some cases, male workers and leaders have withdrawn from female colleagues following sexual harassment prevention initiatives because of fear that an allegation will be made against them.¹⁴³ Pender and Castles state that while this and other fears are irrational and based on myth or misinformation, they must be constructively addressed through dialogue, bringing men into the conversation and normalising conversations about harassment.¹⁴⁴ They note the following examples of this.

Some organisations, such as Male Champions of Change, and GOOD Guys (Guys Overcoming Obstacles to Diversity) have been set up to bring men into the conversation. Created by the National Conference of Women’s Bar Associations in the United States, the rationale behind GOOD Guys is that ‘research has repeatedly shown that the key to achieving diversity is to engage men, not blame them.’ Similarly, one international law firm has deployed reverse mentoring – pairing older partners with

¹³⁹ Campbell and Chinnery, above n40, 40.

¹⁴⁰ Johnson et al, above n27, 47.

¹⁴¹ There are four themes that have empirically emerged in measures of ‘masculine contest cultures’, being “show no weakness, put work first, strength and stamina, and ‘dog eat dog’”: Peter Glick, Jennifer Berdahl and Natalya M Alonso, ‘Development and Validation of the Masculinity Contest Culture Scale’, 74 *Journal of Social Studies* 3 (2018), 449-476, 451.

¹⁴² [Sophie L Kuchynka](#), [Jennifer K Bosson](#), [Joseph A Vandello](#), [Curtis Puryear](#), ‘Zero-Sum Thinking and the Masculinity Contest: Perceived Intergroup Competition and Workplace Gender Bias’, 74 *Journal of Social Issues* 3, 529-550.

¹⁴³ AHRC, *Respect@Work*, 712, citing Rob Bailey-Millado, ‘Men Are Afraid to Mentor Women after #MeToo and It Hurts Us All: Study’, *New York Post* (News Article, 17 May 2019) <nypost.com/2019/05/17/men-are-afraid-to-mentor-women-after-metoo-and-it-hurts-us-all-study/>; Claire Cain Miller, ‘Unintended Consequences of Sexual Harassment Scandals’, *New York Times* (News Article, 9 October 2017) <www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html>; Adam Grant, ‘Men Are Afraid to Mentor Women. Here’s What We Can Do About It.’, *LinkedIn* (Article, 6 February 2018) <www.linkedin.com/pulse/men-afraid-mentor-women-heres-what-we-can-do-adam-grant>; Emily Peck, ‘Me Too Backlash Is Getting Worse’, *Huffington Post* (News Article, 17 May 2019) <www.huffingtonpost.com.au/entry/me-too-backlash-getting-worse_n_5cddd96de4b00e035b8ce786>.

¹⁴⁴ Madeleine Castles and Kieran Pender, ‘Is #MeToo Over? Harassment, Culture Change and the Legal Profession’ [2021] *Pandora’s Box* (forthcoming).

junior lawyers to talk informally about diversity, inclusion and other barriers to equality in the law.

Pender and Castles recognise that there can be challenges, as “[t]here is a risk that in bringing men into the movement, women remain conceptualised as problematic and inherently victimised, waiting for ‘male champions’ to come in and save them.”¹⁴⁵ They suggest that the answer lies in a finding a balance between respecting the voices of women while also engaging men in the conversation, and engaging with the backlash without endorsing it or condoning poor behaviour and sexist attitudes.¹⁴⁶

To this end, organisations should anticipate resistance and consider how to cultivate support for such initiatives.¹⁴⁷ There are a number of resources for employers with practical guidance on managing backlash to gender equality initiatives,¹⁴⁸ including:

- VicHealth: [*\(En\)countering Resistance: Strategies to respond to Resistance to Gender Equality Initiatives*. \(2018\)](#)¹⁴⁹
- Bain & Company: [*Better Together: Increasing Male Engagement in Gender Equality Efforts in Australia*](#)¹⁵⁰
- Male Champions of Change: [*Backlash and Buy In: Responding to the Challenges in Achieving Gender Equality*](#)¹⁵¹

In general, male engagement with gender equality initiatives increases when leaders communicate how the end goal will result in organisational benefits that benefit all workers, not just women, such as improved staff retention, improved overall performance and faster growth.¹⁵²

¹⁴⁵ Ibid.

¹⁴⁶ Ibid,

¹⁴⁷ Johnson et al, above n27.

¹⁴⁸ AHRC, *Respect@Work*, 712, citing Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*, 20; Male Champions of Change and Chief Executive Women, *Backlash & Buy-In: Responding to the Challenges in Achieving Gender Equality* (Report, July 2018).

¹⁴⁹ VicHealth, *(En)countering Resistance: Strategies to respond to Resistance to Gender Equality Initiatives*. (2018), <https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Encountering-Resistance-Gender-Equality.pdf?la=en&hash=F4343F59AFBF3A4C638A7CF3D6E07ED427C018DE> accessed on 29 January 2021. See also, VicHealth, *(En)countering Resistance: 13 Steps to Tackle Gender Discrimination* [13 steps to tackle gender discrimination \(vichealth.vic.gov.au\)](#); and VicHealth, *Managing resistance to gender equality and practice* (21 March 2018) <https://www.vichealth.vic.gov.au/media-and-resources/video-gallery/backlash-forum> accessed on 29 January 2021.

¹⁵⁰ Bain & Company, *Better Together: Increasing Male Engagement in Gender Equality Efforts in Australia* (2019), as cited in AHRC, *Respect@Work*, 712.

¹⁵¹ Male Champions of Change, *Backlash & Buy-In: Responding to the Challenges of Achieving Gender Equality* (undated) <https://championsofchangecoalition.org/wp-content/uploads/2018/07/MCC-CEW-Backlash-and-Buy-in.pdf> accessed on 29 January 2021.

¹⁵² Bain & Company, above n151, as cited in AHRC, *Respect@Work*, 712.

3. Gender equity and diversity on the bench

UK academics Lizzie Barmes and Kate Malleson believe that courts should be understood as a particular form of representative institution and the judiciary should reflect the major identity groups in the UK today.¹⁵³ They quote a 2010 UK government report on judicial diversity, which argues that

in a democratic society it is unacceptable for an unelected institution that wields the power of the judiciary to be drawn from a narrow and homogeneous group that reflects neither the diversity of society nor that of the legal profession as a whole.¹⁵⁴

Barmes and Malleson point out that it is the court as an institution that should be representative, not individual judges. If it were the latter then it would suggest that the individual judge is answerable to a constituency of sorts, which would be incompatible with judicial independence.¹⁵⁵ Neither are they suggesting that every group must be represented on the bench, but rather that overall, judges should come from “a less narrow, confined and restrictive set of educational backgrounds, and...bring a broader, richer range of voices to the bench, crucially with at least some meaningful reflection of the make-up of different groups in society.”¹⁵⁶ For Barmes and Malleson, this would improve both the judiciary’s democratic legitimacy and decision-making.

Thurston also highlights the need for increased judicial diversity to achieve legitimacy. For her article on the lack of diversity on the US magistrate judge bench, Magistrate Thurston surveyed the chief judges from ninety-one of the US federal judicial districts and interviewed many of these judges to understand their views about judicial diversity. Thurston found that “almost uniformly, chief judges believe diversity provides legitimacy for the judiciary locally and nationally. Because the very integrity of our system is at issue, we must actively seek out this legitimacy or risk communities turning against it.”¹⁵⁷

Additionally, Barmes, Malleson and Thurston conclude that a more diverse judiciary would result in different judicial voices. Currently, judicial decision-making is dominated by the discourses of an extraordinarily narrow demographic group of white men. That is, white men from privileged socio-economic backgrounds who have been educated at exclusive private schools and elite universities, then had a professional life as a barrister, frequently specialising in commercial law.¹⁵⁸ According to Thurston, research shows that this has a significant impact on judicial decision-making:

When a federal appellate panel considering a sexual harassment, case includes at least one female, her male colleagues on the panel are twice as likely to find for the plaintiff than if the panel was made up of only men. In sexual discrimination appeals the presence of the female panellist nearly triples the likelihood the plaintiff will prevail. Black judges are much more likely than white judges to decide in favor of the plaintiff in gender discrimination cases. Other studies reveal that outcomes in cases of race discrimination, voting rights, school desegregation, and affirmative action, do not vary significantly when decided by non-white judges rather than white judges. In a similar study, the author determined that plaintiffs in race-based harassment cases were 3.3

¹⁵³ Lizzie Barmes and Kate Malleson, ‘Lifting the Judicial Identity Blackout’ 38(2) *Oxford Journal of Legal Studies* (2018) 357-381.

¹⁵⁴ Ibid, 377, citing Advisory Panel on Judicial Diversity, ‘Report of the Advisory Panel on Judicial Diversity 2010’.

¹⁵⁵ Ibid, 378.

¹⁵⁶ Ibid, 380.

¹⁵⁷ Jennifer L Thurston, ‘Black Robes, White Judges: The Lack of Diversity on the Magistrate Judge Bench’, 82(2) *Law and Contemporary Problems* (2019) 63-102, 101.

¹⁵⁸ Barmes and Malleson, above n153, 370.

times more likely to prevail when their case was decided by a black judge than a white judge, according to logistic regression analysis.¹⁵⁹

Barnes and Malleson are more circumspect, noting the challenges with early research in this area as a result of the small numbers of non-traditional judges, although increasing numbers of women judges have enabled more robust empirical research findings. Based on this, they too conclude “that women and men judge differently in relation to at least some issues, in some contexts, some of the time.”¹⁶⁰ Further, while acknowledging that there are some male feminist judges, they observe that “it would be hard to name a male judge in the UK who has consciously and actively adopted a feminist lens in approaching their work on the bench in the same way as the few explicitly feminist women judges, such as Brenda Hale.”¹⁶¹

While there has traditionally been a view that judges judge impartially based entirely on the law and sound reasoning, it is now widely accepted that personal identity plays a role in decision-making and, according to Barnes, Malleson and Thurston, group identity does too.

In 2017 JUSTICE,¹⁶² a UK organisation that advocates a stronger justice system, formed a working party of eminent legal authorities to consider ways to increase gender and ethnic diversity on the Circuit Bench, High Court and Court of Appeal and Supreme Court. Their [report](#), *Increasing Judicial Diversity*, responds to the problem of the judiciary being “dominated by white and privately educated men”¹⁶³ and “sets out a series of measures to encourage underrepresented groups to embark upon a judicial career and to give them a fair chance of appointment to the bench.”¹⁶⁴

The report’s recommendations include:¹⁶⁵

- Introducing targets “with teeth”, i.e., targets for selection bodies, with the “teeth” being obligations to comply and/or explain by reporting on progress to the Justice Select Committee.
- Creating a permanent “Senior Selections Committee” dedicated to appointments to the Court of Appeal, Heads of Division and UK Supreme Court. This Committee would, alongside the JAC, set targets for diversity for each level of the judiciary, reporting on its progress to a Parliamentary committee.
- Increasing accountability for diversity, through a general responsibility on selectors and the judiciary to encourage a much more diverse field of people to apply for senior judicial office.
- Introducing “appointable pools”, i.e., talent pools of suitable judges for each court. This requires a rolling, proactive programme of recruitment consisting of two stages: the first focussed on the

¹⁵⁹ Thurston, above n157, 71, citing Jennifer L Peresie, ‘Female Judges Matter Gender and Collegial Decisionmaking in the Federal Appellate Courts’, 114 *Yale Law Journal* 1759 (2005) and Stephen J Choi, Mitu Gulati, Mirya Holman and Eric A Posner, ‘Judging Women’, 8 *Journal of Empirical Legal Studies* 504 (2011), 526. In a similar study, different researchers came to a similar conclusion: Christina L Boyd, Lee Epstein and Andrew D Martin, ‘Untangling the Causal Effects of Sex on Judging’, 54 *American Journal of Political Science* 389 (2010); Pat K Chew and Robert E Kelley, ‘Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases’, 86 *Washington University Law Review* 1117 (2009), 1133-34 (citing Nancy E Crowe, ‘The Effects of Judges’ Sex and Race on Judicial Decision Making on the US Courts of Appeals, 1981-1996’ (June 1999) (unpublished PhD. dissertation, University of Chicago).

¹⁶⁰ Barnes and Malleson, above n153, 366, citing E Rackley, *Women, Judging and Judiciary: From Difference to Diversity* (Routledge 2014), 142-4.

¹⁶¹ Ibid.

¹⁶² See <https://justice.org.uk/about-us/>, accessed on 15 October 2020: “JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. We are a membership organisation, primarily of the legal profession, comprising barristers, solicitors, legal executives, academic lawyers, law students and interested non-lawyers. We work on an all-party basis, seeking to inform debate, frame issues and influence decision-makers from across the political spectrum.”

¹⁶³ JUSTICE, *Increasing Judicial Diversity* (25 April 2017), <https://justice.org.uk/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>, accessed on 15 October 2020.

¹⁶⁴ In the UK a “Recorder” can mean either a circuit judge (or magistrate) of a borough or city or a part-time circuit judge.

¹⁶⁵ JUSTICE, above n163.

qualities of the individuals applying, the second focussed on the needs – including diversity – of the court in question.

- An external review of selection processes.
- Creating an upward judicial career path, where junior lawyers can take up an “entry-level” position in the Tribunal system or on the District bench and stand a meaningful chance of promotion to the senior judiciary.
- A “Talent Management Programme” to enable talented judges to progress their career.
- Ensuring more attractive, inclusive career paths and working conditions, including making flexible working the default.

Other jurisdictions have implemented various initiatives aimed at increasing judicial diversity. Some key initiatives are discussed below, including bodies dedicated to improving equality on the bench, collecting and publicising data about the existing composition of the bench, flexible working arrangements, quotas and changes to judicial appointment processes.

a. Forums that promote equality

In the UK the Judicial Diversity Forum (JDF) brings together organisations from across the legal sector to identify ways to improve judicial diversity. Members include heads of the Judicial Appointments Commission, Ministry of Justice, Judiciary, Bar Council, Law Society, Chartered Institute of Legal Executives and Legal Services Board. The JDF terms of reference state that the JDF meets twice a year, with the objective of providing:¹⁶⁶

strategic direction in the areas of: challenging structural barriers to appointment, analysing and addressing the reasons behind differential progression, the gathering and use of data and evidence, resolving issues of common concern and the coordination of agreed activities aimed at encouraging greater judicial diversity. Forum members support each other’s initiatives and undertake joint projects.

The *Judicial Diversity Forum Action Plan*¹⁶⁷ (September 2020) sets out the activities that JDF members are implementing to support and drive judicial diversity. These activities focus on career paths, attracting and supporting candidates, open and fair application processes, and supporting and encouraging retention and progression to the senior levels of the judiciary.

b. Diversity data

It is difficult to know how to improve diversity on the bench without knowing its current make-up. This information is critical for deciding where to focus diversity initiatives. Thurston also observes that publishing court-by-court data may create peer pressure that encourages greater efforts towards achieving diversity.¹⁶⁸

In September 2020 the UK Ministry of Justice published a comprehensive statistical analysis of the make-up of the UK legal professions, judicial selection exercises, and diversity of the judiciary: [Diversity of the judiciary: Legal professions, new appointments and current post-holders 2020 statistics](https://www.judicialappointments.gov.uk/sites/default/files/sync/jdf_terms_of_reference_jan_2020_for_website.docx). The report includes statistics relating to gender, ethnicity, age, professional background, disability, social mobility (i.e. state school or fee-paying school education), sexual orientation and religion. It concludes, among other things, that “[w]omen are less well represented among the more experienced and more senior

¹⁶⁶ Judicial Diversity Forum, *Terms of Reference*, December 2019, https://www.judicialappointments.gov.uk/sites/default/files/sync/jdf_terms_of_reference_jan_2020_for_website.docx, accessed on 15 October 2020.

¹⁶⁷ Judicial Appointments Commission, *Judicial Diversity Forum Action Plan*, (September 2020), <https://judicialappointments.gov.uk/equality-and-diversity/diversity-and-equality-measures/judicial-diversity-forum/>, accessed on 21 December 2020.

¹⁶⁸ Thurston, above n157, 94.

members of the legal professions” and “remain under-represented in the judiciary, particularly in courts.”¹⁶⁹

The JDF noted that this report is the first of its kind, bringing together “data on the diversity of the judiciary, judicial appointments and from the relevant legal professions (solicitors, barristers and legal executives).”¹⁷⁰ According to the JDF:¹⁷¹

The report provides, in one place, data which offers a window into factors which impact upon judicial diversity and brings into focus where positive improvements have been made, and where more remains to be done. For the first time, the report provides data which enables a more in-depth understanding of the make-up of the pool from which much of the judiciary is drawn, and the characteristics of those who apply for, and are successful in their applications to judicial office. In doing so it is a new and important contribution to the debate on how best to bring further improvements to judicial diversity.

The JDF responded to the report by noting the work that is underway to increase judicial diversity and committing to supplement this work with a range of specific measures, including addressing barriers to entry in eligibility criteria and “a new specialist out-reach and support unit for senior roles with the aim of securing diverse talent in our senior courts”.¹⁷²

The UK Judicial Appointment Commission also collects diversity information on candidate application forms. This includes information about the applicant’s educational background in response to a recommendation by the [Social Mobility and Child Poverty Commission](#).¹⁷³

The General Council of the Judiciary in Spain has created a Gender Equality Commission, which helps the Council to comply with gender equality obligations and has also approved an Equality Plan that sets forth objectives for achieving equal treatment and opportunities within the judiciary.¹⁷⁴ The Equality Plan outlines steps to promote equality, including:¹⁷⁵

- Guaranteeing equal opportunity for women and men to access judicial careers;
- Ensuring adequate judicial training in equality, combating gender-based violence and prosecution with a gender perspective;
- Providing professional promotion opportunities for women and ensuring the presence of women in positions of greater responsibility within the judiciary;
- Promoting the equal participation of women and men in training courses, both as speakers and participants;
- Promoting gender-mainstreaming throughout judicial training;
- Promoting co-responsibility and reconciliation of family, work and personal life within the judicial career;
- Development of a protocol of action against all forms of harassment, including sexual harassment;

¹⁶⁹ Ministry of Justice, [Diversity of the judiciary: Legal professions, new appointments and current post-holders 2020 statistics](#), (17 September 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf, accessed on 15 October 2020.

¹⁷⁰ Judicial Diversity Forum, *The combined statistical report 2020*, https://judicialappointments.gov.uk/wp-content/uploads/2020/11/20200916_jdf_common_narrative.pdf, accessed on 2 December 2020.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Judicial Appointments Commission website, *Providing diversity information*, <https://www.judicialappointments.gov.uk/providing-diversity-information-jac>, accessed on 15 October 2020.

¹⁷⁴ GJIN, above n1, 60.

¹⁷⁵ Ibid.

- Protecting the occupational health of judges before and after the birth of a child, as well as judges who have experienced gender-based violence or harassment at work;
- Promoting the use of non-sexist language; and
- Addressing any gender wage gap in the judiciary.

c. Flexible work arrangements

Blackham states that flexible work arrangements are important to both attract and retain non-traditional judicial officers.¹⁷⁶ UK survey data shows that female judicial respondents and Black and Minority Ethnic (BAME) judicial respondents are more likely to leave the judiciary early. Blackham considers that the ability to work part-time or have increased flexibility in working hours could encourage more to stay.¹⁷⁷ This is because “[w]orkplace flexibility...can help judges to manage health issues and caring responsibilities, particularly into older age.”¹⁷⁸ To this end, Blackham also identifies discrimination law as a possible tool that could be used to support female and non-white judges.¹⁷⁹ In Victoria magistrates and judges may enter an agreement to work part-time as long as they work the equivalent of at least 0.4 of full-time duties.¹⁸⁰ The agreement is at the discretion of the Chief Justice or Chief Magistrate, who may consider the court’s operational needs, the circumstances of the judge or magistrate, considerations of parity and equity and any other relevant factors.¹⁸¹ Part-time judges and magistrates are not permitted to engage in other paid employment or business, including legal practice, without the approval of the Chief Justice or Chief Magistrate.¹⁸²

While part-time work is possible in Victoria, most judges work full-time.¹⁸³ Blackham considers that “a broader cultural shift in favour of part-time and flexible working is required in Australia”.¹⁸⁴ Blackham draws on data from a 2016 survey of 142 Australian judges, which shows that while most judges expressed satisfaction with the compatibility of their role with family responsibilities (74.6 per cent), lifestyle (75.4 per cent) and hours (70.8 per cent), there was a statistically significant difference in the ways that women and men experience the high volume of work. While 73.8 per cent of all judges regard the workload as unrelenting, 47 per cent of women judges always feel rushed, compared with only 17 per cent of male judges. Women judges were also more likely to feel that work intrudes on family time and home life – almost half of women judges reported this happening always or often.¹⁸⁵

The same survey sought judicial responses on the proposition that “the use of part-time judicial officers was a challenge”.¹⁸⁶ Thirty-nine per cent of respondents were neutral, 29 per cent disagreed, and 32 per cent agreed, with female judges slightly more likely to hold this view. Appleby, Le Mire, Lynch and Opeskin, who conducted the survey, conclude as follows.¹⁸⁷

¹⁷⁶ Alysia Blackham, ‘Reconceiving Judicial Office Through a Labour Law Lens’ 47 *Federal Law Review* 2 (2019) 203-230, 217: “In the 2014 UK Judicial Attitude Survey, results from England and Wales and UK tribunals found the inability to work flexible hours was a factor that would prompt early retirement for 17 per cent of respondents; conversely, the opportunity to work part-time would make 34 per cent of respondents more likely to remain in the judiciary until the retirement age, and increased flexibility in working hours would influence 25 per cent to remain.” [Footnotes omitted.]

¹⁷⁷ Ibid.

¹⁷⁸ Ibid, 218

¹⁷⁹ Ibid, 217.

¹⁸⁰ Ibid, 219, citing *Constitution Act 1975* (Vic) s 75C(1)–(2); *Magistrates Court Act 1989* (Vic) s 7A(1)–(2).

¹⁸¹ Ibid, citing *Constitution Act 1975* (Vic) s 75C(3); *Magistrates Court Act 1989* (Vic) s 7A(3).

¹⁸² Ibid, citing *Constitution Act 1975* (Vic) s 84A; *Magistrates Court Act 1989* (Vic) ss 7(9)–7(9B).

¹⁸³ A majority of both sessional and non-sessional VCAT members work part-time: Interview with Justice Michelle Quigley, President of VCAT, on 18 September 2020.

¹⁸⁴ Blackham, above n176, 219.

¹⁸⁵ Ibid

¹⁸⁶ Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch, Brian Opeskin, ‘Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption’ (2018) *Melbourne University Law Review*; [2018] *UTSLRS* 4.

¹⁸⁷ Ibid.

The high proportion of neutral responses to the question of whether part-time appointments represent a challenge perhaps reflect the underdeveloped use of part-time judges even in those jurisdictions that permit them, and the prohibition on part-time appointments at the higher levels, so that judicial officers have not had sufficient experience of these appointments to have formed a view. The otherwise mixed responses are likely to reflect the fact that, in the judicial sphere, it is not yet clear whether the arguments in favour of part-time and flexible working arrangements outweigh the perceived costs. The correlation of gender with greater concern regarding part-time appointments is likely explained by the largely gendered foundation that underpins the need for greater workplace flexibility.

It is clear that more can be done to explore the ways in which courts can embrace part-time and flexible work arrangements. Many interviewees and participants in the Review expressed hope that the flexible and remote working arrangements that have been necessary as a result of Covid-19 will help courts and tribunals to identify more flexible working options, develop the institutional capacity to support them, and enable some of these arrangements to continue.

It is also clear that the broader legal profession must make significant adjustments to stop penalising those who cannot work full-time, particularly women. Ashby has described the legislative amendment that allows part-time judicial appointments in the UK as ‘cosmetic’ because working part-time as a judge is likely to be just as career limiting as it is in the wider legal profession.¹⁸⁸ Ashby laments that¹⁸⁹

[e]ven in an age where flexible working arrangements are statutorily recognised, the hypercompetitive nature of the legal profession fundamentally ignores the value attached to the arrangements. Instead they are considered to be counterproductive to the legal profession's objective. Consequently, the value attached to motherhood (and its requirements around part-time and flexible working arrangements) is accorded a lesser status, with the consequence that women are perceived as lacking commitment and a desire to progress. [Footnotes omitted]

In England and Wales, all salaried judicial roles can be held part-time, provided it has “no material adverse impact on the business needs of the court or tribunal or the services to users”.¹⁹⁰ Flexible working arrangements are supported by allowing sitting patterns across days, weeks and months, although usually with a minimum requirement of 50 per cent of the full-time equivalent and permitting the Supreme Court to be composed of a maximum of 12 full-time equivalent judges, rather than 12 individual judges.¹⁹¹

d. Quotas

Malleson challenges the rejection of quotas on the basis that quotas have a proven track record of significantly improving the gender balance of powerful institutions, unlike most other diversity policies.¹⁹² Other equality measures aimed at encouraging a ‘trickle up’ of women into higher ranks of the judiciary have failed, whereas in other areas of public life gender quotas have succeeded: “the use of gender quotas in legislatures both in the UK and elsewhere is now widely regarded as being the most effective

¹⁸⁸ Nicole Ashby, ‘Absent from the Top: A Critical Analysis of Women's Underrepresentation in New Zealand's Legal Profession’, 1 *New Zealand Women's Law Journal* (2017), 80-112, 109.

¹⁸⁹ Ibid.

¹⁹⁰ Blackham, above n176, 219 FN208.

¹⁹¹ Ibid, citing *Constitutional Reform Act 1975* (Vic), s23.

¹⁹² Kate Malleson, ‘Gender Quotas for the Judiciary in England and Wales’, in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (2013), 482.

means of increasing the representation of women in public life.”¹⁹³ However, while diversity targets are relatively uncontroversial, “quotas have traditionally been regarded as the rubicon of positive action.”¹⁹⁴ In the UK there are also some legal impediments to the use of quotas.¹⁹⁵ This is despite the UK Judicial Appointments Commission having had a general duty to promote gender equality since 2007 and the UK *Equality Act 2010* enabling employers to apply preferential decision-making for the purpose of promoting equality when deciding between equally qualified candidates.¹⁹⁶ Malleson observes that quotas are unlikely to resist legal challenges if there is political hostility to their use. According to Malleson:¹⁹⁷

The key to removing the legal barriers to the use of quotas therefore lies in the formulation of persuasive intellectual arguments which can counter the official resistance to quotas shown by government, the judiciary and the legal profession.

Malleson posits the following ways to rethink arguments against quotas:

- *Unfairness to well-qualified candidates outside the target group*: This is outweighed by the unfairness and damage suffered by overlooked women candidates, and the resulting loss of legitimacy and public confidence in the judiciary.¹⁹⁸
- *Appointments lacking merit*: Malleson advocates a threshold model rather than a ranking model for appointments, which would require that applicants meet a predetermined quality threshold to be eligible for appointment.

Whereas a ranking system would involve, for example, simply appointing the first 10 ranked candidates out of 100, a threshold model operates by assessing all candidates against a predetermined quality threshold. Once candidates are assessed as meeting this threshold and deemed eligible for appointment, diversity factors are taken into account when selecting between them.¹⁹⁹ Malleson contends that it is difficult to definitively rank judicial applicants in any event, given the inevitable differences in areas of legal practice and life experience of candidates who are well advanced in their careers, and because of the importance of qualities that are difficult to quantify, such as ‘moral courage’ and worldliness.²⁰⁰ Paradoxically, Malleson observes that if the pool of candidates does become more diverse, ranking based on merit will become even more problematic due to there being an even wider range of backgrounds and experience.²⁰¹

Further, attempting to rank groups of highly qualified candidates is problematic when criteria for judicial selection has been largely determined by “a narrow group of the most elite and powerful commercial barristers” who, until recently, considered higher court advocacy experience to be a prerequisite for judicial office.²⁰² The Judicial Office for Scotland has likewise noted that “[a]n over-emphasis on litigation skills may miss talent, and artificially narrow the pool of suitable candidates.”²⁰³ According to Malleson, “[t]he result is that judges in England and Wales are not and have never been drawn from across the brightest and best of all areas of the legal profession.”²⁰⁴

¹⁹³ Ibid, 485.

¹⁹⁴ Ibid, 484.

¹⁹⁵ Ibid, 486.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid, 488.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid, 489.

²⁰⁰ Ibid, 490.

²⁰¹ Ibid, 492.

²⁰² Ibid, 491.

²⁰³ Judicial Office for Scotland, Law Society of Scotland, Judicial Appointments Board of Scotland and Faculty of Advocates Diversity Steering Group, ‘Merit and Diversity – Compatible Aspirations in Judicial Appointment?’, *Diversity Conference Report*, Annex A (2015) <https://www.lawscot.org.uk/media/3223/diversity-conference-report.pdf> accessed on 29 January 2021.

²⁰⁴ Malleson, above n192, 492.

Quota levels

There are many different quota models. Quotas can be applied at the application stage or the appointment stage, or both, and they can be set at any level, be it 50% or, as in the case of Austria's High Court, 30%.²⁰⁵ The quota level will depend on the number of women in the pool who meet the merit threshold – the former should be raised or lowered depending on the latter so as not to be in a position where the quota level cannot be met with meritorious candidates. However, rather than setting the quota level low, Malleson advocates allowing the quota system to disregard the quota if there is an insufficient number of well-qualified women in the pool, or requiring the process to start again to attract a larger pool.²⁰⁶ Malleson observes that time-limiting quotas, for example by imposing a sunset clause, can ensure that they are a proportionate response to inequality.²⁰⁷ Quotas can also be stepped up over time, increasing as the candidate pool widens.²⁰⁸

The European Court of Human Rights has gender provisions in its appointment processes that require Member States to include a member of the underrepresented sex in its three-person shortlist, with underrepresentation defined as less than 40% of the Court. This requirement does not apply if the sex ratio of members is within a range of 40:60. Malleson considers a 40:60 range to be useful to ensure that gender balance is maintained because “a judiciary which is dominated by women is as undesirable as one dominated by men”.²⁰⁹ This is due to the same concerns stemming from a lack of representativeness, as well as evidence showing that “[w]here women are present in large numbers, the status of the institution generally declines. It is notable that women tend to outnumber men in judiciaries which are low status and poorly paid such as in eastern and central Europe.”²¹⁰ Malleson notes that “the only ranks in the judiciary in England and Wales where women outnumber men are the unpaid and relatively low status lay magistracy.”²¹¹

UK ‘equal merit provisions’

Notably, the “equal merit provisions” that are applied by the UK Judicial Appointments Commission are far from being a quota. The JAC must comply with the UK [Equality Act 2010](#), which requires public authorities to eliminate discrimination, advance equality of opportunity and foster good relations between diverse groups. Further, section 64 of the *Constitutional Reform Act 2005 (CRA)* provides that the JAC “must have regard to the need to encourage diversity in the range of persons available for selection for appointments”. However, this duty is largely aspirational – it relates only to applications (not appointments), is limited to ‘encouraging’ diversity, and can be overridden by the duty to select based on merit.²¹²

Under the CRA, the JAC must select candidates solely on merit, while also encouraging diversity in the range of people available for selection. However, where two or more candidates are assessed as being of equal merit and there is clear under-representation on the basis of race or gender, the JAC can give priority to a candidate (or candidates) for the purpose of increasing judicial diversity using statutory equal merit provisions.²¹³ The JAC relies on national census data, judicial diversity data, and diversity data provided by candidates in their application when considering equal merit provisions.²¹⁴ However, according to a number of commentators, the equal merit provision has made little difference.²¹⁵

²⁰⁵ Ibid, 493.

²⁰⁶ Ibid, 494.

²⁰⁷ Ibid, 495.

²⁰⁸ Ibid.

²⁰⁹ Ibid, 496.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid, 484.

²¹³ *Equality Act 2010* (UK), section 159 and *Constitutional Reform Act 2005* (UK) section 63(4).

²¹⁴ Judicial Appointments Commission website, *Equal merit*, <https://www.judicialappointments.gov.uk/equal-merit>, accessed on 15 October 2020.

²¹⁵ Michael Blackwell, ‘Starting out on a Judicial Career: Gender Diversity and the Appointment of Recorders, Circuit Judges, and Deputy High Court Judges, 1996-2016,’ 44(4) *Journal of Law and Society* (2017), 586-619; Graham Gee, Robert Hazell,

Malleson et al state that “the Ministry’s vision of the JAC as a recruitment agency has prevailed over the competing vision that emphasised the JAC’s duty to drive forward the diversity agenda.”²¹⁶

e. Judicial appointment process

GJIN states that the appointment process for judges should consider gender representation in courts and ensure that the courts broadly reflect society.²¹⁷ Some jurisdictions, namely the UK and South Africa, have tried to increase racial and gender diversity among their judiciaries by introducing changes to the judicial appointment process to increase transparency, standardise the process, and require decision-makers to take into account certain attributes of candidates during the selection process.

The Victorian court appointment process is set out on the Justice and Community Safety webpage, [Judicial Appointments, which provides:](#)

- “Judicial officers are appointed by Governor in Council on the recommendation of the Attorney-General. The process of making appointments is managed for the Attorney-General by the Department of Justice and Community Safety.”
- “The Attorney-General seeks expressions of interest from qualified persons for appointment to the Supreme, County and Magistrates’ Courts of Victoria, and as a Coroner”.
- “Potential candidates are referred to the [Framework of Judicial Abilities and Qualities for Victorian Judicial Officers](#), developed by the Judicial College of Victoria, which outlines the attributes the government, courts and community expect from judicial appointees.”

The webpage states that one can be notified of opportunities to submit an expression of interest once they become available by registering with the ‘[get on board](#)’ website. There is no further information provided about the screening or appointment processes involved. The Review Report discusses the process, particularly with regard to Magistrates and VCAT members, in more detail.

The sections below discuss strategies that have been implemented or proposed to improve the diversity of the judiciary. However, there is limited evidence of the effectiveness of these measures, with the exception of quotas. Other strategies include diversifying the applicant pool, ensuring recruitment processes are transparent and publicised, applying uniform and unbiased selection criteria, diversifying the selection panel, and screening candidates for character. Finally, there is a discussion of judicial appointment commissions, although there is limited evidence that they contribute to improved gender equality.

i. Diversify the applicant pool

The US Brennan Center report, *Building a Diverse Bench*, recommends that the judiciary build a pipeline to law schools and conduct targeted outreach to young lawyers to encourage underserved and minority students and lawyers to consider a career on the bench.²¹⁸ The report notes that judges from diverse backgrounds have indicated that early consideration of a judicial career contributed to their eventual success.²¹⁹ The report recommends frequent outreach and information sessions, and reaching out to

Kate Malleson, Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (2015), 177: According to Malleson et al, this is largely because “[t]he JAC’s workload is generally too large for the commissioners to be closely involved in every recommendation” so “[i]nvariably, therefore, the commissioners accept the evaluation of the selection panel as to who are the strongest candidates”.

²¹⁶ Gee et al, above n215 191.

²¹⁷ GJIN, above n1, 10.

²¹⁸ Kate Berry, (Brennan Center for Justice & American Bar Association Judicial Division), *Building a Diverse Bench: Selecting Federal Magistrate and Bankruptcy Judges* (2017), <https://www.brennancenter.org/our-work/policy-solutions/building-diverse-bench-selecting-federal-magistrate-and-bankruptcy-judges>, accessed on 7 November 2020, 15, citing Kevin M Esterling and Seth S Andersen, Judicature Society, *Diversity and the Judicial Merit Selection Process: A Statistical Report* 24-29 (1999), http://www.judicialselection.us/uploads/documents/Diversity_and_the_Judicial_Merit_Se_9C4863118945B.pdf (“We found relatively clear evidence in all states where data are available that diverse commissions tend to propose more diverse nominees and attract more diverse applicants.”). See also Thurston, above n157, 97.

²¹⁹ Berry, above n218, 9.

leadership at minority law and bar associations to encourage them to recommend strong candidates and increase engagement through attendance and speaking at their events.²²⁰ Thurston makes a similar suggestion and also encourages courts to support diversity throughout the court administration, particularly among clerks given that many will go on to become barristers and some will become judges.²²¹

As indicated above, JUSTICE makes a number of recommendations about strategies to encourage more diverse candidates, including:²²²

- Identifying a talent pool or “appointable pool” of suitable judges for each court through an ongoing, proactive recruitment programme that focusses on both the qualities of the applicants and the needs – including diversity – of the court in question.
- Creating an upward judicial career path, where there is a meaningful chance of being promoted from an “entry-level” position in a lower jurisdiction to the senior judiciary.
- A “Talent Management Programme” to support talented judges to progress their career.
- Providing more attractive, inclusive career paths and working conditions, including making flexible working the default.

ii. Ensure the process is transparent and publicised

Judicial appointment processes vary widely in terms of their transparency – from the extremely private and opaque processes in Australia, including in the Victorian and Federal jurisdictions, to highly transparent processes in South Africa, which invite public comment on nominations and publicly air interviews, or the United States, which has public nomination hearings. Levy considers that public hearings and democratisation of the appointment process risks deterring well-qualified candidates because it favours “comfort before television cameras or a gift for public relations” over desirable judicial values such as “intellectual sensitivity and breadth of vision”.²²³ Further, as Justice Sackville observed, “public hearings in the Australian system will create a heavy politicization that is to be avoided if possible”.²²⁴

Further, exposing why individual appointments are or are not made may embarrass candidates and deter high quality applicants. Nonetheless, there are strong arguments that favour being transparent about the processes used to determine how judicial appointments are made. The Brennan Center report states that the more transparent the process, the more likely it is that underrepresented candidates will participate.²²⁵ It recommends widely disseminating detailed information about vacancies, including:²²⁶

- a detailed position description
- minimum qualification requirements
- detailed application instructions and contact person
- a description of the application process that identifies who will review the applications and conduct interviews
- what will be made public

²²⁰ Ibid, 11.

²²¹ Thurston, above n157, 95.

²²² JUSTICE, above n 163.

²²³ Ron Levy, *Judicial Selections Reform in Comparative Context* 40 *University of British Columbia Law Review*, 2 (2011), 591-628, available at SSRN: <https://ssrn.com/abstract=1967455>, 84.

²²⁴ Ibid.

²²⁵ Berry, above n218, 13, citing Chiara Torres-Spelliscy, Monique Chase and Emma Greenman, Brennan Center for Justice, *Improving Judicial Diversity* 10 (2d ed 2010), available at https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf 8 (explaining that “the less transparent the vetting process is, the less likely candidates of all stripes will subject themselves to it”).

²²⁶ Ibid, 13.

- the process timeline
- the number of candidates to be recommended and
- a statement that the judiciary “values a diverse workforce and an inclusive culture, and encourages candidates of all gender identities, races, ethnicities, national origins, sexual orientations, parental statuses, physical abilities, religious affiliation or lack thereof, socio-economic backgrounds, veteran statuses, and geography to apply.”

The Brennan Centre report recommends making selection panel member names public to increase the transparency in the process.²²⁷

Widely publicising vacancies and distributing detailed job descriptions can encourage applications from diverse candidates. The Brennan Center report states that job opportunities should be widely disseminated through court websites, bar associations, law societies, minority and women’s law and bar associations, law school alumni networks, and national and local law firms.²²⁸

In 2008 then Australian Federal Attorney-General Robert McClelland introduced reforms to create a more transparent appointment process, with the hope of widening the applicant pool and encouraging a more diverse bench.²²⁹ The changes included: making selection criteria publicly available; advertising vacancies and calls for nominations; and using advisory panels to make recommendations to the Attorney-General.²³⁰ The reforms were short-lived, which likely contributed to their limited impact, although Ashby doubts that these changes went far enough to achieve their ultimate goal of increased diversity,²³¹ pointing to the United Kingdom’s experience, which “suggest[s] that clear criteria and transparent processes are not sufficient to promote or increase judicial diversity.”²³²

However, as one of a suite of strategies aimed at promoting judicial diversity, it is logical that being transparent about judicial vacancies and recruitment processes has the potential to demystify the process for people who may not have strong judicial networks, expose barriers to entry within the process and increase accountability for those responsible for judicial appointments.

iii. Uniform and unbiased selection criteria

Blackham speculates that one of the reasons why women continue to be excluded from senior judicial roles may be that selection criteria emphasises ‘old’ (masculine) judicial qualities.²³³ The Brennan Center report recommends that interviews have a uniform set of questions and a question that enables a discussion of greater life experience.²³⁴ The report further advises selection panels to weigh skills and experience rather than titles, value diverse legal experience, and avoid placing undue weight on the applicant’s law school ranking. Conversations with referees should also be standardised.²³⁵

GJIN state that appointment processes should also consider an applicant’s gender sensitivity when assessing their fitness to serve as a judge.²³⁶

²²⁷ Ibid, 16.

²²⁸ Ibid, 13.

²²⁹ Ashby, above n188, 106-107.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Blackham, above n176, 216, citing Rosemary Hunter, ‘Judicial Diversity and the “New” Judge’ in Hilary Sommerlad et al (eds), *The Futures of Legal Education and the Legal Profession* (2015) 79, 95 and Rachel Davis and George Williams, ‘Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia’ (2003) 27 *Melbourne University Law Review* 819. For updated statistics, see Australasian Institute of Judicial Administration, *Judicial Gender Statistics* (7 March 2018) <<https://aija.org.au/research/judicial-gender-statistics/>>.

²³⁴ Berry, above n218, 20.

²³⁵ Ibid, 22.

²³⁶ GJIN, 10.

iv. Diversify the selection panel

The Brennan Center report draws on empirical research which shows that decision-making bodies that are more diverse recruit and recommend more diverse candidates.²³⁷ The author reasons that this is because:²³⁸

By bringing a variety of viewpoints and life experiences to bear on the decision-making process, diverse merit selection panels are more likely to have the capacity to assess a range of professional experiences and demonstrate that the process is open to all.

Diverse selection panel members can be sought through advertising these positions (where they exist) and approaching minority bar associations, law schools and community groups for recommendations.²³⁹

The report also recommends scheduling an organisational meeting of the panel early on – before there is time pressure or the influence of knowing who the candidates are – to confirm formalised selection procedures and diversity goals, and conduct implicit bias training for the panel members.²⁴⁰

Canada implemented some of these changes in 2016, when it reconstituted its Judicial Advisory Committees to increase diversity. The Canadian government designated positions for this purpose, publicly advertised the roles, and introduced diversity and unconscious bias training.²⁴¹ Since November 2015 more than half of its senior judicial appointments have been women.

v. Screen candidates for character

Levy identifies the risks involved with consulting members of elite networks about the suitability of candidates from those same networks, when a sense of loyalty often exists between them and the consultee may not be forthcoming about any flaws.²⁴² “Consultees ‘don’t want to be the rat’, for example, against the candidate who ‘told off-colour jokes’.”²⁴³ One method for overcoming the risks associated with this approach is to formally consult professional associations and regulators, as occurs in the UK and in South Africa.

The UK Judicial Appointments Commission (**UK JAC**) considers whether candidates are “of good character” and details what it takes into account in doing so in the “Good Character Guidance”.²⁴⁴ The Guidance states:²⁴⁵

The principles the JAC adopts in determining good character are based on the overriding need to maintain public confidence in the standards of the judiciary and the fact that public confidence will only be maintained if judicial office holders and those who aspire to such office maintain the highest standards of behaviour in their professional, public and private lives.

The UK JAC convenes regular Selection and Character Committee Meetings, where any relevant character issues are considered by the Commissioners applying the guidance and their own discretion. In addition

²³⁷ Berry, above n218, 9.

²³⁸ Berry, 16.

²³⁹ Thurston, above n157, 99; Berry, above n218, 16.

²⁴⁰ Thurston, above n157, 100; Berry, above n218, 17-18.

²⁴¹ Department of Justice Canada, ‘Minister of Justice hosts virtual forum on Diversity on the Bench’, <https://www.canada.ca/en/department-justice/news/2020/09/minister-of-justice-hosts-virtual-forum-on-diversity-on-the-bench.html>, accessed on 7 November 2020

²⁴² Levy, above n223, 74-5.

²⁴³ Ibid.

²⁴⁴ Judicial Appointments Commission (UK), *Good Character Guidance*, (effective from 8 January 2019), https://www.judicialappointments.gov.uk/sites/default/files/sync/application_selection/good_character-january2019.pdf, accessed on 15 October 2020.

²⁴⁵ Ibid, 2.

to considering the character issues declared by the applicant on their application form, the UK JAC makes character checks with various bodies including, but not limited to, the ACRO Criminal Records Office, HM Revenue & Customs, The Insolvency Service and professional regulatory bodies (such as Bar Standards Board, Solicitors Regulation Authority, Chartered Institute of Legal Executives and General Medical Council).²⁴⁶

However, the UK JAC only considers complaints to a professional body or disciplinary matters that have been upheld against the applicant personally or someone under their direct supervision.²⁴⁷ Information about ongoing investigations must be declared even if a determination has yet been made, but appointments are unlikely until the investigation is finalised.²⁴⁸

In South Africa, the Judicial Services Commission invites comments on shortlisted candidates from the various law associations, such as the Law Society, the Bar Council, the National Democratic Lawyers' Association, or the Black Lawyers' Association.²⁴⁹ However, the South African bench still has a low proportion of women judges.

In Canada, the Federal Judicial Advisory Committees (**Canadian JAC**) ask law societies to provide information about any current or past discipline matter, and any information that could affect a candidate's fitness for judicial appointment.²⁵⁰ Candidates must sign an authorisation to allow the law societies to provide this information to the Canadian JAC.

vi. The final decision-maker

The primary methods of judicial appointment considered in this research involve appointments that are decided by politicians and appointments that are decided by a judicial appointment body, which are commonly influenced by judges. Judicial elections have not been considered. Based on the evidence reviewed, judicial appointment bodies in and of themselves do not appear to be particularly effective at increasing gender diversity, or diversity more broadly.

Malleson observes that the UK Judicial Appointments Commission has failed to meaningfully increase gender diversity of the judiciary.²⁵¹ According to Malleson:²⁵²

Despite policies...designed to attract a wider range of candidates, across the UK there is growing concern that the removal of politicians from the appointments processes and the reinforcement of the role of the judiciary, while strengthening judicial independence, may have come at the cost of reducing the prospects for improving judicial diversity.

Malleson puts this down to an unwillingness on the part of senior judges to actively seek out and advocate for the appointment of non-traditional candidates. Mallson quotes an advocate in Scotland who described the appointment process whereby legal and judicial members have a veto as resulting in "judicial cloning. So, the paradox is you get less diversity because its now judges re-creating themselves rather than the Lord Advocate before saying, 'Try this one, try that one'".²⁵³

²⁴⁶ Ibid.

²⁴⁷ Ibid, 6.

²⁴⁸ Ibid, 7.

²⁴⁹ Penelope Andrews, 'The South African Judicial Appointments Process' 44 *Osgoode Hall Law Journal* 3 (2006), 565-572, 570.

²⁵⁰ Office for the Commissioner of Federal Judicial Affairs Canada, *Judicial Advisory Committees - Guidelines for Judicial Advisory Committee Members* (October 2016), [Office of the Commissioner for Federal Judicial Affairs Canada - Guidelines \(fja.gc.ca\)](https://fja.gc.ca), accessed 20 January 2021.

²⁵¹ Gee, above n215, 247-8

²⁵² Ibid.

²⁵³ Ibid, 248.

The Canadian JAC appears to be an outlier, with more than half of judicial appointees to superior courts (excluding the Supreme Court) since November 2015 being women. A potential reason for this is that it employs a threshold ranking system similar to that advocated by Malleson and discussed above in relation to quotas. That is, the JAC vets candidates and assesses them as being “recommended” or “not recommended”. A previous category of “highly recommended” was dropped in 2007. This is intended to provide a large pool of suitable candidates from which the government can make appointment decisions that “address the particular needs of the court in question.”²⁵⁴ However, this system has also been criticised for enabling the government to make patronage appointments and ideologically ‘stack’ courts, and for failing to increase racial diversity.²⁵⁵

This is a criticism shared by appointment processes that are led and determined by politicians. Levy considers that “patronage is...a pronounced feature of Australian selections” and cites Justice Ronald Sackville as saying: “At present ... the reality is that politics intrudes.”²⁵⁶ Levy refers to a report of a former Chair of the Judicial Conference of Australia saying that: “There is growing evidence that the power of making judicial appointments is coming to be regarded by governments ... as a form of patronage and a source of influence that can be used to serve their short-term political interests”.²⁵⁷ Levy notes criticism of the current process in Australia for being politicised, lacking rigour and promoting a narrow range of candidates.²⁵⁸

vii. Examples of judicial appointment bodies – UK, South Africa and Canada

UK – Judicial Appointments Commission

Judicial appointments in the UK are made by a Judicial Appointments Commission (**UK JAC**). The UK JAC was established in 2006 as a result of the *Constitutional Reform Act 2005* (UK), which enshrined the independence of the judiciary and changed the way judges are appointed. The JAC’s statutory duties are to:

- select candidates solely on merit
- select only people of good character
- have regard to the need to encourage diversity in the range of persons available for judicial selection

The UK JAC comprises 15 Commissioners, including 6 lay members (one of whom is the Chair), 6 judicial members, 2 professional members, and 1 non-legally qualified judicial member.²⁵⁹

The selection and application processes are set out on the UK JAC website. The selection process includes online assessments and can include telephone assessments, panel interviews, role play, and presentations. The UK JAC also consults someone who holds the office that the candidate is applying for. The candidate is told who this will be.²⁶⁰

²⁵⁴ Kirk Makin, “Ontario system eliminates patronage in choosing judges, proponent says”, *The Globe and Mail*, 27 April 2012, <https://www.theglobeandmail.com/news/politics/ontario-system-eliminates-patronage-in-choosing-judges-proponent-says/article4103317/> accessed on 3 December 2020.

²⁵⁵ *Ibid.*

²⁵⁶ Levy, above n223, 74.

²⁵⁷ *Ibid.*, citing Justice Bruce McPherson, “Judicial Appointments and Education: Response from the JCA” (1999) 73 *Law Institute Journal* 23, 25.

²⁵⁸ *Ibid.*

²⁵⁹ Judicial Appointments Commission (UK), *Commissioners*, <https://www.judicialappointments.gov.uk/commissioners>, accessed on 15 October 2020.

²⁶⁰ *Ibid.*

The UK JAC Commissioners sit as the Selection and Character Committee, which recommends candidates to the Appropriate Authority (Lord Chancellor, Lord Chief Justice or Senior President of Tribunals) for appointment.²⁶¹ However, Malleson et al state that in practice decisions about candidate's applications are made by the interview panel in all but borderline cases.²⁶² This is because "[t]he UK JAC's workload is generally too large for the commissioners to be closely involved in every recommendation....Inevitably, therefore, the commissioners accept the evaluation of the selection panel as to who are the strongest candidates".²⁶³

For senior appointments the selection panel comprises two senior judges, the UK JAC's lay Chair, a lay UK JAC Commissioner and a fifth member chosen by the Lord Chief Justice or, if recruiting the LCJ, the UK JAC Chair.²⁶⁴ Even though it is possible to have a majority of lay members on selection panels, Malleson et al consider that judicial influence in the appointment process is too high. Judges shape the job descriptions, design qualifying tests and activities, sit on selection panels and are involved in statutory consultation. While this influence was designed into the system, there is no effective check on it.²⁶⁵

Malleson et al identify two main gaps arising from the increased judicial influence over appointments:

The first is a growing accountability gap. Judicial influence is increasing, especially over the most senior posts, but there is little appetite at Westminster for holding them to account effectively and, given the complexity of the new processes, little capacity to hold them to meaningful account. The second risk is that Lord Chancellors will retreat more and more from the appointments system. With the JAC now functioning as a de facto appointing body in a densely regulated statutory scheme that has extensive judicial influence engineered into it, the judiciary may feel initially even better protected, but ultimately they may be left exposed to future political attacks. A recurring theme in this book is that judicial independence depends on political machinery that understands and respects the role of the judiciary and the courts. Over the long term, the retreat of politicians from the appointments process may pose more of a threat to judicial independence than a system in which engaged and well-informed politicians play a more equal part.

Finally, the UK JAC does not appear to be achieving its aim of encouraging diversity on the bench. Since 2017 the proportion of women in senior courts has increased by four per cent to 32 per cent – a rate of just over one per cent per year,²⁶⁶ while the appointment of Black, Asian and minority ethnic (BAME) judges has stagnated during that period.²⁶⁷

South Africa – Judicial Services Commission

South Africa has a Judicial Services Commission (JSC), established by the Constitution, that is responsible for judicial appointments. The JSC membership includes the chief justice, one judge

²⁶¹ Judicial Appointments Commission website, *Selection decisions*, <https://www.judicialappointments.gov.uk/selection-decisions>, accessed on 15 October 2020.

²⁶² Gee, above n215, 180-1.

²⁶³ Ibid, 177.

²⁶⁴ Ibid, 183.

²⁶⁵ Ibid, 192.

²⁶⁶ JUSTICE, above n163, 15.

²⁶⁷ Ibid, 28.

president, the minister of justice, members of the legal profession and the legal academy, politicians, and laypersons.²⁶⁸

The JSC places a high value on transparency, publishing vacancies and the names of shortlisted candidates and consulting widely about the suitability of shortlisted candidates.²⁶⁹ The application process is also standardised, with a questionnaire that applicants must complete. The questionnaire asks about the applicant's personal and professional life, including the applicant's advocacy against apartheid and commitment to the Constitution's underlying principles. Candidates must also provide a statement from their professional organisation saying they are a member of good standing.²⁷⁰

In the appointment process, the JSC must also consider the "need for the judiciary to reflect broadly the racial and gender composition of South Africa" by virtue of section 174(1) of the Constitution.²⁷¹ The professional and personal values of candidates are also given significant weight. As Andrews states:²⁷²

the Judicial Services Commission (JSC) has indicated that, in terms of its judicial appointments, the stated goals of diversity and representation are more than just the exercise of increasing the numbers of black individuals and women on the bench. The JSC has required that the values and visions of the appointed individuals must also comport with the explicit social justice commitments embodied in the Constitution, indeed, the candidates for an appointment to the judiciary have to demonstrate this commitment both in their personal statements and in their track records.

However, while the judicial appointment process in South Africa may have resulted in a more racially diverse and accountable judiciary, "the process has fallen far short of the goals of gender diversity."²⁷³ Andrews considers that the gender disparity is explained by entrenched gender inequality within South Africa²⁷⁴ and a legal profession with "a markedly masculinist culture [that] is not amenable to attracting a huge number of female practitioners."²⁷⁵

Canada – Judicial Advisory Committees

Canada introduced reforms to the judicial appointment processes of superior courts in 2016, with the aim of "reinforcing public confidence through openness, increased transparency and accountability, and by promoting diversity and gender balance on the bench."²⁷⁶ Measures implemented as a result of the reforms include:²⁷⁷

- Public reporting of the number of applicants and judicial appointees from historically under-represented demographics.

²⁶⁸ Andrew, above n249, 572.

²⁶⁹ Ibid, 572.

²⁷⁰ Ibid, 567

²⁷¹ Ibid, 566

²⁷² Ibid, 567

²⁷³ Ibid, 570.

²⁷⁴ Ibid, 572.

²⁷⁵ Ibid, 571.

²⁷⁶ Department of Justice Canada, 'Minister of Justice hosts virtual forum on Diversity on the Bench', <https://www.canada.ca/en/departement-justice/news/2020/09/minister-of-justice-hosts-virtual-forum-on-diversity-on-the-bench.html>, accessed on 7 November 2020.

²⁷⁷ Ibid.

- Placing Judicial Advisory Committees (**Canadian JACs**) at the heart of the appointment process. The JACs assess all applications for judicial appointment, and forward their recommendations to the Minister of Justice.
- Reconstituting all JACs to make them more representative of the diversity of Canada. This involved a public application process for designated positions, and the development of diversity and unconscious bias training.

The Canadian Department of Justice reports that since November 2015 more than half of the 390 judges who have been appointed at the superior court level are women and the number of judges who are Indigenous, Black and culturally diverse has steadily increased.²⁷⁸

The judicial appointment process is detailed on the Federal Judicial Affairs website with a guide for candidates, an application form and statistics on the gender and backgrounds of judicial applicants and appointees.²⁷⁹ The site also contains the Code of Ethics for JAC members, Guidelines for JAC members and the names of JAC members in each province.²⁸⁰

4. Understanding the nature of the problem

The *Rotten Apples* report emphasises the importance of understanding the risk factors that contribute to poor behaviour within an organisation in order to develop targeted interventions that will result in more ethical behaviours: “There is no silver bullet to eradicate unethical behaviour, but by better understanding what influences people’s decision-making and behaviour, businesses can take evidence-based action to tackle it.”²⁸¹ They refer to three categories of risk – rotten apples, bad barrels, and sticky situations – and suggest asking the questions below to better understand the nature of the risks within an organisation.²⁸²

- **‘Rotten apples’**: to what extent is unethical behaviour the result of individual choices?
- **‘Bad barrels’**: to what extent is it due to systemic, organisation or industry-wide problems, in particular organisational culture or ingrained norms of behaviour?
- **‘Sticky situations’**: to what extent is it due to the difficult or compromising nature of decisions that people face?

Given that risks can arise in relation to individuals, organisation-wide systems and cultures, and specific situations it is necessary to use a range of methods to identify and understand these risks. As discussed further below, these methods can include organisation-wide and team specific surveys, consultation with staff and stakeholders, information about sexual harassment complaints, and other relevant data, such as information about any sexual harassment complaints made.

²⁷⁸ Ibid.

²⁷⁹ Office of the Commissioner for Federal Judicial Affairs Canada, *Judicial Advisory Committees* (26 October 2016), <https://www.fja.gc.ca/appointments-nominations/committees-comites/index-eng.html>, accessed on 2 December 2020.

²⁸⁰ Office of the Commissioner for Federal Judicial Affairs Canada, *Judicial Advisory Committees* (26 October 2016), <https://www.fja.gc.ca/appointments-nominations/committees-comites/index-eng.html>, accessed on 2 December 2020.

²⁸¹ Gifford et al, above n12, 3.

²⁸² Ibid, drawing on the work of J Kish-Gephart, D Harrison, and L Treviño, (2010) ‘Bad apples, bad cases, and bad barrels: meta-analytic evidence about sources of unethical decisions at work’ 95 *Journal of Applied Psychology* 1, 1–31.

Consulting workers who are affected by sexual harassment is important not only to better understand the problem, but also to co-design effective measures to address the risks. Work health and safety systems are designed to do exactly this.²⁸³

a. Surveys

Organisation-wide surveys can be an efficient way to identify trends, patterns and hotspots. The design of these surveys and the questions asked is important. For example, UN Women note that “asking what participants have observed is a safer strategy than asking them to discuss what they have experienced”²⁸⁴ Other relevant surveys should also be taken into account so that questions can obtain comparable data for comparison and evaluation purposes. For example, surveys on experiences of sexual harassment at work have recently been conducted by the Australian Human Rights Commission,²⁸⁵ the Victorian Legal Services Board and Commission²⁸⁶ and the Victorian Auditor-General’s Office.²⁸⁷

Survey data can also inform cultural change initiatives and ensure the design of targeted interventions. It is essential to understand existing norms and attitudes within a group to develop messages aimed at shifting the group norms.²⁸⁸ In their trial of social messaging strategies aimed at encouraging bystander action among university staff and students, VicHealth and the Behavioural Insights Team started by surveying staff and students about attitudes and behaviours relating to sexism, sexual harassment and bystander action.²⁸⁹ This uncovered the majority social norms around what behaviours were acceptable, which could then be used in messaging to encourage bystander action. In this instance the message was: “Most of us studying on campus think it’s right to call someone out for making sexist jokes or comments ... And 78% said they themselves would intervene if they saw sexism and sexual harassment on campus”.²⁹⁰

The survey data also established skill levels and attitudes so that initiatives could be designed to address the needs identified. For example, low awareness of everyday sexism may require training focussed on improving recognition, whereas education about bystander strategies may be more appropriate where there are high levels of awareness and intention to act.

The VicHealth [bystander behavioural survey tool for universities](#) is publicly available and can be adapted for other organisations.

b. Consultation with staff to identify risks and challenges

AHRC recommends having regular, open conversations with staff about preventing sexual harassment in the workplace and normalising these conversations, in the same way that organisations have regular

²⁸³ Smith et al, above n8, 240.

²⁸⁴ Sen above n20, 36.

²⁸⁵ Australian Human Rights Commission, *Everyone’s Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018).

²⁸⁶ Victorian Legal Services Board and Commissioner, *Sexual Harassment in the Victorian Legal Sector* (2019).

²⁸⁷ Victorian Auditor-General’s Office, *Sexual Harassment in the Victorian Public Service* (Report, 28 November 2019).

²⁸⁸ Campbell and Chinnery, above n40, 51, citing D Chung, C Zufferey, and A Powell, VicHealth, *Preventing violence against women in the workplace (An evidence review: full report)* (2012) https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/Economicparticipation/2015-workplace/Creating-Healthy-Workplaces_Preventing-violence-againstwomen_Final-Report.pdf?la=en&hash=FF866E1F1D4F375EE90DF03FD14F7A5C0156F368.

²⁸⁹ VicHealth, *How to be an active bystander* (24 September 2019), accessed at <https://www.vichealth.vic.gov.au/bystander#> on 1 October 2020; and VicHealth, *Take action: Empowering bystanders to act on sexist and sexually harassing behaviours in universities - The final report from the Phase Two bystander trials, 2018 – 2019* (2019).

²⁹⁰ VicHealth, the Behavioural Insights Team and Women Victoria, *Take action: Empowering bystanders to act on sexist and sexually harassing behaviours in universities - The final report from the Phase Two bystander trials, 2018 – 2019* (2019) (Take action) https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Bystander/Bystander_Final-ReportPhase2Trials.pdf?la=en&hash=252829B0D9FFD147690D7FC9FD9907B8D79E3B2D accessed on 29 January 2021, 24. See also VicHealth and Behavioural Insights Team, *Take action: Empowering bystanders to act on sexist and sexually harassing behaviours* (2019) <www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Take-Action-Bystander_Oct2019.pdf?la=en&hash=D3150832DDE6E645A0B854AC2CD57B119E03BD22>.

discussions or even daily ‘toolbox talks’ about safety risks and risk management approaches.²⁹¹ The AHRC has developed a ‘Have your say’ Conversation Toolkit,²⁹² with the following questions and prompts to assist facilitators to lead the discussion.

1. What do you think are the causes of sexual harassment? Are there particular places or times where sexual harassment is more likely to occur?
2. How do you think sexual harassment in the workplace can be prevented: what works, what doesn’t work?
3. When sexual harassment occurs organisations can respond in a number of ways. If an incident of sexual harassment occurred in your workplace, what is the response you’d like to see? What can go wrong?

These consultations can occur within a work health and safety framework, as discussed below.

The US Federal Judiciary Workplace Conduct Working Group, which released a report in 2018 that examined safeguards within the judiciary to protect court employees from inappropriate workplace conduct, also recommends conducting exit interviews with judicial staff, particularly associates and law clerks, to provide an opportunity to report poor workplace conduct.²⁹³ This can be both a responsive and preventative strategy, as information gathered in exit interviews together with other data can provide insight into the lived reality of existing processes, systems and risks and inform future sexual harassment prevention efforts.

c. Making use of WHS systems

Sexual harassment causes psychological and physical harm and is therefore a work health and safety hazard that employers must proactively prevent.²⁹⁴ In Victoria, this obligation is primarily imposed by the *Occupational Health and Safety Act 2004* (Vic) and explained by WorkSafe Victoria’s Guide to *Work-Related Gendered Violence Including Sexual Harassment*,²⁹⁵ which are discussed in more detail in this Review’s Legal Landscape document.

While discrimination laws enable victims to seek individual redress, work health and safety (WHS) laws focus on preventing harm, including by imposing positive duties to do so.²⁹⁶ According to Smith et al, “the more systemic, harm-prevention approach of WHS laws may prove more effective at preventing sexual harassment by tackling its antecedents in workplace cultures, and should be used to complement the individual redress schemes found in anti-discrimination law.”²⁹⁷ The AHRC likewise concluded that “[a]ctive risk management is an important, and currently underutilised, strategy that employers can use to help prevent workers being harmed by workplace sexual harassment.”²⁹⁸

WHS frameworks including the OHS Act, require employers to actively identify, assess and control work hazards that may affect the physical or psychological health and safety of workers. The following resources include guidance and tools to help organisations do this with respect to sexual harassment.

²⁹¹ AHRC, *Respect@Work*, 726.

²⁹² Australian Human Rights Commission, ‘Have Your Say—Conversation Toolkit (2018)’, *National Inquiry into Sexual Harassment in Australian Workplaces* (Web Page, 26 October 2018) <www.humanrights.gov.au/our-work/sex-discrimination/publications/have-your-say-conversation-toolkit-2018>.

²⁹³ United States Courts, *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* (1 June 2018), (**Workplace Conduct Working Group Report**) https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf, accessed on 29 January 2021, 40.

²⁹⁴ Smith et al, above n8, 225.

²⁹⁵ WorkSafe Victoria, <https://www.worksafe.vic.gov.au/resources/work-related-gendered-violence-sexual-harassment>, accessed on 3 December 2020.

²⁹⁶ Smith et al, above n8, 225.

²⁹⁷ Ibid.

²⁹⁸ AHRC, *Respect@Work*, 690.

- WorkSafe Victoria's Guide to *Work-Related Gendered Violence Including Sexual Harassment*²⁹⁹
- The VEOHRC's [Guideline: Preventing and responding to workplace sexual harassment](https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/)³⁰⁰
- EEOC *Chart of Risk Factors and Responses*³⁰¹ (included further below).

The first step is to identify sexual harassment hazards and risk indicators. As discussed below, consulting staff and health and safety representatives is a critical part of this process. These consultations may be particularly useful for identifying specific situations when sexual harassment is more likely to occur. Staff survey results, complaints data, EAP trend reports, information received during staff exit interviews and knowledge about the nature and drivers of sexual harassment gained from this and other reviews will also provide insights.

The next step is to assess the risks, which requires "understanding the impact of a particular hazard in a workplace and making an assessment of the likelihood of it occurring".³⁰² Employers can use this information to prioritise action that must be taken to complete the final step, which is to control health and safety risks. Control measures should also be developed in consultation with those who are affected by them, in a transparent manner.³⁰³ The EEOC *Chart of Risk Factors and Responses*, included below, lists some generic sexual harassment risk factors (in the first column) and control measures (in the fourth column). Control measures may involve redesigning jobs, systems of work, or the physical workplace, or longer-term strategies such as addressing a culture of sexism.³⁰⁴

As the discussion above indicates, a fundamental aspect of WHS regulatory framework is the obligation of persons conducting a business or undertaking (PCBU) – such as employers – to consult workers and health and safety representatives about WHS issues that affect them. As indicated above, this is important because 'front line' workers are best placed to identify safety hazards and design effective responses.³⁰⁵ Further, a meaningful consultation process can promote substantive equality by elevating the voices³⁰⁶ of those who are at higher risk of experiencing sexual harassment, including women, Aboriginal and Torres Strait Islander people, and people with a disability. However, engagement must be genuine, with the provision of relevant information and reasonable opportunities to express views.

*EEOC CHART OF RISK FACTORS AND RESPONSES*³⁰⁷

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Homogenous workforce	Historic lack of diversity in the workplace	Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others.	Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity.
	Currently only one minority in a work group (e.g., team, department, location)	Employees in the majority might feel threatened by	Pay attention to relations among and within work groups.

²⁹⁹ WorkSafe Victoria, <https://www.worksafe.vic.gov.au/resources/work-related-gendered-violence-sexual-harassment>, accessed on 3 December 2020.

³⁰⁰ VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment* (August 2020) <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>, accessed on 3 December 2020.

³⁰¹ Feldblum and Lipnic, above n5, Appendix C.

³⁰² AHRC, *Respect@Work*, 688.

³⁰³ AHRC, *Respect@Work*, 688.

³⁰⁴ VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment* (August 2020) <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>, accessed on 3 December 2020, 65.

³⁰⁵ Smith et al, above n8, 240.

³⁰⁶ Ibid.

³⁰⁷ Feldblum and Lipnic, above n5, Appendix C.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
		those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.	
Workplaces where some employees do not conform to workplace norms	<p>"Rough and tumble" or single-sex-dominated workplace cultures</p> <p>Remarks, jokes, or banter that are crude, "raunchy," or demeaning</p>	<p>Employees may be viewed as weak or susceptible to abuse.</p> <p>Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.</p>	<p>Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership.</p> <p>Pay attention to relations among and within work groups.</p>
Cultural and language differences in the workplace	<p>Arrival of new employees with different cultures or nationalities</p> <p>Segregation of employees with different cultures or nationalities</p>	<p>Different cultural backgrounds may make employees less aware of laws and workplace norms.</p> <p>Employees who do not speak English may not know their rights and may be more subject to exploitation.</p> <p>Language and linguistic characteristics can play a role in harassment.</p>	<p>Ensure that culturally diverse employees understand laws, workplace norms, and policies.</p> <p>Increase diversity in culturally segregated workforces.</p> <p>Pay attention to relations among and within work groups.</p>
Coarsened Social Discourse Outside the Workplace	Increasingly heated discussion of current events occurring outside the workplace	Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.	<p>Proactively identify current events-national and local-that are likely to be discussed in the workplace.</p> <p>Remind the workforce of the types of conduct that are unacceptable in the workplace.</p>
Young workforces	Significant number of teenage and young adult employees	<p>Employees in their first or second jobs may be less aware of laws and workplace norms.</p> <p>Young employees may lack the self-confidence to resist unwelcome overtures or</p>	<p>Provide targeted outreach about harassment in high schools and colleges.</p> <p>Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct.</p>

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
		<p>challenge conduct that makes them uncomfortable.</p> <p>Young employees may be more susceptible to being taken advantage of by co-workers or superiors, particularly those who may be older and more established in their positions.</p> <p>Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.</p>	<p>Provide training on how to be a good supervisor when youth are promoted to supervisory positions.</p>
Workplaces with "high value" employees	<p>Executives or senior managers</p> <p>Employees with high value (actual or perceived) to the employer, <i>e.g.</i>, the "rainmaking" partner or the prized, grant-winning researcher</p>	<p>Management is often reluctant to jeopardize high value employee's economic value to the employer.</p> <p>High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.</p>	<p>Apply workplace rules uniformly, regardless of rank or value to the employer.</p> <p>If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).</p>
Workplaces with significant power disparities	<p>Low-ranking employees in organizational hierarchy</p> <p>Employees holding positions usually subject to the direction of others, <i>e.g.</i>, administrative support staff, nurses, janitors, etc.</p> <p>Gendered power disparities (<i>e.g.</i>, most of the low-ranking employees are female)</p>	<p>Supervisors feel emboldened to exploit low-ranking employees.</p> <p>Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies).</p> <p>Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.</p>	<p>Apply workplace rules uniformly, regardless of rank or value to the employer.</p> <p>Pay attention to relations among and within work groups with significant power disparities.</p>

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Workplaces that rely on customer service or client satisfaction	Compensation directly tied to customer satisfaction or client service	Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.	Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.
Workplaces where work is monotonous or tasks are low-intensity	Employees are not actively engaged or "have time on their hands" Repetitive work	Harassing behavior may become a way to vent frustration or avoid boredom.	Consider varying or restructuring job duties or workload to reduce monotony or boredom. Pay attention to relations among and within work groups with monotonous or low-intensity tasks.
Isolated workplaces	Physically isolated workplaces Employees work alone or have few opportunities to interact with others	Harassers have easy access to their targets. There are no witnesses.	Consider restructuring work environments and schedules to eliminate isolated conditions. Ensure that workers in isolated work environments understand complaint procedures. Create opportunities for isolated workers to connect with each other (<i>e.g.</i> , in person, on line) to share concerns.
Workplaces that tolerate or encourage alcohol consumption	Alcohol consumption during and around work hours.	Alcohol reduces social inhibitions and impairs judgment.	Train co-workers to intervene appropriately if they observe alcohol-induced misconduct. Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed. Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.
Decentralized workplaces	Corporate offices far removed physically and/or organizationally	Managers may feel (or may actually be) unaccountable for their behavior and may	Ensure that compliance training reaches all levels of the organization, regardless of how

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
	from front-line employees or first-line supervisors	act outside the bounds of workplace rules. Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.	geographically dispersed workplaces may be. Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction Develop systems for employees in geographically diverse locations to connect and communicate.

d. *Transparent reporting of sexual harassment complaints and trends*

Transparent reporting of sexual harassment prevalence and progress data can encourage positive change. As the AHRC states:

Transparency is an effective, relatively low-cost mechanism for engineering positive change... that has long been used by policy makers and regulators to motivate positive social change and has increasingly been used as a tool to help achieve gender equality.
“³⁰⁸

The experience of the Women’s Gender Equality Agency (**WGEA**) indicates that reporting requirements tend to prompt action.³⁰⁹ Victoria Police,³¹⁰ the Australian Federal Police,³¹¹ and the Royal Australasian College of Surgeons³¹² all publicly report sexual harassment prevalence and progress data, with the aim of increasing both external and internal confidence in their efforts.³¹³ In the UK in 2019 the ‘Big Four’ accounting firms all released data disclosing the number of partners who had left over the past four years as a result of complaints of inappropriate workplace behaviour.³¹⁴

UN Women has observed that this transparency should extend to communication about the outcome of cases, by sharing information about the application of policies and procedures with the entire company.³¹⁵ At a minimum, deidentified reports of sexual harassment should be shared with organisational leaders as part of standard risk reporting practices.³¹⁶

³⁰⁸ AHRC, *Respect@Work*, 628.

³⁰⁹ Australian Government, Workplace Gender Equality Agency, ‘2018–19 Gender Equality Scorecard’, *Data* (Web Page, 19 November 2019) <www.wgea.gov.au/data/wgea-research/australias-gender-equality-scorecard/2018-19-gender-equality-scorecard>, as cited in AHRC, *Respect@Work*, 696.

³¹⁰ Victorian Equal Opportunity & Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 2 Audit* (2017).

³¹¹ Elizabeth Broderick and Co, *Cultural Change: Gender Diversity and Inclusion in the Australian Federal Police* (2016).

³¹² Royal Australasian College of Surgeons, Submission 207, *Sexual Harassment Inquiry*, 3, as cited in AHRC, *Respect@Work* 696.

³¹³ AHRC, *Respect@Work*, 695

³¹⁴ Kaya Burgess and Tabby Kinder, ‘Revealed: 37 Partners at Big Four Accounting Firms Leave Over Sex and Bullying Claims’, *The Times* (London, 11 December 2018) www.thetimes.co.uk/article/revealed-37-partners-at-big-fouraccounting-firms-leave-over-sex-and-bullying-claims-cr2stzd0f accessed on 5 April 2019, as cited in Pender, above n124, 18 and 105.

³¹⁵ AHRC, *Respect@Work*, 688.

³¹⁶ *Ibid*, 694.

The AHRC recommends informing staff about misconduct among leaders, specifically, and the imposition of sanctions to send a clear message about accountability and what conduct is considered to be acceptable within the organisation.³¹⁷ Further, the AHRC recommends publicly sharing the following deidentified information at periodic intervals:³¹⁸

- Number of incidents and prevalence
- Trends
- Steps taken to resolve complaints
- How long complaints processes took

However, the AHRC cautions that reporting obligations can have undesired consequences, particularly if reporting numbers are considered in isolation and only as an indicator of prevalence:³¹⁹

if reporting organisations report only on the number of reports of sexual harassment made by workers in their organisations, this may create an incentive for organisations to engage in behaviour designed to reduce the number of reports in their business, for example by deterring workers from making complaints, or encouraging them to settle complaints confidentially. In such circumstances, requiring organisations to report on this measure could have the perverse outcome of allowing sexual harassment to continue with impunity and contributing to a culture where it is not addressed in a transparent manner.

It is therefore essential that transparent reporting is accompanied by a mature organisational attitude to sexual harassment prevention and a suite of interventions. Leaders should be reassured that any initial increase in the reporting of sexual harassment is not something to be feared; it can reflect positive workplace change and increased confidence in the organisation's capacity to respond sensitively and effectively.³²⁰

5. Organisational capability

The following sections describe the documents that must exist to inform every one of the behaviours that are expected of them, the potential consequences for behaving inappropriately, and the support and reporting options available to those who are targeted by or witness sexual harassment. These documents form the foundation for many of the other sexual harassment prevention initiatives discussed in this report.

a. Policies and procedures

While a sexual harassment policy alone is no quick fix, it is a critical element of any organisation's sexual harassment prevention and response effort. The policy must, however, be consistently and fairly implemented. This section considers three key aspects of an effective policy – its content, development and dissemination, and provides examples of sexual harassment policies in court settings.

Policy Content

The below list collates advice from the AHRC, VEOHRC, EEOC, IBA and McDonald et al about the content that sexual harassment policies should include.

³¹⁷ Ibid, 690.

³¹⁸ Ibid.

³¹⁹ Ibid, 699.

³²⁰ Ibid, 746.

- 1) A **clear explanation of prohibited conduct**, including practical examples that are relevant to diverse groups of workers.³²¹ The policy should recognise that sexual harassment is unlawful and unacceptable and include a clear definition of sexual harassment,³²² which includes online sexual harassment through digital technology.³²³ However, IBA recommends that the explanation of prohibited conduct be framed broadly, rather than being constrained by strict legal definitions, or it risks failing to address lower unethical conduct that still has adverse individual and workplace consequences. Workplaces should respond to all “behaviours that undermine a culture of civility and respect”.³²⁴

UN Women recommend that sexual harassment be defined “to include its intersection of gender with other structural social inequalities, prominently race, ethnicity, age, disability, nationality, religion and any other social vulnerabilities such as poverty.”³²⁵ In addition, the policy should state the standard of behaviour with which all workers and others in the workplace (such as clients or contractors) are expected to comply.³²⁶

- 2) Identification of the **responsibilities of the organisation, management and workers**,³²⁷ with confirmation that the policy applies to workers at all levels, including leaders and managers all the way to the CEO and the board (and judiciary), as well as others in the workplace such as customers, clients and contractors.³²⁸ This should include reference to relevant laws and state the employer’s commitment to providing a safe working environment.³²⁹
- 3) A commitment to achieving gender equality, including a commitment to specific goals and recognition that **sexual harassment is driven by gender inequality**³³⁰. Sexual harassment policies should be framed in gender-specific terms and acknowledge power differentials.³³¹
- 4) **How and where to report sexual harassment** and the available options (self-management, informal and formal internal processes, formal external complaint options).³³² This should include a clear description of the options, processes involved and potential outcomes.³³³ There should be multiple, accessible avenues of complaint³³⁴ and the option of informal advice to ensure employee confidence in and uptake of grievance procedures.³³⁵ Investigation processes should also be clearly described, and should be prompt, thorough, and impartial.³³⁶
- 5) A clear statement that the organisation’s **priority is the safety and wellbeing of the person disclosing** or formally reporting sexual harassment and information about support services that can provide victims of sexual harassment advice, information, counselling and other assistance.³³⁷

³²¹ Feldblum and Lipnic, above n5.

³²² AHRC *Respect@Work*, 714-5.

³²³ Ibid.

³²⁴ Pender, above n124, 100.

³²⁵ Sen et al, above n19, 8.

³²⁶ VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment* (August 2020) <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>, accessed on 3 December 2020, 51.

³²⁷ AHRC *Respect@Work*, 714-5.

³²⁸ Ibid.

³²⁹ VEOHRC, above n326, 51.

³³⁰ McDonald et al, 53.

³³¹ Ibid, 44.

³³² VEOHRC, above n326, 51.

³³³ AHRC *Respect@Work*, 714-5.

³³⁴ Feldblum and Lipnic, above n5.

³³⁵ McDonald et al, above n39, 44.

³³⁶ Feldblum and Lipnic, above n5.

³³⁷ VEOHRC, above n326, 51.

This should include a reminder that people who experience sexual assault can report their experience to the police.³³⁸

- 6) A **range of sanctions** that may be taken against harassers³³⁹ and **transparency about penalties**, which can be achieved by including “a statement of intent to enforce seriously and promptly, and a clear specification of the penalties for violation.”³⁴⁰ McDonald et al note that “certainty of punishment for SH may provide more effective prevention than severity of punishment.”³⁴¹ Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable “harassment” but which, left unchecked, may lead to same.”³⁴²
- 7) Assurance that the employer will protect the **confidentiality** of harassment complaints to the extent possible,³⁴³ and that those who make complaints or provide information related to complaints, including witnesses and others who participate in the investigation, will be **protected against retaliation**.³⁴⁴

The VEOHRC and AHRC note that the policy should be tailored to the workplace and accessible to workers who may find it difficult to access or understand the policy or exercise their rights because they are young, in insecure work, have a disability or they do not speak English.³⁴⁵

Further, the policy should be reviewed regularly to ensure that all information is up to date.

Zero tolerance and mandatory reporting

GJIN warns against ‘zero tolerance’ policies which may have the unintended effect of deterring people from reporting behaviour due to the belief that even minor offences might attract heavy sanctions, such as dismissal.³⁴⁶ The EEOC also opposes a ‘zero tolerance’ approach because it may give the impression that a ‘one-size-fits-all’ approach will be taken with the same level of discipline in every instance:

This, in turn, may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior - they simply want the harassment to stop. Thus, while it is important for employers to communicate that absolutely no harassment will be permitted in the workplace, we do not endorse the term “zero tolerance” to convey that message.³⁴⁷

Campbell and Chinnery further point out that if targets see the consequences of reporting as being disproportionately severe for harassers, they may view the social cost of speaking up as too high.³⁴⁸

‘Zero-tolerance’ statements also fail to encourage discussion about why it is important to address violence against women and are therefore unlikely to shift social norms.³⁴⁹

³³⁸ AHRC *Respect@Work*, 714-5.

³³⁹ Ibid.

³⁴⁰ McDonald, above n39, 44.

³⁴¹ Ibid.

³⁴² Feldblum and Lipnic, above n5.

³⁴³ Ibid.

³⁴⁴ See Sen et al, above n19, 8–9; McDonald et al, above n39; AHRC, *Respect@Work* 714-5.

³⁴⁵ VEOHRC, above n326, 51; AHRC, *Respect@Work*, 715.

³⁴⁶ GJIN, above n1, 54.

³⁴⁷ Feldblum and Lipnic, above n5.

³⁴⁸ Campbell and Chinnery, above n40, 45.

³⁴⁹ Ibid.

In contrast, David J Sachar, Executive Director of the Arkansas Judicial Discipline and Disability Commission, supports a ‘zero-tolerance’ approach, but only if the sanctions are proportionate and minor issues are dealt with appropriately.³⁵⁰

A ‘zero tolerance’ approach is distinct from a mandatory reporting obligation. There is limited evidence about the effectiveness of regulatory schemes that impose mandatory reporting obligations on members of the legal profession with respect to sexual harassment perpetrated by other lawyers, and such obligations are controversial. In England and Wales barristers must report to the Bar Standards Board if they have committed or witnessed another barrister commit serious misconduct, which may include sexual harassment.³⁵¹ However, a 2020 qualitative study on bullying, discrimination and harassment at the UK Bar found that “there were mixed views on whether the BSB’s Duty to Report is an enabler or barrier to reporting bullying, discrimination and harassment.”³⁵² Making a report to the BSB was seen by some as being too formal and a “last port of call”.

It is also notable that mandatory reporting obligations in New Zealand did not result in any reporting of sexual harassment, although revelations of serious sexual harassment within the legal community eventually came to light³⁵³ However, where a general obligation to report misconduct by lawyers exists, careful consideration must be given to the potentially damaging message of explicitly carving out sexual harassment from this mandatory reporting obligation.

Policy development

Sexual harassment policies should be developed in consultation with affected staff and stakeholders. Co-designing the policy with the workforce can increase engagement with the policy by instilling a sense of ownership and familiarity,³⁵⁴ as well as result in a better policy. It can also be an opportunity to shift social norms or initiate a larger conversation about gender equality, although the benefit of doing so will depend on the organisation’s readiness and existing norms.³⁵⁵ In male-dominated or privileged work environments it is important to provide explicit opportunities for women to participate in the policy development process.³⁵⁶

Policy communication and implementation

Sexual harassment policies must be made visible by being widely disseminated, with the message that sexual harassment will not be tolerated.³⁵⁷ Care Australia notes that the communication and launch of a policy is a key step in creating organisational change because it provides a platform to demonstrate leadership commitment, a consultative approach to the change process (through the policy development phase), fair mechanisms, training and implementation plans and intentions around the broader workplace environment.³⁵⁸

The way that leaders communicate the policy is important. Senior leaders must both promote the policy and model the behaviours that it demands in order to create workplace change and emphasise their commitment to preventing sexual harassment. It is also important that leaders communicate that sexual harassment is an organisational issue, not just an individual grievance.³⁵⁹ Managers and supervisors

³⁵⁰ Sachar, above n345, 14.

³⁵¹ YouGov, *Bullying, Discrimination and Harassment at the Bar: Qualitative study by YouGov for the Bar Standards Board* (October 2020), [October-2020-BDH-at-the-Bar-full-report.pdf](https://www.barstandardsboard.org.uk/wp-content/uploads/2020/10/October-2020-BDH-at-the-Bar-full-report.pdf) ([barstandardsboard.org.uk](https://www.barstandardsboard.org.uk)) accessed on 20 January 2021, 40; and Bar Council, *Discrimination, Harassment, Bullying and Inappropriate Behaviours: Information for Barristers*, <https://www.barcouncilethics.co.uk/wp-content/uploads/2019/08/Bar-Council-Guide-Explaining-Discrimination-Harassment-Bullying-and-Inappropriate-Behaviours-August-2019.pdf>, accessed on 17 October 2020, 6.

³⁵² Ibid, 38.

³⁵³ GJIN, above n1, 54.

³⁵⁴ Campbell and Chinnery, above n40, 49.

³⁵⁵ Ibid, 46.

³⁵⁶ McDonald et al, above n39, 44.

³⁵⁷ Ibid.

³⁵⁸ Campbell and Chinnery, above n40, 46-7.

³⁵⁹ Ibid, 42.

should also discuss the policy with workers regularly and directly to increase awareness and demonstrate that they understand and value the policy, which may encourage workers to raise concerns.³⁶⁰

McDonald et al consider it important that senior management also understand the potential organisational risks and penalties flowing from sexual harassment.³⁶¹ The more effective strategy for doing this is to construct sexual harassment as a community concern, acknowledging the ambiguity of the problem and allowing people to seek advice about ‘grey area’ situations that may not warrant a formal complaint. This is compared to top-down directives that frame sexual harassment as an individual problem that will be addressed with disciplinary action.³⁶²

Examples of sexual harassment policies in other jurisdictions

It is important that sexual harassment policies apply to everyone within an organisation. For courts and tribunals, this includes judicial officers and tribunal members. Some jurisdictions have adopted a single sexual harassment policy that applies to both the judiciary and court staff.

Bosnia and Herzegovina has adopted *Guidelines for the Prevention of Sexual and Gender-based Harassment within the Judicial Institutions of Bosnia and Herzegovina*, which apply to judges, prosecutors and court personnel.³⁶³ The Guideline states that it is intended to convey the clear message to judges, prosecutors and official staff working within the judiciary “that sexual and gender-based harassment will not be tolerated under any circumstance whether in the office, on duty outside the office, or any other official context or activity organized by a judicial institution.” The Guidelines are 16 pages and provide very practical information about what constitutes sexual harassment, who is covered by the Guideline and how to complain. However, the complaint process itself is quite restrictive.

Spain also has a [Protocol of Action Against Sexual Harassment, Gender Harassment, Discriminatory Harassment and All Forms of Harassment and Violence in the Judiciary](#). However, it is published in Spanish so has not been considered for this paper.

The NSW Supreme Court has a Policy on Inappropriate Workplace Conduct, which applies to the conduct of judges, judicial staff and registry staff, and for the benefit of judges and judicial staff.³⁶⁴ (Registry staff are also subject to other policies and guidelines). The process for raising a complaint by judicial staff members about another judicial staff member or judge is to contact: an external consultant nominated by the Court; or the Executive Director; or the Department of Communities and Justice human resources team; or Director of Human Resources for the courts division. Judges with a concern or complaint about another judge or judicial staff member are required to raise the matter with: the Chief Justice; President of the Court of Appeal; Head of the relevant Division; or the Judicial Commission. The policy includes flowcharts that illustrate the processes involved in the various options.

Industry-wide policies

There has been a development in some areas of single industry-wide or sector-wide policies, including model policies that are adopted by workplaces in an industry, profession or sector.³⁶⁵ For example, Live Performance Australia and Screen Producers Australia has adopted a sexual harassment policy for the entertainment industry and Australian Hotels Association of NSW and Tourism Accommodation NSW

³⁶⁰ AHRC *Respect@Work*, 715.

³⁶¹ McDonald et al, above n39, 43.

³⁶² Ibid, 44.

³⁶³ GJIN, 45.

³⁶⁴ Supreme Court of New South Wales, *Supreme Court Policy on Inappropriate Workplace Conduct*, undated, <https://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/Unacceptable%20Workplace%20Conduct%20Policy,%2014%20October%202020.pdf>, accessed on 4 December 2020.

³⁶⁵ AHRC, *Respect@Work*, 716.

developed anti-discrimination guidelines.³⁶⁶ Industry-wide policies can promote consistency and provide clarity for workers about their rights and obligations.³⁶⁷

The AHRC considers that industry, profession and sector-wide policies, procedures, campaigns, complaint and support mechanisms and pathways can help to ensure:³⁶⁸

- **“Simplicity and efficiency**—Industries may create and use a single initiative that applies to all members of the industry and sets the standard and a common understanding across the industry. Having one initiative across an industry will make it simpler and easier for workers and employers to understand, access, apply and/or use the initiatives that apply to them.
- **Industry-wide systemic drivers are addressed**—The collective experience of industry employers can highlight prevalence trends and common drivers in a particular industry, and through sharing efforts can more quickly identify best practice.
- **Ease and cost efficiencies for employers**—Having a single, industry-based initiative reduces the cost and burden that employers may otherwise face if they are required to create their own business-specific initiatives. This is of particular benefit to small business employers who may not otherwise have the skills or resources to create or commission such initiatives for their workplace—they will have immediate access to the industry standard.
- **Better protection for employees who move among employers within an industry**—Industry-wide initiatives also better accommodate the changing nature of work and acknowledge the increasing likelihood of workers working for multiple employers over shorter periods in the ‘gig economy’. As they move between employers within an industry, workers will maintain the same protections, arrangements or approaches offered by the industry initiatives and get the same messages.
- **A ‘raising of the bar’ industry-wide**—While implementation and enforcement of initiatives may vary by workplace, the introduction of industry-wide initiatives will ‘raise the bar’ across the industry and at least ensure that at a minimum, all employers have the same default initiatives in place. This also creates the opportunity to recognise and share good practice within industries.
- **Initiatives and accompanying resources can be tailored appropriately**, to reflect the work environment and issues relevant in a particular industry and provide a consistent approach across the industry.
- **Minimising the risk of media unfairly scandalising individual workplaces**—Industry initiatives recognise the systemic nature of sexual harassment, and can provide ‘safety in numbers’, helping to neutralise unhelpful demonising of one particular workplace in the media (which may lead for example to decreased transparency by workplaces, out of a fear of being singled out for adverse attention and suffering brand damage).”

However, as a result of their broad and economical nature, there is a risk that industry-wide policies can result in insufficient consultations with the affected workforce (as recommended above at section 4.b. *Consultation with staff to identify risks and challenges* and section 5.a. *Policies and procedures*) and fail address the specific needs of a particular workplace.

b. Judicial conduct standards

GJIN cautions that even sexual conduct that is lawful and consensual may raise ethical concerns about judicial impartiality and independence and the dignity of judicial office.³⁶⁹ As a result, a clear set of

³⁶⁶ AHRC *Respect@Work*, 716.

³⁶⁷ Ibid.

³⁶⁸ AHRC, *Respect@Work*, 781.

³⁶⁹ GJIN, above n1, 35.

judicial conduct standards are essential to provide clear guidance to both judges and the broader community about what conduct is acceptable and what is not.³⁷⁰

Judges are expected to do more than simply comply with the law. Every judge holds a significant leadership role in their community. As GJIN states:³⁷¹

Judges are expected to set an example for the rest of society and are held to a higher standard of conduct that is defined not merely by what is lawful or intentional, but by what is ethical. Lawful conduct may still lack integrity and undermine public trust and confidence in the judiciary. Conduct that reflects lack of knowledge or unconscious bias may still be inappropriate, unfair and harmful.

GJIN's paper, *Gender-Related Judicial Integrity Issues* identifies judicial codes of conduct and other policies that provide guidance on what constitutes inappropriate conduct as the first of three main safeguards for promoting and protecting judicial integrity.³⁷² Appleby and Le Mire likewise consider clear judicial standards to be of paramount importance:

One of the key attributes of a judicial complaints system should be that the standards against which judicial behaviour is judged are clear and available. These standards must be broad enough, or contain sufficient flexibility, so as to capture the range of behaviours that may affect a judge's capacity to fulfil the judicial role or undermine public confidence in the institution. However, they cannot be so broad as to provide insufficient guidance for judges and members of the public.³⁷³ [Footnote omitted]

Framed as ethical standards

GJIN emphasise the importance of both adopting a code of judicial conduct and incorporating gender-specific provisions within this ethical code.³⁷⁴ GJIN states that specifically incorporating references to gender bias, discrimination, sexual harassment and other gender-related integrity issues in the ethical rules is necessary in order to capture gender-related misconduct that still falls within the boundaries of lawful conduct, such as a sexual relationship that is arguably consensual, but occurs in a power dynamic where true consent is questionable.³⁷⁵

Anchored in universal standards

GJIN also recommends anchoring judicial conduct and integrity obligations in the international framework, norms and instruments that promote gender equality, gender justice, human rights and integrity in public institutions, because these instruments establish universally accepted standards of judicial conduct. GJIN refers to the international *Bangalore Principles of Judicial Conduct*, which include "independence, impartiality, integrity, propriety, equality and competence and diligence" and note that these values inherently cover gender-related integrity issues, but should be strengthened to make this very clear.³⁷⁶ The Convention on the Elimination of All Forms of Discrimination against Women and

³⁷⁰ Ibid, 6.

³⁷¹ Ibid, 5.

³⁷² Ibid, 6. The other two main safeguards are (1) judicial accountability mechanisms that identify and correct misconduct; and (2) educational and training programmes that promote appropriate conduct and awareness about gender-related integrity issues.

³⁷³ Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity', 38(1) *Melbourne University Law Review* (2014).

³⁷⁴ GJIN, above n1, 6. See also Andrew Lynch and Alysia Blackham, 'Reforming Responses to the Challenges of Judicial Incapacity', 48(2) *Federal Law Review* (2020) 214-246, 215 on including misbehaviour related provisions within an ethical code of conduct.

³⁷⁵ GJIN, above n1, 35.

³⁷⁶ Ibid, 6.

Sustainable Development Goals 5 and 16 also promote gender equality and peace, justice and strong institutions.³⁷⁷

Clear, open and accessible

As a measure aimed at improving both judicial conduct and reporting of misconduct, GJIN recommends adopting judicial conduct standards that are clear, open, and contain guidance and concrete examples.³⁷⁸ Judicial conduct standards should be accessible through a variety of channels and broadly communicated, including to “law students, judges, court personnel and the general public”.³⁷⁹ According to GJIN it is important that the public understand the ethical standards that apply to judges and the behaviour that is expected. Therefore, public communication efforts aimed at raising awareness of this should be undertaken, including media campaigns, public education and information materials.³⁸⁰

Advisory opinions

GJIN also recommends the establishment of an advisory body, which provides advisory opinions to judges and others about the ethics of engaging in particular conduct.³⁸¹ GJIN recommends having a publicly accessible database that includes these advisory opinions, as well as disciplinary cases and decisions: “[c]ompiling frequently asked ethical questions and answers and making them readily available online or in another accessible format can help everyone understand what is expected of judges in different situations.”³⁸² This could address an issue identified by Appleby, Le Mire, Lynch and Opeskin in their survey of the Australian judiciary, which found that a significant proportion of judges (35%) consider ethical support to be a challenge.³⁸³ The authors recommended consideration of the provision of more formalised, institutional ethical support to judges.

Judicial Conduct in Victorian Courts and VCAT

The primary reference for judicial conduct in Victoria is the Australian Institute of Judicial Administration *Guide to Judicial Conduct*.³⁸⁴ This Guide has been adopted by the Judicial Commission of Victoria and is taken into account by the Commission when it considers complaints. It is not a code of conduct or set of standards; it is 55 pages of guidance that “is not intended to be prescriptive.”³⁸⁵

The Guide acknowledges the special nature of judicial office and the responsibilities that accompany the role of being a judge. The Guide states that by accepting judicial appointment, judges accept the limitations that judicial office imposes on private and public conduct, including respect for and observance of the rule of law and “[d]iscretion in personal relationships, social contacts and activities.”³⁸⁶

Judges have to accept that the nature of their office exposes them to considerable scrutiny and to constraints on their behaviour that other people may not experience. Judges should avoid situations that might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges. They must also avoid situations that might expose them to charges of

³⁷⁷ Ibid, 7.

³⁷⁸ Ibid, 36.

³⁷⁹ Ibid, 6.

³⁸⁰ Ibid, 11.

³⁸¹ Ibid, 6.

³⁸² Ibid, 8.

³⁸³ Appleby et al, above n 186.

³⁸⁴ The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (3rd Edition, 2017), <https://aija.org.au/wp-content/uploads/2017/12/GUIDE-TO-JUDICIAL-CONDUCT-3rd-Edition.pdf> accessed on 4 December 2020.

³⁸⁵ Ibid, 1.

³⁸⁶ Ibid, 9.

hypocrisy by reason of things done in their private life. Behaviour that might be regarded as merely “unfortunate” if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.

Judges should remember that many members of the public regard judges as a privileged group because of their remuneration and entitlements, and because of the nature of the judicial office. They are likely to expect that a judge will be especially vigilant in observing appropriate standards of conduct, both publicly and privately.³⁸⁷

In respect to judicial treatment of court staff, the *Guide to Judicial Conduct* states:³⁸⁸

A judge should treat all court staff courteously and considerately. A judge should be mindful that court staff may feel unable to differ from the judge. In dealing with senior court staff an individual judge should respect their responsibility for the efficient administration of the court and the proper use of court resources.

The Guide does not explicitly deal with gender integrity issues such as inappropriate relationships, gender insensitivity or sexual harassment. It notes that public perceptions of a judge’s impartiality can be adversely affected by a judge’s private life, including close relationships to litigants, legal advisers of litigants and witnesses, particularly in a small community.³⁸⁹ Section 3.3.4 of the Guide discusses personal relationships and when a judge should disqualify themselves from a case.

The advice is premised on a categorisation of relationships that includes first degree, second degree and third degree relationships, but is silent on what category less socially accepted intimate relationships, like an affair, might constitute. The closest examples are “spouse” or “domestic partner” (First degree), or “personal friendship” (presumably Third degree, although “personal friendship” is not listed under any of the three categories). If the judge has a personal friendship or acquaintance with a legal representative the Guide says that the Judge should simply consider informing the parties before the hearing begins.³⁹⁰

The 430 page text by the Hon James Thomas AM QC, *Judicial Ethics in Australia*,³⁹¹ is also a highly regarded Australian reference on judicial ethics. It is scholarly text that is not (nor is it intended to be) a clear set of standards or code of conduct.

Comparative jurisdictions

In the United States, the federal judiciary and most states have codes of conduct that are drafted in a prescriptive manner. Appleby and Le Mire state that, in contrast, Commonwealth countries such as Australia, Canada, England and Wales and New Zealand, “have adopted exhortatory documents rather than prescriptive ones.”³⁹² For example:

- The Canadian Judicial Council’s [Ethical Principles of Judges](#) states that the principles it contains “are advisory in nature” and “are not and shall not be used as a code or a list of prohibited

³⁸⁷ Ibid.

³⁸⁸ Ibid, 28.

³⁸⁹ Ibid, 11 and 34.

³⁹⁰ Ibid.

³⁹¹ James Thomas, *Judicial Ethics in Australia* (2009).

³⁹² Appleby and Le Mire, above n373.

behaviours. They do not set out standards defining judicial misconduct”.³⁹³ However, the principles are currently being reviewed and the Canadian Bar Association has recommended changes to the proposed principles to make them directive rather than aspirational.³⁹⁴

- The judiciary of England and Wales has drafted a [Guide to Judicial Conduct](#), which is intended to provide “assistance to judges” and “is not code”.³⁹⁵ The *Guide to Judicial Conduct* is based on the guiding principles of judicial independence, impartiality and integrity, which it describes as a distillation of the six fundamental values contained in the *Bangalore Principles of Judicial Conduct*.³⁹⁶
- New Zealand’s [Guidelines for Judicial Conduct](#) are not binding either and “do not identify misconduct. They are not intended to bind or limit in any way the Commissioner’s discretion in dealing with any such complaint as he or she thinks fit”.³⁹⁷ They also reference the *Bangalore Principles of Judicial Conduct*.³⁹⁸ Notably, guideline I(e) ‘Harassment of staff (including sexual harassment)’ provides that “[a] judge must not subject court or judicial staff to comment or conduct that is inappropriate, insulting, intimidating, degrading or offensive.”³⁹⁹

The above guides are underpinned by the international *Bangalore Principles of Judicial Conduct*⁴⁰⁰ and make reference to these. These principles

are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary.⁴⁰¹

In contrast to the Australian *Guide to Judicial Conduct* does not refer to the *Bangalore Principles of Judicial Conduct*.

While it seems logical that these guides should inform judicial disciplinary processes, Appleby and Le Mire point out that: “The oddity is that such guides generally state categorically that they are not to be used for disciplinary purposes. This appears to be contrary to their existence, the expectations they create, and also practice.”⁴⁰² Appleby and Le Mire believe that “[m]ore definite standards need to be set” in Australia and there is no legal impediment to doing so:⁴⁰³

In summary, best practice dictates that the standards by which judicial officers’ conduct will be judged must be provided to those officers and the public. We believe that there are no constitutional impediments to the adoption of such standards in the Australian system provided that they have been developed within the judiciary and adopted by them. However, unlike many judicial standards documents to date, these standards should be more than just exhortatory and aspirational. They should provide guidance

³⁹³ Canadian Judicial Council, *Ethical Principles for Judges* (1998) 3.

³⁹⁴ Canadian Bar Association, *Ethical Principles for Judges Should be a Code of Conduct*, 26 February 2020, <https://www.cba.org/Our-Work/cbainfluence/Public-Policy-and-Advocacy/2020/February/Ethical-principles-for-judges-should-be-a-code-of>, accessed on 2 November 2020.

³⁹⁵ Judiciary of England and Wales, *Guide to Judicial Conduct* (March 2020) 4.

³⁹⁶ Ibid, 6.

³⁹⁷ Courts of New Zealand, *Guidelines for Judicial Conduct* (2019) 4 [8(a)].

³⁹⁸ Ibid, 4.

³⁹⁹ Ibid, 16.

⁴⁰⁰ *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN ESCOR, 41st plen mtg, Agenda Item 14(c), UN Doc E/RES/2006/23 (27 July 2006) annex Preamble (‘*Bangalore Principles of Judicial Conduct*’), cited in Appleby and Le Mire, above n373.

⁴⁰¹ Ibid.

⁴⁰² Appleby and Le Mire, above n373.

⁴⁰³ Ibid.

about the different categories of judicial incapacity and misconduct that would warrant disciplinary penalties (although, of course, different penalties may be appropriate). Ideally, they would also provide non-exhaustive examples of this behaviour (although, in time, these will be provided in practice if the complaints-handling process is made public, as we recommend...)

United States

The federal courts and most state governments in the USA have adopted the *Code of Judicial Conduct*,⁴⁰⁴ making it binding in those jurisdictions. There is a separate *Code of Conduct for Judicial Employees*.⁴⁰⁵ In 2019 the US Federal codes of judicial and employee conduct were amended in response to a review by the Federal Judiciary Workplace Conduct Working Group. This review found that the policies, as they were in 2018, had not been developed with the aim of addressing particular issues of workplace harassment or incivility. The Review recommended that the Judiciary revise its codes and other guidance “to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behaviour” and that “[t]he codes should more clearly communicate the rights and responsibilities of employees, including the scope of confidentiality and the availability of remedial procedures.”⁴⁰⁶

The Working Group also recommended that the *Code of Conduct for Judicial Employees* clarify that:⁴⁰⁷

- Confidentiality obligations do not prevent any employee—including law clerks—from revealing abuse or reporting misconduct by any person.
- Retaliation against a person who reports misconduct is itself serious misconduct.

The US *Code of Judicial Conduct* contains seven canons including:

- 2) A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
 - 2.A Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
 - 2.B Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.
 - 2.C Non-discriminatory Membership. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.
- 3) A Judge Should Perform the Duties of the Office Impartially and Diligently

⁴⁰⁴ United States Courts, *Code of Conduct for United States Judges*, (12 March 2019) <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#:~:text=The%20Code%20of%20Conduct%20for%20United%20States%20Judges,has%20made%20the%20following%20changes%20to%20the%20Code>: accessed on 30 October 2020.

⁴⁰⁵ United States Courts, *Code of Conduct for Judicial Employees* (12 March 2019) <https://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees> accessed on 29 January 2021.

⁴⁰⁶ United States Courts, *Executive Summary of the Report of the Federal Judiciary Workplace conduct Working Group to the Judicial Conference of the United States* (1 June 2018), https://www.uscourts.gov/sites/default/files/executive_summary_of_federal_judiciary_workplace_conduct_working_group_0.pdf, accessed on 30 October 2020, iii.

⁴⁰⁷ *Ibid*, vi.

- 3.B(4) A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not retaliate against those who report misconduct. A judge should hold court personnel under the judge's direction to similar standards.

...

- 3.B(6) A judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code, that a judicial employee's conduct contravened the Code of Conduct for Judicial Employees, or that a lawyer violated applicable rules of professional conduct.

There is commentary provided on each canon. The commentary for Canon 3B(4) states:

A judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The duty to refrain from retaliation includes retaliation against former as well as current judiciary personnel.

Under this Canon, harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others.

Canon 3B(6) of the Code of Conduct references the [Rules for Judicial-Conduct and Judicial-Disability Proceedings](#), including Rule 4(a)(2) which provides that⁴⁰⁸

cognizable misconduct includes: (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or (C) creating a hostile work environment for judicial employees

and Rule 4(a)(3) which states that

cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability.

The United States also has a tradition of independent judicial oversight bodies, with robust enforcement practices, which stands in contrast to Australia. Tables setting out the composition of US state judicial conduct commissions and the discipline sanctions available to each body are published on the National Center for State Courts Center for Judicial Ethics website.⁴⁰⁹

⁴⁰⁸ US Courts, *Guide to Judiciary Policy Volume 2E*, https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf, accessed on 30 October 2020.

⁴⁰⁹ National Center for State Courts Center for Judicial Ethics (US), *Composition of US State Judicial Conduct Commissions* (August 2019) https://www.ncsc.org/data/assets/pdf_file/0027/14877/composition.pdf and *Available Sanctions in Judicial Discipline Proceedings* (August 2019) https://www.ncsc.org/data/assets/pdf_file/0015/15801/sanctions_tables_2019.pdf, accessed on 25 January 2021.

United Kingdom

In England and Wales there is a Guide to Judicial Conduct, which was developed in 2002, reformulated in 2006 and updated a number of times since,⁴¹⁰ including in March 2020. This guide is not binding; it is intended to provide judges with assistance to make up their own minds and so maintain judicial independence. The following extract from the Guide addresses respectful behaviour and discrimination, but not sexual harassment.⁴¹¹

Members of the judiciary should seek to be courteous, patient, tolerant and punctual and should respect the dignity of all. They should ensure that no one in court is exposed to any display of bias or prejudice on grounds which include but are not to be limited to “race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes”. In the case of those with a disability, care should be taken that arrangements made for and during a Court hearing do not put them at a disadvantage. Further guidance is given in the Judicial College’s Equal Treatment Bench Book.

c. Gender protocols and bench books

GJIN has examined how gender-related issues can affect judicial integrity and notes the important role that judicial leadership can play in mainstreaming gender sensitivity in all aspects of the justice system and ensuring that gender-related integrity issues are addressed within the courts.⁴¹² As a result, GJIN also recommends addressing particular gender issues in a detailed, practical way in other sources of guidance for judges, such as gender protocols, bench books or sexual harassment policies.⁴¹³

‘Gender protocols’ may be adopted to “help judges adjudicate cases with greater sensitivity to gender issues” and address issues that result from lack of knowledge rather than misconduct.⁴¹⁴ For example, the National Supreme Court of Mexico developed the [Protocol for Judicial Decision-Making with a Gender Perspective](#), which focuses exclusively on judicial decision-making and is aimed at enforcing, respecting and guaranteeing the right to equality and to non-discrimination.⁴¹⁵ The protocol requires courts to apply international human rights treaties ratified by Mexico as binding law.⁴¹⁶ GJIN states that Gender Protocols

are particularly helpful in addressing unconscious biases and gender-related integrity issues that reflect lack of knowledge and understanding rather than misconduct... They implicitly recognize that the gendered attitudes and beliefs that shape judicial decision-making may also shape judicial conduct.⁴¹⁷

The Mexican [Protocol for Judicial Decision-Making with a Gender Perspective](#) articulates how courts can play a role in protecting the right to equality rather than reproducing inequality.⁴¹⁸

⁴¹⁰ Laura Cahillane, ‘Ireland’s system for disciplining and removing judges’, 38(1) *Dublin University Law Journal* (2015) 55-83.

⁴¹¹ Judiciary of England and Wales, *Guide to Judicial Conduct* (March 2020) 20.

⁴¹² GJIN, above n1, 9.

⁴¹³ Ibid, 40. See also D Songer, M Radieva and R Reid, ‘Gender diversity in the intermediate appellate courts of Canada’ 37(1) *Justice System Journal* (2016), 4-19

⁴¹⁴ Ibid, 41.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ National Supreme Court of Mexico Gender Equality Unit, [Protocol for Judicial Decision-Making with a Gender Perspective](#) (2013) https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf accessed on 29 January 2021, 13-14

The persistence of laws and jurisprudential practices that diminish women's sexual and reproductive autonomy, that devalue -- when compared to men -- the work that women do and the roles to which they have traditionally been assigned; the behavior expected of women within society, the family and at work; the negation of the myriad possible configurations of families, and domestic violence are all based on a social ideology rooted in stereotypes, which, when not detected and questioned by those who administer and impart justice, are instead reproduced.

...

Judicial decisions play an especially important role in the characterization of women. Judges and adjudicators have the ability to bring the right to equality into reality. For that reason, they must make sure that in the process of interpreting and applying the law, they do not rely on prejudicial notions regarding how persons of a given sex, gender, or sexual orientation 'are,' or how such persons should behave.

The Protocol notes that the benefits of an informed gender perspective extend to all cases that involve power disparities resulting from social norms.

A gender perspective is not only useful in cases involving women. A gender perspective accounts for the ways that certain norms impose disparate impacts on certain people, and helps the jurist respond to those impacts. Thus, a gender perspective should always be used in any case in which there are asymmetrical power relationships or structural inequalities that have to do with sex, gender, or sexual preference/orientation.⁴¹⁹

'Bench books' can perform the same function as a Gender Protocol, being to provide guidance about how to handle courtroom situations, but are broader in scope. England and Wales have adopted the [Equal Treatment Bench Book](#),⁴²⁰ which is intended to ensure fair treatment for everyone, but has a chapter specifically related to gender. The Queensland Supreme Court also has an *Equal Treatment Benchbook*,⁴²¹ and New South Wales College of Law has created an *Equality Before the Law Bench Book*,⁴²² which is circulated to NSW judicial officers.⁴²³ These bench books provide practical guidance to assist the judiciary to promote substantive equality and deal sensitively with different groups of people. They include sections dedicated to gender equality. For example, the NSW Bench Book includes practical guidance for judges around use of language, timing of proceedings, modes of addressing women, and myths and assumptions related to family violence and sexual assault.

The Judicial College of Victoria's *Victims of Crime in the Courtroom: A Guide for Judicial Officers* is another important example of educational guidance that can help to improve gender sensitivity in adjudication.⁴²⁴

⁴¹⁹ Ibid, 77.

⁴²⁰ Judicial College of England and Wales, *Equal Treatment Bench Book* (2018), https://www.unodc.org/res/ji/import/law_on_administration_of_justice/equal_treatment_benchbook/equal_treatment_benchbook.pdf, accessed on 4 December 2020.

⁴²¹ Supreme Court of Queensland, *Equal Treatment Benchbook*, (2nd ed, 2016), https://www.courts.qld.gov.au/_data/assets/pdf_file/0004/94054/s-etbb.pdf, accessed on 4 December 2020.

⁴²² Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2006), https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Equality_before_the_Law_Bench_Book.pdf, accessed on 4 December 2020.

⁴²³ Judicial Commission of NSW, 'Equality Before the Law Bench Book: Agreement for Use', *Bench Books and Handbooks* (Guidelines, 5 June 2019) <www.judcom.nsw.gov.au/equality/#agreement-for-use>.

⁴²⁴ Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (August 2019).

B. RAISING AWARENESS

Policies and guidance materials are meaningless unless they are widely known and implemented.

Workplace training is an essential step in the implementation of sexual harassment policies and response systems. However, it must be part of a broader strategy aimed at creating cultural change.⁴²⁵ If provided in this way, training can be a ‘tool for establishing collective ownership of that process of change’,⁴²⁶ as it is an opportunity to:

- engage workers in a targeted discussion about the problematic behaviours that can lead to sexual harassment;
- impart skills and knowledge that can help to improve reporting and management of those behaviours; and
- provide tips on how to be an active bystander rather than remaining silent and condone the misconduct.

Communication strategies and campaigns can also raise awareness about expected behaviours and the options available for dealing with gender-related misconduct, and thereby potentially increase reporting of sexual harassment. They can also play an important role in changing social norms and behaviours. Strategies for shifting norms and behaviours are primarily discussed above in section 2b. However, VicHealth recently conducted a large-scale trial of bystander interventions, which incorporated both education, training and communication elements, and this is discussed below in section 7 *Bystander interventions*.

The AHRC *Respect@Work* report describes in detail the educational resources and training available to judicial officers and tribunal members. This section is included verbatim below.

Existing resources and training for judicial officers and tribunal members

[Excerpt from AHRC, Respect@Work⁴²⁷]

A number of existing bodies perform a lead role in informing, training and providing education to the judiciary. These include:

- the Australasian Institute of Judicial Administration
- the National Judicial College of Australia
- the Judicial Commission of New South Wales
- the Judicial College of Victoria.⁴²⁸

While judicial officers from across Australia can attend the Australasian Institute of Judicial Administration and National Judicial College of Australia programs, these bodies play a particularly important role for judicial officers in states and territories outside NSW and Victoria, where there are no specific judicial education bodies.

As discussed above, there has already been an increasing focus on education and training for the judiciary on sexual assault and family and domestic violence. For example, judicial officers in

⁴²⁵ AHRC, *Respect@Work*, 730.

⁴²⁶ Sen, above n20, 35.

⁴²⁷ This excerpt is included verbatim from AHRC, *Respect@Work*, 639-643.

⁴²⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) 91.

relevant jurisdictions now have access to the NSW *Sexual Assault Trials Handbook*⁴²⁹ and the National *Domestic and Family Violence Bench Book*.⁴³⁰

The National Judicial College of Australia has also developed the National Curriculum for Professional Development for Australian Judicial Officers, which includes programs on equality and diversity, family and domestic violence and vulnerable witnesses.⁴³¹

The *Equality Before the Law Bench Book* is an example of guidance circulated to NSW judicial officers,⁴³² with similar resources in some other jurisdictions.⁴³³

...

The Judicial College of Victoria released *Victims of Crime in the Courtroom: A Guide for Judicial Officers* in August 2019.⁴³⁴ It details considerations for judicial officers and court staff to limit re-traumatisation of victims and enhance opportunities for post-traumatic growth (the theory that people can benefit and experience positive gains after experiencing adversity, through a focus on understanding and managing trauma).⁴³⁵ The guide also has an intersectional focus with specific sections on people of CALD backgrounds, Aboriginal and Torres Strait Islander peoples, people of diverse religious backgrounds, people with disability and the LGBTIQ community.

There has also been an increasing focus on information and resources directed towards bullying and harassment in the judicial system.⁴³⁶ For example, in recent conferences, the Judicial Commission of New South Wales has included sessions that focus on bullying and harassment in the court-room, as well as strategies judicial officers can use to actively manage their wellbeing following exposure to bullying in the courtroom and where a judicial officer displays bullying behaviours.⁴³⁷ Similarly, the National Judicial College of Australia has included a session on bullying and power imbalances in the courtroom in its recent programs.⁴³⁸

The need for further judicial education and training

In recent years, and particularly as result of the #MeToo movement, there has been increased discussion and growing awareness in the community about workplace sexual harassment. This has been reflected in some judicial decisions, which have demonstrated an understanding of the significant harm that workplace sexual harassment can cause to victims. These decisions have recognised that the amounts awarded to victims should adequately compensate them in a way that reflects current community standards.

For example, in *Richardson v Oracle Corporation Australia Pty Ltd*,⁴³⁹ the Full Federal Court considered the amount of compensation that should be awarded to Ms Richardson, for the loss

⁴²⁹ Judicial Commission of NSW, *Sexual Assault Trials Handbook* (2019).

⁴³⁰ Australian Government, Attorney-General's Department, *National Domestic and Family Violence Bench Book* (July 2019).

⁴³¹ National Judicial College of Australia, *A Curriculum for Professional Development for Australian Judicial Officers* (January 2007) 9–10.

⁴³² Judicial Commission of NSW, 'Equality Before the Law Bench Book: Agreement for Use', *Bench Books and Handbooks* (Guidelines, 5 June 2019) <www.judcom.nsw.gov.au/equality/#agreement-for-use>.

⁴³³ See, eg, Government of Western Australia, Department of Justice, *Equal Justice Bench Book* (September 2017); Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016); Judicial College of Victoria, *Charter of Human Rights Bench Book* (October 2018) ch 6.2.

⁴³⁴ Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (August 2019).

⁴³⁵ Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (August 2019) 2–4.

⁴³⁶ Hon Michael Kirby, 'Judicial Stress and Judicial Bullying' (2013) 87(8) *Australian Law Journal* 516.

⁴³⁷ Rachel Clements, 'Judicial Wellbeing: A Focus on Bullying' (Conference Paper, Local Court of NSW Annual Conference, 2 August 2018); Jan-Marie Doogue, 'Bullying and Harassment in the Court Room' (Conference Paper, District Court of NSW Annual Conference, 23–24 April 2019).

⁴³⁸ National Judicial College of Australia, 'New Perspectives on Courtroom Leadership: 22–23 November 2018' (Fact sheet) <njca.com.au/wp-content/uploads/2017/12/New-Perspectives-on-Courtroom-Leadership.pdf>.

⁴³⁹ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCA 82.

and damage caused to her by sexual harassment by a co-worker over several months.⁴⁴⁰ In increasing the amount of damages awarded to Ms Richardson, Justice Kenny noted that the typical range of damages awarded to victims in sexual harassment cases used by the Court at first instance had:

resulted in an award in Ms Richardson's case that, judged by prevailing community standards, is disproportionately low having regard to the loss and damage she suffered. As noted earlier, the general range of general damages in respect of pain and suffering and loss of enjoyment of life caused by sex discrimination has scarcely altered since 2000 and does not reflect the shift in the community's estimation of the value to be placed on these matters. The range has remained unchanged, notwithstanding that the community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct.⁴⁴¹

In *Kerkofs v Abdallah*,⁴⁴² Judge Harbison demonstrated an understanding that many victims do not report sexual harassment or assault immediately or at all and noted that this alone should not be taken to diminish their credibility.⁴⁴³ Judge Harbison also recognised the potential for victims to be exposed to further trauma as a result of the legal process, and of the need to adequately compensate victims consistent with current community standards, for the significant and far-reaching impacts that sexual harassment can have on their lives.⁴⁴⁴

While some decisions reflect a nuanced understanding of sexual harassment and its impacts, and some judges manage proceedings and respond to victims in a way that minimises further harm to them, the [Australian Human Rights] Commission heard that this was not always the case. Some submissions from individuals and organisations raised the need for increased training for judicial officers to improve responses to victims of sexual harassment.⁴⁴⁵ For example, the Commission heard:

It seems like judges also fail to be aware of what sexual harassment is, and perhaps some also think it is only inappropriate touching ... judicial officers also need to be made aware of what sexual harassment means and how it affects the person on the receiving end.⁴⁴⁶

In her submission to the Commission, Susan Price, an employment lawyer, argued that there is a need for greater judicial education on gender inequality and gender-based violence, as this broader contextual framing is important to understanding sexual harassment.⁴⁴⁷

Price recommended all judicial officers undergo training that 'recognises the role the legal system plays in setting the standards for condoning or excusing violence against women when it is assessing conduct that includes sexual harassment'.⁴⁴⁸ Price recommended that this training align with Our Watch's *Change the Story* framework. As discussed in Section 4, 'Prevention outside the

⁴⁴⁰ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCA 82 Kenny J at [109].

⁴⁴¹ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCA 82 Kenny J at [117].

⁴⁴² *Kerkofs v Abdallah* [2016] VCAT 259.

⁴⁴³ *Kerkofs v Abdallah* [2016] VCAT 259, 162.

⁴⁴⁴ *Kerkofs v Abdallah* [2016] VCAT 259, 29, 255, 262–5.

⁴⁴⁵ Individual, Submission 86, *Sexual Harassment Inquiry*; Gordon Legal, Submission 380, *Sexual Harassment Inquiry*.

⁴⁴⁶ Individual, Submission 377, *Sexual Harassment Inquiry*, 12.

⁴⁴⁷ Susan Price, Submission 373, *Sexual Harassment Inquiry*, 2.

⁴⁴⁸ *Ibid*, 6.

workplace', *Change the Story* has been endorsed by all Australian governments as a national approach to preventing violence against women and their children.

It is important the judiciary continues to build upon improvements in understandings of trauma and the nature and harms of gender-based violence, including sexual harassment, to minimise the risk of victims being re-traumatised through court processes.

Given the role of tribunal members in handling sexual harassment matters, particularly those who hear anti-discrimination complaints, employment matters and workers' compensation cases, training and education should extend to tribunal members.

While some tribunal members are judicial officers, others are not, so it is important that any training be extended to non-judicial members. Professional development for tribunal members is coordinated by each tribunal's committee responsible for professional development.⁴⁴⁹

The Council of Australasian Tribunals is the national body intended to facilitate liaison and discussion between the heads of tribunals.⁴⁵⁰ It supports the development of best practice models and model procedural rules, standards of behaviour and conduct for members and increased capacity for training and support for members. Like the judicial education bodies mentioned above, it could perform a lead role in providing the education outlined in this section to tribunal members.

The Commission's view

In submissions and consultations, the Commission heard the devastating accounts of victims who had been traumatised through their interaction with the legal system. This underscores the importance of courts and tribunals having sensitive, trauma-informed and gender-responsive approaches to victims of workplace sexual harassment.

Given their critical roles in the justice system, judicial officers, magistrates and tribunal members should be strongly encouraged to undertake education on the nature, drivers and impacts of sexual harassment, including that it is driven by gender inequality and is a form of gender-based violence. This education should address court processes, such as factors that could reduce the risk of re-traumatisation of victims in hearings, and also inform judicial decision-making.

The education could be integrated into existing judicial training, programs and resources. The education could apply to both improving judicial understanding and responses to victims who are witnesses in proceedings in which sexual harassment matters arise, as well as in relation to sexual harassment within the judicial workplace.

In addition to judicial officers and tribunal members who oversee discrimination and sexual harassment matters, such as appeals from the Commission or anti-discrimination agencies, the Commission encourages the judiciary to examine the ways they may indirectly encounter sexual harassment victims, such as where they are witnesses in or parties to defamation or other civil proceedings.

To build upon broader primary prevention work, and other recommendations in this report, this education and training should be in line with the principles of *Change the Story*.

⁴⁴⁹ See, eg, NSW Civil and Administrative Tribunal, *NCAT Annual Report 2017–2018* (2018) 35; Administrative Appeals Tribunal, *Workforce Development Plan 2016–20* (2016) 4; Victorian Civil and Administrative Tribunal, *Annual Report 2017–2018* (2018) 35.

⁴⁵⁰ Council of Australasian Tribunals, *About*, (Web Page, 2018) <www.coat.asn.au/about/>.

6. Training

a. Requirements for effective sexual harassment training

The AHRC states that workplace training can demonstrate organisational commitment to dealing with sexual harassment and establish expected standards of behaviour. However, conventional training has proved ineffective.⁴⁵¹ While there is limited research on the efficacy of workplace sexual harassment training,⁴⁵² there is a growing consensus that “conventional ‘fear-based’ training, which focuses on punitive responses to sexual harassment, has limited impact.”⁴⁵³ Such training fails to improve equality, respect and organisational culture, or lead to behavioural change. In fact, one study found that in companies that implemented “forbidden-behaviours training programs”, the number of white women in management dropped by over 5% in the following years, while the representation of African American, Latina and Asian American women remained unchanged.⁴⁵⁴

Conventional training that is focused on delivering information about forbidden behaviours and the consequences for breaching company policy can reinforce gender stereotypes and send the message “that men need fixing”. This can lead to backlash by men against women.⁴⁵⁵ According to Dobbin and Kalev, this is because when you tell a group of people that they are the problem they get defensive and resistant. With respect to sexual harassment training, this has resulted in some men becoming less likely to view coercing a subordinate as sexual harassment, disinclined to report sexual harassment and more likely to blame victims and believe that women fabricate sexual harassment claims.⁴⁵⁶ Further, Dobbin and Kalev state that “research shows that men who are inclined to harass women before training actually become more accepting of such behavior after training.”⁴⁵⁷

Campbell and Chinnery also caution that the language used in training and the way that it is framed is important to maximise engagement and minimise backlash. Awareness raising interventions and training may unintentionally promote perceptions of sexual harassment as being the norm, and men may feel immediately confronted by interventions aimed at changing this and react with opposition.⁴⁵⁸ Men-only programs may address these challenges where they promote honest and reflective engagement.

Other strategies identified to reduce these effects are discussed further above in sections 1.c. *Shifting norms and behaviours*, 1.e. *Effective messaging* and 2.c. *Backlash*. In the context of training, these strategies include positioning training as a business-driven initiative designed to assist workers and

⁴⁵¹ AHRC, *Respect@Work*, 720.

⁴⁵² Mark V Roehling and Jason Huang, ‘Sexual Harassment Training Effectiveness: An Interdisciplinary Review and Call for Research’ 39(2) *Journal of Organizational Behavior* 134 (2018), <http://jasonhuangatwork.com/papers/Roehling%20&%20Huang%202018%20JOB.pdf> accessed on 26 January 2021; AHRC, *Respect@Work*, 721. Although note that this is a growing field. See, for example: Chris Woodrow and David Guest, ‘Leadership and Approaches to the Management of Workplace Bullying’ (2017) 26 *European Journal of Work and Organizational Psychology* 221; Ho Kwan Cheung, Caren B Goldberg, Eden B King, ‘Are They True to the Cause? Beliefs About Organizational and Unit Commitment to Sexual Harassment Awareness Training’ (2018) 43 *Group and Organization Management* 531; Vicki Magley, LF Fitzgerald, J Salisbury, F Drasgow, and MJ Zickar, ‘Changing Sexual Harassment Within Organizations via Training Interventions: Suggestions and Empirical Data’ in Ronald Burke and Cary Cooper (eds), *The Fulfilling Workplace: The Organization’s Role in Achieving Individual and Organizational Health* (London, Routledge 2013) 225.

⁴⁵³ AHRC, *Respect@Work*, 722.

⁴⁵⁴ Frank Dobbin and Alexandra Kalev, ‘Why Sexual Harassment Programs Backfire’, *Harvard Business Review* (May-June 2020).

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid; Campbell and Chinnery, above n40, 54, citing S Bingham, and L Scherer, ‘The Unexpected Effects of a Sexual Harassment Educational Program’, 37 *The Journal of Applied Behavioural Science* 2 (2001), 125-153.

⁴⁵⁷ Dobbin and Kalev, above n454.

⁴⁵⁸ Campbell and Chinnery, above n40, 55, citing E Paluck and L Ball (United States of America: International Rescue Committee) ‘Social norms marketing aimed at gender based violence: a literature review’ (2010) <https://static1.squarespace.com/static/5186d08fe4b065e39b45b91e/t/52d1f24ce4b07fea759e4446/1389490764065/Paluck+Ball+IRC+Social+Norms+Marketing+Long.pdf>.

managers (as opposed to a legal compliance measure) and asking trainees to do tasks that increase empathy with members of other groups.⁴⁵⁹

Dobbin and Kalev consider that bystander intervention training is the most promising alternative to conventional sexual harassment training. These programs “start with the assumption that trainees are allies working to solve the problems of harassment and assault rather than potential perps.”⁴⁶⁰ Bystander training is discussed in more detail below at section 7.

Manager training also works for the same reasons that bystander training shows promise: it frames sexual harassment as a challenge that managers must address, rather than suggesting that they are the problem: “Participants, men and women alike, are encouraged to imagine what they might see other people doing wrong; the focus is deliberately not on what they themselves might do wrong.”⁴⁶¹ As with bystander training, they are also equipped with practical skills to recognise early signs of harassment and how to respond.⁴⁶² Dobbin and Kalev’s research shows that men pay attention to manager training⁴⁶³

because they feel they’re being given new tools that will help them solve problems they haven’t known how to handle in the past—and in part because they’re assumed to be potential heroes rather than villains. Everybody’s in it together, learning how to recognize and curb dubious behaviors in ways that will improve the overall work environment.

Interestingly, Campbell and Chinnery found that there is extremely limited evidence of the effectiveness of unconscious bias training at reducing sexual harassment.⁴⁶⁴

UN Women has published a table that lists issues to consider when evaluating sexual harassment training,⁴⁶⁵ which is included below at section 6.i. However, this is also useful guidance for designing effective training.

The VEOHRC [*Guideline: Preventing and responding to workplace sexual harassment*](#)⁴⁶⁶ also contains helpful guidance on how to design and deliver effective sexual harassment training.

Finally, it is important to note the role that organisational culture can play in determining how receptive people will be to training. A study of a Canadian policing organisation by Rawski and Workman-Stark found that training interventions aimed at remedying the effects of ‘masculinity contest cultures’⁴⁶⁷ are unlikely to be effective where the organisational norms are at odds with the training content.⁴⁶⁸ This paradox is described as follows:⁴⁶⁹

the organizations that need the intervention the most contain the very conditions—tolerance of ethical breaches, normalization of negative behaviors, cynicism—that are most likely to undermine employees’ motivation to learn and change. To address this

⁴⁵⁹ AHRC, *Respect@Work*, 723.

⁴⁶⁰ Dobbin and Kalev, above n454.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Campbell and Chinnery, above n40, 55.

⁴⁶⁵ Sen, above n20, 36–40.

⁴⁶⁶ VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment* (August 2020) <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>, accessed on 3 December 2020.

⁴⁶⁷ There are four themes that have empirically emerged in measures of ‘masculine contest cultures’, being “show no weakness, put work first, strength and stamina, and ‘dog eat dog’”: Peter Glick, Jennifer Berdahl and Natalya M Alonso, ‘Development and Validation of the Masculinity Contest Culture Scale’, 74 *Journal of Social Studies* 3 (2018), 449–476, 451.

⁴⁶⁸ Shannon L Rawski, Angela L Workman-Stark, ‘Masculinity Contest Cultures in Policing Organizations and Recommendations for Training Interventions’ 74 *Journal of Social Issues* 3 (2018), 607–627.

⁴⁶⁹ Ely and Kimmel, ‘Thoughts on the Workplace as a Masculinity Contest’ 74 *Journal of Social Issues* 3, 628–634, 631, referring to Shannon L Rawski, Angela L Workman-Stark, ‘Masculinity Contest Cultures in Policing Organizations and Recommendations for Training Interventions’ 74 *Journal of Social Issues* 3 (2018), 607–627.

paradox, this article recommends that training interventions offer participants different ways of making sense of negative behavior and more positive roles to be taken up in relation to it, while also acknowledging that the same behavior can easily be interpreted differently by different people.

This reinforces the importance of training being framed as bystander training and manager training.

b. Customised

A number of sources emphasise the importance of training being both part of a broader prevention strategy and customised for the specific audience.⁴⁷⁰ When developing sexual harassment training, the AHRC recommends first commencing with a consultative process of ‘roundtables’ to establish shared organisational values and objectives, followed by ‘audits’ to assess the prevalence and nature of sexual harassment in the organisation.⁴⁷¹

McDonald et al likewise recommend that training be informed by organisational assessments, including an assessment of sexual harassment risk factors within the organisation. This includes “identifying situations in which SH is more likely to occur, gauging women’s roles, status and positions in the organization, and conducting regular and anonymous attitude surveys which include measures of SH”.⁴⁷² These activities are discussed in further detail above in section 4 *Understanding the nature of the problem*.

c. Training content

The content of sexual harassment training should cover the following.

Unacceptable behaviours

- McDonald et al state that training should clarify what does and does not constitute sexual harassment, including clarifying any misconceptions and reinforcing expected behavioural norms.⁴⁷³ This should include a discussion of ‘grey areas’.⁴⁷⁴ Effective training about this requires modelling and rehearsal, such as by role-playing case studies to allow participants to practice interpersonal skills in challenging situations. This can increase both resolution handling skills and sensitivity to potentially sexually harassing behaviour.⁴⁷⁵
- The EEOC advises that sexual harassment training should also cover problematic yet lawful behaviours that could escalate to sexual harassment if left unchecked, as opposed to trying to teach participants the specific legal standards that make conduct “illegal”.⁴⁷⁶
- With respect to judges, GJIN recommends covering the full range of gender-related integrity issues, including “sextortion, sexual harassment, sexual discrimination, gender bias, unequal gender representation, gender stereotyping or inappropriate sexual conduct.”⁴⁷⁷ GJIN notes that most training focuses on sexual harassment and gender sensitivity, which are important, but all gender-related integrity issues should be covered. Sachar agrees with this and identifies quid pro quo, sexual harassment, a hostile work environment, and retaliation (victimisation) as specific topics to be covered.⁴⁷⁸

⁴⁷⁰ AHRC, *Respect@Work*, 730; Feldblum and Lipnic, above n5.

⁴⁷¹ AHRC, *Respect@Work*, 731

⁴⁷² McDonald et al, above n39, 45.

⁴⁷³ McDonald et al, above n39, 45.

⁴⁷⁴ United States Courts, *Workplace Conduct Working Group Report*, above n293, 42.

⁴⁷⁵ McDonald et al, above n39, 45.

⁴⁷⁶ Feldblum and Lipnic, above n5; GJIN, above n1, 11-12 and 70-3.

⁴⁷⁷ GJIN, above n1, 11-12 and 70-3.

⁴⁷⁸ Sachar, above n345, 15-17.

Rights, responsibilities and response options

- Training must educate employees about their rights and responsibilities, including avenues for reporting sexual harassment or seeking assistance, the processes involved, and the potential outcomes, including possible corrective actions.⁴⁷⁹
- Trainees should also be informed about the level of confidentiality they can expect, and the protection and support available for those who experience or report sexual harassment.⁴⁸⁰
- Sachar elaborates on this with respect to courts and states that gender integrity training should include “who will conduct the investigation, the timing of the investigation and best practices that will be followed in gathering information and conducting interviews. Proper documentation, rules of confidentiality and other important facets of the investigative process should be clear for all who are in the work place.”⁴⁸¹ He also notes that people should be encouraged to report to the Judicial Commission, even if there is an internal investigation procedure.⁴⁸²

Risk factors

- As indicated above, training should be informed by an understanding of the sexual harassment risk factors that are specific to the organisation and trainee group. Sexual harassment training should address specific risks, particularly situational risks, and strategies to eliminate or minimise these risks.⁴⁸³ This should include training on specific ways in which trainees can respond to ethically questionable decisions or practices.⁴⁸⁴

Gender equality and sensitivity

- McDonald et al recommend that “training should challenge gendered organizational cultures” by explicitly addressing gender-related cultural issues.⁴⁸⁵ This can be achieved by reflecting on the current attitudes, social norms and culture within the organisation that allow gender-related misconduct to occur and applying strategies to shift social norms and reframe masculinity, as discussed above in sections 1.c. *Shifting norms and behaviours* and 1.e. *Effective messaging*.
- GJIN recommend that sexual harassment training be accompanied by training on gender sensitivity and workplace civility because “gender-related integrity issues are rooted in social attitudes and norms that reflect gender bias”, however

people may be unaware of that bias and be firmly convinced they are acting in an equitable and appropriate manner... Gender sensitivity training can help people to recognize and understand gender bias, whether conscious or unconscious, and enhance their awareness of gender issues.⁴⁸⁶

However, we note the cautionary findings of Dobbin and Kalev about how framing sexual harassment training in particular ways can alienate certain groups (referred to above), as well as the research of Kuchynka et al discussed in section 2.c. on Backlash, which may inform how such training is delivered.

⁴⁷⁹ Feldblum and Lipnic, above n5.

⁴⁸⁰ Feldblum and Lipnic, above n5.

⁴⁸¹ Sachar, above n345, 19.

⁴⁸² Sachar, above n345, 19.

⁴⁸³ United States Courts, *Workplace Conduct Working Group Report*, above n293, 45

⁴⁸⁴ Gifford et al, above n 12, 13.

⁴⁸⁵ McDonald et al, above n39, 45.

⁴⁸⁶ GJIN, above n1, 72.

Civility training

- Given the significant link between uncivil behaviours and sexual harassment, discussed above in section 1. *an Organisational culture and climate*, the EEOC, IBA and GJIN recommend that civility training form part of the suite of training that organisations implement to prevent sexual harassment. While the effectiveness of workplace civility training in preventing sexual harassment has not been rigorously evaluated, the EEOC found that there is some empirical evidence to demonstrate its effectiveness in improving workplace cultures of respect that are protective against harassment.⁴⁸⁷ For this reason, the EEOC considers civility training to be an important complement to sexual harassment training.
- Civility training focuses on promoting respect and civility in the workplace by exploring workplace norms and establishing expectations of appropriate behaviour. It includes a strong skills-based component to give trainees the tools to meet these expectations, including training on interpersonal skills, conflict resolution and supervision techniques.⁴⁸⁸

Bystander training

- Bystander intervention training can change social norms by creating awareness, a sense of collective responsibility, a sense of empowerment and by giving people the necessary knowledge and skills to intervene.⁴⁸⁹ Sachar supports bystander training as an important component of sexual harassment training, particularly given that empowering bystanders to be part of the solution can ameliorate the damaging effect that sexual harassment can have on broader team relationships and morale.⁴⁹⁰
- Bystander training is discussed in more detail below in section 7.

Skills for leaders, managers and supervisors

- Staff with supervisory responsibilities should receive additional training.⁴⁹¹ According to McDonald et al, this should cover conflict management skills, including communication and emotional skills to ensure managers can respond to complaints with empathy and actively listen rather than become defensive or dismissive.⁴⁹²
- Training for leaders, managers and supervisors should develop practical skills to enable managers to identify problem behaviour and signs of harassment early and respond to different types of offensive behaviour.⁴⁹³
- This training should also equip trainees with a solid understanding of the available support services for staff and how to respond to complaints of sexual harassment in a fair and victim-centred manner.
- Managers and supervisors must understand how to report harassment up the chain of command and be reminded of their obligation to address sexual harassment even in the absence of a complaint.⁴⁹⁴

⁴⁸⁷ Feldblum and Lipnic, above n5., citing Lim and Cortina, above n15.

⁴⁸⁸ GJIN, above n1, 73; Feldblum and Lipnic, above n5, citing Lim and Cortina, above n15.

⁴⁸⁹ GJIN, above n1, 73.

⁴⁹⁰ Sachar, above n345, 18.

⁴⁹¹ GJIN, above n1, 10.

⁴⁹² McDonald et al, above n39, 45.

⁴⁹³ Feldblum and Lipnic, above n5, citing Lim and Cortina, above n15; Dobbin and Klev, above n454.

⁴⁹⁴ Feldblum and Lipnic, above n5, citing Lim and Cortina, above n15.

Skills for judges and court staff

The US Federal Judiciary Workplace Conduct Working Group also identified the following training content required for specific groups within the courts:⁴⁹⁵

Chief judges:

- Effective leadership principles and techniques.
- How to foster a positive working environment and hold others accountable for maintaining that environment.
- Risk factors that are highly relevant in chambers, such as power imbalances and isolated workplaces, and the need for all judges to lead by modelling exemplary behaviour.
- The judge's duty to take appropriate action when learning of an apparent violation of the Code of Conduct or professional responsibility standards by another judge.
- Formal and informal ways to deal with judges and employees who are suspected of inappropriate behaviour.

Court executives

- Their leadership roles
- How their efforts to create a positive work environment will be recognised in evaluating their job performance.
- The importance of managers and supervisors detecting and responding to inappropriate behaviour.
- Skills for having difficult conversations, including with someone suspected of misconduct.

Court employees, including law clerks (associates)

- Standards, policies and procedures, including how to get advice and help. However, the Working Group recommended that orientation on workplace conduct, including what to do when experiencing or witnessing inappropriate conduct, should be distinct from training on things such as building security, computer usage, health benefits, etc and timed in a way that critical information about workplace standards and remedies does not get lost in the whirlwind of new onboarding information.
- The Working Group noted that there has sometimes been confusion as to whether judge's associates are prohibited from reporting misconduct by their judge or others due to their duty of confidentiality. The Working Group therefore recommended that the orientation and publications describing the role clarify that this is not the duty of confidentiality does not prohibit a law clerk or other employee from reporting misconduct.⁴⁹⁶

d. *Universally attended*

McDonald et al recommend that training be regular and universal, taking place compulsorily across all hierarchical levels, as well as in orientation programs.⁴⁹⁷

Sachar notes that specific training on sexual harassment is vitally important for judges "as it is rarely 'common knowledge' and judges are not necessarily people who rose through the ranks managing a work

⁴⁹⁵ United States Courts, *Workplace Conduct Working Group Report*, above n293, 42-44.

⁴⁹⁶ United States Courts, *Workplace Conduct Working Group Report*, above n293, 41.

⁴⁹⁷ McDonald et al, above n39, 45.

force.”⁴⁹⁸ GJIN recommends mainstreaming consideration of gender issues into every stage of legal education, including at law schools, judicial training institutes, and bar associations.⁴⁹⁹ Gender-related integrity issues should also be covered in orientations for new staff and judges, and included in regular workplace training.⁵⁰⁰

Given that judicial values are instilled long before people become judges, GJIN further recommends that training be provided to:⁵⁰¹

- Students in law schools – ethics courses should include a gender perspective
- Lawyers – continuing education should include gender-related integrity issues, completion of which could be incentivised
- Judges and court personnel – everyone within the courts who might be exposed to sexual harassment, with senior judges and judges in supervisory roles leading by example and participating in training during orientation and at regular intervals thereafter
- Judges with supervisory roles – additional training about how to prevent, detect and address gender-related misconduct, as discussed above. Sachar agrees with this and notes that “[m]anagers should set a tone of propriety as well as provide a safe place for complainants”.⁵⁰²
- The public – public campaigns, FAQs in brochures and community engagement should raise public awareness of the ethical standards for judges and how the justice system works.

e. Long and intensive

In their report for Care Australia, Campbell and Chinnery provide detailed information about evidence-based training design principles that should be applied to sexual harassment training. According to Care Australia, training should be “intensive and provide opportunities to take participants on a long learning journey.”⁵⁰³ It has been suggested that resistance to sexual harassment prevention initiatives and training may be softened by allowing discussions and training to occur over a long timeframe so that participants have time to reconsider their positions and change their minds without losing face.⁵⁰⁴

UN Women report that ‘state of the art’ training:

understands the climate in each organization, recognises that culture change requires interactive and experiential training methods from trainers with sexual harassment expertise, acknowledges that single sex sessions might have a role [and] commits to maintenance of learning and engagement over time.^{505” 506}

f. Compulsory

McDonald et al and GJIN recommends that training be compulsory,⁵⁰⁷ particularly given that people may otherwise choose not to attend because they think they understand the issues, or do not consider the

⁴⁹⁸ Sachar, above n345, 14.

⁴⁹⁹ GJIN, above n1, 10.

⁵⁰⁰ Ibid, 67-8; United States Courts, *Workplace Conduct Working Group Report*, above n293, 42. The US Federal Judiciary Workplace Conduct Working Group recommended that workplace standards training be provided during orientation with regular refresher training thereafter.

⁵⁰¹ GJIN, above n1, 67-8.

⁵⁰² Sachar, above n345, 17.

⁵⁰³ Campbell and Chinnery, above n40, 59

⁵⁰⁴ Ibid 57, citing Paluck and Ball, above n458.

⁵⁰⁵ Sen, above n20, 36.

⁵⁰⁶ AHRC, *Respect@Work*, 730.

⁵⁰⁷ GJIN, above n1, 11-12 and 68; McDonald et al, above n39, 45.

training to be necessary or important or applicable to them (particularly for male judges receiving training on ‘women’s issues’ such as gender equality).⁵⁰⁸

However, Dobbin and Klevorall alluded to the risk that some people may resist training that is mandatory.

g. Engaging

Training must be engaging and valuable for all genders. To this end, training should be interactive, live, use realistic case studies, employ a variety of styles (such as presentation of information followed by role-playing or discussion of case-studies), include content on gender equality, and be tailored to the needs and local cultural context of the target audiences, including how the audience perceives gender issues.⁵⁰⁹ According to Campbell and Chinnery and VicHealth, training should be “intense, framed to engage people emotionally and foster empathy in ways that are relevant to the group.”⁵¹⁰

Care Australia notes that there is evidence of the effectiveness of the following techniques for training aimed at violence prevention:⁵¹¹

- modelling and rehearsal
- expressive writing over a three-day period
- inclusion of multi-media to increase engagement
- case studies, for role play and role negotiations
- drawing on evidence to enhance user experience in digital communications
- increasing contact between individuals to reduce underlying prejudice and discrimination.

To increase the salience on sexual harassment and other gender-related judicial integrity issues, GJIN notes the following examples:⁵¹²

- In Guyana, gender training is tied to the *Bangalore Principles of Judicial Conduct* as well as the sexual offences court, thereby increasing relatability of the training to the work of judges and increasing their willingness to participate.⁵¹³
- In Korea gender sensitivity training is provided by two senior judges – one male and one female – to communicate that gender issues are important and relevant to all genders.⁵¹⁴

h. Delivered by a highly qualified trainer

Training should be conducted by highly qualified and experienced trainers who are experts in the topic and can create a safe and respectful training environment. According to IBA, “a mix of internally and externally provided training appears to be the most effective approach; organisations that entirely outsourced their training received the worst adequacy ratings.”⁵¹⁵

GJIN notes that in some jurisdictions a person from the judicial disciplinary body is involved in delivering judicial training, which can provide additional expertise and insights.⁵¹⁶ David J Sachar echoed this sentiment; as the Executive Director of the Arkansas Judicial Discipline and Disability Commission he plays an active part in delivering training on gender-related integrity issues to judges and considers that this also builds trust and confidence among the judiciary in the Commission.⁵¹⁷ Sachar considers that commissioners from the judicial disciplinary body should lead training for judicial officers and judicial

⁵⁰⁸ GJIN, above n1, 11-12 and 68.

⁵⁰⁹ Ibid.

⁵¹⁰ Campbell and Chinnery, above n40, 57.

⁵¹¹ Campbell and Chinnery, above n40, 59.

⁵¹² GJIN, above n1, 69.

⁵¹³ Ibid.

⁵¹⁴ Ibid.

⁵¹⁵ Pender, above n124, 101.

⁵¹⁶ GJIN, above n1, 70.

⁵¹⁷ Interview with David J Sachar (Executive Director of the Arkansas Judicial Discipline and Disability Commission), Alex Shehadie and Melanie Schleiger on 10 September 2020.

staff, educating them about the obligations of staff, managers and bystanders and gender related integrity issues, including in the context of ethics training.⁵¹⁸

The potential benefits of virtual reality-based training are currently being explored, but it does not appear to have been specifically tested in relation to sexual harassment prevention.⁵¹⁹

i. Evaluated

Training should be evaluated regularly to ensure its relevance and effectiveness⁵²⁰, although GJIN notes the need to be mindful of conducting evaluations in a way that does not undermine judicial independence.⁵²¹

The effectiveness of training can be measured by 1) assessing whether participants found the training valuable and learned something or 2) assessing whether the training may have changed behaviour, for example by analysing complaints data, surveying court users, evaluating judicial conduct through peer review and observation.⁵²² The EEOC recommends that training should be evaluated with a view to assessing whether the training changed the behaviours of participants and what they observed in the workplace.⁵²³

Summary of UN Women review of sexual harassment training evaluations⁵²⁴

Structure and delivery:	Method:	Content:
<ol style="list-style-type: none"> 1. Training should run over one or two days, with the same duration and content for all staff. 2. Training should be compulsory and offered to all new joiners. 3. Workers, managers and leaders should all participate regularly and seriously. 4. Trainers should have expertise on sexual harassment, inequality and discrimination and the skills to engage with complexities. 	<ol style="list-style-type: none"> 1. Training should be conducted face to face. 2. Participation should be active; participants to engage with what they know and think they know. 3. Consider whether the training should be single sex, and how to address the range of cultures within an organisation. 4. Encourage debate and discussion, and create space for questions, doubts, concerns. 5. Provide space for reflection and revision of positions. 	<ol style="list-style-type: none"> 1. Useful, relevant and up-to-date materials need to be created, for the specific context. 2. There should be strong links between the content and intended impacts and outcomes. 3. Case studies should be authentic, linked to the organisation, and used to explore what difference it would make if the parties had different characteristics, for example, in terms of age, sex, race/ethnicity, sexuality. <p>They can also be based on examples of where processes did not work. This enables consideration of what could or</p>

⁵¹⁸ Sachar, above n345, 4-5.

⁵¹⁹ P Bertrand, J Guegan, L Robieux, CA McCall and F Zenasni 'Learning Empathy Through Virtual Reality: Multiple Strategies for Training Empathy-Related Abilities Using Body Ownership Illusions in Embodied Virtual Reality,' 5 *Front. Robot. AI* 26 (2018); [Alexandra D Kaplan](#), [Jessica Cruit](#), Mica Endsley, [Suzanne M Beers](#), [Ben D Sawyer](#), [P A Hancock](#), 'The Effects of Virtual Reality, Augmented Reality, and Mixed Reality as Training Enhancement Methods: A Meta-Analysis', *Human Factors: The Journal of the Human Factors and Ergonomic Society*, (24 February 2020) <https://journals.sagepub.com/doi/abs/10.1177/0018720820904229>, accessed on 25 January 2021.

⁵²⁰ GJIN, above n1, 73-4; and Feldblum and Lipnic, above n5.

⁵²¹ GJIN, above n1, 73

⁵²² Ibid, 74.

⁵²³ Feldblum and Lipnic, above n5.

⁵²⁴ Sen, above n20, 36-40.

<p>5. Training should be an embedded part of an organisational commitment to cultural change, conveyed by leadership and practised by all.</p> <p>6. Follow-up micro-training should be conducted to maintain commitment and trace change at the individual level.</p> <p>7. Consider whether training in assertiveness and/or self-defence may be relevant for women especially those with client or customer facing roles.</p>	<p>6. Explore and address resistance from women and men about sexual harassment policy and training.</p> <p>7. Experiment with new and original approaches.</p>	<p>should have been done differently.</p> <p>4. The content should be immersive and safe, with a focus on new ways of thinking and acting rather than right answers.</p> <p>5. Explore social and sexual ethics in the workplace explicitly, what is and is not acceptable and how to judge if behaviour may be unwelcome.</p> <p>6. Present a range of options for action other than formal reporting—e.g., collective ownership of change, first responder options, support for victims, and questioning the behaviour of harassers. Role plays are often useful for practising different ways of acting, especially if time is taken to explore what it felt like for the intervener, for the victim and for the harasser.</p> <p>7. When promoting first responder interventions, explore what could go wrong, what might be the barriers to intervening and enable alternative forms of action to be explored.</p> <p>8. Include space for personal and group action plans: how people will become change makers.</p>
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7. Bystander interventions

Bystander interventions have been shown to emotionally support the person targeted, discourage the perpetrator from harassing in future and support a culture that condemns sexist behaviours and sexual harassment.⁵²⁵ In the university and high school context, bystander education has been shown to change social norms and increase the likelihood of staff and students intervening to prevent assaults and sexual harassment.⁵²⁶ In the context of the courts, bystander training also has the potential to address the fear

⁵²⁵ VicHealth and Behavioural Insights Team, 'Take Action: Empowering bystanders to act on sexist and sexually harassing behaviours', *Victorian Health Promotion Foundation*, Melbourne (2019), 2.

⁵²⁶ Feldblum and Lipnic, above n5, citing Centers for Disease Control and Prevention Injury Prevention and Control: Division of Violence Prevention, *Sexual Violence: Prevention Strategies*, available at

that reporting judicial misconduct will diminish public confidence in the courts, by educating judges and others about the range of ways in which they can address wrong or unprofessional behaviour.⁵²⁷

The EEOC describes a ‘bystander’ as follows.⁵²⁸

A bystander is someone who witnesses an incident of sexism or sexual harassment without taking part in it, or someone who is later told about or shown images of an incident. An ‘active bystander’ is someone who responds to the incident with some sort of action that communicates their disapproval. It could be something that prevents the incident from continuing, or a response to the incident after it happens. It could involve saying something to the perpetrator, checking in with and supporting the target, making a formal report to a relevant authority – or a combination of these actions.

Notably, bystander interventions involve more than just training, and usually comprise four strategies:⁵²⁹

- “Create awareness - enable bystanders to recognize potentially problematic behaviors.
- Create a sense of collective responsibility - motivate bystanders to step in and take action when they observe problematic behaviors.
- Create a sense of empowerment - conduct skills-building exercises to provide bystanders with the skills and confidence to intervene as appropriate.
- Provide resources - provide bystanders with resources they can call upon and that support their intervention.”

The EEOC acknowledges that, as with civility training, more research is required to determine the effectiveness of bystander training, but considers that bystander training has real potential to positively change organisational culture.⁵³⁰ The AHRC is also positive about bystander initiatives, noting that “studies have suggested that bystanders who do intervene when they witness or hear about workplace sexual harassment can effectively prevent and reduce harm to victims and contribute to a more respectful culture.”⁵³¹ The 2018 US Federal Judiciary Workplace Conduct Working Group also saw promise; it recommended that further work be done to encourage bystander action by witnesses of misconduct and that the Federal Judicial Centre “develop advanced training programs specifically aimed at developing a culture of workplace civility” including training on bystander action.⁵³²

<http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html>; VicHealth and Behavioural Insights Team, ‘Take Action: Empowering bystanders to act on sexist and sexually harassing behaviours’, Victorian Health Promotion Foundation, Melbourne (2019), 2.

⁵²⁷ GJIN, above n1, 54. Although the US Courts Workplace Conduct Working Group found that “Judges have a special responsibility to promote appropriate behavior and report instances of misconduct by others, including other judges.”: US Courts, *Executive Summary of the Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* (1 June 2018), https://www.uscourts.gov/sites/default/files/executive_summary_of_federal_judiciary_workplace_conduct_working_group_0.pdf, accessed on 30 October 2020, iii.

⁵²⁸ VicHealth, ‘Take Action: Empowering bystanders to act on sexist and sexually harassing behaviours in universities: Report Summary’ (September 2019) accessed at https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Bystander/Bystander_Summary-Report.pdf?la=en&hash=D6AE39B8222BD02AF417AA83BBF19ED022437F92 on 1 October 2020.

⁵²⁹ Feldblum and Lipnic, above n5.

⁵³⁰ Ibid.

⁵³¹ AHRC, *Respect@Work*, 748, citing McDonald et al, above n39, citing Deborah Balogh et al, ‘The Effects of Delayed Report and Motive for Reporting on Perceptions of Sexual Harassment’ (2003) 48(7) *A Journal of Research* 337. Paula McDonald and Michael Flood, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (Australian Human Rights Commission, June 2012).

⁵³² US Courts, *Executive Summary of the Report of the Federal Judiciary Workplace conduct Working Group to the Judicial Conference of the United States* (1 June 2018), https://www.uscourts.gov/sites/default/files/executive_summary_of_federal_judiciary_workplace_conduct_working_group

The AHRC cautions that while bystander training is an important component of a strategy to end workplace sexual harassment, there are also challenges and drawbacks that must be acknowledged. One challenge is the risk of retaliation in response to bystander action, with the AHRC's 2018 National Survey finding that "one in ten bystanders who took action after witnessing sexual harassment were ostracised, victimised or ignored by colleagues, while 9% were labelled as troublemakers and 6% resigned after taking bystander action."⁵³³ The risk of retaliation may be exacerbated in occupations that are highly hierarchical and rely heavily on patronage and tightknit networks.

For the reasons above, Campbell and Chinnery indicate that people must be supported to challenge behaviours and the bystander actions that are encouraged "need to be realistic, achievable and appropriate to the personnel level in the organisation, their roles and responsibilities and ability to effect organisational and attitudinal change."⁵³⁴ It is also important that leaders vocally support bystander interventions.⁵³⁵

Interventions aimed at creating new social norms around bystander action may also reduce the social risks involved, as illustrated by the following example:⁵³⁶

Green et al., (2018) developed a mass media experiment in Uganda aimed at constructing new public norms regarding bystander intervention in intimate partner violence situations. Green et al., (2018) found an increasing willingness to report as a new public norm reduced judgement against bystanders, resulting in a reduction in the number of households experiencing violence against women, even though there was little evidence of attitude change regarding the acceptability of violence. Women were less likely to believe they would be labelled a gossip if they were to report an incident of violence against women, and their willingness to speak out increased substantially.

There is also the risk that bystanders may not understand what sexually harassing behaviour is,⁵³⁷ and the risk that responsibility to address sexual harassment is shifted from organisations onto bystanders. It must be remembered that "employers ultimately bear the duty to create a safe and respectful work environment" and "bystander action is more likely to be taken if it is actively encouraged and supported by employers."⁵³⁸

VicHealth has released a number of tools to assist organisations to implement bystander intervention programs, but emphasises that these tools must be implemented with a suite of other actions including top-down organisational support, a clear and enforced sexual harassment policy, key metrics to track sexist and sexually harassing behaviour, and an effective reporting and resolution process.

The tools include the following:

- [Take Action: Empowering bystanders to act on sexist and sexually harassing behaviours](#)⁵³⁹

[p 0.pdf](#), accessed on 30 October 2020, xi and United States Courts, *Workplace Conduct Working Group Report*, above n293, 42.

⁵³³ Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 97. as cited in AHRC, *Respect@Work*, 749.

⁵³⁴ Campbell and Chinnery, above n40, 26

⁵³⁵ AHRC, *Respect@Work*, 750, citing Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*, 18–19. See also See VicHealth et al, *Take action*, above n293 See VicHealth et al, *Take action*, above n290.

⁵³⁶ Campbell and Chinnery, above n40, 15, citing D Green, A Wilkes and J Cooper (Poverty Action), *Silence Begets Violence: A mass media experiment to prevent violence against women in rural Uganda*, Working Paper (2018) https://www.poverty-action.org/sites/default/files/publications/Green_et_al.pdf.

⁵³⁷ AHRC, *Respect@Work*, 749.

⁵³⁸ AHRC, *Respect@Work*, 748, citing Women's Health in the South East, Submission 221, *Sexual Harassment Inquiry*; Diversity Council Australia, Submission 282, *Sexual Harassment Inquiry*, 6, 41–43.

⁵³⁹ See VicHealth et al, *Take action*, above n290.

- [Guide to implementing a university-wide bystander email campaign](#)⁵⁴⁰
- [Bystander behavioural survey tool for universities](#)⁵⁴¹

In designing bystander interventions for an organisation, it is important to consider the skill level and attitudes of the workforce so that initiatives can be designed effectively.⁵⁴² For example, providing a workforce with information about bystander intervention strategies will be less effective if that workforce has a low awareness of sexual harassment and cannot identify when bystander action should be taken.⁵⁴³

VicHealth and Behavioural Insights Team - bystander intervention trials

In 2018-19 VicHealth and the Behavioural Insights Team trialled two interventions at Victorian Universities that tested bystander interventions aimed at reducing sexist and sexually harassing behaviours.⁵⁴⁴

- The University of Melbourne trial, which involved a 'light touch' series of email communications; and
- the Victoria University trial, which was more focussed and involved intensive online training for a more narrow population of interested students.

Some of the interventions trialled, particularly the email series trialled at the University of Melbourne, led to more staff and students taking bystander action. The trial also showed that positive 'majority norm' messaging – for example communications stressing that active by standing is common – can help to change behaviour and are more effective than those suggesting it is rare.⁵⁴⁵

The University of Melbourne started by establishing 'social norms' about what behaviours are acceptable. The University surveyed staff and students about attitudes and behaviours relating to sexism, sexual harassment and bystander action. The results informed the social norm messaging included in a series of five emails with advice on how to take action, which were sent to 30,000 staff and students. The emails included either a 'majority norm' message (e.g., "Most of us studying on campus think it's right to call someone out for making sexist jokes or comments ... And 78% said they themselves would intervene if they saw sexism and sexual harassment on campus") or a 'minority norm' message (e.g. "Most of us studying on campus think it's right to call someone out for making sexist jokes or comments ... But only 46% of us actually do").⁵⁴⁶

The trial found that people were more likely to take bystander action after receiving communications with the 'majority norm' message. Those who received both training and majority norm messaging were 10% more likely to take bystander action than the control group (42% compared to 32% of people who witnessed sexual harassment in the previous 8 weeks). Women

⁵⁴⁰ VicHealth, the Behavioural Insights Team and Women Victoria, *Guide to Implementing a University-wide Bystander Email Campaign* (2019) <https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Bystander/Bystander-Email-Campaign-Tool.pdf?la=en&hash=F3352E7C7B2DBD31A2A47E5D932064D182A19C24> accessed on 29 January 2021.

⁵⁴¹ VicHealth, the Behavioural Insights Team and Women Victoria, *Bystander Behavioural Survey Tool for Universities* (2019) https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Bystander/Bystander_Survey-Tool.pdf?la=en&hash=9E5E9C8A4C6537CCD9C79E97DC4A3993DF61B611 accessed on 29 January 2021.

⁵⁴² AHRC, *Respect@Work*, 750, citing Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*, 18–19. See VicHealth et al, *Take action*, above n290.

⁵⁴³ Ibid.

⁵⁴⁴ VicHealth et al, *Take action*, above n290. See also VicHealth, 'How to be an active bystander', 24 September 2019, accessed at <https://www.vichealth.vic.gov.au/bystander#> on 1 October 2020.

⁵⁴⁵ Ibid, 5.

⁵⁴⁶ Ibid, 33-35.

who received social norm messaging were also 13% more likely to take bystander action against sexist behaviours, although this was not true for men.⁵⁴⁷

Men also noticed sexism and sexual harassment less than women so were less likely to notice the need for intervention. The researchers identified that:⁵⁴⁸

future initiatives targeted at encouraging men to take action against sexism could focus more deeply on explaining what sexism is, how to identify it and why it's problematic; and use social norms or messengers from groups that men are most likely to identify with.

There was broad-based acceptance of the emails overall – with just 0.85% of the 22,138 staff and students who received the emails choosing to unsubscribe.⁵⁴⁹

VicHealth and BIT made the following recommendations for universities based on the results of the trials.⁵⁵⁰

“Recommendation 1 Roll out light-touch messaging on bystander action, and stress that taking action is the norm. We found that sending students emails that contained clear, actionable information about intervening after witnessing sexism or sexual harassment increased bystander action on campus. This method is inexpensive, simple-to-implement, and can reach a wide and representative cohort of the university community. Importantly, these communications should stress that most people say they would take action if they saw sexism or sexual harassment.

Recommendation 2 Use more intensive training approaches to further engage already motivated individuals. Although reaching fewer students, we found that the eLearn was well-accepted by individuals who engaged with it. There is some evidence from international programs, such as the Green Dot initiative, that training courses play a vital role in arming key individuals (for example, socially influential students, students in leadership positions, or staff) with the skills to intervene. We only need one active bystander in the room to send a powerful message that sexism and sexual harassment are unacceptable.

Recommendation 3 Evaluate and measure changes in bystander action, not just intentions, attitudes and engagement. Many bystander initiatives that are rolled out have limited evidence. We found from using our behavioural survey tool that engagement and reported intentions are not sufficient to understand whether bystander action will increase. New reporting tools will provide even more rich data that we can utilise. Existing initiatives should be evaluated using this data.

The researchers also made the following recommendations based on more speculative findings and behavioural sciences literature.

Recommendation 4 Design approaches specifically targeting men, especially if focused on sexist behaviours. We discovered that our intervention encouraged men to actively bystand after sexual harassment, but not sexism, and that men were less likely to recognise sexism. We recommend:

⁵⁴⁷ Ibid, 36-39.

⁵⁴⁸ Behavioural Insights Team, 'How to stop sexual harassment as a bystander', 24 September 2019, accessed at <https://www.bi.team/blogs/how-to-stop-sexual-harassment-as-a-bystander/> on 1 October 2020.

⁵⁴⁹ VicHealth et al, *Take action*, above n290. See also VicHealth, 'How to be an active bystander', 24 September 2019, accessed at <https://www.vichealth.vic.gov.au/bystander#> on 1 October 2020, 41.

⁵⁵⁰ Ibid, 55-57.

- In the email series, spend more time focused on what sexism is and why it's problematic, and experiment with using social norms or messengers from groups that men identify with.
- Engage men in the co-design of new initiatives.

Outside of the email series, initiatives could be co-designed with groups more traditionally resistant to interventions about sexism and sexual harassment. Many universities are currently targeting all-male sports teams and male colleges with intensive bystander interventions.

Recommendation 5 Shift the physical and digital environment to make active bystanding normal and easy. As we outlined earlier, given our remit, in this project we opted to focus on building skills in individuals to encourage them to take bystander action. A second technique is to instead redesign the environment in which these individuals find themselves... [See section C.i Online information, reporting and referral tools below for a further discussion of this.]

C. SUPPORT AND REPORTING

Sexual harassment can cause serious physical and mental harm and often causes distress and anxiety in victims and witnesses. Despite this, there is a lack of meaningful support for victims and the majority of people who experience workplace sexual harassment do not report the conduct. The 2018 Australian Human Rights Commission's (AHRC) Fourth National Survey on Sexual Harassment in Australian Workplaces (**AHRC Survey**) showed that only 17% of people who experience harassment made a formal report (such as to their direct manager or supervisor) or complaint about the harassment.⁵⁵¹ There are multiple reasons for this, including fear that nothing will change, fear that complaining will damage one's relationships, reputation and career and culturally reinforced feelings of shame. These fears are well-founded: the 2018 AHRC Survey found that "almost one in five people who made a formal report were labelled as a trouble-maker, victimised, ostracised or resigned."⁵⁵²

GJIN also details multiple barriers to reporting judicial misconduct, including:⁵⁵³

- Lack of information about or access to effective complaint mechanisms.
- Shame and fear of negative repercussions, including a fear of social or professional retaliation that is not unfounded, given the often poor organisational response to sexual harassment and the potential power imbalance between perpetrator and victim.
- Lack of support services, including access to legal, medical and psychological services.
- Lack of confidence in the complaint process and institutional response, including a fear of not being believed or that corrective action will not be taken.
- Confusion about the scope of confidentiality provisions and whether reporting misconduct breaches the confidentiality ordinarily required of judges, law clerks and court employees.

While most victims do not report sexual harassment, when they do it is mostly to someone in their workplace.⁵⁵⁴ Yet, organisational responses to reports of sexual harassment are often unsupportive of victims and have a silencing effect on both the victim who reported the conduct and future victims who

⁵⁵¹ Australian Human Rights Commission (2018) *Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces*, 9.

⁵⁵² Ibid, 73-75.

⁵⁵³ GJIN, above n1, 50-51.

⁵⁵⁴ Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 69, as cited in AHRC, *Respect@Work*, 742.

lose trust in the organisation. In the course of its inquiry, the AHRC heard “that experiences relating to reporting could be more traumatising and disempowering for victims than the experience of sexual harassment itself.”⁵⁵⁵ Common failures that were reported to the AHRC include:⁵⁵⁶

- Lack of confidentiality resulting in the complaint becoming ‘common knowledge’;
- Having to explain one’s story over and over again, including to complete strangers;
- Responding to complaints in any of the following ways:
 - Ignoring or dismissing the complaint;
 - Minimising the conduct, e.g. by saying it was just a joke, the victim should be flattered, the person didn’t mean any harm;
 - Saying that the victim is too pretty, friendly, wears the wrong clothes and other comments that are victim blaming;
 - Disbelieving the complaint and suggesting that the victim is making it up.
- Investigations being unreasonably long;
- Allowing retaliation against the victim, including through performance processes or mistreatment by colleagues;
- Assuming that every complaint of sexual harassment requires a formal investigation.

Responding to reports of sexual harassment in ways that are ineffective or further harm the victim or reporter both discourages people from reporting misconduct and undermines the organisation’s other sexual harassment prevention initiatives.⁵⁵⁷ On the other hand, well designed reporting and response systems that take a victim-centred approach can reap organisational benefits, including giving workers the confidence to report sexual harassment.⁵⁵⁸ Further, responses that are “timely, informative and considerate toward the victim”, rather than “slow, dismissive, and discouraging toward the victim”, can almost eliminate the reputational damage and public backlash that company’s otherwise experience in response to sexual harassment incidents.⁵⁵⁹

As McDonald et al state:⁵⁶⁰

By definition, SH involves sexual conduct that is often experienced (and managed) as a highly personal affront. This necessitates a complaint-handling process that is mature, expert, timely, sensitive and transparent. Indeed, the literature is clear that effective organizational voice systems should be characterized by timely responses and investigations and an open and supportive environment where employees feel safe to express their views and can expect management to take them into account.

⁵⁵⁵ AHRC, *Respect@Work*, 744, citing SDA National, Submission 455, *Sexual Harassment Inquiry* 94–95; Individual, Submission 258, *Sexual Harassment Inquiry*; Consultation with policy stakeholders, Hobart; Individual, Submission 228, *Sexual Harassment Inquiry*; Individual, Submission 429, *Sexual Harassment Inquiry*.

⁵⁵⁶ AHRC, *Respect@Work*, 744.

⁵⁵⁷ Campbell and Chinnery, above n40, 42, citing H K Cheung H K, CB Goldberg, et al ‘Are They True to the Cause? Beliefs About Organisational and Unit Commitment to Sexual Harassment Training’, *Group and Organization Management*, (2017) 1-30: “Sexual harassment training is less successful when employees are cynical towards an organisation’s commitment to change and value of staff and believe that their workgroup is unethical.”

⁵⁵⁸ AHRC, *Respect@Work*, 744.

⁵⁵⁹ AHRC, *Respect@Work*, 760, citing Serena Does, Seval Gündemir and Margaret Shih, ‘Research: How Sexual Harassment Affects a Company’s Public Image’, *Harvard Business Review* (Research article, 11 June 2018) <hbr.org/2018/06/research-how-sexual-harassment-affects-a-companys-public-image>.

⁵⁶⁰ McDonald et al, above n39, 51.

The sections below discuss how organisations can support workers who have experienced sexual harassment and take a victim-centred response to reports of sexual harassment.

There is also a discussion of strategies to overcome the various barriers that discourage people from reporting sexual harassment, such as inaccessibility, fears of retaliation and reputational damage, and lack of faith in the complaint mechanisms or likely outcomes. These strategies include creating a variety of reporting options and channels, such as confidential online reporting options, and better protecting victims from retaliation. It is hoped that these strategies will improve rates of sexual harassment reporting, although there does not appear to be substantial evidence to demonstrate this.

a. Victim-centred response

UN Women encourages organisations to reorient themselves to identify with the interests of the victim and recognise that it is the victim who suffers the primary harm, and that when the organisation sides with the victim they can make a common cause against the harassment that undermines them both.⁵⁶¹

There is a narrative about sexual harassment that sees the primary victims being the organisation—which risks reputational damage—and alleged perpetrators, who claim that they are maligned because they would ‘never’ behave in such ways. It may well be right that organisations suffer damage and it is certainly true that sexual harassment impedes the mission of most organisations; that is why investment in the hard work of prevention and elimination matters. This means placing victim-survivors at the core of this work: listening, learning and changing the culture. This also means providing support, care and redress. Managers and leaders carry responsibility for these efforts.”⁵⁶²

Adopting a victim-centred approach can make it easier and more likely for victims to report, and therefore improve the effectiveness of efforts to address workplace sexual harassment.⁵⁶³ The AHRC states “[a] victim-centred response will prioritise the worker’s health needs ahead of the organisation’s formal reporting and disciplinary processes.”⁵⁶⁴ The AHRC takes the view that this is not only organisational best practice, but a legal obligation:

Given the significant impacts and harm caused by sexual harassment, and the further harm that workers can experience from reporting it, the Commission’s view is that, consistent with their obligations under WHS laws, an employer’s first priority on receiving a report should be to ensure the safety and welfare of the worker who has made the report, by providing them with suitable support.⁵⁶⁵

Further guidance about how to respond to reports of sexual harassment in a victim-centred way is provided in the UN Women report, *What Will It Take? Promoting Cultural Change to End Sexual Harassment*.⁵⁶⁶ UN Women has identified nine core elements of a victim-centred approach to addressing sexual harassment:

⁵⁶¹ Sen, above n20, 29.

⁵⁶² AHRC, *Respect@Work*, 736, citing Email, Dr Purna Sen, Executive Co-ordinator and Spokesperson on addressing sexual harassment and other forms of discrimination, UN Women, to the Sex Discrimination Commissioner, 20 November 2019.

⁵⁶³ AHRC, *Respect@Work*, 736

⁵⁶⁴ *Ibid*, 741

⁵⁶⁵ *Ibid*, 740

⁵⁶⁶ Sen, above n20, 29-33.

1. Allow the victim to decide whether or not to make a report, and if they decide to do so, when and where to report. (Note that there are circumstances that may invoke an employer's duty to act without the victim's consent, "such as when a harasser has multiple reports against them or the conduct concerned is a criminal act."⁵⁶⁷)
2. Clarify issues of privacy and confidentiality as soon as possible and preferably before details are shared, by telling the reporter about the listener's reporting obligations and other ways in which the information may be disclosed.
3. Ask and listen without judgement or interruption and show sympathy. Ensure that when speaking with victims the language used is neutral, non-judgemental and unbiased. Never blame victims for the harassment experienced.
4. Keep the victim informed throughout any process and before any action is taken, particularly around sharing information.
5. Ensure wellbeing, protection and safety of the victim. Anticipate that victims can experience trauma and be mindful of how and when symptoms may present.
6. Timelines for communications and investigations (if conducted) should be short and clear.
7. Ensure equal treatment of the victim and the alleged harasser, for example during the investigation, in terms of access to support, leave with pay, information and rights to appeal.
8. Offer a range of administrative adjustments, such as paid time off work or the option to work away from the alleged harasser.
9. Convey an openness about what happened, without making assumptions about accuracy of the report. Do not adopt the criminal justice system approach of beginning from an assumption of innocence of the accused. Interactions with victims can be supportive without being conclusive about the alleged conduct having occurred.

The AHRC notes that some organisations train contact officers in responding to trauma.⁵⁶⁸

Employers should periodically "test" their reporting system to determine how well the system is working.⁵⁶⁹

b. Access to psychological counselling and support services

In line with the above approach, information about available services to support the reporting person's safety and wellbeing should be provided to them as soon as possible, and ideally before any discussion about options for responding to their report. This should be practically reflected in the reporting system and guidance for contact officers and other first-responders. In practice, the AHRC states that this means:

individuals receiving reports must understand what support services are available to workers (inside and outside the workplace) and ensure that, as a 'first responder', the first step is to provide that support information to the worker. Ideally, information about and access to these support services should be available to all workers without the need for a worker to first raise a concern or make a formal or informal report to their employer. The worker should then be able to choose if they wish to pursue

⁵⁶⁷ See UN Women and International Labour Organization, *Handbook: Addressing Violence and Harassment against Women in the World of Work* (2019) 77; US Equal Employment Opportunity Commission, 'Chart of Risk Factors for Harassment and Responsive Strategies', *Harassment Task Force* (Web page) <www.eeoc.gov/eeoc/task_force/harassment/risk-factors.cfm>.

⁵⁶⁸ AHRC, *Respect@Work*, 835.

⁵⁶⁹ Feldblum and Lipnic, above n5.

reporting options or they may feel that obtaining support is sufficient to meet their needs at this stage.⁵⁷⁰

Support options may include staff welfare services provided by the organisation, such as an Employee Assistance Service, and publicly available services, such as Lifeline. Some large organisations, such as Victoria Police, offer staff more tailored welfare and mental health services.

c. Responsibility for internal complaint-handling – HR or Integrity Office?

There is a question as to who is best placed within an organisation to have responsibility for managing sexual harassment reporting processes, complaints and investigations. The question relates to both skills and competency, but also to the perception of sexual harassment as being an individual grievance versus an integrity issue of broader organisational significance. The author has not identified any empirical evidence that answers this question but notes the following case studies.

The US Federal Judiciary Workplace Conduct Working Group recommended the establishment of an internal Office of Judicial Integrity, that could provide counselling and assistance by telephone and email to judiciary employees in relation to workplace conduct. Specifically, the assistance could include a discussion of available options or intervention on the person's behalf, with the goal of addressing problems at an earlier stage. The review noted that the office could be combined with existing offices that ensure integrity issues such as waste, fraud and abuse.⁵⁷¹

The Working Group identified the following necessary characteristics of the advisers in the Office of Judicial Integrity:⁵⁷²

The advisers must have sufficient rank and stature to engage actively with judges and supervisors. They must have the training necessary to initiate the difficult conversations that invariably result in addressing inappropriate workplace behavior. They must be independent of influence from local human resources and management. And they must have access to the resources necessary to engage in effective problem solving. Former employees should have access to guidance on the scope of the confidentiality requirements.

A case study on the Australian Football League (AFL) in the AHRC *Respect@Work* report provides a further illustration of a model where responsibility was moved from the human resources department. The AFL published a new *Respect and Responsibility Policy* in 2017, which established complaint processes for sexual harassment, sexual assault and discrimination, as part of a suite of gender equality and inclusion initiatives. The policy shifted the AFL's complaint management approach from legal fact finding to victim welfare. The case study states:⁵⁷³

The AFL implemented a number of changes that have significantly improved the outcomes of complaints for all concerned, including:

- Locating responsibility for complaints within the Integrity team, and appointing a specific Integrity Operations Coordinator with relevant expertise in dealing with sex offences, victim management and child abuse to handle respect and responsibility complaints.

⁵⁷⁰ AHRC, *Respect@Work*, 740.

⁵⁷¹ United States Courts, *Workplace Conduct Working Group Report*, above n293, 37.

⁵⁷² Ibid, 38.

⁵⁷³ AHRC, *Respect@Work*, 738-9, citing Email, Australian Football League to the Commission, 27 November 2019.

- Establishing and publicising a new reporting platform under AFL.com for victims to make a complaint directly to the AFL Integrity Team (victims can also remain anonymous if they wish).
- Greater focus on victim welfare, including implementing a new more effective system to provide independent welfare support at three levels, covering referral to a counsellor, psychologist or psychiatrist, depending on need.
- Providing more open access to the Integrity team, including establishing a 24/7 response (mobile phone capability) from the Integrity team to take calls and respond to victims at any time of the day or night.

According to Tony Keane, AFL Head of Integrity, the more victim-centric approach has led to more reports, better satisfaction rates and outcomes for the victims, and the process is more sensitive to the welfare of all parties involved.⁵⁷⁴

d. Multiple reporting channels

Good practice systems for reporting sexual harassment provide victims of sexual harassment with multiple avenues to obtain information and support and raise their concerns within the workplace. This ensures that people have a choice of procedures and a degree of choice of 'complaint handlers',⁵⁷⁵ as well as protecting against the concentration of power.⁵⁷⁶ According to the EEOC a robust system might include:

- multiple options for reporting the conduct; and
- various mechanisms to address the situation, depending on the conduct involved, such as someone with the requisite authority telling the harasser to stop, or an immediate intervention and investigation.⁵⁷⁷

Potential reporting options include:

- Manager or supervisor
- Human resource department
- 'Hotline' (internal or external)⁵⁷⁸
- An online complaint filing system⁵⁷⁹
- Decentralised complaint handlers responsible for outreach, education and dispute resolution⁵⁸⁰
- Designated court personnel with whom complainants can talk confidentially about misconduct issues and seek assistance in addressing them.⁵⁸¹ These personnel may also be trained to assist with informal solutions (such as a low-key conversation with the perpetrator to stop the conduct).⁵⁸² However, McDonald et al note that formal processes result in greater perceptions of procedural justice than informal processes.⁵⁸³

⁵⁷⁴ Ibid.

⁵⁷⁵ Feldblum and Lipnic, above n5.

⁵⁷⁶ GJIN, above n1, 50-51.

⁵⁷⁷ Feldblum and Lipnic, above n5.

⁵⁷⁸ GJIN, above n1, 8; Feldblum and Lipnic, above n5.

⁵⁷⁹ GJIN, above n1, 8; Feldblum and Lipnic, above n5.

⁵⁸⁰ McDonald et al, above n39, 48.

⁵⁸¹ GJIN, above n1, 8.

⁵⁸² McDonald et al, above n39, 48.

⁵⁸³ Ibid, 48.

- Other pathways for people to raise misconduct issues formally or informally and anonymously or on the record;⁵⁸⁴

It is important that ‘first-responders’ are well-trained and ready to support those who approach them for assistance in the victim-centred manner described above. According to the AHRC, they should also have an “understanding of the gendered drivers of sexual harassment, the way it manifests and its impacts on different groups of workers, to reduce the risk of further harm.”⁵⁸⁵ Research consistently shows the importance of a complainant being satisfied that the process is fair and effective, even if they do not agree with the outcome.⁵⁸⁶ Further, reporters need clear and relevant information to help them decide how best to manage the situation and their wellbeing.⁵⁸⁷ The number of reporting options that an organisation can support to develop the necessary expertise may influence its decision about the reporting channels that it ultimately adopts.

Having multiple reporting channels can increase accessibility, but it is important that additional measures are taken, such as raising awareness about the reporting options through posters and pamphlets in courts and legal communities, training, and providing information in accessible languages and formats.⁵⁸⁸

The US Federal Judiciary Workplace Conduct Working Group recommended that a number of changes be made to the employee dispute resolution plan to make it more user friendly and accessible, including to interns and externs who might not fall within the definition of ‘employee’.⁵⁸⁹ United States Courts now has a webpage titled ‘Workplace Conduct in the Federal Judiciary’, which has a specific section on ‘Reporting Workplace Harassment to the Office of Judicial Integrity, outlining the reporting process and confirming that it can be done confidentially and anonymously. The site names the Judicial Integrity Officer who will receive the complaint and provide assistance and includes clear contact details.⁵⁹⁰

e. *Informal processes*

As Pender states, “[t]argets should feel they can report incidents whatever the severity, and that incidents will be dealt with sensitively, proportionately and – to the extent necessary – confidentially.”⁵⁹¹ Informal reporting processes can provide an option that is particularly useful for addressing less serious behaviours. The US Federal Judiciary Workplace Conduct Working Group found that while a complaint to a judicial disciplinary body or a formal grievance process is appropriate for serious cases, there is often a need for less formal measures when dealing with workplace misconduct and harassment than those formal mechanisms are not designed to address:

For example, an employee may be uncomfortable with a well-meaning supervisor’s familiarity or avuncular physical contact and seek advice on how to express discomfort. Or an employee may encounter crude or boorish behavior from a co-worker and not want to file a formal complaint, but may want a supervisor to step in and curtail the conduct. Or an employee may encounter sexual advances from a judge and seek confidential advice on what support is available if a formal complaint is filed, such as placement in another chambers. Or a former law clerk, now in private practice, may seek advice on application of the Judiciary’s confidentiality requirements in deciding whether to file a misconduct claim.⁵⁹²

⁵⁸⁴ GJIN, above n1, 8.

⁵⁸⁵ AHRC, *Respect@Work*, 765-766.

⁵⁸⁶ McDonald et al, above n39, 47.

⁵⁸⁷ AHRC, *Respect@Work*, 753 and 759-60.

⁵⁸⁸ GJIN, above n1, 8.

⁵⁸⁹ United States Courts, *Workplace Conduct Working Group Report*, above n293, 34.

⁵⁹⁰ United States Courts website, *Workplace Conduct in the Federal Judiciary*, <https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary>, accessed on 17 October 2020.

⁵⁹¹ Pender, above n124, 106.

⁵⁹² United States Courts, *Workplace Conduct Working Group Report*, above n293, 36.

To address this, the Working Group recommended the establishment of an internal Office of Judicial Integrity (discussed above), that could provide counselling and assistance by telephone and email to judiciary employees in relation to workplace conduct. Specifically, the assistance could include a discussion of available options or intervention on the person's behalf, with the goal of addressing problems at an earlier stage.⁵⁹³

This approach is consistent with the AHRC finding that:

Where possible, employers should intervene in sexual harassment 'earlier' and provide victims with more flexible and informal options for responding to their reports, as alternatives to formal investigations.

Prevention and early intervention reduce, rather than create, legal risk and will contribute to a more respectful work culture. They can help reduce the prevalence of sexual harassment and increase workplace safety and productivity.⁵⁹⁴

However, the AHRC also identified that this area is a knowledge gap for many employers, who often are either unaware of the informal, early intervention options that can be implemented, or view informal ways of dealing with sexual harassment as being high risk. The AHRC addresses these concerns in the below excerpt from *Respect@Work*.

Informal and early responses⁵⁹⁵

[Excerpt from AHRC, *Respect@Work*, pp767 and 751]

The Commission has observed that many employers do not appreciate that victims want informal, early response options—or that it can be appropriate, effective and less harmful to victims, to offer such options.

The Commission acknowledges concerns raised about the use of early intervention approaches. However, the Commission disagrees that the use of early intervention strategies necessarily results in 'unfair' processes for alleged harassers. Any decision to discipline or dismiss a worker for engaging in sexual harassment must be taken in a way that respects their legal rights. However, offering victims the option to pursue less formal ways of addressing their concerns need not result in 'unfair' outcomes for alleged harassers or increased legal risk for employers.

Alongside proactive preventative measures, there needs to be a greater emphasis on early intervention to address workplace sexual harassment. An early intervention approach prioritises workers' welfare, will reduce prevalence of sexual harassment and aligns with an employer's duties to provide a safe and harassment-free workplace. All response options should apply a victim-centred approach.

Moreover, many employers are not aware of what informal, early intervention options are available to them, or how they can implement them in their workplaces. Subject to the size of the workplace, practical early intervention options that employers can adopt may include informal 'tap on the shoulder' peer-to-peer intervention programs, anonymous or informal reporting options, bystander intervention strategies by managers or co-workers and direct intervention by reporting workers.

...

For example, the Commission heard that if a worker had engaged in disrespectful behaviour, having a manager or peer 'tap them on the shoulder' and engage in an informal conversation with them about

⁵⁹³ Ibid, 38.

⁵⁹⁴ AHRC, *Respect@Work*, 751.

⁵⁹⁵ Ibid, 767 and 751.

their behaviour could be an effective, informal way for employers to intervene early to prevent sexual harassment occurring or escalating.⁵⁹⁶

The Australian Medical Association (AMA) told the Commission about a ‘tap on the shoulder’ system used by Melbourne Health since 2016. Under this system, nominated doctors are authorised to speak privately with peers who are showing a ‘trend of exhibiting negative behaviour’.⁵⁹⁷ The AMA noted that the system is premised on the idea that ‘a person would prefer to “know” if their conduct was inappropriate, ‘because often the behaviour is unconscious’. The AMA observed that this was an effective way to ‘nip in the bud’ and ‘informally manage’ disrespectful conduct, rather than waiting until a formal complaint was made.⁵⁹⁸

The AHRC is cautious to note that while informal interventions are an important offering, employers must still give victims the choice of using an appropriate formal process in accordance with the victim-centred principles described above in section C.a.⁵⁹⁹

In addition to the US Courts model described above, there are other examples of organisational systems that provide informal support to deal with misconduct, including sexual harassment, that operate in the context of courts and hospitals, which are described below.

Spain – Confidential Advisor

*[Excerpt from Global Judicial Integrity Network, Gender-related Judicial Integrity Issues]*⁶⁰⁰

In Spain, each tribunal has pamphlets about sexual harassment and reporting channels, a red post box for complaints and a Confidential Advisor who is specially trained to deal with cases in an informal and confidential manner. Complainants have the option of putting a written complaint in the post box or presenting a complaint orally to the Confidential Advisor. The informal complaint resolution process which resembles a private mediation is confidential and the Confidential Advisor cannot be called as a witness in a later proceeding. The Confidential Advisor plays a valuable role in advising judges who may be unaware their behaviour is inappropriate and helping them to change their behaviour.

Bosnia and Herzegovina – Advisor

*[Excerpt from Global Judicial Integrity Network, Gender-related Judicial Integrity Issues]*⁶⁰¹

The head of each judicial institution appoints an Advisor who is specially trained in preventing sexual and gender-based harassment. Individuals may request assistance from the Advisor in

⁵⁹⁶ Consultation with policy stakeholders (LGBTQI community), Sydney.

⁵⁹⁷ Australian Medical Association, Submission 205, *Sexual Harassment Inquiry*, 16.

⁵⁹⁸ Australian Medical Association, Submission 205, *Sexual Harassment Inquiry*, 16.

⁵⁹⁹ AHRC, *Respect@Work*, 765-766.

⁶⁰⁰ GJIN, above n1, 53 citing Protocol of Action against Sexual Harassment, Gender-Based Harassment, Discriminatory Harassment and Combating All Forms of Harassment and Violence in the Judiciary (17 February 2015) https://www.unodc.org/ji/resdb/data/esp/protocolo_de_actuacion_frente_al_acoso_sexual_al_acoso_por_razon_desexo_al_acoso_discriminatorio_y_frente_a_todas_las_formas_de_acoso_y_violencia_en_la_carrera_judicial.html.

⁶⁰¹ GJIN, above n1, 53, referring to Guidelines for the Prevention of Sexual and Gender-based Harassment within the Judicial Institutions of Bosnia and Herzegovina (February 2015), https://www.unodc.org/ji/resdb/data/bih/2015/guidelines_for_the_prevention_of_sexual_and_genderbased_harassment_within_the_judicial_institutions_of_bosnia_and_herzegovina.html.

person, in writing or anonymously. The Advisor seeks to resolve the matter informally by talking with the complainant and the person responsible for the unwanted behaviour. The informal resolution procedure is confidential and without prejudice to the individual's right to pursue a formal complaint. Records of the matter remain confidential, unless the individual wishes to use them in the formal complaint process or unless disclosure is sought by an authorized person in accordance with applicable laws. If a complaint is received anonymously, the Advisor may take steps to raise awareness within the institution about sexual and gender-based harassment and the rights and avenues of redress available for those who experience it. For monitoring purposes, the Advisor is required to submit regular, confidential reports to the head of the judicial institution that summarize the actions taken but do not reveal the identity of the persons involved. The Advisor is also responsible for collecting and maintaining statistical data that are disaggregated by sex.

St Vincent's Health Australia's Ethos Program

[Excerpt from AHRC, Respect@Work⁶⁰²]

St Vincent's Health's Ethos program (Ethos) was introduced in 2017 to address entrenched cultural issues in the health sector by building a culture of respect and safety in the workplace.

Ethos is a peer-led early intervention program which encourages a culture of speaking up, recognises staff who exhibit positive behaviour and addresses behaviour that undermines staff and patient safety.

The Ethos program is designed to remove barriers to speaking up by providing an avenue which is fast, fair and transparent. It supplements, rather than replaces, existing measures for disciplinary processes.

Ethos provides staff with training and information on responding to inappropriate or unsafe behaviours at an early stage and preventing them from reoccurring. Staff can submit reports about positive or negative behaviour they have observed through an online tool, with the option to remain anonymous.

When a negative report about a worker is made, it is assessed by the Ethos triage team which makes a decision about the most appropriate response. If the triage team decides a report is actionable, the worker involved will usually receive feedback about how their behaviour was perceived in the form of an informal, respectful and confidential 'Ethos message'. This is a conversation designed to deliver informal feedback to a worker and offer an opportunity to reflect on ways they may behave differently in the future.

Repeated reports of 'lower level' conduct will trigger a higher level of intervention. This is essentially an Ethos 'message' conversation involving an 'Ethos messenger', the worker involved and their line manager.

Reports of conduct including sexual harassment that are sufficiently serious to warrant disciplinary action will be referred to Human Resources and ordinary disciplinary processes will apply.

Westbrook and Sunderland note that "[c]ulture change is incredibly hard" and "[u]nfortunately, there is very limited evidence about the types of interventions which work and bring about change."⁶⁰³ However they will soon have a rich set of data, as they are scheduled to complete a four year evaluation of the

⁶⁰² AHRC, *Respect@Work*, 752, citing email, St Vincent's Health Australia to Commission, 6 August 2019.

⁶⁰³ Johanna Westbrook and Neroli Sunderland, 'Bullying and harassment of health workers endangers patient safety', *The Conversation*, 5 November 2018, <https://theconversation.com/bullying-and-harassment-of-health-workers-endangers-patient-safety-106167>, accessed on 17 October 2020.

Ethos Program, described above, in 2021. Westbrook and Sunderland note the importance of system-wide responses to the complex problems of bullying and harassment, but caution that such interventions must be rigorously evaluated to measure their effects on both behaviours and (in hospital settings) clinical outcomes.⁶⁰⁴

The Ethos Program has been criticised by some senior medical staff at St Vincent's for triggering too many trivial complaints and causing significant stress for the subjects of those complaints.⁶⁰⁵ They also disliked its informality and anonymity because there is no avenue to challenge action taken or access documents about the complaint. One anonymous critic of the program said "[t]he anonymity has led to frivolous complaints and some staff feel a divide growing between the messengers and ordinary staff."⁶⁰⁶ According to a media article, the data as at 2019 showed that female medical staff were the subject of about 30% more complaints than male medical staff,⁶⁰⁷ although it's not clear whether this is proportionate to the gender make-up of the workforce.⁶⁰⁸

An evaluation of the CORS™ reporting system developed by the Centre for Patient and Professional Advocacy (CPPA) at Vanderbilt University, upon which the Ethos Program is based, showed "over 90 per cent of...staff had no adverse observations recorded against them over a three year period, and of those that had a single observation recorded, for most this represented their only deviation, from which they reflected and self-corrected."⁶⁰⁹

f. Anonymous reporting

Giving people the option to report sexual harassment anonymously can encourage greater reporting and raise organisational awareness of any problems. It can provide an option for people who want their experience to be known, but do not wish to formally complain and have the conduct investigated. The Victorian Bar, for example, will receive reports of sexual harassment that are anonymised and used to inform training and awareness raising activities, as discussed in section 11 below. The AHRC identified that there is some confusion about whether organisations can receive anonymous reports of sexual harassment, and what can be done with the information obtained. The below excerpt from *Respect@Work* addresses these issues.

Anonymous reporting

[Excerpt from AHRC, Respect@Work⁶¹⁰]

Anonymous reporting channels in workplaces can be important tools to encourage workers to raise concerns and facilitate early identification of sexual harassment and intervention by employers to address it. As set out below, anonymous reporting can be facilitated in workplaces by employers through different means, including the use of digital technologies.

The Commission heard that some groups of victims were particularly reluctant to make formal reports and facilitating anonymous reporting was one way to encourage them to report. For

⁶⁰⁴ Ibid.

⁶⁰⁵ Anthony Colangelo, 'St Vincent's reviews anti-bullying program amid staff backlash', *The Age* (Melbourne) 23 February 2019, <https://www.theage.com.au/national/victoria/st-vincent-s-reviews-anti-bullying-program-amid-staff-backlash-20190223-p50zri.html>, accessed on 17 October 2020.

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid.

⁶⁰⁹ Victoria Atkinson, 'The Ethos Program: Re-defining normal', *The Sector Speaks*, http://www.cha.org.au/images/healthmatters/2016/Atkinson_HM80.pdf, accessed on 17 October 2020.

⁶¹⁰ AHRC, *Respect@Work*, 755-7.

example, a survey conducted by the St Kilda Legal Service found that LGBTQI workers would be more likely to report workplace sexual harassment if they could remain anonymous.⁶¹¹

Anonymous or informal reporting can occur in different ways. For example:

- inviting anonymous reports delivered as a note or letter to a secure mailbox or email account
- using existing whistleblowing reporting channels in an organisation⁶¹²
- digital reporting technology, such as a staff intranet or app-based reporting tools (discussed below).

[There are] a number of organisations and agencies that are developing or provide for anonymous reporting via online or app-based technologies. For example:

- NSW OLSC is developing an online platform to allow for anonymous reporting of sexual harassment in law practices.⁶¹³
- Victoria Police is exploring the option for anonymous reporting of workplace harm as part of an online complaints portal for recruits that it is currently developing.⁶¹⁴
- The South Eastern Centre Against Sexual Assault runs the Sexual Assault Report Anonymously (SARA) website which allows anonymous reporting of sexual assault or harassment.⁶¹⁵
- A number of Australian universities, including Swinburne University of Technology,⁶¹⁶ UNSW,⁶¹⁷ University of New England,⁶¹⁸ University of Newcastle,⁶¹⁹ James Cook University⁶²⁰ and Southern Cross University,⁶²¹ advised the Commission following its 2017 report, *Change the course: National report on sexual assault and sexual harassment at Australian universities*, that they provide for anonymous online reporting of sexual assault and sexual harassment.

Anonymous reporting systems provide workers with an avenue to report sexual harassment without fear of victimisation, while potentially prompting action to stop the sexual harassment. For employers, anonymous reporting may provide a warning about sexual harassment that is happening to enable action, and can contribute to useful indicators of sexual harassment to drive better prevention.

Some employers were under the misapprehension that they could not legitimately act on anonymous reports of sexual harassment and could only take action if a victim was prepared to make a complaint. They believed the optimal and only legally appropriate response to a report of

⁶¹¹ St Kilda Legal Service, Submission 409, *Sexual Harassment Inquiry*, 6.

⁶¹² Organisation, Submission 456, *Sexual Harassment Inquiry*, 6; Diversity Council Australia, Submission 282, *Sexual Harassment Inquiry*, 39, 44.

⁶¹³ See Section 6.2(c)(ii), 'Case study: Changing culture across the legal profession'.

⁶¹⁴ Victorian Equal Opportunity & Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour*, in *Victoria Police: Phase 2 Audit* (2017) 202.

⁶¹⁵ 'Sexual Assault Report Anonymously', S.A.R.A. (Web Page, 30 August 2019) <www.sara.org.au/>.

⁶¹⁶ Swinburne University of Technology, 'Safer Community Online Reporting', *Student Services* (Web Page) <www.swinburne.edu.au/form/safer-community-online-reporting/>.

⁶¹⁷ See Australian Human Rights Commission, *Audit of university responses to the Change the course report: Snapshot of progress* (August 2018) 3.

⁶¹⁸ Australian Human Rights Commission, *Audit of university responses to the Change the course report: Snapshot of progress* (August 2018) 3.

⁶¹⁹ Australian Human Rights Commission, *Audit of university responses to the Change the course report: Snapshot of progress* (August 2018) 3.

⁶²⁰ James Cook University, 'Sexual Harassment and Sexual Assault', *Safety and wellbeing* (Web Page) <www.jcu.edu.au/safety-and-wellbeing/sexual-harassment-and-sexual-assault>.

⁶²¹ Australian Human Rights Commission, *Audit of university responses to the Change the course report: Snapshot of progress* (August 2018) 36.

sexual harassment was to formally investigate it.⁶²² The [AHRC] heard that these beliefs were based on both the legal framework and the perception that sexual harassment was a matter of individual misconduct, rather than driven by a range of underlying systemic factors as identified in this inquiry.

...

While the responses that are appropriate will necessarily depend upon the nature and content of any anonymous complaint, and the workplace in question, interventions and responses available to employers may, for example, include:

- Monitoring or surveying the areas of the workplace or individuals identified in the anonymous complaint, to seek further information to supplement or support that provided in the anonymous report. This may then prompt further response or action.
- Changing workplace protocols or procedures to control or eliminate any risk factors identified in the anonymous report and reduce the risk of sexual harassment occurring or continuing.
- Taking steps to remind workers of the standards of respectful behaviour required of them, for example by conducting discussions, sending email or using other workplace communication channels to remind and educate workers about their right to report sexual harassment and their obligation not to engage in it.
- While respecting privacy, conducting discussions with relevant individuals identified in the anonymous complaint or who may have information about matters raised in the complaint, to seek further information to supplement or support that provided in the anonymous report. This may also then prompt further response or action.

g. External handling of inquiries and complaints – ombudsman and ‘safe place’

Dobbin and Kalev discuss the option of an ombudsman/ombuds office, which “sits outside of the organisational chain of command and works independently to resolve sexual harassment complaints. An ombuds...system is informal, neutral, and truly confidential – only the ombuds officer needs to know of the complaint.”⁶²³ Thirteen per cent of US companies have an ombudsman to handle various matters, including sexual harassment, bullying and termination.⁶²⁴ They are considered particularly effective at supporting victims who just want the problem to stop and do not wish to make a formal complaint for fear of reprisals or other social costs.⁶²⁵ Dobbin and Kalev describe the benefits as follows.⁶²⁶

What’s most important about the ombuds system is that it puts victims in the driver’s seat. If they don’t want the accused to know they’re talking, that’s OK—the ombuds can hear them out confidentially and help them think through their options. Ombuds offices hold no formal hearings, are guided by no rules of evidence, and impose no restrictions on discussing the problem with others. Moreover, by tracking complaints by department and location, they can identify problem spots that need attention and alert leaders. They track complaints more effectively than grievance officers can, because people actually bring complaints to them.

⁶²² Legal roundtable, Sydney; Consultation with men (CEOs), Melbourne.

⁶²³ Dobbin and Kalev, above n454.

⁶²⁴ Ibid.

⁶²⁵ Dobbin and Kalev, above n454.

⁶²⁶ Ibid.

The New South Wales Supreme Court has an external consultant who “can be contacted at any time”.⁶²⁷ However, they do not appear to be independent of the Supreme Court. Their role is to advise complainants of their options and the resources available, and can raise the matter anonymously and confidentially with the Chief Justice if the complainant requests this or if the external consultant considers it necessary. If escalated to the Chief Justice for review they will consider whether there should be an investigation or referral of the matter to the Judicial Commission, or other steps taken. The external consultant maintains “an informal, confidential, register of complaints and concerns brought by staff.” This arrangement appears to retain control of the complaint process with the Supreme Court as compared to an ombudsman/ombuds office, where the complainant determines whether or not their complaint is escalated.

Victoria Police has a 24 hour ‘Safe Space hotline’ that is independent of the Employee Assistance Program and Victoria Police.⁶²⁸ Safe Space is available to current and former Victoria Police personnel, as well as their families. It provides confidential help and information for victims of workplace harm, such as sex discrimination and sexual harassment. However, an audit found that there had been low engagement with Safe Space.⁶²⁹

h. Hotlines

There are a number of ways to provide people with quick access to information about their options for responding to sexual harassment, including available support services and reporting options. One of these is a telephone ‘hotline’. A hotline can be provided internally, as in the case of the US Courts Office of Judicial Integrity, or externally.

‘Hotlines’ to report misconduct can address underreporting. In Brazil the Sao Paulo President of the Tribunal of Justice created a direct channel of communication to his office for employees to report harassment and received over 2000 complaints in two years.⁶³⁰ New Zealand has the LawCare hotline, created by the NZ Law Society,⁶³¹ for lawyers and law firm staff to discuss sensitive issues including harassment and receive information about available options and support.

In their submissions to the AHRC 2019 inquiry into sexual harassment, Women’s Health Victoria and the NSW Women Lawyers’ Association recommended establishing and resourcing “a dedicated, specialist national sexual harassment phoneline and information service”.⁶³²

Australia does not have a free and widely available counselling service specifically for people affected by sexual harassment, however there is the 1800RESPECT hotline, which is a national sexual assault, domestic and family violence counselling and information service.⁶³³ This is an Australia wide service. However, it does not, to the author’s knowledge, have formal referral arrangements in place with any institutions, agencies or associations in the legal profession.

i. Online information, reporting and referral tools

Online web-based systems are becoming an increasingly popular method of providing access to information for victims of sexual harassment and for receiving reports. These systems show promise for helping to solve a number of barriers to sexual harassment reporting, because “systems such as these can

⁶²⁷ Supreme Court of New South Wales, *Supreme Court Policy on Inappropriate Workplace Conduct*, undated, <https://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/Unacceptable%20Workplace%20Conduct%20Policy,%2014%20October%202020.pdf>, accessed on 4 December 2020.

⁶²⁸ VEOHRC, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 2 Audit*, (2017), https://www.humanrights.vic.gov.au/static/2f96c692561ba8a9db1176997e18fd53/Resource-Independent_Review_Victoria_Police-Phase_2-2017.pdf, accessed on 6 December 2020.

⁶²⁹ Ibid, 21.

⁶³⁰ GJIN, above n1, 53.

⁶³¹ Ibid, 54.

⁶³² AHRC, *Respect@Work*, 827.

⁶³³ Ibid, 41.

facilitate reporting, provide for anonymity and allow victims to report from anywhere, anytime.”⁶³⁴
Online systems have a variety of features that can:

- Receive a detailed and contemporaneous report of an incident that can be time-stamped and saved for potential use in future if the reporter decides to pursue a formal complaint. This is particularly important in cases involving sexual assault or misconduct where it can often take six months or more before a victim feels ready to pursue a formal complaint.
- Hold complaints in escrow until another complaint about the same alleged harasser has been received, at which time the complainant can be contacted by a caseworker to discuss their options for pursuing a formal complaint. This can reduce the risks and social costs involved with being a lone complainant, as well as supporting claims where there is otherwise limited evidence. See, for example, Project Callisto discussed further below.
- Save evidence that is otherwise often lost, such as voicemail, text messages, digital records, screenshots and emails.
- Provide targeted information and referral options to the user, thereby reducing the potential for individuals to feel overwhelmed and confused about their options. This can include information about informal options for addressing problem behaviour or more formal options and legal protections.
- Make direct or ‘warm referrals’ to support services or regulators (with the person’s consent), based on backend referral arrangements that can be instantly updated by the service-provider or regulator online to ensure that referral protocols are current.
- Notify the employer and/or regulator about trends, patterns and ‘hotspots’, or when a report is made.

According to the AHRC, this “technology can help ease the evidential burden that makes it difficult for victims to report sexual harassment in the workplace, and may also help in overcoming “cultural bias towards not believing women, victim blaming and an assumption that complaints of sexual harassment are exaggerated and embellished”.”⁶³⁵

Further, technology can help to filter the many reporting options available in this area. This includes multiple regulators (for example the Victorian Legal Service Board and Commission, the Judicial Commission of Victoria, WorkSafe), the human rights commissions (AHRC and VEOHRC), law and bar associations (LIV, Vic Bar) employers (Court Services Victoria, law firms, Victoria Legal Aid, VGSO) and work arrangements (self-employed barristers), and support services (EAP, Sexual Assault Service, 1800-Respect). Chatbots with well-designed decision trees can provide information that is tailored to different scenarios and help answer complex questions.

The VEOHRC has developed a ‘chatbot’ tool as part of its [Raise It!](#) program that does this with respect to sexual harassment, as discussed below.

⁶³⁴ Ibid, 758-9.

⁶³⁵ AHRC, *Respect@Work*, 758-9, citing Harmers Workplace Lawyers, Submission 366, *Sexual Harassment Inquiry*, 1.

Case study: Using chatbots to educate and guide workers on workplace sexual harassment

*[Excerpt from Victorian Equal Opportunity and Human Rights Commission, 'Raise It! Conversations about Sexual Harassment and Workplace Equality']*⁶³⁶

VEOHRC recently piloted a workplace training program called *Raise It!* This program is designed to support and equip Victorian workers to have safe conversations about sexual harassment, pregnancy, parental leave and access to flexible work.

The *Raise It!* program included the development of an interactive digital sexual harassment support and response 'chatbot' tool, to provide support and resources to users about workplace sexual harassment.

The chatbot identifies support pathways users can access if they experience workplace sexual harassment and provides 'evidence-based suggestions' for supporting colleagues who are victims of sexual harassment, for 'calling out' sexual harassment and for reporting workplace 'culture issues ... in a way that protects victims of harassment'.

The chatbot provides a range of topics or issues for users to choose from and then generates support options and prompts for ways that users can discuss these issues with others, if they wish.

The chatbot is accessible 24/7 from a mobile device and is completely anonymous. It does not require workers to sign-in to access it, nor does it record any personally identifying information. This anonymity feature is emphasised to workers during face-to-face training sessions, where they are guided through what the chatbot is and how to use it.

According to VicHealth, technology has the potential to positively change the behaviour of many people instantly through small tweaks to the system. While these strategies have not been empirically tested, it provides the following examples:⁶³⁷

- "Using software such as Project Callisto to allow students to make low-friction, time-stamped reports which are embargoed until other targets come forward.
- Using software such as Crowdsport to provide targets with methods of asking for help from bystanders.
- Using signposting on all reporting systems to show that bystanders are able to report sexism and sexual harassment."

Project Callisto

Project Callisto in the United States targets sexual assault on University Campuses and provides an online trauma informed platform for students to document and report their sexual assault.⁶³⁸ Its three year report confirms that it significantly increases the chances that a victim of sexual assault will report it, increases access to support services, and enables schools to detect repeat offenders.⁶³⁹

Callisto gives users three options:

⁶³⁶ Victorian Equal Opportunity and Human Rights Commission, 'Raise It! Conversations about Sexual Harassment and Workplace Equality', *Projects and Initiatives* (Web Page) <www.humanrightscommission.vic.gov.au/home/our-projects-a-initiatives/raise-it#what-is-the-raise-it-project-about-why-is-my-workplace-involved-in-this-project>.

⁶³⁷ VicHealth et al, *Take action*, above n290, 57.

⁶³⁸ Project Callisto 2017-2018 Academic Year Report, accessed online on 4 February 2019 at: http://www.projectcallisto.org/Callisto_Year_3_final.pdf, as cited in Victoria Legal Aid, *Change the Culture, Change the System: Urgent Action Needed to End Sexual Harassment*, (2019) 43.

⁶³⁹ Ibid page 3.

- 1) create a time-stamped, secure record of sexual assault
- 2) report electronically by sending a record to the school, or
- 3) only notify the school if another student names the same perpetrator. That is, if multiple people report the same person, their records would be jointly sent to the school.

“Because the record is time-stamped, officials can see the time between when the misconduct allegedly occurred and when the account was written. Callisto utilizes the concept of ‘information escrows.’ An ‘information escrow’ is a third-party agent that holds on to the relevant information and disseminates it when others report similar behavior or the same bad actor to the escrow. Individuals may not wish to be the first to report problematic behavior, because of the relatively high costs involved (e.g., more scrutiny); however, they may wish to do so if there are multiple people experiencing the same thing, either because the individual recognizes that the assailant may otherwise engage in misconduct again, or because their report gains credibility if it is not the only one.”⁶⁴⁰ [Footnotes omitted]

The AHRC has identified a number of online and app-based tools for reporting sexual harassment, as outlined below.

Online and app-based tools

[Excerpt from AHRC, *Respect@Work*⁶⁴¹]

The growing number of online and app-based tools in Australia for reporting sexual harassment, sexual assault or other forms of inappropriate conduct, include:

- **The Sexual Assault Report Anonymously (SARA) tool:** a mobile-friendly website run by the South Eastern Centre Against Sexual Assault, for victims who do not wish to make a formal police complaint to report sexual assault or harassment.⁶⁴²
- **The ‘STOPit’ app:** that allows workers to report inappropriate conduct including sexual harassment.⁶⁴³
- **The University of Sydney online reporting form:** that allows staff and students to make confidential disclosures of sexual assault and harassment.⁶⁴⁴ A non-exhaustive list of other Australian universities that offer anonymous online reporting options appears above under the heading ‘Anonymous reporting’.

Innovative digital reporting apps and tools developed internationally include:

- **ROSA:** a chatbot app in Timor-Leste that allows public servants to make complaints about sexual harassment by public servants.⁶⁴⁵

⁶⁴⁰ Project Callisto, *2016-2017 School Year Report*, (2017), available at <https://www.projectcallisto.org/Callisto Year 2 highres.pdf>, as cited in Heidi Liu, ‘When Whispers Enter the Cloud: Evaluating Technology to Prevent and Report Sexual Assault,’ 31(2) *Harvard Journal of Law & Technology* (2018), 939-964, 945.

⁶⁴¹ AHRC, *Respect@Work*, 758.

⁶⁴² Women’s Health Victoria, Submission 342, *Sexual Harassment Inquiry*; Individual, Submission 353, *Sexual Harassment Inquiry*; St Kilda Legal Service, Submission 409, *Sexual Harassment Inquiry*. Reports are forwarded to the South Eastern Centre Against Sexual Assault (SECASA), which collects data before de-identifying each report and passing it on to police to help identify repeat offenders. Many users provide personal details, allowing SECASA to follow up and provide support.

⁶⁴³ Reports can include pictures and video evidence. Administrators can communicate with workers through a real-time, anonymous messaging app, to clarify details or provide follow-up support. The app also features an incident management system for employers to use in addressing reports. See ‘About STOPit’, *STOPit* (Web Page) <www.stopitsolutions.co.za/about-stopit>.

⁶⁴⁴ University of Sydney, Submission 357, *Sexual Harassment Inquiry*.

⁶⁴⁵ Complaints are immediately registered in the database of the Civil Service Commission. Officers then assess each complaint and decide whether to initiate formal disciplinary proceedings against the harasser. See OtimizAI, ‘Chatbot Rosa—Complaint Intake System for Civil Service Commission of Timor-Leste’ (YouTube, 4 December 2018) <www.youtube.com/watch?v=xFiPhh-Urfo>.

- **Vault:** a UK-based app that provides workers with a place to record incidents of workplace sexual harassment and save related evidence, and offers a 'GoTogether' feature that flags if another worker in the same organisation has reported a similar incident or individual.⁶⁴⁶
- **Talk to Spot:** an artificial intelligence (AI) chatbot in the UK that facilitates the documentation of an incident.⁶⁴⁷⁶⁴⁸
- **Callisto:** a US non-profit that creates technology to detect repeat perpetrators of professional sexual coercion and sexual assault.⁶⁴⁹
- **Silent Choir Project:** a private network for victims of sexual harassment and abuse in the US.⁶⁵⁰

However, as is the case with hotlines, there are important considerations relating to data collection, privacy and ownership. It is also essential to ensure that the system is designed in a way that is trauma-informed and staffed by people who are appropriately trained to respond in a way that protects the wellbeing of both service users and themselves, as workers who are vicariously exposed to information about traumatic experiences.

Like hotlines, these systems can be hosted by a variety of organisations, such as a not-for-profit organisation, a government agency, the employer organisation, or a third party contracting to the employer organisation. However, an online reporting system that is marketed towards employer organisations and aimed primarily at assisting those organisations to identify problem 'hot-spots' and patterns may be quite different (or perceived to be quite different) to a victim-centric online reporting system.⁶⁵¹

As is the case with telephone 'hotlines', the following factors require consideration for online information and reporting systems:⁶⁵²

- the ownership, use and sharing of data collected through the tool;
- accessibility, including for people with a disability and people who cannot read or write well in English due to language or literacy skills;
- confidentiality and privacy needs of those reporting sensitive information;

⁶⁴⁶ The GoTogether feature allows a worker to submit a report in the knowledge they are not the first or only one affected. See 'Home Page', *Vault Platform* (Web Page) <vaultplatform.com/solution/>, and 'Our Solution', *Vault Platform* (Web Page) <vaultplatform.com/>.

⁶⁴⁷ Using a cognitive interviewing style, Spot responds to what the employee writes, asks meaningful questions and generates a confidential time-stamped report of the exchange which the employee can edit. Submitting the report to human resources is optional and employees can opt to remain anonymous. Human resources can ask follow-up questions and the worker can respond via the app. See: 'Document an Incident', *Talk to Spot* (App web page) <app.talktospot.com/>.

⁶⁴⁸ <https://www.barcouncil.org.uk/support-for-barristers/equality-diversity-and-inclusion/talk-to-spot.html>, 12 October 2020

⁶⁴⁹ The Callisto Campus website allows university students to 'write' (secure evidence of an incident by making a time-stamped record), 'match' (report only if another victim names the same perpetrator) or 'report' experiencing sexual harassment (directly to campus administrators without waiting for a match). From 2018, Callisto was extended to professional environments. When a repeat offender is identified under the expanded system, a Callisto Legal Options Counsellor reaches out to each victim to advise them on their options. Individual, Submission 230, *Sexual Harassment Inquiry*; Brendan Nyhan, 'Reporting Sexual Assault Is Difficult, but a New Technology May Help', *The New York Times* (News Article, 2 December 2014) <www.nytimes.com/2014/12/03/upshot/reporting-sexual-assault-is-difficult-but-a-new-technology-may-help.html>; 'By Survivors, For Survivors', *Project Callisto* (Web Page) <www.projectcallisto.org/>.

⁶⁵⁰ Once they join, victims are asked to indicate where the abuse or harassment occurred and identify the perpetrator through a link to their Facebook account. The platform provides information about support services and gives victims the option to be contacted if their harasser is identified by another participant. See 'Home Page', *The Silent Choir Project* (Web page) <www.silentchoir.org/>.

⁶⁵¹ Victoria Legal Aid, *Change the Culture, Change the System: Urgent Action Needed to End Sexual Harassment*, (2019), 43-44.

⁶⁵² Ibid, 43-44.

- the skills, sensitivity and training required to communicate safely and effectively with people who have experienced sexual harassment and assault, and may be traumatised by their experience;
- the training and support required to ensure the safety of staff who manage the tool and provide support to victims; and
- protocols for referrals to service providers and agencies.

For further discussion of ‘Trust Tech’ and using technology as a tool to facilitate better reporting of harassment in the workplace, see Pender and Franklin, *Innovation-led Cultural Change: Can Technology Effectively Address Workplace Harassment*.⁶⁵³

⁶⁵³ E Franklin and K Pender, *Innovation-led Cultural Change: Can Technology Effectively Address Workplace Harassment*, International Bar Association Discussion Paper, (November 2020), <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=4c00afd9-53e7-4ad6-8db0-c663c2f23f45>> accessed on 26 January 2021.

D. ENSURING ACCOUNTABILITY

Strong and demonstrable accountability for sexual harassment communicates that an organisation takes it seriously and “creates a positive cycle that can ultimately reduce the amount of harassment that occurs in a workplace.”⁶⁵⁴ This requires:⁶⁵⁵

- Ensuring that investigations and corrective actions are undertaken promptly and fairly, and investigators are suitably qualified.
- Holding individuals who engage in harassment accountable by imposing prompt and proportionate sanctions.
- Applying the same processes and sanctions to all employees, including high-ranking or high-value individuals.
- Holding mid-level managers and supervisors accountable for monitoring and stopping harassment by those they supervise and manage and stopping any retaliation.
- Rewarding responsiveness to anti-harassment efforts by managers. This might initially mean rewarding managers when there is an increase in complaints in their division.

These measures are also required to ensure judicial accountability, in addition to some further measures. According to GJIN, the following is necessary to properly address and prevent sexual harassment by judicial officers.⁶⁵⁶

1. Clear communication about standards of appropriate conduct

Policies and standards must be clear, include explanations and be widely disseminated in a variety of forms and methods, including at orientation and regular training. (This is discussed in more detail above in section 5. *Organisational capability*.) A publicly accessible database of ethics advisory opinions and disciplinary decisions is also important.

2. Clear communication about the complaint process and multiple, accessible avenues of complaint

Complaint processes must also be communicated in clear and simple language and widely disseminated, and there should be a choice of procedures with multiple options for points-of-contact, complaint handlers and methods for resolving disputes. Accessibility can be improved by increasing the number of options for filing a complaint, providing information in multiple languages, accommodating disabilities, using technology. (This is discussed in more detail above in section C. *Support and Reporting*.)

3. Support for complainants and protection against retaliation

This can be particularly problematic in a small town. (See below section 10.c. *Long-term response – follow-up to ensure no retaliation*.)

4. Independent and impartial disciplinary body

This independent disciplinary body should have a statutory foundation, clear and readily available rules and regulations, and a right of appeal.⁶⁵⁷ (See below, section 8 *Disciplinary body for judicial officers and tribunal members*.)

5. Ability to initiate investigations

⁶⁵⁴ Feldblum and Lipnic, above n5.

⁶⁵⁵ Ibid.

⁶⁵⁶ GJIN, above n1, 8.

⁶⁵⁷ Ibid, 56.

Given that victims can be reluctant to complain, disciplinary bodies should be able to investigate credible reports received from any source, including anonymous complainants, bystanders or witnesses.⁶⁵⁸ (See below, section 8 *Disciplinary body for judicial officers and tribunal members*.)

6. Confidentiality

With respect to confidentiality, the complainant's wishes should be respected as far as possible. See below, section 9.c. *Confidentiality*.)

7. Prompt, thorough and impartial investigation

Investigations should be timely and impartial, and proceedings should have all of the guarantees of a fair trial and the right to appeal.⁶⁵⁹ (See below, section 9.b. *Prompt, thorough and impartial investigations*.)

8. Prompt and proportionate corrective action

Additionally, judges should not be able to evade disciplinary investigations, proceedings or consequences by resigning. A range of corrective actions must be available to ensure sanctions are proportionate and people are not deterred from reporting.⁶⁶⁰ (See below, section 10.a. *Corrective action and sanctions – a range must be available*.)

9. Adequate resources

Adequate resources are essential for effective prevention efforts and to deal with misconduct promptly, objectively and thoroughly.⁶⁶¹ Sachar likewise emphasises the need for adequate staffing.⁶⁶²

Transparency around processes and outcomes is also essential, as discussed below at section 10.b.

8. Disciplinary body for judicial officers and tribunal members

With respect to judicial officers and tribunal members, GJIN recommends that there be an independent disciplinary body. There are a range of ways in which disciplinary bodies can be constituted, but GJIN note that the following considerations are important.⁶⁶³

- a. **Composition** – must be independent and effective.
- b. **Appointment of members** – important to perceived and actual independence.
- c. **Enforcement powers** - if its jurisdiction, investigation powers and/or power to impose sanctions are limited than it is unable to effectively address judicial misconduct.
- d. **Separation of investigation and adjudication** to ensure impartial decision-making.
- e. **Separate level of appeal** to enhance fairness.
- f. **Clear and readily available rules and regulations**.
- g. **A statutory foundation** to strengthen judicial accountability mechanisms.

GJIN recommends improving the actual and perceived independence of the judicial disciplinary body that hears cases of misconduct by ensuring:⁶⁶⁴

- Diverse membership, with different interests represented
- An objective and impartial selection process for members

⁶⁵⁸ Ibid, 56.

⁶⁵⁹ GJIN, above n1, 57.

⁶⁶⁰ Ibid, 58.

⁶⁶¹ Ibid.

⁶⁶² Sachar, above n345, 4-5.

⁶⁶³ GJIN, above n1, 56.

⁶⁶⁴ Ibid, 8.

- Internal rules for disciplinary procedures that are founded in statute.

Sachar agrees that a judicial disciplinary body should have diverse membership – that is, an adjudicatory body that is not made up entirely or mostly of judges – and further recommends that the Commission be a constitutionally independent agency, being independent of the Supreme Court, the executive and the legislature with some shielding from budget cuts.⁶⁶⁵ Appleby and LeMire concur on this point:⁶⁶⁶

As a threshold point, we have argued that any judicial complaints system must be administered by a body (be that a council or commission) removed from the ordinary judicial hierarchy and process. Constitutional restrictions in Australia dictate that this commission must still be made up of members of the judiciary, although it could also be constituted by lay members if those members are not appointed by the political branches of government.

GJIN and Sachar both recommend that the body have a two-tier system, with members who oversee the investigation stage being separate from members who hear a case that goes to a formal hearing.⁶⁶⁷

It is also important that the rules and regulations for judicial disciplinary proceedings are clearly and readily accessible “so that judges and the public can know what to expect and have confidence in the fundamental fairness with which they are conducted.”⁶⁶⁸

According to GJIN and Sachar, judicial disciplinary bodies should have clear enforcement powers because any limits on its jurisdiction, investigation powers or power to impose sanction will limit its ability to effectively address judicial misconduct.⁶⁶⁹ According to Sachar, these powers should include:⁶⁷⁰

- Investigation powers, including a proper subpoena power and the ability to procure court orders with an assigned court or judge as the arbiter of any request for court order.
- Cyber investigation powers, including the capacity to conduct forensic examination of computers and online investigations, whether in-house or by agreement with a government agency that will abide by the Commission rules when conducting the investigation.
- Rules and Policies that support victim and witnesses to report, as proper rules can ensure safe reporting processes, proper investigation and shield victims from publicity and retaliation, including by protecting witness confidentiality at the investigatory stage.
- The power to self-initiate complaints, so that inside knowledge or anonymous complaints can be acted upon without a formal complainant, complaints are not dismissed due to mere technicalities, and fair factual notice of the complaint can still be provided.
- The power to order remedies, such as requiring a judge to undergo education, monitoring, mentoring, counselling, suspension or even permanent removal.

Sachar further recommends that judicial disciplinary bodies have:⁶⁷¹

- Online complaint forms and language accessibility, including for hearing or sight impaired complainants.
- The ability to sensitively address disability and mental health issues.
- Internal rules that cover sexual harassment and other matters, such as conflict of interest.

⁶⁶⁵ Sachar, above n345, 6-7.

⁶⁶⁶ Appleby and Le Mire, above n373.

⁶⁶⁷ Sachar, above n345, 6-7.

⁶⁶⁸ GJIN, above n1, 8.

⁶⁶⁹ Ibid, 56; Sachar, above n345, 9-14.

⁶⁷⁰ Sachar, above n345, 9-14.

⁶⁷¹ Ibid.

Sachar says that judicial conduct commissions should also constantly reflect on ways to improve and be involved in matters of policy, particularly about the ethical rules for the judiciary.⁶⁷²

9. Investigations

a. Remove barriers to investigation of poor conduct

In order to address misconduct as frequently as possible and avoid “open secrets”, people other than the victim should be allowed to make complaints that can prompt investigations.⁶⁷³ This includes anyone who witnesses or learns of misconduct.⁶⁷⁴

Giving judicial conduct bodies ‘own motion’ powers to initiate investigations can also be an effective method for addressing conduct that is known but not formally reported, as well as enabling the investigation of complaints that risk being dismissed due to a technicality.⁶⁷⁵

To further address these problems, GJIN suggests that judges “receive guidance and training about their responsibility to prevent, intervene to stop or report gender-related misconduct by another judge or by court personnel.”⁶⁷⁶

b. Prompt, thorough and impartial investigations

Investigations into sexual harassment allegations must be fair and effective for a number of reasons, including those discussed above at section C.a. *Victim-centred response*. A complainant who is satisfied that a grievance process is fair and effective is more likely to be satisfied with their experience overall, even if they do not agree with the outcome.⁶⁷⁷ Further, employers have a legal duty to provide reasonable support to all employees involved in an investigation.⁶⁷⁸

It is widely agreed that investigations should be prompt and timely,⁶⁷⁹ although not at the expense of objectivity, neutrality, fairness, or employee safety⁶⁸⁰ (which may require that protective arrangements are made). According to the EEOC, “[e]mployers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough.”⁶⁸¹

UN Women and the AHRC emphasise that a criminal standard of proof should not be applied to workplace investigations of sexual harassment.⁶⁸² The AHRC and VEOHRC indicate that the ‘balance of probabilities’ standard is the most appropriate.⁶⁸³ It is common for workplace investigators to apply the principle from *Briginshaw v Briginshaw*,⁶⁸⁴ which is that more serious allegations (such as serious sexual harassment) can only be substantiated on the balance of probabilities if there is stronger or more compelling evidence. The VEOHRC also indicates that this is appropriate.⁶⁸⁵ However, it is not legally required and the practice is problematic because it is a complex and legalistic rule, known only to

⁶⁷² Sachar, above n345, 4-5.

⁶⁷³ Ibid, 9-14; GJIN, above n1, 9.

⁶⁷⁴ GJIN, above n1, 9.

⁶⁷⁵ Sachar, above n345, 9-14.

⁶⁷⁶ GJIN, above n1, 9.

⁶⁷⁷ McDonald et al, above n39, 47.

⁶⁷⁸ *Hayes v Queensland* [2016] QCA 191; Adriana Orifici, ‘[Unsystematic and Unsettled: A Map of the Legal Dimensions of Workplace Investigations in Australia](#)’ (2019) 42(3) UNSW Law Journal 1075.

⁶⁷⁹ AHRC, *Respect@Work*, 765; McDonald et al, above n39, 47; Feldblum and Lipnic, above n5.

⁶⁸⁰ McDonald et al, above n39, 47.

⁶⁸¹ Feldblum and Lipnic, above n5.

⁶⁸² Sen et al, above n19, 7; AHRC, *Respect@Work*, 761.

⁶⁸³ AHRC, *Respect@Work*, 761; VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment* (August 2020) <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>, accessed on 3 December 2020, 79.

⁶⁸⁴ (1938) 60 CLR 336.

⁶⁸⁵ VEOHRC, *Guideline: Preventing and responding to workplace sexual harassment* (August 2020) <https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>, accessed on 3 December 2020.

employers and employees with access to specialist legal advice, that further disadvantages victims in cases of sexual misconduct, which are notoriously difficult to prove.

Orifici notes that the law relating to workplace investigations “is fragmented and has developed unsystematically”, resulting in complexity and uncertainty for both employers and employees alike.⁶⁸⁶ Orifici state that⁶⁸⁷

while there is no legislation specifically directed at workplace investigations in Australia, workplace investigations take place within an intricate framework of regulation... the legal dimensions of workplace investigations are often complex and unsettled. One consequence of legal complexity in this area is that it is likely to be challenging for employers and employees involved in workplace investigations to navigate these rules, understand their legal obligations and/or assert their legal rights.

It is essential that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees.⁶⁸⁸ Investigators should document all steps from the first point of contact, report in writing, use guidelines to determine credibility and communicate determinations to all parties.⁶⁸⁹

GJIN also recommends that complaint processes and proceedings conducted by judicial disciplinary bodies be “prompt, thorough and impartial”.⁶⁹⁰ This requires authority and technical resources, as well as rules that ensure due process protections for the judge.⁶⁹¹ Adequate funding is essential to achieve this, as major investigations can be costly.⁶⁹²

c. Confidentiality

The complainant’s wishes with regards to the confidentiality of an investigation should be respected as far as possible, noting that complete confidentiality will not always be achievable.⁶⁹³ It is also important to protect the confidentiality of the accused.⁶⁹⁴ While there are legal obligations of privacy and confidentiality, particularly around the investigation, it is important to have some transparency around the investigation outcome, as discussed below in section 10.b., and not to unreasonably silence victims, who may wish to talk openly about their experience.

10.Outcomes

a. Corrective action and sanctions – a range must be available

If there is a finding of sexual harassment, prompt action should be taken in response. If sanctions are imposed, they should be proportionate to the conduct and consistent with previous cases to ensure fair and equal treatment of harassers.⁶⁹⁵ The AHRC recommends an emphasis on measures that support behavioural change and not just punishment.⁶⁹⁶

However, it is important to get the balance right and demonstrate a strong commitment to addressing sexual harassment rather than creating a climate that tolerates it. A weak response is a real risk.

⁶⁸⁶ Orifici, above n677.

⁶⁸⁷ Ibid.

⁶⁸⁸ Feldblum and Lipnic, above n5; McDonald et al, above n39, 47.

⁶⁸⁹ McDonald et al, above n39, 47.

⁶⁹⁰ GJIN, above n1, 9.

⁶⁹¹ Ibid.

⁶⁹² Ibid.

⁶⁹³ Feldblum and Lipnic, above n5.

⁶⁹⁴ GJIN, above n1, 57.

⁶⁹⁵ Sen et al, above n19, 77.

⁶⁹⁶ AHRC, *Respect@Work*, 765-766.

McDonald et al caution that where there is a choice of disciplinary measures, it is common for organisations to choose the least severe measure, such as a warning.⁶⁹⁷ The ‘Professionalism Pyramid’, outlined below, can provide guidance to organisations on how best to respond to poor behaviour.

Typical remedial measures that may be taken include:

- requiring an apology
- ongoing monitoring or coaching
- awareness raising and educational activities
- verbal or written warnings
- foregoing a scheduled pay rise or bonus
- demotion
- suspension or dismissal.

Corrective action should also include making systemic changes to address the risk factors that contributed to the incident. This could involve, for example, changes to job design or organisational systems. The AHRC encourages “[e]mployers [to] use reports and investigation findings as an opportunity to learn more about risks and issues in their businesses and inform their practice and approaches moving forward.”⁶⁹⁸

A broad range of corrective actions should be available to judicial disciplinary bodies to enable them to deal proportionately with misconduct.⁶⁹⁹ GJIN lists the following sanctions that may be appropriate for judges: “admonishment; reprimand; censure; or other levels of rebuke; suspension; fines; compulsory retirement; removal; disbarment; payment of costs; compensation for the complainant; education; monitoring; mentoring; counselling; or other corrective action.”⁷⁰⁰ GJIN cautions that if the remedies are limited to dismissal or removal, people will be hesitant to report misconduct.⁷⁰¹

Additionally, judges should not be able to evade disciplinary investigations, proceedings or consequences by resigning.⁷⁰² This can result in a highly unsatisfactory outcome for the victim or complainant that in turn discourages others from reporting misconduct, and a lack of accountability for the perpetrator. It may also result in serious misconduct remaining ‘hidden’ and the alleged perpetrator taking up positions of public office for which they would not otherwise be considered suitable or receiving a pension to which they would not be entitled in the event of an unfavourable finding. It is therefore important that the disciplinary body have authority to investigate judges, even if the judge has retired.⁷⁰³

⁶⁹⁷ McDonald et al, above n39, 47.

⁶⁹⁸ AHRC, *Respect@Work*, 765-766.

⁶⁹⁹ GJIN, above n1, 9.

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid.

⁷⁰² Ibid, 58.

⁷⁰³ Ibid, 9.

Case study: Professionalism Pyramid—Vanderbilt Center for Patient and Professional Advocacy

[Excerpt from AHRC, Respect@Work⁷⁰⁴]

The Professionalism Pyramid was developed by the Vanderbilt Center for Patient and Professional Advocacy (CPPA), a US-based academic centre working in the area of healthcare leadership and professional accountability.⁷⁰⁵ The pyramid is a tool for guiding employer responses to unprofessional conduct, through a structure of escalated communication as patterns of unacceptable behaviour develop.

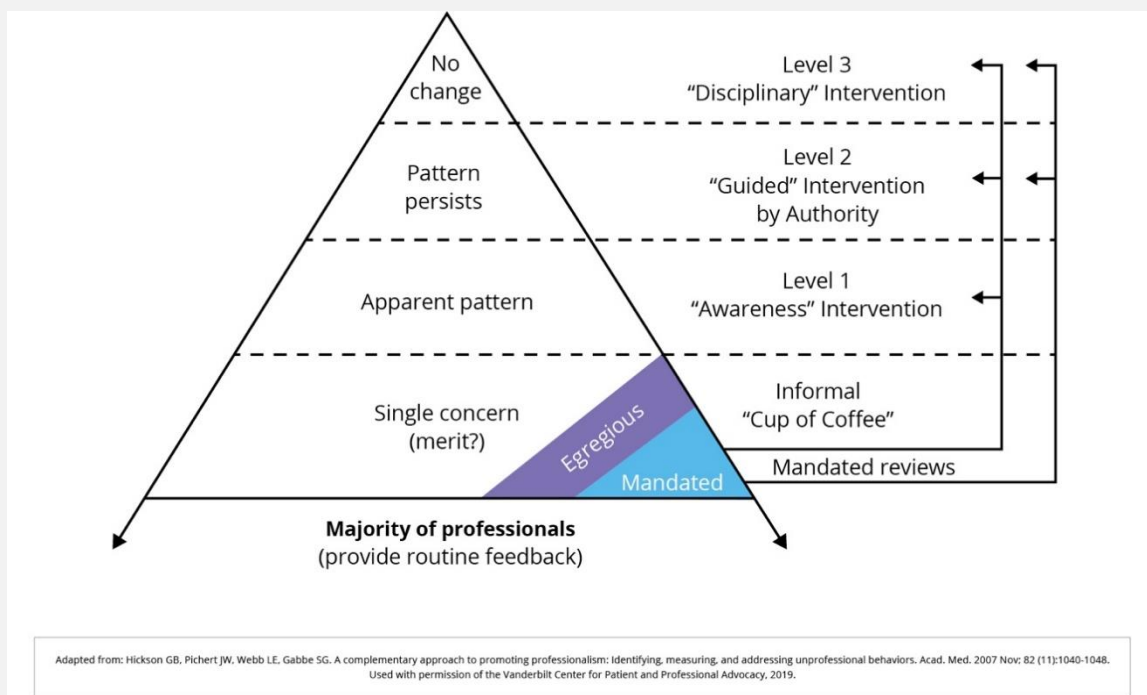
The tool is underpinned by research indicating that most workers conduct themselves with propriety, but all are subject to lapses and may engage in occasional acts of inappropriate conduct. Workers who exhibit a pattern of inappropriate behaviour need to have their conduct addressed. The level of intervention depends on the circumstances of a particular situation, and managers' judgement plays an important role in deciding how to proceed.

The tool is often used to address incidents of workplace sexual harassment. Inappropriate jokes and comments fall at the lowest level of the pyramid, while sexual assault is at its peak, with a range of other behaviours in the middle. If a worker engages in more serious conduct, or the same conduct repeatedly despite warnings, they will be subject to escalating intervention. The stages of the pyramid are demarcated by dashed lines (see diagram below), indicating managerial discretion on the appropriate level of intervention.

Managers using the tool remind workers at each intervention that they must not retaliate against victims or others involved in a complaint. The CPPA emphasises that managers should be equipped and supported to appropriately respond to workers' reactions to interventions.

All workers are trained in the operation of the pyramid at induction and regularly afterwards. A hotline is available to guide managers on using the tool in specific cases, which also allows for central data collection. An oversight group, comprising doctors, human resources officers, and diversity and inclusion officers, meets quarterly to monitor the operation of the tool.

Figure 6.3: CPPA Promoting Professionalism Pyramid



b. Transparency of outcomes

Organisations should be as transparent as possible about actions taken to address sexual harassment. The AHRC discusses the rationale and benefits of doing so below.

The need for transparency about sanctions imposed for sexual harassment

[Excerpt from AHRC, Respect@Work⁷⁰⁶]

The delivery of commensurate sanctions for harassers, and transparency within the workforce about these sanctions, can lead to shifts in perception across a workplace.

Subject to considerations of privacy and confidentiality, where employers impose such sanctions and inform their workforce of these actions, it can help reinforce behavioural standards and also give workers confidence that their leaders take complaints seriously. Over time, this can positively influence the culture of a workplace. For example, one worker said that where workers saw their employer taking action and sanctioning harassers, this was ‘the greatest prevention, because that's where people go “oh, you're actually serious about this”’.⁷⁰⁷ Another worker told the Commission:

one of our very senior partners had an allegation of sexual harassment against him ... It was investigated, and he was sacked. I had so many people come up to me and say, ‘I didn’t think that was going happen’ ... I think that set a really important cultural tone in our organisation that no one is above the law. No matter what level, we take this seriously and if you're in breach of it, you're out.⁷⁰⁸

Finally, as discussed above, the Commission heard that outcomes of reporting sexual harassment should be communicated to all relevant parties, but also, where possible, in a general or de-identified way to the broader workplace, respecting the privacy of the individuals involved.⁷⁰⁹

There is broad agreement that outcomes of investigations into judicial misconduct should also be publicly communicated.⁷¹⁰ While investigations should be confidential, GJIN recommends that there is transparency about the disposition of the case. Increased transparency about complaint outcomes can improve confidence in the complaint process and institutional response, and alleviate the fear of not being believed or that corrective action will not be taken.⁷¹¹ (GJIN notes that to address these concerns, it is also important to ensure that disciplinary bodies are not composed only of judges, and hold judges accountable even if they resign.⁷¹²)

GJIN recommends communicating final determinations and providing written reports to reassure complainants that the investigation was fair and offer guidance and deterrence to others.⁷¹³ Fair and

⁷⁰⁴ AHRC, *Respect@Work*, 747, citing Vanderbilt Center for Patient and Professional Advocacy, *What Ee do* (Web Page) <www2.mc.vanderbilt.edu/cppa/45627>.

⁷⁰⁵ Vanderbilt Center for Patient and Professional Advocacy, *Home* (Web Page) <www2.mc.vanderbilt.edu/cppa/>.

⁷⁰⁶ AHRC, *Respect@Work*, 765.

⁷⁰⁷ Consultation with employers (hospitality and retail industries), Melbourne.

⁷⁰⁸ Consultation with policy stakeholders, Perth.

⁷⁰⁹ Legal roundtable, Sydney

⁷¹⁰ Appleby and Le Mire, above n373; GJIN, above n1, 57; Sachar, above n345, 4-5.

⁷¹¹ GJIN, above n1, 50-51.

⁷¹² Ibid.

⁷¹³ Ibid, 57.

transparent operations are also necessary to maintain broader public confidence. GJIN explains the different approach to transparency with respect to a case outcome versus the investigation as follows:⁷¹⁴

During the investigation, the balance between confidentiality and transparency should be struck in favour of granting the complainant and the accused protections that are at least comparable to those available in a civil or criminal proceeding. That balance shifts once the case has been decided, and the disposition should be made public, even if certain confidential information needs to be withheld.⁷¹⁵

GJIN considers that this approach promotes public confidence in the judiciary, helps everyone to know what conduct is expected, encourages reporting, and discourages others from engaging in similar misconduct.

Appleby and Le Mire agree that “a wide range of consequences must be available and their use made public”, however they argue that transparency should extend further to conduct standards, processes and potential outcomes:⁷¹⁶

Fundamental to a rigorous accountability system is transparency — transparency of standards, processes, timeframes and consequences. As such, we have argued that any system must have a transparent system of sorting complaints, indicating what complaints are within the jurisdiction of the body. The administration of the system, that is, the progress and resolution of the complaints, must also be transparent. Those subject to the process must be given a fair opportunity to be heard. A complaints system must also have tangible standards by which to measure the seriousness of judicial misbehaviour.

This reflects a common theme discussed throughout this paper, which is the importance of communicating policies and organisational initiatives widely and ensuring that information about sexual harassment policies and complaint mechanisms is accessible.

c. Long-term response – follow-up to ensure no retaliation

Research shows that workers who report sexual harassment often experience retaliation (or ‘victimisation’).⁷¹⁷ Reporting sexual harassment is also adversely correlated with performance ratings, promotion and attendance rates, and higher rates of resignation.⁷¹⁸ As a result, it is important to provide clear and accessible information about available supports and protections from retaliation, as well as the extent to which private and confidential information may be disclosed.

Protection measures could include changing work arrangements or reassignment to limit contact with the alleged perpetrator. Access to victim support services is also important.⁷¹⁹

McDonald et al discuss ‘tertiary interventions’, which “involve longer-term responses after the problem has occurred to deal with lasting consequences, minimize its impact, restore health and safety, and prevent further perpetration and victimization”.⁷²⁰ They note Oppenheimer’s recommendation to proactively follow-up complainants and respondents in the longer term to ensure there has been no retaliation.⁷²¹

⁷¹⁴ Ibid, 9.

⁷¹⁵ Ibid.

⁷¹⁶ Appleby and Le Mire, above n373.

⁷¹⁷ AHRC, *Respect@Work*, 765.

⁷¹⁸ McDonald et al, above n39; AHRC, *Respect@Work*, 765.

⁷¹⁹ GJIN, above n1, 55.

⁷²⁰ McDonald et al, above n39, 48.

⁷²¹ McDonald et al, above n39, 48, citing Oppenheimer 2004.

The AHRC recommends taking the following steps to stop victimisation.⁷²²

- providing the worker with a nominated contact person, with whom they can discuss any concerns or report victimisation
- regularly monitoring the workplace to observe the way their co-workers are interacting with them
- continuing to ‘check in’ and communicate with workers at regular intervals after they have made or been involved in a report, to ask whether they are experiencing any victimisation
- looking for other signs that may indicate evidence of victimisation—for example workers having high levels of absenteeism or personal leave, or reduced performance—and discussing these with the workers involved
- reminding harassers and the workforce generally that victimisation is prohibited and sanctions will apply for those who engage in it
- disciplining any staff found to be engaging in victimisation and communicating appropriately with the workforce about this.

E. MEASUREMENT

As discussed in section 5, it is important to gather information using a variety of methods to better understand the nature of the problem and inform the design of sexual harassment prevention and response initiatives. It is equally important to monitor and evaluate interventions to determine their effectiveness, identify any unintended consequences and inform modifications to existing initiatives or the design of new ones.

Evaluating action taken encourages accountability as well as continual improvement. Thurston’s view is that “[u]nless courts are required to account for their efforts made toward diversity, those courts that are mired in the status quo will have little impetus to change.”⁷²³

The AHRC notes that while organisations often collect data on the number of sexual harassment complaints made, this information is less usual for organisations to track the effectiveness of activities taken to address sexual harassment. However, a number of large employers do so, including Victoria Police,⁷²⁴ the Australian Defence Force⁷²⁵ and Australian Universities.^{726 727} Evidence about the prevalence of sexual harassment can be obtained in the following ways:

- Informal discussions with workers;

⁷²² AHRC, *Respect@Work*, 766.

⁷²³ Thurston, above n157, 101.

⁷²⁴ AHRC, *Respect@Work*, 774 and FN439: “The Commission heard that Victoria Police conducted anonymous staff surveys in 2015 and 2018, to obtain specific information about the people and situations that created the highest risk for its workforce in relation to sex discrimination and sexual harassment. Information from the 2015 survey led to Victoria Police adopting new, broad and proactive strategies in their workplaces, designed to prevent workplace sexual harassment and sex discrimination by addressing its underlying causes. Information from the 2018 survey was then compared to information from the 2015 survey, to help assess how effective the strategies introduced following the 2015 survey had been in reducing sex discrimination and sexual harassment. See Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*, 31.”

⁷²⁵ See Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force* (Phase 2 Report, 2012) and Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force* (Audit Report, 2014).

⁷²⁶ See Australian Human Rights Commission, *Audit of university responses to the Change the course report: Snapshot of progress* (August 2018).

⁷²⁷ AHRC, *Respect@Work*, 773.

- Staff and customer feedback, including through exit interviews and performance feedback;
- Business metrics that identify unhappy staff, such as rates of staff attrition and absenteeism, EAP counselling service trends;
- Anonymous staff surveys;
- Staff complaints.⁷²⁸ Note that procedures need to be established for collecting and maintaining the data required to evaluate the performance of the complaint process.⁷²⁹

These methods have been discussed above in section 5.

The AHRC cautions that “while an analysis of the content of complaints may provide some data about the nature of sexual harassment in particular cases, the ‘number of complaints’ cannot be used as an accurate measure of prevalence, given the under-reporting of sexual harassment.”⁷³⁰⁷³¹ For this reason, an initial increase in complaints can reflect positive organisational change.⁷³² Further, a reliance on complaints data does not capture situations where the issue was resolved informally or where the victim was discouraged by a supervisor or HR from pursuing the complaint.⁷³³

GJIN also recommends ongoing monitoring and evaluation of “gender-related issues in the way judges manage their courtroom, render decisions or fulfil administrative and supervisory responsibilities.”⁷³⁴

Large scale evaluations can be costly. It is important to anticipate this and build the expense into the overall budget of any sexual harassment prevention initiatives at the outset.

F. WIDER LEGAL PROFESSION

11. The Bar

The most common training ground for judges is the Bar. The senior judiciary, in particular, predominantly comprises former senior counsel. This is problematic when it comes to increasing gender diversity on the bench given that women make up only 13 per cent of silks in Victoria.⁷³⁵ The Victorian Women Barristers Association (WBA) has noted that responding to sexual harassment as a barrister is complex and requires balancing considerations of self-care with the need to maintain working relationships and sources of work, and also protect the interests of the client.⁷³⁶

⁷²⁸ AHRC, *Respect@Work*, 771.

⁷²⁹ GJIN, above n1, 10.

⁷³⁰ For example, the 2018 National Survey found that fewer than one in five people (17%) who said they experienced sexual harassment in the workplace in the last five years made a formal report or complaint: Australian Human Rights Commission, *Everyone’s Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018), 67. See also, for example, Royal Australasian College of Surgeons, Submission 207, *Sexual Harassment Inquiry*, 5; Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*, 1, 8; Elizabeth Broderick & Co, *Cultural Change: Gender Diversity and Inclusion in the Australian Federal Police* (2016), 94; Victorian Equal Opportunity & Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police* (Phase 3 Audit and Review, August 2019), 70.

⁷³¹ AHRC, *Respect@Work*, 771.

⁷³² Feldblum and Lipnic, above n 5, 36.

⁷³³ AHRC, *Respect@Work*, 771.

⁷³⁴ GJIN, above n1, 10.

⁷³⁵ Victorian Bar, *Diversity & Inclusion*, <https://www.vicbar.com.au/sites/default/files/17624%20VicBar%20-%20Diversity%20%26%20Inclusion%20Brochure%20Web.pdf>, accessed on 12 October 2020; Lawyers Weekly, *Vic Bar making strides in gender equality and diversity*, 2 April 2018, <https://www.lawyersweekly.com.au/wig-chamber/22992-vic-bar-making-strides-in-gender-equality-and-diversity>, accessed on 12 October 2020. The Victorian Bar does not appear to have reported the cultural diversity of senior counsel.

⁷³⁶ Women Barristers Association (Victoria), *Submission to the National Inquiry into Sexual Harassment in Australian Workplaces* (28 February 2019) <<https://www.vicbar.com.au/sites/default/files/WBA%20submission%20to%20National%20Sexual%20Harassment%20Inquiry%20FINAL.pdf>> accessed on 12 October 2020, 11-12.

The Victorian Bar has implemented the following diversity initiatives:⁷³⁷

- A parental leave policy that includes entitlement to subsidised chambers for a period of parental leave of up to six months.
- Equality and diversity committee
- Commitment to equitable briefing.

The Victorian Bar also has a list of Senior Counsel and Queen's Counsel who have signed an undertaking to promote equality and diversity, including a workplace free from bullying and discriminatory behaviours and sexual harassment.⁷³⁸

Options for taking action include reporting a breach of the Legal Profession Uniform Conduct (Barrister) Rules 2015 (**Rules**)⁷³⁹ and making use of mechanisms established under the Victorian Bar's *Policy Against Sexual Harassment*.⁷⁴⁰ These mechanisms include an internal grievance procedure, pursuant to which a complaint is investigated and may be independently conciliated. There is also an option to make an informal report of sexual harassment, which is anonymised and used for reporting purposes to inform training and awareness needs and initiatives. Informal reports are not investigated.

In March 2020 the Victorian Bar hired an assessment and conduct officer to support those who have experienced sexual harassment and facilitate formal and informal conduct investigation, including those referred to the Victorian Bar by the Victorian Legal Services Board and Commission (**VLSB+C**).⁷⁴¹ This officer has specific sexual harassment and investigation training.

The Victorian Bar's Equality and Diversity Committee also recently approved a number of recommendations to build a positive culture and prevent sexual harassment, which are outlined in the Review report.

The WBA states that it is unclear whether the *Equal Opportunity Act 2010* (Vic) (**EOA**) provides barristers with protection against sexual harassment in various contexts given the atypical nature of their work as sole-traders and because the locations where sexual harassment often occurs may not be considered a common "workplace", such as at industry conferences, social events or even a senior barrister's home.⁷⁴² WBA advocates that the EOA be amended to make it clear that sexual harassment of all persons who are self-employed is prohibited, including sexual harassment of barristers by barristers and of barristers by solicitors outside of the context of a formal retainer.⁷⁴³

⁷³⁷ Emma Ryan, 'Vic Bar making strides in gender equality and diversity', *Lawyers Weekly* 2 April 2018, <https://www.lawyersweekly.com.au/wig-chamber/22992-vic-bar-making-strides-in-gender-equality-and-diversity>, accessed on 12 October 2020

⁷³⁸ Victorian Bar, *The Silks' Undertaking to Promote Equality and Diversity*, 29 April 2020, <https://www.vicbar.com.au/sites/default/files/Victorian%20Bar%20Silks%27%20Undertaking%20Equality%20and%20Diversity.pdf>, accessed on 12 October 2020.

⁷³⁹ Cl 123(b) of the Rules provides that "a barrister must not in the course of practice, engage in conduct which constitutes sexual harassment". The term "sexual harassment" takes its definition from state, territory and federal anti-discrimination legislation: Women Barristers Association (Victoria), *Submission to the National Inquiry into Sexual Harassment in Australian Workplaces*, 28 February 2019, <<https://www.vicbar.com.au/sites/default/files/WBA%20submission%20to%20National%20Sexual%20Harassment%20Inquiry%20FINAL.pdf>> accessed on 12 October 2020, 11-12.

⁷⁴⁰ Victorian Bar, *Policy Against Sexual Harassment*, undated, <https://www.vicbar.com.au/sites/default/files/Policy%20Against%20Sexual%20Harassment.pdf>, accessed on 6 December 2020.

⁷⁴¹ Victorian Bar, *Submission to Review of Sexual Harassment in Victorian Courts and VCAT* (2020).

⁷⁴² Women Barristers Association (Victoria), *Submission to the National Inquiry into Sexual Harassment in Australian Workplaces*, 28 February 2019, <<https://www.vicbar.com.au/sites/default/files/WBA%20submission%20to%20National%20Sexual%20Harassment%20Inquiry%20FINAL.pdf>> accessed on 12 October 2020, 16.

⁷⁴³ *Ibid.*

The Victorian Bar has adopted the Law Council of Australia's [National Model Gender Equitable Briefing Policy](#) (EBP).⁷⁴⁴ The targets in the equitable briefing policy include:

- "to brief or select senior women barristers accounting for at least 20% of all briefs and/or 20% of the value of all brief fees paid to senior barristers;
- to brief or select junior women barristers accounting for at least 30% of all briefs and/or 30% of the value of all brief fees paid to junior barristers".⁷⁴⁵

The Victorian Bar reports that it exceeded its equitable briefing targets in 2020.⁷⁴⁶ However, the EBP has been strongly criticised for being substantially ineffective and unambitious. Chan states:⁷⁴⁷

The EBP lacks clarity in application, is built upon targetless objectives, and, of more concern, proceeds on ill-informed understandings of merit-based selection and affirmative action. While this may be the result of inevitable compromises in the process of developing an uncontroversial national policy, it is argued that it can also be attributed to a strong aversion to developing any regulatory initiative which could be characterised as a form of affirmative action.

The Victorian Bar has also adopted the Law Council of Australia's [Diversity and Equality Charter](#),⁷⁴⁸ although the Charter is very brief, at three sentences.

The Law Council has also recently released a *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession*.⁷⁴⁹

United Kingdom

In May 2018 the UK Bar Standards Board (BSB), which regulates barristers and specialised legal services businesses in England and Wales, released a report *Women at the Bar: Research exploring solutions to promote gender equality*. The BSB expressed concern about the lack of progression of women in the profession – women comprise just 15 per cent of heads of chambers and 13 per cent of Queens Counsel – and the far higher rate of attrition for women at the Bar compared to men.⁷⁵⁰

The BSB's qualitative research highlighted a number of issues facing women at the Bar, including the impact of individual chambers' culture and policies on women's experience of bringing up children and some women feeling disadvantaged by power structures within chambers.⁷⁵¹ The report concluded, based on quantitative analysis, that:⁷⁵²

⁷⁴⁴ Victorian Bar, *Gender Equality* (website), <https://www.vicbar.com.au/public/community/equality-and-diversity/gender-equality>, accessed on 12 October 2020.

⁷⁴⁵ Law Council of Australia, *Equitable Briefing Policy*, (June 2016) https://www.lawcouncil.asn.au/files/pdf/policy-guideline/National_Model_Gender_Equitable_Briefing_Policy_updatedversion.pdf accessed on 12 October 2020.

⁷⁴⁶ Victorian Bar, *Diversity & Inclusion* (website), <https://www.vicbar.com.au/sites/default/files/17624%20VicBar%20-%20Diversity%20%26%20Inclusion%20Brochure%20Web.pdf>, accessed on 12 October 2020; Lawyers Weekly, *Vic Bar making strides in gender equality and diversity*, 2 April 2018, <https://www.lawyersweekly.com.au/wig-chamber/22992-vic-bar-making-strides-in-gender-equality-and-diversity>, accessed on 12 October 2020.

⁷⁴⁷ Ryan Chan, 'Sexism at the bar and the equitable briefing policy: well-meaning but misguided response to gendered briefing practices' 29(2) *Bond Law Review* (2017), 159-186.

⁷⁴⁸ Victorian Bar, *Gender Equality* (website), <https://www.vicbar.com.au/public/community/equality-and-diversity/gender-equality>, accessed on 12 October 2020.

⁷⁴⁹ Law Council of Australia, *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* (23 December 2020) <[National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession FINAL.pdf](https://www.lawcouncil.asn.au/files/pdf/National_Action_Plan_to_Reduce_Sexual_Harassment_in_the_Australian_Legal_Profession_FINAL.pdf) ([lawcouncil.asn.au](https://www.lawcouncil.asn.au))> accessed on 26 January 2021.

⁷⁵⁰ Bar Standards Board (UK), *Women at the Bar: Research exploring solutions to promote gender equality*, (2018), available at <<https://www.barstandardsboard.org.uk/uploads/assets/118b1db5-d15f-4e53-a214b0e71622f9aa/womenatthebarreportv4.pdf>>, accessed on 12 October 2020, 7.

⁷⁵¹ Ibid.

⁷⁵² Ibid.

notwithstanding the current parity in the numbers of men and women called to the Bar, with the present model of practice at the Bar, a 50:50 gender balance among all practising barristers is unlikely ever to be achieved.

The BSB made a number of recommendations to improve gender equality at the Bar including to:⁷⁵³

- Monitor various equality indicators, such as the allocation of work, flexible work requests, the number of discrimination and harassment complaints.
- Improve transparency of the above data and how discrimination and harassment complaints are dealt with.
- Introduce and improve policies, including parental leave policies, and introduce an external ‘helpline’ to discuss discrimination and harassment.
- Expand equality and diversity training for clerks and senior management.
- Create cultural change by taking a ‘zero-tolerance’ approach to unlawful discrimination and harassment, ensure clear and visible support for improvement and change from senior leadership and make a clear business case for equality at the Bar.

The current equality and diversity resources on the UK Bar Council website include:⁷⁵⁴

- Equality and diversity resources, including:
 - BSB guidance on complying with equality and diversity
 - Career Breaks – Advice Pack
 - Family Career Breaks – Advice Pack
 - Flexible Working Guide
 - Court dress – including advice on clothing worn as a requirement or emblem of faith
 - Discrimination, Harassment, Bullying and Inappropriate Behaviours guide
 - Discriminatory instructions guide
 - Fair Recruitment Guide
- Helplines for equality and diversity, ethics, bullying and harassment and pupillage issues
- Equality and diversity, compliance and wellbeing courses
- Equality and Diversity Officers network

The BSB Equality and Diversity Strategy 2020-2022 states that its strategy is underpinned by the following three key drivers:⁷⁵⁵

- **“Public interest and the rule of law** – A profession which is representative of the people it serves is more likely to meet the diverse needs of its clients, thereby working more effectively and creating a positive public image. As an employer, we will work more efficiently if we maintain an inclusive workplace that is free from discrimination.

⁷⁵³ Ibid.

⁷⁵⁴ The Bar Council (UK), *Equality, diversity and inclusion* (website) <https://www.barcouncil.org.uk/support-for-barristers/equality-diversity-and-inclusion.html> accessed on 29 January 2021.

⁷⁵⁵ Bar Standards Board (UK), *Equality and Diversity Strategy 2020 to 2022* (7 April 2020) <https://www.barstandardsboard.org.uk/resources/resource-library/bsb-equality-and-diversity-strategy-2020-to-2022-pdf.html> accessed on 29 January 2021, 6.

- **Moral** – We believe that the promotion of equality and diversity is morally the right thing to do and helps to combat social injustice. It is unfair for a person to experience disadvantage or discrimination on the basis of difference.
- **Legal** – As a public body, we have a general equality duty and a number of specific equality duties arising from the Equality Act 2010. We must also comply with the Regulatory Objectives as set out in the Legal Services Act 2007, notably the Objective about encouraging an independent, strong, diverse and effective legal profession and the Objective about improving access to justice.”

Notably, barristers in the UK have a mandatory obligation to report sexual harassment that constitutes serious misconduct, although this has been watered down. BSB rule C65 states: “You must report to the BSB if you have reasonable grounds to believe that there has been serious misconduct by a barrister” and gC96.2 states that serious misconduct includes harassment. However, the Bar Council policy on *Discrimination, Harassment, Bullying and Inappropriate Behaviours: Information for Barristers* states that “there may be instances of inappropriate conduct at the lesser end of the spectrum which do not mandate a BSB report.”⁷⁵⁶ (Emphasis in the original).

Plowden and Brunner note that the mandatory reporting obligation can result in the victim losing control over what happens and potentially deter victims from confiding in colleagues:⁷⁵⁷

The potential downside of the compulsory reporting regulation is that victims of harassment may feel that they will have no control over what happens as soon as they discuss their predicament with another barrister, as they would arguably transmit the reporting requirement along with the story. The Western Circuit is liaising with the BSB as to how a victim can informally discuss matters with a barrister colleague without losing control of the decision to report and we understand the BSB is to consult on whether current rules deter people from reporting cases of possible harassment within chambers.

A recent study by YouGov into bullying, discrimination and harassment at the UK Bar confirmed that “[t]he BSB’s Duty to Report was an enabler for reporting for some but a barrier for many - they see the route as too formal and prescriptive.”⁷⁵⁸

While their article appears to be based on informal interviews and anecdotal reports, Brunner, Gamble, Beal explored the views of male barristers about sexual harassment, and received a telling response to the question “what did YOU first think when people started raising the profile of sexual harassment at the Bar?”⁷⁵⁹

My initial reaction was surprise. During my time at the Bar I had seen a number of exchanges as between barristers, clerks and barrister, judges and barristers, that were somewhat close to the knuckle... I had always viewed this as part of the rough and tumble of being at the Bar.’

⁷⁵⁶ Bar Council, *Discrimination, Harassment, Bullying and Inappropriate Behaviours: Information for Barristers*, <https://www.barcouncilethics.co.uk/wp-content/uploads/2019/08/Bar-Council-Guide-Explaining-Discrimination-Harassment-Bullying-and-Inappropriate-Behaviours-August-2019.pdf>, accessed on 17 October 2020, 6.

⁷⁵⁷ Selena Plowden and Kate Brunner QC, ‘#TimesUp: calling it out at the Bar’, *Counsel* (UK), April 2018, <https://www.counselmagazine.co.uk/articles/timesup-calling-it-out-the-bar>, accessed on 17 October 2020.

⁷⁵⁸ YouGov, *Bullying, Discrimination and Harassment at the Bar: Qualitative study by YouGov for the Bar Standards Board* (October 2020), [October-2020-BDH-at-the-Bar-full-report.pdf](https://www.barstandardsboard.org.uk/october-2020-bdh-at-the-bar-full-report.pdf) (barstandardsboard.org.uk) accessed on 20 January 2021, 3.

⁷⁵⁹ Kate Brunner QC, Esther Gamble, Jason Beal, ‘Ending harassment: men, welcome to the conversations!’, *Counsel* (UK), April 2019, <https://www.counselmagazine.co.uk/articles/ending-harassment-men-welcome-to-the-conversation>! accessed on 17 October 2020.

The article states that for many male barristers, their attitudes changed once they realised how widespread the problem is, while for others the catalyst was hearing first-hand accounts.⁷⁶⁰ However, there remained concern about where the line is drawn and what might happen if a complaint was handled badly, which could lead to a severe loss of reputation or worse.⁷⁶¹

The authors' advice to men who want to do something about sexual harassment is to let their pupil (i.e. reader) know from the time they start at the Bar that they should have the confidence to speak up if they feel uncomfortable in any way and speak up if you witness poor behaviour.⁷⁶²

In 2019 the England and Wales Association of Women Barristers released a report on harassment and bullying with recommendations relating to changing the dialogue, codes and policies, training, long-term support for those who experience or report harassment or bullying and better facilities for women and non-binary people at court centres: *In the Age of 'Us Too?': Moving Towards a Zero-Tolerance Attitude to Harassment and Bullying at the Bar*.⁷⁶³

12. Law firms and other private legal service providers

Sexual harassment prevention initiatives within law firms is out of scope for this paper. However, a number of experts referred the author to a report by Dame Margaret Bazley, who was commissioned by law firm Russell McVeagh to review its handling of the sexual harassment of five summer clerks at Russell McVeagh in 2015-16.⁷⁶⁴ The clerks alleged serious sexual misconduct by a partner and a solicitor, and received a poor response from the firm. Dame Bazley made a number of recommendations, many of which aim to improve the firm's culture.⁷⁶⁵ The report is a valuable resource for law firms wishing to improve their approach to gender equality and sexual harassment prevention and response.

In response to the incident and criticism of its handling of the initial reports, the Law Society of New Zealand undertook a workplace environment survey and recommended improvements to enable better reporting of sexual harassment in the legal profession.⁷⁶⁶ This is a comprehensive report that makes a number of significant, practical and meaningful recommendations to address sexual harassment. Among these recommendations include:⁷⁶⁷

- clearer conduct and reporting standards, including a new rule to specifically prohibit victimisation of people who report in good faith;⁷⁶⁸
- closer regulation of workplace obligations;
- improving the current Lawyers Complaints Service and Standards Committee process in respect of complaints about sexual violence, harassment, discrimination and bullying;
- a specialised pathway at the Lawyers Complaints Service for complaints about sexual violence, bullying, harassment, discrimination and related personal conduct issues, made up of non-lawyers with expertise in receiving complaints of this kind and offering support. The purpose of

⁷⁶⁰ Ibid.

⁷⁶¹ Ibid.

⁷⁶² Ibid.

⁷⁶³ https://www.city.ac.uk/_data/assets/pdf_file/0006/492594/AWB-Anti-Bullying-Round-Table-Report-Oct-2019.pdf accessed on 26 January 2021.

⁷⁶⁴ Bazley, Margaret, *Independent Review of Russell McVeagh* (March-June 2018), <https://www.russellmcveagh.com/getmedia/cc682d64-46a1-40e3-987b-cd82223bea24/Independent-Review-of-Russell-McVeagh-2018.pdf/>, accessed on 17 October 2020.

⁷⁶⁵ Ibid.

⁷⁶⁶ New Zealand Law Society Working Group, *Report to enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession* (2018) <https://www.lawsociety.org.nz/professional-practice/practising-well/bullying-and-harassment/resources-and-reports/> accessed on 17 October 2020.

⁷⁶⁷ Ibid, 32.

⁷⁶⁸ Ibid, 11.

this unit would be to provide support and assistance to people considering making a complaint and act as a triage;⁷⁶⁹

- reform of the procedures around confidentiality and suppression;
- reducing delays in the review process;
- changes to the procedures of the New Zealand Lawyers & Conveyancers Disciplinary Tribunal (LCDT);
- imposition of sexual harassment mandatory training as a CPD requirement;⁷⁷⁰
- effective program for implementation of change and long-term monitoring.

LSNZ also provides a template sexual harassment policy for the legal profession.

⁷⁶⁹ Ibid, 13.

⁷⁷⁰ Ibid, 13.

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