



**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL
AFFAIRS LEGISLATION COMMITTEE ON THE *JUDGES' PENSIONS
AMENDMENT (PENSION NOT PAYABLE FOR MISCONDUCT) BILL
2020***

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Submitted:	By email
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About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 600 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community for female identifying lawyers.

Since 1996, VWL has advocated for the equal representation of women at all levels of the legal profession and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, to achieve justice and equality for all women.

Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab. In particular we draw attention to our recent submission to the *Review of Sexual Harassment in Victorian Courts*.

Overview of submission

VWL welcomes the opportunity to make a submission to Legal and Constitutional Affairs Legislation Committee for inquiry into the *Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020 (the Amendment)*.

VWL strongly condemns misuse of power by members of the Australian judiciary, especially as leaders and respected members of our profession. VWL supports all action taken to address judicial misconduct and particularly sexual harassment in the legal profession. VWL supports the Amendment and the concept that a retired Judge who has engaged in serious misconduct in office should face the same consequences as a sitting Judge. However, VWL questions the effectiveness of the Amendment as a standalone measure, and considers that a suite of further reforms is necessary to deter serious misconduct, hold perpetrators to account, and restore public confidence in the judiciary. To this end, VWL has identified a number of additional complementary approaches to strengthen and effectively deliver on the purpose of the Amendment in this Submission.

***“[Sexual harassment is] everywhere, and it’s insidious. It’s very difficult to call out because sometimes it’s so nuanced and accepted. One of the worst things is that in my workplace, and I think in the law in general, there is a view that things are really good for women now. That makes it virtually impossible to call out systematic and insidious gendered issues”.*¹**

1.1 VWL supports the need for the Amendment

Sexual harassment continues to be a significant issue in the Australian legal and justice sectors. Although sexual harassment affects all members of the profession, it is well accepted that women are disproportionately targeted: a 2019 survey of Victorian legal professionals conducted by the Victorian Legal Services Board + Commissioner (VLSB+C) revealed that 61% of women in the Victorian legal profession have experienced sexual harassment while working in a legal workplace (compared to just 12% of men), with 9 in 10 perpetrators reported to be men.² This reflects the underlying gender inequality that continues to underpin the attitudes, cultural norms and systematic manifestations that disadvantage women in the legal industry.

Sexual harassment can have profound impacts on women’s opportunities for career advancement and access to leadership roles, and too often results in women leaving the profession altogether. Sexual harassment perpetrated by Judges and senior members of the legal profession further erodes public confidence in the legal system, essential for effective democratic governance.³

In order to deter such misconduct and restore public confidence in the judiciary, perpetrators must be held to account for their actions. Currently, retired Judges remain entitled to taxpayer-funded pensions if found guilty of serious misconduct whilst serving as a Judge.⁴ This contrasts with sitting Judges, who are ineligible for pensions if they commit serious misconduct. VWL supports the Amendment, which rectifies this loophole by imposing the same consequences for misconduct in office on retired Judges as they would experience had they still been sitting.

¹ Women’s Legal Service Victoria, *Sexism and Gender Inequality in the Victorian Legal and Justice Sector* (Discussion Paper Phase 1)

<<https://www.womenslegal.org.au/files/file/Starts%20With%20Us%20discussion%20paper.pdf>>.

² Victorian Legal Services Board + Commissioner, *Sexual Harassment in the Victorian Legal Sector: 2019 study of legal professions and legal entities* <<https://lsbc.vic.gov.au/sites/default/files/2020-03/Sexual%20Harassment%20in%20the%20Victorian%20Legal%20Sector%20Report.pdf>>.

³ Australian Law Reform Commission, *Judicial Bias and Public Confidence: The Importance of Good Data* (2020) <<https://www.alrc.gov.au/news/importance-of-good-data/>>.

⁴ Explanatory Memorandum, Judges’ Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020.

1.2 VWL questions the effectiveness of the Amendment as a standalone deterrent to serious misconduct

Although VWL supports the Amendment, VWL considers that it is likely to have limited effect as a stand-alone deterrent to sexual harassment and other serious misconduct by Judges.

Sexual harassment is a complex and insidious issue in the Victorian legal industry. Although the Amendment rectifies a legislative loophole, it does not address the root causes of gender inequality in the legal profession and barriers faced by victims reporting senior members of the profession, including the judiciary.

Most people who experience sexual harassment in the workplace do not formally report their experience or seek support or advice.⁵ Barriers to reporting include fear of being seen to be over-reacting, concerns about job security and career trajectory, and fear of not being believed.⁶ Often, as in the case of Judges who have sexually harassed their staff, there is a power imbalance between the perpetrator and victim which exacerbates fears of reporting.⁷

Sexual harassment is particularly difficult to address in a workplace such as the Courts, due to a variety of factors including:⁸

- The relative power imbalance between individuals working for and accessing the Courts – from justices, judges, magistrates and tribunal members to barristers and solicitors of all ages and experience levels, to court staff and the general public;
- The transitory nature of legal Courts, being spaces where people enter and exit frequently and stay for varying lengths of time;
- The diverse contexts of the Courts, both in terms of the purposes for which people access the Courts and the physical locations within the Court complexes;

⁵ Katie Walsh, "Glacial pace: one third of new law firm partners are women" Australian Financial Review (20 June 2017) < ['Glacial pace': one third of new law firm partners are women \(afr.com\)](https://www.afr.com/news/politics-government/one-third-of-new-law-FIRM-partners-are-women-20170620)>.

⁶ Ibid.

⁷ For a greater overview of the many barriers to reporting sexual harassment in the workplace, see VWL's Submission to the National Inquiry into Sexual Harassment in Australian Workplaces, available at: <https://vwl.asn.au/wp-content/uploads/2019/02/Victorian-Women-Lawyers-submission-to-the-AHRCs-inquiry-into-sexual-h....pdf>.

⁸ For a more detailed discussion of the difficulties associated with addressing workplace sexual harassment in a Court context, see VWL's Submission to the Review of Sexual Harassment in Victorian Courts, available at: <https://vwl.asn.au/wp-content/uploads/2020/11/20201030-VWL-submission-SH-Review.pdf>.

- The adversarial nature of Court rooms and proceedings, in which poor professional behaviour by practitioners can go unchecked and where disparaging practices can be accepted or ignored;
- The formality of Court rooms and court complexes, which serve to create a context for secrecy; and
- The subject-matter of Court proceedings, which can involve highly emotional or sensitive matters.

VWL considers that the Amendment is inadequate to address the many complex and deep-rooted causes of sexual harassment within the Australian judiciary. Instead, the Amendment should be considered a part of a broader suite of reforms and cultural change necessary to deter sexual harassment and other serious misconduct in the legal profession and judiciary.

1.3 Complementary mechanisms to effectively meet the purpose of the Amendment Act

VWL has outlined a number of proposed mechanisms below to complement the Amendment in deterring serious misconduct by the Australian judiciary, holding perpetrators to account, and restoring public confidence in the legal system.

Firstly, VWL endorses the recommendations made by the Women Lawyers' Association of NSW, including the need for victim-focused complaint and investigation processes, reporting that provides high-level visibility and accountability to executives and Boards, and a Code of Conduct for those appointed to courts and tribunals.⁹

VWL further supports the need to creatively consider the range of deterrents to sexual harassment and other serious misconduct available to the legislature. For example, Hersh suggests approaches which create financial incentives for effective deterrents. These could include the removal of any caps on damages awards for sexual harassment.¹⁰

VWL notes that the Amendment utilises a financial deterrent to engaging in misconduct. Recognising that the costs of sexual harassment are disproportionately borne by survivors,

⁹ Women's Lawyers Association of NSW, Measures to deter and address sexual harassment: Proposals for change (2020) < <https://womenlawyersnsw.org.au/wp-content/uploads/2020/07/SexualHarassmentMeasures.pdf>>.

¹⁰ Hersh, Joni (2019) 'Efficient Deterrence of Workplace Sexual Harassment,' University of Chicago Legal Forum: Vol. 2019 , Article 6. Available at: <https://chicagounbound.uchicago.edu/uclf/vol2019/iss1/6>.

VWL recommends that any money saved (from forfeiting a pension) or collected from perpetrators by way of fines or undertakings, be made available to support victims in areas such as reporting, recovery, pursuing legal action, or compensation for the injury on victim's careers and mental health.

VWL further considers that removal of the judicial pension should not preclude the taking of criminal or tort action, and any ensuing penalties.

Finally, VWL supports the adoption of government primary prevention strategies to facilitate broader cultural and social shifts needed to address gender inequality. Such strategies could include social marketing, school-based education programs, and mandatory educational programs across workplaces which promote positive and equitable workplace cultures. Broader social policy initiatives that address gender inequality and improve the status of women are critical to reducing sexual harassment against women in the long-term.

Conclusion

VWL strongly condemns misuse of power by members of the Australian judiciary and supports all action taken to address issues of judicial misconduct and particularly sexual harassment in the legal profession. To this end, VWL supports the Amendment as one component of a suite of reforms needed to deter serious misconduct in the Australian judiciary, hold perpetrators to account, and restore public confidence in the legal system. VWL urges the adoption of complementary mechanisms alongside the Amendment to facilitate the broader cultural and social shifts required to address gender inequality and the issue of sexual harassment within the judiciary and legal profession.

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