



VICTORIAN
WOMEN
LAWYERS

**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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Response to questions taken on notice to the Senate Legal and Constitutional Affairs Committee

VWL welcomes the opportunity to make further recommendations to the Legal and Constitutional Affairs Legislation Committee for inquiry into the Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020 (the Amendment) and broadly, federal measures to prevent sexual harassment by members of the judiciary.

1.1 Should the proposed Amendment apply retrospectively?

VWL supports the contention that the *Judges' Pensions Amendment (Pension not payable for misconduct) Bill 2020* be retrospective in application. This is to ensure that all past Judges are held accountable for any serious misconduct done while they held their position (which has become apparent after their retirement).

In general, the Commonwealth has agreed and held the view of *nulla crimen, nulla poena sine lege*; that is 'no punishment without the law.'¹ Under this principle, if the Amendment was not in place when the misconduct occurred, the Amendment should not be applied retrospectively.

However, while the law is generally reticent to apply laws retrospectively, the Guide to Framing Commonwealth Offences states that exceptions to retrospective application have been made where "there has been a strong need to address a gap in existing offences, and a moral culpability of those involved means there is no substantive injustice in retrospectivity."²

VWL submits that this provides the basis for application here. There is no clear injustice in this Bill (but for that which has been suffered by the victims of the misconduct) applying retrospectively. Having regard to the privileged position judges hold and

¹ Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010).

² Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 15.

community expectations of the judiciary, there is a higher degree of moral culpability for judges who engage in misconduct.

VWL asserts that there is a strong need to address the gap in existing offences, and the law that should apply retrospectively to protect past victim survivors of misconduct, irrespective of whether the Judge at that time was aware of this particular punishment..

1.2 How should ‘serious misconduct’ be defined under the proposed Amendment?

We note that ‘serious misconduct’ is not currently defined in the Bill but derives its meaning from the *Governor General Amendment (Cessation of Allowances in the Public Interest) Bill 2019* and the *Fair Work Act 2009*. We understand from the Explanatory Memorandum that this is ‘intended to provide the Parliament with maximum discretion to determine the scope, pervasiveness and impact of a Judge’s behaviour when determining what serious misconduct is.’

The *Fair Work Act 2009* adopts the definition of serious misconduct used in the *Fair Work Regulations 2009*. The Regulations define serious misconduct as having its ordinary meaning, but provides the following examples:

- *Wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;*³
- *Conduct that causes serious and imminent risk to:*⁴
 - *The health or safety of a person; or*
 - *The reputation, viability or profitability of the employer’s business.’*
- *The employee, in the course of the employee’s employment, engaging in:*⁵

³ *Fair Work Regulations 2009*, Regulation 1.07, s2a.

⁴ *Ibid*, Section 2b.

⁵ *Ibid*, Section 3.

- *Theft; or*
- *Fraud; or*
- *Assault;*
- *The employee being intoxicated at work;*⁶
- *The employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.*⁷

Although VWL supports the inclusion of the above definition of serious misconduct in the proposed Amendment, VWL recommends the explicit inclusion of sexual harassment as a specific example of 'serious misconduct' so as to avoid any ambiguity. This could be defined with reference to the below definition of sexual harassment adopted in the *Sex Discrimination Act 1984*:⁸

1. For the purposes of this Division, a person sexually harasses another person (the person harassed) if:

- a. the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
- b. engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*

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.

1A. For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

⁶ Ibid.

⁷ Ibid.

⁸ *Sex Discrimination Act 1984* (Cth) s28A.

- a. *The sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;*
- b. *The relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;*
- c. *Any disability of the person harassed;*
- d. *Any other relevant circumstance.*

2. *In this section:*

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

1.3 Key features of a Federal Judicial Code of Conduct

VWL notes there is activity in some Australian jurisdictions to update the code of conduct for judicial officers. For example the Judicial Commission of Victoria, in its recent media release supporting the recommendations in the Review of Sexual Harassment in Victorian Courts (The Report), makes reference to having commenced preparation of a guideline to clearly set out appropriate standards⁹

In terms of developing a federal Judicial Code of Conduct, VWL recommends aiming for consistency with State based guidelines and Codes, however we also urge leadership at a federal level and consideration of a higher standard for federal judges.

VWL recommends developing a contemporary and strong federal code of conduct. VWL recognises the need to impart confidence in the public and the legal profession that judicial misconduct is being addressed at a national level, with a focus on the significant position of power held by Judges. VWL also recommend ensuring both current and former judges are accountable for conducting themselves in compliance with any Judicial Code of Conduct.

⁹ Judicial Commission of Victoria, Media Release 19 April 2021
www.judicialcommission.vic.gov.au/publications/media

VWL notes that basic requirements are already included in existing Codes of conduct¹⁰, whereby judicial officers are encouraged to act ethically, fairly and with integrity; and to not discriminate or harass in the course of carrying out their duties. Based on the statistics and stories of victims included in reports from the AHRC and VHREOC, and more recently in the Review of Sexual Harassment in Victorian Courts¹¹, these existing codes have provided sufficient protection for women in the legal profession from sexual harassment or sex discrimination.

VWL recommend that a federal code of conduct calls out specific behaviours that must not be engaged in by judicial officers. VWL also urge that the Code is then utilised as a clear and robust framework to underpin other preventive measures such as education, training and reporting.

These recommendations are informed by the findings from the recent reviews into sexual harassment by AHRC and VEOHRC, and more recently the Review of Sexual Harassment in Victorian Courts.

Specifically VWL supports the recommendations made in the Review of Sexual Harassment in Victorian Courts¹². The safeguards identified by the Global Judicial Integrity Network (GJIN) in its paper, *Gender-Related Judicial Integrity Issues* can guide the development of a federal code of conduct as to what constitutes inappropriate conduct.¹³

Within a code of judicial conduct, the three safeguards for promoting and protecting judicial integrity identified by the GJIN are summarised as follows¹⁴:

¹⁰ See for example The Judicial Commission of NSW 'Code of Conduct' <<https://www.judcom.nsw.gov.au/publications/code-of-conduct/>> , and Judicial Commission of Victoria 'Guide to Judicial Conduct'

¹¹ Review of Sexual Harassment in Victorian Courts <<https://www.shreview.courts.vic.gov.au/>>.

¹² Ibid.

¹³ Cited in Review of Sexual Harassment in Victorian Courts.

¹⁴ Review of Sexual Harassment in Victorian Courts and VCAT, Appendix 1: Summary Review of Interventions to Prevent and Respond to Sexual Harassment in Courts, February 2021.

- Framed as ethical standards: Specifically incorporating references to gender bias, discrimination, sexual harassment and other gender-related integrity issues in the ethical rules is necessary in order to capture gender-related misconduct that still falls within the boundaries of lawful conduct.
- Anchored in universal standards: Judicial conduct and integrity obligations that are anchored in the international framework, norms and instruments that promote gender equality, gender justice, human rights and integrity in public institutions would align the federal code with established and universally accepted standards of judicial conduct. GIJN specifically refers to the international *Bangalore Principles of Judicial Conduct*, and the Convention on the Elimination of All Forms of Discrimination against Women and Sustainable Development Goals 5 and 16.
- Clear, open and accessible: GIJN recommend a judicial code of conduct contains guidance and concrete examples. They recommend making the standards accessible through various channels so that they reach and influence all members of the legal profession as well as the broader community. Public awareness raising in the form of campaigns, education and information material was identified as important.

International examples

In addition to these safeguards, the comparative analysis undertaken in the report is extremely informative and provides a basis for the development of a federal judicial code of conduct in Australia. The GIJN identifies that In the United States, the federal judiciary and most states have codes of conduct that are drafted in a prescriptive manner. Whereas Commonwealth countries such as Australia, Canada, England and Wales and New Zealand have adopted documents that largely guide, encourage or persuade rather than being prescriptive about conduct appropriate for a judicial officer.

The findings identify a compelling need for a Judicial Code of Conduct to provide more than non-binding guidance or principles. VWL endorses the recommendation that an

effective Judicial code be both prescriptive, particularly in defining what constitutes misconduct, and enforceable, with victim-focused reporting mechanisms and remedial procedures articulated¹⁵.

1.4 Establishment of a Federal Judicial Commission

As discussed above, a clear set of judicial conduct standards is essential to provide clear guidance to both judges and the broader community about what conduct is acceptable. Such guidance would reflect the community's expectations to have transparent accountability of judicial officers outside of, and additional to, the existing appeal processes.

VWL supports the establishment of a Federal Judicial Commission to uphold such clear standards of conduct and recommended that such a Commission should be modelled on both the existing NSW Judicial and Victorian Judicial Complaints Commission.

Calls for a Federal Judicial Commission are not new to the profession, but they were renewed in July 2020 following the High Court of Australia's investigation which found that former High Court Justice Dyson Heydon sexually harassed young associates. In February of this year, President of the Law Council, Jacoba Brasch QC, said that it is essential to have strong and independent commission that is separate to the executive arm of the government that aims to "alleviate serious concerns while ensuring crucial accountability and the maintenance of public confidence".¹⁶

VWL supports an amalgamation of the key features of both the NSW and Victorian Judicial Complaints Commissions, with an emphasis on preventing sexual harassment against women in the legal profession and safeguards against re-traumatisation of victim-survivors. VWL supports the recommendations of the Review of Sexual

¹⁵ Review of Sexual Harassment in Victorian Courts and VCAT, Appendix 1: Summary Review of Interventions to Prevent and Respond to Sexual Harassment in Courts, February 2021.

¹⁶ Jerome Doraisamy, 'Proposed Federal Judicial Commission 'moving in the right direction'' (2021) *Lawyers Weekly* <<https://www.lawyersweekly.com.au/politics/30647-proposed-federal-judicial-commission-moving-in-the-right-direction>>.

Harassment in Victorian Courts and refers the Committee to Appendix 3 of that Report for further information about the current complaints process in Victoria.¹⁷

Both Commissions have the power to investigate complaints about the ability or behaviour of a judicial officer including relating to bias and inappropriate behaviour with some differences outlined below:

- (a) VWL supports a clear Federal Code of Conduct to provide clear guidance to judges and a complaints body about what is appropriate.
- (b) VWL supports the amalgamation of some of the key features of both the NSW and Victorian Judicial Complaints Commissions, with an emphasis on preventing sexual harassment against women in the legal profession and safeguards against re-traumatisation of victim-survivors.
- (c) VWL supports that there should be options for anonymity when lodging a complaint, which is currently not possible in the NSW jurisdiction.¹⁸
- (d) VWL expresses the importance of clear guidelines around time limits when lodging complaints. The NSW Commission will dismiss a complaint if it is of the opinion, after considering matters as it thinks fit, that the matter complained about occurred at “too remote a time” to justify further consideration.¹⁹ This is vague.
- (e) VWL supports that retired judicial officers should be subject to the same complaints processes, as currently the NSW Commission has no power to examine a complaint against a retired Judicial officer.
- (f) VWL supports that alleged criminal conduct, should be referred to police or corruption bodies.

¹⁷ Dr. Helen Szoke, ‘Appendix 3: Judicial independence, accountability and the role of the Heads of Jurisdictions’ *Review of Sexual Harassment in Victorian Courts and VCAT* <<https://www.shreview.courts.vic.gov.au/wp-content/uploads/2021/04/Appendix-3-Judicial-independence-accountability-and-the-role-of-the-Heads-of-Jurisdictions.pdf>>.

¹⁸ *Judicial Officers Act 1986* (NSW), s17.

¹⁹ *Ibid*, Section 20.

NSW Judicial Commission

The Judicial Commission's role is to examine complaints about ability or behaviour however the Commission has no power to discipline judicial officers. There is also no option to make a report anonymously under the *Judicial Officers Act 1986* which requires all complainants to provide their name and contact details to the Judicial Commission when lodging a formal complaint.

Victorian Judicial Complaints Commission

The Victorian Judicial Complaints Commission is constituted by heads of jurisdiction of courts and tribunals across the State and four non-judicial members appointed by the Governor in Council. VWL notes that the Victorian Complaints Commission still relies heavily on unguided decisions by heads of jurisdiction and fails to appropriately provide clear guidance about how to deal with complaints. The Commission receives and investigates complaints against judicial officers. It has the power to:

- (a) dismiss the complaint;
- (b) if it is serious enough to warrant removal from officer, refer the matter to an investigating panel; or
- (c) for less serious complaints, refer it to the relevant head of jurisdiction with recommendations about future conduct of the officer concerned.

Once a matter is referred to the head of jurisdiction, they have the power to:

- (a) counsel the officer;
- (b) make recommendations to the officer as to their future conduct; or
- (c) exercise any other powers that the head of jurisdiction has in relation to the officer concerned.

However as set out above, heads of jurisdiction do not have a vast amount of power over other judges at common law, by convention or in the legislated regimes. In

addition, referring a complaint to a head of jurisdiction removes it from public scrutiny without necessarily leading to an adequate response.²⁰

Thus, the Victorian approach alone is inadequate, as this process still means that the 'chief judge' is unguided and the unreviewable interpretation of the alleged misconduct will dictate if and how discipline is administered.

The importance of a Federal Commission upholding judicial independence and judicial immunity

VWL however does stress the importance of judicial independence and judicial immunity, which are central to maintaining public confidence in the integrity of the judicial system in Australia. In Australia, the Commonwealth Constitution protects judicial independence at both state and federal level through the separation of federal judicial power from the political branches of government. Judicial independence is a foundation of our justice system and the separation of powers.

However, VWL agrees with the comments in the Victorian Review on Sexual Harassment in Victoria Courts, which states that, judicial independence, should not be a reason against, or a limitation upon, clear regulation of the conduct of judicial officers to prohibit serious misconduct, notably, sexual harassment.²¹

²⁰ See for example, Section 15 of the *Judicial Commission of Victoria Act 2016 (VIC)*.

²¹ Review of Sexual Harassment in Victorian Courts, 'About the review,' <<https://www.shreview.courts.vic.gov.au/about-the-review/>>.