

JUDICIAL BULLYING: STICKS AND STONES ...

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Bullying, like all unacceptable behaviour, also erodes trust.

Chief Justice Bathurst, New South Wales Supreme Court, February 2021¹

Bullying and harassment is an unfortunate feature of working in the legal profession. It occurs in all areas of practice, including in court.² This paper focuses on judicial bullying in court.³

Douglas R. Richmond in his article, *Bullies on the Bench*⁴ suggests that when judges move beyond occasional displays of anger, frustration, or impatience and intentionally abuse or denigrate those who appear before them, they may be fairly described as bullies. Bullying can occur by words or actions. There is no exhaustive list of the type of conduct that may be characterised as bullying. Bullying can occur in inter-personal interactions, by the way work is organised and managed, by imposing unreasonable work demands, by unfair or inappropriate directions or aggression. Bullying may take the form of discrimination and harassment, including sexual harassment.

Respondents to the NSW Bar Association's 2018 Quality of Working Life Survey reported their experiences of different forms of judicial bullying. Kylie Nomchong SC, a former Chair

I work on the lands of the Gadigal people of the Eora Nation. I acknowledge the traditional custodians and pay respects to their elders past, present and emerging.

¹ Chief Justice of the New South Wales Supreme Court, the Hon T F Bathurst AC 'Trust in the Judiciary – 2021 Opening of Law Term Address' (Speech, 3 February 2021).

² International Bar Association *Us Too? Bullying and Sexual Harassment in the Legal Profession* | International Bar Association (ibanet.org) (Report, 2019).

³ This paper is focused on conduct in the courtroom in public. I have not addressed the conduct of judicial officers behind closed doors, in their chambers, and their interaction with associates, tipstaves, assistants, court staff, and other judges. Judges may also experience bullying from advocates and others: see A Loughland, "Female judges, interrupted: a study of interruption behaviour during oral argument in the High Court of Australia" (2019) 43(2) *Melbourne University Law Review* at 822; see *Judge Kalyani Kaul KC v Ministry of Justice and ors* [2023] EAT 41, 15 March 2023. See also The Hon Justice Keith Mason, 'Throwing Stones: Cost/benefit analysis of judges being offensive to each other' (2008) 82 *Australian Law Journal* 260. For the purpose of this paper 'judge' is used to describe all judicial officers, including magistrates, commissioners of inquiries and royal commissioners - it is also intended to include tribunal members and those in quasi-judicial roles. In NSW a 'judicial officer' under the *Judicial Officers Act* 1986 (NSW). The reference 'court' is intended to cover all courts, tribunals and inquiries – such as royal commission.

⁴ Douglas R Richmond, 'Bullies on the Bench' (2012) 72(2) *Louisiana Law Review* 325.

of the NSW Bar Association's Wellbeing Committee, referred to some of the accounts of judicial bullying in her paper *Judicial bullying: the view from the bar*.⁵ She said:

Qualitative responses from 494 barristers provided an insight into the differing forms of bullying that advocates in NSW have experienced. The responses recounted instances of verbal comments from the bench which were belittling or amounted to public humiliation in front of the barrister's opponent, clients and observers in the court. Others recounted instances of excessively personal or otherwise unfair criticism. Also noted in the survey as a common type of bullying experienced by advocates was being repeatedly interrupted or being intimidated. Remarkably, there were accounts of angry outbursts of yelling and even screaming of derogatory comments. In addition, and disturbingly, there were also some accounts of inappropriate gender-based comments. Barristers also reported judicial bullying in the form of the imposition of unreasonable deadlines which demonstrated favouritism or bias towards one side.

Bullying may be intentional because it has the purpose of shaming, humiliating, offending, intimidating, excluding or belittling another person. It may also be unintentional, if the bully has little or no awareness of the impact of their treatment on others.

Judicial bullying in the unique environment of a court room

A court room is a unique working environment. It is hierarchical, adversarial and stressful. The stakes are high. The outcomes can be life changing. The judge does not give advice, provide pastoral care or 'problem solve'. Judges must hear the evidence and arguments and determine the matter according to the law. There is no obligation to be courteous or kind in the way judicial functions are discharged.

As legal practitioners, our interaction with judges in a court room is only one part of our relationship with clients. It is the work we do in addition to the private and confidential work where we provide advice, solve problems, sometimes give pastoral care and manage our caseloads.

Our work in court is in public, for all to see. We share this workplace with judges, associates, tipstaves, court attendants, transcribers, jurors, witnesses, the sheriff, other lawyers, the media and the public. We have no choice who we appear before and other than in cases of actual or apprehended bias, we cannot object or refuse to appear before a particular judge. We often appear before the same judicial officers, but for our clients, it may be their one and only experience in court or before a judicial officer.

Professor Steven Lubet, the Director Emeritus of the Bartlit Center of Trial Advocacy at Northwestern University in his article on *Bullying from the Bench*, said there is "stylized demonstrations of obeisance" in litigation:

⁵ Kylie Nomchong SC, '[Judicial bullying: the view from the bar \(nsw.gov.au\)](https://www.nsw.gov.au/judicial-officers-bulletin)' (2018) 30(10) *Judicial Officers Bulletin* 95.

*"We stand when the judge enters and leaves the room. Our 'pleadings' are 'respectfully submitted.' Before speaking, we make sure that it 'pleases the court.' We obey the judge's orders and we even say 'thank you' for adverse rulings."*⁶

When we are in court, our clients see us play a particular role. We have ethical duties to the court and our clients. In the court setting, our language and demeanour may be different when addressing (speaking to) the judge to our communication style with clients and colleagues. We observe a level of formality in the court room setting that is laden with its own rules and rituals. When we become part of this culture and the rituals, we accept, tolerate and may resign ourselves to accepting that this is just the way it is. Legal practitioners are reluctant to behave in a way which challenges the hierarchy in court.⁷

If the most powerful person in the room, the judge, engages in bullying and harassment - where do we go? What should we do? There is a reluctance to take action or complain. As one commentator observed, for legal practitioners the capacity to make a complaint after an incident may seem like "the ambulance at the bottom of the cliff".⁸

Of course, I am not suggesting that every judge, every appearance or every interaction will involve judicial bullying and harassment, far from it. Many judges conduct themselves and their courts with courtesy, respect, and an understanding of the pressure, stress and demands of the environment. It can be a pleasure to appear before those judges and one leaves the court feeling confident, heard and knowing our clients have had a fair hearing. But an experience of judicial bullying can be profound and materially change the way an advocate approaches any appearance in court, even when another judicial officer is known to be courteous and respectful. Once bullied, there is an underlying fear and concern it may happen again. Single or isolated incidents of bullying or harassment may cause a person to feel bullied and have an adverse effect on their health and safety.

Bullying – what it is, what it is not

The general workplace laws, policies and practices that regulate bullying and harassment either do not apply or are inadequate to respond to judicial bullying in a court room setting, where the bullying is directed to legal practitioners.

Fair Work Act 2009 (Cth)

Under the *Fair Work Act 2009 (Cth)* (**FW Act**), a 'worker' is bullied at work if an individual (or a group of individuals) *repeatedly* behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and that behaviour creates a risk to health and

⁶ Steven Lubet, *Bullying from the Bench* 5 GREEN BAG 11, 12 (2001), cited in Abbe Smith "Judges as Bullies," (2018) 46(1) *Hofstra Law Review* 254, fn 6.

⁷ Suzanne Le Mire and Rosemary Owens 'A Propitious Moment? Workplace Bullying and Regulation of the Legal Profession' (2014) 37(3) *UNSW Law Journal* 1030, 1031.

⁸ Anusha Bradley, 'Judges, bullying and a broken complaints system', *Radio New Zealand* (online, 23 September 2021) <https://www.rnz.co.nz/news/in-depth/452026/judges-bullying-and-a-broken-complaints-system>.

safety.⁹ Bullying cannot be exhaustively defined but it may include intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination.¹⁰ Some of these behaviours may describe judicial conduct occurring in a court setting.¹¹

Bullying must be determined on its facts and by reference to an objective test.¹²

One of the challenges in understanding and responding to bullying is the extent to which the subjective response of the person (who feels bullied because of the conduct which causes them to feel shame, humiliation, offence, intimidation in the moment or over a period of time) impairs their health and safety. For example, in a workplace setting, giving feedback on a person's performance, requiring improvement in performance or taking disciplinary action may feel like bullying, but if it is reasonable or may be characterised as 'reasonable management action', it is not bullying. As the Fair Work Commission explains:

The law accepts that managers and employers may need to act if a worker is not doing their job well. They can take 'reasonable management action' to:

- help the employee improve their work;
- address poor performance or behaviour.

It is 'reasonable management action' for an employer to:

- start performance management processes (such as a performance improvement plan);
- take disciplinary action for misconduct;
- tell a worker about work performance that is not satisfactory;
- tell a worker their behaviour at work is not appropriate;
- ask a worker to perform reasonable duties as part of their job;
- take action to maintain reasonable workplace standards.

But the way the employer takes these actions must also be 'reasonable'. If they are not reasonable, and they are repeated, these actions could still be bullying.¹³

The FW Act does not apply to legal practitioners who are bullied by clients, opponents or judicial officers in court, notwithstanding it is a shared workplace.¹⁴ The FW Act has no application to New South Wales courts or tribunals.¹⁵ The *Industrial Relations Act 1996* (NSW) does not include any provisions comparable to Part 6-4B of the FW Act.

⁹ *Fair Work Act 2009* (Cth) s 789FD. See also the Fair Work Commission's [Stop bullying benchbook](http://www.fwc.gov.au) ([fwc.gov.au](http://www.fwc.gov.au)).

¹⁰ *Mac v Bank of Queensland Limited and Others* [2015] FWC 774 at [99]. See also the Fair Work Commission's [Stop bullying benchbook](http://www.fwc.gov.au) ([fwc.gov.au](http://www.fwc.gov.au)).

¹¹ Ms Suzan Cox QC OAM. [Judicial Bullying](#) Criminal Lawyers Association of the Northern Territory, Conference 2013.

¹² *Blagojevic v AGL Macquarie Pty Ltd* [2018] FWCFB 4174 at [15]; GC [2014] FWC 6988 (GC) at [47].

¹³ See Fair Work Commission [About reasonable management action](#) | Fair Work Commission ([fwc.gov.au](http://www.fwc.gov.au)).

¹⁴ Kylie Nomchong SC, 'Judicial bullying: the view from the bar (nsw.gov.au)' (2018) 30 (10) *Judicial Officers Bulletin* 95.

¹⁵ Compare *Re A.B.* [2014] FWC 6723.

Work Health and Safety Act 2011 (NSW)

Bullying is recognised as a health and safety issue.¹⁶ Safety includes psychological safety and psychosocial hazards. The *Work Health and Safety Act 2011* (NSW) (**WHS Act**) applies to all persons who conduct a business or undertaking in the WHS Act. Persons conducting a business or undertaking within the meaning of s 5(1) of the WHS Act have a range of duties to prevent the risk of injury and, so far as is reasonably practicable, ensure the health and safety of other persons are not put at risk from work carried out in that workplace. Kylie Nomchong SC suggests:¹⁷

There is an argument that the court system is a “person conducting a business or undertaking” within the meaning of s 5(1) of the *Work Health and Safety Act 2011* (NSW) (WHS Act). If so, court staff are workers pursuant to s 7 of the WHS Act, and courts are a workplace under s 8 of the WHS Act. As such, the courts are under an obligation to the court staff to protect them against the risk of injury from judicial bullying, particularly, if known (or capable of being known) and not acted upon. Pursuant to s 19(2) of the WHS Act, the courts must ensure, so far as is reasonably practicable, that the health and safety of other persons are not put at risk from work carried out in that workplace. Barristers and solicitors are capable of being “other persons” in that context.

(citations omitted)

Sexual harassment, sex based harassment and a hostile working environment

“There is no place for sexual harassment in any workplace.”

Chief Justice Kiefel, High Court of Australia, June 2020 ¹⁸

The *Sex Discrimination Act 1984* (Cth) (**SD Act**) (NSW) proscribes sex-based harassment, sexual harassment, being subjected to a hostile working environment, discrimination and victimisation unlawful.

Sex based harassment means unwelcome conduct of a demeaning nature done because of a person’s sex if a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.¹⁹

Sexual harassment means unwelcome sexual advances, requests for sexual favours or sexual conduct if a reasonable person having regard to all the circumstances, would have

¹⁶ SafeWork Australia has published a range of guidelines and model policies to address workplace bullying – [Bullying | Safe Work Australia](#).

¹⁷ Kylie Nomchong SC, [‘Judicial bullying: the view from the bar \(nsw.gov.au\)’](#) (2018) 30(10) Judicial Officers Bulletin 955.

¹⁸ High Court of Australia, [Statement](#) by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia, 22 June 2020.

¹⁹ Section 28AA of the SD Act.

anticipated the possibility of the conduct offending, humiliating or intimidating the person to whom the conduct is directed.²⁰

The SD Act applies to Commonwealth and New South Wales state government employees and workplaces. The definitions of Commonwealth and State ‘employees’ includes judicial officers (emphasis added):

Commonwealth employee means a person who:

- (a) is appointed or engaged under the *Public Service Act 1999*;
- (b) holds a Commonwealth administrative office;
- (c) is employed by a public authority of the Commonwealth;
- (d) holds an office or appointment in the Commonwealth Teaching Service or is employed as a temporary employee under the *Commonwealth Teaching Service Act 1972*;
- (e) is employed under the *Australian Security Intelligence Organisation Act 1979* or the *Commonwealth Electoral Act 1918*; or
- (f) is a member of the Defence Force; or
- (g) is a member of either House of the Parliament; or
- (h) is a person employed or engaged under the *Members of Parliament (Staff) Act 1984*; or
- (i) **is a person who holds a Commonwealth judicial office.**²¹

State employee of a State means a person who:

- (a) is appointed or engaged under a law of the State that corresponds to the *Public Service Act 1999*; or
- (b) holds a State administrative office of the State; or
- (c) is employed by a public authority of the State; or
- (d) is a member of the Parliament of the State; or
- (e) is a member of the staff of a member of the Parliament of the State; or
- (f) **is a person who holds a State judicial office of the State.**²²

Judicial bullying and judicial immunity

Judicial officers are immune from civil suit for acts done “in the exercise of their judicial function or capacity”.²³ This immunity extends to acts which are “administrative or ministerial in nature” to the extent that the acts are “intimately associated” with the judicial function.²⁴ Whether there is an immunity for bullying, sexual harassment and related conduct, may depend on the nature of the conduct and the circumstances in which it occurred.²⁵

²⁰ Section 28A of the SD Act.

²¹ See also s 108 of the SD Act – the Commonwealth is the deemed ‘employer’.

²² See also s 109 of the SD Act – the State is the deemed ‘employer’.

²³ *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 365–6 [30].

²⁴ Deputy Chief Magistrate Theo Tsavdaridis and Dane Luo, ‘Immunity of administrative decisions by judicial officers’ (2023) 35(2) *Judicial Officers Bulletin* 14; *Yeldham v Rajska* (1989) 18 NSWLR 48.

²⁵ There is no corresponding immunity for extra-judicial conduct - see *Judicial Officers Act 1986* (NSW) ss 44A, 44B, 44C. The immunity does not extend to the disciplining of judicial officers in accordance with the statutory regime: see *Scanlon v Director-General, Department of the Arts, Sport and Recreation* (2007) 70 NSWLR 1 at [54].

Prevalence of judicial bullying and harassment

In Australia, there is little data to assist in identifying the prevalence of judicial bullying.²⁶ The two main sources are practitioner surveys and complaints data. These are not particularly reliable ways of identifying the prevalence of judicial bullying. Nevertheless, the surveys do reveal judicial bullying and harassment is real and persistent.

Surveys of legal practitioners

In 2013, the Law Council of Australia's *National Attrition and Re-engagement Study (NARS) Report*²⁷ made the following findings:

- women barristers more often reported experiencing almost every form of discrimination or type of harassment at work than their counterparts in private practice or in-house legal roles;²⁸
- women barristers were also more likely than other women to report experiencing discrimination due to gender, bullying or intimidation, and discrimination due to family/carer responsibilities;²⁹
- 80% of women barristers experienced bullying or intimidation; 84% discrimination due to gender; 55% discrimination due to age; 40% of discrimination due to family responsibilities.³⁰

In January 2018, the NSW Bar Association conducted a Quality of Working Life Survey of its members about their level of wellbeing including factors influencing the quality of their working life. One of the questions was directed to judicial bullying. Sixty-six percent (66%) of respondents surveyed had experienced judicial bullying.³¹

In June 2018, the Victorian Bar published its *Wellbeing of the Victorian Bar*³² report. The findings were based on a survey undertaken of 856 Victorian barristers. The report recorded:

- 55% of male barristers and 66% of female barristers reported they had experienced judicial bullying;

²⁶ Compare the approach taken in the United Kingdom – see Matthew Williams and Geoff Pike, *Barrister's Working Lives 2021: A report for The Bar Council (Report 567, September 2021)*.

²⁷ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (Final Report, 2013).

²⁸ Ibid, 6.

²⁹ Ibid, 8.

³⁰ Ibid.

³¹ Kylie Nomchong SC, 'Judicial bullying: the view from the bar (nsw.gov.au)' (2018) 30(10) Judicial Officers Bulletin 95.

³² Victorian Bar, *Wellbeing of the Victorian Bar* (June 2018).

- when responding to the question “*How could your quality of working life be improved?*” more than 16% referred to better judicial behaviour and some 13% to more timely payments; and
- when asked to comment on judicial bullying, some 26% of respondents mentioned denigrating or humiliating behaviour, and 11% mentioned feeling personally attacked.

In 2019, the International Bar Association’s *US Too? Bullying and Sexual Harassment in the Legal Profession* report found bullying and sexual harassment were rife.³³ The IBA reported:³⁴

- almost one-seventh of respondents to the survey were from Australia, the highest response rate by country. 58% of Australian respondents worked at law firms, with 13% from government, 12% from the bar, 9% in-house and a small percentage from the judiciary
- 73% of Australian female respondents and 50% of Australian male respondents had been bullied in connection with their employment. These rates are significantly higher than global averages, in which women and men are bullied at rates of 55% and 30%, respectively
- Australian legal professionals also report a higher rate of sexual harassment than the global average: 47% of female respondents indicated they had been sexually harassed (compared with 37% globally) and 13% of male respondents (7% globally).

Complaints data

Observing patterns or themes in complaints about judicial conduct may be a “surrogate indicator of issues that undermine community perceptions of judicial behaviour and the integrity of the judicial system”.³⁵

For New South Wales, the statistics for the year ending 30 June 2023 were published in the July 2023 edition of the *Judicial Officers’ Bulletin*. The NSW Judicial Commission’s 2022/23 Annual Report (which will report on the complaint statistics) is currently being finalised.³⁶ Of note:

- the complaint statistics have remained generally constant in the previous five years. In the 2022–2023 financial year, there has been an increase in the number of complaints which appear, on the face of it, to be either frivolous, vexatious, not made

³³ International Bar Association *Us Too? Bullying and Sexual Harassment in the Legal Profession* | International Bar Association (ibanet.org). The International Bar Association has subsequently published comprehensive reports designed to aid the global legal profession’s ongoing efforts to address bullying, sexual harassment and discrimination. *Beyond Us Too? Regulatory Responses to Bullying and Sexual Harassment in the Legal Profession* and *A Global Directory of Anti-Discrimination Rules Within the Legal Profession: Main Findings* on the response to the *Us Too* report.

³⁴ Ibid, 87.

³⁵ Emily Schindeler, ‘The Problematic of Judicial Accountability’ (2021) 1(2) *Legalities*, 210 at 215.

³⁶ See previous reports Judicial Commission of NSW [Annual Report 2021-2022](#) (Report, 2021-22) and ‘[Conduct Division Reports](#)’ *Judicial Commission of New South Wales*.

in good faith and/or with insufficient clarity (96 complaints received, with 71 examined and dismissed, three referred to the relevant head of jurisdiction and 1 withdrawn)

- although there has been an increase in the number of complaints received in the 2022–2023 financial year, this has not equated to an increase in the number of complaints being substantiated. The proportion of complaints which were summarily dismissed by the Judicial Commission, following preliminary examination, is consistent with prior years with over 96% of complaints being summarily dismissed after preliminary examination of the complaint in 2022–2023 (as compared against the 5 year average of 96%).

Although the majority of complaints are dismissed, information gathered from the investigation of complaints is used by the Judicial Commission to further develop continuing judicial education sessions on topics such as: providing a fair hearing and avoiding bias; avoiding inappropriate comments and discourtesy; domestic violence and sexual assault issues; and cultural awareness training.

There is no equivalent reporting on the prevalence or nature of complaints at the federal level.

The Australian Law Reform Commission's recent report *Without Fear or Favour: Judicial impartiality and the Law on Bias* commented on the issue of judicial bullying, with a focus on federal courts. The ALRC heard from 46 individuals through informal submissions as to their experiences before judges in the federal courts. The key themes reported were that litigants felt that they had not been able to put their case, that the judge had not considered the evidence, that they were not treated with respect, that they were warned by their lawyers of a judge's reputation for unpredictable behaviour in Court and that there was no effective oversight.³⁷

The ALRC found also a reluctance to raise concerns about bias. In an anonymised survey conducted by the ALRC, 58% of those who completed the survey (207) reported having made the decision not to raise an issue of bias with a judicial officer, even though they believed there were strong grounds to raise it.³⁸ The three most common reasons given were:

- concern that raising it would impact negatively on the case;
- the fact that the disqualification decision would be made by the judicial officer concerned; and
- concern that raising it would impact negatively on their own career.

The experience of being bullied and the impact on bullying

³⁷ Australian Law Reform Commission, '*Without Fear or Favour: Judicial Impartiality and the Law on Bias*' (Report, No 138, December 2021), [5.178].

³⁸ Australian Law Reform Commission, '*Without Fear or Favour: Judicial Impartiality and the Law on Bias*' (Report, No 138, December 2021) [12.128].

"In a time gone by, when I began practice, appearing in the New South Wales Supreme Court sometimes felt like participating in a dangerous blood sport. Some judges appeared to enjoy pulling the wings off baby barristers"

Chief Justice Allsop, Federal Court of Australia, 2021³⁹

It is not uncommon for current judges to recount their experiences of being bullied prior to their appointments. During seminars or in writing, judges refer to their time as advocates and can recall the bullying judges by name. They often recount a description of the bullying and how they felt in the moment. They do not disclose whether they made a complaint or took any other action.⁴⁰ In telling their personal stories, there appears to be a tacit acceptance that bullying was part of the culture.

The war stories are not confined to judges who experienced bullying in a former professional life. Older and experienced practitioners also share their experiences. In June 2022, The Right Hon Lady Rose of Colmworth DBE, Justice of the Supreme Court of the United Kingdom spoke on the topic of 'What makes a good judge?'.⁴¹ She spoke about the changing attitude to rudeness and bullying by judges. She said:

Older practitioners relating "war stories" of how they were mistreated by former judges should not be a source of admiration but rather, a sad indictment that this issue has not been addressed earlier. Just because one has suffered the humiliation of judicial bullying and "lived to tell the tale" does not mean that it should be an experience visited upon the newer members of the Bar. Rather, it should be the trigger for right-thinking members of the Bench and Bar to ensure that such behaviour is treated with opprobrium."

Lady Rose observed that unpleasant behaviour in court had fallen so far out of fashion because younger lawyers have been educated in a school and university system that takes bullying seriously and they are, quite rightly, no longer prepared to put up with it.

We should not overlook or discount the impact of bullying. It can evoke feelings of shame, humiliation, embarrassment and undermine a person's confidence, reputation and capacity to work. A personal experience of being bullied may have both immediate and long term adverse effects. The experience is not answered by calling in aid the 19th century rhyme "*sticks and stones will break my bones, but words will never harm me*".⁴² Rather, the Book of Sirach/Ecclesiasticus at 28.17 may be more accurate "*the blow of a whip raises a welt, but a blow of the tongue crushes the bones*".⁴³

³⁹ The Hon Chief Justice Allsop, *The culture of the legal profession: lessons of the past and hope for the future* Queensland Law Society Symposium, 11 March 2021.

⁴⁰ Ibid; see also The Honourable Justice Ross Robson & The Honourable Justice Josh Wilson, 'Judges on Ethics: Judicial Conduct in the new Millennium' (Twilight Lecture, Deakin University Law School) August 2022; Neilson N, *Judicial Q&A: What judges want from young barristers in the courtroom*, *Lawyers Weekly*, 2 November 2020; Hon. Michael Kirby AC CMG, *Judicial Stress and Bullying* (2014) 14(1) *QUT Law Review* 1, 11.

⁴¹ The Right Hon Lady Rose of Colmworth DBE, Justice of the Supreme Court of the United Kingdom, 'What makes a good judge?' (Speech, The Barnard's Inn Reading, 16 June 2022).

⁴² See 'sticks and stones may break my bones but names will never hurt me' – word histories

⁴³ See <https://biblia.com/bible/nrsv/sirach/28/13-26>.

Bullying in a court setting undermines the confidence and integrity of the justice system. It will have an impact on the trial process. Bullying can reveal bias - conscious or unconscious. When a litigant sees, hears and experiences their representative being bullied, it shapes their perception of fairness in the process.⁴⁴ Bullying can derail the trial and impair the fairness of the process. This may have immediate implications for the parties with respect to the outcome and costs of a trial.

In February 2021, at the Opening of Law Term, the Hon Chief Justice Tom Bathurst AC spoke about the importance of trust in the judiciary.⁴⁵ He said the public was regularly and deeply questioning the trust they place in institutions, and “rightly so”. He acknowledged that public trust in institutions was fragile and institutions could no longer simply assume the public will place their trust in them. The Chief Justice said:

The judiciary must take this decline in public trust seriously. Whilst the Australian judiciary has historically enjoyed high levels of trust, we cannot afford to be complacent. We cannot assume that trust is ever-present and uniform across the community we serve. The legitimacy of the judiciary and, in turn, the courts relies upon a certain level of trust in the competency, motivations and values of its judges. The judiciary, like all institutions, must continue to build and strengthen trust by *all* groups in our society.

The Chief Justice acknowledged the effect on victims of bullying, noting victims stay silent; leave the law because of sexual harassment and bullying; leave the law because of bias and discrimination that result in unequal opportunities; and are disempowered, excluded and silenced from their rightful place in the law.

The impact of inappropriate judicial conduct is not confined to Australia. In July 2023, Professor Margaret Satterthwaite, the United Nations Special Rapporteur on the independence of judges and lawyers presented her report on *Reimagining justice: confronting contemporary challenges to the independence of judges and lawyers*.⁴⁶ She identified the importance of maintaining judicial independence and integrity. Her report referred to the Bangalore Principles of Judicial Conduct, a non-binding but authoritative set of principles adopted in 2002 following an extensive international and consultative process, and provide useful guidance to judges everywhere, including by providing them with a framework for regulating judicial conduct. The Bangalore Principles of Judicial Conduct stress the value of independence, impartiality, integrity, propriety, equality, competence and diligence.⁴⁷

⁴⁴ The Right Hon Lady Rose of Colmworth DBE, Justice of the Supreme Court of the United Kingdom, ‘What makes a good judge?’ (June 2022) at [29].

⁴⁵ Chief Justice of the New South Wales Supreme Court, the Hon T F Bathurst AC ‘Trust in the Judiciary – 2021 Opening of Law Term Address’, 3 February 2021.

⁴⁶ Margaret Satterthwaite, Special Rapporteur on the independence of judges and lawyers – report *Reimagining justice: confronting contemporary challenges to the independence of judges and lawyers* (13 April 2023, published 10 July 2023) A/HRC/53/31 at <https://www.ohchr.org/en/documents/thematic-reports/ahrc5331-reimagining-justice-confronting-contemporary-challenges> see the Bangalore Principles of Judicial Conduct (2018).

⁴⁷ *ibid*, para 41 (footnotes omitted).

Professor Satterthwaite also referred to her work in exploring the role of lawyers in dismantling structures and practices within the legal system that can harm rights holders and keep equal justice from becoming a reality. In her role as the Special Rapporteur on the independence of judges and lawyers, she will examine policies and practices in the legal field that may amount to discrimination on the basis of race, ethnicity, caste, sex, sexual orientation, gender identity, ableism, migration status and other arbitrary bases.⁴⁸

Why does judicial bullying occur?

“Judicial bias, bullying, impatience, ill-temper and incomprehension are all vices much more likely to emerge if no-one is present but the parties and their legal advisers, particularly when the victim of the misconduct is an unpopular or unattractive figure represented by weak, inexperienced or easily overborne lawyers.”

Justice Dyson Heydon, Justice of the High Court of Australia, 2004⁴⁹

Sometimes, judicial bullying is explained away or excused by reasons of stress and the demands of judicial responsibilities.⁵⁰ I doubt anyone would question that discharging judicial duties may be difficult and is stressful, but does this really explain or justify judicial bullying? This may be a simplistic and convenient explanation. To address the issue, we need to consider a broader range of factors.⁵¹

First, there are personal characteristics of a judge that may predispose the judge to engage in bullying behaviours. The selection and appointment of judicial officers may not address personal characteristics, past conduct and their inter-personal communication style.

Second, when the majority of judges are appointed from the Bar, the person may not be fully equipped to make the changes or be aware of what is required in contemporary workplaces where employment laws, workplace policies, human resources departments and longer term working relationships will be in place. This is far from the organisation and structure of work at the Bar, being the ‘gig economy’ sector of the legal profession, where working relationships are project based and not long term.

Third, there is no course or instruction manual on “how to become a judicial bully”. However, there may be cultural and historical expectations of how a judge is expected to conduct a

⁴⁸ *ibid*, paras 56 - 57 (footnotes omitted)

⁴⁹ The Hon Justice Dyson Heydon ‘Practical impediments to the fulfilment of judicial duties’ in *The Role of the Judge* (National Judicial Orientation Programme, June 2004) at page 34.

⁵⁰ See Neilson N, *Judicial Q&A: What judges want from young barristers in the courtroom*, *Lawyers Weekly*, 2 November 2020; Hon. Michael Kirby AC CMG, *Judicial Stress and Bullying* (2014) 14(1) *QUT Law Review* 1, 11. His Honour expressly stated that judicial bullying, in whatever form, should not be tolerated or excused on the footing that “it was ever thus.” (page 10). The article addresses judicial stress and demands. Justice Kirby recounted conduct that may by today’s standards be examples of bullying. He suggested however, that it was ‘essential to keep the problem in perspective’, noting ‘although there are a few serial judicial offenders in the judiciary, who are widely known in the legal profession, in my experience, the problem of judicial bullying is not widespread. Most judges are aware of the need to keep their personalities in check when they are exercising public power.’

⁵¹ Suzanne Le Mire and Rosemary Owens ‘A Propitious Moment? Workplace Bullying and Regulation of the Legal Profession’ (2014) 37(3) *UNSW Law Journal* 1030.

court room and manage the participants. Modelling judicial behaviour on the personal experiences of other judges, lends itself to historical and outdated behaviours continuing.

Fourth, judges are human and they may also lack confidence and skills to maintain the authority required in a court. They may express their stress, frustration and consider those appearing before them are incompetent, lazy or they themselves could do a far better job. However, it is not the judge's role to undertake performance reviews of practitioners or seek to 'fix' poor performance by bullying the person. The behaviours which are intended to 'control' and 'exert authority' may manifest as bullying.

Fifth, bullying is about power, how power is exercised and the absence of consequences when power is misused. The very purpose of discharging judicial functions is to exercise power and to do so, without fear or favour. The independence and the prohibition on the interference of a judge's independence reinforces the sense of power.

Finally, bullying and harassment are more likely to occur if there is no sanction. Very rarely is there any immediate sanction or action that can be taken when the bullying occurs. Even after the event, what can be done? There is an absence of any effective personal remedy for a practitioner who experiences bullying or harassment. There is a perception that there is unlikely to be any sanction for the judicial officer if a complaint is made. The difficulty of removing a judicial officer from office undoubtedly would have an effect on the extent to which a judicial officer may act outside the boundaries of traditionally accepted workplace behaviour. The risk that inappropriate workplace conduct would lead to removal from judicial office is low.⁵²

Standards of judicial conduct

There is "no universally enforceable authoritative definition or set of standards for what constitutes actionable misbehaviour or misconduct of a judicial officer".⁵³

In 1995, John Basten QC (as his Honour was then) addressed the need for judicial standards. He said "*if judges are required to perform, they must know in advance what standards are required of them. Those standards should encompass both personal and judicial behaviour*".⁵⁴

In December 2020, the Law Council of Australia released the [National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession](#). The Action Plan applies to

⁵² Compare the consequences for a legal practitioner who engaged in inappropriate conduct directed to a court security officer: *Kanapathy v in de Braekt (No 4)* [2013] FCCA 1368. The legal practitioner was struck off the roll for reasons including offensive and discourteous conduct in court and in correspondence towards a magistrate, police and security officer: *Legal Profession Complaints Committee v in de Braekt* [2013] WASC 124.

⁵³ Emily Schindeler, 'The Problematic of Judicial Accountability' (2021) 1(2) *Legalities*, 210 at page 213.

⁵⁴ John Basten QC, *Should Judges Have Performance Standards?* (1995) *Bar News* 9. This paper was first delivered to the 1995 NSW Legal Convention. See also the Honourable J Spigelman 'Dealing with judicial Misconduct' (5th World Wide Common Law Judiciary Conference, Sydney, Australia, 8 April 2003); and see Law Reform Commission of Western Australia *Complaints Against Judiciary* (Final Report, August 2013).

all parts of the legal profession. With respect to judicial conduct, the Law Council referred to its advocacy to establish a Federal Judicial Commission. The Law Council said:

Sexual harassment in the legal profession highlights the importance of robust accountability mechanisms for the judiciary, and the Law Council believes that an independent oversight body forms an essential part of this framework.

If properly constituted, a Federal Judicial Commission will have a vital role to play in receiving and responding to the conduct of judicial officers, including allegations of sexual harassment. It is imperative that this matter be addressed at every level to ensure the ongoing sustainability of the profession and public confidence in the legal system as a whole.⁵⁵

(footnotes omitted)

The Australian Bar Association produced a number of podcasts to directed to understanding and addressing sexual harassment at the Bar, which in part, touch on judicial standards.⁵⁶

The Australasian Institute of Judicial Administration (AIJA) has published a [Guide to Judicial Conduct](#), now in its 3rd edition (February 2023). In 2020, a paragraph was added to the *Guide to Judicial Conduct*, at the end of the section on “Conduct generally and integrity”, as follows:⁵⁷

Judges must conform to the standard of conduct required by law and expected by the community. They must treat others with civility and respect in their public life, social life and working relationships. **It goes without saying that Judges must not engage in discrimination or harassment** (including sexual harassment) **or bullying**. In relation to these matters, Judges must be particularly conscious of the effect of the imbalance of power as between themselves and others, especially their Chambers staff, Court staff and junior lawyers.

(emphasis added)

Notably, the paragraph does not ask judges to be conscious of the power imbalance between themselves and all those that appear before them.⁵⁸ It is perhaps not a matter which is self-evident, nor does it necessarily go “without saying”.

In October 2022, the NSW Judicial Commission released the [Handbook for Judicial Officers](#)⁵⁹ which includes a selection of papers on judicial officers’ relationship with the legal

⁵⁵ Law Council of Australia *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* 47, [150] – [151].

⁵⁶ See Australian Bar Association website and links to [Eliminating sexual harassment](#); (17 February, 2021) [Eliminating Sexual Harassment at the Bar - Power and Consent](#); (29 November, 2012) [Eliminating Sexual Harassment at the Bar - Building a Culture of Respect](#); (28 October, 2021) ABA Sexual Harassment Podcast - [Amendments to the Sex Discrimination Act 1984 \(Cth\) and what they mean for the Bar](#) (16 November, 2021).

⁵⁷ The Council of Chief Justices of Australia and New Zealand by The Australasian Institute of Judicial Administration Incorporated, [Guide to Judicial Conduct](#) (The Australasian Institute of Judicial Administration Incorporated, 3rd Edition, December 2022) 8.

⁵⁸ Chapter 4 of the Guide notes that everyone has an entitlement to be treated with dignity, that bullying by a judge is unacceptable and that many complaints to the Judicial Commission have had remarks made by judicial officers in the course of proceedings as their foundation.

⁵⁹ Judicial Commission of New South Wales *Handbook for Judicial Officers* https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/index.html.

profession, bullying and harassment.⁶⁰ Although numerous papers refer to judicial conduct reflecting courtesy, compassion, humility and people skills, there does not appear to be a code of conduct, or a similar NSW specific guideline for the conduct of judicial officers. There is no definition of judicial misconduct.

Policies

Over the past few years, many courts have updated or introduced policies directed to appropriate workplace conduct, including for judges. While these policies describe work, health and safety obligations, express a 'zero tolerance' approach to bullying and harassment and describe pathways for making complaints, they are generally confined to the treatment of employees who work in the courts and court administration.⁶¹

In 2021, the then Chief Justice of the Federal Court of Australia, the Honourable James Allsop spoke about the culture of the legal profession. He outlined the reforms made in the Federal Court to address harassment, abuse and bullying and said:

The message, I hope, is clear: harassment, abuse and bullying will not be tolerated; you should have a right to feel safe, included and respected at work. You should feel safe to speak up; you will be listened to and matters will be dealt with, with confidentiality, due process and integrity.⁶²

The Federal Circuit and Family Court of Australia's Judicial Workplace Conduct Policy acknowledges there should be a 'culture of respect'. It states:

The judges of the Court recognise their conduct must not undermine the community's trust and confidence in their integrity, impartiality and independence.

The judges of the Court must promote a culture of respect and courtesy in their workplaces and in the performance of judicial duties.

The judges of the Court are committed to:

- providing a workplace where the Court staff and all people who perform their work in the Court are treated with respect and courtesy;

⁶⁰ Judicial Commission of NSW, *Handbook for Judicial Officers* (September 2022) https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/index.html.

⁶¹ See for example, High Court of Australia *Justices' Policy on Workplace Conduct* (March 2022) Supreme Court of New South Wales, *Supreme Court Policy on Inappropriate Workplace Conduct*, (Version 4.0, 2 July 2020); District Court of New South Wales, *Workplace Conduct Policy*, (8 October 2020). Land and Environment Court of New South Wales *Commissioners' Code of Conduct* (18 January 2010). The NSW Civil and Administrative Tribunal (NCAT) is not a court, its members (with the exception of the President and the judicial officers serving as deputy presidents) are not judicial officers. However, the Member Code of Conduct addresses the conduct of members towards litigants and practitioners. The Member Code of Conduct requires its members to conduct themselves appropriately: see [16] and [17] of the NCAT Member Code of Conduct, *NSW Civil and Administrative Tribunal* (9 July 2020); NCAT Member Terms and Conditions Handbook (Version 2.6, 23 November 2021).

⁶² The Hon Chief Justice Allsop, *The culture of the legal profession: lessons of the past and hope for the future* (Speech, Queensland Law Society Symposium, 11 March 2021).

- wherever possible preventing or eliminating discrimination, sexual harassment, harassment and bullying.⁶³

The practitioner's perspective on handling and responding to judicial bullying

The reality is that a legal practitioner is unlikely to make a complaint to the NSW Judicial Commission or the relevant Chief Justice. Such an avenue is likely to be the 'last resort option' where everything else has failed and generally if the impact of the bullying has disadvantaged clients or a trial process. Consequently, legal practitioners put up with behaviours that would in any other environment or interaction be unacceptable.

Dealing with bullying

The following makes suggestions on what to do if you or a fellow practitioner experiences judicial bullying.⁶⁴

Be prepared

Be prepared. If you know the judicial officer is a bully and the nature of the bullying, be prepared to navigate, deflect and manage. Before appearing before the particular judge, consider what strategic approach to take and prepare your clients for what to expect. While not condoning or seeking to excuse the conduct, the client or witness should know what might occur before it occurs. For the practitioner personally, remembering and being ready to apply de-escalation strategies and techniques are important.⁶⁵

Recordings and transcript

The public nature of the court room should be used to an advocate's advantage. The transcript or sound recording provides an opportunity to ensure the advocate's concerns and the evidence of inappropriate judicial conduct is recorded. If there is no sound recording use the transcript and consider using words to describe what has happened. Include a reference to the tone and manner of a remark or conduct.

Personal response in the moment and de-escalation

Be aware of your presentation and how to use your breath, stance, tone and cadence of your voice. Some suggestions to changing the onslaught might be to slow down, take a step back from the lectern (don't lean in), change eye contact or stop. Take some water.

Silence and an extended pause can be very effective tools to de-escalate inappropriate behaviour. Use an uncomfortable silence to effect.

⁶³ Federal Circuit and Family Court of Australia, [Judicial Workplace Conduct Policy](#).

⁶⁴ See also the England and Wales Bar Council's publication about wellbeing at the Bar, [Mental Health and Wellbeing at the Bar: Bullying](#).

⁶⁵ See, for example, Jennifer Anderson [De-escalation skills that every lawyer should know](#) (Website, Infotrack, 3 May 2023). This is principally directed to client interactions but the techniques can also be used in court.

If necessary, seek an adjournment.

Bystander and interventions

Consider your role as a bystander. As the then Chief of the Army, Lieutenant-General David Morrison said in 2013 when addressing bullying and harassment in the Australian Defence Force, “*the standard you walk past is the standard you accept*”.⁶⁶

What should you do when you witness another advocate or your opponent being bullied? Consider how you might assist or intervene to diffuse a situation or support the other advocate. It may be in your interests to do so to avoid the risk of the trial being de-railed or an appeal.

After court

After the appearance ensure you have a diary or contemporaneous note of what took place. In Australia, as far as I am aware we do not have the equivalent to the US website [The Robing Room](#), a site that claims to provide a forum for evaluating United States federal district court judges and magistrate-judges.

Self-care

Be aware of the personal reaction and the effect of the conduct on you. Get assistance as frequently as you consider you need it. Friends and family may not have the skills to assist in a way that you need. Immediate assistance is available via Lifeline - 131 114; 1800Respect - 1800 737 732; MensLine Australia - 1300 789 97; and BeyondBlue - 1300 224 636.

Other Assistance

Seek out and use assistance from colleagues, employers, support services. If you are employed, then raise the matter with relevant managers – ask them to address the issues and follow up. Schedule time to follow up, de-brief and consider whether there are implications for the conduct of the case or the need for an appeal. There are a range of best practice guidelines for the legal profession including the TJMF Psychological Wellbeing: Best Practice Guidelines for the Legal Profession.⁶⁷

The NSW Law Society has established the Solicitor Outreach Service which is a confidential counselling service for NSW solicitors. Up to three psychology counselling sessions per

⁶⁶ See [David Morrison: 'The standard you walk past is the standard you accept', ADF investigation - 2013 — Speakola](#).

⁶⁷ See NSW Public Defenders www.publicdefenders.nsw.gov.au/Documents/TJMFmentalHealthGuidelines_A4_140427.pdf and NSW Bar Association https://nswbar.asn.au/docs/webdocs/BAR_TJMF_Guidelines_Web_20Oct17.pdf.

financial year, as well as 24/7 telephone crisis counselling with a psychologist are paid for by the NSW Law Society.⁶⁸

BarCare is a confidential counselling service for barristers and their immediate families. Up to six consultations are provided free of charge. Clerks and colleagues in chambers can make a confidential referral to BarCare. It is funded by the Barristers' Benevolent Association of NSW and does not give any personal information to the Bar Association without the express permission of the barrister involved.

Consider options for taking action

Consider when, how and why you might want to escalate a complaint. We need to have trust and confidence in the complaints pathways to address inappropriate bullying and harassment.

Making a complaint about a judicial officer

There are differences of opinion within the judiciary as to how judicial misconduct should be managed. In a survey of 142 judicial officers (nationally), judicial officers were asked to indicate the extent to which they agreed that adequacy of disciplining and removal procedures was a challenge in their jurisdiction:⁶⁹

- 44% of respondents were neutral, 34% agreed or strongly agreed and 22% disagreed or strongly disagreed. 29% of male respondents strongly disagreed or disagreed, while only 11% of female respondents disagreed or strongly disagreed⁷⁰
- women respondents were more likely to indicate that disciplinary and removal procedures were a challenge, while only 24% of male respondents agreed or strongly agreed
- as to whether complaints handling procedures were sufficient, 47% of respondents agreed, 24% were neutral and 28% either disagreed or strongly disagreed.⁷¹

New South Wales

In New South Wales, there is a legislative regime for complaints to be made to the NSW Judicial Commission. Any person may make a complaint to the Judicial Commission about a matter concerning the ability or behaviour of a 'judicial officer' within the definition of s 15(1) of the *Judicial Officers Act* 1986 (NSW).

The complaint must be in writing, identify the complainant and identify the judicial officer concerned. The particulars of the complaint must be verified by statutory declaration (*Judicial Officers Regulation* 2022 (NSW)): see [Guidelines for complaints against Judicial](#)

⁶⁸ NSW Solicitors can call Solicitor Outreach Service on 1800 592 296 <https://www.lawsociety.com.au/sos>.

⁶⁹ Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch and Brian Opeskin, 'Contemporary challenges facing the Australian judiciary: an empirical interpretation' (2019) 42(2) *Melbourne University Law Review* 299.

⁷⁰ Ibid.

⁷¹ Ibid 363.

Officers. Online complaints can be made at: <https://www.judcom.nsw.gov.au/wp-content/uploads/2018/03/Judicial-Commission-complaints-form.pdf>.

The judicial officer named will be advised of the fact that a complaint has been made and be provided with a copy of the complaint documentation. The Judicial Commission can seek a response from the judicial officer.

The Judicial Commission will conduct a preliminary examination, including inquiries into the subject-matter of the complaint as it thinks appropriate (see s 18(2) *Judicial Officers Act 1986* (NSW)).

Following its preliminary examination, the Judicial Commission must then take one of the following actions:

- summarily dismiss the complaint; or
- refer the complaint to the relevant head of jurisdiction; or
- refer the complaint to the Conduct Division

Section 20(1) of the *Judicial Officers Act* requires that, whether or not the complaint is substantiated, it must be summarily dismissed if:

- the complaint is one that the Commission is required not to deal with;
- the complaint is frivolous, vexatious or not in good faith;
- the subject matter of the complaint is trivial;
- the matter complained about occurred at too remote a time to justify further consideration;
- there was a satisfactory means of redress or of dealing with the complaint or the subject-matter;
- the complaint relates to the exercise of a function subject to adequate appeal or review rights;
- the person complained about is no longer a judicial officer; and
- in all the circumstances, further consideration of the complaint would be unnecessary or unjustifiable.

If the Judicial Commission considers a matter concerns corrupt conduct, then those allegations are required to be referred by the Judicial Commission to ICAC.⁷²

The Independent Commission Against Corruption (**ICAC**), has concurrent jurisdiction with the Judicial Commission to investigate complaints of criminal misconduct by any public official, including judges.⁷³ ICAC has no enforcement powers against judges but it may refer its findings to the Judicial Commission or to NSW Parliament.⁷⁴

Federal statutory regime

In 2019, the Federal Court, Family Court and Federal Circuit Court together with the Presidents of the State and Territory Bar Associations agreed to a protocol for an alternative

⁷² *Independent Commission Against Corruption Act 1988* (NSW) s 11.

⁷³ *Independent Commission Against Corruption Act 1988* (NSW) ss 3(1), 8-10.

⁷⁴ *Independent Commission Against Corruption Act 1988* (NSW) s 53.

and less formal mechanism of reporting judicial conduct, which allows members of the Bar to raise concerns about judicial conduct with any President of any Bar Association who may then raise that concern directly with the relevant Chief Justice.⁷⁵

In 2007 a Senate Committee recommended that the Australian Government establish a federal judicial commission modelled on the Judicial Commission of NSW.⁷⁶ In early 2023, the Australian Government announced that they were “considering the merits and design of a federal judicial commission that could independently examine and deal with complaints made to it about federal judges”.⁷⁷

There is no federal equivalent through which complaints about judicial misconduct can be made. The federal complaints process involves making complaints directly in writing to the relevant Chief Justice of each jurisdiction.

The *Courts Legislation Amendment (Judicial Complaints) Act 2012* amended the *Family Law Act 1975* (Cth), the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth) and inserted a complaints handling procedure. The amendment provided that a person had a “relevant belief” in relation to a complaint about a judge if they believed that the circumstances giving rise to a complaint could, if substantiated (a) justify consideration of the removal of the Judge (b) adversely affect the performance of judicial or official duties of the judge or (c) have the capacity to adversely affect the reputation of the Court.

In the Federal Court, a complaint about judicial conduct must be made by letter addressed to the Chief Justice pursuant to the [Judicial Complaints Procedure](#). It must identify the complainant, the judge about whom the complaint is made and the judicial conduct about which the complaint is made. Judicial conduct, for the purposes of this procedure, means conduct of a judge in court or in connection with a case in the Federal Court, or in connection with the performance of a judge’s judicial functions.

The Federal Court explains:

The complaints procedure does not, and cannot, provide a mechanism for disciplining a judge. It does, however, offer a process by which complaints by a member of the public about judicial conduct can be brought to the attention of the Chief Justice and the judge concerned, and it provides an opportunity for a complaint to be dealt with in an appropriate manner.

For constitutional reasons, the participation of a judge in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its judges. It can also provide the Court with opportunities to explain the nature of its work, correct misunderstandings where they have occurred and, if it should fall short of judicial standards, to improve the performance of the Court.

⁷⁵ [Protocol for the Bar Associations of Australia to raise any concerns about judicial conduct in Commonwealth Courts](#) (Protocol, August 2019).

⁷⁶ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, [Australia’s Judicial System and the Role of Judges](#) (Report, 8 December 2009) 97.

⁷⁷ Attorney-General’s Department, Australian Government, [Scoping the establishment of a federal judicial commission](#) (Discussion Paper, January 2023).

The Federal Circuit and Family Court of Australia’s complaints procedure for practitioners is broadly similar to the Federal Court process.⁷⁸

The Federal Court’s Annual Report 2021-2022 reveals the court has established a judicial workplace conduct committee, chaired by Justice Markovic. The committee “will develop education programs specific for judges as well as a dedicated portal on judicial workplace conduct”.⁷⁹ The scope of the education programs, and the role of the workplace conduct committee is not clear. It is not clear whether it relates to the conduct of judges within the workplace, in relation to their own, Court and registry staff, or whether it extends more broadly into interactions with legal practitioners in court.

Other jurisdictions

In May 2023, the Victorian Judicial Commission released a new *Judicial Conduct Guideline on Judicial Bullying*.⁸⁰ It accompanies the *Judicial Conduct Guideline on Sexual Harassment* (February 2022).⁸¹ There are two main grievance mechanisms in Victoria; a complaint to the Judicial Commission of Victoria, or via the Protocol between the Victorian Bar and the courts and tribunals.

Victoria also has a process to report inappropriate judicial conduct, whether experienced or witnessed. These reports are not investigated, but the reports record the jurisdiction and the conduct, without naming the judicial officer. The purpose of the reports is to enable information to be provided periodically to the Victorian Bar Council and courts about the prevalence and nature of allegations of inappropriate judicial conduct.⁸²

The United Kingdom has a comprehensive Guide to Judicial Conduct, which includes a “Statement of expected behaviour” which sets out the standards of behaviour expected from all judicial office holders in and outside the hearing room. It arose from the Bangalore Principles of Judicial Conduct.⁸³ It includes expectations that judicial officers:⁸⁴

- treat others fairly and respectfully
- be aware of how our words and behaviour can affect others
- remain patient and tolerant when encountering difficult situations
- act professionally and courteously, including under pressure, and avoid shouting or snapping.

⁷⁸ Federal Circuit and Family Court of Australia, [Judicial Complaints Procedure](#)

⁷⁹ Federal Court of Australia, [Annual Report 2021-2022](#) (Report, 19 September 2022) 30.

⁸⁰ Judicial Commission of Victoria, *Judicial Conduct Guideline: Judicial Bullying* (Guideline, May 2023).

⁸¹ Judicial Commission of Victoria [Judicial Conduct Guideline - Sexual Harassment.pdf](#) (judicialcommission.vic.gov.au).

⁸² Victorian Bar, *Judicial Conduct Policy*.

⁸³ See note 56 above and *Bangalore Principles of Judicial Conduct* (2018).

⁸⁴ United Kingdom Courts and Tribunals Judiciary, *Guide to Judicial Conduct* (Guideline, July 2023) 26.

The UK Bar also has an “Equality and Diversity Line” where incidents can be reported, to be collated, anonymised and shared with judicial officers in education programs to support the training of judges in this area.⁸⁵

Into the future – shaping and changing the culture

The reasons why some judges are bullies and others display impeccable manners and never engage in such behaviours, may be complex. Trying to understand why bullying occurs may assist at addressing systemic issues, but little is to be gained by trying to understand why one person behaves inappropriately.

The purpose of this paper is not to make many recommendations for reform or to identify what action should be taken - that is a role for others better placed to do so.

However, I note the recommendations made by the Hon Michael Kirby AC CMG to address with judicial bullying:⁸⁶

- data should be gathered by responsible institutions
- discussion of judicial bullying should occur at judicial conferences
- Bar Associations should accept the topic of judicial bullying as one suitable for examination by the legal profession
- Chief Justices should adopt publicly available protocols for bringing complaints to the attention of judges
- judicial education and orientation courses should include lectures that refer to judicial behaviour and bullying as well as stress management
- members of the profession should not suppress complaints
- senior members of the profession have a responsibility to stand up to bullying
- judges in collegiate courts should not accept judicial bullying. They should immediately place on record their dissociation from it
- bullying and intimidation should be expressly included in legislation addressing judicial misconduct
- legal and civil society organisations and community groups, medical legal academics and the media should maintain their involvement in the problem.

⁸⁵ Bar Council of England and Wales, Wellbeing at the Bar, *Mental Health and Wellbeing at the Bar: Bullying* at page 6.

⁸⁶ The Hon Justice Michael Kirby AC CMG, *Judicial Stress and Bullying* (2014) 14(1) *QUT Law Review* 1, 11.