

Report pursuant to
Recommendation 4 of the Szoke Report
on preventing and addressing
Sexual Harassment in
Victorian Courts

REVIEW OF RECRUITMENT AND
WORKING ARRANGEMENTS OF JUDICIAL STAFF
WHO WORK IN A PRIMARY RELATIONSHIP WITH
JUDICIAL OFFICERS IN
VICTORIAN COURTS AND VCAT

AUGUST 2022

THE HON. JULIE DODDS-STREETON KC

JACK O'CONNOR, VICTORIAN BAR

COURT SERVICES VICTORIA

REPORT PURSUANT TO RECOMMENDATION 4
OF THE SZOKE REPORT ON PREVENTING AND ADDRESSING
SEXUAL HARASSMENT IN VICTORIAN COURTS

REVIEW OF RECRUITMENT AND WORKING ARRANGEMENTS OF JUDICIAL STAFF
WHO WORK IN A PRIMARY RELATIONSHIP WITH JUDICIAL OFFICERS
IN VICTORIAN COURTS AND VCAT

Introduction	1
Genesis of this review	1
Recommendation 4 Review	3
Questions and Challenges	3
Methodology	9
Background	11
Legal Framework - Responsibilities of CSV	13
<i>Occupational Health and Safety Act 2004 (Vic)</i>	13
<i>Equal Opportunity Act 2010 (Vic)</i>	15
Definition of “sexual harassment”	16
Other Commonwealth legislation: Recent amendments to the <i>Sex Discrimination Act 1984 (Cth)</i>	17
Other amendments to Commonwealth law in response to Respect@Work Report	19
The Key CSV Staff Roles	19
Judicial Officers	20
Judicial demographics and backgrounds.....	22
CSV staff in primary relationship with judicial officers	23
The Role of Associates and Tipstaves	24
Associates	24
Role of Tipstaves	27
Brief history of the recruitment and composition of Victorian chambers staff	27
The American clerkship hiring process and working conditions – Risks and Incentives	29
Observations on changes in recruitment of Victorian associates, approximating American Federal clerk system	33
Should the courts aim to recruit a more diverse associate workforce with more flexible terms?	35
Some observations on existing practices in Supreme and County Courts	36
Supreme Court of Victoria.....	36
Supreme Court staff Feedback on Recruitment and working Conditions	39
Summary of Key Comments.....	39
County Court of Victoria	40
Summary of Key Comments by County Court Associates, Staff and Judges	42
Prevalence of sexual harassment in the Australian courts – lack of reliable data	43
Data on Prevalence	43
Current record keeping protocols in the Victorian Courts and VCAT	45
Investigations and their outcomes not transparent	45

Case Studies of Inappropriate Sexualised Conduct by Judges of Chambers Staff or Junior Legal Personnel	48
The American Cases	48
Judge Kozinski.....	49
Judge Reinhardt	49
Conclusion on Reported American Incidents.....	52
The Substantiated Cases of Judicial Sexual Harassment in Australia.....	53
Observations on the Australian Cases of inappropriate sexualised conduct by judges.....	54
A positive outcome from a bystander report coupled with prompt intervention by another judge.....	56
The Causes and Drivers of Sexual Harassment	58
Szoke Report.....	58
Identification of, and attempts to solve, the problem in the united states	60
Report of the Federal Judiciary Workplace Conduct Working Group.....	61
Risk factors for sexual harassment and the judiciary identified in the United States.....	64
Risk Factors in Victorian Courts	65
Supreme Court	65
County Court.....	66
The Other Courts.....	66
Brief Summary of Employment Arrangements in each Relevant Jurisdiction.....	67
Magistrates’ Court	67
Children’s Court.....	71
Coroners Court.....	73
Conclusion	76
Victorian Civil and Administrative Tribunal.....	77
Across all Courts and VCAT	79
The Respect in the Workplace Policy	79
The Respect in the Workplace Module.....	80
New CSV Policies.....	80
Summary of Observations	85
Demographics and Length of Tenure of Associates	85
Assignment of Staff to Judicial Officers.....	86
Appropriate training on Respective Responsibilities for Supervision of Staff	87
Induction Processes for Judicial Officers and Judicial Staff concerning Sexual Harassment.....	88
Reporting lines.....	89
Peer Support and Mentoring/Feedback Mechanisms.....	90
RECOMMENDATIONS	92

GENESIS OF THIS REVIEW

1. We have been commissioned by Court Services Victoria (“CSV”) as Independent Experts to conduct a review recommended by the Report of Dr Helen Szoke AO (“Szoke Report”)¹ on her Review of Sexual Harassment in Victorian Courts (“Szoke Review”).
2. We submitted a “work-in-progress” report on 31 January 2022 setting out the ground covered up to that date and the proposed way forward. We have now completed our investigative field work and academic research. The present final report is based on the earlier progress report but some observations and conclusions have been modified or corrected in light of new information and further investigation. We have also expanded our coverage and included new topics, sections and materials, including records or summations of interviews.
3. The Szoke Review was commissioned in response to revelations in June 2020 that five former associates of former Justice Heydon of the High Court of Australia, and another member of the Court’s staff, had complained that the judge (who had since retired) had sexually harassed them. An independent investigation commissioned by the High Court found the complaints to be substantiated. The Australian judiciary, legal profession and the community at large were shaken, not only by the realisation that one of the country’s most esteemed and senior judges had engaged in multiple instances of sexual harassment of Court chambers’ staff, but also that (despite the severe impact on the victims) there was a collective failure to take action to prevent, acknowledge or address the misconduct, either when it occurred or for a long time thereafter.²
4. The Szoke Review, pursuant to relatively wide terms of reference, was tasked with considering measures to:
 - (a) prevent sexual harassment;
 - (b) improve reporting by and support for those who experience sexual harassment; and
 - (c) raise awareness and ensure accountability for perpetrators of sexual harassment in Victorian Courts and the Victorian Civil and Administrative Tribunal (“VCAT”).³

¹ Dr Helen Szoke AO, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT: Report and Recommendations*, March 2021.

² Since the publication of the Szoke Report, two other Australian cases of allegations of sexually inappropriate conduct by judicial officers towards associates or juniors working in the legal profession have been investigated. They are discussed in detail below.

³ Szoke Report, 23.

5. The Szoke Report was presented in March 2021 to the Attorney-General for the State of Victoria and the Chief Justice of the Supreme Court of Victoria (who is also the Chair of the Courts Council).⁴
6. While Dr Szoke did not, in her report, attempt to determine precisely “how widespread sexual harassment is in the courts and VCAT”, she concluded that “the cases reported indicate the need for a dedicated focus” on the problem. Dr Szoke’s observations were informed by the following evidence⁵:
 - (a) The 2019 Survey conducted by the Victorian Legal Services Board and Commissioner in which 17 respondents had alleged sexual harassment by judicial officers.⁶ The conduct included comments on looks, clothing, make up and expressions of female lawyers, requests for dates, sexually explicit comments, unwanted touching and unnecessary disrobing in chambers.⁷
 - (b) The “VEOHRC process”,⁸ which was a “safe and confidential process for those who had experienced sexual harassment or witnessed sexual harassment in the Courts or VCAT to share their experiences”.⁹ This relied on a total of 36 respondents, 28 of which reported sexual harassment (23 multiple incidents) and 21 reported witnessing sexual harassment (18 reported multiple incidents). The Szoke Report noted that these included instances where the perpetrators were, *inter alia*, judicial officers. Other perpetrators included colleagues, managers and barristers.¹⁰
 - (c) The Women Barristers’ Association submission that court staff, such as judges, associates and research staff, as well as women barristers (particularly newer young women) had been approached by judicial officers as objects of romantic or sexual interest, where the approach was not welcomed or appreciated.¹¹
7. Dr Szoke made 20 inter-related recommendations intended to prevent, ameliorate and address that problem, including Recommendation 4, which is the basis of the present review.

⁴ *Court Services Victoria Act 2014*, s 12(3).

⁵ Szoke Report, 8.

⁶ <https://lsbc.vic.gov.au/resources/report-sexual-harassment-study>; Szoke Report, 38.

⁷ Szoke Report, 38.

⁸ The Victorian Equal Opportunity and Human Rights Commission, which received reports of sexual harassment over a six-week period during which “36 people shared their experience via written submission or through a one-on-one interview”: Szoke Report, 23,

⁹ Szoke Report, 23.

¹⁰ Szoke Report, 39. 50% of those 36 participants in the VEOHRC process indicated that they had experienced or witnessed sexual harassment by a judicial officer or VCAT member, and 38% of those incidents had occurred within the last five years: Szoke Report, 76.

¹¹ Szoke Report, 39.

RECOMMENDATION 4 REVIEW

8. Recommendation 4 of the Szoke Report states:

Commission an independent expert to review and make recommendations to the Courts Council on the recruitment processes and working arrangements for Court Services staff who work in a primary relationship with judicial officers, including associates, tipstaves and clerks.

The independent review should include:

- a. the processes by which staff are assigned to judicial officers;
- b. appropriate training for judicial officers and CSV managers on their respective responsibilities for the supervision of staff;
- c. the quality and scope of induction processes as it relates to sexual harassment;
- d. reporting lines, and the options for different systems of reporting that could mitigate sexual harassment risk factors;
- e. models of peer support that build collegiate support and networks, such as mentoring or buddy systems;
- f. feedback mechanisms for both judicial officers and judicial staff; and
- g. processes for identifying, addressing and responding to sexual harassment perpetrated against judicial staff.

QUESTIONS AND CHALLENGES

9. Several unanswered questions and obvious challenges confronted the present review.
10. First, several terms or concepts in Recommendation 4 are not comprehensively defined. However, the inclusive examples given for the key category of “[CSV] staff who work in a primary relationship with judicial officers” indicate that the intended focus is on traditional “chambers” staff (while extending to any employees whose roles approximate their direct service to a judicial officer). It appears that the reference is primarily concerned with how the recruitment processes for, and working arrangements of, the relevant CSV staff might magnify, reduce or otherwise affect their risk of sexual harassment by judicial officers.
11. The potential latitude of the primary direction in the reference is echoed in some of the seven specified inclusions. The overarching direction on recruitment and working arrangements of particular CSV staff is quite narrow, but at least one of the specified inclusions ((g) “processes for identifying, addressing and responding to sexual harassment perpetrated

against judicial staff”) is potentially of much wider scope and overlaps with other independent recommendations in the Szoke Report.

12. Although inclusion (a) refers to the assignment of staff to judicial officers, this does not reflect the traditional or current practice for all staff who work closely with judicial officers. In the superior courts, at least, primary staff such as associates and tipstaves are not “assigned” or allocated to judges in the usual sense of those terms.¹² Rather, judicial officers select the staff who will work directly with them, subject perhaps, to limitations that may vary according to the court or tribunal concerned. We therefore considered all processes whereby staff come to work in a primary relationship with a judge, including cases of allocation, personal selection by the judge, or otherwise.
13. Paragraph (b) refers to “appropriate training for judicial officers and CSV managers on their respective responsibilities for the supervision of staff”. The scope of this inclusion appears to be narrowly confined, given that sexual harassment training more broadly, or “sexual harassment, gender inequality and discrimination training”, is already dealt with for CSV staff and contractors under Recommendation 12. Recommendation 13 deals with an education program on the nature, drivers and impacts of sexual harassment, gender equality and discrimination for existing and newly appointed judicial officers to be implemented by the Judicial College of Victoria. Recommendation 13 is potentially related to but distinct from paragraph (b) of Recommendation 4. As education and training related to sexual harassment for both CSV managers and judicial officers are dealt with elsewhere in the recommendations, read literally, Recommendation 4, paragraph (b) might contemplate only training on the supervision of staff that is not related to sexual harassment. That conclusion, however, appears inconsistent with the wider context of the Szoke Report and the apparent focus of Recommendation 4.
14. Whatever the scope of paragraph (b), our initial inquiries indicated that at the date of receiving our instructions (with some isolated exceptions) judicial officers in the various jurisdictions did not receive any formal training on any aspect of the supervision of or interactions with, any staff. As discussed below, the situation changed during the course of the review. During the course of 2022, the Judicial College of Victoria devised and began to implement, training sessions related to sexual harassment for judicial officers. In particular, the Judicial College of Victoria has offered classes to judicial officers (commencing with judges of the Supreme Court of Victoria) on preventing and addressing sexual harassment, including “customised” scenarios and targeted hypotheticals with options

¹² As to the relatively new arrangements in the Magistrates’ Court concerning the assignment of “Court Officers”, see [314]-[318] below.

for feedback, and bystander training “leveraging peer to peer learning”. Other relevant topics and classes for the judicial officers of all Victorian courts and VCAT are, at the time of writing, being devised and implemented.¹³

15. As to the training of CSV managers, we found that CSV managers appeared to have a good understanding of the fact that it is the role of CSV, as employer of judicial staff, to supervise those staff, even where their day-to-day tasks are performed at the direction of a judicial officer. Several CSV managers we spoke with described having attended training sessions which included discussion of how best to respond to sexual harassment-related scenarios. We have also been informed that in the 2021/2022 financial year, all managers were required to complete two half day sexual harassment training sessions provided by an independent specialised training provider, and that in the 2022/2023 financial year all managers will be required to complete refresher sexual harassment training.
16. The managers with whom we spoke appeared well-aware of the risk factors of sexual harassment and goals in addressing sexual harassment of court staff. In addition, we heard that contact officers (some of whom have substantive roles within CSV which involve the management or supervision of staff) undergo training which includes sessions run by the Victorian Equal Opportunity and Human Rights Commission (“VEOHRC”).¹⁴
17. However, as discussed below, when we interviewed the associates and other court staff, it appeared that few considered the supervision by CSV managers to be comprehensive or effective. Moreover, some judicial staff considered that essentially, they worked at the direction of the judge, and their employment by CSV was in some respects a formality.

¹³ At the time of completion of this report, the CEO of the Judicial College of Victoria provided the following update: “During 2022, the Judicial College of Victoria has offered education sessions to judicial officers (commencing with judges of the Supreme Court of Victoria and the County Court of Victoria) on preventing and addressing sexual harassment. This training starts with forums for facilitated discussion and awareness-raising, including ‘customised’ scenarios and hypotheticals with scope for feedback. The sessions to follow range from bystander training; understanding the complaints and resolution process across the jurisdictions, CSV and the Judicial Commission; assistance with managing employees in the workplace and hearing about the experiences of close staff; to engagement with the roles of changemakers and male allies. Developed with enduring cultural change in mind, this education aims to provide practical strategies for contemporary workplace leaders. Its leverages peer to peer learning among judicial officers to build active engagement and investment in maintaining a safe workplace.”

¹⁴ At the time of completion of this report, CSV provided the following update: “All managers were required to complete two half day sexual harassment training sessions provided by an independent specialist training provider in the 2021/22 period. In 2022/23 all managers are required to complete refresher sexual harassment training. Contact officers have their initial training with VEOHRC and thereafter quarterly sexual harassment training with an independent specialist training provider, they also attend regular network meetings and in July 2022 received specific training in relation to bullying again by an independent specialist training provider.”

These perceptions relate more to the nature of judicial work and the relative lack of power of CSV managers *vis a vis* judges rather than to inadequacy in the training or performance of the managers.

18. The ambit of paragraph (c) may be arguable as the reference to “the quality and scope of the induction process as it relates to sexual harassment” is not limited to the induction of CSV staff. Informed by context, we have taken paragraph (c) to extend to the induction of judicial officers.
19. The ambit of Recommendation 4 is also debatable due to the many potential overlaps with a significant number of other recommendations. In some instances, the Recommendation 4 review necessarily requires at least peripheral treatment of matters (eg training) that are the principal subject of an independent recommendation. In other cases, consideration of issues that are primarily to be dealt with under other recommendations cannot be entirely excluded from the Recommendation 4 review. For example, the reference to “processes for identifying, addressing and responding to sexual harassment perpetrated against judicial staff” in paragraph (g) of Recommendation 4 appears to overlap with at least Recommendation 2(f) and Recommendation 9, which concern avenues for reporting sexual harassment.
20. We explored these issues further in a conference with Dr Szoke during the course of preparing this report. Dr Szoke indicated that the drafting of Recommendation 4 was relatively flexible, rather than deliberately restrictive, given the prevailing uncertainties. Accordingly, where meaningful treatment of aspects of our reference required it, we considered, to the extent necessary, topics under other Recommendations.
21. A second challenge is that the Recommendation 4 review depends on accurately ascertaining the current factual background, terms and conditions of recruitment and working conditions in the various relevant courts and VCAT. Because each jurisdiction is in a different stage of transition with respect to its approach to sexual harassment risk factors, it was difficult to describe with confidence a fixed current situation in each court and VCAT. Changes had been made, are in the process of being made, are being considered, or are in the pipeline, as each court or tribunal attempts to respond to the Szoke Report. The courts are still responding, albeit not uniformly or in the same timeframe. Some proposed changes depend, for their formulation and implementation, on still other changes that may be made.
22. Therefore, in the course of preparing the report, some initial descriptions of the *status quo* were overtaken by interrelated changes being implemented within a relatively short space of time. Accordingly, it was necessary to revise or qualify them.

23. Thirdly, the five Victorian Courts and VCAT have significantly different structures and conditions of work. The sheer number of the courts, and the number of different categories of officers or personnel within them we needed to interview or consult, required us to undertake a large number of conferences.
24. Fourthly, pandemic conditions applied strictly at the commencement of the review and have subsequently been maintained at least in part. Therefore, a great many of the conferences and interviews to date were conducted virtually, with the attendant restrictions, inconveniences, and possible impediments to free communication.
25. Fifthly, there are a plethora of new Australian reports, seminars, reviews and discussion papers potentially relevant to the issues subject to review. A large quantity of directly relevant American material on sexual harassment in the judiciary has also relatively recently been produced. The volume of relevant and emerging materials was substantial and demanding. However, it appears, at this stage of our research, that the majority of the published material focuses on recognition of the problems, causal analysis and aspirational statements. Guidance on concrete practical measures, which is the focus of our task, is much less common.
26. Sixthly, there is a lack of clarity about what constitutes sexual harassment, which necessarily complicates systemic attempts to prevent, reduce or appropriately address it, in this and other contexts. The legislative tests pose difficulties. The body of case law is evolving. There are few comprehensive Australian legal texts or commentaries which address the topic of sexual harassment.¹⁵
27. In particular, in identifying sexual harassment there are many grey areas and it is frequently difficult to draw the line in a rapidly transitioning context. It can be said, however, that the reach of sexual harassment claims is expanding. Conduct which once would probably not have been found to contravene the statutory prohibitions is now more likely to do so. Further, some conduct which would once have been seen as acceptable or at least tolerated by the community is now seen as unacceptable and culpable.
28. Seventhly, it is also clear that conduct which is sexualised and inappropriate, but falls short of sexual harassment as defined, may nevertheless constitute serious misconduct by a judge, inconsistent with maintenance of judicial office, although it does not contravene any law. We explore the relevant legal framework at [56]–[83] below, noting that it was not until 2021

¹⁵ There are texts on the topic of Sex Discrimination more broadly which have chapters dealing with sexual harassment, see, e.g. *Australian Anti-Discrimination and Equal Opportunity Law*, Federation Press (2018) 3rd ed.

that amendments were made to the *Sex Discrimination Act 1984* (Cth) (“SD Act”) which clarified its application to judicial officers.

29. Thus, at the time of the investigations of the allegations made against the three Australian judges, the position was uncertain. The independent investigation of allegations against the Hon. Dyson Heydon QC nevertheless concluded that the former judge had engaged in sexual harassment. Subsequently, the Federal Circuit Court Conduct Committee’s investigation of complaints against a judge, completed in February 2021, recommended that its findings be referred to the Attorney-General. That recommendation did not depend on a finding that the judge had sexually harassed the complainants within the statutory meaning of the term. The Conduct Committee concluded that the judge’s inappropriate sexualised conduct towards two junior women working in or associated with the legal profession rendered him unfit to continue in office, given the extremely high standards and expectations that properly apply to judges. In the case of former Justice Vickery of the Supreme Court of Victoria, it was reported in February 2022 that an investigation conducted by Kate Eastman AM SC had found that he had subjected two female associates to unwanted sexual advances, constituting sexual harassment, and that his conduct constituted a serious transgression of appropriate professional boundaries.
30. Eighthly, as discussed in detail below, we frequently relied, for information and evidence (particularly in the case of staff), on voluntary participation. The information was thus not necessarily comprehensive, could not be forensically tested, was not balanced by the accounts of the other parties involved and could reflect selection bias.
31. Ninthly, a further potential grey area was the relationship of sexual harassment concerns to consensual relationships between judicial officers and junior court staff. It has been suggested that such relationships, like sexual harassment, are based on an abuse of power, often ultimately damage the junior person, and are therefore ethically questionable.
32. We note that since we published our Progress Report, guidelines on how to manage personal relationships have been published. The guidelines resolve the current Victorian position in relation to CSV staff and judges. Particularly, the “Managing Consensual Personal Relationships in the Workplace” is a CSV guideline which aims to ensure that CSV employees are aware of, and can manage, the impacts that consensual personal relationships may have in the court workplace. The Guideline also states that “judicial officers are required to conduct themselves in accordance with Guidelines set out by the Judicial Commission of Victoria”.

33. The relevant Judicial Commission guideline, the “Judicial Conduct Guideline: Sexual Harassment” published by the Judicial Commission in February 2022, does not impose a blanket ban on consensual relationships which may develop between judicial officers and judicial staff. Indeed, the document states that “[t]he Commission acknowledges that personal relationships can occur in a workplace and take various forms, including sexual or nonsexual relationships”. The Guideline provides that judicial officers “must recognise how factors such as gender and power imbalances can impact on how people respond to unwanted sexual advances”, and that “[p]rofessional admiration, deference to a judicial officer’s position or attempts to please or be appreciated in the workplace do not amount to romantic attraction, nor indicate consent to unwelcome conduct of a sexual nature”. The Guideline requires judicial officers to declare to their head of jurisdiction “a sexual relationship with a CSV employee where there is a hierarchical working relationship and an actual, potential or perceived conflict of interest”.

METHODOLOGY

34. Our methodology focused on identifying the current practices within each court and VCAT concerning the recruitment processes and working arrangements for CSV staff who work in a primary relationship with judicial officers. This was with a view to identifying what works well, and what does not, to assist us in identifying best practice to ameliorate the risks of sexual harassment. We also conducted extensive research into the applicable legal framework and the work done in other jurisdictions, particularly the United States, into the problem of sexual harassment perpetrated against court staff.
35. Our methodology for conducting the review has been a pragmatic combination of: (a) field work and investigation to permit fact finding and narration of the *status quo* in each relevant court or tribunal; (b) theoretical research on the nature of sexual harassment; (c) the identification of causal and risk factors; and (d) comparative analyses of other jurisdictions, to illuminate optimal ways forward.
36. In summary, we commenced with interviews of human resources directors and CEOs in each court to ascertain the demographics of judges and staff and the recruitment processes for chambers and other staff. We examined the terms of employment, induction processes (including the materials, advice and counselling they receive) educational sessions, literature provided, caveats, reporting lines, accommodations, and the impressions of those working in the various courts. We also interviewed the CEO and the Content Developer of the Judicial College of Victoria. We interviewed experts who had worked in the field, conducted

investigations and or had evolved proposals, both in Australia and overseas. Some of our interviewees in turn recommended other persons whose input could assist the review.

37. We spoke to and received input from large numbers of people with relevant input, in many cases too informally to record. We spoke to judges or judicial officers in all of the courts and VCAT, sometimes via Zoom, at other times in person, both individually and in groups and both formally and informally. In some cases, the judges were approached and in other cases, they volunteered.
38. We spoke to associates, tipstaves and junior staff in the Supreme Court, County Court and Magistrates' Court both in person and via Zoom, and both individually and in groups. We also spoke with a solicitor and registrar in the Coroners Court.
39. In some cases, an individual staff member asked to speak with us (or one of us) under conditions of anonymity and confidentiality. In some cases, the interviewees found the information distressing to recount and their participation in an interview was an obvious effort. We are indebted to the many people who made the effort to meet and share their experiences, often at the cost of reliving distressing experiences.
40. We also invited the submission of written comments, whether anonymously or otherwise, from court staff in all relevant courts and from barristers at the Victorian Bar. We received 17 written submissions on an anonymous basis.
41. As the interviewees and respondents participated voluntarily, and in many cases were self-selecting, it might be apprehended that an unduly negative picture of recruitment processes and curial workplace conditions would emerge, as those who had experienced unsatisfactory conduct or conditions would be more likely to take part.
42. Many of our respondents did report concerning assessments of conditions, or their experience or observations, in particular courts at particular times. However, not all the respondents reported negative experiences. The accounts of those who did have criticisms or troubling experiences were, in most instances, impressively balanced. It was obvious that those who chose to speak to us were frequently actuated by an altruistic desire to ameliorate the conditions and experiences of court staff. Moreover, we formally interviewed only a small fraction of the past and present Victorian judicial and court personnel. Our overall impression, based on many informal communications over time, is that the majority of court staff, past and present, do not have major concerns about their experience of the court as a workplace. In particular, despite the negative experiences of some, the vast majority of associates report an overwhelmingly positive experience, both professionally and personally.

43. The information provided to us as described above has not, of course, been subject to the rules of evidence or forensically tested. It is “one sided”, in the sense that accused or criticised persons’ responses are unavailable. Nor is the information necessarily complete or comprehensive.
44. The conduct and interactions central to a review of this nature are frequently secret, unwitnessed and undisclosed. The targets and witnesses of such conduct are understandably reluctant to be identified or cross-examined. Consequently, as yet, much is hidden. Comprehensive, admissible and tested evidence is not at this time obtainable. The lack of reliable data and information makes it more difficult to understand and effectively address the problem.
45. Despite the limitations of the evidence available to a review such as the present, we have found that the highly plausible, unvarnished and detailed accounts of those who describe having witnessed or suffered from inappropriate conduct by a judicial officer, who had no apparent motive to mislead, eloquently illuminated not only the causes and patterns, but also possible preventative steps. Many of our recommendations are based on or informed by the accounts and suggestions of anonymous interviewees.
46. We maintained, throughout, a dialogue between, on the one hand, our research, literature reviews, attendance at relevant seminars and colloquia, and on the other hand, our interviews and practical investigation and inquiries.

BACKGROUND

47. Our instructor, CSV, is the employer of staff who work with Victorian judges.
48. CSV is an independent statutory body established under s 5 of the *Court Services Victoria Act 2014* (Vic) (“CSV Act”) to, among other things, provide administrative services and facilities to Victorian Courts and Tribunals and to support the Judicial Commission: CSV Act s 8. The Chief Executive Officer of CSV is empowered to terminate a judicial employee’s employment as provided in s 103 of the *Public Administration Act 2004* (Vic) (“PA Act”).
49. CSV is directed not by the Executive but by the Judiciary, through its governing body, the Courts Council, which is composed of the Chief Judicial Officers of all Victorian Courts, the President of VCAT and up to two other members possessing relevant expertise: CSV Act Part 3.
50. Importantly for our review, CSV is the employer of all Victorian court staff, including chambers staff (typically, associates, tipstaves and secretaries) who work closely with, and

are attached to, judicial officers. CSV is responsible for hiring, inducting and remunerating such staff.

51. CSV is also the entity that owes duties and responsibilities to the staff pursuant to relevant legislation, including the *Victorian Equal Opportunity Act 2010* (Vic) (“EO Act”) and the Commonwealth SD Act which prohibit sexual harassment in defined contexts, including employment, and occupational health and safety legislation such as the *Occupational Health and Safety Act 2004* (Vic) (“OHS Act”) which imposes a duty on employers and persons managing and controlling a workplace to ensure that a workplace is safe and without risks to health, including by preventing sexual harassment and responding appropriately if it does occur. This legislation is discussed in detail below.
52. All Victorian court staff are the employees of CSV. If they are “judicial employees” as defined in s 101 of the PA Act (such as associates, tipstaves or secretaries of the Supreme Court and County Court judges) they are employed pursuant to Part 6 Division 3 of the PA Act. If other court employees, they are employed pursuant to Part 3 of the PA Act: CSV Act s 36, but see also s 37 (which provides that a provision of Part 3 of the PA Act does not apply if inconsistent with the CSV Act, or if it provides for the control of an employee by the executive government). The “public sector employment principles” apply to the employment of judicial employees: PA Act, s 102(2). These are set out in s 8 of the PA Act: see also, s 7 of the PA Act, which sets out the “Public sector values”.
53. CSV court staff are not subject to the control, supervision or direction of the Premier, a minister or any other representative of the Executive: CSV Act s 37. In recognition of the separation of powers and judicial independence (see CSV Act s 4), CSV-employed staff provide administrative services necessary for the courts and VCAT to act independently, and under those arrangements, judicial officers may direct and instruct judicial and other court staff in the provision of those services.
54. In contrast to the judicial chambers and court other staff discussed above, the PA Act does not apply to judges or associate judges of the Supreme Court or County Court, or to magistrates or coroners. Section 106 of the PA Act provides:

106 Act not to apply to certain persons

- (1) Except to the extent that a provision of this Act otherwise expressly provides, this Act does not apply to a person in his or her capacity as, or to the appointment or employment of a person as—
 - (a) a judge of the Supreme Court;
 - (b) a judge of the County Court;

- (c) an Associate Judge of the Supreme Court within the meaning of Part III of the *Constitution Act 1975*;
- (d) an associate judge of the County Court;
- (e) a magistrate;
- (f) a coroner;
- ...

55. Similarly, s 16(3) of the *Victorian Civil and Administrative Tribunal Act 1998* provides that the PA Act “does not apply to a member in respect of the office of member”.

LEGAL FRAMEWORK - RESPONSIBILITIES OF CSV

56. As described above, CSV is the employer of court staff who work closely with judicial officers and tribunal members (including, among others, associates, tipstaves, trainee court officers and various registry staff). Judicial officers and tribunal members are not CSV employees. They sit entirely outside the CSV hierarchy and organisational chart. However, within each of the courts and VCAT, judicial officers and tribunal members direct CSV employees in the conduct of their roles. Indeed, the job description of many CSV-employed staff is to support a judge, or judges (or a tribunal member, or members). In practical terms, their role is to carry out the reasonable demands of that judge or tribunal member to assist the judge or tribunal member to carry out their own role. Despite being the employer, CSV will not always know what instructions are being issued to staff by the judicial officer or tribunal member, or be aware of the judicial officer or tribunal member’s conduct towards CSV staff.
57. This complicates the considerable challenges CSV faces in controlling the risks and preventing, addressing and responding to sexual harassment by judges of their chambers or other court staff, and in complying with its legal duties as employer.

OCCUPATIONAL HEALTH AND SAFETY ACT 2004 (VIC)

58. Section 21(1) of the OHS Act provides that “[a]n employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health”. The reference to “health” in s 21(1) includes “psychological health”: see s 5(1). Contravention of s 21(1) attracts a maximum penalty of 9000 penalty units for a body corporate.
59. Section 20 of the OHS Act explains the “concept of ensuring health and safety”. Among other matters, it provides that a duty imposed on a person “to ensure, so far as is

reasonably practicable, health and safety” requires the person to “eliminate risks to health and safety so far as is reasonably practicable”, or if that is not possible, to “reduce those risks as far as is reasonably practicable”: s 20(1). The section adds that in determining what is “reasonably practicable in relation to ensuring health and safety”, regard must be had to, among other things, “the likelihood of the hazard or risk concerned eventuating”, and “the degree of harm that would result if the hazard or risk eventuated”: s 20(2).

60. A working environment in which sexual harassment occurs or is at risk of occurring poses risks to employee’s health. Sexual harassment is notoriously capable of affecting both the psychological and physical health of any employees who are subjected to it. If the risk of sexual harassment is realised within a workplace, a significant degree of harm may be caused to the relevant employee.
61. As well as imposing duties on employers, the OHS Act, by s 26, imposes a like duty on persons who have “to any extent, the management or control of a workplace”. Ms Fiona McLeod AO SC in a memorandum of advice (annexed as Appendix 4 to the Szoke Report) concluded that “it is possible that [s 26] may apply to the conduct of a judicial officer”, but that much would depend “upon the precise nature of the particular workplace”,¹⁶ particularly the level of control the judicial officer in question has over their associates’ workloads and the manner in which associates perform their work. Ms McLeod added that “[w]hilst associates may also be subject to policies and procedures developed by their actual employer that does not alter the fact that judicial officers also exercise some level of control”, and that, in her view, “a judicial officer engaging in unlawful conduct would not be protected by the immunity [judicial immunity] regardless of the context of judicial activity”.¹⁷
62. The OHS Act further requires that an employer (among other matters) “monitor the health of employees of the employer”, “monitor conditions at any workplace under the employer’s management and control” and “provide information to employees ... concerning health and safety at the workplace, including the names of persons to whom and employee may make an enquiry or complaint about health and safety”: s 22(1). An employer must also “keep information and records relating to the health and safety of employees of the employer”: s 22(2)(a).
63. In addition, the proposed Occupational Health and Safety Amendment (Psychological Health) Regulations, which will amend the Occupational Health and Safety Regulations 2017, are expected to require employers to identify and control “psychosocial hazards”, and

¹⁶ Szoke Report, Appendix 4, [72].

¹⁷ Szoke Report, Appendix 4, [74].

to put prevention plans in place for such hazards, including sexual harassment, as are identified.¹⁸ The Regulations are also expected to impose reporting obligations which require an employer to “provide the Authority with a [written] report ... in respect of any reportable psychosocial complaint that the employer has received during the reporting period”. The report must include information including “a description of the workplace relationship between the persons involved in the reportable psychosocial complaint”. A copy of the report must be kept for five years.

EQUAL OPPORTUNITY ACT 2010 (VIC)

64. Section 15 of the EO Act is headed “[d]uty to eliminate discrimination, sexual harassment or victimisation”. The section applies to “a person who has a duty under Part 4, 6 or 7 [of the Act] not to engage in discrimination, sexual harassment or victimisation”: s 15(1). Relevantly, under Part 6 of the EO Act, employers have a duty not to sexually harass a candidate for employment, or an employee (s 93(1)). Section 15(2) of the EO Act then provides that “[a] person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible”.
65. In determining whether a measure is “reasonable and proportionate” for the purposes of testing compliance with the positive duty in s 15(2), a number of factors must be considered, including the size of the employer’s business or operations, the nature and circumstances of the employer’s business or operations, and the employer’s resources: s 15(6). A contravention of the duty created by s 15(2) may be the subject of an investigation by the VEOHRC: s 15(4).
66. The “Respect@Work Report” stated that “the positive duty applies to employers all the time and does not rely on an individual complaint to be made”.¹⁹ It recommended the implementation of a positive duty at the federal level.
67. Section 93(1) of the EO Act provides that an “employer must not sexually harass ... an employee of that employer”. The word “employer” is defined in s 4 of the EO Act in terms which would not capture a judicial officer.
68. Section 94(1) of the EO Act is also relevant. It provides that a “person must not sexually harass another person at a place that is a workplace of both of them”. For the purposes of that section, it is “irrelevant” whether “each person is an employer, an employee or neither”

¹⁸ The definition of “psychosocial hazard” in the exposure draft published in February 2022 includes sexual harassment as an example of a psychosocial hazard.

¹⁹ Respect@Work Report, 474.

or, “if they are employees, whether their employers are the same or different”: s 94(2). In Ms McLeod’s view, “there is scope for section 94 of the EO Act to apply” to the conduct of a judicial officer in the workplace context.²⁰

69. Section 105 of the EO Act provides that a “person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 4 or 6 [which contains the prohibitions of sexual harassment in ss 93–102] or this Part [Part 7]”.
70. Employers are also, by virtue of s 109 of the EO Act, vicariously liable for a contravention of Part 6 of the Act by “a person in the course of employment or while acting as an agent”. A judicial officer who carries out their role does not do so “in the course of employment” as an employee of CSV, or as an agent of CSV. As Ms McLeod stated,²¹ the “nature of judicial appointment by commission ... would appear to preclude a finding of vicarious liability” under the EO Act.²²

DEFINITION OF “SEXUAL HARASSMENT”

71. The generally-expressed duty in s 21(1) of the OHS Act is to provide and maintain “a working environment that is safe and without risks to health”. That duty may be contravened if the working environment poses risk to an employee’s health, however that risk arises (including where the risk arises because of sexual harassment). By contrast, the positive duty in s 15(2) of the EO Act referred to above is specifically tied to defined terms in that Act, namely “discrimination”, “sexual harassment” and “victimisation”.
72. Section 92 of the EO Act defines “sexual harassment” as follows:
- 92 What is sexual harassment?
- (1) For the purpose of this Act, a person sexually harasses another person if he or she—
- (a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
- (b) engages in any other unwelcome conduct of a sexual nature in relation to the other person—
- in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

²⁰ Szoke Report, Appendix 4, [33].

²¹ in her advice annexed to the Szoke Report.

²² Szoke Report, Appendix 4, [46].

73. This definition is substantially identical to the definition of “sexual harassment” in s 28A of the SD Act.
74. Finally, even conduct that may not formally satisfy the legal definition of sexual harassment may nevertheless constitute sexual harassment in the sense that phrase is colloquially understood. Further, conduct that falls short of meeting the legal definition may nevertheless carry the risk of harm to the target and devastating sanction to the perpetrator, as well as reputational risk to Victorian courts and VCAT. As discussed above, such conduct on the part of a judge may also justify the conclusion that he or she is unfit to hold office.

OTHER COMMONWEALTH LEGISLATION: RECENT AMENDMENTS TO THE *SEX DISCRIMINATION ACT 1984* (CTH)

75. In 2021, the federal Parliament passed the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*. Among other things, the Act implemented several (but not all) recommendations of the Respect@Work Report, including that the SD Act be amended to ensure that “sex-based harassment” be expressly prohibited. Section 28AA(1) of the SD Act now provides:

28AA Meaning of harassment on the ground of sex

- (1) For the purposes of this Act, a person harasses another person (the **person harassed**) on the ground of sex if:
- (a) by reason of:
 - (i) the sex of the person harassed; or
 - (ii) a characteristic that appertains generally to persons of the sex of the person harassed; or
 - (iii) a characteristic that is generally imputed to persons of the sex of the person harassed;the person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and
 - (b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

76. There is no directly analogous provision to s 28AA under the Victorian EO Act. However, some cases that would constitute harassment on the ground of sex within the meaning of s 28AA of the SD Act might constitute discrimination on the basis of sex as defined in Part 2 of the EO Act. As stated in the Respect@Work Report in the context of complaints made

under the Commonwealth SD Act, “[i]f a person alleges that they are being harassed because of their sex, but the conduct complained of does not amount to ‘conduct of a sexual nature’ then the complaint may be assessed and accepted as one alleging sex discrimination”.²³

77. The 2021 Amendment Act also introduced a number of provisions relating to the application of the SD Act to judges. In that regard, the explanatory memorandum to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 stated that the purpose of these amendments, and others relating to members of parliament, was to “clarify that the scope of the SD Act extends to members of parliament, their staff, and judges at all levels of government”.
78. Particularly, the 2021 Amendment Act inserted the words “a person who holds a Commonwealth judicial office” into the definition of “Commonwealth employee”. A new definition of “State employee” was also inserted, which includes “a person who holds a State judicial office of the State”. The change is significant because the concept of employment under the SD Act is defined to include “work as a Commonwealth employee” and “work as a State employee of a State”: SD Act, s 4. Therefore, persons captured by that definition can infringe (for example) s 28B(2) of the Act, which provides that it “is unlawful for an employee to sexually harass ... a fellow employee or a person who is seeking employment with the same employer”, or s 28B(7) of the Act, which provides that it is “unlawful for a person (the first person) who is an employee ... to sexually harass ... a person if the harassment occurs in connection with the first person being an employee...”.
79. Further, the new s 109 of the SD Act provides that “a State employee of a State [which now includes a person holding judicial office] is taken to be employed by the State”. This will have implications for potential vicarious liability under s 106 of the SD Act. There is an exception to vicarious liability under the Act where it is established that “all reasonable steps” were taken “to prevent the employee... from doing [the relevant unlawful] acts”: s 106(2).
80. The above amendments to the SD Act were intended to bring both “judges at the federal level” and holders of a “State judicial office” “within the scope of the [SD Act] to the extent the Act applies to employment”.²⁴ Assuming that the amendments described above have that intended result, the SD Act as amended would have covered the complaints (discussed

²³ Respect@Work Report, 458.

²⁴ Explanatory Memorandum to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, [68], [96].

below) of sexual harassment made against former Justice Heydon, the Federal Circuit Court judge and former Justice Peter Vickery.

OTHER AMENDMENTS TO COMMONWEALTH LAW IN RESPONSE TO RESPECT@WORK REPORT

81. In addition to the above amendments to the SD Act, the 2021 Amendment Act included several amendments to the *Fair Work Act 2009*.
82. Particularly, Part 6.4B of the *Fair Work Act* was amended so as to permit the Fair Work Commission to make an order, if it is satisfied that a worker has been sexually harassed at work by one or more individuals and there is a risk of further sexual harassment, to prevent the worker from being sexually harassed at work by the individual or individuals: *Fair Work Act 2009* s 789FF(1). The phrase “sexually harassed at work” is defined, for the purposes of Part 6.4B, in s 789FD(2A). That provision states that “a worker is sexually harassed at work if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker”. The phrase “constitutionally-covered business” is defined in s 789FD(3) to mean a “business or undertaking” conducted by a person that is, among other things, a “constitutional corporation” or a Commonwealth authority.
83. Other amendments to the *Fair Work Act* and regulations included:
 - (a) the insertion of a legislative note in s 387 of that Act (which sets out criteria which must be taken into account considering whether an employee’s dismissal was harsh, unjust or unreasonable for the purposes of s 385 of the Act) stating that the fact that an employee has sexually harassed another person, and did so in connection with their employment, can amount to a valid reason for dismissal; and
 - (b) amending the definition of “serious misconduct” in r 1.07 of the Fair Work Regulations 2009 (which in turn provides the meaning of “serious misconduct” for the purposes of the *Fair Work Act*: see s 12 of that Act) to include sexual harassment in the course of an employee’s employment.

THE KEY CSV STAFF ROLES

84. As stated above, although it has ancillary specified inclusions of sometimes debatable ambit, Recommendation 4’s principal focus is on the recruitment and working conditions of “Court Services staff who work in a primary relationship with judicial officers...”. Although it is not expressly stated, from the wider context of the Szoke Report, we assume that the recruitment processes and working conditions should be examined with a view to:

- (a) identifying the likely prevalence of and risk factors for the sexual harassment of the relevant staff by judicial officers;
- (b) discerning possible means of eliminating or reducing the prevalence and risk factors; and
- (c) identifying the optimal means of addressing and responding to any sexual harassment of CSV staff by judicial officers if it does occur.

85. It is therefore necessary to:

- (a) define the key terms, including “judicial officers” and “CSV staff who work primarily with judicial officers”;
- (b) consider the fundamental role, attributes and conditions of tenure or employment of the relevant personnel;
- (c) identify acknowledged or potential causes of and risk factors for the occurrence of sexual harassment; and
- (d) consider the potential operation and impact of the risk factors in the context of the attributes and functions of the persons involved.

86. We note that the literature on causes of and risk factors for sexual harassment in employment is varied and voluminous. We consider this separately below.

87. As noted above, the six jurisdictions presenting under review vary greatly, including in relation to the attributes and role of staff who serve judicial officers. Only the Supreme and County Court currently retain traditional associates and tipstaves.

88. The other jurisdictions do, however, retain staff in roles and working relationships with judges that can approximate those of associates and tipstaves in relevant respects. We commence with a general discussion of judicial officers, associates and tipstaves, but subsequently consider the staffing arrangements of each jurisdiction separately.

JUDICIAL OFFICERS

89. The term “judicial officers” is defined in the Szoke Report as: “[i]ncludes judges of the Supreme Court or County Court, reserve and associate judges of the Supreme Court or County Court, magistrates, reserve magistrates, coroners, reserve coroners and judicial registrars”.²⁵

²⁵ Szoke Report, 11.

90. Judicial officers are not employees or public servants. Rather, they are appointed by the Governor in Council (on the recommendation of the Attorney-General) with secure tenure until the fixed age of retirement.²⁶ They are removable only by the Governor in Council “on the presentation to the Governor of an address from both Houses of the Parliament agreed to by a special majority in the same session praying for the removal on the ground of proved misbehaviour or incapacity”: *Constitution Act 1975* (Vic) s 87AAB(1).²⁷ A resolution of a House of the Parliament praying for the removal from office of a holder of judicial office “is void if an investigating panel has not concluded that facts exist that could amount to proved misbehaviour or incapacity such as to warrant that removal of that office holder from office”: *Constitution Act* s 87AAB(2).
91. Removal of a judicial officer by parliament has happened only once in the history of the Australian judiciary.²⁸ It is thus an extraordinarily rare event. Whilst in office, judges wield enormous power in applying and construing the law, conducting criminal and civil trials, indicating the need for and nature of law reform, liaising with law reform and academic bodies and influencing legal and public discourse through their writings and decisions. A judge’s exercise of office is likely to affect the property rights, personal freedoms and civil liberties not only of individual litigants, but of the entire community.
92. Judges are generally not, in the performance of their judicial role, subject to the authority or direction of any person or entity, as even the head of each jurisdiction is not empowered to order or direct them, save in relation to some specific issues.²⁹ The almost complete freedom from external control is a necessary concomitant of judicial independence. In practice, however, as seems well-recognised, most judges are profoundly aware of the dignity and responsibilities of their office and the public trust reposed in them. They are aware of community expectations of the highest standards of personal conduct and probity, and the majority aim scrupulously to live up to the ideals and expectations. Judges typically voluntarily comply with the requests of the Chief Justice or the collective decisions of the

²⁶ There are exceptions. For example, coroners appointed under s 94 of the *Coroners Act 2008* hold office for a period of five years unless reappointed: s 94(3). Judicial registrars of the Supreme Court are appointed for a period not exceeding five years: *Supreme Court Act 1986* s 113F.

²⁷ For the purposes of that provision, “judicial office” is defined in s 87AAA of the *Constitution Act 1975* (Vic).

²⁸ In 1989, the Governor of Queensland cancelled Justice Angelo Vasta’s commission as a Judge of the Supreme Court of Queensland following a motion of the Queensland Parliament due to behaviour which, in the opinion of a Commission of Inquiry, warranted his removal from office. See also Geoffrey Nettle, “Removal of Judges from Office” 45(1) *Melbourne University Law Review* (advance copy).

²⁹ See, eg, *Supreme Court Act 1986*, s 28A: Chief Justice may direct judicial officers, or any judicial officer, to participate in specified professional development or continuing education and training activity.

judges in council. They are in practice also very responsive to peer advice, suggestion, approval or subtle rebuke within the tight knit, collegiate community of their respective courts.

93. Although the Chief Judge of each Victorian jurisdiction may direct a judge to stand down pending an investigation of alleged misconduct and may direct judges to undertake some professional development activities, there is no other basis — apart from limiting the cases that are listed before that judge or ensuring that no cases are listed before that judge — for directing or coercing a judge. Nor is there an obvious means of disciplining or sanctioning a recalcitrant judge who engages in inappropriate conduct that falls short of justifying the ultimate, but virtually never invoked process of removal by Parliament. We are not aware that such a situation has ever arisen in Victorian courts.

JUDICIAL DEMOGRAPHICS AND BACKGROUNDS

94. Judges of the Supreme and County Courts (who are the only judicial officers served by associates and tipstaves) are typically of mature age (the youngest appointments may be in their 40s but many are in their 50s and some appointees commence at over 60). They are usually high achieving, highly regarded barristers with wide experience, established reputations and significant professional standing who command significant personal respect.
95. In the Supreme Court and County Court, modern appointment practices have made significant inroads into the traditional judicial stereotype of an elderly Anglo Saxon male barrister. However, although the current Chief Justice and the President of the Court of Appeal are both female, the majority of Supreme Court judges are male. As at the time of writing, 38% of Supreme Court judges, 44% of Associate Judges and 45% of Judicial Registrars were women (comprising 40% of Supreme Court judicial officers). Most judges are recruited from the Victorian Bar. There are increasing numbers of solicitors or judges who had other legal roles.³⁰ Practice as an advocate provides excellent preparation for a judicial role. However, barristers are sole traders who frequently have no full-time staff. Even very senior barristers typically have only a single personal assistant. In contrast to solicitors, barristers are unlikely to have any experience of systematically managing staff, or much familiarity with modern workplace standards, regulations and processes.
96. The judges of the County Court now consist of almost equal numbers of men and women. Many County Court judges are also recruited from the Victorian Bar.

³⁰ The Supreme Court of Victoria currently has four judges and seven associate judges who were solicitors or had legal roles, other than as a barrister, immediately prior to their appointment.

97. As yet, on cursory examination, it would appear that the judiciary of neither court reflects marked ethnic or cultural diversity. The judges are also, necessarily, an unusually or even uniquely mature workforce, as they commence their judicial career at ages when many members of the community are well-established in their workplace or even verging on retirement. This is unavoidable, given the essential requirement for long experience, wide learning and proven skill.
98. In the Magistrates' Court, Children's Court and Coroners Court, the judicial officers tend to be younger, are of much more diverse professional backgrounds and proportionately include more women. This diversity is even more pronounced in relation to VCAT "ordinary members" who are not required to be legally qualified: *Victorian Civil and Administrative Tribunal Act 1998*, s 14(2).
99. Moreover, despite the fundamental common features of autonomy and judicial independence, as discussed, there are many differences between the practical roles, status and working conditions of judicial officers working in the six Victorian courts and tribunals. They include:
- (a) jurisdiction – and the judicial officer's consequent relative status and authority within the context of an inescapably hierarchical system;
 - (b) the predominant nature of the court's business / work;
 - (c) the working conditions for judges and staff;
 - (d) demands of the position and hours of work;
 - (e) travel requirements and conditions;
 - (f) the size of the workforce in the court as a whole;
 - (g) the size of the judges' dockets and the extent of their other responsibilities;
 - (h) the number of staff assisting judges, in what capacity, for what period, on what terms, how they are assigned or selected, and on what basis are they redeployed or terminated;
 - (i) the age, background and experience of the staff assisting the judicial officers;
 - (j) the accommodations in the court and the physical working environment; and
 - (k) the administrative structure and reporting lines of the court.

CSV STAFF IN PRIMARY RELATIONSHIP WITH JUDICIAL OFFICERS

100. As noted above, the scope of the reference to "Court Services staff who work in a primary relationship with judicial officers..." in Recommendation 4 may be debatable. There is no

definition of “a primary relationship with judicial officers”. Recommendation 4’s language is not precisely the same as that of the definition of “judicial employees” in the PA Act. It echoes that definition, but is wider and more flexible. However, the Szoke Report’s genesis in the disclosure of sexual harassment of associates by a high ranking judge, and the recommendation’s reference to “including associates, tipstaves and clerks” indicates that the principal, albeit not exclusive, focus is on traditional chambers staff (associates and tipstaves) who work exclusively with and for, and are attached to, a nominated judge throughout their service. A secretary, research assistant or executive assistant might in some cases work exclusively for a judge, but this is less common, even in the Supreme Court and County Court. Such staff, in our view, are within the scope of Recommendation 4 although not within the statutory definition of “judicial employees”.

101. Further, there are other categories of CSV court staff who, although not attached permanently or full-time to any particular judge, work principally for and have significant contact with, a number of judges simultaneously, or work closely with a judge for certain periods. Working on that basis would bring such staff (although not falling into the categories of associate, tipstaff, clerk or secretary) within the scope of Recommendation 4.
102. It is clear, however, that associates and tipstaves form the most identifiable occupational groups within the scope of Recommendation 4. While (for reasons discussed below) tipstaves do not pose obviously pronounced vulnerabilities to sexual harassment by judges or other persons within a court, associates, as a professional group, represent a particularly, even uniquely, at risk occupational cohort. Indeed, for reasons discussed in detail below, relatively recent but significant changes to the recruitment of associates and consequent changes in the demographics of that population (while laudably substituting competitive merit-based selection over potential nepotism) may have magnified their vulnerabilities to the risk factors for sexual harassment in curial employment.

THE ROLE OF ASSOCIATES AND TIPSTAVES

ASSOCIATES

103. The traditional role of an associate is of very long standing and appears to be constant across both national and international jurisdictions.
104. The County Court’s website states that the “responsibility of an associate role is to provide operational, administrative and technical legal support to a judge both in chambers and in court.” This is a generic but, so far as it goes, an accurate, summary of the associate’s role.

The role of an associate might also be described in broad terms as to carry out tasks as directed by their judge, and to assist their judge in the performance of their judicial functions.

105. The role of an associate will typically include performing legal research as directed, proofreading rulings and judgments, and assisting the judge during hearings, including by ensuring that the judge has access to relevant materials. The role might also include assisting the judge with extra-judicial tasks that are nevertheless connected to the judge's role, such as speeches to the legal community, liaising with external committees, helping with academic commitments, attending meetings and events with the judge and giving the judge feedback and input on cases, writings and other relevant matters. In some circumstances, associates may exercise minor administrative powers under Rules of Court.³¹
106. Further, the duties of an associate to a judge who hears criminal trials will include assisting in empanelling a jury, arraigning the accused and taking the jury's verdict. Particularly where a judge does not also have a tipstaff on their staff, an associate might also swear-in witnesses, or act as a jury-keeper.
107. In our experience, associates often perform supportive "housekeeping" jobs for judges, including serving coffee, collecting necessities, and performing minor errands. In chambers, where tipstaves are employed, tipstaves are more likely to perform such extra-legal tasks. We heard that associates usually accept the need to perform some "non-legal" chambers tasks for the judge, but may feel aggrieved if too many "menial" chores are expected, particularly if demanded ungraciously
108. A significant part of the associate's role, which may not be readily apparent to anyone who has not been, or worked closely with, a judge, springs from the isolation of a judicial officer. In order to avoid perceived conflicts of interest, or inconvenient exchanges that could lead to questions about judicial impartiality or preconceptions, judges, by convention, tend not to communicate directly with the profession or the public. During a trial, it may be awkward or inconvenient for judges to encounter litigants or witnesses in a coffee shop or similar premises near the court. Judges generally refrain from publicly expressing views on most issues, particularly potential controversies. Judges therefore rely on their associate to answer the chambers telephone and to email litigants and interested parties. The associate routinely communicates with members of the legal profession concerning the conduct of matters listed before the judge. The associate is in effect an intermediary between the profession and the judge.

³¹ See, eg, Supreme Court (General Civil Procedure) Rules 2015, r 34.05 (Associates may adjourn directions hearings).

109. The above is a general description of the types of tasks an associate will ordinarily undertake. However, as each judge may have different expectations of their associate and different understandings of the proper role of an associate, the role of one associate may differ significantly from another associate, even within the same court. Significant latitude has traditionally been extended to judges to define the role of their associate in the way they see fit. For example, some judges might invite their associate to prepare a first draft of a judgment, while others might not. Some judges might ask their associate to assist them with matters unconnected to their judicial office (for example, by arranging restaurant reservations or private travel for the judge), but some judges might view that as inappropriate.
110. The quality of the personal interactions between judges and associates also varies. Some judges are personable, friendly and very informal. Other judges prefer to maintain more professional distance and may not, for example, invite an associate to use their first names. This issue was raised in our study, as some suggest that a more professional and formal protocol is protective against sexual harassment.
111. Despite the difficulties involved in attempting to define a “typical” role of an associate, for all the reasons described above the role necessarily involves a close working relationship and the maintenance of the judge’s confidence. The judge, the associate and the tipstaff typically spend many hours each day working together in court and the same or closely connected chambers, often under pressure from deadlines, urgent applications or stressful matters. They may overhear personal telephone calls and observe each other’s personal and relatively private interactions. As Dowsett J stated in *Hurley v McDonald’s Australia Ltd*:³²

The relationship between associate and Judge is routinely described as being one of confidence. There are, I believe, substantial reasons why a Judge would expect an associate to maintain confidentiality concerning knowledge derived during his or her employment. The associate may have knowledge of the Judge’s personal affairs, of relationships between Judges in the same court and of the Judge’s views concerning individual practitioners, other Judges, public issues (including political issues) and other sensitive matters which, if they became public, might embarrass the Judge or detract from the capacity to fulfil his or her functions. It might also be embarrassing if knowledge of particular idiosyncrasies were to be disclosed.

112. Accordingly, it is unsurprising that many judges have reported that a very important criterion when selecting an associate or tipstave is whether they are likely to get on well together, share trust and feel comfortable working in each other’s company.

³² (2000) 101 FCR 570 at [59].

ROLE OF TIPSTAVES

113. Unlike Associates who are now generally drawn from a younger highly-educated demographic (and who remain at the court for a fixed term), tipstaves in Victorian courts tend to be recruited from an older cohort, and tend not to have any legal qualifications.
114. We also heard that the tipstaves of both the Supreme and County Courts have remained, unusually for the present era, almost exclusively male, and that there have been occasional reports of “every day sexism” associated with the cohort.³³
115. Tipstaves tend to be employed on a long-term basis. Correspondingly, their role is more administrative and security focused in nature. It is not focused on legal research and analysis like that of an associate.
116. A tipstaff assigned to a particular judge may assist generally in maintaining the judge’s chambers and carry out tasks for the judge, including tasks which are not necessarily directly connected with the judge’s judicial functions. In court, the role of the tipstaff includes ensuring the smooth conduct of the matter before the judge, including by opening the court, escorting the judge, maintaining security, order and decorum, managing any disruptions within the courtroom, operating in-court technology (and particularly during the COVID-19 pandemic, setting up and overseeing Zoom or Teams hearings) and liaising with the parties to ensure that any audio-visual recordings can be played without technical issues. The tipstaff will administer oaths and affirmations to witnesses and jurors. In a jury trial, the tipstaff will be responsible for the logistics of managing the jury, communicating with the jury about administrative matters, and passing any notes from jurors to the trial judge.

BRIEF HISTORY OF THE RECRUITMENT AND COMPOSITION OF VICTORIAN CHAMBERS STAFF³⁴

117. As at 2002, the Supreme Court protocol (which also applied to the County Court) for recruiting a trial judge’s chambers staff, comprising an associate and tipstaff, was traditional and longstanding. Judges might know of suitable candidates or ask other judges or staff for suggestions. Alternatively, they consulted a sometimes outdated, looseleaf compilation of applicants who had written to the Court seeking positions, which was kept in the offices of the Chief Justice’s Associate.

³³ See also below at [123].

³⁴ The account is based on the recollection of Julie Dodds-Streton, who was appointed a judge of the Supreme Court of Victoria in 2002 and to the Court of Appeal in 2007.

118. The choice of an associate and tipstaff, their age, gender, qualities and qualifications, were entirely left to the judge. Further, whether there would be any, and if so what, interviews, how any interviews would be conducted, who would be present and what questions would be asked, were also entirely left to the discretion of the judge. The most important consideration was that the judge could repose confidence in, and feel comfortable with a staff member with whom he or she was to work so closely and on whom the judge would greatly depend for many interactions with the profession, litigants and the public.
119. According to the traditional practice, the associate and the tipstaff were formally employed by the judge, pursuant to a contract under which their employment was tied to the judge personally. Should the judge retire or die, their employment theoretically would cease, although in practice, another position in the court might be found for them.³⁵ Although the associate and tipstaff were employed by the judge, their salaries were government funded.
120. At this time, the roles of the associate and the tipstaff were fundamentally the same as at present, as described at paragraphs [103]-[116] above. Although it was then relatively rare, some judges had two associates rather than an associate and a tipstaff. In such cases, the associates performed the tipstaff's functions in court and carried out minor services (such as running errands or fetching lunch).
121. There was no requirement that associates possess legal qualifications or experience. It was not uncommon for judges to have associates with no legal qualifications. Similarly, it was not uncommon for associates to be personal relations of the judge. Examples of close relatives working as associates included the brother, son, daughter, sister and even a wife of the relevant judge. In other instances, the associate might be the child of a family friend, colleague, or a more distant relative. In other cases, judges might employ each other's children.
122. The ages and professional background of the associates was quite varied. A majority were young law graduates (albeit not necessarily competitively selected on merit) who retained the position for approximately two years. However, there was also a not inconsiderable number of older associates in their 50s, 60s, 70s and even 80s, who had retired from their primary careers. They included³⁶ a retired banker, chemist, headmaster and several lawyers who had transitioned from more demanding roles. Many of those associates were permanently employed and worked at the court for years, ultimately retiring only with "their" judge. Some interviewees do not recollect a marked imbalance in the number of male and

³⁵ From the early 1990s, statutory provisions established departmental employment, but for a considerable time thereafter there was little emphasis on the formal change.

³⁶ in Julie Dodds-Streeton's experience.

female associates in the early 2000s, but records indicate that a majority of associates were female.

123. Tipstaves, similarly, were not competitively selected and there were no particular prerequisites for the role, other than the capacity to carry out the necessary functions. Tipstaves nevertheless in practice tended to be retired prison, custodial or military personnel. They were exclusively male and, (like the judges) constituted (having retired from their primary careers) an older demographic. There have been suggestions that their military background predisposed tipstaves not to question a judge's directions. Similarly, some informants indicated that some tipstaves (and in the past, older male associates in at least one court) tended to engage in sexist "banter". However, that was not a uniform perception. The tipstaves' remuneration was said to be modest, which was apparently justified on the ground that it was merely supplementary to a military or similar pension.
124. The tipstaves appeared to be a close-knit professional cohort within the Court. They were permanently employed and many worked at the court, often for the same judge, for many years.
125. From personal observation, the tipstaves in the Supreme Court, usually older men who were experienced and continuing employees, often had very amiable, strongly supportive and even protective relationships with their judge's associates, including the young female associates. Thus, while the associate and tipstaff model prevailed, the judge, associate and tipstaff maintained a close tripartite professional relationship. At that time, there was no advertising for associates or tipstaves. Indeed, a new judge made an attempt to advertise for an associate, in 2000 or 2002, but was informed by senior judges that it was not an accepted or correct practice.
126. The above relates to chambers staff in the trial division. A similar position prevailed in the Court of Appeal, save that the appeal judges shared a tipstaff's services between three or four judges, as there were no juries or trial work.
127. Traditionally, judicial officers of the Magistrates' Court, Children's Court, Coroners Court and VCAT have worked without dedicated associates and tipstaves. We discuss the current position in those courts and VCAT below.

THE AMERICAN CLERKSHIP HIRING PROCESS AND WORKING CONDITIONS – RISKS AND INCENTIVES

128. The legal clerkship system — particularly as it exists in the federal court system in the United States — is highly relevant to the present review, as the Victorian associateship model has,

of recent years, tended to replicate it. Some features of the American system heighten the risk of sexual harassment of chambers staff. It is useful to identify those elements to see if they can be modified in the Australian model.

129. In *On Sexual Harassment in the Judiciary*,³⁷ Litman and Shah (writing after highly publicised allegations that two eminent American judges sexually harassed law clerks) describe the American judicial clerkship, which broadly corresponds to associateship in Australia. The authors also identify “perverse incentives” that create an environment conducive to the sexual harassment of American Federal Court clerks.
130. It appears that although there are variations between courts, American “Judicial law clerks” share basic job functions of researching legal issues, distilling briefs filed by the parties and helping their judge come to a legal conclusion. Clerks may or may not draft opinions. Some are permanent but most are hired on an annual basis. Clerks typically work in chambers with their co-clerks.
131. According to the authors, clerkships provide the following personal and professional benefits for clerks:
 - (a) they help determine outcome of cases, as opposed to carrying out junior tasks in law firms;
 - (b) they improve their writing and analytical skills;
 - (c) they understand procedure;
 - (d) they acquire behind the scenes insights;
 - (e) they learn from and are mentored by judges;
 - (f) they gain a sense of what constitutes good and bad advocacy; and
 - (g) they gain unparalleled access to the legal world.
132. The authors observe that the clerkships are prestigious due to the secrecy of the court’s internal workings. Internal operating procedures, including case assignment, how judges “vote”, how they draft opinions, which judges are respected by their colleagues, how particular judges are persuaded and what their temperament is – are all inaccessible to outsiders.

³⁷ Leah M Litman and Deeva Shah, “On Sexual Harassment in the Judiciary” (2020) 115 *Northwestern University Law Review* 599.

133. Litman and Shah also identify some downsides of clerkship, including its poor pay rates (which deter poorer students), missed vacations, lack of choice of their co-clerks (with whom clerks work in close proximity) and a possibly demanding or abusive judge.
134. Most American law clerks apply soon after graduation or within a few years after, relying on their law school record, professors' references and writing samples.
135. Sought after districts and circuits receive hundreds of applications. Law schools may have clerkship committees to help students apply. Shortlisted candidates are interviewed by the judge and the other clerks, in a style that is left up to the judge.
136. Litman and Shah state that clerkships provide access to the legal profession and the secrecy surrounding them “replicates the existing systems of inequality in the profession”. Students know that they will interact with the powerful known professionals and their “reverence seeps into the clerkship application process”.³⁸ As secrecy and confidentiality surround the post, some clerks are uncertain whether they can disclose misconduct or harassment.
137. Litman and Shah argue that sexual harassment in the legal profession is not just due to the acts of individuals. Nor is only the perpetrator culpable. Others contribute to it by recounting uncritically laudatory stories or anecdotes about judges that promote undue deference and idolising. Victims of abuse fear to come forward as bystanders might blame them. It is also difficult for people to believe that an adulated judge would be guilty of misconduct. Further:
- (a) The legal profession prizes access to judges. Clerkships can be a professional proxy to determine employment eligibility. This can prop up and reward problematic behaviour. Other judges assume that if a particular judge hired a clerk, they could be Supreme Court material.³⁹
 - (b) There are financial incentives, because law firms offer significant bonuses to Supreme Court clerks —this is payment for access and insight into chambers, which law firms can sell to prospective clients.⁴⁰
 - (c) There are institutional incentives — law schools prize clerkships in recruiting academics they have worked with respected jurists. A clerk's connection to the judge is a professional tool, as they are “in” and have a circle of privilege, a network and connections. Access to judges and relationships with judges are professional assets.⁴¹

³⁸ Litman and Shah, 615.

³⁹ Litman and Shah, 623.

⁴⁰ Litman and Shah, 624.

⁴¹ Litman and Shah, 624.

138. Litman and Shah conclude that although the benefits from clerking are not inherently sinister they prop up the clerkship system and deference to judges, irrespective of their behaviour. The clerkship process also entrenches some of the most problematic parts of an already unequal profession.⁴²
139. The American clerkship process also outsources job selection functions to other people, including professors or other judges. This entrenches power structures through “tastemakers”. Litman and Shah refer to the well-known case of the husband and wife Yale professors, Jed Rubenfeld and Amy Chua, who claimed to influence whether applicants obtained or were denied Supreme court clerkships. Amy Chua, a law professor at Yale, had an acquaintance with Justice Brett Kavanaugh (who in turn was a clerk and close associate of Judge Kozinski, discussed below). Professor Chua was heavily criticised for allegedly advising female applicants for clerkships with Justice Kavanaugh to dress attractively and in particular styles. Ultimately, her spouse, Professor Rubenfeld, was accused of sexually harassing female students. His behaviour was variously described as “borderline”, “creepy” or “sexual harassment”. In August 2020, Rubenfeld, who denied the allegations, ceased to teach.⁴³
140. Litman and Shah argue that the toleration of sexual harassment is self-replicating, because the effect of the above is that students who put up with such behaviour or do not speak out themselves secure prestigious posts, succeed and become powerful down the track. Thus, the hierarchical system “self-replicates” by promoting people with the same views. There is mimicry and assimilation, as they adapt to the offender’s ways. The incentive structures of the clerkship system, and people’s implicit bias towards others like themselves, produces assimilation. There is no countervailing incentive for students to speak out.⁴⁴ Thus, the incentive system replicates hierarchies within the legal profession.⁴⁵
141. The authors state that people “who are likely to speak out against sexual harassment are frequently siphoned off from the pool of clerkship candidates.”⁴⁶ Silence “reinforces the lack of support for future victims”⁴⁷ Future victims feel isolated because they have not seen other victims come forward.

⁴² Litman and Shah, 625–6.

⁴³ Litman and Shah, 626–9.

⁴⁴ Litman and Shah, 628–9.

⁴⁵ Litman and Shah, 630.

⁴⁶ Litman and Shah, 632.

⁴⁷ Litman and Shah, 632.

142. American Federal Court clerkships are much more institutionalised and professionalised than traditional Australian associateships as described above. There is a long-established, highly competitive (albeit still potentially nepotistic) process for securing a clerkship. A clerkship has a significant dollar value that can vary according to the identity of the judge. We have been informed that some clerkships can add hundreds of thousands of dollars to the candidate's salary in the profession. A judge may accumulate a large, close knit, influential network of former clerks. There remain significant distinctions from the current Victorian position. We are not aware of influential networks of former clerks, salary premiums or active recruitment inputs by law schools in Australia. Nevertheless, the Victorian approach is (as an incident of the attempt to eliminate nepotism) moving closer to the American Federal clerkship system. As stated, this is important because the American Federal clerkship system poses significant systemic and institutionalised risks for law clerks, which Victorian courts may yet, by timely consideration, avoid.
143. It is clear that within a relatively short space of time, significant changes have occurred in the recruitment of Victorian judges' associates. The judge's untrammelled discretionary power to award the position, and his or her status as an employer, have disappeared. The change has been driven by a perception that a system of recruitment permitting nepotism and privileging inside knowledge was unacceptable in a modern public employment context.
144. A logical consequence of a shift to merit-based competitive recruitment is that all associates are required to have formal legal qualifications appropriate to the role, by which competing candidates can be objectively compared and measured. That competitive process has inevitably led to recruitment of students with the best results from the most prestigious law schools. Despite the relatively modest remuneration, the offsetting benefits are uniquely valuable to those embarking on a legal career. Top law graduates with years of professional experience are unlikely to apply, as in their case, the offsetting benefits are not as great. Thus the well-qualified candidates are almost exclusively young and/or professionally junior.
145. Whilst such candidates were always a significant proportion of the associates in a court, they now almost exclusively constitute that cohort. Moreover, the judge who is the associate's functional employer, is no longer the legal employer. The American system of recruitment still appears to allow the American judge complete discretion, and nepotism remains possible. Similarly, the American associates may be slightly older as a cohort, given that they will have completed their law degree as post-graduates. Otherwise, the demographic

composition of the Victorian associate workforce in the superior courts now appears very similar to that in the USA. Exactly the same kinds of benefits and rewards (which are uniquely attractive to aspiring lawyers at the outset of their careers) thus accrue to Victorian associates. Conversely, the threats to professional advancement posed by incurring a judge's wrath also apply with unique force to this cohort.

146. The characteristics of a cohort of youthful top graduates, the high value they place on the benefits of the role and the potentially disastrous consequences of losing the judge's favour, combine a number of potent risk factors for both the occurrence of sexual harassment and the victim's unwillingness to report it. To this may be added the more general established risk factors (see below) present in the workplaces of the superior courts.
147. In summary, until recently, the system for recruiting judge's associates and tipstaves in Victoria had few rules. Many judges in practice selected their associates on merit. However, the system unfairly permitted nepotism, exclusivity and an uncompetitive "closed shop". Associates' positions, at least, were especially, if not exclusively, accessible to the well-connected, those "in the know" or extremely confident applicants who applied despite possessing no connections. The judge's absolute discretionary entitlement to award those jobs unaccountably, and irrespective of merit, was a valuable prerequisite of judicial office and hallmark of status.
148. However, ironically, this unregulated and quasi-feudal system resulted in a much more diverse associates' cohort than the current system (discussed below). There were diverse ages, diverse job experience and a number of more mature professional peers, as well as a balance between permanent and short-term staff. Nevertheless, even if the gender of the associates was evenly balanced, given that tipstaves were exclusively and judges' predominantly male, males predominated in chambers. The model of chambers staff was typically an associate and a mature male tipstaff from a military or custodial background who worked closely with the judge together.
149. The transition to a competitive, merit-based recruitment system for associates has extinguished the old nepotism and exclusions, but ironically, it has also resulted in a potentially more elitist, less diverse associate cohort that is inherently more vulnerable to sexual harassment by judges. This is reinforced by the current tendency to dispense with tipstaves and instead to employ two young, short-term legal professionals as associates.

SHOULD THE COURTS AIM TO RECRUIT A MORE DIVERSE ASSOCIATE WORKFORCE WITH MORE FLEXIBLE TERMS?

150. Victoria has rapidly moved to the American model of associateship, which has now all but replaced the more traditional one that applied a very short time ago. The move to a merit-based selection of associates and concomitant rejection of nepotism, monopolising publicly funded jobs for a privileged inner circle, is laudable. It is, however, questionable whether only high-achieving recent graduates can best fulfil the demands of the position in every case. We were informed of a perception that only top graduates of top Australian or overseas law schools can confidently apply for an associateship in the Supreme and County Courts. We question whether the move to merit-based recruitment can only be achieved at the expense of the greater demographic and professional diversity that was a strength of the old system.
151. We see no obvious reason why all associates must be young, top ranking, high-achieving law graduates from elite law schools, embarking on potentially stellar legal careers. Even in the relatively recent past, employing non-legally qualified associates did not detract from the excellence of judicial work. For example, Victorian Supreme Court judges, Justices Nettle and Buchanan, who were well-known for the excellence of their judgments, had permanent, non-legally qualified associates. Such judges highly valued the continuity and stability of their associates' service, which could not be achieved with junior associates who treated the position as a brief interlude or "stepping stone".
152. It may be that more flexible recruitment criteria could allow for the appointment of applicants who lack formal legal qualifications but possess equivalent experience or training, such as paralegals.
153. Even if the complex demands of modern litigation now require all associates without exception to be legally qualified, there is no reason why candidates in mid-career or towards retirement, should not be encouraged, or why their appointment must necessarily be short-term. In circumstances where a judge has two members of chambers staff or access to research support outside chambers, there may be scope to employ a person who does not conform to the rigid pattern of a high-achieving, short-term, junior lawyer.
154. Because the remuneration is relatively low, the majority of applicants will probably continue to be highly qualified young lawyers, as they uniquely prize the offsetting benefits of the position. It is likely, however, that there will always be some more mature candidates for whom an associateship has appeal.

155. We consulted widely with interviewees at different levels on the desirability of broadening the associates' demographic in the context of more flexible and varied terms of employment.
156. No interviewee had any objection to that proposal. Associates and junior staff uniformly indicated that they would welcome the presence of some more mature, experienced and permanent peers as an additional informal source of guidance, instruction and stability, as well as for potential recourse if concerns arose about a judge's expectations or conduct. Several judges reported their own positive experience of long-term associates who provided continuity and stable support over many years.
157. Some interviewees, including heads of jurisdiction, while not opposed in principle, doubted that judges would now wish to recruit associates who did not conform to the present model. There was reference to the judges' perception that they should, as a priority, assist in training and mentoring young lawyers at the outset of their careers. Some respondents also doubted that the current remuneration would attract more mature candidates.
158. Nevertheless, the proposal to aim for a more diversified associates cohort drew strong support from Kate Eastman AM SC, who has wide experience in the field of workplace sexual harassment.

SOME OBSERVATIONS ON EXISTING PRACTICES IN SUPREME AND COUNTY COURTS

SUPREME COURT OF VICTORIA

159. What follows is a selection of our observations of practices in the Supreme and County Courts concerning the recruitment, role and working arrangements of associates and other staff in primary working relationships with judges. As described above in this report, what is set out below is subject to change in a rapidly-changing environment. Our fact-finding is based on conferences with court management and human resources officers, consultations with heads of jurisdiction and feedback from the judges and employees themselves.
160. Judges of the Supreme Court have the assistance of one or two associates. Some judges may also have a tipstaff on their staff, in preference to having two associates.
161. A Supreme Court associate works closely with their judge. As noted above, the role of an associate will vary depending upon the requirements of each judge, but it includes researching points of law, proofreading judgments and liaising with members of the legal profession, as well as in-court assistance.
162. Associates are employed at the VPS3 level. The previous distinction between Junior (VPS2) and Senior Associates has been abolished.

163. There is a slight majority of female associates. This contrasts with the gender balance among judges of the Court, the majority of whom are male. Associates are typically in their twenties with little professional experience before joining the Court (although we heard that some judges prefer associates who have some post-qualification experience). The competitive nature of securing a Supreme Court associateship means that associates generally have strong academic credentials.
164. Associates are employed for a fixed term (as we understand it, that term is often 12-18 months). We heard that the employment of long-term associates is not encouraged. However, there remain a handful of longer-term associates at the Court, including in learning and development roles. We heard that other associates and court staff benefit from and appreciate having access to the expertise of those associates.
165. The administrative reporting line of associates is not to the judge with whom they work, but to their Judicial Services Co-ordinator (“JSC”). The JSC is a CSV employee who reports in turn to a Judicial Services Manager. Broadly, the role of the JSC is to manage the working relationship between judge and associate; to be a point of contact for associates; and to ensure that judges have sufficient support, including by managing workloads of CSV staff and addressing any issues which arise. Our consultations with court human resources personnel indicated that JSCs form close working relationships with associates, and that a JSC speaks with incoming associates on their first day at the Court. The conversation with incoming associates will include a description of the role of an associate and other practical matters, including making associates aware that their work fortnight is 76 hours. Court managers and human resource officers acknowledged that, at least historically, the conversation between JSCs and incoming associates has not focused on training associates to identify, and to report, any “red flags” of sexual harassment or inappropriate behaviour.
166. The role of the JSC also includes being a point of contact for judges and associates to raise concerns about how the judge-associate workplace relationship is progressing. Given that the role of JSC involves close contact with judges and associates, we heard from human resources officers and staff in court administration that JSCs are likely to be in a position (or at least the best position of anyone at the Court) to identify any “red flags” which arise in the judge-associate relationship. That view, however, was not shared by associates who doubted that a JSC would ever be in a position to observe, and act upon, “red flags”.
167. All of the JSCs at the Supreme Court, as well as the Judicial Services Manager, are (since the introduction of “contact officers” after the publication of the Szoke Report) contact officers and have completed the training relevant to that position. Contact officers are CSV staff (across all jurisdictions) who act as voluntary contact points for CSV employees with

enquiries related to bullying, harassment (including sexual harassment), or other misconduct. Their role includes the provision of support and advice on CSV complaint resolution procedures and assisting employees to understand their options.

168. In addition to the support associates can receive from the JSCs, we heard that associates are set up with a “buddy” who is a more experienced associate at the Court.
169. At the commencement of our Review, associates (and other staff at the Court) completed the CSV “modules” relating to the now superseded Respect in the Workplace policy. There was no other formal training for incoming associates or other junior CSV staff that is specific to sexual harassment. As described below at [358]-[365], several new CSV policies were introduced in 2022. The associates with whom we consulted had been inducted prior to the introduction of the new policies. We have been informed that all CSV staff, including associates, were required to complete an online sexual harassment module as part of their professional development plan for 2021/2022. All newly appointed staff will, from 1 July 2022, be required to complete the online sexual harassment module as part of their induction. Further, all existing staff will be required to complete refresher sexual harassment training in 2022/2023. We have also been informed that the Respect in the Workplace training is being revised.
170. As noted above, in a significant departure from past practices, the recruitment of associates now involves a competitive merit-based recruitment process conducted by the Court’s administration. In general, under the new process, human resources will advertise for a pool of candidates (either for a Division of the Court or a particular judge), and candidates will register their interest. JSCs will go through the pool and create a shortlist of candidates (unless the judge prefers to undertake that task himself or herself), and judges will interview, usually alongside a JSC, their preferred candidates from that shortlist.
171. Other CSV-employed staff at the Court who work closely with judges, in addition to registry staff, include tipstaves, researchers, policy officers and executive assistants. Administratively, those staff also report to a JSC, or the Judicial Services Manager.
172. We heard that the existing complaints procedure in the Supreme Court is that set out in the relevant CSV policies, particularly the “Resolution procedure — Inappropriate workplace behaviours” document. The process set out in that document is explained at [360]-[361] below. There is no written policy specific to the Supreme Court.
173. The administrative side of the Court has no role in the induction of judges beyond the practicalities of setting up chambers and IT systems. We address the topic of induction of judges below and in our recommendations.

174. Finally, we observe that there are significant differences between the Supreme Court and the other courts and tribunals the subject of our analysis. The power disparity between judges and CSV-employees is at its greatest in the Supreme Court. That Court still has a preponderance of male judges who are on average older than in other courts. Further, the geography of the nineteenth century Supreme Court building lends itself to a “cloistered” working environment. In other courts staff assigned to a particular judge, magistrate or tribunal member (if any are “assigned” at all) sit in an open-plan arrangement outside chambers, and there are frequently windows and glass partitions. Staff assigned to each judge of the Supreme Court may sit with that judge within the same chambers complex (in which case there are physical barriers to visibility of how that working relationship is operating). In most cases, associates now have a separate office usually shared with another associate. Irrespective of whether associates have a separate office, they will frequently be required to attend the judge to work in chambers. The nature of the work is also such that chambers often operates as a “bubble” or closed production unit, without regular external input. Those arrangements may be conducive to an optimally productive judge-associate working relationship. Indeed, it may be the only option, given the nature of the work and the architecture of the Court. The latter is ill-suited to an open-plan arrangement and scope for significant change appears limited. The geography may nevertheless present a risk factor for sexual harassment or other inappropriate conduct.

SUPREME COURT STAFF FEEDBACK ON RECRUITMENT AND WORKING CONDITIONS

175. We interviewed a number of past and present Supreme Court associates and summarise their comments and feedback below.

SUMMARY OF KEY COMMENTS

176. Despite the great variation from very positive to very critical assessments, a number of common themes consistently emerge from the feedback of the Supreme Court associates:

- (a) Their inductions did not include any specific reference to sexual harassment by judges, instruction on reasonable limits of legitimate work demands or guidance on how to refuse unwanted invitations.
- (b) Associates want the option of raising their problems or complaints about a judge with another judge — “Someone who has power”. They perceive HR personnel and CSV staff (including JSCs) as beholden, and equally subject to, the judge’s authority.

- (c) Associates usually see themselves as “inducted into chambers”, not a workplace. They see CSV as relatively remote from their daily working lives.
- (d) Associates greatly appreciate strong public statements by the Chief Justice denouncing judicial misconduct.
- (e) Associates wish judges to receive some training in staff management as well as about sexual harassment, and training as to how a judge’s remarks may have an unintended detrimental impact on staff in the context of the great power disparity.
- (f) Associates also wish to know, broadly, the content of the judges’ training and instruction on those matters.
- (g) Many associates found their associateship extremely rewarding and warn against destruction of the traditional relationship by over regulation responding to isolated cases of misconduct.
- (h) Associates expressed support for the presence of a CSV or HR representative in their recruitment interview.
- (i) Associates advocate periodic checks on their wellbeing.
- (j) Associates commented on the vast variation in work demands and atmosphere between different chambers.

COUNTY COURT OF VICTORIA

177. Like the Supreme Court, judges of the County Court have associates to support them. The majority of judges of the County Court are supported by one associate and a tipstaff, although a handful of judges have opted to have two associates. As in the Supreme Court, associates are usually at a very early stage of their career, and are employed on a fixed term basis (usually for a period of up to two years, although we understand that there is some scope to extend the term for a further one year).
178. Unlike the Supreme Court, in the County Court associates (and tipstaves) sit together in an open plan arrangement, close to, but separate from, their judge’s chambers. This accommodation may minimise the risk of inappropriate conduct but it has been noted that it is crowded and is not entirely comfortable.
179. Associates report to a Judicial Staff Co-ordinator. There is a co-ordinator based on each floor of the building where judges’ chambers are located. The role of the co-ordinator includes supporting judges and staff by organising recruitment processes for associates, dealing with staffing requirements for judges, supporting staff from a pastoral care perspective, and

addressing any performance management issues that arise. The co-ordinator will speak with judges to ensure they are getting adequate support. On any given day, they might also move staffing resources around to ensure that judges have sufficient support in court. For example, when an associate is absent, the co-ordinator will ensure that another associate is able to step in to assist that judge. That replacement associate might be drawn from the ranks of the Court's "reserve" associates or tipstaves, who are not assigned to any particular judge. For the co-ordinator's pastoral care role, we heard that the co-ordinators had each undergone training as to how to respond to staff complaints of bullying or sexual harassment. One of the purposes of the co-ordinator role is to establish rapport with staff so that co-ordinators are in a position to identify any "red flags" in the judge-associate working relationship before significant problems arise, and so that associates feel comfortable in raising issues with the co-ordinators.

180. Recruitment of associates is merit-based. Bulk recruitment is done twice a year. From all applications received, court staff select a merit list. Each of the candidates who reaches the merit list is interviewed by court staff. When an associate position becomes available, court staff provide the judge with the CVs of those applicants on the merit list. The judge then goes through those CVs and organises an interview with the associates. In addition to the bulk recruitment process, the Court will occasionally advertise a position with a specific judge if that judge feels that no one on the merit list is suitable for the role.
181. On induction, associates have a session with human resources where they are taken through the Code of Conduct. Associates are also told about the contact officers at the Court, and are given their contact details. Until the publication of new CSV policies in early 2022, associates also completed the CSV "modules", including that which covers the CSV Respect in the Workplace policy. We set out recent developments in the training of associates through online modules at [169] above. Associates also complete a course with a learning and development associate who trains them in the practical aspects of their role. New staff are also directed to the intranet, which includes contact details of the Court's contact officers, as well as a June 2020 memorandum from the Chief Judge and the CEO as to the seriousness with which the Court's leaders take their responsibility to prevent and respond to sexual harassment. The June 2020 memorandum also addresses the options "for making a complaint against *anyone* (judicial officers included) about inappropriate workplace behaviour", namely making a report to a manager, a member of the Court's HR team, to a Peer Support Team member, to the CEO, to the Chief Judge, or (where the complaint relates to the conduct of a judicial officer) to the Judicial Commission of Victoria.

182. In addition to associates and tipstaves, County Court CSV-employed staff whose role includes interacting with judges include researchers and divisional lawyers. Researchers are employed in ongoing full-time roles. Divisional Lawyers are employed for a period of 3 years and tend to be more senior, as reflected by their employment at a VPS5 level.
183. The County Court undertakes a significant amount of circuit work. We heard that there are no formal policies or guidelines specific to travel and accommodation arrangements on circuit, and that arrangements are left to each “team” of judge, associate and tipstaff (which in practice means that arrangements are left to the judge).
184. As to induction of judges, we heard that a judge of the court who is designated as the staff judge has a discussion with each incoming judge, and provides each judge with a package of induction materials. That discussion covers, among other things, the standards of behaviour expected of judges, as well as the role of CSV-employed staff. The discussion also covers various of the matters raised by the Szoke Report. We understand that this discussion with the judicial staff judge is a relatively new practice within the Court. Incoming judges also have a session with the Chief Judge which covers a range of topics and emphasises the need for the Court to be a civil working environment and the power imbalance that exists between judicial officers and staff. Incoming judges also meet with the CEO of the Court and the Judicial Staff Manager. That conversation with the CEO covers practical matters including the judge’s preferred staffing model and what the judge can expect of court staff. The conversation can also address, informally, the culture of the court and the potential risks presented by the power disparity between judge and staff. New judges are also assigned a senior judge as a mentor, whom they are able to talk to about any matters, including staffing issues.

SUMMARY OF KEY COMMENTS BY COUNTY COURT ASSOCIATES, STAFF AND JUDGES

185. Until recently, the induction of associates has not included any specific reference to sexual harassment. A very recently appointed associate indicated that this has now changed. During our consultations, it appeared that revised training had not yet been consistently extended to those who had been inducted in the past. However, as noted above, we have been informed that all staff were required to complete an online sexual harassment module in 2021/2022. Associates expressed a preference for training on how to interact with judges, based on specific scenarios.

186. Associates do not know what the consequences of making a complaint will be, and have no insight into the possible consequences or sanctions for the judges. This adds to their reluctance to make a complaint.
187. Some of the associates who spoke to us believe that there are judges in the court who are well-known to be prone to sexually inappropriate behaviour, some of whom do not have female associates. They report that there are also judges who engage in sexist banter in front of associates. One associate reported an unwanted sexual advance towards an associate, and an explicit, sexually predatory comment, by a judge. Some associates feel that the judges who are known to engage in such conduct are tolerated. It should be noted, however, that not all our respondents were aware of such “open secrets”. The recently retired judges and the newly appointed associate had not heard of them.
188. The County Court associates considered that the current high turnover and contract-based terms of their employment prevented the development of the positive, stable relationships that were once more common between judges and their associates.

PREVALENCE OF SEXUAL HARASSMENT IN THE AUSTRALIAN COURTS – LACK OF RELIABLE DATA

DATA ON PREVALENCE

189. We referred above at paragraph 6 to the Szoke Report’s observations on the prevalence of sexual harassment within courts, and the legal profession more broadly. We observe that the evidence set out in the Szoke Report on the prevalence of sexual harassment, and the precise forms it has taken, contained very limited specific data on the conduct of judicial officers towards court staff. The evidence consists of anonymous assertions without much detail rather than tested statements or many particularised accounts of incidents. The acts constituting sexual harassment (which cover a wide range) are rarely specified with precision. While 28 respondents to the VEOHRC process conducted during the Szoke Review reported having experienced sexual harassment in the courts, the alleged perpetrators in those matters covered a broad spectrum of colleagues, managers, barristers and others, in addition to judicial officers.⁴⁸ A majority of the reported incidents involving judicial officers had occurred more than five years previously.⁴⁹ It is not possible to conclude how many incidents were attributable to judicial officers, or what form the conduct complained of took.

⁴⁸ Szoke Report, 39.

⁴⁹ 50% of those 36 participants in the VEOHRC process indicated that they had experienced or witnessed sexual harassment by a judicial officer or VCAT member, and 38% of those incidents had occurred within the last five years: Szoke Report, 76.

190. The difficulties in assessing the prevalence of the problem are compounded given that it cannot be assumed that the target of sexual harassment by a judge will report that conduct. Indeed, it is very likely that misconduct will not be reported. It is clear that the usual significant reluctance to report sexual harassment is greatly magnified when the perpetrator is a judge. Thus, the number of formal complaints made is a very unreliable indicator of the extent to which sexual harassment may be occurring. In any event, as we understand it, no organised record is kept within each court of the number of complaints made. More importantly, there is apparently no comprehensive record of the queries, communications or expressions of concern (that do not rise to the level of “a complaint”) made to court authorities about possible misconduct by judges. Thus, no reliable statistics are available from which to draw conclusions about the prevalence of staff concerns over their interaction with judges; the nature of the concerning interaction; or the outcome of the staff queries.
191. Although the existing Victorian data constitutes a relatively fragile basis for assessing prevalence of a characteristically hidden and under reported issue, it appears indisputable that sexual harassment as defined in relevant legislation occurs within the legal profession, including the Bar and the courts. Even extrapolating from data on workplaces generally, the rate of sexual harassment within the courts is likely to be similar to that in workplaces generally. Further, given the high level of characteristic identified drivers of sexual harassment present at the Bar and in the courts, it is possible that sexual harassment may be more prevalent in those workplaces.⁵⁰ Against this, countervailing factors in courts (discussed below) may have a mitigating impact.
192. Our investigation to date suggests that bullying and incivility are much more prevalent problems than sexual harassment by judicial officers. They are, at any rate, much more visible. Such behaviours are closely related to, and constitute, the crucible of disrespect which fosters sexual harassment. With both bullying and sexual harassment, the “boss” has crossed accepted boundaries. The heightened reluctance to report such conduct makes it difficult to form confident conclusions. In our consultations, we have also heard reports of inappropriate sexual comments, sexually inappropriate conduct and sexist attitudes by some judges. While it appears that only a minority of judges engage in such behaviour, it is clear that it does occur, at varying levels of gravity. The risk factors for the occurrence of sexual harassment exist, and when it does occur (as the three substantiated Australian cases

⁵⁰ See the findings as to the prevalence of sexual harassment in the International Bar Association Report authored by Kieran Pender, “Us Too: Bullying and Sexual Harassment in the Legal Profession” (May 2019) (“IBA Report”) particularly at 49–59.

demonstrate) the consequences are potentially catastrophic for the victim/survivor, the judge, the courts and public confidence in the administration of justice.

193. The Victorian Public Sector Commission 2021 People Matter Survey provides some further support for the proposition that while relatively rare, sexual harassment does occur in Victorian courts and VCAT.⁵¹ There were a total of 881 CSV respondents (528 women and 238 men, 115 non-declared), 53% of whom were CSV Corporate staff. 6% of the total respondents reported having experienced sexual harassment within the previous 12 months.
194. The Respect@Work Report and other relevant studies emphasise the need for greater transparency in order to address the mischief of workplace sexual harassment and bullying. The lack of capacity to provide information about how frequently staff raise concerns (as distinct from formal complaints) with relevant court officers and about the nature of the conduct at issue poses a serious obstacle to assessing and addressing workplace risks. It also creates a perception of secrecy, potential “cover up” and lack of judicial accountability.
195. In our opinion, the courts should record all staff communications of concern (even if not amounting to a formal complaint) about a judge’s conduct, which are made to a court agent such as a judge, CSV manager or other supervisor. We discuss this in detail below in our recommendations at **Recommendation 22**.

CURRENT RECORD KEEPING PROTOCOLS IN THE VICTORIAN COURTS AND VCAT

INVESTIGATIONS AND THEIR OUTCOMES NOT TRANSPARENT

196. Just as there is no reliable or comprehensive data about the incidence of informal complaints or expressions of concern about a judge’s conduct, the written reports on investigations of allegations of sexual harassment by judges are confidential. They are not published and their content is not publicly available.
197. As also noted above, the commissioning of the Szoke Review was provoked by a disclosure of multiple complaints by five former associates (and a staff member) of sexual harassment at the High Court by Justice Dyson Heydon, during his tenure as a High Court Judge.
198. The High Court commissioned an independent investigation of the complaints made against Justice Heydon (who had retired by the time of the complaints). The High Court also

⁵¹ See also the IBA Report which states that “legal professionals in Oceania experience the highest prevalence of sexual harassment, at 30% on a gender-weighted basis”: at 51.

proactively sought to ascertain whether persons other than the initial complainants had been the subject of misconduct.

199. The High Court investigation concluded that the complaints of sexual harassment were made out. The Chief Justice publicly apologised to the complainants. The complainants all requested anonymity and confidentiality, which were accorded and maintained. One complainant, Ms Alex Eggerking, in February 2022 went public with her account of former Justice Heydon's conduct and appeared on television. The report of the investigation commissioned by the High Court, which was conducted by Dr Vivienne Thom AM, is not published or otherwise available. It is not possible to ascertain the details of the conduct that the investigator held (albeit not judicially) to constitute sexual harassment by the judge.
200. The particulars of the Heydon incidents, whilst unprecedented and shocking, and provoking activity aimed at amelioration and reform, thus remain opaque. The matter made clear the possibility of judicial sexual harassment (which many would previously have found unthinkable) but it provided no detailed guidance as to background, context, causes, risks or means of avoiding or preventing such misconduct.
201. The Heydon incidents were followed by two substantiated complaints of misconduct characterised as sexual harassment made against a Federal Circuit Court Judge (Judge Harman). As outlined in more detail below, the two complainants in that matter were not associates and neither worked directly with the accused judge.
202. Unlike the Heydon case, the accused judge was currently in office and was sitting at the time the complaints were made. He ceased to sit, but remained in office, during a lengthy investigation of the complaints. It was not publicly disclosed that complaints had been made, and that an investigation was occurring, until the conclusion of the investigation.
203. A Conduct Committee comprising three retired judges of the Supreme Court of Victoria⁵² investigated the complaints. The Conduct Committee ultimately found that the judge had engaged in inappropriate sexualised conduct towards the complainants, that could well be found to constitute sexual harassment. The Conduct Committee refrained from making a specific finding of sexual harassment given the limitations of their investigative powers. (Further, at that time, it was not clear that sexual harassment legislation applied to judicial officers). The Conduct Committee recommended that the matter be referred to the Attorney-General to decide whether to refer it to Parliament for possible removal of the judge for misconduct. The Chief Judge released a public statement identifying the outcome of the

⁵² Including the Hon. Julie Dodds-Strecton QC, the Hon. David Habersberger QC and the Hon. Katharine Williams.

investigation and naming the judge, who immediately resigned. The Chief Judge both publicly and privately apologised to the complainants.

204. As in the Heydon matter, the undertakings given to the complainants and the judge by the Chief Judge of the Federal Circuit Court and the Conduct Committee under the Federal Circuit Court Complaints Procedure to maintain confidentiality, have precluded the reporting or disclosure of communications conveyed by those parties to the Conduct Committee.
205. At this stage, no part of the Conduct Committee's lengthy report has been released. Accordingly, the report on the Federal Circuit Court investigation also provides no publicly available insights or learning as to the risks, prevention and consequences of sexual harassment by judges.
206. The report of Ms K Eastman AM SC on her investigation of the allegations against former Justice Peter Vickery, (which she found to be substantiated) is likewise confidential and unavailable. That investigation was commissioned by the Supreme Court, and the report is kept confidential at the request of the complainants.⁵³
207. We acknowledge that the Victorian courts (in their non-judicial functions) and CSV are bound by privacy laws, including the *Privacy and Data Protection Act 2014* (Vic). The courts and CSV are also obliged to maintain the confidentiality, and respect the wishes, of the targets of inappropriate conduct. Nevertheless, the confidentiality and secrecy that, for valid reasons, surround the investigation of and reports upon allegations of sexual harassment by judges in Australia, which are held to be substantiated, constitute a serious impediment to understanding the prevalence, risks, behaviours and devising prevention strategies in this unique context.
208. Allegations and complaints may have been made and investigations may currently be in progress, but there is no consistent way of ascertaining this.⁵⁴ Reliable and meaningful data are scarce and detailed accounts which could lead to useful insights are unavailable. Further:
- (a) the level of secrecy surrounding investigations of and reports of substantiated misconduct by judges means that a victim of sexual harassment may consider, justifiably, that there will be no accountability for or public denunciation of a judge's misconduct, which therefore may not be worth reporting;
 - (b) there is little scope for meaningful general deterrence;

⁵³ See statement of the Chief Justice of the Supreme Court of Victoria, 17 February 2022.

⁵⁴ An investigation of complaints against a magistrate in South Australia has been publicly disclosed. However, such disclosure is haphazard.

- (c) judges are not informed of the types of circumstances which have led to devastating personal consequences for other judges and the targets of their misconduct, and so do not have the benefit of guidance in self-reflection and adjusting, if necessary, their own conduct;
 - (d) the courts, legal profession and the community do not have the benefit of the information necessary to assess and address the problem; and
 - (e) the absence of transparency may be seen as judicial exceptionalism. More serious misconduct by other categories of persons is not exempt from scrutiny and report (subject to measures to protect the identity of victims).
209. In our opinion, the courts and the legal profession should, to the extent possible (and while affording due respect to the needs and wishes of the complainants) promote and facilitate publication of reports (redacted as appropriate) of investigations of allegations of significant judicial misconduct in cases where those allegations have been found to be substantiated. In such cases, provided that appropriate measures to preserve the anonymity of complainants are adopted and their wishes consulted, the identity of the judge should (save in exceptional circumstances) be disclosed. We recognise that it may not be possible to achieve those goals given current legislative constraints, the wishes and requirements of some complainants and the prospect that sometimes, any disclosure will in effect identify the complainant or other relevant persons. Further consultation and legislative measures may be required. However, commitment to provide greater transparency is justifiably sought by court staff and would secure wider benefits.

CASE STUDIES OF INAPPROPRIATE SEXUALISED CONDUCT BY JUDGES OF CHAMBERS STAFF OR JUNIOR LEGAL PERSONNEL

THE AMERICAN CASES

210. The disclosure of allegations of sexual harassment of chambers staff by two distinguished, high profile American judges provides insight into the nature of such conduct as well as its drivers and risk factors. The response to the allegations is also instructive. It contrasts with that of Australian courts, in that:
- (a) legislative protection from sexual harassment has not been extended to court staff, including associates;
 - (b) the allegations, although numerous and widely supported, have not been investigated as in one case the accused judge resigned and, in the other case, had died; and

- (c) complainants we interviewed stated that the courts offered no acknowledgment or apology.

JUDGE KOZINSKI

211. In December 2017, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, resigned amidst numerous allegations of sexual harassment and like misconduct towards court chambers staff and other legal professionals. His resignation forestalled an investigation of the allegations.
212. The resignation originated when, earlier in the year, in the wake of the #MeToo movement, six former clerks or more junior staffers known as “externs” alleged to the Washington Post that Judge Kozinski had subjected them to sexually inappropriate conduct or comments.⁵⁵
213. The judge also faced claims of imposing abusive employment demands on his chambers staff. He allegedly had outbursts of furious temper tantrums. It was reported that he claimed that the location of his clerks’ apartments was subject to his approval, tried to dictate what they ate for lunch and made derogatory comments about women. Allegedly, the judge expressly forbade his clerks from socialising with each other without his permission or supervision. He required them to arrive in chambers at 9.30am on weekdays and 12pm on weekends and stay until 1.30am each night.⁵⁶ Because judges are entitled to conduct their chambers as they see fit, these alleged practices had not previously been questioned.
214. Shortly after the emergence of the multiple complaints, in December 2017, the then Chief Judge of the United States Court of Appeals for the Ninth Circuit initiated a review, although no formal complaint had been received. The review could have led to a reprimand or a request that the judge retire or not take new cases for a time.
215. As noted above, Judge Kozinski’s resignation meant that there was no formal inquiry and findings into the allegations made against him. He has since returned to practice.

JUDGE REINHARDT

216. Judge Stephen Reinhardt was an eminent American Federal Ninth Circuit judge, who throughout his decades long tenure, was widely known and lauded for liberal opinions and

⁵⁵ https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html

⁵⁶ Litman and Shah, 615

dissents upholding marriage equality, reproductive freedom and the right to determine the time and manner of one's own death. The judge was particularly known for his opposition to the death penalty. A vocal opponent of what he described as impenetrable procedural rules elaborated by the Supreme Court to trump substantive rights, Judge Reinhardt was known as "the lion of liberalism".

217. When he died in office at age 87, he had some 150 former associates (clerks) many of whom published adulating eulogies and panegyrics.
218. Some memorials acknowledged that the late judge's bluntness in criticising the judicial opponents, whatever their rank, also prevailed in communications with chambers staff.

I would learn soon enough when I became one of his law clerks, that Judge Reinhardt pulled no punches when talking to anyone, and that thick skin could be a valuable asset in this chambers.⁵⁷

219. In February 2020 (after the judge's death in March 2018), Judge Reinhardt's former clerk, Olivia Warren testified to a Congressional Panel about the Judge's sexual harassment of her during her clerkship.⁵⁸ Ms Warren, is a graduate of Harvard Law School who has since clerked for Justice Ketanj Brown Jackson and now works as a staff attorney at the Centre for Death Penalty Litigation in Durham, North Carolina.
220. Ms Warren asserted before the Congressional Panel that that the judge's misconduct was widely known and a long-standing open secret.
221. In her written testimony to Congress at the hearing on 13 February 2020, Ms Warren testified to the view at Harvard that clerkships were:

the *be all and end all for high performing law students* because they provide "singular opportunities within the legal profession to develop close relationships with judges, to gain first hand experience with the judicial system as a young lawyer and, through connections to judges' former clerks, to develop a robust professional network that can open professional doors and lead to further opportunities.

(Emphasis added)

222. Ms Warren alleged that on her first day working as his clerk, Judge Reinhardt pointed out a drawing depicting a sine chart, on which he had drawn two round dots to the top of the curves to resemble breasts, affixed to her computer and asked her if it was accurate. He routinely

⁵⁷ The Exile: In Memory of Judge Stephen Reinhardt, Ben Wizner 4 April 2018, ACLU.

⁵⁸ Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet, February 13 2022.

and frequently made disparaging comments about Ms Warren’s physical appearance. He expressed doubt that she could really have a husband or if so that her marriage had been consummated, due to her appearance and lack of sexual attraction.

223. Ms Warren alleged that the judge regularly commented in detail on the appearance of women. He requested Ms Warren to look at photographs of applicants for clerkships and to identify which had nicer or longer legs. The judge kept photographs of his “pretty” women clerks on a shelf. As described by Ms Warren in her testimony, Judge Reinhardt also:

- (a) referred to a gay female clerk as a “dykester”;
- (b) made, both to Ms Warren alone and in front of others, frequent disparaging comments about Ms Warren’s personal appearance;
- (c) said that he was surprised that she had a husband, as no man could be attracted to her;
- (d) speculated that her husband was gay, a wimp or lacked a penis, was likely impotent and that the marriage had not been consummated;
- (e) criticised her physical appearance and “short” (by which he meant unattractive) stature;
- (f) expressed disbelief in allegations of sexual harassment. He believed that women were liars who initially “wanted it” but subsequently changed their minds;
- (g) stated that Ms Warren could not understand sexual harassment, as she was not attractive and her husband was not a real man;
- (h) stated that women were not to be trusted and that he would not hire any more female clerks; and
- (i) called Ms Warren a “stupid little girl”.

224. Ms Warren also stated that when allegations were made against Judge Alex Kozinski in 2017, Judge Reinhardt, (a close friend of Judge Kozinski) was angered by and critical of the MeToo movement associated with the former’s exposure and resignation.

225. Ms Warren confided in close friends and family, and a mentor about the judge’s conduct during her clerkship.

226. Ms Warren stated that systemic barriers kept her from reporting her mistreatment by Judge Reinhardt even after reforms were adopted in the wake of Judge Kozinski’s resignation.

227. Ms Warren stated:

there are systemic barriers to reporting harassment and misconduct by judges that are unique to the legal profession and uniquely formidable in the context of the relationship between law clerk and judge. The consequences of miscalculating the risk of possibly offending a judge are fraught with a peril that does not dissipate with time and can hang over ones entire professional career. For a law clerk, at the precipice of his or her legal career, alienating a federal judge can spell doom for their life in the law. And it is not only the judge him or herself from whom retribution is feared”.

228. Ms Warren explained that the judges, peers, friends and associates (for whom the judges reputation is inextricably intertwined with their own) “would wish to protect that reputation at all costs.

229. A group of over 70 of Judge Reinhardt’s former clerks issued a joint statement supporting Ms Warren. They signed an open letter seeking new procedures for reporting workplace misconduct by judges and supervisors, as well as improved training on sexual harassment. The signatories represented over half of Judge Reinhardt’s former law clerks.

230. The open letter stated that “we believe the clerk’s testimony that she experienced inappropriate conduct, including sexual harassment”.

231. The letter praised Ms Warren’s courage, regretted that she did not feel secure to reach out to the network of Judge Reinhardt’s clerks, and urge that Title VIII Protections (anti-discrimination protections) should be extended to law clerks working in the judicial branch.

232. The letter stated that “some of us experienced or witnessed conduct in chambers that we would call sexist, workplace bullying or mistreatment and others did not”.

CONCLUSION ON REPORTED AMERICAN INCIDENTS

233. The reported and apparently undisputed allegations against the eminent American judges demonstrate the impact of many of the recognised risk factors for sexual harassment – the enormous power disparity; the extreme reverence for the distinguished judges; the isolation and segregation of the courts as workplaces; and the lack of any effective external restraint or curb upon “employees” who were so high value that they apparently did not accept that normal professional boundaries and protocols applied to them. Such assumptions were apparently reinforced by the widespread adulation of their clerks and legal professionals, by whom the judges’ alleged misconduct was mischaracterised as loveable eccentricity.

234. The unique risk factors lay the extreme vulnerabilities of the Federal law clerks springing from the unparalleled special relationship between judges and their associates. The inherent vulnerabilities of the relationship are exaggerated in the American federal context by particular features, such as the status, qualifications and aspirations (universal to the associate cohort), the institutionalised networking practices, the development of influential “armies” of linked former associates, the pecuniary premium and other high value benefits of service with identified judges and the consequent “make or break” power of the judge.
235. Other recognised patterns are clearly identifiable. The evolution of minor incivilities to more serious misconduct, the fine line between bullying and sexual harassment, the multiplicity of targets and the development of disturbing “open secrets”.
236. It is unlikely that the open, persistent, unreasonable and extreme work demands allegedly imposed by the American judges would be tolerated in the Australian context. Nor have the same patterns of networking, patronage and premiums for service amongst Australian associates yet developed. As stated, however, the Victorian arrangements for recruiting associates now have many similarities to that of the American Federal approach.

THE SUBSTANTIATED CASES OF JUDICIAL SEXUAL HARASSMENT IN AUSTRALIA

237. Substantiated cases of sexual harassment or similar misconduct by judges are rare in Australian courts. The real prevalence is more difficult to assess because the conduct is frequently secret and unwitnessed, targets rarely complain and there is a lack of reliable comprehensive data or record keeping.
238. Whatever its prevalence, the impact of sexual harassment by a judge is potentially catastrophic, for the victim, for the judge, for the court and the wider community.
239. There are now three Australian cases in which complaints of sexual harassment or similar misconduct have been formally investigated and substantiated: They concern judges of the High Court of Australia, Federal Circuit and Family Court of Australia and the Supreme Court of Victoria.
240. There have been other unresolved incidents. An additional, publicly reported complaint against another Federal Circuit and Family Court judge was not substantiated on investigation, but the judge subsequently resigned. An investigation of complaints against a magistrate in South Australia by a judicial conduct panel is reportedly in progress.⁵⁹

⁵⁹ For background to that investigation, see *A Judicial Officer v The Judicial Conduct Commissioner and the Judicial Conduct Panel* [2022] SASCA 42.

241. As stated above, the Australian cases were preceded by the dismaying allegations, in the context of #MeToo, of two of America’s most venerated, influential and senior judges, Judges Kozinski and Reinhardt, which inspired Chief Justice Roberts to commission a Working Group. In contrast to the American instances, the Australian courts commissioned a full investigation of the allegations. When the allegations were found to be substantiated, the Chief Justice of the relevant court apologised to the complainants.
242. Whether alleged misconduct comes within the ambit of sexual harassment as statutorily defined is not of primary relevance in the case of judges. Indeed, within many workplaces, people may be sanctioned, including with dismissal, for inappropriate sexualised behaviours (contrary to corporate policies incorporated into contracts of employment), irrespective of whether the conduct constitutes sexual harassment within terms of the applicable legislation. Further, at the time of the conduct complained of in all three Australian instances, there was significant doubt as to whether the legislation did apply to judges. As outlined above in this Report, amendments introduced have made the application clear following recommendations in the Respect@Work Report.

OBSERVATIONS ON THE AUSTRALIAN CASES OF INAPPROPRIATE SEXUALISED CONDUCT BY JUDGES

243. Although the investigations and reports on the three cases remain confidential, it is possible to learn something of the conduct complained of, because some of the complainants elected to go to the press or appear on television. In one instance, the judge responded publicly.
244. The nature of the conduct alleged in the three substantiated Australian cases was, broadly, as publicly reported (in the High Court and Supreme Court cases) seeking or giving unwanted kisses, inappropriate comments, invitations to “one-on-one” meals in restaurants, texting, asking for dates and solitary meetings and touching the target’s thighs. In the Federal Circuit Court case, the alleged conduct was communicating in an unduly personal and sexualised manner and giving unwelcome hugs.
245. Some aspects of the conduct (particularly indecent physical contact) were denied. If much was admitted, in all cases, the judge denied that it amounted to sexual harassment or other wrongdoing.
246. In the Heydon and Vickery cases, the complainants were associates. In the Federal Circuit Court case, the complainants were a former law student and a junior female court employee.
247. In all cases, there were multiple targets, who were all young, inexperienced professional women at an early stage of their legal (or related) career.

248. It is reported that in the case of the High Court justice, other justices knew nothing of the conduct, although the court is relatively small. There were, however, reports in June 2020 that two judges of the High Court came to know of reported misconduct against one of Justice Heydon's associates in 2005, after an associate (who was not an associate of Justice Heydon) told her judge of what one of Justice Heydon's associates, who had been a target of offending conduct, had told her. In the other cases, there are no reports on whether other judges suspected or were aware of the conduct. While it is frequently asserted that the inappropriate behaviour of a judge is an "open secret", at least among some groups of staff, it would seem that other judges are less likely than staff to know of the situation.
249. The Australian cases indicate many established risk factors that play a significant role in patterns of misconduct. The judges were classical "high value employees" who may assume that relevant policies and employment laws do not apply to them, so that they have absolute power over those working in chambers.
250. The unique vulnerability of associates (or similar staff) as a cohort is evident in all cases. Targets are fearful to confront or report on a judge who could have them sacked and could make or break their subsequent career.
251. Targets are also very hesitant to reveal their reluctance to respond to a judge's personal, social or romantic overtures. They may be paralysed with fear but compelled to feign an acquiescence that they do not feel.
252. One case reported to us particularly highlights the deleterious effects of isolation and segregation. The associate in question had no friends or buddies, was unfortunately without a fellow associate for much of the time and was obliged to attend circuit alone with the judge. Her fellow associates were distant and disapproving due to the rumours of the sexual relationship with the judge and a subsequent judge specifically instructed her not to make friends.
253. The associate was so isolated that she was unknown to other judges, who therefore may not have understood the implications when a judge publicly embraced the associate. She thus was not assisted by any bystander or intervening judge and felt totally dependent on the judge for whom she worked.
254. It is highly improbable that judicial misconduct that occurred in that case could now play out in the same way, given the many measures and safeguards that have already been introduced.
255. One retired judge when interviewed, acknowledged that he probably would not have made any inquiry had he witnessed the public embrace at the time. He observed that he would not have known that the young woman was a staff member, as opposed to the judge's partner.

If he had known that the target was an associate, he may still not have acted, as at the time, it would have seemed officious. The retired judge stated that he would now act differently, in the light of current awareness of the problem of sexual harassment. He would make inquiries and follow up on such an occurrence.

256. Clearly, Victorian courts are in the process of a cultural transition, but many of the fundamental risk factors for sexual harassment by judges remain entrenched.

A POSITIVE OUTCOME FROM A BYSTANDER REPORT COUPLED WITH PROMPT INTERVENTION BY ANOTHER JUDGE

257. During our consultations, we spoke with a person known to us who had worked as an associate (Associate A).

258. Associate A recounted that:

- (a) She worked with a judge aged in his late 60s who occupied a senior role at the court, and was harassed by a different judge in the course of her employment.
- (b) The sexual harassment was ongoing. Associate A had a lot of contact with the relevant judge. It got to the point where he asked Associate A if she would like a sexual relationship with him – he was in his late 50s, and she was in her early 20s.
- (c) Associate A tried to “bat him away”. At a dinner, however, the harassment became obvious to other judges in attendance. They could tell he was over-friendly and that Associate A was uncomfortable. A female judge noticed it – she reported her concerns to Associate A’s judge, who raised it with her and had a “one-on-one” talk with her. Associate A was upset and had to take a few days off. He asked Associate A what she wanted to do – how to handle it – whether by a formal complaint or otherwise.
- (d) Associate A said that a complainant should be able to choose a formal complaint process or an alternative. Associate A simply wanted the conduct to stop and for the judge concerned not to be working with other young women.
- (e) The offending judge did realise what he had done. Associate A’s judge met him, took him on and told him that other judges were aware of his conduct. He was embarrassed.
- (f) Associate A said that there was basically no supervision of judges’ conduct towards associates because they worked “one-on-one”.
- (g) Associate A did not want to be in the same room with the offending judge or have email contact. The judge did not stay in the same position – he was moved so he no longer had contact with her.

- (h) Associate A's employer had nothing to do with this process. In practical terms, her employer was a "token" employer who paid Associate A and did little else. Associate A did not want human resources to be told as she felt she would have then lost control over the process.
 - (i) It was a relief to Associate A that her judge broached it with her. She regretted not telling him beforehand.
 - (j) Associate A observed that most people who suffer this treatment (sexual harassment) just resign. Her "feisty" judge de-escalated the problem. To address sexual harassment, she recommended that surveys be conducted of the last five clerks who worked for each judge and those clerks be asked to provide anonymous feedback.
259. Associate A's narrative is especially interesting because it provides an encouraging example of how a bystander communication (where the bystander was a judge), coupled with active intervention by a fellow judge, short-circuited a problem which could have escalated with very grave outcomes for both the associate and erring judicial officer.
260. It also eloquently underscores how embedded is the reluctance of an associate to complain about the conduct of a judicial officer, even when the associate is working for another judge in whom she has total confidence. It also demonstrates the desirability of taking steps to ensure that associates, other chambers staff and people working closely with judges are known to, at least some other judges. Unless the social segregation of chambers staff can be reduced, it is improbable that inappropriate behaviour will be witnessed by a person who has both sufficient context and familiarity with the principals to interpret it, coupled with the power, status and authority to effectively intervene, or at least to communicate the problem to such a person.
261. The outcome in the above case was very positive (given that inappropriate conduct had already occurred). The target was not subjected to the potentially terrifying ordeal of lodging a formal complaint. The inappropriate conduct and all unwanted contact by the judge stopped forthwith. The erring judge was moved from the committee on which he interacted with the associate, while the associate maintained her position. She did not suffer any further detriment.
262. The associate was left in control of the process. "Her" judge inquired whether the witnessing judge's concerns were well-founded and although distressed, Associate A was then able to confide in him. Her judge asked her how she wanted the matter handled and conscientiously observed her wishes.

263. He took the matter so seriously that he at once travelled to another city in order to confront the erring judge. The latter was remorseful, compliant and shamed by the realisation that other judges were aware of his inappropriate conduct.
264. It is apparent that the witnessing judge did not feel able to confront the harassing judge herself. There may be many cases when the witness, even if a judge, is not prepared to do so, either because he or she lacks the seniority or status, or feels uncomfortable for other reasons. The witnessing judge nevertheless passed her concerns on to someone who possessed the confidence of, and ability to question, the target. He also had the status and confidence to confront the errant judge.
265. It is clear that the witness need not be a judge in order to achieve a similar outcome. It does, however, seem that the early involvement of a judge of sufficient status, who is willing forcefully to intervene, is essential to a de-escalating, informal and effective intervention.
266. As discussed below, we consider that one or more staff judges with suitable backgrounds and some appropriate training could be designated to receive expressions of concern from witnesses or indeed targets of potentially unwelcome conduct.

THE CAUSES AND DRIVERS OF SEXUAL HARASSMENT

SZOKE REPORT

267. The Szoke Report identified the drivers of sexual harassment as follows:⁶⁰
- (a) **Gender Inequality:** the Report identified gender inequality (unequal power between men and women in society) as the central driver of sexual harassment. Other drivers, many of which are related to gender inequality, included:
- (i) conservative norms of gender and sexuality;
 - (ii) the culture of a workplace, including the role of leadership in setting workplace behaviour and norms;
 - (iii) overlapping systems of discrimination or disadvantage, including race and disability;
 - (iv) lack of understanding about what constitutes sexual harassment;
 - (v) sexualisation and subordination of women in traditionally female roles;

⁶⁰ Szoke Report, 31–4.

- (vi) a sense of entitlement and lack of accountability by those who hold powerful positions in the workplace; and
 - (vii) abuse of alcohol in the workplace context.
- (b) **Abuse of Power:** the Szoke Report emphasised that hierarchy and power imbalance are key risk factors. The Report accepted that sexual harassment prevails in hierarchical workplaces with strongly embedded masculine norms and a dominance of male leadership. Those factors can also create a “culture of silence” against speaking out.
268. Further, the Szoke Report set out (with apparent approval) a commentary by a law lecturer at the University of South Australia, Dr Joe McIntyre:
- [t]he foundational sin in the legal profession is that it remains a domain dependent upon personal relationships and hierarchical power ... [i]t is significant that the further up the hierarchy of legal practice one climbs, the more dependent upon personal relationships for referrals, briefs, appointments one becomes. ... Men in positions of power are operating with a sense of practical immunity, because if the women speak out, they know their career is dust.⁶¹
269. The Szoke Report referred to sexual harassment as a particular manifestation of abuse of power by judicial officers, which occurred together with disrespect and uncivil behaviour. The abuse of power was also reflected in inadequate responses to sexual harassment, as many respondents indicated that they would neither confront a perpetrator nor report bad behaviour by judicial officers.
270. The Szoke Report referred to a permissive culture in which sexual harassment and (a range of cognate behaviours – gendered bullying, disrespect and every day sexism) are overlooked, tolerated or condoned. In such environments, there is no risk management of sexual harassment, employees are not confident to report it, as they feel that complaints will not be taken seriously and that perpetrators will not be held to account.⁶²
271. The Szoke Report recognised the perhaps unique combination of features of a court workplace, including complex and demanding environments, long hours, pressure for unquestioning obedience and travel requirements, including circuit obligations.⁶³
272. The Report also recognised a professional expectation of socialising and networking at events which could include alcohol consumption. Alcohol, while not causative on its own,

⁶¹ Szoke Report, 32.

⁶² Szoke Report, 33.

⁶³ Szoke Report, 33.

could contribute to sexual harassment, sexual assault and inappropriate behaviours. Therefore, the report recommended that, as Respect@Work indicated, prevention measures should include consideration of how access to alcohol, especially at work social events, could increase the risk of workplace sexual harassment.⁶⁴

IDENTIFICATION OF, AND ATTEMPTS TO SOLVE, THE PROBLEM IN THE UNITED STATES

273. Above, we referred to the work of Leah Litman and Deeva Shah in *On Sexual Harassment in the Judiciary*. It is a penetrating study of relevant developments in the current American context with ramifications for the Victorian situation. Many of the observations in the article are applicable to the Victorian context.
274. Litman and Shah identify the important accusations of sexual harassment by two former judges of the United States 9th Circuit Court of Appeals, Judge Alex Kozinski and Judge Stephen Reinhardt, as provoking important public discourse in the context of the “MeToo” movement. We have summarised the details of those accusations above.
275. The authors referred to the particular instances of alleged misconduct by both judges and observed that clerks who had not witnessed extreme instances of sexual harassment had nevertheless witnessed sexist behaviour and aggressive bullying or sexist bullying.
276. Litman and Shah advocate a broader understanding of causes of and responsibility for sexual harassment, which includes:⁶⁵
- (a) recognition that a myriad of specific behaviours that fall well short of serious or actionable sexual harassment are red flags. Those behaviours can have an exclusionary impact particularly on disadvantaged groups, and seemingly insignificant behaviours can normalise other inappropriate behaviours and lead to more severe harassment and discrimination, creating a work culture where inappropriate behaviour can escalate;
 - (b) acknowledging that problematic behaviours falling short of being illegal or cruel could help to identify unsafe working environments before they become more severe; and
 - (c) accepting broader responsibility for sexual harassment beyond merely witnessing specific instances.

⁶⁴ Szoke Report, 33.

⁶⁵ Litman and Shah, 609–10.

277. The Report of the Federal Judiciary Workplace Conduct Working Group (USA) (which was established in December 2017 on the request of Chief Justice Roberts of the United States Supreme Court to examine the sufficiency of safeguards in place to protect court employees from inappropriate conduct) states that the most significant challenge for accountability “...arises from the reluctance of victims to report misconduct”.⁶⁶
278. The Working Group comprised eight experienced judges and courts administrators from the diverse units within the judiciary. The Chair was the director of the Administrative Office of the United States Courts.⁶⁷
279. The Working Group’s Charter, at the instance of Chief Justice Roberts, was to consider what changes were needed:
- (a) to the Judiciary’s Code of Conduct;
 - (b) guidance to employees on issues of confidentiality and reporting instances of misconduct;
 - (c) educational programs; and
 - (d) rules for investigating and processing misconduct complaints.
280. The ultimate goal was to ensure an “exemplary workplace” for every judge and every court employee. The Working Group recognised that “the judiciary must hold itself to the highest standards of conduct and civility to maintain the public trust” and must not only address harassment but “pursue the overarching goal of an inclusive and respectful workplace”.⁶⁸
281. The Working Group stated that the various complaints provisions are effective when their provisions are invoked, although there was room for greater transparency and accessibility.⁶⁹ The Working Group recommended that:
- (a) Chief Judges should inform chief circuit judges or judicial councils of reports of wrongful conduct by judges and how those reports were being addressed;⁷⁰
 - (b) Further complaints of sexual harassment by judges should be specifically identified in statistical reports and “decisions on those complaints made more readily accessible

⁶⁶ Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (‘US Working Group Report’), 1 June 2018, 12.

⁶⁷ US Working Group Report, 1–2.

⁶⁸ US Working Group Report, 2.

⁶⁹ US Working Group Report, 10.

⁷⁰ US Working Group Report, 11.

through searchable electronic indices”. Accountability would be strengthened if the outcomes of disciplinary proceedings were better communicated;⁷¹ and

(c) Regular employee input should be sought and exit interviews should be conducted.⁷²

282. The Working Group noted that law clerks expressed concern about the seeming lack of punishment for errant judges who could terminate disciplinary proceedings by resigning and, if qualified, could just retire on full benefits and carry on an alternative legal career.⁷³

283. The Working Group emphasised that:⁷⁴

- (a) leadership is crucial and must come from the top of the judiciary, but must also extend to the judges generally, throughout the diverse courts;
- (b) there must be commitment to the goal of a “welcoming and civil workplace”, backed up by “educational programs, performance reviews and mechanisms for motivating positive change” from the judges, executives, supervisors and managers at every level.
- (c) Employees must see that “bad behaviour will not stand and that everyone complicit in that behaviour will be held responsible”.

284. The Working Group identified short-term contract employment as a significant problem. It stated:⁷⁵

Although the reluctance to report misconduct arises in all employment categories, it deserves special attention in the case of law clerks, most of whom serve in the courts for only one to two years. ... Law clerks, who are typically at the start of their legal careers...work in close quarters with their judge providing confidential support in an isolating environment. There is an acute “power disparity” between a life tenured judge, who is a person of stature and influence, and a law clerk. Law clerks face strong disincentives to report inappropriate conduct. The law clerk who reports misconduct may understandably fear that the complaint will permanently destroy the bond of trust between the judge and the clerk and cause unwelcome strife in the chambers. Law clerks know that a judge’s recommendation often plays a role in the individual’s future job prospects. A judge’s rancor may result in embarrassment among peers, tarnish the clerks professional reputation, and curtail career opportunities.

⁷¹ US Working Group Report, 11.

⁷² US Working Group Report, 11.

⁷³ US Working Group Report, 11–12.

⁷⁴ US Working Group Report, 8–9.

⁷⁵ US Working Group Report, 12–13.

285. The Working Group proposed vigilance on the part of judges themselves as a solution. It stated:⁷⁶

...[t]he virtues of mutual respect, independence, and collegiality should not prevent a judge from intervening when necessary to protect an employee from another judge's inappropriate conduct.

...

The Code of Conduct should make clearer that judges cannot turn a blind eye to a colleague's mistreatment of employees, and the training programs for new and experienced judges should provide direction on how to navigate this sensitive issue without eroding the distinctive values of the Judicial Branch.

286. The Working Group also advocated:

- (a) Codes of Conduct for judges to clarify and make explicit that "disrespect, abuse and harassment are impermissible and should be reported";⁷⁷
- (b) Codes and publications to make clearer that confidentiality obligations do not prevent an employee from reporting misconduct;⁷⁸
- (c) ensure that avoidance of sexual harassment or inappropriate behaviour does not work to exclude any groups from opportunities;⁷⁹ and
- (d) clarified complaints procedures, including lists of key contacts.⁸⁰

287. The Federal Judiciary Workplace Conduct Group's report acknowledged that the American Judiciary shared common features with other American public and private workplaces, although it was unique in certain respects. On the one hand, the following factors tended to mitigate risk:⁸¹

- (a) the rigorous screening of judges through the judicial vetting prior to appointment;
- (b) the judiciary's institutional role involving commitment to fairness and the rule of law;
- (c) the fact that most employees are subject to pre-employment background investigations;
- (d) long-maintained codes of professional conduct;
- (e) a host of fair employment training and educational programs; and

⁷⁶ US Working Group Report, 13.

⁷⁷ US Working Group Report, 14.

⁷⁸ US Working Group Report, 26.

⁷⁹ US Working Group Report, 44.

⁸⁰ US Working Group Report, 16.

⁸¹ US Working Group Report, 3.

- (f) judges are subject to both statutory and regulatory programs to investigate misconduct.
288. The Report noted, however, that elements of the judicial workplace can increase the risk of misconduct or impose obstacles to addressing inappropriate behaviour effectively:⁸²
- (a) significant power disparities exist between judges and law clerks (and other employees) which may deter the latter from reporting or challenging objectionable conduct;
 - (b) judges enjoy life tenure and are subject to discipline only through formal processes;
 - (c) a high degree of confidentiality required by judicial decision-making, which clerks and chambers employees may think forbids the reporting of misconduct.
289. The Working Group referred⁸³ to the EEOC (Equal Employment Opportunity Commission) Task Force Study of Harassment in the Workforce (2016) which explained that workplace harassment is a persistent and pervasive problem in all economic sectors, in all socio-economic classes and at all organisational levels. As it was both widespread and under reported in workplaces, the Chief Justice had acknowledged “there is no reason to believe that the judiciary is immune”. The Working Group cited the EEOC’s identification of five steps that employers could take to end sexual harassment:
- (a) demonstrate committed and engaged leadership;
 - (b) require consistent and demonstrated accountability;
 - (c) issue strong and comprehensive policies;
 - (d) offer trusted and accessible complaints procedures; and
 - (e) provide regular interactive training tailored to the organisation.

RISK FACTORS FOR SEXUAL HARASSMENT AND THE JUDICIARY IDENTIFIED IN THE UNITED STATES

290. The 2016 Equal Employment Opportunity Commission Report identified 12 non-exhaustive conditions that amount to risk factors, one or more of which could constitute fertile ground for sexual harassment to occur. According to Litman and Shah, the federal judiciary exhibited the following five factors:⁸⁴
- (a) **Homogenous workforce.** Sexual harassment is more likely where there is a lack of diversity in the workplace. Litman and Shah noted a 2000 study which revealed that,

⁸² US Working Group Report, 3.

⁸³ US Working Group Report, 5–7.

⁸⁴ Litman and Shah, 615-620.

between 1994 and 1998, more than 85% of federal clerks in the United States were white. A significant majority of federal judges are men.

- (b) **Workplaces with significant power disparities.** There is a significant power disparity in the judiciary. Judges have real power to affect the career of clerks, and job loss reflects poorly on competence and employability.
- (c) **Isolated workspaces.** Harassment is more likely for physically isolated workers. Harassers have easy access and there are few witnesses. Judicial chambers are entirely isolated, and judges can forbid staff to go out or socialise, or require them to stay late.
- (d) **Decentralised workplace.** If there is limited communication between organisational levels, sexual harassment may go unchecked. The judicial workplace is almost entirely decentralised. Although the Chief Judge may be seen as senior management, the communication between levels is limited and there appear to be no rules requiring judges to report on employment issues. Judges have incentives not to act as checks on one another. Even if misconduct is an “open secret”, they are reluctant to address it and do not interfere in how other judges run their chambers. They may want to preserve a good personal relationship with other judges, as they must work together. Further, judicial chambers are hierarchical fiefdoms that lead to judicial isolation. The purported rationale is judicial independence, but the result is unchecked judicial power in an employment context.
- (e) **Workplaces with high-value employees.** There is reluctance to challenge the behaviours of highly valued employees (or in this context, judges) who may believe that workplace rules do not apply to them. Judges may be appointed for life and be removable only by impeachment, which is uncommon.

RISK FACTORS IN VICTORIAN COURTS

SUPREME COURT

- 291. In our opinion, the Supreme Court of Victoria displays all of the above risk factors for the occurrence of sexual harassment. It is an extremely hierarchical workplace with significant power disparities between the judges and all other staff, but most particularly, chambers’ staff, including junior support staff, such as associates.
- 292. Although the balance between male and female judges is becoming more equal and both the current Chief Justice and the President of the Court of Appeal are women, a majority of judges are male. The workforce appears to be relatively homogeneous. The architecture and layout of the court result in physical isolation. The workplace is very decentralised.

Communication between the various levels and categories of workers are limited. The workplace is segregated as many workers do not meet or know each other. Although most other staff members know the judges by sight and name, the judges may not know or even recognise many staff members apart from their own chambers staff. The difficulty is compounded by the shifting population of short-term associates and the heavy workload. The judges are a classical and extreme example of “high value employees”, as they legitimately exercise greater power, are, broadly, subject to no higher authority and cannot be removed from office save by a cumbersome and very rarely invoked process.

293. To the above well-recognised risk factors, we would add some risk factors peculiar to judges and curial workplaces. Most obviously, there is the unique working relationship of judge and associate which necessarily involves an unusual mutual proximity and dependency. This offers the associate crucial professional benefits, but engenders great vulnerabilities. The integral vulnerability is exacerbated by the current norm of short-term, insecure employment and recruiting high achieving law graduates at the outset of their career.
294. Further, due to the high status of the judge in professional legal circles generally, junior legal professionals, law students and other court workers who are not associates may share virtually the same vulnerability. Judges are frequently requested or encouraged to meet with, assist and mentor young persons in the profession, who may be in awe of the judge.
295. The role of the judge is isolating, as the workload is heavy, sometimes urgent and often stressful. Judges may experience a painful contrast with the camaraderie, wide social interactions and peer support of the bar or a solicitors’ firm, from which most judges are recruited.

COUNTY COURT

296. The County Court shares similar risk factors to the Supreme Court, but has a better architecture and layout. Associates sit together in groups in open plan. It also has a somewhat more balanced gender distribution of judges who may, on average, be younger and include more non-barristers.

THE OTHER COURTS

297. As discussed in detail above, the risk factors are much less pronounced.

BRIEF SUMMARY OF EMPLOYMENT ARRANGEMENTS IN EACH RELEVANT JURISDICTION

298. Commencing at paragraph [159] above, we set out our observations on practices at the Supreme Court and County Court concerning the recruitment of, and working arrangements of, associates and other judicial staff in those Courts.
299. The following section of the Report contains our observations on practices in the Magistrates' Court, Children's Court, Coroners Court and VCAT.

MAGISTRATES' COURT

300. The Magistrates' Court does not employ the Associate model adopted in the higher courts. Instead, a magistrate will be assisted in court by a "bench clerk", and that role will usually, but not invariably, be filled by a different CSV-employed staff member from day-to-day. The bench clerk assists the magistrate in court, including by entering court orders into the Court's systems and liaising with members of the profession. Given the volume of matters typically heard by a magistrate on any day, and the number of lawyers present in the court room (or the virtual court room) with whom the bench clerk must liaise to ensure that the sittings go smoothly, the role of a bench clerk can be demanding.
301. The "bench clerk" role is usually carried out by CSV-employed staff designated as "Trainee Court Registrars" ("TCRs"). TCRs are very junior employees employed on a permanent ongoing basis at the VPS2 level with a six-month probation period. A law degree is not a prerequisite for employment as a TCR. We understand that TCRs may potentially remain at the Court indefinitely, subject to satisfactory completion of their training and potential promotion to a more senior role.
302. TCRs report through Registry, generally to a VPS3 or VPS4 staff member. Given that it is a traineeship role paid at a VPS2 level, TCRs are typically young people in their twenties. When working as bench clerks, these very junior staff work in close and regular contact with magistrates.
303. The recruitment process for TCRs is merit-based. The Court advertises for TCRs through normal channels, such as advertising online on Seek. We were told that the Court advertises for TCRs approximately every two months.
304. Some TCRs are based in regional locations, across the 51 court locations throughout the State. However, it is sometimes necessary to have TCRs commute to a different location, particularly to regional courts in areas where it is difficult to recruit TCRs.

305. The traineeship period for a TCR typically takes three years to complete. An induction program facilitated by the Court's Learning and Development Unit is run monthly. That induction program runs for three weeks, and TCRs then move into their work locations for on-the-job learning. The Learning and Development Unit's training sessions cover a general induction to the Court, and go through the policies in place at the Court, including the CSV "Respect in the Workplace" policy and the eLearn relating to that policy. We were told that TCRs are also advised during induction as to what they can do if they have concerns about anything at work, and how they might raise those concerns. This includes a discussion on what types of behaviour are inappropriate and not tolerated within the Court.
306. TCRs are "rotated" and assigned to different magistrates, rather than assigned to any one magistrate in particular. Some magistrates will, however, express a preference for a particular TCR who has worked well with them in the past. When that occurs, the magistrate will ask the co-ordinator to schedule that TCR to be the bench clerk for their hearings. However, we understand that assignment on that basis is very uncommon. We were told that if for any reason the working relationship between a TCR and a judicial officer becomes strained, it is possible to ensure that that TCR is not assigned to work with that magistrate, and indeed that is what often happens. TCRs may also report to court administration, or even to the Chief Magistrate, if they have a problem with a particular magistrate and do not wish to be assigned to that magistrate, although we understand that TCRs in practice do not tend to take that step.
307. As to training for new magistrates, we were told that a team of Learning and Development staff conduct training focused on the court's computer systems. There is also three weeks of judicially-led training on court craft. The Chief Magistrate also has one-on-one meetings with all newly appointed magistrates. Further, there are occasional "development days", at which the Chief Magistrate might speak to judicial officers about management of staff or standards of appropriate behaviour. For example, on one development day magistrates attended a session on sexual harassment conducted by Kristen Hilton, former Victorian Equal Opportunity and Human Rights Commissioner.
308. As to the complaints process that existed prior to the introduction of new CSV policies in 2022, we heard that information on where to report sexual harassment was available, but not always easy to find. We were also told that staff are informed that the Court administration is under a positive obligation to take reports further if it becomes aware of serious allegations which pose a risk to the health of staff, even if the complainant indicates that he or she does not wish the complaint to be taken further.

309. We heard that the impression within the Court is that sexual harassment is not a significant issue, but that there is no reason to believe that the Court is entirely free of such behaviour. Anecdotally, however, other interpersonal behaviour such as bullying or simply unprofessional behaviour is a more prominent concern at the Court. Sexual harassment incidents within the recent past concerned interactions between CSV employees, not conduct by a judicial officer towards a CSV employee. Further, given the multitude of avenues by which a complaint might be raised, there is no comprehensive data on the scope of the problem of sexual harassment.
310. There are also other significant and relevant differences between the Magistrates' Court and the higher courts, including the large size of the Court (there are approximately 140 judicial officers and 1,000 CSV-employed staff members), and the demographics of the Court. We were told that the gender composition among judicial officers is approximately 50:50, and that approximately 77% of CSV-employed staff at the Court are female. That ratio does shift somewhat at higher levels of court administration among senior registrars.
311. It was evident in our discussions with Court staff that the Court benefited from the Chief Magistrate's strong messaging on appropriate standards of behaviour. In an email to all staff soon after the release of the Szoke Report, the Chief Magistrate included a link to the Szoke Report, stated that the issue was one she and the court leadership took seriously, called upon all judicial officers and staff to engage in steps to address sexual harassment and implement the Szoke Report recommendations. The Chief Magistrate drew attention to the supports available to anyone who had experienced sexual harassment at the Court, including the Sexual Harassment Confidential Support Service. Her email also included contact details of relevant personnel in the "Contact Officer Group", as well as in People and Culture, and encouraged court staff to raise matters with her directly.
312. Since the onset of the pandemic, there have been relevant changes in the Court's staffing and processes.
313. First, the Chief Magistrate and the Court's CEO have instituted regular "town hall" meetings with all staff. The meetings are conducted by Zoom, and all staff may attend (and we understand some magistrates also attend). At one such meeting, the Chief Magistrate raised the issue of sexual harassment within courts, and indicated that she views it as an important issue. Participants are given the opportunity to ask questions during the town hall meetings, and some of the questions asked have been directed to the topic of appropriate behaviour by magistrates towards staff. The staff attendees may remain invisible and can ask questions anonymously. From all accounts, the town hall meetings have been very successful in raising awareness of the issue and reinforcing that the topic of sexual harassment is taken very

seriously by the Court’s leadership. The town hall meetings also allow all court personnel to assemble together as a united workforce which mitigates the known risk of decentralisation. The meetings also familiarise the leadership to court workers at all levels. The leaders are thus not simply remote figures and can promote important messages in an accessible forum.

314. Secondly, the Court has instituted a new category of CSV-employed staff: “Court Officers”. We heard that the Court Officer program was designed with the recommendations of the Szoke Report in mind. Like TCRs, Court Officers are employed at the VPS2 level. The role is similar to that of the typical role of an Associate in the higher courts, in that it is envisaged that each Court Officer will be assigned to work with a particular magistrate and to support that magistrate.
315. Court Officers report directly to the Legal Policy Unit at the Court. Their induction is conducted by the Legal Policy Unit, and includes a discussion about reasonable expectations magistrates may have of them in their role, and how Court Officers may escalate any concerns which they have when working with a magistrate. Reporting to legally qualified persons was perceived as an advantage, as there is a shared understanding of what may be at stake in making any complaint. The induction process is about a month long. One session focuses specifically on sexual harassment. A series of slides are given to inductees and Divisional Lawyers speak to those slides. That session covers:
- (a) the definition of sexual harassment under the SD Act;
 - (b) an outline of the Szoke Report, including the risk factors for sexual harassment identified in the Report;
 - (c) a list of common concerns staff may have around making a report (for example, “it will ruin my career”, or “the person who harassed me is a judicial officer”), and the Court’s response to those concerns (inductees are shown a quotation from a statement by the Chief Justice that “there is zero tolerance for sexual harassment”, and told that confidentiality obligations between staff and a judicial officer do not prevent the making of a complaint);
 - (d) a series of scenarios during which inductees are invited to consider whether the conduct described in the scenario is appropriate (for example, “X messages everyone but Y in their work team via WhatsApp to talk about Y’s short skirt and generally “super sexy” work outfits”); and

- (e) the process for making sexual harassment and victimisation complaints (noting that that process is subject to change with the publication of new CSV policies), including flowcharts of the complaint procedure.
316. During induction, Court Officers are also told that the magistrate to whom they are assigned is not their employer or supervisor. It is reinforced that they report to the Court's Legal Policy Unit. The message is further reinforced by the fact that the Court Officers have desks in the William Cooper building, alongside their supervisors, separate from the magistrate to whom they are assigned, although we understand that these arrangements may change over time. This arrangement deliberately emphasises that the Court Officers are part of a team of Court Officers. Further, each Court Officer is assigned a mentor at the VPS3 level, and is encouraged to build a relationship with their mentor.
317. Alongside the induction of new Court Officers, there is a further induction process for magistrates who are to be assigned a Court Officer. As part of that process, it is emphasised that they are not the employer or supervisor of the Court Officer assigned to them. The Chief Magistrate speaks with those magistrates, including about appropriate standards of conduct. As part of that discussion, the Chief Magistrate states that any performance issues are to be raised with the Court's administration, and speaks to magistrates about the limits of the Court Officer's role and the tasks which may be expected of them. We heard that this practice works well, and that Court Officers gain additional comfort from their awareness that the magistrates to whom they have been assigned have been instructed, including by the head of jurisdiction, about the nature and limits of their role.
318. The determination of which Court Officer will be assigned to a particular magistrate is made by the Legal Policy Unit. Various factors are considered in the assignment process, including the Court Officer's interests and whether the working practices of the Court Officer match that of the magistrate. Court Officers are encouraged to report if the assignment is not working for any reason.

CHILDREN'S COURT

319. The Children's Court is a workplace with a very high percentage of female staff and magistrates. We understand that (as at January 2022) there are approximately 170 staff at the Court, of whom 82 per cent are female, and that of the 22 judicial officers at the Court (18 magistrates and 4 judicial registrars), 17 are female.
320. The Court does not employ associates as that role is typically understood in the higher courts. Approximately 25 TCRs are employed at the Court. These TCRs carry out the bulk of the

“bench clerk” work at the Court, although on occasion a VPS3 or VPS4 staff member (who is often a former TCR who has been promoted from the ranks) will carry out that task when a TCR is absent.

321. The Magistrates’ Court manages the recruitment of TCRs for both the Magistrates’ Court and the Children’s Court. TCRs employed at the Children’s Court therefore complete the same 3-week induction as do TCRs based at the Magistrates’ Court, including the “Respect in the Workplace” learning module. TCRs may spend 12 to 18 months at the Children’s Court, then move to the Magistrates’ Court for a time to complete their training. As in the Magistrates’ Court, TCRs are overwhelmingly female and in their early to mid-twenties. We were told that this demographic reflects the demographics of applicants for the role.
322. We were told that senior members of staff meet with new recruits at the Court. That meeting mostly concerns staff wellbeing, and includes a discussion around reasonable expectations which magistrates may have and the boundaries of proper judicial expectations. In that regard, we were told that the experience of the Court during COVID has increased the awareness of the need to draw a clear boundary between work hours and non-work hours, including by instructing staff that there is no expectation for them to have contact with any judicial officers outside of work hours.
323. In the relatively recent past, the policies at the Court concerning assignment of TCRs to magistrates have changed. While in the past bench clerks were posted to courts on a day-to-day basis without being attached to any particular magistrate, under the new arrangements TCRs are assigned to a particular magistrate for a 3 or 4 month term. We were told that while a TCR is administratively assigned to a particular magistrate, that TCR remains part of a CSV-employed “team” assisting that magistrate including a bench clerk, registrar and manager. TCRs do not sit with the magistrate to whom they are assigned, and continue to sit with the registry staff, in an open-plan environment, within their teams to ensure that they have support for their ongoing development. Judicial officers sit on the same floor as the registry, and we were told that given the open-plan layout, there is ample visibility of what is occurring on the floor.
324. Under the new arrangements, the Senior Registrar and the Operations Manager assign TCRs to magistrates. They consider a number of factors assigning the TCRs, including the TCR’s stage of training, their strengths and weakness and the expectations of magistrates. They take into account the TCR’s personality, including whether they are introverted or extroverted. Before a TCR is assigned to a magistrate, staff speak to the magistrate and inform them of the chosen TCR to ensure that the magistrate is comfortable with the assignment. Throughout the assignment, the working relationship is monitored by senior registry staff

and there is capacity to re-assign a TCR to a different magistrate if the assignment is not working, including where a magistrate is not satisfied with the TCR's performance. In that case, however, registry staff will first work with that TCR to attempt to build-up the TCR's capabilities. At the end of the 3-to-4-month assignment, a TCR will be rotated.⁸⁵

325. Reporting lines within the Court appear to be clear. We were told that TCRs report to VPS3 Registrars, who in turn report to VPS4 Registry Managers. Those VPS4s report to the Operations Manager, who reports to the Senior Registrar at the VPS6 level. We were further told that, from a registry perspective, there are clear expectations about regular catch-ups within reporting lines as well as performance discussions. Managers are expected to be proactive in having weekly and fortnightly catch-ups, and there are regular staff meetings. Peer level meetings also occur on a regular basis to discuss any issues which arise. Mentoring and peer support is also provided, particularly for the VPS2 and VPS3-level staff, in a monthly externally facilitated session where those staff members can speak about how they are feeling given the sometimes challenging nature of the Court's work.
326. During our consultations, the managers and the CEO emphasised the benefits of the relatively small size of the Children's Court. We were told that there is a real sense of working together within the Court. Senior registry staff are able to get to know junior registry staff. Similarly, staff get to know magistrates well. All staff we spoke to appeared confident that any "red flags" of sexual harassment would be detected, and that junior staff members would feel comfortable in raising any concerns with more senior members of the registry.
327. We were also told that there are no specific written protocols relating to arrangements for travel on circuit. In practice, however, CSV staff will generally travel to the destination separately from the judicial officer and will stay at separate accommodation.

CORONERS COURT

328. The Coroners Court is unlike other jurisdictions in many respects. Much of the Court's work is done in chambers, with only a very small proportion of the Court's matters progressing to an inquest. Further, the Court's work is inquisitorial, rather than adversarial. The nature of the Court's work and the consequent risk of vicarious trauma necessitates a focus on staff wellbeing.

⁸⁵ At the time of completing this report, we were informed that, following consultation with magistrates, who expressed preference for more permanent support, the Children's Court would move away from the frequent rotation of TCRs.

329. The problems which the Coroners Court has faced in recent years have been well publicised. Some detail of those matters appears in the November 2020 “Finding into Death without Inquest” concerning the death of a Court employee in September 2018. The coroner found in that matter that the employee, a respected senior solicitor, had been suffering from a “work related major depressive disorder”, and that the “workplace and its culture at the time, was deeply flawed”.
330. In 2019, a number of allegations of misconduct or inappropriate behaviour against the then State Coroner were made and investigated by the Judicial Commission. Most of the allegations were dismissed after a preliminary investigation. Several allegations were referred to the Chief Judge of the County Court for counselling. One allegation concerning the removal of alcohol purchased by Court funds for personal use was referred to an investigating panel, and was dismissed. The then State Coroner resigned but remained as a County Court judge.
331. In our consultations with Court HR management and CEO, we gained the impression that the troubles the Court has been through have provided the impetus for significant structural change within the Court as a workplace. We heard also that the Court’s leadership takes a strong stand on setting positive values within the Court, and regularly communicates with staff about staff wellbeing and support. We also heard that the relationship between staff and coroners tends to be significantly less formal than it is in the higher courts, and that there is not the same kind of power imbalance and hierarchy as exists in the higher courts.
332. The Court has 14 coroners, with a gender balance that is approximately 60% female. Some coroners are magistrates, while others are appointed simply as coroners on a fixed-term basis. The coroners are supported by 116 CSV-employed staff, approximately 70% of whom are female. Staff are generally in their twenties or thirties.
333. Each coroner is supported by a team comprising a solicitor and a registrar. Each Coroner and their team will have a caseload of about 400 matters at any single time, of which about 20 to 30% of which will result in written findings, and about 1% will progress to an inquest. The solicitor provides legal support, and the registrar case manages matters. There is no analogue to associates/tipstaves in the higher courts. Registrars are employed at the VPS3 level, and solicitors are employed at the VPS4 level. As registrars are employed at a higher level than in other courts (where junior registrars tend to be employed at the VPS2 level), the Coroners Court is often seen as a desirable destination for registrars looking to progress in their career. Accordingly, the Court’s registrars tend to have some previous experience in the workforce before working at the Court.

334. A significant factor which sets the Coroners Court apart from other jurisdictions is that staff are now in ongoing roles, rather than appointed on fixed terms. Staff at the Court tend to be senior in grade to their counterparts at other courts and have more secure employment on a long-term basis. We heard further that the security of tenure among staff has instilled a sense of stability in the workplace. The longer tenure ensures that staff are familiar with the way in which the court operates and are able to provide better support to coroners. As stated above, short-term contract employment is a major risk factor for sexual harassment, which the new Coroners Court arrangement avoids.
335. In addition to solicitors and registrars, other staff at the Court include investigators, Family Liaison Officers and Koori Family Liaison Officers.
336. Given the nature of the Court’s jurisdiction and work, recruitment decisions are influenced by the need for candidates with resilience. During the recruitment process (which is a competitive process based on merit), the Court communicates openly about the sometimes challenging nature of the work. This includes the publication of a series called “a Day in the Life” which sets out what sort of tasks an employee at the Court might undertake in a day in their role. The purpose of the publication is to ensure that applicants know what to expect.
337. We heard that there are no fixed arrangements for how long a “team” (comprising a coroner, registrar and a solicitor) will stay together. The decision is based on business needs. The Court will generally aim to keep a team together on a long-term basis to foster seamless working arrangements and in recognition that each coroner will like things done in a certain way. However, there is scope to change the composition of teams in certain circumstances. For example, a new coroner may join the Court and require assistance from experienced staff, or there may be other issues within the team which affect the working environment.
338. As to induction, new staff members have a one-on-one conversation with the head of HR shortly after commencement of their employment and are given a detailed Welcome Information Pack, and a “Welcome to the Coroners Court” eBook. The Welcome Information Pack includes an organisational chart with details of the Court’s executive team and a diagram of the business unit structure. One page of the Welcome Information Pack is headed “A safe, healthy and respectful workplace”. New staff are informed that the Court is committed to providing a “safe, healthy and respectful workplace”, and that “[a]ll care is taken to protect the privacy of [complainants], with supports being put in place while complaints are resolved”. Staff are also informed that they will be required to undertake the mandatory “Respect in the Workplace” eLearn. Another page of the Welcome Information Pack sets out the various health and wellbeing supports available to staff, including confidential one-on-one wellbeing debriefs with psychologists, as well as vicarious trauma

workshops. New staff will also have a welfare supervision session at week 6 of their employment where they will see a psychologist to have a general conversation and are given the option of creating a wellbeing plan.

339. We heard that a significant part of the work of the human resources division at the Court has been the development of appropriate reporting structures. Supervision ratios have significantly improved since 2018. Within the legal services team at the Court, the role of “Senior Solicitor” has been created. Each “Senior Solicitor” has three solicitors who report to them. A similar arrangement exists within the registry team within the Court. A strong supervision framework has been developed. A staff member with supervision responsibilities is expected to have regular catch-ups with staff which are designed to give staff an opportunity to speak about how their work is progressing, both in terms of performance and the staff member’s wellbeing. Such meetings are scheduled during work hours and are one-on-one meetings between staff and supervisor. The Court has developed a template to guide conversation during those supervision meetings. We heard that supervisors within the Court are attuned to what reasonable expectations are within each role at the Court, and that staff are able to raise any concerns in that regard during supervision discussions. We heard that there is an understanding at the Court that the supervision arrangements are working well, and that as a result senior leadership has visibility of any “red flags” that develop within the Court.
340. The Court’s geography comprises modern, open workspaces. Staff are not situated within the same room as the coroner to whom they are assigned. Coroners are assigned offices that are glass-fronted, with frosted glass.
341. As to induction of coroners, an induction program has been designed in recent years. No formal induction was previously in place. As part of the induction, the CEO meets with each new coroner and takes him or her through, among other things, the administrative arrangements concerning the employment of staff and the coroner’s relationship with staff (noting that staff are employed by CSV and have their own reporting lines independent of the coroner), the Court’s values and priorities, and how the Court operates. New coroners also meet with other members of the Court’s leadership team, including the Principal Registrar and the Head of Legal Services. At present, the induction for coroners does not include any formal session specific to sexual harassment.

CONCLUSION

342. In summary, the Coroners Court lacks many of the risk factors that are obvious in the Supreme and other Courts, but the background of traumatic past events has not been entirely

blotted out. The observations of some interviewees suggest that some instances of inappropriate conduct continue to occur. While the targets of an individual judicial officer had confidence to complain and the latter's conduct has been curbed, it is clear that the Coroners Court should persist in, strengthen and reinforce the many appropriate responsive measures it is currently implementing.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

343. There are approximately 250 CSV-employed staff at VCAT, along with approximately 200 members, some of whom are appointed on a permanent basis, and others on a sessional basis. The senior permanent membership is an older group, mainly aged in their sixties. There are more women than men at all levels within the organisation, including among members, a slight majority of whom are female.
344. CSV-employed staff at the Tribunal are recruited in a merit-based competitive process. The Court advertises for positions when there is a vacancy.
345. Tribunal members, whether sessional or permanent, are not assigned associates. Rather, a pool of staff within the Tribunal's Registry work with different members and provide them with assistance. The staff who work most closely with members are known as Member Support Officers ("MSOs"). MSOs are employed on an ongoing basis, and we heard that there is relatively low staff turnover. Indeed, some staff at the Tribunal have been employed at the Tribunal since it was established over 20 years ago. It is recognised that short-term employment is a risk factor for, among other things, sexual harassment.
346. The tasks of MSOs include legal research (a role usually conducted by more senior MSOs), assistance with typing up rulings, ensuring that the relevant papers for the matter are available to the member, and helping to set-up remote hearings. MSOs are not assigned to particular members, but rather to particular lists within the Tribunal, such as the Human Rights List or the Residential Tenancies and Planning Lists. MSOs will often rotate to other lists for their own learning and development, but there are some MSOs who stay with one list, and so work with a particular group of members, on a long-term basis. Therefore, if a member has, for example, a research task with which they require support, that member will not go to any one designated MSO in particular, but rather one of a number of MSOs assigned to the relevant list. The exception to the above arrangements is that judicial officers at VCAT, the President and Deputy Presidents, have their own associates pursuant to the arrangements applying within the Supreme Court and the County Court.

347. MSOs report to a CSV-employed manager, and not to any member. Their direct report is to a Team Leader, with whom they work closely day-to-day and who is located on their floor. That Team Leader in turn reports to the Manager, Member Support and Hearing Services, who reports to an Executive Director. The role of the Manager, Member Support Services includes determining the assignment of MSOs to particular lists. CSV, through the Manager, has the ultimate say on which MSOs will be assigned to particular lists. This is done, however, in consultation with members, who may express a preference for certain MSOs. If a problem arises in the working relationship between an MSO and a member, it would be possible for that MSO to be rotated away from that member. We heard that these reporting arrangements were implemented in the relatively recent past, and that MSOs previously reported directly into People & Culture. The change was intended to bring MSOs within more regular management lines within the Tribunal's registry and operations area, and to ensure that there was more visibility over any instances of MSOs being subject to members' unreasonable expectations.
348. During our consultations, we heard that senior leadership at the Tribunal are proactive in setting the culture at the Tribunal, and in addressing any inappropriate conduct that arises at the Tribunal. The Court has instituted a practice of holding "town hall" meetings which are conducted by Zoom and take place every Friday. The President of the Tribunal speaks at those town hall meetings, including on subjects concerning wellbeing and the need for kind and respectful behaviour within the Tribunal. We heard that the town hall meetings are very well attended, staff ask questions on any matter anonymously and become familiar with the Tribunal's leaders. The staff have indicated that they value the town hall meetings and wish them to continue. The meetings have been instrumental in setting a positive culture during the Tribunal during the COVID pandemic.
349. We also heard that the perception within the Tribunal is that the power differentials within the Tribunal are not as great as in the higher courts, and that there is less sense of a strict hierarchy. Staff and members are on first name terms. Regular training sessions at the Court are also conducted jointly with both members and staff in attendance.
350. We heard that while the Tribunal had not conducted any training sessions specific to the topic of sexual harassment for members, members had access to the materials produced by the Judicial College on that topic. As for training for new members, there is an induction program that is run by the Tribunal's People & Culture Unit. That program is based on CSV materials and policies, and covers the CSV policies on workplace respect and sexual harassment, but is specific to VCAT. We heard that there was interest within the Tribunal in expanding the induction materials supplied to new members on the topic of sexual

harassment, and the subject of inappropriate behaviour more broadly. In addition, when members join the Tribunal, they are assigned a mentor from the ranks of more senior members, and advised that they can approach the heads of lists and divisions at the Tribunal for assistance. Heads of lists and divisions are in turn encouraged to act as mentors for members. The President of VCAT also meets with each new member.

351. Geographically within the Tribunal, MSOs sit in an open plan arrangement co-located with members. While permanent members have their own offices, sessional members share working places within an open area. Members' offices have glass doors. Lunchrooms and kitchens are shared by staff and members.

ACROSS ALL COURTS AND VCAT

THE RESPECT IN THE WORKPLACE POLICY

352. As at the end of 2021, the relevant CSV policy was the "Respect in the Workplace" policy.⁸⁶ The stated purpose of the policy was "to outline the behaviour that is expected of employees, volunteers and contractors/consultants, and the steps that can be taken if it is considered that this policy has been breached". The policy applied to all VPS employees of CSV, and to "all workplaces and work activities of CSV, where staff are performing the duties of their employment, or are engaging in other activities during the course of their employment or which are related to or in connection with their employment with CSV". The policy stated that "CSV aims to create an environment of exemplary work standards and conduct, and to ensure high levels of positive public opinion". It went on to state that staff "must show respect for others, including public officials and members of the public by treating them fairly and objectively and ensuring freedom from discrimination, sexual harassment, racial or religious vilification, victimisation, occupational violence and bullying."
353. The policy defined sexual harassment in the same terms as in s 92 of the EO Act. The policy also sets out a number of examples of conduct which may constitute sexual harassment, including inappropriate sexually suggesting comments, repeated unwanted requests to go out, or intrusive questions or remarks about a person's sexual activities or private life.
354. Under the heading "Procedure", the policy stated that "[d]epending on the nature of the alleged conduct, local and informal resolution of complaints is preferred if possible". added that the resolution of complaints can include among other things "the individual concerned

⁸⁶ As noted above, the Respect in the Workplace policy has now been superseded by new CSV policies introduced in 2022. We have also been informed that the Respect in the Workplace module is to be replaced.

resolving the matter with the relevant party/parties”, “mediation or a facilitated discussion between the parties”, “investigating the incident”, “conducting a workplace review” or “referring the matter to Victoria Police”. A number of options for making a report were then set out, including raising the matter with a manager or HR representative, raising the matter with the CEO of the Court or Tribunal (or the CEO of CSV if the matter involves the CEO), or raising the matter with Workplace Relations, or external bodies such as the VEOHRC.

355. The Respect in the Workplace policy did not specifically address the concerns which CSV-employees may have in reporting conduct where the perpetrator is a judicial officer, or any specific reporting pathways or complaint resolution processes which apply in those circumstances. The focus of the policy was the standards of behaviour expected of CSV employees.

THE RESPECT IN THE WORKPLACE MODULE

356. We heard that within all Courts and VCAT (as at the end of 2021), CSV-employed staff were required to complete the “Respect in the Workplace” eLearn. As noted above, staff with whom we consulted viewed the “eLearn” as a “tick and flick” exercise, which was unsatisfactory as it was not tailored to the court workplace and dealt solely with peer-to-peer interactions between CSV employees. In our Progress Report at [280]–[281], we set out the contents of the “eLearn”. We are informed that CSV has a design and proposal for the customisation and delivery of a new “Respect & Equality at CSV” module, which will replace the old Respect in the Workplace module.
357. The eLearn made no mention whatsoever of judicial officers. The risks presented by the power differential between judge and CSV-employed staff were simply not addressed. It did not address the standards of behaviour expected of judicial officers, or assist staff experiencing inappropriate behaviour perpetrated by a judicial officer who were seeking to understand what options might be available to them.

NEW CSV POLICIES

358. A number of new policies and guidelines have been implemented by CSV since we began our review. Many of the new policies were published in January 2022, after we had already commenced our consultations with court staff. Further, the majority of the judicial staff with whom we consulted had been inducted into their roles prior to the introduction of those policies and had therefore had to complete the “Respect in the Workplace” module and “eLearn” described above.
359. The relevant CSV policies and guidelines which were publicised in early 2022 are:

- (a) The “Sexual Harassment and Victimisation Policy”. The purposes of that policy are “to provide all [CSV] employees with a clear understanding of what sexual harassment and victimisation are; to make clear CSV’s commitment to ensuring a workplace that is free of sexual harassment and victimisation; to make employees aware of their obligations in relation to standards of workplace behaviour, in particular sexual harassment and victimisation; and to provide guidance on how to make a report or complaint”. The policy contains a definition of sexual harassment and states that sexual harassment is unlawful under the EO Act and the SD Act. The policy also states that “[b]ystanders have an important role in responding to instances of sexual harassment and/or victimisation” and that “CSV will support and protect bystanders against victimisation, wherever possible”. The policy provided that employees can make a complaint of sexual harassment or victimisation by telling a manager, anonymously reporting via the CSV Respect and Integrity Hotline,⁸⁷ notifying the CSO or CSV, or talking to a contact officer. The policy further states that “[a]ll complaints will, to the extent reasonably practicable, be treated confidentially”, but notes that “at times information about alleged or proven behaviour may need to be used within CSV or a court or tribunal in a disciplinary proceeding or to address health and safety risks”.

The policy also contains a heading titled “Complaints against judicial officers”. It states that “[c]omplaints against current judicial officers can be made to the Judicial Commission of Victoria, head of jurisdiction, or the Australian Human Rights Commission (AHRC) (pursuant to the SD Act), whilst complaints against former judicial officers can be made to the relevant head or jurisdiction or the AHRC (although time limits apply).

- (b) The “Bullying, Discrimination, Harassment and Victimisation Policy”. The purposes of that policy are “to ensure that all [CSV] employees are aware of their obligations in relation to standards of workplace behaviour; to provide a clear understanding of what bullying, discrimination, harassment and victimisation are; and to make clear CSV’s commitment to ensuring a workplace that is free of bullying, discrimination, harassment and victimisation, and to provide guidance on how to make a report or complaint”. The policy states that “CSV recognises the right of all employees to attend work and to perform their duties without being subjected to any form of bullying,

⁸⁷ We are informed that the policy has been updated to state that anonymous reports can be made to Your Safe Space and CSV Workplace Relations, and not the CSV Respect and Integrity Hotline. We are also informed that complaints can be made to local HR.

discrimination, harassment or victimisation”. Like the “Sexual Harassment and Victimisation Policy”, the policy contains a section dealing with complaints against judicial officers which states that complaints can be made to the Judicial Commission or the Australian Human Rights Commission. The policy adds that confidentiality obligations between staff and judicial officers do not prevent employees from making a complaint about bullying, discrimination, harassment or victimisation.

(c) The “Alcohol Consumption at Work and Work Related Events” guideline. The purpose of the guideline is to ensure that CSV employees “are aware of their obligations in relation to standards of workplace behaviour, in particular the consumption of alcohol at work and when attending work-related events and work functions, and to demonstrate CSV’s commitment to ensuring a workplace that is free of sexual harassment, bullying, discrimination, other harassment and victimisation”. Under the heading “Statement of Guideline”, it is stated that “CSV acknowledges the rights of employees to consume alcohol in a legal and responsible manner at work-related events and work functions”, and that “[a]ll CSV employees are expected to ensure that their alcohol consumption at work, in the workplace, and at work-related events is moderate and responsible in all circumstances”. The guideline does not mention judicial officers.

(d) The “Managing Consensual Personal Relationships in the Workplace” guideline. The purpose of that guideline is to enable CSV employees “to be aware of and manage the impacts that consensual personal relationships may have in the workplace...”. The guideline notes that “[a]ny consensual personal relationships involving people in a hierarchical working relationship can represent a potential conflict of interest risk. The risks of potential conflicts of interest are likely to be heightened for employees in senior leadership positions and for judicial officers”. The guideline adds that “[e]mployees who are in a consensual personal relationship within a hierarchical working relationship should confidentially declare the relationship”.

The guideline also states that “[j]udicial officers are required to conduct themselves in accordance with Guidelines set out by the Judicial Commission of Victoria...”. Relevantly, the “Judicial Conduct Guideline: Sexual Harassment” published by the Judicial Commission:

- acknowledges that personal relationships can occur in a workplace and take various forms, including sexual or nonsexual relationships;

- states that “judicial officers must recognise how factors such as gender and power imbalances can impact on how people respond to unwanted sexual advances”;
- states that judicial officers should be aware of the requirement on CSV employees to declare a sexual relationship where there is a hierarchical working relationship and an actual, potential or perceived potential of interest;
- requires that judicial officers declare to their head of jurisdiction a sexual relationship with a CSV employee where there is a hierarchical working relationship and an actual, potential or perceived conflict of interest, so that the head of jurisdiction can work with the judicial officer concerned to put in place arrangements to avoid actual, potential or perceived conflicts.

360. In June 2022, CSV published a new complaints process set out in a document titled “Resolution procedure — Inappropriate workplace behaviours”. The procedures outlined in that document apply to all matters involving CSV employees, and also applies to reports regarding judicial officers (including VCAT members). The document sets out a list of persons and organisations a CSV employee may contact in the first instance to seek support: Your Safe Space; a CSV Contact Officer; Agile Mental Health; the Employee Assistance Program; local human resources; CSV People and Culture; CSV Workplace Relations; or the employee’s manager or another manager.

361. The document provides further information about Your Safe Space, which is described as “an independent external service provider that specialises in wellbeing support to those who have experienced inappropriate workplace behaviours”, which can “provide guidance on resolving matters” and “provide assistance in determining the preferred pathways to seek resolution, including provision of a case manager if needed”. The service is confidential and “provides specialist care including psychological first aid support and warm referrals to specialised providers”. The document also provides background information on CSV Contact Officers (“CSV employees who have been identified as well-regarded, trusted, specialist and trained members of staff who can support confidential discussions about inappropriate workplace behaviours”) and notes that a list of contact officers is to be found on the intranet.

362. Under the heading “Employee guided resolution options”, the document notes that an “employee has several resolution options they may choose from to resolve the matter”. These include self-management whereby the employee talks directly to the other person/s involved, if they feel comfortable to do so, and can choose to contact Your Safe Space, their manager, human resources or People and Culture to receive support in doing so. Alternatively,

employees may seek assisted resolution through Your Safe Space, a manager, local human resources, People and Culture, or CSV Workplace Relations who will “arrange a suitable agreed third person to facilitate the discussion”. A further option is to report anonymously. This may be done by contacting Your Safe Space or CSV Workplace Relations. Where this is done and the complainant decides to remain anonymous, “a deidentified report will be recorded and the information will be provided to the Chief People Officer, CSV who will take whatever steps are reasonably practicable to address the health and safety risks”. Another option is a formal resolution process initiated by reporting a matter to Your Safe Space, a manager, local human resources, CSV Workplace Relations, or CSV People and Culture. CSV Workplace Relations “will determine if an investigation is appropriate”, and “if an investigation is deemed appropriate, an independent investigator may be engaged”. Finally, employees may choose to report to an external body such as Victoria Police, the Judicial Commission of Victoria, the VEOHRC, the Australian Human Rights Commission, the Fair Work Commission, WorkSafe Victoria or the Victorian Workcover Authority.

363. Specific to the case where the alleged perpetrator is a judicial officer, the document states that:

- reports about judicial officers may be made to Your Safe Space, CSV Workplace Relations or the relevant local human resources team, CEO or head of jurisdiction;
- if a report is made to Your Safe Space, local human resources, CSV People and Culture or CSV Workplace Relations they may need to report the matter to the head of jurisdiction on the employee’s behalf, if the employee consents;
- a report may be made by an employee (including a bystander) directly to a head of jurisdiction or to an external body;
- the head of jurisdiction may determine to resolve the matter locally (by speaking to the judicial officer concerned) or through assisted or formal resolution (including through the Judicial Commission of Victoria, or by engaging an independent body to investigate the matter).

364. Finally, in June 2022 CSV also published a document titled “Guidance Material for Judicial Officers and VCAT Members”. The purpose of the document is to assist judicial officers (including VCAT members) when:

- (a) approached by a staff member or another person making a disclosure about inappropriate behaviour directed towards them or where they have observed inappropriate behaviour; and

(b) observing potential inappropriate behaviour towards a person.

365. In the first case, guidance is provided that judicial officers should: (a) listen to the disclosure; (b) provide support to the person; (c) inform them of their reporting options (which are then set out); (d) encourage or assist the disclosure of the matter to the CSV Chief People Officer and/or to the Head of Jurisdiction where appropriate; and (e) keep a confidential record of their report. In the second case, guidance is provided that when a judicial officer observes what they consider is inappropriate conduct towards a person in a work or work-related setting, the judicial officer should consider whether it is appropriate to speak up or act at the time. The guidance notes that if a judicial officer speaks up or acts in response to such conduct, that sends a significant message. The guidance sets out a number of examples of types of inappropriate behaviour and possible responses.

SUMMARY OF OBSERVATIONS

366. In this section we briefly summarise several of our principal observations, and identify some possible ways forward.

DEMOGRAPHICS AND LENGTH OF TENURE OF ASSOCIATES

367. We described above the relatively recent shift towards a merit-based recruitment process for associates. That shift has, entirely appropriately, done away with the potential for nepotism historically associated with the position.

368. Together with the short-term employment of associates in the Supreme and County Courts (typically on fixed-terms of two years or less), a result of the change to a merit-based recruitment process is that associates in the higher courts form a younger demographic of high-achieving recent graduates who use the position as a valuable “stepping stone” to other positions within the profession. We have been informed that there is a widespread assumption that only top honours graduates from Melbourne Law School, Monash Law School or other elite law schools, with valuable extra-curricular achievements, need bother to apply. While a few longer-term associates do remain in the Supreme and County Courts, including in learning and development roles, they are very much in the minority. We understand that the employment of associates on a long-term basis is discouraged, if it is possible at all. However, as discussed in detail above in this report, there is no reason why all associates must be young, high-achieving graduates from top law schools.

369. The advantages of retaining longer-term associates include the learning and development role they can play, the mature and accessible mentorship they can provide and the quality of their work given their length of experience. In our experience, longer-term associates are

invaluable in assisting new associates to settle into the court environment. Further, they are regarded by junior associates as a source of expertise and advice not only for technical questions as to how to carry out the role of an associate, but also for questions as to how to navigate any issues which might arise with other court staff or judicial officers. Such associates may preserve an “institutional memory” and knowledge base. Their presence promotes continuity, stability and diversity. Longer-term associates do not necessarily have any *formal* peer support role, but in our experience, they do provide a valuable source of support for new recruits at the court.

370. The fact that the significant majority of associates are employed on short-term contracts is itself an obvious and significant risk-factor for sexual harassment. It also provides a disincentive for associates to report inappropriate conduct: an associate subjected to such conduct might think it better to “put up with” that conduct for a short time before the expiry of their contract, rather than make a complaint and cut the associateship short, knowing that if they leave their position with a judicial officer before the standard 12 or 18 months questions may be asked by future employers as to the reasons for the early termination of that role. They will also forfeit the many benefits, uniquely valuable to those commencing a legal career, of the judge’s association and patronage.
371. As stated above, we conclude that it would be desirable and feasible to encourage recruitment over time, of at least some associates who are employed on a longer-term basis, and who need not be young, high-achieving graduates (they may be, for example, experienced lawyers looking for a different role or change of pace).

ASSIGNMENT OF STAFF TO JUDICIAL OFFICERS

372. As discussed above in this report, it is generally inaccurate to speak of staff who work in a primary relationship with judicial officers in the Supreme and County Courts being “assigned” to those judicial officers. Rather, judicial officers select the staff who will work with them. We have been informed that the judicial officer interviews candidates (often together with a Judicial Services Co-Ordinator) and has the final say as to who is recruited (provided that person has gone through the competitive recruitment process). While some judicial officers regret the relatively recent protocol requiring the presence of a Human Resources officer at interviews, some of the disclosures, discussed above, indicate that this is a reasonable and desirable convention, which accords with modern workplace practice and underlines the staff member’s real employment status.
373. In the other courts and tribunals, there are “assignment” processes. The precise arrangements differ across courts. Relevant considerations in assigning staff to particular judicial officers,

or particular lists or groups of judicial officers, often include (particularly in the assignment of trainee court registrars) the stage of training of the CSV staff member concerned. In some courts, CSV managers also take into account other matters, including whether the staff member concerned is likely to get along with a particular judicial officer, bearing in mind whether that staff member is introverted or extroverted, and that staff member's interests, strengths and weaknesses.

374. A close working relationship with a judge (on which Recommendation 4 focuses) may heighten the risk of sexual harassment. However, the power and status of judicial office pose inherent risks *vis a vis* junior people working in, or associated with, the legal profession. Judicial office provides many opportunities for the incumbent to connect with young over-awed persons studying or working in the law. Effective education for judges on the impact of their power and its potential abuse is thus of primary importance. This will provide guidance on appropriate judicial conduct whether in or outside the employment context.
375. A related issue — which affects all courts and VCAT — concerns the arrangements which can be made by CSV managers in response to a deterioration in the working relationship between a CSV staff member and a judicial officer, whatever the cause of that deterioration. In matters involving sexual harassment or other inappropriate conduct, in particular, there ought to be effective mechanisms whereby CSV staff can be transferred to an appropriate position at the court or tribunal which involves no diminution of their status or pay level. If those mechanisms are not in place, then staff subjected to inappropriate conduct by a judicial officer may perceive that there is no practical remedy available to them if they make a complaint, and that they must simply “put up with” what is occurring. We have observed that each court and tribunal has in the past been able to reassign CSV staff members to other suitable positions where there has been a breakdown in their relationship with a particular judicial officer. Sometimes, that has been because other positions have fortuitously become available, for example because of new judicial appointments. From the perspective of a complainant, however, the availability and conditions of such a reassignment are not clear or obvious.

APPROPRIATE TRAINING ON RESPECTIVE RESPONSIBILITIES FOR SUPERVISION OF STAFF

376. As we described above in this report, paragraph (b) under the heading of Recommendation 4 appears to be narrowly confined. Our inquiries indicate that judicial officers have not received training about their responsibilities for the supervision of staff (although CSV managers do). Nor (at least as a generally applicable proposition across jurisdictions, with

some exceptions) are judicial officers told anything about the limits of the appropriate role of CSV-employees assigned to work with them, or the limits to the types of work which might be expected of those employees. Courts that employ associates may be reluctant to be prescriptive about such matters, as there are great benefits in maintaining flexibility. However, encroaching workplace demands that blur the dividing line between the personal and professional are a risk factor for, and may characteristically precede or accompany, sexual harassment.

377. In the higher courts, it appears to be understood that the role of an associate is to assist a particular judge in the performance of that judge’s judicial functions. The judge has the practical day-to-day supervision of the associate, but not the administrative responsibility of supervising that associate, which rests with CSV as employer. We did not see any indication that that distinction is poorly understood by CSV managers. During our consultations, CSV managers were aware of the responsibilities CSV had towards its employees who work in a primary relationship with judicial officers, particularly those arising under occupational health and safety legislation.
378. We observed that CSV managers were generally aware that CSV’s responsibilities required monitoring the relationship between staff and judicial officers for any warning signs, and also that an employee be transferred away from a particular judicial officer if there were risks to the employee’s health or wellbeing (whether because of bullying, sexual harassment, or other misconduct). Indeed, we heard of instances where such steps had been taken. However, we also heard from staff of instances where such steps perhaps should have been, but had not been, taken, where it was an “open secret” at least among staff that a judicial officer had been engaging in inappropriate conduct. It was not always clear to us, however, what level of actual knowledge CSV managers in fact had, if any, of the inappropriate conduct in those cases.

INDUCTION PROCESSES FOR JUDICIAL OFFICERS AND JUDICIAL STAFF CONCERNING SEXUAL HARASSMENT

379. Our consultations revealed that, until very recently, to the extent that formal existing induction processes for new CSV employees address the topic of sexual harassment, they did so by providing a general introduction to, and summary of, CSV policies, particularly the “Respect in the Workplace Policy”. New starters were also required to complete an “eLearn”, which, as noted above, did not address sexual harassment by judicial officers.
380. The “Respect in the Workplace Policy” was in the process of being replaced by the policies developed by CSV in line with Recommendation 2 of the Szoke Report during the writing

of this report. We have summarised above the replacement policies recently introduced in 2022.

381. We interviewed a recently recruited associate in the County Court who recounted the induction which appeared to reflect changes instituted following the implementation of the revised policies concerning sexual harassment. The Magistrates' Court has introduced a specific induction program for the new position of court officers (analogous to associates in the higher courts) which specifically focusses on matters raised in the Szoke Review, the definition of sexual harassment, and common concerns staff may have around making a complaint. In other courts, the transition to new induction processes relating to sexual harassment is ongoing.
382. Newly-appointed judicial officers are (with some exceptions, particularly in the recent past involving sessions with the County Court staff judge) not given any formal training or induction that is specific to sexual harassment. We also observed that judicial officers — many of whom are appointed directly from the Bar and may have no experience at all in managing staff — are for the most part not given any formal guidance as to how to work with CSV staff, or the limits of the role of CSV staff. In our view, newly-appointed judicial officers would benefit from training as to the role of CSV staff and the limits of that role, and how to work with CSV staff, as well as training on sexual harassment and the power differential that exists between judicial officers and CSV staff. We address this topic in our recommendations below.

REPORTING LINES

383. A focus of Recommendation 4 (paragraph (d)) is “reporting lines” and the “options for different systems of reporting that could mitigate sexual harassment risk factors”. Senior CSV managers in each court appeared to us to have a strong understanding of the administrative reporting lines applicable within each court. Further, reporting lines appeared to be clearly defined (for example VPS2 trainee court registrars reporting to a VPS3 registrar, or an associate reporting administratively to a Judicial Services Co-ordinator), at least in a formal sense.
384. Our consultations indicated, however, that more junior CSV-employed staff (including chambers staff) who work in a primary relationship with judges either did not always have an accurate understanding of their reporting lines, or perceived that their reporting line, at least in practice if not theory, is to a judicial officer. Reporting lines must not only be well defined on the organisational chart, but also clearly communicated to those working in a primary relationship with judicial officers. They must also be compatible with the realities

of their daily working conditions. It is notable that the induction program for newly-appointed court officers in the Magistrates Court was specifically designed to reinforce to new staff that they report to the Magistrates' Court Legal Policy Unit, and not to a magistrate to whom they are assigned (and the induction program appears to have been effective in doing so).

385. CSV managers are conscious of the need to ensure that the person to whom an associate (or other junior staff member in a primary relationship with a judge) reports is able to observe or monitor the working relationship between associate and judicial officer. For example, managers and HR personnel informed us that Judicial Services Co-ordinators and Judicial Staff Co-ordinators work closely with associates and can observe the associates' relationship with judicial officers. That oversight permitted any problems in that relationship to be picked up and resolved before the relationship deteriorates further. However, our consultations with CSV staff (chambers staff) indicated that they do not consider that the CSV managers to whom they nominally report, are in a position adequately to monitor that working relationship and lack authority to intervene effectively.

PEER SUPPORT AND MENTORING/FEEDBACK MECHANISMS

386. At the time we published our Progress Report, there were few formal peer support arrangements in place within courts and VCAT. In our Progress Report, we summarised some existing peer support programs, and noted that a peer support program was then in development by CSV: at [301]–[302].
387. The peer support program developed by CSV is now in place. That program is not specific to sexual harassment or other inappropriate conduct by judicial officers. Peer supporters are selected from among CSV staff (following expression of interest) and receive training. Peer supporters volunteer their time to the role as peer supporter in addition to performing their substantive role. They provide an avenue of support to staff that co-exists with other preventative and early intervention programs in place. It is a secondary support service by which peer supporters are able to suggest referrals to primary providers of mental health assistance or support. The details of peer supporters are on the CSV intranet, and staff are informed that they can contact the peer supporters directly for support, irrespective of which jurisdiction they work in.
388. While we have been told that new judges in some courts are assigned a mentor on induction, our understanding is that there is in general little organised mentoring for new judges, at least in terms of assisting new judges to understand the role of CSV employees, and the limits of that role. Some judges expressed a preference for having a judge to whom they could resort

for mentoring and advice. Many judges and staff we consulted with assumed that the Judicial College provided substantive education for judges on the limits of appropriate conduct towards CSV staff. The Judicial College had not traditionally provided such training specific to addressing sexual harassment risks in response to Recommendation 13 of the Szoke Report (see also 14 above).

RECOMMENDATIONS

This section of our Report sets out our recommendations for measures to mitigate the risks for the occurrence and escalation of sexual harassment associated with the recruitment and working conditions of staff who work in primary relationships with judicial officers in Victorian courts and VCAT, and to improve responses to such conduct. Some recommended measures are independent while some assume a mutual operation with other recommendations.

It is difficult to formulate concrete recommendations to address risk factors exposed by the substantiated incidents and feedback outlined above, that arise in the unique, hitherto virtually unregulated relationship between judges and their chambers staff. That relationship has worked well for many people over time, often providing career highlights for associates, mutual satisfaction and lasting bonds for judges and staff and efficiency in serving the administration of justice in a frequently demanding context.

Recommendation 1 applies only to some courts. The implementation of some other recommendations may require adjustment to take account of the great diversity in the size, structure and organisation of the five Victorian courts and VCAT.⁸⁸

The recommendations we propose frequently emphasise education, counselling, instruction and training for the parties involved. It would be, as one of our interviewees noted, a tragedy if heavy handed attempts to regulate or micro-manage the personal and professional interactions of judges and their staff effectively destroyed a unique, sometimes idiosyncratic relationship which has long served many participants so well. While, as noted, reliable data are as yet unavailable, our enquiries do not suggest that sexual harassment of chambers or other staff by Victorian judicial officers is widespread. Rather, there are risk factors and some reported instances and observations which cannot be ignored and must be addressed.

After each recommendation, in some cases for convenience, we repeat the principal reasons for the recommendation, which are set out in greater detail above.

- 1 The Supreme Court and County Court should implement measures to diversify the demographic composition of, and include some longer-term appointees in, the associates' workforce. It should, to the extent feasible, encourage the recruitment of some more professionally experienced associates, including from a variety of cultural and social

⁸⁸ For example, the appointment of staff judicial officers may not be feasible in the Magistrates' Court, given its many locations. Similarly, the mode and scope of training and instruction for judicial officers of VCAT could be adjusted to take account of their large numbers and very variable frequency of service.

backgrounds. It should also attempt to retain a modest proportion of associates in continuing positions or on long-term contracts.

- 1.1 The above measures are mutually supportive as long-term contracts may be more attractive to experienced applicants who do not seek an associateship primarily as a “stepping stone” to advancement in the legal profession.
- 1.2 This recommendation aims to mitigate a structural risk factor inherent in the great power disparity between judges and associates. Absence of workforce diversity is an independent risk factor. Such risks are magnified by the features of the model of clerkship which has developed in the United States federal courts, to which Victorian associateships increasingly conform. While the power disparity is necessarily immutable, there is some scope to mitigate the unique vulnerability based on the associate’s inexperience, early career stage, professional aspirations and insecure, short-term tenure.
- 1.3 As discussed in detail above,⁸⁹ associates in the Supreme Court and County Court typically comprise a young demographic.⁹⁰ In the Supreme Court (and to a significant extent, the County Court) associates are now overwhelmingly recruited from the ranks of high achieving graduates of top law schools. A small number of long-serving associates remain in both courts, including in learning and development roles. Associates tend to be in their early to mid-twenties and frequently lack prior work experience, whether in the law or otherwise. Some may have completed a single year of practical legal training at a law firm. For such associates, the position presents an opportunity to gain valuable experience with a judicial officer and privileged insight into the opaque workings of the court and the judiciary. It is also a “stepping stone” to other positions in the profession, whether in employment at a law firm or at the Bar. Consequently, associates in the higher courts are now a relatively homogenous group. They are at a similar stage in their careers, tend to be of a similar age and background and have similar professional aspirations.
- 1.4 Further, associates in Victorian courts are now recruited on short-term contracts (generally for a period of between 12 months and two years). Short-term contracts are a significant and recognised risk factor for the occurrence of sexual harassment.

⁸⁹ See [150] above and following.

⁹⁰ Associates are employed only in the Supreme and County Courts. In other jurisdictions, as described above in this Report, there are roles which approximate that of an Associate in some respects, particularly Court Officers in the Magistrates’ Court.

There is scope to extend the term (particularly in the County Court), usually for 12 further months. However, not all seek an extension, and some judges prefer an 18-month or 2 year “rotation” to provide education and mentoring to more young lawyers. Consequently, the associates tend to constitute a shifting workforce with insecure tenure and limited opportunity to become familiar with workplace norms, or many fellow workers at different levels.

- 1.5 As a younger, inexperienced demographic employed on a precarious, short-term basis and beholden to a particular judge for professional advancement, associates are a uniquely “at-risk” group for sexual harassment. The extreme power imbalance and the unique vulnerabilities of the typical associate render the latter peculiarly susceptible to sexual harassment, but also very unlikely to report misconduct by a judicial officer. We heard a commonly repeated view that complaining about a judge was “career suicide”. Due to what is at stake, and the short-term employment, associates are likely to endure the misconduct and to see out the end of their contract. They perceive that otherwise, unique benefits may be lost and if they leave, the premature termination of their position may raise questions with future employers.
- 1.6 The staff we spoke with during our consultations emphasised the importance of obtaining a substantial and positive reference from their judges. Such a reference, or the lack of one, can “make or break” an incipient legal career. It is an extremely pressing factor for associates when deciding whether to report misconduct. Equally, a judge’s introductions and subsequent efforts to assist the associate’s professional advancement are important. Longer-serving associates with a strong record of legal experience, who have worked with more than one judge, are thus less reliant upon a positive reference or support from any one judicial officer.
- 1.7 More experienced longer-term associates are not only less vulnerable themselves, their presence may assist and reduce the vulnerability of recently graduated associates. Younger associates informed us that they appreciated the contribution of the remaining longer-serving associates including by training (both formally as a learning and development associate, or by an informal approach). Longer-term associates may also provide an approachable point of contact for new associates, (whether as formal buddies⁹¹ or informally) to discuss uncertainty as to norms, particularly when interpersonal issues arise with judges or other court staff.

⁹¹ See Recommendation 19.

- 1.8 Therefore, we consider that (if feasible given court resources and administrative requirements) there would be benefits to achieving a more diverse cohort of associates in the County and Supreme Courts by including a greater number of more professionally experienced and/or continuing or longer-term associates.
- 1.9 We suggest that at least a small number of longer-term positions as associate be made available to candidates at all stages of their careers, including those who already have significant experience in the law and may be looking for a “change of pace”. To summarise, the benefits of a more diverse associates’ workforce may mitigate the risks of sexual harassment because:
- 1.9.1 longer-serving associates are themselves less vulnerable to sexual harassment, because they have more established qualifications, more experience, different career trajectories and more secure employment;
 - 1.9.2 longer-serving associates are likely to have more standing and experience within the Court and knowledge of its norms and operations. They will have more confidence in identifying what conduct is or is not acceptable and may be more willing to report misconduct, whether experienced or witnessed;
 - 1.9.3 longer-serving associates are able to assist in training new associates, including as to policies concerning sexual harassment;
 - 1.9.4 longer-serving associates, as professional peers performing the same job, may be effective buddies or mentors to new associates, help them to feel comfortable in the Court environment, and act as an informal providers of pastoral care.
- 1.10 Despite general support for diversifying the associates’ workforce, two objections were raised:
- 1.10.1 many judges may not choose more experienced candidates, because they prioritise the mentoring and education of talented recent graduates at the outset of their legal careers; and
 - 1.10.2 payment at a VPS3 level is unlikely to be attractive to a more advanced legal professional.
- 1.11 We recognise that recent graduates should and will continue to comprise the majority of associates. However, the above difficulties should not deter an attempt to achieve greater diversity, which in fact applied up until the major change of

policy and practice in the relatively recent past. An associateship is an extremely valuable career experience at various ages and stages of a legal professional's working life. Some judges in the past preferred and in future will prefer a longer-serving associate, whose presence is stable, who understands court practice, and who is familiar with the judge's routines and needs. Especially where a judge has two associates, at least one longer-term associate may be preferred.

1.12 CSV should consider the feasibility and details of relevant measures in consultation with the Chief Justice and Chief Judge. We suggest consideration of the following:

1.12.1 whether to aim for a small percentage of associate positions (10-15%) that are long-term (that is, either ongoing or for a fixed period of greater than two years);

1.12.2 advertisements for associates should state that the Court welcomes applications both from recent graduates at an early stage of their legal career, and experienced legal professionals who are interested in working at the Court, including those with an interest in working at the Court on a continuing or long-term basis; and

1.12.3 all job advertisements for associate positions should state that relevant professional experience in the profession is well-regarded.

1.13 This recommendation does not apply to the Magistrates' Court, Coroners Court, Children's Court or VCAT where, as discussed above, it is exceptional for judicial officers to be assigned short-term associates or equivalent support staff. Where analogues of those positions exist (for example, Court Officers in the Magistrates' Court, or solicitors in the Coroners Court), we consider (for the reasons discussed above in this Report) that those staff are less at-risk populations than associates in the higher courts, whether because of clearer reporting lines and support structures for those staff and/or longer tenure in their roles.

2 We recommend that the induction of associates and court staff who work in a primary relationship with judicial officers include instruction and training (preferably from a reputable external provider).⁹² The instruction and training should:

2.1 acknowledge that there have been incidents of sexual harassment or inappropriate sexualised conduct by judicial officers towards court staff and other junior legal

⁹² The instruction and training referred to in this recommendation for associates and comparable chambers staff should be additional to general sexual harassment training provided to all CSV staff.

- staff and explain the risk factors (including the particular vulnerabilities of chambers staff);
- 2.2 include instruction and guidance on the behaviours that constitute sexual harassment or inappropriate sexualised conduct and acknowledge grey areas, including overlaps with bullying;
 - 2.3 outline legislation, court policies and codes of conduct that mandate a safe and respectful workplace and prohibit sexual harassment and other misconduct, including by judicial officers;
 - 2.4 include realistic hypotheticals and scenarios specifically tailored to the court workplace and the employees' interactions with judicial officers and others;
 - 2.5 include specific reference to any applicable policies, guidelines for attending circuit and hypotheticals based on working on circuit (or otherwise away from the court);
 - 2.6 outline the policies, and provide written materials, on the reporting options available to employees (including anonymous, informal communications) who consider that they (or others) have been subjected to inappropriate sexualised or improper conduct in the workplace, including by a judicial officer;
 - 2.7 acknowledge that judicial officers and other senior court officers also receive similar instructions and training on sexual harassment and other inappropriate conduct in the court as a workplace;⁹³
 - 2.8 refer to the possible processes and potential outcomes of the different reporting or informal communication options, for both the employee and a judicial officer the subject of a complaint. The information should refer to possible reassignment to a different judicial officer and options for obtaining references. The information should also refer to the relevant policy on reassignment (if **Recommendation 15** is adopted); and
 - 2.9 include guidance on how to navigate the power disparity to decline any inappropriate or sexualised requests and unwanted social or personal invitations from a judicial officer.

As we do not consider that tipstaves as a cohort, although working closely with judges, currently share the associates' vulnerabilities to sexual harassment, CSV should consider whether it is necessary to mandate the additional specific training for tipstaves.

⁹³ This presupposes implementation of **Recommendation 3**.

- 3 We recommend that the induction of judicial officers⁹⁴ include instruction and training (preferably by a reputable external provider)⁹⁵ that should:
- 3.1 acknowledge that there have been incidents of sexual harassment or inappropriate sexualised conduct by judicial officers towards court staff and other junior legal staff and explain the risk factors (including the particular vulnerabilities of chambers staff);
 - 3.2 include instruction and guidance on the behaviours that constitute sexual harassment or inappropriate sexualised conduct and acknowledge grey areas, including overlaps with bullying;
 - 3.3 outline legislation, court policies and codes of conduct that mandate a safe and respectful workplace and prohibit sexual harassment and other misconduct, including by judicial officers;
 - 3.4 include realistic hypotheticals and scenarios specifically tailored to the court workplace and the employees' interactions with judicial officers and others;
 - 3.5 provide guidance on navigating the power disparity with chambers staff, including on how to avoid inappropriate sexualised or personal requests, how to provide staff with an opportunity to decline unwanted social or personal invitations and how to address the tendency of junior staff to interpret the requests of judicial officers as commands;
 - 3.6 include specific reference to any applicable policies, guidelines for attending circuit and hypotheticals based on working on circuit (or otherwise away from the court);
 - 3.7 refer to the policies, and provide written materials on, reporting options available to employees (including anonymous informal communications) who consider that they (or others) have been subjected to inappropriate sexualised or improper conduct, in the workplace, including by a judicial officer;
 - 3.8 refer to the possible processes and potential outcomes of the different reporting or informal communication options, for both the employee and a judicial officer the subject of a complaint; and

⁹⁴ See footnote 88.

⁹⁵ The Judicial College of Victoria, although not independent of the courts in terms of governance, appears well-equipped to provide or organise the provision of such training and should be considered an appropriate provider.

3.9 include basic instruction on legislative requirements for a safe workplace, judicial officers' legal responsibilities to staff, practices regarding hours, chambers workloads, professional boundaries and standard practice for managing and supervising their chambers staff.

We recommend that the above education and training should not be provided only to judicial officers on their induction. It should be available to all judicial officers, including long-serving judicial officers as part of or in addition to their continuing professional development program.

We heard during our consultations that many new appointments to the Courts and VCAT (but particularly the higher courts) have no or no recent prior experience in supervising and managing staff. Magistrates (and many County Court judges) may have recently worked in organisations where they acquired some familiarity with staff management, such as the Office of Public Prosecutions, Victoria Legal Aid, or law firms. Those appointed from the Bar (a majority of Supreme Court judges) may never have had permanent full-time staff or a managerial role. In that case, the need for some basic training as to workplace practices and the role of CSV-employed staff (and the limits of that role) is more acute. Many associates and other court staff told us that they felt that some of their difficult interactions with their judge and the great disparity in working conditions between chambers, reflected the absence of appropriate training.

4 We recommend that the Courts⁹⁶ and VCAT appoint several “staff judges”⁹⁷ to welcome and speak, on induction, with new judicial officers, new associates and other CSV employees⁹⁸ who will work closely with judicial officers about judicial conduct, to check on wellbeing at intervals and to be available to advise.

4.1 A staff judge should welcome each newly-appointed judicial officer. The welcome and orientation should include a brief discussion of the status and entitlements of CSV-employed staff, appropriate limits on expectations of their performance and role and briefly discuss the policies on judicial conduct.⁹⁹ (This will reinforce

⁹⁶ See footnote 88 in relation to the Magistrates' Court.

⁹⁷ Where two or three “staff judges” are appointed, they should preferably comprise both male and female judicial officers.

⁹⁸ We have concluded that tipstaves are not an at risk group for sexual harassment, but it is desirable that all chambers staff be introduced to a staff judge on commencing employment.

⁹⁹ Particularly the Judicial Commission's *Judicial Conduct Guideline: Sexual Harassment* published in February 2022.

through personal communication the education and training dealt with under **Recommendation 3**).

- 4.2 A staff judge should advise that he or she will be available to the judicial officer whether as a first contact or otherwise as appropriate to advise, and to help with managing staff, the limits of the role of CSV-employed staff, or interpersonal conflict with staff.
- 4.3 A staff judge should, if necessary, refer to or help to organise training sessions for the judicial officer on appropriate workplace conduct and basic staff management. (Equally this could be handled administratively and would operate in conjunction with **Recommendation 3**).
- 4.4 A staff judge should (with or without the head of jurisdiction) meet with each incoming associate (or other CSV-employee who will work closely with judicial officers) either individually or in small groups, soon after their commencement.
 - 4.4.1 A staff judge should acknowledge that the court staff are employees in a workplace that prioritises their safety and wellbeing and recognises their entitlements and appropriate expectations of their role.
 - 4.4.2 A staff judge should explicitly acknowledge that there have been a small number of substantiated incidents of sexual harassment of associates by judges in Australian courts.
 - 4.4.3 A staff judge should discuss the Judicial Commission's *Judicial Conduct Guideline: Sexual Harassment* (as well as any statement on the topic by the relevant head of jurisdiction).
 - 4.4.4 A staff judge should explain the Court/Tribunal's commitment to eliminating sexual harassment and other misconduct, including bullying of staff by judges and others.
- 4.5 A staff judge should be available (among other options), at least as a first contact, to CSV-employed staff who wish to raise difficulties they are experiencing with a judicial officer and should, if necessary, also receive complaints about a judicial officer's conduct.
- 4.6 A staff judge should liaise with or be available to speak formally or informally, to any judicial officer (with or without the head of jurisdiction) who has been the subject of a complaint or query to advise or counsel the judge in accordance with in the *Judicial Conduct Guideline: Sexual Harassment*.

- 4.7 A staff judge should liaise with or meet on a regular basis the head of jurisdiction,¹⁰⁰ and the CEO (or other appropriate person in the administration of the Court or Tribunal) to:
- 4.7.1 bring any matters relevant to CSV’s responsibilities under occupational health and safety legislation to CSV’s attention;¹⁰¹
 - 4.7.2 provide CSV with a brief record of any relevant communication or complaint (see **Recommendation 9**); and
 - 4.7.3 where necessary advise CSV (with the consent of the staff member concerned) that the staff member should be re-assigned to a different judicial officer or an equivalent position in the Court or Tribunal (see also **Recommendation 15**).
- 5 We recommend that where staff judges are appointed, the courts and VCAT should appropriately recognise their additional responsibilities and role.
- 5.1 Depending on the size of the court or tribunal, the role of a “staff judge” may require a significant commitment of time and effort. It could be necessary to adjust the regular duties and case load of the relevant judicial officers to take account of the time and responsibilities involved. The responsibilities and requirements of the role will not suit all judicial officers. The role calls for an approachable person with communication skills, discretion and requisite seniority. At least some targeted training may be required. Not every judicial officer would be willing to assume the role, and the recommendation assumes that suitable judicial officers will be willing to serve. It will ultimately be a matter for the head of jurisdiction to decide on the appropriate number of staff judges, select and approach suitable candidates and decide on any necessary adjustment to their duties.
- 6 We recommend, consistently with recommendation 1 of the Szoke Report, that the heads of jurisdiction and other leaders in Victorian courts and VCAT publicly communicate at regular intervals a clear message to judicial officers and court staff that the court prioritises a safe workplace, and will not tolerate sexual harassment or bullying.
- 6.1 The head of jurisdiction has an important role in establishing the culture of each Court and tribunal, in messaging a commitment to eliminate judicial misconduct,

¹⁰⁰ or other suitable senior CSV-employee in the Court’s administration.

¹⁰¹ While complying to the extent possible with any complainant’s preference that the matter be kept confidential.

including sexual harassment, and in defining the limits of acceptable behaviour by judicial officers.

- 6.2 In Victoria, the heads of jurisdiction have already made significant advances in this respect. The Chief Justice of the Supreme Court of Victoria published strong statements on the Court’s website following the publication of the Szoke Report and the revelation of allegations against former Justice Vickery.¹⁰² Our consultations indicate that the statements made a significant and favourable impression on associates. In the County Court, the head of jurisdiction has proactively emphasised required standards of conduct in memoranda on the Court’s intranet. In the Coroners Court, the State Coroner meets new staff on their induction. In the Magistrates’ Court and VCAT, the message has been conveyed through “Town Hall” meetings conducted virtually by Zoom or Teams. During those “Town Hall” meetings, the Chief Magistrate and VCAT President, and the CEOs of the Court and Tribunal, have spoken to many Court or Tribunal staff about sexual harassment risks. They have reaffirmed their commitment to eliminating the risk and their “zero tolerance” approach to sexual harassment. Magistrates’ Court Court Officers told us that the Chief Magistrate visited their induction session and stated unequivocally that she would not tolerate such misconduct and that her door was always open should they have concerns. The new Court Officers reported that they gained great reassurance from the Chief Magistrate’s personal presence and direct message.
- 6.3 Statements and messages from the relevant heads of jurisdiction have been greatly appreciated by court staff, who have referred to the positive impact of hearing a strong message directly from the highest authority in their workplace. Such statements from the supreme authority in a court or tribunal communicate the Chief’s commitment to preventing sexual harassment and are essential to a positive court culture. Although many junior staff members may in practice prefer to use other avenues and would be hesitant to approach a head of jurisdiction, we were struck by the reassuring impact of a direct invitation to do so. We suggest that heads of jurisdiction consider including such an invitation in their public statements.

¹⁰² See <https://www.supremecourt.vic.gov.au/news/statement-from-anne-ferguson-chief-justice-of-the-supreme-court-of-victoria>.

7 We recommend that heads of jurisdiction (and/or senior judges) should, on the induction of new judicial officers, explicitly and clearly message that sexual harassment and bullying will not be tolerated.

7.1 Our discussions with heads of jurisdiction indicated some variation in their practice of meeting new judges/tribunal members, and the content of their discussions. It is not a uniform practice to engage squarely with a newly appointed judge on the topic of sexual harassment. Some heads of jurisdiction speak informally with the incoming judge/member, about the expected standards of conduct. At least one head of jurisdiction emphasises the power disparity between judges and staff, and the new judge's need to be conscious of this in their interactions with staff. We heard that some new judges may not have a strong understanding of that power differential. Some heads of jurisdiction expressly raise sexual harassment in the first meeting with incoming judicial officers. At least one head of jurisdiction raises the topic of sexual harassment, the Szoke Report and the investigation into the conduct of Justice Heydon of the High Court. Other heads of jurisdiction do not raise sexual harassment explicitly but some indicated that they would do so in future, together with the Szoke Report, the power disparity and appropriate judicial conduct.

7.2 Each head of jurisdiction may choose to model their discussions with new judicial officers on the message from the Chief Justice set out on the first page of the Judicial Commission's *Judicial Conduct Guideline: Sexual Harassment*.

8 We recommend that the courts and VCAT, on induction and regularly thereafter, encourage (through education, training and reinforcement by the heads of jurisdiction and senior judges) greater involvement and commitment by the entire body of judges to eliminating sexual harassment as consistently sought by CSV staff. This, in concert with the implementation of other recommendations, will facilitate lasting cultural change.

8.1 In our consultations, CSV-employed staff repeatedly sought that all judges be proactively involved in preventing and addressing instances of judicial misconduct, including sexual harassment.

8.2 CSV staff recognised that given the inherent and unavoidable sense of hierarchy at a court, and the disparity of power between judges and administrative staff, only a judge had sufficient "status" and authority to curb, question or deal with another judge's problematic conduct. The perception was that senior court staff were (understandably) unwilling seriously to confront or challenge a judge.

- 8.3 A number of CSV-employed staff we spoke with expressed disappointment that judges who did not themselves engage in inappropriate conduct or discourse were passive in the face of offensive banter or minor improprieties by another judge. This signalled to staff that even conscientious judges tolerated such conduct and viewed it as inevitable or normal.
- 8.4 All judicial officers could play a more active role in reassuring staff and reducing sexual harassment risk factors. The judges' collective approach to misconduct does much to set the standards of conduct at the court. If they turn a blind eye to misconduct, such conduct may be normalised. Further, while individual judges have no authority over other judges,¹⁰³ the majority of judges are highly sensitive to the opinion or disapproval of their peers.
- 8.5 Staff emphasised that cultural change must be effected from within the judiciary. It is difficult to achieve this other than through education, incrementally heightened awareness and appropriate training, such as bystander training. As stated, there is a very strong appetite amongst CSV staff for heads of jurisdiction and indeed for all judges to play a proactive and leadership role in managing sexual harassment risk factors.
- 9 We recommend that appropriate lines of communication be established between staff judges and CSV:
- 9.1 if staff judges are appointed to fulfil the proposed roles, appropriate lines of communication between "staff judges" and a selected senior CSV-employee should be established. Uncertainty may arise if a staff member raises problematic judicial conduct with "staff judges", but just wishes him or her to speak to the problem judge and go no further. It is difficult to devise any prescriptive rules for that situation. Case-by-case discretion in balancing a complainant's desire for confidentiality against CSV's occupational health and safety and protection obligations, is required. We envisage that often, confidentiality could be maintained, at least within a narrow circle of persons (i.e., the "staff judge", the CEO and, at least in some cases, the head of jurisdiction). This is particularly likely in cases that the staff judge can handle the matter informally by "counselling" or "tapping on the

¹⁰³ An exception being the power of the Chief Justice to require a judicial officer to participate in professional development or continuing education and training: *Supreme Court Act 1986* s 28A(3). See also *County Court Act 1958* s 17AAA.

shoulder” of the offending judge and, if necessary, facilitating transfer by CSV of the affected staff member to a different but equivalent position.

10 We recommend that in appropriate cases the heads of jurisdiction should consider whether to exercise their discretion to:

- *proactively direct or require a judicial officer to engage in further training or education;*
- *work with CSV to ensure that chambers staff are not assigned to a judge, or are assigned only on specified conditions; and*
- *give, to the extent consistent with any applicable limitations, directions in relation to the judicial officer’s sittings or case allocations.*

10.1 Heads of jurisdiction should, in a suitable case, direct judicial officers to participate in specified training activities on appropriate behaviour towards judicial staff. The existing statutory power of a head of jurisdiction to direct a judicial officer to “participate in a specified professional development or continuing education and training activity”¹⁰⁴ would support such a request or direction. The power could and may already be exercised in relation to routine participation in professional development activities. A targeted exercise of the power may also be effective if the head of jurisdiction becomes aware of problematic conduct by a particular judicial officer. This may be, for example, where it is an “open secret” that a particular judicial officer tends to behave inappropriately towards staff, thus jeopardising their occupational health and safety and the reputation and integrity of the Court.

10.2 A judge’s constitutionally-protected status limits what can be done to counsel, censure or discipline a judicial officer who has engaged or engages in misconduct against judicial staff. A referral to the Judicial Commission, investigation by that body, or steps towards removal from office on the basis of proved misbehaviour, are extreme sanctions. It is likely that such steps would be appropriate only in cases where significant misconduct was suspected or substantiated. However, relevant studies suggest that harassment and related misconduct often begin as small incivilities or a relatively mild testing of boundaries, that if unchecked, gradually escalate into more serious incidents. Timely intervention may prevent more

¹⁰⁴ See, eg, *Supreme Court Act 1986* s 28A(3).

damaging outcomes. For inappropriate conduct falling short of misbehaviour, a referral for instruction, counselling or training may be effective. It is likely that most judges would co-operate with the request of the head of jurisdiction without resort to a direction. Most judges are highly sensitive to the requests of the head of jurisdiction and the potential disapproval and censure of their fellow judges. Other judges' disapproval of problematic behaviour may suffice to put a stop to it.

10.3 If, in a rare case, a judge declines counselling or training to improve his or her conduct towards court staff, the head of jurisdiction may consider, in consultation with CSV, discretionary measures to ensure the safety and wellbeing of staff, including:

10.3.1 appropriate supervision of the judicial officer's interaction with staff;

10.3.2 assigning staff who do not have relevant vulnerabilities or risk factors to that judicial officer;

10.3.3 limiting the manner in which a judicial officer may interact with staff (for example, remote interactions only); or

10.3.4 requesting, to the extent consistent with any applicable limitations, the judge not to sit for a specified time or not to sit on particular categories of cases.

10.4 Where there is no formal complaint, investigation or adverse finding against the judicial officer, considerations of procedural fairness and judicial independence are relevant to the exercise of such discretion, which may nevertheless provide flexibility to address staff safety in an unusual case.

11 We recommend that the courts should, to the extent possible, introduce flexible short-term staff exchanges or rotations, to ensure that chambers staff are known to several judges.

11.1 The Supreme and County Courts should introduce measures to combat segregation, isolation and the total dependence of associates (or similar chambers staff) upon a single judge. It would be beneficial if associates are known to several other judges. Suggested steps to achieve this include pooling arrangements for associates, encouraging routine short-term staff exchanges, facilitating associates' social interaction and arranging some collegiate events open to all court personnel.

11.2 Several interviewees suggested, to avert problems arising from associates working exclusively with a single judge one-on-one, that they be allocated to small pools of

associates (perhaps 2 or 3) who assist a correspondingly small pool of judicial officers.

- 11.3 This arrangement would diminish the one-on-one intensity of the associate/judge relationship, which some associates (particularly when the relationship is problematic) find difficult. Pooling would diminish the opportunity for unwitnessed misconduct by a judge. Associates in such an arrangement would work closely with other associates, with ready access to peer support. If the relationship with a particular judge broke down, or misconduct took place, the targeted associate would not be inhibited from resisting or complaining by total dependence on the erring judge. Other judges would have sufficient familiarity with the associate to provide a continuing relationship, a meaningful reference, mentoring and future professional support.
- 11.4 While the pooling of associates has the above obvious benefits, we are doubtful if it would be extensively adopted. The arrangement would not work if imposed on unwilling judges. Judges require immediate, consistent and dedicated assistance to fulfil their duties. They should not be placed in a position of having to compete with other judicial officers, who may be more assertive, demanding or senior, for essential services and support. Two retired judges thought the proposed arrangement would be “a disaster” for less assertive or female judges. However, where a group of judges have a mutually harmonious relationship and work practices, the option may present benefits.
- 11.5 Another potentially beneficial measure (which may be well-received by both associates and judges) is facilitating a system of associate “exchanges”, whereby judicial officers swap associates for a month or so.
- 11.6 In practice, associates are already assigned to other judges when their own judge is on leave, workloads fluctuate or emergencies arise. We propose that the practice be extended and standardised to the extent possible. Appropriate consultation with both the relevant judges and associates would precede the finalisation of the arrangements. We recognise that a degree of disruption may be entailed, but will likely be outweighed by the benefits. More associates would gain a real opportunity to work with at least one other judicial officer pursuant to a standard practice. The potentially disastrous effects of falling out with an individual judge would be diminished, if not entirely averted. The associate may be able to continue to work

for a familiar judge. The options for securing a meaningful reference and relevant professional support from another judge would be increased. That would reduce the reluctance to raise concerns about the conduct of the staff member's primary judge and would eliminate embarrassment if a more permanent reassignment took place.

12 We recommend that each court and tribunal seek to reduce segregation and foster a sense of collegiality among judicial staff, particularly associates and short-term chambers staff.

We suggest that this may be done by:

- *providing a room or space for the use of judicial staff to meet during breaks throughout the workday, stocked with tea and coffee facilities;*
- *arranging optional events for judicial staff to create opportunities for staff to meet one another and socialise; and*
- *arranging events, lectures or classes (open to all working in the court) to provide opportunities for staff and judges at all levels to become mutually acquainted (for example, lunch time addresses on topics of interest, musical events, or well-being classes).*

13 We recommend that a CSV representative, as standard practice, attend recruitment interviews of associates and other chambers staff.

13.1 It is now common practice in the Supreme Court and the County Court for a judicial services co-ordinator (or other CSV employee) to participate in interviews of candidates for associate positions. If and to the extent such participation is not routine, we recommend that it become standard practice.

13.2 The judge (although not the associate's employer) must necessarily interview short listed applicants in order to assess their ability and capacity to work together harmoniously and closely. The judicial officer makes the final decision on selection of the successful candidate. CSV makes an offer of an employment to the person who has passed its initial merit-based screening, but who has been selected by a judicial officer, rather than CSV.

13.3 At least one Supreme Court judge queried the attendance of CSV human resources personnel at recruitment interviews, regretting the apparent lack of confidence in judges that the practice appeared to suggest. Nevertheless, the presence of a trained Human Resources officer in recruitment interviews is a routine practice in many

workplaces. Further, during our consultations we heard that one judge asked at an interview inappropriate suggestive questions of an associate, where no representative of the Court's administration was present. While this was the only report of impropriety during a recruitment interview, at least one other interviewee expressed an apprehension that some judges had discriminatory hiring practices. The routine presence of a judicial services co-ordinator would ensure that questions and discourse were proper, professional and non-discriminatory, thus protecting the interests of all parties. More importantly, the presence of the CSV representative would reinforce that while associates work at the direction of a judicial officer, they are employed by CSV and report in the first instance to their judicial services co-ordinator. The associates we interviewed strongly supported this measure. In our view, the presence of a CSV employee during an interview for an associateship is more than just symbolic. Although associates usually understand that CSV is their employer and that their reporting line is through the relevant judicial services co-ordinator, many perceived the employment by CSV and the reporting line as merely notional. It had little practical importance given that associates spend their time almost exclusively one-on-one with, and solely at the direction of, their judge.

14 We recommend that judges retain the final decision on appointment of associates and similar chambers staff.

14.1 Throughout our consultations, the traditional practice of working as an associate (or in a similar role) exclusively for a single judge, who selected the candidate was well accepted by all parties. (Although suggested by some interviewees, there was no broad support for working in a "pool" of associates for a particular group of judicial officers). There are obvious benefits to the existing practice. A judicial officer can select an associate with expertise in areas relevant to their own work, and with whom the judge feels he or she will be able to work effectively, closely and harmoniously. Associates can apply to serve a judicial officer who generally works in an area of law in which they are interested, and from whom a valuable reference is likely, consonant with their career aspirations. Both parties will know at the outset whether they are likely to feel comfortable with each other. Further, over the period of the associateship both judge and associate come to know how the other works and to develop an effective working relationship. When it works well, as it generally does, the relationship can be a high point of an associate's professional life. Many interviewees expressed the great value they attached to it. Many associates would be disappointed if they had no opportunity to develop a close

relationship with their judge. For the reasons outlined in detail in this report, it is important that judges retain the maximum opportunity to select a candidate who can meet their needs and with whom they can work harmoniously. They should always retain the final decision on the appointment.

15 We recommend that the courts publish a clear policy outlining how, and in what circumstances, chambers staff may be reassigned to work with another judge in the event of relationship difficulties.

15.1 CSV should, in consultation with each court and tribunal, develop and publish a readily accessible policy setting out the options for reassigning staff members whose relationship with their primary judge has broken down.

15.2 It will be necessary to determine how CSV staff may be re-assigned if their relationship with a judge deteriorates, particularly where the cause is alleged misconduct by the judicial officer (as opposed to, for example, reasonable performance management action). This important question calls for clear policies and procedures which are effectively communicated to CSV staff. It is important because if judicial staff do not see a workable remedy which managers at the court or tribunal can implement, and which is likely to put a stop to the misconduct sooner rather than later, they are far less likely to report misconduct at all, or at a stage before it has escalated.

15.3 Re-assigning a staff member to a different judicial officer (or list) is not a perfect solution to alleged or established judicial misconduct. However, it at least removes the staff member from the influence of the alleged “perpetrator”. It provides an employee who has or may have experienced inappropriate behaviour with another opportunity to obtain the originally anticipated experience and professional benefits available from working with a judicial officer. Re-assigned employees may obtain a positive reference and related support should their work warrant it. Re-assignment should be an option for staff who are experiencing harassment by a judicial officer. It should occur while maintaining the maximum confidentiality possible (if desired by the affected staff member). The judicial officer complained about will likely infer from the fact of the transfer that dissatisfaction has been expressed, but that is unavoidable. There should be no reduction in the staff member’s status, role or VPS level.

- 15.4 We heard during our consultations that processes for reassigning staff differ between the courts and tribunals. In some courts, re-assignment is a relatively simple process, but it is more complex in others.
- 15.5 In the Supreme Court, for example, the process is complicated because other judges will already have associates assigned to them and have generally recruited their incoming associates in advance of their commencement. Often, there will be no readily available vacancy for an aggrieved associate. However, it has been possible to find associates positions with other judges on the rare necessary occasions (for example, because a new judge requires an associate). In the County Court, where a problem arises in the relationship between judge and associate, the associate can be transferred to the “pool” of reserve associates. In the Magistrates’ Court, a Court Officer may be transferred to a different magistrate, or a trainee court registrar may be rotated to a different group of magistrates. There is also capacity to re-assign trainee court registrars to different magistrates in the Children’s Court and to reassign staff to a different Coroner in the Coroners Court.
- 15.6 The policy should:
- 15.6.1 apply where there the working relationship between the staff member and judicial officer breaks down, and should not continue, because a risk to the staff member’s health or safety is apprehended;
 - 15.6.2 state that there need not be any formal finding of harassment or misconduct against a judicial officer before the Court or Tribunal may re-assign a staff member under the policy;
 - 15.6.3 confirm the Court or Tribunal’s commitment to re-assigning the relevant staff member to a different judicial officer or equivalent position that (so far as possible) reflects the staff member’s former role, provides the opportunity to work with a different judge and carries no reduction in salary;
 - 15.6.4 articulate in broad terms how this may be done (for example, by transfer to a different Judge, or transfer to the pool of reserve associates);
 - 15.6.5 identify the process by which staff may trigger the application of the policy (for example, by contacting a judicial services co-ordinator, CEO, or staff judge); and
 - 15.6.6 state that, so far as possible, requested confidentiality will be maintained; set out the personnel at the Court who will be informed of the matter

(for example, the CEO/staff judge/head of jurisdiction) state that some disclosure may be necessary if the matter involves a risk of harm to other employees which must be addressed under occupational health and safety legislation.

16 We recommend that in the Supreme Court and County Court, CSV should clearly articulate and explain to new associates and similar chambers staff, on induction, the applicable reporting lines and the limits of their role.

16.1 The Supreme Court and County Court should adopt a practice whereby a judicial services co-ordinator or manager, at the induction of incoming associates and researchers (and other staff who will have significant direct contact with judicial officers):

16.1.1 explains to the staff member the reporting lines within the Court's administration;

16.1.2 explains the associate's (or other staff member's) role, including its limits;

16.1.3 notes that if an associate becomes concerned that they are being asked to carry out tasks which exceed the proper limits, they should speak with a judicial services co-ordinator or the staff judge;

16.1.4 notes that CSV takes seriously its duty to provide a safe workplace, and identify the relevant policies concerning sexual harassment and misconduct and how to report such conduct;

16.1.5 informs associates that it is the Court's standard practice to provide the associate with the opportunity to work for a brief period with a different judge where possible: see **Recommendation 11**; and

16.1.6 notes that (subject to acceptance and implementation of **Recommendation 4** above) the Court has appointed "staff judges" and explain the role of those judges.

16.2 In recommending that judicial services co-ordinators speak with incoming associates about the limits of that role, we acknowledge that the role of a Supreme Court or County Court associate is difficult to define in detail. A judicial services co-ordinator should explain the ordinary working hours of the Court but acknowledge that, particularly in the Supreme Court, it will sometimes be necessary and proper for an associate to assist a judicial officer with judicial business outside of those hours. In practice, the core role of an associate is to assist the judge to

carry out their judicial function, and to do so by performing tasks as reasonably directed by the judicial officer (while, of course, in the employ of Courts Services Victoria). However, the role is not that of a butler, housekeeper or a personal assistant with responsibility for the judge's social calendar. As most associates accept, it may sometimes be necessary to perform non-legal tasks in order to ensure that chambers function smoothly. Whether this becomes a problem or involves sex discrimination, may be a question of fact and degree. Associates should be encouraged to speak with their judicial services co-ordinator, or a staff judge, if they are:

16.2.1 allocated a concerning volume of non-legal or personal tasks which appear beyond their proper role; or

16.2.2 requested to perform domestic or "menial" tasks apparently based on their gender.

16.3 In the Supreme Court and County Court, associates nominally report administratively to a judicial services co-ordinator. The co-ordinator is the first point of contact for associates about administrative matters concerning their employment. In both the Supreme Court and County Court, judicial services co-ordinators are trained about how to talk with persons who have experienced sexual harassment, and about the options for reporting sexual harassment within CSV. There is no reason to doubt the adequacy of the judicial services co-ordinators' training. Associates recounted that judicial services co-ordinators spoke to newly-inducted associates about working hours, leave and the expectations of associates. Associates also mentioned occasions where a judicial services co-ordinator emphasised their pastoral care role and invited associates to "tell them about anything".

16.4 However, our understanding is that judicial staff do not in practice complain of misconduct or sexual harassment by judges to judicial services co-ordinators (despite their level of training, awareness of the problem and conscientious approach). Judicial staff, particularly associates, perceive that judicial services co-ordinators and human resources personnel are powerless, lack the authority to stand up to a judge and are dependent on the judge's goodwill. Staff are not confident that judicial services co-ordinators have sufficient independence.

- 16.5 Further, we heard that while associates in the Supreme Court and County Court were aware that they administratively reported to judicial services co-ordinators, in practice they saw their reporting line as directly to their judge. It was the judge who directed them in their day-to-day tasks, and they had little interaction with their CSV supervisors. Indeed, the associates' overwhelming impression was of being inducted into "a chambers" to work for a judge. There was little sense of being inducted into a modern workplace as a CSV-employee. (This perception was not necessarily a problem for associates. Many enjoyed the flexible, historic and idiosyncratic working environment). The widely held view was that the judicial services co-ordinator did not have sufficient visibility, insight into or awareness of what actually occurred in the judge/associate relationship, and thus could not identify any "red flags" that arise. Nor could they intervene before any escalation in problematic behaviour by a judicial officer. (The scepticism of the chambers staff on this issue was at odds with the views of court administrators with whom we had spoken before preparing our Progress Report).
- 16.6 The position of Court Officers in the Magistrates' Court is different. In designing the Court Officer position, the Legal Policy Unit had the benefit of the findings of the Szoke Report. Court Officers report to managers in the Legal Policy Unit. They undergo an induction program with other Court Officers who are based together in the William Cooper Justice Centre (with other parts of the Court administration). This fosters a sense of being a part of CSV and an awareness of the CSV reporting line structures. The Court Officers whom we interviewed indicated that they would feel comfortable to raise problems with their managers, who (rather than magistrates) were their "bosses". There was also a consensus that Court Officers worked closely with their managers.
- 16.7 In the Coroner's Court too, the reporting lines appear to be clear and well-understood. Solicitors report to a Senior Solicitor, and to the Director of Legal Services. A similar structure exists for registry staff. Staff assigned to a particular coroner sit in open workspaces separate from that coroner. There is a supervision framework under which a supervisor regularly "catches up" with staff to ask how they are progressing, and whether there are any issues. There is a template to guide the conversation, which covers both performance matters and the staff member's wellbeing. In the Children's Court, there is also a clearly defined reporting line whereby trainee court registrars report to VPS3 Registrars, who in turn report to VPS4 Registry Managers (who then report to the Operations Manager, who reports

to the Senior Registrar). We heard that there are clear expectations that supervisors hold regular “catch ups” with staff under their supervision. In VCAT, Member Support Officers report to a Team Leader within registry, who is located on their floor and with whom they work closely. One purpose of that reporting line is to ensure that senior registry staff can see whether members are subjecting the Member Support Officers to any unreasonable expectations.

16.8 Overall, we did not observe any systemic problems associated with the reporting lines in the Magistrates’ Court, Children’s Court, Coroners Court or VCAT which contribute to the risk factors for sexual harassment. In each of those jurisdictions, there are clear reporting lines. There is no evidence that staff perceive that their reporting line as solely to a judicial officer, or see no purpose in informing CSV managers of misconduct. However, in the superior courts, the widely-held perception among associates that judicial services co-ordinators are not in a position to detect “red flags” for harassment or other misconduct impedes the management of sexual harassment risk factors. Particularly in the isolated environment of Supreme Court chambers, the opportunity to pick up on any “red flags” may be lost if (as associates apprehend) no-one to whom they report has sufficient awareness of what occurs in chambers, or the necessary authority to take steps to put a stop to misconduct.

16.9 The judicial services co-ordinators in the superior courts, given associates report directly to them, do play a useful role in controlling sexual harassment risk factors which could become more effective. As noted above, staff may be reluctant to complain to them of misconduct (given their status and role vis a vis judges). However, the deterrent perception that judicial services co-ordinators are powerless effectively to intervene, may be countered by the combined effect of various recommendations reflecting the judges’ commitment to eliminate judicial misconduct. Regular meetings and communication with judicial services co-ordinators may further reduce the associate’s hesitancy and potential isolation. The latter, as noted, is itself a risk factor for sexual harassment. Judicial services co-ordinators can (and we understand, often do) play an important role in informing associates of relevant CSV policies on sexual harassment and misconduct generally.

17 We recommend that CSV should arrange for regular meetings between judicial services co-ordinators and associates to check on the wellbeing of associates.

- 17.1 Judicial services co-ordinators should meet with associates on a regular basis (at most three-month intervals) outside judicial chambers to:
- 17.1.1 invite the associate to raise any issues or concerns about their wellbeing or workload;
 - 17.1.2 explain the avenues available for staff to report misconduct, and the related supports provided by CSV; and
 - 17.1.3 ask the associate whether they wish to further their professional development by working for a time with another judicial officer, which (a) the Court sees as a standard component of an associateship; and (b) the Court will take steps to facilitate to the extent possible: see **Recommendation 11**.
- 17.2 This recommendation is intended to assist judicial services co-ordinators to play a more effective role in controlling sexual harassment risk factors, as discussed in more detail under **Recommendation 16**.
- 18 We recommend that during induction, an appropriate CSV staff member meet with incoming staff members¹⁰⁵ to describe the relevant CSV policies on sexual harassment and avenues of reporting:
- 18.1 This recommendation overlaps with **Recommendation 16**, but applies to all courts and VCAT.
 - 18.2 During our consultations, staff recounted a range of experiences on whether, and if so to what extent, sexual harassment was discussed on induction, or noted in induction materials. On the whole, few associates recalled the topic of sexual harassment being addressed. Where the topic was addressed, the treatment given to the subject was cursory, and tailored to peer-to-peer sexual harassment and misconduct as opposed to sexual harassment or other misconduct by judicial officers. The material did not recognise that the workplace was a Court or Tribunal, with several unusual risk factors for sexual harassment. Some associates reported being told that if staff were subject to sexual harassment, resources were available. They noted that there was no developed discussion on the topic.

¹⁰⁵ Who are to work in a primary relationship with a judicial officer, or in a role in which they will have regular contact with judicial officers (for example, researchers, trainee court registrars and member support officers).

- 18.3 We emphasise, however, that a significant majority of staff members with whom we spoke were inducted before the implementation of new CSV policies in early 2022. Staff members in the Magistrates’ Court and County Court who had been inducted in 2022 following the implementation of those policies (after a greater awareness of the problem of sexual harassment exposed in the Szoke Report) reported more positively on the treatment of sexual harassment and inappropriate conduct by judges during their induction. In the Supreme Court, no associate with whom we spoke had been inducted in 2022. However, one associate who had been inducted in late 2021 was advised of the resources available should associates experience inappropriate conduct. That associate considered that sexual harassment should have been confronted more squarely and that it should have been acknowledged that sexual harassment by a judge has happened at the Court.¹⁰⁶
- 18.4 The discussion of CSV policies under this recommendation should focus upon the “Resolution procedure — Inappropriate workplace behaviours” policy published by CSV, which sets out the various options for judicial staff in the event they are subjected to inappropriate conduct, including by a judicial officer.
- 18.5 In the Magistrates’ Court, during their induction Court Officers participate in a dedicated session on sexual harassment. The content of those sessions is summarised at [315] above.
- 18.6 In our view, the Magistrates’ Court approach in the induction of Court Officers is an effective means of raising the topic of sexual harassment and the risk factors particular to a Court/Tribunal environment. It ensures that staff are told of relevant CSV policies and reporting options.¹⁰⁷ In our consultation with Court Officers, those who had attended the training session led by the Divisional Lawyers had positive impressions of that training and found it useful.
- 18.7 The staff member conducting this session should ideally be a person in a senior role within the jurisdiction, or a legally qualified person within the jurisdiction in a position broadly analogous to the Divisional Lawyers in the Magistrates’ Court who

¹⁰⁶ However, we understand that the findings against Justice Vickery had not yet been made public at the time of the associate’s induction.

¹⁰⁷ The slides of the presentation by Divisional Lawyers which we reviewed had been prepared prior to the implementation of the 2022 CSV policies. The induction process should, as noted above, now include reference to all of those 2022 policies, particularly the “Resolution procedure — Inappropriate workplace behaviours”.

conduct the training of Court Officers on this topic. In our view, the sessions would best be conducted with small groups of incoming staff members soon after their commencement.

18.8 The discussion should address the topics currently addressed in the training of Magistrates' Court Officers summarised at [315] above, and be accompanied by a document addressing those matters, a summary of CSV policies, and instructions on how to access those policies. In addition, the discussion should:

18.8.1 note that CSV as employer has a responsibility to a safe working environment;

18.8.2 refer to any statements made by the relevant head of jurisdiction concerning the determination of the jurisdiction to eliminate sexual harassment;

18.8.3 refer to the availability of the staff judge (or judges) as a point of contact (if **Recommendation 4** is adopted); and

18.8.4 note and explain the policy of the relevant jurisdiction on the transfer of staff where there is a breakdown in the relationship between judicial staff and a judicial officer (see **Recommendation 15**).

19 We recommend that peer support mechanisms / buddy systems should be introduced where not yet in place, and social interactions for chambers staff, particularly associates, facilitated.¹⁰⁸

19.1 We recommend that the courts and VCAT design and implement a practice of putting newly recruited associates (and judicial staff who work closely with judges) in touch with a more experienced employee working in an analogous position. Further, opportunities for social interaction amongst chambers staff should be provided.

19.2 CSV has recently implemented both a system of "contact officers" (who are CSV staff in each court and tribunal trained to advise CSV employees on matters concerning sexual harassment and misconduct and reporting options) and "peer supporters" (who are trained CSV employees in each jurisdiction whom employees can contact for social and emotional assistance, and can direct staff to the right resources to assist them).

¹⁰⁸ We note that at the time of completion of this report, a peer support program was being introduced, designed "to help create a safe and supportive workplace": see above at [387].

- 19.3 Some courts already have a formal buddy system. We heard that Court Officers in the Magistrates' Court are assigned mentors at the VPS3 level (that is, one level higher than the VPS2 Court Officers). Court Officers are encouraged to build a relationship with their mentor. In the Children's Court, staff are encouraged to build relationships with more senior staff in the Registry, and there are monthly externally-facilitated sessions in which staff are able to talk about the sometimes challenging nature of their work.
- 19.4 In the Supreme Court, we heard that incoming associates are assigned a mentor who is a more senior associate. However, the associates reported that the existing arrangements were not sufficiently structured. The associates emphasised that strong relationships usually develop within the Court "organically" (that is, otherwise than through existing mentoring process).
- 19.5 Therefore, as well as a formal buddy system, the courts should encourage associates and similar judicial staff to form peer relationships with their colleagues. This will reduce the feelings of isolation which can develop among such staff (particularly within the "siloes" geographical environment of Supreme Court chambers) which constitutes a risk factor for sexual harassment. Two judicial staff members told us that they discussed reporting the options available to them, weighing up the benefits and disadvantages on whether to report inappropriate conduct by a judicial officer. This illustrated the significant mutual support drawn from trusted colleagues. See **Recommendation 12** above.
- 19.6 During our consultations, we heard that judicial staff (particularly associates and Court Officers) were, on the whole, already a collegiate group, and that that collegiality best develops organically. However, there is still merit to formal buddy or mentoring programs. The spontaneous development of collegiality depends in large part upon the initiative of judicial staff themselves. Less gregarious judicial staff, particularly associates working in chambers, experience feelings of isolation. The difficulty of making friends organically has increased recently due to the pandemic restrictions and the move towards virtual hearings and attendance. A recently appointed County Court associate reported that he found his assigned buddy very helpful. Case studies illustrate that an associate who is the victim of inappropriate conduct may be isolated from other associates by the reason of that very misconduct. Perpetrators of misconduct may be controlling and deliberately

forbid targeted staff to associate with others. We refer to two instances of such behaviour above. In such situations, an assigned buddy could play a positive role.

19.7 The buddy system should be tailored to each jurisdiction and should be developed by Courts Services Victoria in consultation with senior administrators in each jurisdiction. In our view, however, the following features should be considered:

19.7.1 Court personnel¹⁰⁹ should identify a more experienced mentor for each incoming associate/judicial staff member who is to work in a primary relationship with a judicial officer;

19.7.2 the identified buddy should ideally be a more experienced person in the same role as the recruit (for example, a senior associate). In some cases, an experienced person in a different role, but who nevertheless works closely with judicial officers, may be appropriate;

19.7.3 the incoming associate/judicial staff member should be given the contact details of the selected buddy, and informed that they can contact that person with any queries about their work, how the court or tribunal operates and social contact;

19.7.4 the more experienced buddy should be encouraged to contact their assigned recruit with an offer to set up short catch ups (whether in person or virtually), commencing within the first two weeks of the recruit commencing their job;

19.7.5 the more experienced buddies should be advised that their role is to keep in contact with their assigned recruit to discuss what it is like to work at the relevant court or tribunal where appropriate about their own experiences at the court;

19.7.6 the experienced buddy should be advised that their role does not include acting as a contact officer or to receive complaints about inappropriate conduct, but includes pointing the recruit to relevant CSV policies on appropriate workplace conduct and reporting mechanisms if the topic of inappropriate behaviour by judicial officers or judicial staff arises;

¹⁰⁹ For example, a judicial services manager in the Supreme and County Courts, or senior officer in the Registry in other courts or VCAT.

- 19.7.7 judicial services co-ordinators should “check in” with both buddies to enquire whether the relationship is progressing well, and whether either requires the assistance of the judicial services co-ordinator.
- 19.8 At least a number of these steps are, we understand, already in place within some courts and tribunals. We also recognise that acting as an experienced buddy may be sometimes burdensome. The role may not suit some staff. Accordingly, participation should be entirely voluntary. Despite all best efforts in matching buddies, and a mutually positive approach, the arrangement may not prove beneficial in all cases. Although buddy contact should be encouraged, it too should remain voluntary.
- 20 We recommend that all courts consider the feasibility of introducing very brief, but regular “town hall meetings” to be held electronically, attended by the head of jurisdiction, the CEO and some senior judges, at which news and announcements can be made and questions raised (anonymously if preferred) and to which all court workers, including judges, are invited.
- 20.1 Town hall meetings are currently being held by the Magistrates’ Court and VCAT. The feedback is that they are a successful means of reducing isolation. They ameliorate the segregation of and non-communication between different levels and categories of people in the workplace (including judicial officers) and constitute an effective forum for clarification and discussion of concerns and queries. Such meetings permit staff at all levels to recognise and become more familiar with the leaders of the court or tribunal and may reduce any perception that they are remote or inaccessible figures.
- 20.2 We recognise that town hall meetings may not be readily compatible with the size, routines and work demands of the Supreme and County Courts.
- 21 We recommend, consistently with recommendation 9 of the Szoke Report, that CSV, the courts and VCAT provide multiple and varied means for making a complaint or raising a concern about inappropriate judicial conduct, including sexual harassment.
- 21.1 The recently published CSV Policy “Resolution procedure — Inappropriate workplace behaviours”, summarised above at [360] and following, sets out a range of varied reporting options, including externally to “Your Safe Space”. In our view,

those options should be supplemented by the option of speaking to a “staff judge”, at least as a first contact, as outlined under **Recommendation 4**.

22 We recommend that:

- (a) surveys of judicial staff be conducted; and
- (b) CSV, together with the heads of jurisdiction, consider the feasibility of implementing a system whereby CSV keeps records of staff complaints and expressions of concern (falling short of complaint) about inappropriate judicial conduct.

22.1 We note that Recommendation 18 of the Szoke Report concerned the conduct of an annual anonymous survey which would “reach all CSV staff”. We support the recommendation that there be such an annual survey of CSV staff.¹¹⁰ The People Matter Survey (referred to above at [193]) alone is a flawed means of assessing the prevalence of sexual harassment of judicial staff. We heard from CSV staff that the People Matter Survey questions were not sufficiently targeted to the problem, and the broad terms of the questions made it impossible to determine what proportion of reported incidents involved sexual harassment by judicial officers, rather than by CSV employees or court users.

22.2 We describe below a proposed system of record keeping, by CSV, of records of staff complaints and expressions of concern about inappropriate judicial conduct which appears consonant with emerging best practice in this area. The model of record keeping could significantly facilitate ensuring the safety of judicial staff. It would enable CSV to identify sexual harassment risks and evaluate the scope of the problem. Recommendation 22 is limited to directing consideration by CSV (together with the heads of jurisdiction) of the feasibility of implementing the model we describe below. The form of the recommendation recognises:

22.2.1 the tension between, on the one hand, recording records of expressions of concern which have not been the subject of formal investigation and, on the other hand, a judicial officer’s interest in knowing that adverse statements have been made against them. As noted below, that tension should in our

¹¹⁰ We were informed that as at the date of completion of this report, a dedicated sexual harassment survey has been sent to all CSV staff, judicial officers and VCAT members.

view in principle be resolved in favour of staff safety where an improved system of record keeping would promote it; and

- 22.2.2 the need for legal advice on the scope of CSV's obligations and potential liabilities under relevant occupational health and safety, privacy, freedom of information and related legislation with respect to keeping records of informal expressions of concern.
- 22.3 CSV should maintain a register of records of formal complaints and informal reports, communications or signals of concern relating to misconduct (including sexual harassment) by judicial officers. Such a record should identify the judicial officer. It should contain a narrative of the complaint or report and any action taken by CSV. It should be kept securely and accessible only by senior CSV staff centrally and in each jurisdiction. A complainant or reporter should have the option to remain anonymous.¹¹¹ The register should be used by CSV to identify potential risks to staff posed by particular judicial officers. Where appropriate, further investigations may be undertaken and steps taken to reduce any risk found to be posed by a judicial officer.
- 22.4 Throughout our consultations, we heard from those in human resources and court administration that there was no organised system of record keeping of reports of misconduct, or complaints or communications of concern made by judicial staff against judicial officers. Indeed, there was uncertainty among court administrators as to what would constitute a "complaint" that could, should, or needed to be kept in the records of the court.
- 22.5 It is well established that records of formal complaints, although necessary, do not provide an accurate or comprehensive picture of the prevalence or nature of sexual harassment in a particular workplace. Informal expressions of concern by persons who are reluctant to lodge a formal complaint would provide a more reliable, if still imperfect picture.
- 22.6 The keeping of records of *informal* reports or signals of significant concern about a judicial officer is, however, a vexed question.

¹¹¹ While we recognise that it might be possible to identify the complainant if the judicial officer is identified, in the context of securely held records there is significantly less risk that details which may lead to the identification of a complainant will be disseminated.

- 22.7 On the one hand, complainants desiring an informal resolution of their problem (for example, by a staff judge speaking with the offending judicial officer) may not wish any record of the incident to be committed to writing. Judicial officers about whom no positive finding of wrongdoing has been made would likely object if they knew they were named in the record of an informal report. The knowledge that such a written record exists would, itself, be a source of concern for a judicial officer, as would be the risk that such a record might be exposed if the records were not securely kept.¹¹²
- 22.8 On the other hand, recording of such informal reports seems essential to identify the potential scope of the problem of sexual harassment. It would assist each court and tribunal to identify risks to the health and safety of staff posed by individual judicial officers. The identification of such risks would improve the ability of CSV to take steps to ensure the health and safety of its employees.
- 22.9 If records of informal reports against a judicial officer were kept, it would permit the detection of multiple informal complaints made against the same judicial officer. In such a case, when a new complaint is made, the previous reporters may be contacted. Because complainants find strength in numbers, they could then resolve to bring a formal complaint against that judicial officer. If no records are kept, only institutional memory will reveal whether an informal report comes “out of the blue” or is one in a series of informal matters or signals of concern relating to the same judicial officer.
- 22.10 We see no insuperable impediment to CSV recording the details of any informal reports against judges that come to its attention, including a description of the misconduct alleged and the judicial officer’s name. (We have not analysed the question in depth and it may be prudent to obtain an opinion on that issue). Where such records are made, complainants should:
- 22.10.1 be given the option whether they wish to be named in the report;

¹¹² These issues were canvassed in the 2008 publication of the Australian Human Rights Commission’s *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* at Chapter 9: <https://humanrights.gov.au/our-work/chapter-9-record-keeping-effectively-preventing-and-responding-sexual-harassment-code>. That publication concluded that “[r]ecording the name of the individual who has been harassed should be optional”, and that “the name of the alleged harasser should not be recorded ... but the particular department or section where the incident occurred should be noted for monitoring purposes”: at Chapter 9.3.

22.10.2 be told that the report will be kept confidentially and securely on a register of occupational health and safety matters relating to reports of inappropriate conduct (and not on that employee's personnel file) unless the conduct reported poses a serious health and safety risk to staff, such that CSV must take action and anonymity cannot be maintained; and

22.10.3 be asked whether they are willing to be contacted by CSV if further reports are made against the judicial officer in question.

22.11 Above, we recommended at **Recommendation 4.7** that staff judges meet regularly with senior officers in court administration. A focus of that meeting should be to facilitate the keeping of records by CSV, including of expressions of concern made by staff to a staff judge. The exact process by which that will be done will likely be worked out over time. The process in each case will depend upon whether the complainant wishes to be anonymous and whether it is possible to maintain anonymity in the circumstances. It is possible that some complainants may make an informal complaint to the staff judge but not wish anyone within the administration of the court or tribunal to be informed. In such cases, where there is no real risk to occupational health and safety, the staff judge should seek the complainant's agreement to provide some de-identified information about the complaint to be kept in the CSV records.¹¹³

22.12 Where an informal report has been made, there will be no finding that a judicial officer has engaged in any misconduct. However, judges could well be concerned if they were aware that they have been named in any record as the subject of an untested allegation of inappropriate conduct. In many cases, the relevant judge will not be aware of this. It may be argued that a judge is entitled to be informed that such a record exists. If, however, the protocol requires the "accused" judge to be informed, it is likely that troubled staff will not make even informal confidences about their problems. The principal reason for this is that judicial and court staff are very fearful of a judge learning that they have complained about, or criticised, him or her. Staff fear retribution and ill will, as well as the loss of the judge's professional support. There is thus a real tension between, on the one hand, the beneficial recording of informal communications or complaints and, on the other

¹¹³ While it is difficult to be prescriptive if the complainant objects to that course, and no apparent risk is posed to the health and safety of any person, we consider that it would be appropriate to comply with the complainant's wishes.

hand, the desirability of advising the judge that he or she is mentioned in a report as the object of adverse comment.

- 22.13 It may not be possible to resolve that tension entirely. If keeping such records is important to staff safety, this may be seen to outweigh the named person's interest in knowing of the report. Certainly, if the latter is prioritised, staff would not wish their complaint to be recorded, as the judge could guess their identity.
- 22.14 It is not clear that any compelling consideration requires a judge to be informed that he or she has been criticised in the mere record of an anonymous informal report made in confidence. There appears to be no requirement to inform employees generally that they have been criticised in an informal, confidential oral report. Including such an oral report in a securely kept written record would not appear to make a material difference. From CSV's perspective, the record would narrate the historical fact that one of its employees, during their employment, made an allegation or criticism about the conduct of a judicial officer. The record may also state what was done in response to the informal report.
- 22.15 We refer to the terms of s 22(2)(a) of the OHS Act, quoted above. A record of an informal report against a judicial officer for sexual harassment (or other serious misconduct) could constitute a record "relating to the health and safety of employees [of CSV]". In some cases, it may not be "reasonably practicable" to keep such records within the meaning of that phrase in s 22(2) of the OHS Act. However, keeping of records of informal reports — acknowledging the fact that they constitute a record of an *unproven allegation* against a judicial officer — may support CSV's compliance with occupational health and safety requirements, and significantly strengthen its ability to identify sexual harassment risks where they exist. We also note the expanded reporting obligations contained in the proposed Occupational Health and Safety Amendment (Psychological Health) Regulations, summarised at [63] above.
- 22.16 Where records reveal that a multitude of informal complaints have been made against, or concerns expressed about a particular judicial officer, CSV and the head of jurisdiction could confer on steps to mitigate the risk posed to CSV-employees. Such steps might include some supervision of the judicial officer's interaction with staff, conditions on the judicial officer's interactions with staff, selection of

different staff to work with that judicial officer, requiring training for the judicial officer (see **Recommendation 10**) or other appropriate action.

22.17 CSV's recently published Policy titled "Resolution procedure — Inappropriate workplace behaviours" details the role of "Your Safe Space" as an external body which can be a first point of contact for staff who experience inappropriate conduct, including where that conduct is perpetrated by a judicial officer. The Policy also notes that CSV has a mandatory obligation to act where there is a risk to employees that cannot be mitigated without further action. In our view, there should be an arrangement requiring Your Safe Space to inform CSV of risks to staff apparent from a report made only to Your Safe Space. The arrangement should also provide for the maintenance of confidentiality of staff (where requested) as far as possible in the circumstances.

23 We recommend that the courts and the legal profession should, consistently with legislative, privacy or related limitations, and the needs and wishes of complainants, promote and facilitate publication of reports (redacted as appropriate) of investigations of allegations of significant judicial misconduct in cases where those allegations have been found to be substantiated. Appropriate measures to preserve the anonymity of complainants and other potentially affected persons should be adopted. We recognise that the competing interests must be balanced, which may require consultation and legislative amendment. The identity of the judge should be disclosed save where this would identify the complainant or others, or in otherwise exceptional circumstances. The reasons in support of this recommendation are set out at paragraphs [196]-[209].

24 We recommend that each jurisdiction adopt a practice of encouraging participation in an exit interview when court staff leave their position with a judicial officer (including associates, researchers, trainee court registrars, lawyers and registrars in the Coroners Court, and member support officers). The exit interview should provide an opportunity to express concerns about the employee's interactions with other persons in the workplace, including judicial officers and about any sexual harassment, bullying or other inappropriate conduct.

24.1 Exit interviews will provide a further important source of information for CSV on possible risks to health and safety. Departing staff are a useful source of potentially frank information about the incidence of inappropriate conduct, and staff perceptions of whether the existing safeguards against sexual harassment are adequate and the complaint processes useful. We understand that such exit

interviews are currently conducted, but the practice is not uniform across each jurisdiction. At least one former associate who experienced inappropriate conduct by judicial officers was not invited to participate in an exit interview.

25 Tackle “Open Secrets”.

25.1 We recommend that CSV take steps to ensure that: (a) it is in a position to identify those judicial officers who are known or suspected by staff to engage in misconduct; and (b) it is proactive in taking steps to protect the health and safety of its employees once it becomes aware of a potential risk to staff presented by alleged misconduct.

25.2 During our consultations, we heard from individuals and groups of court staff that it was notorious or an “open secret” that a small number of judicial officers engaged in bullying of judicial staff or sexually inappropriate conduct. We heard that in at least one such case there was a sense among court administrators and staff that little could be done given the judicial officer’s status and security of tenure, apart from re-assigning multiple staff away from that judicial officer. We also heard of incidents where newly appointed associates would begin work with a judicial officer who was widely believed among staff to be a bully, with no warning, or only an informal warning from concerned staff members, of what they were likely to experience.

25.3 We repeatedly heard that a profound sense of betrayal is engendered in staff who believe that the court or CSV exposes them (or others) to possible ill treatment or risk at the hands of a judge whose reputation for inappropriate conduct is well-known.

25.4 We acknowledge that although many staff members may be aware of such “open secrets”, other judicial officers may not share this knowledge. The perpetrator may not act improperly before others, particularly his or her peers. Staff may be reluctant to report criticisms of a judicial officer to another judicial officer.

25.5 Nevertheless, the identification of judicial officers who have a pattern of inappropriate conduct will be facilitated by the appointment of a staff judge(s) as outlined under **Recommendation 4** who may be a “conduit” for passing information between staff, the judiciary, and CSV. Similarly, the actions of judicial officers who are prepared to act as bystanders when they witness inappropriate conduct will assist in bringing cases of misconduct that would otherwise remain an

“open secret” to light. In that regard, we note that the *Judicial Conduct Guide: Sexual Harassment* published by the Judicial Commission sets out an expectation that judicial officers will act where they witness, or are informed of, sexual harassment, having regard to the circumstances and the wishes of the victim.

- 25.6 The proactive steps that CSV can take in consultation with the head of jurisdiction to mitigate known risks posed by particular judicial officers are set out in **Recommendation 10** above.
- 26 We recommend that the courts should devise and adopt appropriate arrangements for travel and accommodation on circuit, and should promulgate guidelines for circuit to ensure wellbeing of judges and staff.
- 26.1 Throughout our consultations, both judicial staff and court administrators reported a widely-held perception that circuits posed particular risks for sexual harassment and other inappropriate conduct. Some judicial officers, too, expressed uncertainty and unease about awkward situations that can arise on circuit. For example, in some cases the circumstances made it difficult to dine separately. In other cases, the judge felt uneasy as to how dining and/or drinking one-on-one with a much younger associate might be perceived.
- 26.2 One head of jurisdiction who was particularly conscious of these issues reported speaking often with judicial officers to emphasise that they need to be particularly conscious while on circuit as to how certain situations might be perceived, given the power imbalance between judicial officer and judicial staff.
- 26.3 We heard that there are currently no specific formal policies within each jurisdiction on arrangements for travel to circuit destinations, or procedures and standards of conduct while on circuit. Rather, the expectation is that the general policies and standards concerning appropriate workplace continue to apply to the judicial officer and their staff in the circuit destination. Because there is no formal guidance, travel and accommodation arrangements are the responsibility of each judicial officer and their staff to work out before the circuit. In practice, this probably means that the judge’s expressed preference will prevail.
- 26.4 We also heard that, despite the lack of formal policies, there has been a significant degree of cultural change over the past decade. For example, while it was relatively common for judicial officers and staff to share accommodation a decade ago,

judicial officers and staff now often stay at different accommodation where practicable. Further, while it was once routine for the associate or tipstave to drive the judge to the circuit destination, it is now more common for them to travel separately.

- 26.5 Nevertheless, circuit travel, accommodation and conditions involve significant risk factors for sexual harassment or other inappropriate conduct. A judicial officer and judicial staff member are removed from the court environment and the protections offered by the routine of that environment and the presence of other judicial officers and staff. Contact between the two is not limited to regular work hours. There may be no third party present to observe their interactions. Judges may feel obliged to dine frequently with their staff, when they would prefer free time. Associates may interpret unwanted dinner (or other social) invitations by the judge while on circuit as commands.
- 26.6 In our view, there are some practical steps that can be taken, across each jurisdiction where judges and staff go on circuit together, which can significantly ameliorate the peculiar risk factors.
- 26.7 Each jurisdiction should adopt policies and procedures to ensure that usually:
- 26.7.1 at least two staff members routinely accompany a judge on circuit;
 - 26.7.2 appropriate travel arrangements which provide an option of travelling independently are available;
 - 26.7.3 appropriate accommodation is available, which provides the option of residing in different facilities or at least in accommodation that is not unduly intimate, such as a small, shared private house; and
 - 26.7.4 there are options available for the parties to have their meals separately.
- 26.8 a staff judge's discussion with judicial officers who are to travel on circuit should include advice on the particular risks posed by circuit, including:
- 26.8.1 that secluded, one-on-one dining with a staff member can create the perception of an inappropriate relationship, and excessive drinking with judicial staff can destroy professional boundaries;
 - 26.8.2 emphasise that the judge should generally travel to circuit with more than one judicial staff member, and should consult with an appropriate CSV staff

member (for example, a judicial services manager) before travelling on circuit if suitable arrangements are not in place;

26.8.3 note that the power disparity between judges and judicial staff may inhibit staff from declining an unwelcome invitations from the judge (such as an invitation to drinks or dinner) even if the staff member would prefer to decline; and

26.8.4 emphasise that judicial officers should take steps to ensure that judicial staff understand that they can make their own arrangements outside of court hours and that invitations may be declined without offence.

26.9 the staff judge (or a designated staff member in each jurisdiction, such as a judicial services manager or senior registrar) should state, in discussions, with judicial staff who are to travel on circuit that during circuit:

26.9.1 judicial staff are not required to spend time with the judge outside of court hours if they do not wish to, and that invitations from a judge to meals or events outside of court hours may be declined;

26.9.2 CSV policies concerning appropriate workplace conduct continue to apply while on circuit;

26.9.3 that lines of contact with CSV and the staff judge remain open while the staff member is on circuit;

26.9.4 a judicial officer is accompanied on circuit by more than one judicial staff member.

26.10 After the circuit, court administration should routinely check with the judge to confirm that the arrangements for the circuit were satisfactory and whether there were any problems or inadequacies that the judge wishes to raise;

26.11 Court administration should speak with each judicial staff member to enquire whether the staff member has any feedback on whether the arrangements for circuit were satisfactory and give the staff member an opportunity to raise any questions or issues.

In making this recommendation, we do not suggest that judges and their staff should be inhibited from sharing meals or socialising while on circuit. Rather, they should be aware of risk factors for inappropriate conduct and that staff are entitled to exercise free choice in relation to personal and social activity.

27 Review Recommendations

27.1 We recommend that the operation of each of the recommendations in this Report adopted by CSV (whether across each jurisdiction or only in select jurisdictions) be reviewed by CSV within three years of the implementation of those recommendations.

August 2022

The Hon. Julie Dodds-Streeton KC

Jack O'Connor, Counsel