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Editor's note

Volume 1, Issue 3, February 2024

The first article by Paul Lakatos SC,"'Junk' science or proof beyond reasonable doubt?", is in two parts. Part 1 **Expert evidence and significance of reliability to admissibility** compares expert evidence law in Australia, United States, United Kingdom and Canada; Part 2 **Reliability of forensic science disciplines: report to the United States President** analyses the reliability of forensic sciences in the criminal justice system in light of two forensic science reports in the United States — report of the National Research Council of the National Academies and the report on Forensic Science in Criminal Courts: ensuring scientific validity of feature-comparison methods (PCAST report). Forensic evidence such as bite mark analysis, fingerprint analysis, firearms analysis, footwear analysis, hair analysis and ear prints were tested and the PCAST report concluded that some forensic feature-comparison methods may be inadmissible due to lack of adequate evidence of scientific validity.

Bullying may be difficult to define, but examples of bullying in courtroom situations are intimidation, threats, humiliation, shouting, sarcasm, victimisation, physical, verbal or emotional abuse, belittling, ostracism, rumour-mongering and disrespect. The courtroom is hierarchical and adversarial. An experience of bullying can undermine a practitioner's confidence and capacity to work, and diminishes public trust in the integrity of the judicial system. The author, Kate Eastman AM SC, analyses general workplace laws that regulate bullying and harassment in a courtroom setting, and concludes these laws either do not apply or are inadequate. The Quality of working life surveys conducted by the NSW and Victorian Bar Associations and the International Bar Association found bullying by judicial officers to be widespread. The Law Council and Australian Bar Association have published professional standards for judicial officers, and courts have introduced policies. The article, "Judicial bullying: let's have a conversation", makes a number of practical suggestions on how to respond to judicial bullying and options for getting assistance and making a complaint.

The Honourable Justice Nicola Pain
Land and Environment Court of NSW
Guest Editor

Judicial Quarterly Review

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"Junk" science or proof beyond reasonable doubt?

Paul Lakatos SC*

This article is in two parts: Part 1 ***Expert evidence and significance of reliability to admissibility*** *compares expert evidence law in Australia, United States, United Kingdom and Canada; Part 2* ***Reliability of forensic science disciplines: report to the United States President*** *analyses the reliability of forensic sciences in the criminal justice system in light of two forensic science reports in the United States — report of the National Research Council of the National Academies (National Research Council report) and the report on Forensic Science in Criminal Courts: ensuring scientific validity of feature-comparison methods (PCAST report). Forensic evidence such as bite mark analysis, fingerprint analysis, firearms analysis, footwear analysis, hair analysis and ear prints were tested and the PCAST report concluded that some forensic feature-comparison methods may be inadmissible due to lack of adequate evidence of scientific validity.*

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs: *Frye v United States*[1] (relating to the inadmissibility of lie detector evidence to prove an accused's innocence).
>
> Justice Hammond in *Wallace v R,*[2] cited with approval *Lundy v R:*[3]
>
> > It must also follow that, in principle, a critical reliance on 'bad science' *could* lead to an unsafe or wrong conviction ...
> >
> > Within the discipline of science itself, it could be said that scientific principles always 'exist' in some sense. Often — indeed routinely — humans have simply not been clever enough to understand and use those principles yet. As *Kirk*[4] has noted:
> >
> > > Physical evidence cannot be wrong; it cannot perjure itself; it cannot be wholly absent. Only in its interpretation can there be error. Only human failure to find, study and understand it can diminish its value. Progress in science lies precisely in a further enlargement of human understanding. So "freshness" in terms of true scientific principles has to be understood in a distinct context for legal purposes.

This paper endeavours to examine the law and the reliability of forensic science methods across a number of jurisdictions. It is important to underpin any such discussion by referring to the law which governs the admissibility of expert evidence within the Australian context and particularly, the significance of the reliability of such evidence to the question of admissibility. It is also useful to examine the manner in which other jurisdictions have dealt with similar issues. Part 1 **Expert evidence and significance of reliability to admissibility** deals with law locally and internationally and Pt 2 **Reliability of forensic science disciplines** grapples with the reliability of some of the traditional areas of forensic sciences (the categories of which are expanding with increasing research and knowledge in novel areas).

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* Commissioner NSW, ICAC and former Judge of NSW District Court.

1 293 F 1013 (D C Cir 1923).

2 [2010] NZCA 46 at [48] and [49].

3 [2013] UKPC 28 at [121].

4 P Kirk, *Crime investigation: physical evidence and the police laboratory*, 2nd ed, John Wiley & Sons, New York, 1974 at p 2.

Expert evidence and significance of reliability to admissibility

Traditionally, experts have had a prominent place in courts of law and their opinions have been accorded great respect. This has been underpinned by a rightful regard for the rigour and reliability of the scientific method and an acceptance that most expert witnesses are objective and non-partisan. That has been the general rule. With the expansion of categories of expert forensic evidence and the variable quality of experts who proffer opinions, there has however been increased scrutiny in recent times. Two notable examples are the work of the National Research Council of the National Academies, National Research Council report[5] and the PCAST report.[6]

The PCAST report was written by the Executive Office of the President, the President's Council of Advisors on Science and Technology ("the Council"). The Council was comprised of a number of well-credentialed academics and persons working in high-level scientific organisations. Included amongst the advisors were a number of judges in the US federal and State system and legal academics. The PCAST report was prompted by a request from President Obama in 2015 following the highly critical 2009 National Research Council report, as to whether there were additional scientific steps that could help to ensure the validity of forensic evidence. The PCAST report will be discussed in greater detail in Part 2 **Reliability of Forensic Science Disciplines**.

Suffice to say, the Council concluded in summary that two important gaps needed to be remedied:

1. The need for clarity about the scientific standards for validity and reliability of forensic methods, and
2. The need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable.

How then have other jurisdictions grappled with the issue of the reliability of expert evidence?

United States of America

Currently in the United States, Federal Rule of Evidence 702 governs the admissibility of relevant expert evidence based upon meeting four requirements:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) The testimony is based on sufficient facts or data.

(c) The testimony is the product of reliable principles and methods; and

(d) The expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

It is noteworthy that up until the decision in *Daubert v Merrill Dow Pharmaceuticals,*[7] there had been a controversy as to whether the proper test was the *Frye* test[8] or Rule 702.

In *Daubert*, the petitioners sued in respect of their children's serious birth defects which they claimed, had been caused by the mothers' prenatal ingestion of Bendectin, a prescription drug marketed by respondent. The District Court granted the respondent summary judgment based on a well-qualified expert's evidence concluding, upon reviewing the extensive published scientific literature on the subject, that maternal use of Bendectin had not been shown to be a risk factor for human birth defects. The petitioners responded

5 National Research Council of the National Academies, *Strengthening forensic science in the United States — a path forward*, The National Academies Press, Washington DC, 2009.
6 Executive Office of the President, President's Council of Advisors on Science and Technology, *Forensic science in criminal courts: ensuring scientific validity of feature-comparison methods*, Washington DC, 2016.
7 509 US 579 (1993).
8 *Frye v United States* 293 F 1013 (D C Cir 1923).

with the testimony of eight other well-credentialed experts, who based their conclusion that Bendectin can cause birth defects on animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human statistical studies.

The District Court determined that this evidence did not meet the applicable "general acceptance" standard for the admission of expert testimony. The Court of Appeals affirmed that decision applying the rule that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.

The US Supreme Court concluded that the Federal Rules of Evidence governed the admissibility of expert scientific testimony in federal trials and pointed to the following factors as relevant to the admissibility of expert evidence:

- whether the theory or technique can be or has been tested
- whether the theory or technique has been subjected to peer review and publication
- there should be consideration of the known or potential rate of error, and
- "general acceptance" of the relevant scientific community is also material.

In *Kumho Tire Co v Carmichael*,[9] the US Supreme Court considered whether the *Daubert* test was restricted to the admissibility of scientific expert testimony or had a wider application (in that case, to expert testimony in tyre failure analysis). The Supreme Court concluded that the test applied not only to "scientific" knowledge but also to "technical" and "other specialised" knowledge, including the expert evidence of engineers. In delivering the opinion of the Court, Breyer J expressed the view:

> The objective of that requirement [the *Daubert* requirement] is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigour that characterizes the practice of an expert in the relevant field.

In concurring with the majority, Scalia J couched the issue as:

> [the] discretion to choose among reasonable means of excluding expertise that is false and science that is junky.

Canada

As the decision of the Supreme Court of Canada demonstrates in *R v Trochym*,[10] the Canadian jurisprudence also applies the *Daubert* test for admissibility of expert evidence. In this respect, the observations of majority of the Supreme Court namely, McLachlin CJ and Binnie, LeBel, Deschamps and Fish JJ are worthy of consideration. That case involved the admissibility of so-called "post-hypnosis evidence", ie evidence obtained from a witness after she had been hypnotised and which in effect, changed her recollection of the time she thought she saw the accused murderer entering his victim's premises shortly before her death. The later evidence of the witness, adopted the revised version of events and resulted in the conviction of the accused.

The plurality summarised the Canadian position as to scientific evidence in the following way at [31]–[34]:

> Not all scientific evidence, or evidence that results from the use of a scientific technique, must be screened before being introduced into evidence. In some cases, the science in question is so well established that judges can rely on the fact that the admissibility of evidence based on it has been clearly recognized by the courts in the past. Other cases may not be so clear. Like the legal community, the scientific community

9 526 US 137 (1999).
10 [2007] 1 SCR 239.

> continues to challenge and improve upon its existing base of knowledge. As a result, the admissibility of scientific evidence is not frozen in time.
>
> While some forms of scientific evidence become more reliable over time, others may become less so as further studies reveal concerns. Thus, a technique that was once admissible may subsequently be found to be inadmissible. An example of the first situation, where, upon further refinement and study, a scientific technique becomes sufficiently reliable to be used in criminal trials, is DNA matching evidence, which this Court recognized in *R v Terceira* [1999] 3 SCR 866. An example of the second situation, where a technique that has been employed for some time comes to be questioned, is so-called "dock", or in-court, identification evidence. In *R v Hibbert* [2002] 2 SCR 445, 2002 SCC 39, at para 50, Arbour J, writing for the majority, stated that despite its long-standing use, dock identification is almost totally unreliable. Therefore, even if it has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted in evidence without first confirming the validity of those assumptions.
>
> ...
>
> The central concern in [*R v*] *Mohan* [[1994] 2 SCR 9] was that scientific evidence be carefully scrutinized because, in Sopinka J's words, "[d]ressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves" (p 21). The situation in the case at bar is similar in that the evidence reveals a risk that post-hypnotic memories may be given more weight than they should. In [*R v*] *J-L J* [[2000] 2 SCR 600], the Court went a step further, establishing a framework for assessing the reliability of novel science and, consequently, its admissibility in court.

United Kingdom

In the UK, the admissibility of expert evidence is governed by Pt 19A of the Criminal Practice Directions 2015 and more specifically, the common law. Rule 19A.1 provides as follows:

> Expert opinion evidence is admissible in criminal proceedings at common law if, in summary,
>
> (i) it is relevant to a matter in issue in the proceedings;
>
> (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and
>
> (iii) the witness is competent to give that opinion.

It has been made clear that failure by either of the parties to comply with the Practice Direction could result in a ruling by the trial judge that the expert witness should not be called: *R v Reed.*[11]

The common law emphasises that the role of the expert is to give an opinion based on an analysis of the available evidence. The fact finder is not bound by that opinion, but can take it into consideration in determining the facts in issue. A person claiming to be an expert must have acquired by study or experience, sufficient knowledge of the relevant field to render the opinion of value. According to the Crown Prosecution Service guidelines on expertevidence, a court "is concerned that evidence should not be given by experts who are, patently unqualified or little more than enthusiastic amateurs".[12]

The expert must be able to provide impartial, unbiased, objective evidence on the matters within their field of expertise. Such an expert should not be seen to usurp the role of the advocate by seeking to make submissions to the court. And as has already been stated, there should be a sufficiently reliable scientific basis for expert evidence. In *R v Clarke (RL),*[13] Steyn LJ wrote that there were no closed categories of expert evidence. His Lordship considered that it would "be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and advances in science".

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11 [2009] EWCA Crim 2698 at [129]–[131].
12 Director of Public Prosecutions, The Code for Crown Prosecutors, *Expert evidence*, updated 20 November 2023.
13 [1995] 2 Cr App R 425.

That position was confirmed by the Court of Appeal (Criminal Division) in *R v Dlugosz,*[14] where the Court noted that:

> It is essential to recall the principle … [that] in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury [citation omitted].

Part 19A.3 goes on to provide that a Law Commission report in March 2011[15] recommended a statutory test for the admissibility of expert evidence but the government declined to legislate. Therefore the common law remains the source of the criteria by which admissibility is assessed. The direction states that nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended, they being in summary:[16]

(a) the extent and quality of the data on which the opinion is based and the validity of the methods by which they were obtained;

(b) if the opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or other appropriate terms);

(c) if the opinion relies on the results of the use of any method (for instance, a test, measurement or survey) whether the opinion takes proper account of matters such as the degree of precision or margin of uncertainty affecting accuracy or reliability of those results;

(d) the extent to which any material upon which the expert's opinion is based, has been reviewed by others with relevant expertise (for instance, in peer#reviewed publications) and the views of those others on that material;

(e) the extent to which the opinion is based on material outside the expert's field of expertise;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

(h) whether the expert's methods followed established practice in the field and the reasons for any divergence.

In *R v Dlugosz*, at issue was the admissibility of mixed profile DNA evidence and more particularly, the lack of any evidence of statistics of random match probability and sliding scale expressions, relevant to assessing the reliability of the scientific testing. The term "random match probability" is self-explanatory namely the probability of matching more than one person to a DNA sample located at a crime scene. The sliding scale or hierarchy provides expert opinions ranging from "lends no support" to "lends powerful support" or like phrases.

The Court of Appeal concluded that even if there was no reliable statistical basis, it was open to the court to admit "an evaluative opinion, provided there is some other sufficiently reliable basis for its admission": at [9]. The Court further concluded that "an expert is not bound to express an evaluative opinion by reference to the hierarchy; he can use other phrases. The real significance of the expert's inability to use the hierarchy might be that it is indicative of the lack of a proper basis on which to express an opinion … It is a matter to be taken into account in an assessment of whether there is a sufficiently reliable scientific basis for such an evaluative opinion to be given": at [14].

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14 [2013] EWCA Crim 2 at [11].

15 The Law Commission, *Expert evidence in criminal proceedings in England and Wales*, Report no 325, London, March 2011.

16 Criminal Practice Directions 2015, rule 19A.5.

The Court was at pains to point out that it is preferable that expressions should not be allocated numbers "lest that run any small risk of leading the jury to think that they represent an established numerical, that is to say measurable, scale": at [6]. What was required was merely "forms of words" which "need to be in an ascending order if they are to mean anything at all, and if a relatively firm opinion is to be contrasted with one which is not so firm": at [6]. It must be made plain to the jury that these are expressions of subjective opinion.

The Court of Appeal at [24] set out the process that the trial judge should adopt in resolving issues of this kind:

> If the admissibility is challenged, the judge must, in the present state of this science, scrutinise the experience of the expert and the features of the profile so as to be satisfied as to the reliability of the basis on which the evaluative opinion is being given. If the judge is satisfied and the evidence is admissible, it must then be made very clear to the jury that the evaluation has no statistical basis. It must be emphasised that the opinion expressed is quite different to the usual DNA evidence based on statistical match probability. It must be spelt out that the evaluative opinion is no more than an opinion based upon [the expert's] experience which should then be explained. It must be stressed that, in contrast to the usual type of DNA evidence, it is only of more limited assistance.

The Privy Council in *Lundy v The Queen*[17] made reference to the Canadian (and US) position and the four factors set out in *Daubert* and endorsed the test of reliability of expert evidence. The Privy Council stated at [139]:

> The Board considers that this list provides a useful template for the examination of the issue whether evidence based on a novel technique such as IHC (novel, at least, in the forensic setting of a criminal trial) should be admissible. But the debate as to whether the listed factors should operate to render inadmissible such evidence has not been engaged — at least, not to the extent that it can be resolved. For present purposes, it is sufficient to say that the need for such a debate signifies the impact that it might well have on an assessment of whether there has been a miscarriage of justice and an unsafe conviction.

The United Kingdom is a jurisdiction in which there appears to be an expansion of the categories of expert evidence admitted in criminal cases. The Crown Prosecution Service guidelines on expert evidence[18] point to traditional categories such as fingerprints, DNA analysis, handwriting and voice recognition but also to more novel areas, including ear prints, facial mapping and video evidence, forensic anthropology, forensic archeology, forensic pathology, hypnosis, psychological autopsies and gait analysis. The tendency by the UK courts has been to admit such novel evidence but to give instructions to juries about the proper weight to be attached to it.

Australia

In contradistinction, the Australian legal requirements for expert evidence are to be found in s 79 *Evidence Act* 1995. The High Court judgment in *Honeysett v R*[19] reiterated that admissibility of expert evidence is reliant on three factors:

- whether it is relevant to a fact in issue
- whether the expert witness has "specialised knowledge based on the person's training, study or experience", and
- whether the opinion is substantially based on such specialised knowledge based on training, study or experience.

17 [2013] UKPC 28.
18 *Expert evidence*, above n 12.
19 (2014) 253 CLR 122.

As to the second requirement, the High Court in a joint judgment in *Honeysett v R*, at [23], emphasised that "specialised" knowledge is not equivalent to matters of "common knowledge". Specialised knowledge is knowledge outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. That training, study or experience must result in the acquisition of knowledge which is explained as facts or ideas "accepted as truths on good grounds". The latter quote is taken from the judgment of Blackmun J in *Daubert*.

As to the third requirement, the opinion must be substantially based on specialised knowledge acquired through training, study or experience and it must be presented in a way that makes it possible for a court to determine that it is so based: at [24]. The High Court held that the "expert" evidence of an anatomist and biological anthropologist was inadmissible because it was not based wholly or substantially on his specialised knowledge.

The evidence of the expert involved viewing CCTV images of a robbery and images of the accused in custody and expressing a view about the physical characteristics of one of the three offenders shown in the CCTV footage. The expert concluded that there was a high degree of anatomical similarity between the person depicted in the CCTV footage and the accused and that he was unable to discern any anatomical dissimilarity between the two individuals. The Crown did not seek to lead the opinion as to the anatomical similarity and it was agreed that his evidence would be confined to the physical characteristics of the relevant offender in the CCTV footage, the physical characteristics of the accused and the absence of observable anatomical dissimilarities.

The High Court accepted that the expert had an undoubted knowledge of anatomy; but because his conclusion was based on his subjective impression of what he saw when he looked at the images and their consequent comparison, his opinion was not based wholly or substantially on his specialised knowledge. The Court observed that his evidence gave "the unwarranted appearance of science to the prosecution case that the appellant and Offender One share a number of physical characteristics. Among other things, the use of technical terms to describe those characteristics — Offender One and the appellant are both ectomorphic — was apt to suggest the existence of more telling similarity than to observe that each appeared to be skinny": at [45]. The Court was also not convinced that the expert was an ad hoc expert because he was not shown to have examined the CCTV footage over a lengthy period before forming his opinion.

It is somewhat ironic that the expert qualified on behalf of the accused in *Honeysett*, who challenged the prosecution expert evidence, was the same expert who appeared for the Crown in *R v Tang*[20] and part of whose evidence, was held to be inadmissible by the Court of Criminal Appeal.

New South Wales

An appropriate starting point are the observations of Bell J (then of the NSW Supreme Court) in *R v McIntyre:*[21]

> The question of whether a field is one of "specialised knowledge" for the purpose of s 79 of the Act does not require proof of the matters with which the Court was concerned in *Daubert v Merrell, Dow Pharmaceuticals Inc* …, which include proof of capacity for testing, actual testing, peer review, publication and the like.

20 (2006) 65 NSWLR 681.
21 [2001] NSWSC 311 at [14].

Broader questions as to whether the credibility and reliability of expert evidence fall for the consideration of the trial judge and whether those issues should be considered in the exercise of the court's discretion under s 137 *Evidence Act* 1995, were the subject of consideration in *R v Shamouil.*[22] Spigelman CJ observed at [60]:

> The preponderant body of authority in this Court is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility. There is no reason to change that approach.

His Honour qualified that statement by referring to some limited cases where credibility and reliability can be taken into account: at [63]:

> There will be circumstances, as envisaged by Simpson J in *Cook,*[23] where issues of credibility or reliability are such that it is possible for a court to determine that it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of the fact in issue. In that limited sense, McHugh J's observations in *Papakosmas*[24] that "considerations of reliability are necessarily involved" have application.

Chief Justice Spigelman also drew attention to the fact that the unreliability of any evidence can be the subject of a warning under s 165: at [75]–[77].

In *R v Tang*, the Court of Criminal Appeal considered the admissibility of expert evidence that depictions of a person taken from surveillance CCTV at the site of a robbery and depictions of the accused from forensic photographs, indicated that they were one and the same person ie evidence of identification. The area of expertise was said to be facial and body mapping.

In the appeal, it was not contended that all the expert evidence was inadmissible but the attack was confined to three issues: that the two types of photographs depict the same person; that applying the six point scale, the similarities lent support to the conclusion that the offender and the accused were one and the same person; and the expert's characterisation of certain matters as "unique identifiers".

In the course of the expert's evidence at trial, the jury asked what Spigelman CJ described as a "pertinent, indeed perspicacious" question which sought answers as to the accuracy of the relevant type of analysis, the percentage of cases revealing correct as opposed to incorrect matches and the minimum number of matching features required for the expert to conclude that the photos disclosed the same person: at [74] ff. The expert's response was not specific but centred on the claim that the methodology was accurate enough to show matches or no matches.

Chief Justice Spigelman at [137] pointed out that the focus of attention should be on the notion "specialised knowledge" and not on the introduction of extraneous ideas such as "reliability". His Honour was at pains to point out that *Daubert* and its progeny in the United States have little useful to say about s 79 of the *Evidence Act*. However, his Honour noted the reference by the US Supreme Court to the issue of the character of the "knowledge" required for it to be "specialised knowledge" ie that it was more than merely common knowledge and more than a subjective belief or unsupported speculation but "any body of known facts or any body of ideas inferred from such facts or accepted as truths on good grounds". The meaning of "knowledge" in s 79 was the same: at [138].

Chief Justice Spigelman noted that in the absence of any kind of objective standard or database which is capable of leading to a quantification of probabilities, evidence of similarity may have a cumulative effect, by reason of the numbers of points of similarity: at [143]. His Honour concluded that the three

22 (2006) 66 NSWLR 228.
23 *R v Cook* [2004] NSWCCA 52.
24 *Papakosmas v The Queen* (1999) 196 CLR 297.

contentious opinions did not go beyond a "bare *ipse dixit*" (at [154]), because the expert did not identify the terms of the strict protocol she said that she applied, nor did she set out the basis on which the protocol was developed.

As will be evident from the discussion below, there came about a difference in approach between the NSW and the Victorian courts regarding the relevance of questions of reliability of expert evidence when considering the admissibility of that evidence. In *Dupas v R*,[25] the Victorian Court of Appeal, sitting as a bench of five judges, determined that the NSW approach was erroneous and had the effect of undermining "an important safeguard which the common law provided against an unfair trial and which the legislatures intended should be replicated in the Evidence statutes": at [226].

In turn, the NSW Court of Criminal Appeal sat as a bench of five judges in *R v XY*.[26] By majority (Basten JA, Hoeben CJ at CL, Simpson J and Blanch J; Price J disagreeing on this point), the Court rejected the approach of the Victorian courts. Justice Basten supported the approach and reasoning in *Shamouil* but considered that it was doubtful as to how far *Dupas* was different from the former case in terms of principle: at [65]. His Honour however also considered that the correct approach did not exclude considering issues of credibility and reliability observing at [44]:

> Thirdly, adoption of "a restrictive approach" was not intended to exclude all consideration of credibility and reliability. There must be, as the Chief Justice noted, an initial assessment as to whether it was open to a jury acting reasonably to use the proffered evidence in assessing the existence of a fact. If the trial judge were satisfied that evidence could not rationally affect the assessment of the probability of a fact in issue, it would not be relevant evidence and would therefore not be admissible: *Evidence Act*, ss 55 and 56. That, however, is not the end of the exercise. The extent to which the evidence could rationally affect the probability of a fact in issue involves an evaluative judgment. That judgment is not a forecast of the weight the jury is likely to give the evidence, nor is it a statement of the weight the judge would give the evidence.

And at [48]:

> Two factors are apparent from these passages. First, in carrying out the "weighing" exercise, it would be necessary for the trial judge to consider where the prosecution evidence fell on a scale of probative value ranging from strong to weak. Secondly, the unreliability of the evidence was a factor to be weighed on the other side of the scale, together with the likely effectiveness of warnings about the nature of such unreliability. In effect, *Shamouil* requires careful attention to the language of the statute and the exercises required to be undertaken: the judgment must be read as a whole. The prosecution is entitled to have its evidence assessed according to its capacity to support the prosecution case, which is not to say that the reliability of the evidence may not be a factor, at least in some cases, in applying the test provided in s 137.

Conversely, Price J gave his support for the use of the test in *Dupas* at [224]:

> Whilst upon my analysis, it is unnecessary to consider the conflict in the approaches to be taken to s 137 *Evidence Act* since the decision in *Dupas v The Queen* [2012] VSCA 328, it seems to me that enabling the trial judge to consider questions of credibility, reliability or weight when s 137 is invoked, is likely to enhance the fundamental principle that an accused is to receive a fair trial.

Victoria

In *Dupas v R*[27] the Court of Appeal concluded that when considering the probative value of evidence for the purposes of the exclusionary rule in s 137 of the Act, the trial judge retained "the common law function of assessing reliability and weight": at [164]. The case involved the admissibility of the evidence of three identification witnesses who had observed a person they nominated as the accused, near the scene of the offence on the day of the murder. Over objection, the trial judge admitted the evidence,

25 (2012) 40 VR 182.
26 (2013) 84 NSWLR 363.
27 (2012) 40 VR 182.

accepted that there might be problems with the reliability of that evidence, but considered that that went to a question of weight rather than admissibility.

The Court observed that an evaluation of the weight of probative evidence necessarily involved an assessment of the quality (and any inherent frailty) of that evidence. Part of the task of the trial judge in forming an opinion about the weight that a jury could reasonably assign to the evidence was "to evaluate the quality, reliability and weight of the evidence": at [141]–[142].

In *Tuite v R*[28] (a case which dealt with the admissibility of expert evidence in relation to DNA analysis), the Court of Appeal consistently with the NSW authorities of *Tang* and *McIntyre* and the statement of Gleeson CJ in *HG v The Queen*[29] affirmed that the language of s 79(1) leaves no room for reading into the test, evidentiary reliability as a condition of admissibility of expert evidence. It is the language of the section which is to be applied: at [70] and [71]. That is not to say that the question of reliability is entirely irrelevant to an assessment of the expert evidence — it is merely not relevant at the point where admissibility is being considered.

The Court however did not abandon the issue of reliability in terms of considering expert evidence when it stated at [82]:

> Our conclusion about s 79(1) is a conclusion about statutory construction. It says nothing about the importance of the rigorous assessment of evidentiary reliability when expert opinion evidence is proposed to be called. As will appear, we view this as a matter of the first importance to the integrity and fairness of the criminal justice system. On our analysis, however, reliability falls for consideration under s 137, not under s 79(1).

As will be seen, the High Court in *IMM v R*[30] rejected the proposition that "reliability falls for consideration under s 137".

Australian — definitive position

The competing authorities were considered and the issue resolved by the High Court in favour of the approach of the NSW Court of Criminal Appeal in *IMM*. In the judgment of the plurality (French CJ, Kiefel, Bell and Keane JJ, with whom Gageler, Nettle and Gordon JJ disagreed on this issue) their Honours noted that the point of difference between the Victorian and NSW authorities concerned whether a trial judge could take into account the reliability of the evidence in assessing its probative value. At [39], the plurality stated:

> The question as to the capability of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue is to be determined by a trial judge on the assumption that the jury will accept the evidence. This follows from the words "if it were accepted", which are expressed to qualify the assessment of the relevance of the evidence. This assumption necessarily denies to the trial judge any consideration as to whether the evidence is credible. Nor will it be necessary for a trial judge to determine whether the evidence is reliable, because the only question is whether it has the capability, rationally, to affect findings of fact. There may of course be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.

Their Honours considered that it was essentially the same enquiry for the test of relevance, stating at [43]:

> The enquiry for the purposes of s 55 is whether the evidence is capable of the effect described at all. The enquiry for the purposes of determining the probative value of evidence is as to the extent of that possible effect. But the point is that in both cases the enquiry is essentially the same; it is as to how the evidence

28 [2015] VSCA 148.
29 (1999) 197 CLR 414.
30 (2016) 257 CLR 300

> might affect findings of fact. An assessment of the extent of the probative value of the evidence takes that enquiry further, but it remains an enquiry as to the probative nature of the evidence.

This approach necessarily followed from the assumption which the majority considered must apply, in assessing the probative value of evidence, namely the assumption as to the jury's acceptance of the evidence. Their Honours concluded at [52] that no question as to the credibility or the reliability of the evidence can arise and further at [54] and [58]:

> The *Evidence Act* contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137.
>
> ...
>
> It would not seem to be necessary to resort to an assessment of the reliability of evidence of this quality for it to be excluded under s 137. For the reasons already given, evidence which is inherently incredible or fanciful or preposterous would not appear to meet the threshold requirement of relevance. If it were necessary, the court could also resort to the general discretion under which evidence which would cause or result in an undue waste of time may be rejected. [Note: s 135 provides that evidence may be inadmissible if the probative value is substantially outweighed by danger of unfair prejudice; the likelihood of it being misleading or confusing or the prospect that it may cause an undue waste of time]

Justice Gageler took the opposite approach at [96]:

> Together with Nettle and Gordon JJ, I consider the view of McHugh J — that an assessment of probative value necessarily involves considerations of reliability — to be a view that is compelled by the language, structure and evident design of the *Evidence Act*. To think of evidence that is relevant as evidence that has some probative value and to go on to think of probative value as a measure of the degree to which evidence is relevant is intuitively appealing. It is elegant; it has the attraction of symmetry. For many purposes, it may not be inaccurate. But it is not an exact fit for the conceptual framework which the statutory language erects. The statutory description of relevance requires making an assumption that evidence is reliable; the statutory definition of probative value does not provide for making that assumption. The conceptual framework which the statutory language erects therefore admits of the possibility that relevant evidence will lack probative value because it is not reliable.

Justices Nettle and Gordon at [154] stated:

> As Basten JA suggested in *XY*, it may be that the differences between *Shamouil* and *Dupas* are essentially only semantic. *Shamouil* defined the relevance of reliability to the decision to exclude evidence under s 137 in terms of whether evidence is so unreliable that it would not be open to the jury to conclude that it could rationally affect the assessment of the probability of the existence of the fact in issue … *Dupas* answered the question in functionally not dissimilar terms of the weight which the jury, acting reasonably, could give to the evidence (as opposed to the weight which the jury would or will give to the evidence) … With respect, there is force in Basten JA's observation in *XY* … that the results under either formulation may be much the same. Even so, however, it now remains for this Court to decide the point of whether a judge should have regard to the reliability of evidence for the purposes of s 137 of the Act.

and concluded at [160]:

> At common law, the established categories of exclusion are grounded in accrued corporate judicial knowledge and experience of the inherent potential for unreliability of evidence of that kind. Likewise, under the Act, the point of Ch 3 and its structure is to repose responsibility in the judge for enforcing the statutory rules of admissibility and exclusion in a manner calculated to withhold otherwise relevant evidence from the jury's consideration of reliability. That necessitates a judicial preliminary assessment of criteria going to reliability in order to determine whether the evidence has the capacity sufficiently to affect the jury's rational assessment of the probability of the existence of a fact in issue or whether it is so lacking in reliability that it should be excluded.

The latest word from the High Court on expert evidence was handed down on 11 October 2023 in *Lang v The Queen*.[31] By majority (Kiefel CJ, Gageler and Jagot JJ, the latter in a separate judgment) dismissed an appeal against a conviction for murder, in which one of the grounds was the alleged wrongful admission of disputed expert evidence. In a joint judgment, the dissenting justices (Gordon and Edelman JJ) would have allowed the appeal partly on the basis that the expert evidence was inadmissible because the expert failed to expose how his expertise was the substantial basis for connecting the established facts and that he expressed opinions which were not shown to have any connection with his expertise.

All members of the Court premised their judgments on the proposition adopted in *IMM* that the prerequisites for admissibility of expert evidence did not include reliability. Justices Gordon and Edelman observed at [221]:

> In contrast with other jurisdictions, it has been observed that "most Australian judges have not exhibited much interest in the reliability of expert opinion evidence", a lack of interest that has been said to be "intriguing, at the very least". Instead, the exclusion of unreliable expert evidence will usually depend upon a conclusion that the prejudicial effect of the evidence exceeds its probative value …, particularly where the evidence is of "little or no weight". [Citation omitted]

In a similar vein, Jagot J noted at [436]:

> As noted, at common law, the threshold of reliability for expert evidence is governed by the requirement for the area of expertise to constitute a "body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render [their] opinion of assistance to the court" … At common law, once it is accepted, as in this case, that there is such an area of expertise and the witness is an expert within that area, reliability is not a determinant of admissibility, albeit expert evidence remains subject to the power of exclusion in a criminal trial if its probative value is outweighed by its prejudicial effect. If admitted into evidence, the "weight to be attached to [the] opinion is a question for the jury" … [Citations omitted]

Kiefel CJ and Gageler J did not specifically refer to the issue of reliability. However, their Honours did discuss notions of "the cogency of reasoning" applying the expert's specialised knowledge and the "utility or value of the opinion", notions which are related to the issue of reliability. At [15]–[17] of the judgment, their Honours make tolerably clear that there is no divergence from the *IMM* view:

> Here, it is important to highlight a distinction touched on but not elaborated upon in *Makita* … The distinction is between the present question as to whether a process of reasoning engaged in by an expert is sufficient to demonstrate that his or her opinion is the product of the application of specialised knowledge and the question of the extent to which a process of reasoning engaged in by an expert through the application of specialised knowledge is clear and convincing. Both questions can be described as going to the utility or value of the opinion …
>
> However, it is the present question alone that goes inexorably to the "admissibility" of the opinion as distinct from its "weight" … In addressing the present question of whether the opinion satisfies the condition of admissibility that the opinion be demonstrated to be based on specialised knowledge or experience of the expert, lack of cogency in so much of the reasoning as is found to involve application of specialised knowledge is not to the point: "the giving of correct expert evidence cannot be treated as a qualification necessary for giving expert evidence" …
>
> The latter question — as to the cogency of reasoning involving the application of specialised knowledge — can also go to the admissibility of a resultant opinion. But that is only in so far as the degree of cogency of the reasoning bears on the extent to which the resultant opinion has the potential to assist the tribunal of fact in drawing requisite inferences from the evidence and so bears on the calculus to be undertaken by a court if and when the court is asked or required to consider whether the opinion should be excluded

31 [2023] HCA 29.

> on the distinct ground … that the probative value of the opinion is outweighed by its prejudicial effect … [Citations omitted]

As has been referred to, the Australian context is informed by a close adherence to the *Evidence Act*s and the judicial consideration has focused upon the statutory construction of the terms in s 79. Accordingly, the issue of reliability of expert evidence has been relegated to be considered if at all, after the application of the statutory test.

It might be thought that the *Evidence Act* test for expert evidence is premised on the proposition that juries have the capacity to assess, engage and apply expert evidence in their fact-finding function, cf *Velevski v R*[32] per Gummow and Callinan JJ at [182]:

> Expert evidence does not, as a matter of law, fall into two categories: difficult and sophisticated expert evidence giving rise to conflicts which a jury may not and should not be allowed to resolve; and simple and unsophisticated expert evidence which they can. Nor is it the law, that simply because there is a conflict in respect of difficult and sophisticated expert evidence, even with respect to an important, indeed critical matter, its resolution should for that reason alone be regarded by an appellate court as having been beyond the capacity of the jury to resolve.

The analysis in Part 2 **Reliability of forensic science disciplines** may question the confidence in that view.

Nevertheless, s 135 and for that matter s 55, require consideration of the relevance and probative value of expert evidence. It cannot be doubted that issues relating to the reliability of expert evidence may inform judgments about relevance and particularly probative value. Indeed, it seems unlikely that those matters would not be considered in the great majority of cases involving expert evidence, particularly those in newly arising areas of this type of evidence.

If the science, learning or method of applying the test is unreliable ie prone to produce false results, it is difficult to conclude that the probative value exists at all or at a level upon which a fact finder can safely make conclusions beyond reasonable doubt.

It may be that the law in this area will continue to develop driven by at least two factors: the increasing reach of expert evidence into areas previously thought to be a matters of common knowledge (cf Kiefel CJ and Gageler J in *Lang* at [8] referred to the traditional common law approach of accepting opinion evidence of witnesses with "peculiar skill(s)" in areas where "inexperienced persons are unlikely to prove capable of forming a correct judgment"), and denying opinion evidence of witnesses where the "subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it" and concluded at [9]:

> The traditional approach has come under strain as developments in specialised knowledge, especially in fields of behavioural science … and forensic science …, have narrowed the subject-matters in respect of which it might continue to be asserted categorically and with confidence that common knowledge and experience provide so firm a foundation upon which to engage in fact-finding that the opinion of an expert could be of no assistance.

An example is expert evidence regarding the delayed complaint of sexual assault victims (the origins having been based the concept of hue and cry). The second factor is the demonstrated unreliability of previously accepted areas of expert evidence (as to which see Part 2 **Reliability of forensic science disciplines** and the *Report of the 2022 Inquiry into the convictions of Kathleen Megan Folbigg*).[33]

But *Lang* re-affirms the position in *IMM* that expert evidence will be excluded in a criminal trial if its probative value is outweighed by its prejudicial effect: see Kiefel CJ and Gageler J at [17]:

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32 (2002) 76 ALJR 402.

33 T F Bathurst, *Report of the 2022 inquiry into the convictions of Kathleen Megan Folbigg*, released 8 November 2023.

> The prejudicial effect which might in an appropriate case be required to be weighed against the probative value of an expert opinion has properly been recognised to be capable of including a risk that a jury might give the opinion more weight than it deserves by reason of a perception of the status of the expert — the so-called "white coat effect" — or by reason of difficulty in assessing information of a technical nature [Citation omitted].

and Jagot J at [436], quoted above.

What then is the result of these authorities as it impacts upon the functions of a trial judge? The issue of reliability of expert evidence will not generally arise when the admissibility of that evidence is considered, save for the following exceptions:

- whether the evidence (with its degree of unreliability) is relevant as required by s 55?
- whether in considering the discretion in s 135, is the evidence so inherently incredible, fanciful or preposterous that it could cause or result in undue waste of time (or query: be misleading or confusing?) and
- does the asserted unreliability of the evidence warrant a warning to the jury pursuant to s 165?

In my opinion, there is much to recommend the approach of Gageler J in *IMM*, that the conceptual framework of the *Evidence Act* admits of the possibility that relevant evidence will lack probative value because it is not reliable. As a matter of construction, the notion of "specialised knowledge" is distinct from the question of the reliability of the process and of the expert's conclusion. However, a relevant question remains: is it conducive to the attainment of justice that specialised knowledge which underpins expert opinion before a court, be reliable? In terms of expert evidence, the idea that there can be specialised knowledge based upon unreliable or questionable foundations seems to be contradictory. In any event if the value of the evidence is questionable, one might think that it is apt to mislead the fact finder, particularly if dressed up in scientific language.

The effect of not grappling with the issue of reliability may result in the reduction rather than the enhancement of the fundamental principle that an accused is to receive a fair trial as referred to by Price J in *XY*. That other jurisdictions have done so, supports the view that reliability of expert evidence should be considered. However, until there is an amendment to the *Evidence Act* or a reconsideration by the High Court of s 79, the issue of reliability will predominantly remain a contest between the prosecution and the defence litigated in the course of the trial rather than an issue of admissibility of evidence for the court.

It may be that given the divergence of judicial opinion in other jurisdictions, in the intermediate appellate courts and also for that matter in the High Court, the issue may be revisited in the future. In any event, this excursus through the current state of the law has been undertaken to demonstrate that putting aside the integrity of the criminal justice system, the issue of reliability of expert evidence is nevertheless a matter which may warrant scrutiny by a trial judge, in appropriate cases.

Reliability of forensic science disciplines: report to the United States President

As earlier noted, the PCAST report was written by the Executive Office of the President, the President's Council of Advisors on Science and Technology ("the Council").[34] The Council was comprised of a number of well-credentialed academics and persons working in high-level scientific organisations. Included amongst the advisors were a number of judges in the federal and State system and legal academics.

34 The White House, President's Council of Advisors on Science and Technology, accessed 14/12/23.

The PCAST report was prompted by a request from President Obama in 2015 following a highly critical 2009 National Research Council report, as to whether there were additional scientific steps that could help to ensure the validity of forensic evidence.

The Council adopted the definition of "forensic science" as the application of scientific or technical practices to the recognition, collection, analysis and interpretation of evidence for legal proceedings. The Executive Summary[35] noted that developments in the preceding two decades including the exoneration of wrongfully convicted accused persons based in part on forensic-science evidence as well as scientific studies, have called attention to the validity and reliability of forms of forensic evidence.

The need for scrutiny of forensic feature-comparison methods was necessary because it posed unique dangers of misleading jurors.[36] This was because the vast majority of jurors has no independent ability to interpret the probative value of results based on the detection, comparison and frequency of scientific evidence. When expert evidence is dependent on expert statements garbed in the mantle of science and otherwise not within the experience of lay jurors, the danger is evident. (By way of example, if a jury is presented with an expert conclusion that: in two DNA samples, the third exon of the DYNC1H1 gene is precisely 174 nucleotides in length, it is apt to confuse rather than enlighten the jury especially when in fact more than 99.9% of people have a fragment of the indicated size.[37])

There is also a high potential prejudicial impact because jurors are likely to overestimate the probative value of a "match" between samples. The reference to "match" has been demonstrated in mock jury experiments to lead to a belief that errors likely to occur are significantly smaller than the actual error rates.[38]

The Council concluded in summary, that two important gaps needed to be remedied:

1. the need for clarity about the scientific standards for validity and reliability of forensic methods, and
2. the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable.[39]

The focus of the report was to help close the gaps in the case of forensic "feature-comparison" methods ie methods that attempt to determine whether a crime scene sample is or is not associated with a potential "source" sample (for example, from a suspect) based on the presence of various similarities. Examples of such methods include the analysis of DNA, hair, latent fingerprints, firearms and spent ammunition, tool marks and bite marks, shoe prints, tyre tracks and handwriting.

Scientific evidence began to be questioned in 1989 when the New York Supreme Court held DNA evidence inadmissible in a murder case involving the analysis of blood, linking the accused to the murders of his neighbour and her young daughter: see *People v Castro.*[40] (It is noteworthy that the co-chair of PCAST, Eric Lander was an expert witness in that case.)

In the USA, it was the emergence of DNA analysis in the 1990s that first lead to a serious questioning of the validity of many of the traditional forensic disciplines. Reviews by a number of bodies found that DNA testing during the course of investigations cleared tens of thousands of suspects, and re-examination of past cases led to the exoneration of 342 defendants. These questions and results about scientific validity

35 PCAST report, above n 6, p 1.
36 ibid at p 2.
37 ibid at p 45.
38 ibid at p 51.
39 ibid at p 142.
40 545 NYS2d 985 (Sup Ct 1989).

led to increased efforts to test the reliability of the methods employed by those disciplines. Those studies showed amongst other things:

(a) a 2002 FBI re-examination of microscopic hair comparisons by subsequent DNA testing showed that 11% of hair samples found to match microscopically, actually came from different persons[41]

(b) a 2004 National Research Council report commissioned by the FBI on bullet lead evidence found that there was insufficient research and data to support drawing a definitive connection between two bullets based on their similar composition of lead content[42]

(c) a 2005 report of an international committee established by the FBI to review the use of latent fingerprint evidence in a terrorist bombing of the Madrid commuter train system found that "confirmation bias" — the inclination to confirm a suspicion based on other grounds — contributed to a misidentification (the FBI erroneously detained an American in Portland, Oregon and held him for two weeks as a material witness; an FBI examiner concluded a match with a 100% certainty whereas Spanish authorities were unable to confirm the match),[43] and

(d) studies in 2009 and 2010 on bite mark evidence found that procedures for comparing bite marks, were unable to reliably exclude or include a suspect as a potential biter.[44] (In 2015, a study by the American Board of Forensic Odontology[45] showed a significant lack of consistency in the way that forensic odontologists analyse bite marks, including even on deciding whether the bite mark was human or otherwise.)

In addition, reviews have found that expert witnesses have often overstated the probative value of their evidence, going far beyond what the relevant science can justify. Evidence to the effect that expert conclusions are of 100% certainty, are scientifically indefensible because as the 2009 National Research Council study found: all laboratory tests and feature-comparison analyses have some degree of error.[46]

In 2012 and following, the Department of Justice and FBI undertook a review of testimony in more than 3000 criminal cases involving microscopic hair analysis, the initial results of which showed that FBI examiners had provided scientifically invalid testimony incriminating the defendant, in more than 95% of cases.[47]

The 2009 National Research Council Report made clear that some problems and irregularities which resulted in miscarriages of justice, could not be attributed solely to rogue analysts or underperforming laboratories but were systemic and pervasive. They resulted from a high degree of fragmentation, a lack of standardisation of disciplines, insufficient high-quality research and education and a dearth of peer-reviewed studies establishing the scientific basis and validity of many forensic methods. The report found that shortcomings were especially prevalent among the feature-comparison disciplines many of which lacked well-defined systems for determining error rates and had not done studies to establish the uniqueness, rarity or commonality of the features being examined. Their conclusion was:[48]

> much forensic evidence — including, for example, bite marks and firearm and tool mark identifications — is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline.

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41 See M Airlie et al, "Forensic hair analysis — worldwide survey results" [2021] 327 *Forensic Science International* 1.
42 See W Koen, C Bowers (eds), Ch 1 Compositional bullet lead analysis, *Forensic Science Reform*, Academic Press, 2017.
43 See R Stacey, "Report on the erroneous fingerprint individualization in the Madrid Train Bombing Case" [2005] 7(1) *Forensic Science Communications*.
44 National Research Council Report, above n 5, p 173.
45 See American Board of Forensic Odontology, Forensic Odontology Response to the NIST Report and CIFS Video.
46 National Research Council Report, above n 5, p 47.
47 See FBI, Root cause analysis for microscopic hair comparison analysis completed, Washington DC, 2019 and the report at ABS Group, Root and cultural cause analysis of report and testimony errors by FBI MHCA examiners, 2018.
48 National Research Council Report, above n 5, p 107.

Legal Context

Traditionally, forensic science has been used in the criminal justice process in the investigation phase and in the prosecution phase. Different standards apply to the use of that science in those phases. In the prosecution phase, legal standards and scientific standards intersect. Judges must determine "whether the reasoning or methodology underlying the scientific testimony is valid".[49] Judges make decisions about admissibility of scientific evidence solely on legal standards but those decisions require making determinations about scientific validity. Accordingly it is appropriate that the scientific community provide guidance concerning standards for scientific validity. The PCAST report focuses on the scientific standards.

Two types of scientific validity are considered:

- foundational validity, and
- validity as applied.[50]

Foundational validity requires that it be shown that a forensic science method based on empirical studies is repeatable, reproducible and accurate at levels that have been measured. This means that the method can, in principle, be reliable. Validity as applied means that the method has been reliably applied in practice.

The foundational validity and reliability of forensic feature-comparison methods include objective and subjective methods. Objective methods consist of procedures that are defined with enough standardised and quantifiable detail that they can be performed either by an automated system or human examiners exercising little or no judgment. Subjective methods denote methods including key procedures that involve significant human judgment eg concerning which features to select within a pattern or how to determine whether the features are sufficiently similar to be called a probable match.

The essential points of foundational validity include:[51]

1. That the method has been subjected to empirical testing by multiple groups under conditions appropriate to its intended use. The method must be repeatable and reproducible and provide valid estimates of the methods accuracy;
2. For objective methods, foundational validity can be established by studying and measuring accuracy, reproducibility and consistency of each of the steps;
3. For subjective feature-comparison methods, because the individual steps are not specified, the method must be evaluated as if it were a "black box" in the examiner's head — these evaluations are based on studies in which many examiners render decisions about many independent tests and the error rates are determined; and
4. Without appropriate estimates of accuracy, an examiner's statement that two samples are similar or indistinguishable, is scientifically meaningless: it has no probative value and considerable potential for prejudicial impact.

Once a method has been established as foundationally valid, claims about accuracy of the methods and their probative value in order to be valid, must be based on empirical studies. Forensic experts should report findings with clarity and restraint and should not imply that the method is able to produce results at a higher accuracy than that which the tests disclose. The report emphasises that neither experience, nor judgment nor good professional practices, can substitute for actual evidence of foundational validity and reliability. Generally they are not matters of judgment but of empirical evidence.

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49 PCAST report, above n 6, at p 142.
50 ibid at pp 42 ff,146 ff.
51 ibid at p 5 ff.

The PCAST report applied the above criteria to six forensic feature-comparison methods:[52]

- DNA analysis of single-source and simple-mixture samples[53]
- DNA analysis of complex-mixture samples[54]
- bite marks[55]
- latent fingerprints[56]
- firearms identification;[57] and
- footwear analysis.[58]

Single-source and simple-mixture DNA analysis[59]

The vast majority of DNA analysis currently involves samples from a single individual or from a simple mixture of two individuals eg, a rape kit. DNA analysis in such cases is an objective method in which laboratory protocols are precisely defined and the interpretation involves little or no human judgment. (The UK Crown Prosecution Service guidelines[60] contain a very useful and comprehensive lay description of the methodology of DNA testing.)

The foundational validity of an objective method can be evaluated by examining the reliability of each of the individual steps. In the case of simple DNA analysis, each of the steps has been found to be repeatable, reproducible and accurate with levels that have been measured and are appropriate to the intended application.

As for the validity as applied, DNA is not infallible in practice. Errors can occur. Although the probability that two samples from different sources have the same DNA profile is tiny, the chance of human error is much higher. Such errors may be simple mix-ups, contamination, incorrect interpretation and errors in reporting.

DNA analysis of complex-mixture samples[61]

DNA analysis of complex mixtures involves biological samples from multiple unknown individuals in unknown proportions eg mixed bloodstains and multiple individuals touching a surface. The fundamental difference between a complex analysis and single source analysis lies not in the laboratory process but in the interpretation of the resulting DNA profile.

DNA analysis of complex mixtures is inherently difficult as it is often impossible to tell with certainty which genetic variants are present in a mixture or how many separate individuals contributed to the mixture. An examiner must ask whether a suspect DNA profile could be present within the mixture and what the probability was that such an observation might occur by chance. Initial approaches to the interpretation of complex mixtures rely on subjective judgment by examiners and PCAST concluded that subjective analysis of complex DNA mixtures is neither foundationally valid nor a reliable methodology.

Given the problems with subjective interpretation, efforts were made to develop computer programs that apply various algorithms to interpret complex mixtures in an objective manner. These programs represent a major improvement over purely subjective interpretation but still require scientific scrutiny. Issues remain as to whether the methods are scientifically valid and whether the software correctly

52 ibid at p 146.
53 ibid at p 147.
54 ibid at p 148.
55 ibid at p 148.
56 ibid at p 149.
57 ibid at p 150.
58 ibid.
59 ibid at p 69 ff.
60 *Expert evidence*, above n 12.
61 PCAST report, above n 6, p 75 ff.

implements the methods. PCAST has concluded that studies have established the foundational validity of some objective methods under limited circumstances but that substantially more evidence is needed to establish foundational validity more broadly.

It is useful to illustrate some of these problems with the following examples: in a 2003 double homicide case, *Winston v Commonwealth*,[62] a prosecution expert reported that the defendant could not be excluded as a possible contributor to DNA on a discarded glove that contained a mixed DNA profile of at least three contributors. The defendant was convicted and sentenced to death. The prosecutor told the jury that the probability that the match occurred by chance, was 1 in 1.1 billion. A 2009 paper makes a reasonable scientific case that the chance is closer to 1 in 2 ie 50% of the relevant population could not be excluded.[63]

A 2011 study tested whether irrelevant contextual information influenced the conclusions of examiners, using DNA evidence from an actual adjudicated criminal case (a gang rape case in Georgia).[64] In that case, one suspect implicated another suspect in connection with a plea bargain. The two experts who examined evidence from the crime scene, were aware of his testimony against the suspect and knew that the plea bargain testimony could only be used in court with corroborating DNA evidence. Due to the complexities of the DNA mixture, the analysis of the evidence required judgment and interpretation on the part of the examiners. The two experts concluded that the suspect could not be excluded as a contributor. The original DNA evidence from the crime was presented to 17 expert DNA examiners but without any of the relevant contextual information. The test resulted in the finding that only 1 of the 17 experts agreed with the original experts who were exposed to the biasing information and in fact, 12 of the experts excluded the suspect as a possible contributor.

In another paper, 19 DNA experts were presented with a mock case involving an alleged violent robbery outside a bar involving the following facts: there is a male suspect who denied any wrongdoing.[65] DNA samples were conducted from the shirt of the alleged female victim who claimed to have been grabbed by the assailant; a cigarette butt picked up by the police and allegedly smoked by the victim and/or the suspect; and nail clippings from the victim who claimed to have scratched the perpetrator. Although all the experts were provided with the same DNA profiles, their conclusions varied wildly. One examiner excluded the suspect as a possible contributor while another examiner declared a match between the suspect's profile and a few minor peaks in the mixed profile from the nails — reporting a random match probability of roughly 1 in 209 million. Still others declared the evidence inconclusive.

In 2015, "a remarkable chain of events in Texas" revealed that problems with subjective analysis of complex DNA mixtures, were systemic.[66] The Texas Department of Public Safety issued a public letter to the Texas criminal justice community noting that "minor errors in its (FBI) population databases used to calculate statistics in DNA cases" had been identified. The Department offered that it would on request, recalculate statistics previously reported. When several requests were submitted for recalculation, prosecutors were stunned to find that the statistics had changed dramatically eg from 1 in 1.4 billion to 1 in 36 in one case and from 1 in 4000 to inconclusive in another. Closer examination for the significant alterations revealed that the large shifts were unrelated to minor corrections in the FBI's population database but rather were due to the fact that forensic laboratories had changed the way in which they calculated the CPI statistic. Up until September 2015, a list of more than 24,000 DNA mixture cases were analysed; however the total number which may require review could exceed 50,000.[67]

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62 604 SE 2d 21 (Va 2004).

63 W Thompson, "Painting the target around the matching profile: the Texas sharpshooter fallacy in forensic DNA interpretation" (2009) 8(3) *Law, Probability and Risk* 257. See also PCAST report, above n 6, at p 76.

64 I Dror and G Hampikian, "Subjectivity and bias in forensic DNA mixture interpretation" (2011) 51(4) *Science & Justice* 204. See also PCAST report, above n 6, at p 76.

65 J de Keijser et al, "Differential reporting of mixed DNA profiles and its impact on jurists' evaluation of evidence: an international analysis" (2016) 23 *Forensic Science International: Genetics* 71. See also PCAST report, above n 6, p 77.

66 See PCAST report, above n 6, at p 77. See also https://fsc.txcourts.gov/, accessed 14/12/23.

67 See PCAST report, above n 6, at p 78.

In order to bypass purely subjective interpretation, several groups have launched efforts to develop "probabilistic genotyping"[68] computer programs that apply various algorithms to interpret complex mixtures. However, the report warns that careful scrutiny is required to determine whether the methods are scientifically valid, including defining the limits of their reliability and whether the software correctly implements the methods. This is particularly important because the programs employ different mathematical algorithms and can yield different results for the same mixture profile. Appropriate evaluation should consist of studies by multiple groups not associated with software developers. Issues concerning commercial in confidence may preclude such independent testing.

Bite mark analysis[69]

Bite mark analysis involves examining marks left on a victim or an object at the crime scene and comparing those marks with dental impressions taken from a suspect. Such analysis is based on the assumptions that dental characteristics particularly the arrangement of the front teeth, differ substantially among people and that skin or some other surface of the crime scene, can reliably capture those distinctive features.

The analysis begins with an examiner deciding whether an injury is a mark caused by human teeth. Thereafter photographs or impressions are created of the questioned bite mark and of a suspect's dentition. This is followed by a comparison between the bite mark on the dentition and a determination as to one of three alternatives: the dentition cannot be excluded as having made the bite mark; it can be excluded or it is inconclusive.

Bite mark analysis is a subjective method and current protocols do not provide well-defined standards concerning the identification of features or the degree of similarity that must be identified to support a reliable conclusion. These are all subjective judgments.

The foundational validity of a subjective method can only be established through multiple black-box studies. The few studies which have been undertaken disclosed that the observed false-positive rates were very high, typically above 10% and sometimes more. Available scientific evidence strongly suggests that examiners not only cannot identify the source of bite mark with reasonable accuracy but that they cannot even consistently agree on whether an injury is a human bite mark. Accordingly, PCAST concluded that bite mark analysis is far from meeting the scientific standards for foundational validity and the prospects of developing bite mark analysis into a scientifically valid method are low.[70]

The background studies concerning this methodology commenced in a widely cited 1984 paper that claimed that "human dentition was unique beyond any reasonable doubt".[71] The study examined 397 bite marks carefully made in a wax wafer, measured 12 parameters from each and assuming without evidence, that the parameters were uncorrelated with each other, suggested that the chance of two bite marks having the same parameters is less than one in 6 trillion. A 2010 paper debunked these claims by empirically studying 344 human dental casts and measuring them by three-dimensional laser scanning.[72] The report noted that these studies examine human dentition patterns under idealised conditions and by contrast, skin has been shown to be an unreliable medium for recording the precise pattern of teeth. Studies involving bite marks on living pigs or human cadavers have demonstrated significant distortion in all directions.

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68 ibid at p 79.
69 ibid at p 83.
70 ibid at p 87.
71 R Rawson et al,"Statistical evidence for the individuality of the human dentition" (1984) 29(1) *Journal of Forensic Sciences* 245.
72 M Bush et al, "Statistical evidence for the similarity of the human dentition" (2011) 56(1) *Journal of Forensic Sciences* 118.

Latent fingerprint analysis[73]

Latent fingerprint analysis involves comparing a "latent print" which is a complete or partial friction-ridge impression from an unknown subject with one or more "known prints" ie fingerprints deliberately collected under controlled settings from known subjects to assess whether they may have originated from the same person. It can also involve comparing latent prints with one another. The examination may involve a comparison of a latent print to the fingerprints of a known suspect or searching a large database of fingerprints to identify a suspect.

Latent fingerprint analysis was first used in criminal identification in the 1800s and was long hailed as infallible, despite a lack of empirical studies to assess its error rate. PCAST concluded that latent fingerprint analysis is a foundationally valid subjective methodology albeit with a false positive rate that is substantial and is likely to be higher than expected by many jurors.[74] The false-positive rate could be as high as 1 error in 306 cases (FBI study) and 1 error in 18 cases.[75]

In 2005, an international committee established by the FBI, released a report concerning flaws in the FBI's practices for fingerprint identification that had led to a prominent misidentification. The FBI had erroneously detained an American in Portland, Oregon and held him for two weeks as a material witness based entirely on a latent fingerprint recovered from the 2004 bombing of the Madrid commuter train system. An FBI examiner concluded that the fingerprints matched with "100% certainty" although Spanish authorities were unable to confirm the match. The review committee concluded that the FBI's misidentification had occurred primarily as a result of "confirmation bias".[76]

With respect to validity as applied, there are a number of open issues:[77]

- **confirmation bias** which involves examiners often altering the features that they initially mark in a latent print based on comparison with an apparently matching exemplar. This could be prevented by having examiners complete their analysis before looking at any known fingerprint
- **contextual bias** which involves the risk that examiners can be influenced by any irrelevant information about the facts of the case, and
- **proficiency testing** which involves ensuring an examiner's capability is such as to ensure accurate judgments.

PCAST recommends that improvements be made to latent print analysis as a subjective method and more importantly, improvements be made to convert latent-print analysis from a subjective method to an objective method.[78] This would involve analogous automated image analyses based on machine learning, as is currently found in facial recognition and the interpretation of medical images. The most important resource to encourage development of objective methods, would be the creation of huge databases containing known prints, each with many corresponding "simulated" latent prints of varying qualities and completeness.

Firearms analysis[79]

This form of analysis attempts to determine whether ammunition is or is not associated with a specific firearm based on "tool marks" produced by guns on the ammunition. The analysis is based on the idea that the tool marks produced by different firearms vary substantially enough owing to variations in manufacture and use, to allow components of fired cartridges to be identified with particular firearms.

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73 See PCAST report, above n 6, at p 87.
74 ibid at p 95.
75 ibid pp 94, 95.
76 ibid p 90. See also US Department of Justice Office of the Inspector General: A review of the FBI's handling of the Brandon Mayfield case, March 2006, at www.justice.gov/oig/special/s0601/PDF_list.htm, accessed 14/12/23.
77 See PCAST report, above n 6, at p 102.
78 ibid.
79 ibid at p 104.

The examination begins with an evaluation of class characteristics of the bullets and casings which are permanent and predetermined features arising from manufacture. If these class characteristics are different, the weapon is eliminated as a possibility. If they are similar, the examination proceeds to identify and compare individual characteristics ie markings which arise during the firing from a particular gun.

In 2005, the FBI discontinued the practice of bullet lead examinations. The technique involves comparing the quantity of various elements in bullets found at a crime scene with that of unused bullets to determine whether the bullets came from the same box of ammunition. A 2004 NRC study found there was no scientific basis for making such a determination.[80] Whilst the method for determining concentrations of various elements within a bullet was reliable, there was insufficient research and data to support drawing a connection based on compositional similarity between a particular bullet and a given batch of ammunition. It was on this basis that the FBI discontinued this form of analysis, noting that while it "formally supports the scientific foundation of bullet lead analysis",[81] manufacturing and distribution of bullets was too variable to make matching reliable.

Although firearm analysts state that the discipline has near-perfect accuracy (eg in 2009, the chief of the Firearms-Tool marks Unit of the FBI Laboratory stated that "a qualified examiner will rarely if ever commit a false positive error (misidentification)"),[82] research has shown that the foundational validity of the field has not been established. The studies have suggested that many previous studies have underestimated the false positive rate by at least 100-fold.[83] A blackbox study showed that the false positive rate was at 1 in 66, with a 95% confidence limit indicating that the rate could be as high as 1 in 46. PCAST concluded that the current evidence falls short of establishing foundational validity.[84]

Whether firearms analysis should be deemed admissible based on current evidence is a decision that belongs to the courts. However, if the evidence is allowed there should be a clear reporting of the error rates.

Validity as applied would require that a firearms expert has undergone rigourous proficiency testing and a disclosure that when performing the examination, he or she is aware of other facts that might influence the conclusion.

Footwear analysis[85]

Footwear analysis is a process that involves comparing a known subject, such as a shoe, to a complete or partial impression found at a crime scene to assess whether the object is likely to be the source of the impression. The analysis begins with a comparison of "class characteristics" eg design, physical size and general wear and then of "identifying characteristics" or "randomly acquired characteristics" eg marks on the shoes caused by cuts, nicks and gouges in the course of use.

A leading textbook on footwear identification in the United States[86] referred to a mathematical model which claimed that the chance is 1 in 16,000 that two shoes would share one identifying characteristic and 1 in 683 billion that they would share three characteristics.[87] Such claims lack scientific foundation.

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80 National Research Council, *Ballistic imaging*, The National Academies Press, Washington DC, 2008, p 3.
81 Federal Bureau of Investigation, "FBI laboratory announces discontinuation of bullet lead examinations", National press release, 1 September 2005.
82 S Bunch et al, "Is a match really a match? A primer on the procedures and validity of firearm and toolmark identification" (2009) 11(3) *Forensic Science Communications*.
83 See PCAST report, above n 6, p 109.
84 ibid at p 110.
85 ibid at p 114.
86 W Bodziak, *Footwear impression evidence: detection, recovery and examination*, 2nd edn, CRC Press, Florida, 2000.
87 Based on a mathematical model in R Stone, "Footwear examinations: mathematical probabilities of theoretical individual characteristics" (2006) 56(4) *Journal of Forensic Identification* 577.

The mathematical model is entirely theoretical and makes many unsupported assumptions.[88] The entire process — from choice of features to include (and to ignore) and the determination of rarity — relies entirely on an examiner's subjective judgment. Studies in Europe[89] and Israel[90] which presented examiners with mock cases, reported considerable variation in their answers. The important question however is not one of consistency (whether the same answers were given) but one of accuracy (whether the right answer was given).

PCAST concluded that there are no appropriate blackbox studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specifying identifying marks.[91] Such associations are not supported by meaningful evidence or estimates of their accuracy and are thus not scientifically valid.

By contrast in the UK, comparison evidence of footwear marks left at crime scenes with control footwear impressions by a suitably qualified footwear examiner is admissible. The expert can compare the crime scene footprint with the suspect's footwear and assess the degree to which the pattern size and configuration as well as mould detail match as well as any similarities in the damage or wear.

In *R v T,*[92] the Court of Appeal concluded that it was permissible for an expert who has determined that the suspect's footwear could have made the footprint, to express a more definitive opinion as to the likelihood of the match based on his or her experience. The expert must set out the factors which permit the expression of a more definite evaluative opinion including any data on which reliance was placed. However, the expert is obliged to declare that the opinion is subjective and based on experience. Use of the word "scientific" is to be eschewed because it gives a misleading impression of a degree of precision and objectivity which is not present in the current state of this area.

The Court noted that in relation to footwear evidence there is no sufficiently reliable database to permit the calculation of a likelihood ratio that marks were made by a particular item footwear. A likelihood ratio is arrived at by dividing the probability that the evidence in question was attributable to the accused or an item belonging to the accused by the probability that the evidence was attributable to another person. To attribute a mathematical value to the likelihood was problematical as there was not a sufficiently reliable database providing figures as to the numbers of similar footwear, with the relevant matching characteristics: per Lord Justice Thomas at [86].

See also *R v Smith.*[93] Evidence of footmarks matching footwear of the accused was held to be admissible as part of the circumstantial evidence in the case.

Hair analysis[94]

This form of analysis is a process by which examiners compare microscopic features of hair to determine whether a particular person may be the source of a questioned hair. PCAST concluded that the studies do not establish the foundational validity and reliability of hair analysis. A 2002 FBI study found that in 9 of 80 cases (11%) where there had been an initial conclusion that the hairs were microscopically indistinguishable, DNA analysis showed that the hairs actually came from different individuals.[95] These shortcomings underscore why it is important that quantitative information about the reliability of these methods should be clearly stated in evidence eg the frequency of false associations and hair analysis.

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88 See PCAST report, above n 6, at p 115.
89 H Majamma and A Ytti, "Survey of the conclusions drawn of similar footwear cases in various crime laboratories" (1996) 82(1) *Forensic Science International* 109.
90 Y Shor and S Weisner, "Survey on the conclusions drawn on the same footwear marks obtained in actual cases by several experts throughout the world" (1999) 44(2) *Journal of Forensic Science* 380.
91 See PCAST report, above n 6, p 117.
92 [2010] EWCA Crim 2439 at [97]–[99].
93 [2011] 2 Cr App R 16 at [75], [84] and [85].
94 ibid at p 118.
95 ibid at p 121.

A 1984 paper studied hairs from 17 pairs of twins (9 fraternal, 6 identical and 2 unknown zygosity) and one set of identical triplets.[96] The hairs from identical twins showed no greater similarity than the hairs from fraternal twins. In the test designed to simulate forensic casework, two examiners were given seven challenge problems, each consisting of comparing a questioned hair to between 5 and 10 hairs. The false positive rate was 1 in 12, which is approximately 3300 times higher than the 1984 paper asserted.

Ear prints

The Crown Prosecution Service guidelines on expert evidence[97] state that if an ear print is found at the scene of a crime, it is permissible when a suspect is arrested to take an ear print, anonymise it and place it with other prints for comparison with the print found at the scene. The guidelines note that there is no national database against which such an ear print can be compared.

In *R v Dallagher,*[98] the Court of Appeal undertook an extensive review of the learning surrounding this area of expert evidence. It was noted that the expertise of ear print comparison was in its relative infancy and there were not many persons involved with it. The evidence in contest, was ear prints left on the glass of a window which had been the point of forced entry into the home of a 94-year-old, disabled victim who was murdered. The windows had been cleaned three or four weeks earlier. The prints were examined by two experts. They compared them with control prints provided by the accused and others and were satisfied that the ear prints found at the scene matched the control prints provided by the accused who lived not far away and who had committed a number of dwelling house burglaries, frequently effecting entry by means of a window.

In giving the judgment of the Court, Lord Justice Kennedy stated at [23]:

> It is accepted that there is no basis for excluding evidence of what was found at the scene, including the evidence of the ear prints on the glass. When the appellant was arrested he provided ear prints which, having been anonymised, were put with other prints and compared with the prints found at the scene. It is difficult to see on what basis it would be possible to exclude the evidence of those steps having been taken as part of the investigatory process, or the evidence of the conclusion reached by the examiner.

His Lordship reviewed a number of earlier authorities relating to voice identification, facial mapping and psychological evidence (relating to the deceased's state of mind), referred to *Daubert* and *Frye* and concluded at [29] that provided:

> the field is sufficiently well-established to pass the ordinary tests of relevance and reliability, then no enhanced test of admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere [adopting the words of the authors of C Tapper, *Cross and Tapper on Evidence*, 10th edn, Oxford University Press, 2005 at p 523].

The issue of the weight to be attached to the evidence was more problematical for the Court. The first Crown expert witness concluded that the same ear made the suspect print and the control print in terms of being "absolutely convinced". The second Crown witness was less emphatic stating that he held a "firm opinion that it is very likely to be the same person but … (he could not) be 100% positive". The context of the evidence adduced was that the experts accepted that they were working on the assumption that any questioned ear print can only be ascribed to one ear; that each ear and ear print is discernibly different; that that assumption was supported by relatively limited information and also that comparisons of this kind could not be expressed in terms of statistical probability. Given this context, the Court of Appeal was not critical of the way in which the evidence was adduced but encouraged an inclusion in the expert evidence of the premise that the assumptions were correct and that the expert was unable to find

96 ibid at p 120.
97 *Expert evidence*, above n 12.
98 [2002] EWCA Crim 1903.

any difference between the control print and the questioned prints other than differences for which he or she could account. In short, if the expert exposed the underlying assumptions (and their weaknesses or strengths), the matter of the weight to be attributed to the evidence was for the jury.

In *R v Kempster*[99] a further case involving ear print expert evidence, the Court of Appeal endorsed the view in *Dallagher*, but cautioned against expert evidence to the effect that gross features alone of an ear are capable of providing a precise match (although that opinion may be justified where the minutiae can be identified and matched): per Lord Justice Latham at [27] and [28].

Conclusion

PCAST concluded that many forensic feature-comparison methods have historically been assumed, rather than established to be foundationally valid based on appropriate empirical evidence.[100] It is only in the past decade that the forensic science community has begun to recognise the need to empirically test whether specific methods meet the scientific criteria for scientific validity. Accordingly, it may be that some forensic feature-comparison methods may be rejected by courts as inadmissible because they lack adequate evidence of scientific validity.

In its recommendations to the judiciary, PCAST encouraged the courts to take into account the appropriate scientific criteria for assessing scientific validity including:[101]

- **foundational validity** that testimony is the product of reliable principles and methods, and
- **validity as applied** that an expert has reliably applied the principles and methods to the facts of the case.

In addition, they recommended that judges should not permit statements suggesting or implying greater certainty, which statements are not scientifically valid.

PCAST identified other types of forensic evidence which were beyond the scope of the report but required urgent attention: arson science and abuse of head trauma commonly referred to as "shaken baby syndrome".

Testimony concerning forensic evidence

By way of postscript, PCAST also examined the terms often adopted by expert witnesses in relation to the certainty of their conclusions and arrived at the following results. Reviews of trial transcripts found that expert witnesses have often overstated the probative value of their evidence, going far beyond what the relevant science can justify. Three examples:[102]

(1) conclusions are expressed to be "100% certain"; have "zero" "vanishingly small", "minimal" or "microscopic" error rate. Such statements are not scientifically defensible.

(2) evidence can be "individualised" eg using markings on a bullet to attribute it to a specific weapon "to the exclusion of every other firearm in the world"; and

(3) the result being true "to a reasonable degree of scientific certainty". This phrase has no generally accepted meaning in science even though it implies certainty.

This is a further aspect of expert evidence which requires continue to scrutiny.

A number of interesting observations can be made arising out of the PCAST report: with the advent of artificial intelligence and greater computing power (as shown in the access to automated image analysis of fingerprints), the comparative ease and less cost of undertaking forensic "feature-comparison"

99 [2008] EWCA Crim 975.
100 ibid at p 122.
101 ibid at p 145.
102 ibid.

methods may encourage more emphasis on the question of reliability of expert evidence. To require the reporting of error rates for such methods as a matter of course, would also lead to greater confidence in expert conclusions.

An insistence that expert evidence be scrutinised for its foundational validity and validity as applied would also be helpful — this is so because as is demonstrated in relation to footwear analysis in the English context, an expert may offer a subjective opinion based on experience. Similarly, the admission of ear print analysis in the UK, given its questionable reliability, in my view, calls for added scrutiny. In any event, descriptors such as "scientific" evidence in relation to novel or untested "expert evidence" areas should be eschewed. To do otherwise, runs an unacceptable risk of wrongful convictions and detracts from the proper administration of justice.

In concluding Part 1 **Expert evidence and significance of reliability to admissibility** of this paper, I stated that the result of these authorities may be summarised as follows: the issue of reliability of expert evidence will not generally arise when the admissibility of that evidence is considered, save for the following exceptions: whether the evidence (with its degree of unreliability) is relevant, cf s 55; whether in considering the discretion in s 135, is the evidence so inherently incredible, fanciful or preposterous that it could cause or result in undue waste of time (or query: be misleading or confusing?) and whether the asserted unreliability of the evidence warrants a warning to the jury pursuant to s 165?

Furthermore, I offered the view that there is much to recommend the approach of Gageler J in *IMM*, that the conceptual framework of the *Evidence Act* admits of the possibility that relevant evidence will lack probative value because it is not reliable. Given the substantial contrary views, the issue may be revisited by the High Court or legislatively in the future.

Whether this is so or not, I adhere to the earlier view that the effect of not grappling with the issue of reliability may result in the reduction rather than the enhancement of the fundamental principle that an accused is to receive a fair trial. I consider that to attempt to meet the aspiration that justice be done in legal proceedings, it is necessary to continue to scrutinise the reliability and validity of expert evidence. That is the purpose of this paper.

Judicial bullying: let's have a conversation*

Kate Eastman AM SC†

Bullying may be difficult to define, but examples of bullying in courtroom situations are intimidation, threats, humiliation, shouting, sarcasm, victimisation, physical, verbal or emotional abuse, belittling, ostracism, rumour-mongering and disrespect. The courtroom is hierarchical and adversarial. An experience of bullying can undermine a practitioner's confidence and capacity to work, and diminishes public trust in the integrity of the judicial system. The general workplace laws that regulate bullying and harassment do not apply, or are inadequate to respond to, bullying in a courtroom setting. The Quality of working life surveys conducted by the NSW and Victorian Bar Associations and the International Bar Association found bullying by judicial officers to be widespread. The Law Council and Australian Bar Association have published professional standards for judicial officers, and courts have introduced policies. The author makes a number of practical suggestions on how to respond to judicial bullying and options for getting assistance and making a complaint.

> Bullying, like all unacceptable behaviour, also erodes trust.[1]

Introduction

A courtroom is a unique working environment. It is hierarchical, adversarial and stressful. The stakes are high. The outcomes can be life changing.

Barristers' work is in public, for all to see. Even more so with online and live-streamed hearings. 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 or control over who will be our opponents or the judges we appear before. We cannot object or refuse to appear before a particular judge because we don't like the judge or the judge's style.

While we may appear before the same judge many times, for our clients it may be their one and only experience in court or with a judge. When we are in court, our clients see us play a particular role. In the court setting, our language and demeanour may be different when addressing the judge compared to our communication style with clients and colleagues. We observe a level of formality in the courtroom setting that is laden with rituals and rules with respect to the nature of our engagement with a judge during trial.[2] We must observe our ethical duties to the court.

When we become part of this culture and its 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.[3]

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† Barrister, New Chambers.

1 T F Bathurst, "Trust in the judiciary", Opening of Law Term Address, 3 February 2021.

2 See for example *Charisteas v Charisteas* (2021) 273 CLR 289 at [11]–[23] on the protocols around communications between a judge and counsel during a trial or when judgment is reserved.

3 S Le Mire and R Owens "A propitious moment? Workplace bullying and regulation of the legal profession" (2014) 37(3) *UNSW Law Journal* 1030 at 1031.

In his article, "Bullying from the bench", Professor Steven Lubet, the Director Emeritus of the Bartlit Center of Trial Advocacy at Northwestern University describes the "stylized demonstrations of obeisance" in litigation:[4]

> 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.

Arguably, the formality, obeisance and ethical obligations should all operate to make working in a courtroom a psychologically safe working environment free from bullying and harassment.

Professor Amy Edmondson describes "psychological safety" in a workplace as follows:[5]

> The term is meant to suggest neither a careless sense of permissiveness, nor an unrelentingly positive affect but, rather, a sense of confidence that the team will not embarrass, reject, or punish someone for speaking up. This confidence stems from mutual respect and trust among team members.

She makes the point that psychologically safe workplaces are not about being "nice". Likewise, it is not about feeling comfortable all the time.[6] Rather it is about knowing the boundaries and what to expect when working in a particular workplace setting.

Yet, we know a court room can be an unsafe working environment. A former Chief Justice of the Federal Court, the Honourable James Allsop AC said:

> 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.[7]

I note his Honour was admitted to the Bar in 1981.

More than forty years on, "blood sport" continues to be used to describe the experience of judicial bullying. In October 2023, the Honourable Judge Glen Cash of the District Court of Queensland delivered a speech titled "Judicial bullying: the last of the legal bloodsports?". Judge Cash said:[8]

> The first is the literal meaning of the phrase — a kind of bloodsport that takes place in the forensic, rather than gladiatorial, arena. The second sense … is the idea that judicial bullying is a bloodsport that is "legal" because it is, to some degree, tolerated or expected in our adversarial system.

A review of papers and presentations about judicial bullying reveal it is not uncommon for current or retired judges to recount their experiences of being bullied prior to their judicial elevations. During seminars or in writing, current and retired judges refer to their time as advocates and many recall, by name, the judges who bullied them. They often recount a description of the bullying and how they felt in the moment. However, most do not disclose whether they made a complaint or took any other action

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4 S Lubet, "Bullying from the bench" (2001) 5 *Green bag* 2D 11 at 12, cited in A Smith, "Judges as bullies" (2018) 46(1) *Hofstra Law Review* 253 at 254, fn 6; see also G Cash, "Judicial bullying: the last of the legal bloodsports?", presented to the Sunshine Coast Bar Association Conference, Alex Surf Club, 7 October 2023, at p 12 accessed 20/2/24. Cash draws parallels between the hierarchical and obeisant nature of the military and the courtroom, noting the high rates of bullying in the military.

5 A Edmondson, "Psychological safety and learning behavior in work teams" (1999) 44(2) *Administrative Science Quarterly* 350 at 354.

6 A Gallo, "What is psychological safety?", *Harvard Business Review*, 15 February 2023, accessed 20/2/24.

7 J Allsop, *The culture of the legal profession: lessons of the past and hope for the future*, Queensland Law Society Symposium, 11 March 2021, at p 5, accessed 1/2/24.

8 Cash, above n 4.

to address the bullying conduct.[9] In telling their lived experience, there appears to be a tacit acceptance that bullying was part of the culture or a rite of passage.[10]

The war stories are not confined to judges who experienced bullying in a former professional life. Older and experienced practitioners also share their lived experience of being humiliated or bullied when talking about what to expect when becoming a barrister or their personal journeys of a life at the Bar.

In June 2022, The Right Honourable Lady Rose of Colmworth DBE, Justice of the Supreme Court of the United Kingdom spoke on the topic of "What makes a good judge?".[11] She referred to the changing attitude to judicial rudeness and bullying. She said:[12]

> 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.[13]

The war stories reveal the lived experience of being bullied is seared in one's memory. Not just what was done but the personal impact or feeling. Bullying 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. Being on the receiving end of judicial bullying can be profound and materially change the way a barrister approaches any appearance in court. Once bullied, there is an underlying fear and concern it may happen again, either by the same judge or another judge.

The war stories reveal why bullying undermines psychological safety in the shared workplace of the court or tribunal room. Isolated incidents of bullying or harassment may cause a person to feel bullied and have an adverse effect on their health and safety. 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".[14]

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 and we have been treated with respect.

As the Honourable Michael Kirby AC CMG said in 2014, it was essential to keep the problem in perspective:[15]

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9 Allsop, above n 7; see also R Robson and J Wilson, "Judges on ethics: judicial conduct in the new millennium", Twilight Lecture, Deakin University Law School, August 2022, accessed 1/2/24; N Neilson, "Judicial Q&A: what judges want from young barristers in the courtroom", *Lawyers Weekly*, 2 November 2020, accessed 1/2/24; M Kirby, "Judicial stress and judicial bullying" (2014) 14(1) *QUT Law Review* 1, at 11, accessed 1/2/24.

10 See also the comments of Julann Tiernan on the "code of silence" that "exists out of fear" regarding bullying behaviour in the profession: L Croft, "Bullying still way too commonplace in Australia's legal profession", *Lawyers Weekly*, 13 December 2023, accessed 20/2/24.

11 V Rose, "What makes a good judge?", The Barnard's Inn Reading, 16 June 2022, accessed 1/2/24.

12 ibid at p 6.

13 ibid.

14 A comment made by Magistrate Jessica Kerr reported by A Bradley, "Judges, bullying and a broken complaints system", Radio New Zealand (online), 23 September 2021.

15 M Kirby, above n 9, at 10–11.

> 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.

We need to change the conversation about judicial bullying from war stories and consider what we as barristers can do, separately and collectively. I want to challenge the entrenched view that bullying is inevitable, a rite of passage and, if you survive, a war story you can tell those following you into the profession as part of your cache of war stories about life at the Bar. We need to have a conversation.[16] To address judicial bullying, we need to understand what it is understanding of what it is, why it occurs and what structural or organisational factors are needed to eliminate bullying or the risk of bullying conduct continuing.

What is and what is not workplace bullying

Bullying cannot be exhaustively defined. In a workplace context, bullying occurs by words or actions and may be described as intimidation, threats, humiliation, shouting, sarcasm, victimisation, verbal abuse, emotional abuse, belittling, harassment, coercion, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mocking and discrimination.[17]

Employment laws

Under the *Fair Work Act* 2009 (Cth) (FW Act), a "worker" is bullied at work if an individual (or a group of individuals) repeatedly[18] 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 safety.[19]

Whether the discomfort experienced by a worker rises to the level of bullying must be determined on its facts, having regard to the particular circumstances and context. Not all behaviour that causes distress or discomfort will be bullying.[20] For example, in a workplace setting, giving feedback on a person's performance, requiring improvement in performance or taking disciplinary action is not bullying if it is reasonable or may be characterised as "reasonable management action". As the Fair Work Commission explains:[21]

> 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

16 International Bar Association, "Us too? Bullying and sexual harassment in the legal profession", *Report*, 2019, accessed 20/2/24; Croft, above n 10; K Mason, "The court as a workplace: notes for starting a conversation within the County Court", presented at the County Court of Victoria Conference, 22 March 2016; V Bell, "Keynote address", presented at the Tristan Jepson Memorial Foundation Lecture, 23 October 2014, accessed 20/2/24.

17 See description of "bullying" in *Momirovski* [2023] FWC 3299 at [86]; *Mac v Bank of Queensland Ltd* [2015] FWC 774 at [99].

18 *Blagojevic v AGL Macquarie Pty Ltd* [2018] FWCFB 4174 at [17]: "a one-off incident will not be a sufficient basis … Provided there is more than one occurrence, there is no specific number of incidents required to meet the condition of 'repeated' behaviour, nor does the same specific behaviour have to be repeated".

19 *Fair Work Act* 2009 (Cth) s 789FD. See also the Fair Work Commission, *Orders to stop bullying benchbook*, updated June 2023, accessed 24/1/24.

20 *Blagojevic v AGL Macquarie Pty Ltd*, above n 18, at [15]; *Application by GC* [2014] FWC 6988 (GC) at [47].

21 See Fair Work Commission, "About reasonable management action", accessed 24/1/24.

- 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.

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.[22]

Professional conduct and ethical rules

Bullying is described in r 125 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) to mean:

> unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate or cause serious offence to a person.

Unlike the FW Act, this definition does not require the barrister to engage in "repeated" behaviour. The definition captures a type of behaviour (assessed as "unreasonable") that could "reasonably" be expected to have a particular effect or impact on another person. Barristers who engage in bullying breach r 123(1)(c).[23]

The prohibition applies to bullying in the course of, or in connection with legal practice or their profession and includes:[24]

> conduct in connection with a barrister's profession includes, but is not limited to:
>
> (a) conduct at social functions connected with the bar or the legal profession, and
>
> (b) interactions with a person with whom the barrister has, or has had, a professional relationship.

Work health and safety laws

Workplace bullying is recognised as a health and safety issue.[25] 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) 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.[26]

Safety includes a positive duty to eliminate psychosocial hazards. Safe Work Australia says:[27]

> A psychosocial hazard is anything that could cause psychological harm (eg, harm someone's mental health). Common psychosocial hazards at work include:
>
> - violence and aggression
> - bullying
> - harassment, including sexual and gender-based harassment.

Kylie Nomchong SC, the former Chair of the NSW Bar Association's Wellbeing Committee, has suggested:[28]

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22 K Nomchong, "Judicial bullying: the view from the bar" (2018) 30(10) *JOB* 95.
23 See the 2022 amendment to the Legal Profession Uniform Conduct (Barristers Rules) 2015 (NSW).
24 Legal Professional Uniform Conduct (Barristers) Rules 2015 (NSW) r 123(2).
25 SafeWork Australia has published a range of guidelines and model policies to address workplace bullying, eg, *Bullying*, accessed 1/2/24.
26 *Work Health and Safety Act* 2011 (NSW) s 19(2).
27 Safe Work Australia, "Psychosocial hazards", accessed 20/2/24.
28 Nomchong, above n 22.

> [T]here 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*. If so, court staff are workers pursuant to s 7 of the *Work Health and Safety Act*, and courts are a workplace under s 8 of the *Work Health and Safety 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 *Work Health and Safety 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]

Meeting the WHS Act obligations requires more than a response after the bullying occurs. It requires proactive action. This means identifying risk, assessing the risk and developing a proactive plan to eliminate the risk. This is not an easy task in the area of psychosocial risks and promoting psychological safety. We can contemplate what physical risks might occur in a courtroom, but psychosocial risks in a courtroom will arise because of the interpersonal interactions in the courtroom.

Sexual harassment and hostile working environments as a form of bullying

In the context of workplace bullying, sexual harassment is a form of bullying. The *Sex Discrimination Act* 1984 (Cth) (SD Act)[29] proscribes sex-based harassment, sexual harassment, being subjected to a hostile working environment, discrimination and victimisation as unlawful conduct:

- **sex-based harassment** is 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.[30]
- **sexual harassment** is unwelcome sexual advances, requests for sexual favours or sexual conduct if a reasonable person having regard to all the circumstances, would have anticipated the possibility of the conduct offending, humiliating or intimidating the person to whom the conduct is directed.[31]
- **being subjected to a hostile working environment** occurs when any conduct in a workplace that a reasonable person, having regard to all the circumstances, would have anticipated would have the possibility of offending, humiliating or intimidating a person because of the person's sex.[32]

The Respect@Work report[33] highlighted the prevalence of sexual harassment in Australian workplaces and the gaps in understanding and legal protections. The legal profession and the courts have not been immune to incidents and allegations of sexual harassment.

On 22 June 2020, the Honourable Susan Kiefel AC KC, Chief Justice of the High Court of Australia, announced the High Court had investigated allegations of sexual harassment against a former Justice and it acted to commission an independent investigation. The investigation found that six former associates had been harassed.[34] At the time, the Chief Justice said "[t]here is no place for sexual harassment in any workplace".[35] She apologised on behalf of the High Court to the women.

The judge concerned did not participate in the investigation and through his lawyers said the judge "categorically denied" the allegations.[36]

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29 For NSW, see also *Anti-Discrimination Act* 1977 (NSW) ss 22A, 22B, 24, 25, 50.
30 Section 28AA of the SD Act.
31 Section 28A of the SD Act.
32 Section 28M(2) of the SD Act.
33 Australian Human Rights Commission, *Respect@Work: sexual harassment national inquiry*, Final Report, 5 March 2020, accessed 21/2/24.
34 See also C Knaus, "Dyson Heydon: High Court invites 100 former associates to tell of their experiences", *The Guardian*, 25 June 2020, accessed 21/2/24.
35 S Kiefel, "Statement by Chief Justice of the High Court of Australia", 22 June 2020, accessed 21/2/24.
36 C Knaus, "Former High Court Justice Dyson Heydon sexually harassed staff, inquiry finds", *The Guardian*, 22 June 2020, accessed 21/2/24.

The revelations were a "wakeup call" to the legal profession and resulted in a number of reviews into relevant policies and practices.[37] The High Court subsequently introduced a *Justices' policy on workplace conduct* in March 2022 and updated it in November 2023.[38]

On 14 July 2020, the Attorney-General of Victoria and the Chief Justice of the Supreme Court of Victoria jointly initiated a review of sexual harassment across the Victorian courts and Victorian Civil Administrative Tribunal. The Supreme Court published the investigation report and the initiatives implemented in response to the report, including further investigations, training and education and revised policies.[39]

In October 2020, the South Australian Attorney-General asked the Commissioner for Equal Opportunity to conduct an independent review into harassment in the legal profession. This resulted in a report and 16 recommendations.[40]

Allegations about inappropriate sexualised behaviour by judicial officers continued to emerge.[41] The allegations were generally in relation to a judicial officer's treatment of associates or court staff. 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.[42]

Following amendments in September 2021, the SD Act applies to barristers (as persons conducting a business or undertaking) and also to Commonwealth and NSW judicial officers.[43] In December 2021, the Law Council of Australia issued the *National model framework addressing sexual harassment for the Australian legal profession*.[44]

In December 2022, the SD Act was amended to introduce s 47C, requiring "employers" and "persons conducting a business or undertaking" to take reasonable and proportionate measures to eliminate, as far as possible, sexual harassment, sex-based harassment, sex discrimination, conduct creating a workplace environment that is hostile on the ground of sex, and related acts of victimisation.

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37 A Davies and N Zhou, "Dyson Heydon: Australian courts review how they handle sexual harassment in wake of case", *The Guardian*, 24 June 2020, accessed 21/2/24.

38 High Court of Australia, *Justices' policy on workplace conduct*, March 2022, accessed 21/2/24.

39 See Supreme Court of Victoria, "Respect and sexual harassment", accessed 21/2/24; Court Services of Victoria, "Preventing sexual harassment in Victorian courts and tribunals", accessed 21/2/24.

40 See Equal Opportunity Commission, *Report of the review of harassment in the South Australian legal profession*, 9 April 2021, accessed 21/2/24; see also the current further review, *2024 review of harassment in the legal profession (SA)*, accessed 21/2/24.

41 Sexual Harassment Claims, "District Court Judge resigns over sexual harassment allegations", 25 May 2023, accessed 21/2/24; C Campbell, "Adelaide magistrate accused of sexual harassment loses attempt to have investigation quashed", *ABC News*, 16 May 2022, accessed 21/2/24; N Neilson, "Victorian Supreme Court judge sexually harassed two associates", *Lawyers Weekly*, 17 February 2022, accessed 21/2/24; J Maley, "Federal Circuit Court judge found to have harassed two young women", *Sydney Morning Herald*, 8 July 2021, accessed 21/2/24.

42 Supreme Court of NSW, *Supreme Court policy on inappropriate workplace conduct*, October 2021, accessed 21/2/24; District Court of NSW, *Workplace conduct policy*, 8 October 2020, accessed 21/2/24; Land and Environment Court of NSW, *Commissioners' code of conduct*, 18 January 2010, accessed 21/2/24. 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 *NCAT member code of conduct* addresses the conduct of members towards litigants and practitioners. The *NCAT member code of conduct* requires its members to conduct themselves appropriately: see [16] and [17] of the NSW Civil and Administrative Tribunal, *NCAT member code of conduct*, 9 July 2020; NSW Civil and Administrative Tribunal, *NCAT member terms and conditions handbook*, Version 2.6, 23 November 2021, accessed 21/2/24.

43 See also s 4(1) of the definitions of "Commonwealth employee", "Commonwealth judicial office", "State employee" and "State judicial office". See also s 109 of the SD Act — the State is deemed the "employer".

44 Law Council of Australia, *National model framework addressing sexual harassment for the Australian legal profession*, December 2021, accessed 21/2/24.

In December 2023, the Australian Bar Association released a *Best practice guide to barristers and meeting the positive duty*.[45] The advice and content contained therein are also of assistance in understanding how the positive duty could be applied effectively in the courtroom.

Judicial bullying

For the purpose of this paper, "judicial" means all judicial officers,[46] including magistrates, commissioners of inquiries and royal commissioners — it is also intended to include tribunal members and those in quasi-judicial roles. It is intended to cover all courts, tribunals and inquiries — such as Royal Commissions.

This paper is focused on conduct in the courtroom and the public aspect of bullying. I have not addressed the conduct of judicial officers in their chambers with respect to their interaction with associates, tipstaves, assistants, court staff [47] or other judges.[48] Likewise, if a judge is bullied by a barrister or solicitor.[49]

In 1995, John Basten QC (as his Honour then was) 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".[50]

In 2021, the then Chief Justice Allsop spoke about the culture of the legal profession. He said:[51]

> We are now at a moment in time where, overwhelmingly, the public and the profession, rightly so, expect a higher standard of behaviour from each other and from judges. We must meet those expectations. As repositories of privilege and power, judges are leaders in the community and so play an important part in setting or reinforcing a standard of behaviour in the legal profession generally and for the judges around them and barristers before them.

However, there is "no universally enforceable authoritative definition or set of standards for what constitutes actionable misbehaviour or misconduct of a judicial officer".[52] There is no statutory definition of "judicial bullying".

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45 Australian Bar Association, *Best practice guide to barristers and meeting the positive duty*, accessed 21/2/24.

46 *Judicial Officers Act* 1986 (NSW) s 3(1).

47 See also A Rooding et al, "Court Services Victoria receives significant fine for psychological safety breach", *King & Wood Mallesons Insights*, 31 October 2023, accessed 21/2/24.

48 See also K Mason, "Throwing stones: cost/benefit analysis of judges being offensive to each other" (2008) 82 *ALJ* 260; 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* 822; see *Judge Kalyani Kaul KC v Ministry of Justice* [2023] EAT 41.

49 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.

50 J Basten, "Should judges have performance standards?" (1995) *Bar News* 9. This paper was first delivered to the 1995 NSW Legal Convention. See also J Spigelman "Dealing with judicial misconduct", 5th World Wide Common Law Judiciary Conference, Sydney, Australia, 8 April 2003, accessed 21/2/24; and see Law Reform Commission of WA, *Complaints against judiciary*, August 2013, accessed 21/2/24.

51 Allsop, above n 7, at 7.

52 E Schindeler, "The problematic of judicial accountability" (2021) 1(2) *Legalities* 210 at 214, accessed 1/2/24.

Judicial consideration of judicial standards and judicial bullying

There is limited judicial consideration identifying whether judges have duties with respect to the treatment of legal practitioners in court and the content of the duty.[53]

In *Damjanovic v Sharpe Hume & Co*[54] Mason P, Sheller JA and Rolfe AJA described the duties of judicial officers in the conduct of the trial. At [159], they referred to *Toner v AG NSW*[55] where Kirby P, Clarke JA and Hope AJA said:[56]

> Whilst there are duties of courtesy imposed upon legal representatives as a [corollary] of the privileges they enjoy as advocates, there is a correlative duty in judicial officers to listen patiently and carefully and to retain self control at all times.

They went on to address the duties of judicial officers, as follows ([160]–[163]):

> The duties that judicial officers listen patiently and carefully and retain self control at all times have various purposes. First, a patient and careful listening to the evidence will enable the judicial officer to understand, as well as possible, the cases being made by the parties and the evidence relevant to those cases. On that basis the judicial officer is in a far better position to make a proper evaluation of the evidence in the light of the issues raised and the submissions made. In these circumstances, the judicial officer should be in a far better position to decide the case properly, as opposed to one who does not follow those courses.
>
> Secondly, the observance of such duties upholds the standing of the Court in the community as providing careful and impartial adjudication of disputes between the litigants. Obviously, in the vast majority of cases, one party will lose. There is much anecdotal evidence to support the view that a losing party, whilst usually disappointed, will accept that situation if that party believes that his or her case has been considered properly and thoroughly — in other words if the losing party is able to say that the Court has provided him or her with a "fair go".
>
> Thirdly, the observance of these duties does not mean that the Court is obliged to listen to endless repetition or the advancing, beyond a point of reaching a proper understanding, of submissions which are groundless. However, there is a difference between that situation and allowing the orderly development of evidence and submissions. Even if the first position is reached, the Court can bring it to an end by stating that it understands the point sought to be made, assuming that it does, and inviting the party to proceed to the next point.
>
> Fourthly, and this is probably the most important consideration, failure to observe the duties leads to an erosion in the public's perception that the Court is administering the law fairly to all parties and, thus, to a lack of confidence in the administration of justice. Confidence in the judicial system plays a very important part in maintaining confidence in the orderly working of society. Conduct by a judicial officer, which may cause that confidence to be diminished, is to be deplored.

There is also limited judicial consideration of what type of conduct departs from a duty to "to listen patiently and carefully and to retain self-control at all times" that will constitute "judicial bullying".[57] Generally, any judicial consideration has arisen in the context of allegations of judicial bias[58] or claims of an unfair trial.[59]

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53 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*, 13 April 2023, published 10 July 2023, accessed 1/2/24; see the United Nations Office on Drugs and Crime,https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf*Bangalore principles of judicial conduct*, Vienna, 2018, accessed 1/2/24.

54 [2001] NSWCA 407 at [159] ff.

55 [1991] NSWCA 267.

56 ibid at 10.

57 *R v T, WA* (2014) 118 SASR 382; *Eliezer v Sydney Water Corporation* [2021] NSWDC 66 (on appeal *Eliezer v Sydney Water Corporation* [2021] NSWCA 300.

For example, in *Adacot and Sowle*[60] the appellant alleged apprehension of bias and denial of a fair trial.[61] The judicial officer's conduct included:

- impugning the honesty of counsel[62]
- impugning the professionalism of counsel[63]
- rudeness to counsel[64]
- hectoring, bullying, insulting and demeaning behaviour.[65]

The Full Court concluded:[66]

> The tone, nature and ferocity of his Honour's comments could never be seen as justified, and in our view resulted in the [appellant] not receiving a fair trial and raised the identified apprehended bias, that no matter what the [appellant's] case was as presented, it would be rejected.

There have been a number of cases describing judicial bullying, but they are often grounds for apprehended bias applications or claims of an unfair trial.[67] These have included:

- critical comments that are purely gratuitous or serve only to insult, harass or threaten a person[68]
- criticism on a personal level[69]
- vulgar language, discriminatory language and swearing[70]
- threats, both implicit and explicit[71]
- shouting or speaking in a menacing tone[72]
- in a tribunal, when the member's tone and manner in questioning a litigant was loud, aggressive and interrupting, often raising his voice and displaying impatience, rudeness, and being scornful or incredulous about the litigant's evidence.[73]

Policy positions describing judicial bullying

There are some policies addressing and describing judicial bullying. 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:[74]

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58 *Ozmen v Culture Map Pty Ltd (No 1)* [2020] FCA 1890; *R v T, WA*, above; *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2016] NSWCA 23; *Dennis v Commonwealth Bank of Australia* [2019] FCAFC 231 at [35]–[36].

59 *Galea v Galea* (1990) 19 NSWLR 263; *Royal Guardian Mortgage Management Pty Ltd v Nguyen* (2016) 332 ALR 128; *Ellis v R* [2015] NSWCCA 262; *AB v Magistrates' Court of Victoria at Heidelberg* [2011] VSC 61 at [93], *Reznitsky v DPP (NSW)* [2014] NSWCA 79 at [38].

60 [2020] FamCAFC 215.

61 ibid at [2].

62 ibid at [24]–[35].

63 ibid at [36]–[67].

64 ibid at [68]–[74].

65 ibid at [75]–[98].

66 ibid at [108]. See also *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144 generally and at [32], [34]; *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113 at [105].

67 See *George v Fletcher (Trustee)* [2012] FCAFC 148 at [166]–[167] where the remarks in question were labelled "injudicious" but did not create an apprehension of bias. "Harsh tones", mere discourtesy or abruptness does not give risk to a reasonable apprehension of bias: *VFAB v Minister for Immigration* [2003] FCA 872 at [44] and [81] per Kenny J and *SZNVM v Minister for Immigration and Citizenship* [2010] FCA 261 at [31] per Katzman J.

68 *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407 at [43], [46]; *Gambaro v Mobycom Mobile Pty Ltd* , above n 66, at [32]; *Jorgensen v Fair Work Ombudsman*, above n 66, at [119], [126]; *George v Fletcher (Trustee)*, ibid, at [160]–[167].

69 *Finch v Finch* [2020] FamCAFC 60 at [40]–[46], [65]; *Cook v R* [2016] VSCA 174 at [99]; *Adacot and Sowle*, above n 60, at [103].

70 *Damjanovic v Sharpe Hume & Co*, above n 68, at [157]–[159]; *Were v Police (SA)* [2003] SASC 116 at [13]; *Mills v Police (SA)* [2000] SASC 362 at [23]–[33]; *Sideridis v Police (SA)* [2001] SASC 90 at [11]–[13]; *Naisauvou v Minister for Immigration and Multicultural Affairs* [1999] FCA 86 at [29]–[34].

71 *Adacot and Sowle*, above n 60, at [24]–[35]; *Magistrates' Court of Victoria at Heidelberg v Robinson* [2000] VSCA 198 at [12], [25]–[26]; *Barmettler v Greer* [2007] QCA 170 at [40].

72 *Dennis v Commonwealth Bank of Australia* [2019] FCAFC 231 at [35], [37].

73 *Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 41 at [49]–[51].

74 The Council of Chief Justices of Australia and New Zealand by AIJA, *Guide to judicial conduct*, 3rd edn, AIJA, December 2022, at p 8.

> 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.[75] It is perhaps not a matter which is self-evident, nor does it necessarily go "without saying".

In its 2022 consultation paper on judicial bullying, the Judicial Commission of Victoria acknowledged there is "a challenge in identifying when and where judicial conduct oversteps" the mark of robust and vigorous legal debate and adversarial exchanges "and can be characterised as bullying".[76]

Following consultations with the Victorian legal and court sector, the Judicial Commission of Victoria published a *Judicial conduct guideline on judicial bullying* in May 2023. It applies in court and to the treatment of persons appearing in court.[77] The guideline describes "judicial bullying" as follows:[78]

> Judicial bullying is conduct by a judicial officer towards an individual that:
>
> (a) is unreasonable; and
>
> (b) includes, but is not limited to, conduct that a reasonable person would, having regard to all the circumstances, perceive as belittling, humiliating, insulting, victimising, aggressive or intimidating.
>
> What is unreasonable is to be assessed objectively, with regard to the following factors:
>
> (a) the functions of the judicial officer;
>
> (b) the subject or target of the conduct;
>
> (c) the tone or nature of the conduct;
>
> (d) whether the conduct is momentary or sustained;
>
> (e) the location, including the jurisdiction and type of proceeding (for in-court matters) in which the conduct occurs; and
>
> (f) the overall context of the conduct.

The Judicial Commission of Victoria also outlines a "standard of behaviour expected of judicial officers" relating to in-court conduct, as follows:[79]

> Robust and vigorous legal debate and adversarial exchanges are common in the courtroom. The judicial function often requires questioning and scrutinising evidence or testing and challenging submissions. Such exchanges go to the heart of the adversarial system and the interests of justice, ensuring relevant issues in a proceeding are ventilated and explored.
>
> … To the extent that such conduct is respectful and courteous it is consistent with the standards of conduct generally expected of judicial officers.
>
> Where a judicial officer engages in conduct that meets the definition of judicial bullying, then that conduct breaches the standards expected of a judicial officer. This is consistent with and reflects the principle that all persons coming before the court are entitled to be treated in a way that respects their dignity and with courtesy and respect.

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75 Chapter 4 of the *Guide to judicial conduct* 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.

76 Judicial Commission of Victoria, *Judicial bullying — consultation paper*, July 2022 at p 4 [2].

77 Judicial Commission of Victoria, *Judicial conduct guideline: judicial bullying*, May 2023, accessed 6/2/24.

78 ibid p 5.

79 ibid pp 5-6.

> It is important to recognise that momentary displays of frustration or annoyance do not necessarily evidence unprofessionalism or judicial bullying. Further, judicial officers may speak to legal practitioners in frank language and a robust way. Equally, addressing inadequate or incompetent representation (such as a lack of preparation) by a legal practitioner is not of itself inappropriate. What is relevant is how the judicial officer engages with the legal practitioner or displays any frustration or annoyance.

The Federal Circuit and Family Court of Australia's *Judicial workplace conduct policy* acknowledges there should be a "culture of respect". It states:[80]

> 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;
> - wherever possible preventing or eliminating discrimination, sexual harassment, harassment and bullying.
>
> [emphasis added]

The policy describes bullying as follows:[81]

> Bullying is repeated unreasonable behaviours that create a risk to the health and safety of a person or group of persons.
>
> Bullying can occur by:
>
> - communicating either verbally or in writing in an aggressive or disrespectful manner;
> - making unjustified or unreasonable criticism or complaints about a person;
> - imposing unreasonable work demands or constantly changing deadlines;
> - humiliating, shouting at or threatening someone;
> - setting tasks that are unreasonably below or above someone's skill level;
> - excluding someone from taking part in activities that relate to their work;
> - spreading misinformation or malicious gossip.
>
> Reasonable management action done in a reasonable manner is not bullying. This includes:
>
> - appropriate performance management;
> - providing constructive and courteous performance feedback;
> - legitimate disciplinary action;
> - reasonable supervisory practices;
> - allocating work in accordance with the terms and conditions of employment and the Court's organisational practices;
> - giving reasonable directions;
> - making a complaint about the conduct of Court employee, if the complaint is made in an appropriate and reasonable way.

80 Federal Circuit and Family Court of Australia, *Judicial workplace conduct policy*, 1 September 2021, accessed 6/2/24.
81 ibid, at p 4.

Academic research

There are some papers and articles describing judicial bullying. Douglas R Richmond in his article, "Bullies on the bench",[82] 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.

However, many of the articles and papers about judicial bullying elide examples of judicial bullying with the cause of judicial bullying or discussion why judicial bullying is a problem. I will address the "why" issue below.

In October 2021, the Judicial Commission of NSW released the *Handbook for Judicial Officers*[83] which includes a selection of papers on judicial officers' relationship with the legal profession, bullying and harassment.[84] 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 or bullying.

Prevalence of judicial bullying to identify the nature of the conduct

Understanding the prevalence of judicial bullying or examining complaints data might also provide some insight into what judicial bullying is. 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".[85]

In Australia, there is little data about the prevalence of judicial bullying.[86] The two main sources are practitioner surveys and complaints data. Neither are particularly reliable ways of identifying the prevalence of judicial bullying. Nevertheless, the surveys do reveal barristers' experience of judicial bullying and harassment is real and persistent.

In 2014, the Law Council of Australia's *National report on attrition and re-engagement*(NARS Report)[87] made the following findings: 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. The NARS Report found the experiences of bullying and harassment contributed to women leaving the legal profession.

Survey data

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.[88]

Respondents reported their experiences of different forms of judicial bullying, as follows:[89]

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82 D Richmond, "Bullies on the bench" (2012) 72(2) *Louisiana Law Review* 325.
83 Judicial Commission of NSW, *Handbook for Judicial Officers*, Sydney, 2021.
84 ibid, at "Relationship with legal profession, bullying and sexual harassment".
85 Schindeler, above n 52, at 215.
86 Compare the approach taken in the United Kingdom — see UK Bar Council, *Bullying, harassment and discrimination at the Bar*, December 2023, accessed 21/2/24; see also UK Bar Council, "Bar Council commits to address inappropriate behaviour at the Bar", Press Release, 7 December 2023, accessed 21/2/24.
87 Law Council of Australia, NARS Report, 2014, accessed 6/2/24.
88 Nomchong, above n 22. This is generally consistent with the results of a Victorian survey: Victorian Bar, *Wellbeing of the Victorian Bar*, Final Report, June 2018, accessed 21/2/24.
89 Nomchong, above n 22.

> 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.

The Australian Law Reform Commission's (ALRC) 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.[90]

Complaints data

The complaint statistics for the year ending 30 June 2023 were published in the Judicial Commission of NSW's *Annual Report 2022–2023*. The report noted:[91]

- 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 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 one withdrawn);[92]
- although there had 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%).[93]

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 publicly available data about complaints made about alleged bullying in the federal courts.

In summary, judicial bullying primarily focuses on the inter-personal interaction between the judge and advocate (sometimes also a witness) in court. Most of the examples describe verbal exchanges or judicial intervention in the way an advocate presents their case. However, anecdotally judicial bullying may also extend to other aspects of judicial behaviour, for example:

- repeated mispronunciation of an advocate's name
- comments or criticisms of an advocate's accent[94] or appearance

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90 Australian Law Reform Commission, *Without fear or favour: judicial impartiality and the law on bias*, Report No 138, December 2021, at [5.178], accessed 1/2/24.
91 Judicial Commission of NSW, *Annual Report 2022–2023*, Sydney, 2023, (Report 2022–2023) at p 43.
92 ibid.
93 ibid p 46.
94 Compare *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407.

- misgendering an advocate. Most women barristers have experienced the "thank you gentlemen" comments which are insensitive and outdated. Barristers who identify as non-binary may experience misgendering in the way the judge addresses the barrister or repeated use of inappropriate pronouns to describe a witness
- comments about pregnant women barristers and apparent reliance of common tropes or undated stereotypical views about the effect of pregnancy
- a failure to accommodate or make adjustments for an advocate with disability (there have been examples of judges expecting vision impaired barristers to read text, whispering or refusing to repeat a direction for a barrister with a hearing impairment, routinely expecting barristers to stand when a barrister uses a wheelchair or ableist language to describe a person with disability)
- imposing unreasonable timeframes for pre-trial preparation or submissions
- making unnecessary personal criticisms of advocates in reasons for judgment
- engaging in gratuitous and unfair gossip about advocates
- threatening or making unfair and unjustified professional conduct complaints about the barrister.

Why does judicial bullying occur?

Understanding why judicial bullying occurs is necessary to ensure any statutory or policy responses and developing complaints pathways to address judicial bullying are appropriate, adapted and likely to be effective. A review of the literature, particularly when judges explain why judicial bullying occurs is insightful.

In 2004, Dyson Heydon, a former Justice of the High Court of Australia, appeared to suggest that judicial bullying may be explained by a judge's response to an advocate's perceived characteristics, saying:[95]

> 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.

In 2013, the Honourable Justice Glenn Martin AM described "judicial bullying" as:[96]

> conduct engaged in by the judge against counsel which is designed to coerce that counsel into taking a particular course, not through the strength of any intellectual argument, but simply through the application of the power of the position of the person involved.

In 2023, the Honourable Judge Cash described "judicial bullying" as an abuse of power:[97]

> the vice lies in the judge's abuse of the power of their position. Even if the course desired by the judge is the proper one to adopt, it is bullying to seek to achieve it through an abuse of power in place of argument and reason.

Judge Cash has noted the "tension inherent in our system, where counsel and judges have different aims".[98] He referred to academic lawyer and ethicist, Monroe Freedman, saying:[99]

> One probable reason for that tension is the fact that the judge and the advocates have different functions. The lawyers are committed to seek justice as defined by the interests of their clients, while the judge is dedicated to doing justice between the parties.

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95 D Heydon, "Practical impediments to the fulfilment of judicial duties", *The role of the judge*, National Judicial Orientation Programme, June 2004, at p 34.
96 G Martin, "Bullying in the courtroom" (2013) 4(1) *WR* 16, quoted in Cash, above n 4, at p 7.
97 Cash, ibid.
98 ibid at p 12.
99 M Freedman, *Understanding lawyers' ethics*, 1st edn, LexisNexis, 1990 at p 73.

> From the perspective of the judge, therefore, at least one lawyer in each case is attempting to achieve something to which her client is *not* entitled. From the perspective of the lawyer, however, the judge is always poised to deprive her client of something to which the client *is* entitled.

Sometimes, judicial bullying is explained away or excused by reasons of stress and the demands of judicial responsibilities.[100] The pressures on judicial officers to manage lists and trials, deliver judgments in a timely manner with limited resources and assistance is well known.[101] The Judicial Commission of NSW's *Handbook for Judicial Officers*[102] addresses the stress and vicarious trauma risks for judges.[103] I doubt anyone would question that discharging judicial duties may be difficult and is stressful,[104] but does this really explain or justify judicial bullying — be it in court, in chambers or towards a fellow judge?

Understanding why judicial bullying occurs requires more than describing particular incidents or behaviours. As Sir Geoffrey Vos, the Master of the Rolls, said in an excellent speech delivered on 1 December 2023,[105] "I have deliberately avoided giving examples about exclusive behaviours and, even worse, about out and out bullying, harassment and discrimination. Examples sometimes cloud the message" about what can, and should be done, to provide legal communities and the judiciary with a more inclusive environment. He said "sometimes, it is valuable to be asked to stop and consider the unintended effects of conduct, that those dishing it out, probably regard as quite normal and acceptable".

To address the issue, we need to consider a broader range of factors.[106]

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.

The AIJA recently published Emerita Professor Kathy Mack's report on "Suggested criteria for judicial appointment".[107] Among many other highlighted skills and abilities, the report relevantly lists the following as important criteria:[108]

- treat others with respect, and so inspire respect and confidence
- exercise authority calmly and professionally, particularly when challenged
- maintain control of courtroom, using fair direction or intervention
- speak calmly, courteously, and patiently, even when necessary to be forceful
- use or display humour with care, never at the expense of a court participant or relying on stereotypes
- maintain appropriate demeanour even under pressure
- avoid display of sarcasm, harshness, anger, rudeness or hostility
- be aware of and thoughtfully manage one's own emotion and the feelings of others, consistent with the judicial role
- engage appropriatly with a wide range of court participants, including skilled or unskilled legal representatives, represented and unrepresented parties, witnesses, jurors and court staff; and
- be considerate, tactful and empathetic with others.

The report also notes:[109]

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100 See Neilson, above n 9.
101 J Kidd, "NSW Chief Justice Andrew Bell says judges, magistrates are 'overstretched' with caseloads 'unsustainable'", *ABC News Online*, 1 February 2024, accessed 21/2/24.
102 Judicial Commission of NSW, above n 83.
103 See Kirby, above n 9, at 11.
104 H Bowskill "Cumulative trauma and stress as a judicial officer", presented at Brisbane Magistrates Court, 25 March 2021, accessed 21/2/24.
105 G Vos, "The relevance of equality, diversity and inclusion for the legal sector and the Inns of Court", presented at Ashworth Centre at Lincoln's Inn at 6 [43], 4 [26]; recording online at https://www.youtube.com/watch?v=vH2CSg-D7qs.
106 Le Mire and Owens, above n 3.
107 K Mack, "Suggested criteria for judicial appointment", Report prepared for the AIJA, January 2024, accessed 21/2/24.
108 ibid at pp 9–10.
109 ibid at pp 12–13.

> Undesirable judicial conduct, including bullying and harassment, and judicial stress, trauma and wellbeing all entail judicial emotion, and the intersection of judicial emotion with the feelings and behaviours of others. Improved emotion awareness will enable judicial officers to better manage their own responses to the demands of their work and so reduce undesirable conduct and improve wellbeing.
>
> … Applying these criteria in a sufficiently transparent and fair process will mean those appointed to judicial office will have greater capacity to meet the sometimes unrelenting demands of the role, while maintaining their own wellbeing and serving the public well. This will improve the substance and appearance of impartiality, increase public confidence in the judiciary and support the legitimacy of judicial officers and their courts.

Second, experience as a barrister may not fully equip a person to make the transition from the solo nature of a barrister's practice to the working environment of a judge, who will need to be aware of, or conform with, contemporary workplace policies and human resources departments. 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, not long-term and not governed by employment law obligations. The stress on a barrister may be acute and focused on meeting court-imposed deadlines and the stress of conducting a trial. The stress on a judge has a direct character. It is more likely to be chronic stress to deliver judgments in a timely manner and manage a court list.

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 courtroom and manage the participants. Modelling judicial behaviour on the personal experiences of other judges may lend itself to replicating historical and outdated behaviours based on the judge's experience as a barrister.

The National Judicial College of Australia (NJCA) conducts orientation programs for newly appointed judges and magistrates.[110] It is not clear from a review of the website and the publications that the issues of bullying and harassment are specifically addressed in the initial orientation training or on an ongoing basis. The College's website suggests that a national curriculum continues to be work in progress:

> In 2004 the National Judicial College of Australia initiated a process to promote the preparation of a national standard for the amount of time and funding that should be available for each member of the Australian judiciary for professional development.
>
> The Standard was endorsed by the Council of Chief Justices of Australia, Chief Judges, Chief Magistrates, the Judicial Conference of Australia, the Association of Australian Magistrates, the Australian Institute of Judicial Administration and judicial education bodies. The Standard was reviewed in late 2010.
>
> The recent ALRC Report recommendations noted that: "there is currently no publicly available curriculum or professional development pathway for Commonwealth judges. This means that, although a significant number of judicial education courses may be available, covering issues important for supporting judicial impartiality, there is no clear or transparent expectation that judges will attend those courses specifically throughout their judicial career."[111]
>
> The NJCA, as the national leader in judicial education and training, is committed to meeting the need for a coherent and high quality system of judicial education and training in Australia through the development and delivery of a dynamic national curriculum (the National Curriculum). The National Curriculum will be a living framework, designed to allow for adjustments to new developments, changing demands, actions and will be referenced based on the contribution of judicial education stakeholders committed to its implementation. Importantly, the National Curriculum will also provide a benchmark for the implementation, monitoring and the evaluation of judicial education and training into the future.

110 See NJCA, "A national standard for professional development for Australian judicial officers", accessed 21/2/24. There were two orientation programs in 2023; and three orientation programs planned for 2024.

111 ALRC, above n 90, at [12.65].

> Once approved by our Council, further details about the National Curriculum will be available shortly on the NJCA website.

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.[112] 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.

Sixth, bullying may arise because of different ways unconscious bias works. For example:

- **affinity bias** where advocates who look, sound, have similar backgrounds and experience, or appear to share similar qualities to the judge, may receive more favourable treatment;
- **attribution bias** occurs when a person's errors or mistakes are assumed to be a consequence of the person's lack of skill or competence, rather than external factors. A simple example might be poorly collated submissions being assumed to be the advocate's incompetence, rather than external factors, eg, the equipment failing when printing or collating the documents over which the advocate had no control and was unrelated to the advocate's skill or competence;
- **confirmation bias** this occurs if judges look for, or give greater weight to, an advocate's presentation that confirms the judge's views or preferences;
- **halo bias** this occurs when a person is known, respected and liked, which may result in focusing on one particular feature of the person's skill and ignoring the negative;
- **contrast bias** this is the form of bias that gives rise to discrimination when assumptions are made based on comparison, rather than assessing individual merit.

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.[113]

Judicial bullying and corrosion of trust

The literature tends to focus on inappropriate conduct directed towards individuals and very little discussion is directed to the effect of judicial bullying at an institutional level.

In February 2021, at the Opening of the Law Term, the Honourable Chief Justice Tom Bathurst AC spoke about the importance of trust in the judiciary.[114] He said the public was regularly and deeply questioning the trust they place in institutions, and "rightly so".[115] He acknowledged that public trust in institutions

112 Cash, above n 4, at p 7.
113 In comparison, see n 49, above.
114 Bathurst, above n 1.
115 ibid at p 2, [3].

was fragile, and institutions could no longer simply assume the public will place their trust in them. The Chief Justice said:[116]

> 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.[117]

Sir Geoffrey Vos spoke to similar themes in his 2023 lecture. He said:[118]

> The problem is, I think, exacerbated by the fact that those who reach the peak of the professions and the judiciary are, even if they are themselves diverse, sometimes unwilling to challenge the structure and governance of the institutions themselves. Some don't want to accept that the system within which they may have spent 30, 40 or more years is itself in need of attention.
>
> The whole purpose of the justice system is to be fair and just. Lawyers and judges, and preeminently senior lawyers and judges assume that they are fair and just and, more importantly that the system that has created them is fair and just too.
>
> In some ways they are right, but in others they are not. It takes intellectual courage to challenge the institution that has put you in your place. I believe that our senior lawyers and judges need the courage to challenge the over-centralisation of power. They need to consider the maintenance and introduction of checks and balances intra-institutionally not just inter-institutionally.

Addressing these issues requires us to acknowledge the court as a workplace, the court must reflect contemporary practices of workplace behaviour and strive to make the workplace psychologically safe. This includes feeling safe to raise concerns or complaints about unfair and inappropriate judicial behaviour without the fear of victimisation. The next step to maintaining trust in our institutions is accountability and transparency when a judge's behaviour crosses the line. The developments in the United Kingdom and the public statements following investigations is an example of a transparent approach.[119]

Turning to practical matters — handling and responding to judicial bullying

A barrister is unlikely to make a complaint about bullying to anyone, but even less likely to make a complaint to the Judicial Commission of NSW or the relevant head of jurisdiction. 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, barristers may put up with behaviours that would in any other environment or interaction be unacceptable.

It is important to know what information is available and what is involved in a complaints process.

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116 ibid at [4].
117 ibid at p 17, [52].
118 Vos, above n 105, at p 5, [32]–[34].
119 See Judicial Conduct Investigations Office, eg, "Statement from the Judicial Conduct Investigations Office — Lord Justice Clive Lewis", 29 September 2023, accessed 21/2/24.

The NSW Bar Association has some information on its website:

- "What can I do if I am subject to or witness unacceptable conduct by a barrister or member of the judiciary in NSW?"
- Best practice guidelines
- Well being resources
- BarCare, and
- the CPD "Dealing with bullying or incivility in the law with Dr Dawn D'Amico".[120]

There are also some helpful articles in Bar News about these policies and issues.[121]

A barrister may raise a concern with the Bar Association. The Association and the courts have protocols for raising matters of concern between the President of the Bar Association and the relevant head of jurisdiction.

However there is very little guidance about what a barrister should or could do in the moment when experiencing bullying or taking a concern further to make a complaint.

I recommend the England and Wales Bar Council's *Bar Council guides: advice to the Bar about bullying by judges*.[122] The guide is practical and provides suggestions on what to do if you or a fellow practitioner experiences judicial bullying.

Taking the guide's suggestions into account and drawing on general advice to address bullying in the workplace, the following sets out some steps a barrister may take if they feel at risk of being bullied by a judge with a reputation for his/her treatment of counsel or those occasions when a barrister feels bullied. The following is not intended to be exhaustive!

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. Consider whether the judge may have an unconscious bias. If you are aware of how those unconscious biases may affect you, a client, witnesses or the particular case, you can engage and present your case in a way that taps into the judge's unconscious bias.

Recordings and transcript

The public nature of the courtroom should be used to an advocate's advantage when bullying occurs or the judge's behaviour crosses the line. As discussed above, the record of the proceeding in *Adacot and Sowle*[123] was examined by the appellate court. The transcript, a sound or video recording provides an opportunity to ensure the advocate's concerns and the evidence of inappropriate judicial conduct is recorded during the hearing.

120 See also Inns Court of Alliance for Women, "ICAW: tackling judicial bullying", Youtube, 21 March 2023, and ABA, "Bullying from the Bench: how to cope in court", *ABA Journal: Asked and Answered*, 25 February 2019.
121 *Bar News: the journal of the New South Wales Bar Association*, AustLii, 7 February 2024, accessed 21/2/24.
122 England and Wales Bar Council, *Bar Council guides: advice to the Bar about bullying by judges*, February 2019, accessed 6/2/24.
123 [2020] FamCAFC 215.

Personal response in the moment and de-escalation

Be aware of your presentation.[124] Be aware of how to use your breath, stance, tone and cadence of your voice. Bullying can trigger the "flight or fright" response and you need to be aware of applying de-escalation techniques in that moment. These may include:

- slowing down the pace of delivery and breathe
- taking a step back from the lectern but particularly being aware of not leaning in or forward into the conflict
- change eye contact or stop looking directly at the judge — a strategic glance to the ceiling, window or the wall clock (if there is one)
- "drink and think" to use a moment to collect one's thoughts
- silence and an extended pause can be very effective tools to de-escalate inappropriate behaviour. An uncomfortable silence may be used for effect, and
- if necessary, ask for a break or short adjournment.

Bystander and interventions

As Lieutenant-General David Morrison, the then Chief of the Army, said in 2013 when addressing bullying and harassment in the Australian Defence Force, "the standard you walk past is the standard you accept".[125]

What should you do when you witness another advocate or your opponent being bullied? Consider your role as a bystander. Don't assume that the bullying of your opponent will not be visited upon you. Do not participate or encourage the judge's conduct towards your opponent.

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 the event

After the appearance, ensure you make a note and keep a record of what occurred.

In Australia, as far as I am aware, we do not have the equivalent to the US website, *The Robing Room*,[126] a site that claims to provide a forum for evaluating United States federal district court judges and magistrate judges.

Self-care

Be aware of your personal reaction and the effect bullying may have 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. BarCare is an important resource. 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.

Immediate assistance is available via Lifeline — 131 114; 1800Respect — 1800 737 732; MensLine Australia — 1300 789 97; and BeyondBlue — 1300 224 636.

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124 See for example A Cuddy, "Your body language may shape who you are", TED Video, June 2012, accessed 21/2/24.

125 See D Morrison, "The standard you walk past is the standard you accept — ADF investigation — 2013", Speakola, 13/6/2013, accessed 6/2/24.

126 *The Robing Room*: *where judges are judged*, accessed 22/2/24.

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*.[127]

Consider options for raising concerns or making a complaint

Consider when, how and why you might want to escalate any concerns about the judge's conduct or whether to make a complaint.

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:[128]

- 44% of respondents were neutral, 34% agreed or strongly agreed and 22% disagreed or strongly disagreed. Twenty-nine percent (29%) of male respondents strongly disagreed or disagreed, while only 11% of female respondents disagreed or strongly disagreed;[129]
- 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;[130]
- as to whether complaints handling procedures were sufficient, 47% of respondents agreed, 24% were neutral and 28% either disagreed or strongly disagreed.[131]

Judicial Commission of New South Wales

In NSW, 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) *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) reg 4.[132] For more information see:

- *Guidelines for complaints against judicial officers*,[133]
- Online complaints can be made at 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).

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127 See NSW Public Defenders, *TJMF psychological wellbeing: best practice guidelines for the legal profession*, accessed 6/2/24; NSW Bar Association, *TJMF psychological guidelines for chambers — psychological wellbeing*, accessed 6/2/24.
128 G Appleby et al, "Contemporary challenges facing the Australian judiciary: an empirical interpretation" (2019) 42(2) *Melbourne University Law Review* 299 at 362.
129 ibid.
130 ibid.
131 ibid at 363.
132 Judicial Commission of NSW,*Instructions for lodging a complaint against a NSW judicial officer*, accessed 6/2/24.
133 Judicial Commission of NSW, *Guidelines for complaints against judicial officers,* accessed 6/2/24.

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) *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 not dismissed, the Commission may refer a complaint to the relevant head of jurisdiction, along with all supporting material, and recommend either counselling or disciplinary action: see s 21(2) *Judicial Officers Act*.

Alternatively, if justified, a complaint may be referred to the Conduct Division, a non-standing body convened on an as-needs basis. The Conduct Division may ultimately report to Parliament that a complaint may justify removal of the judicial officer, and Parliament will vote on whether this should occur. To date, this has not occurred. If the Conduct Division does not believe a substantiated complaint would justify removal from office, it will set out its conclusions in a report that may include recommendations on how to deal with the complaint: see s 21(1) *Judicial Officers Act*.[134]

If the Judicial Commission considers a matter concerns corrupt conduct, then those allegations are required to be referred by the Judicial Commission to the Independent Commission Against Corruption (ICAC).[135]

ICAC has concurrent jurisdiction with the Judicial Commission to investigate complaints of criminal misconduct by any public official, including judges.[136] ICAC has no enforcement powers against judges but it may refer its findings to the Judicial Commission or to NSW Parliament.[137]

Federal courts and complaint pathways

In 2007, a Senate Committee recommended that the Australian Government establish a federal judicial commission modelled on the Judicial Commission of NSW.[138] In early 2023, the Australian Government announced 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".[139]

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 and less formal mechanism of reporting judicial conduct, which allows members of the Bar to raise concerns about judicial conduct

134 Judicial Commission of NSW, above n 91, at pp 48–50.
135 *Independent Commission Against Corruption Act* 1988 (NSW) s 11.
136 ibid ss 3(1), 8–10.
137 ibid s 53.
138 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's judicial system and the role of judges*, Report, 7 December 2009, at p 97, accessed 6/2/24.
139 Attorney-General's Department, Australian Government, *Scoping the establishment of a federal judicial commission*, Discussion Paper, January 2023, accessed 6/2/24.

with any President of any Bar Association who may then raise that concern directly with the relevant Chief Justice.[140]

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[141] (Cth) (repealed) 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.[142] 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:[143]

> 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.

The Federal Court's *Annual Report 2021–2022* revealed the court had established a judicial workplace conduct committee, chaired by Markovic J. The committee "will develop education programs specific for judges as well as a dedicated portal on judicial workplace conduct".[144] 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.

The *Annual Report 2022–2023*[145] indicates this committee still exists, but provides no further information.

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140 *Protocol for the Bar Associations of Australia to raise any concerns about judicial conduct in Commonwealth Courts*, August 2019, accessed 6/2/24.

141 Federal Magistrates Court was replaced by the Federal Circuit and Family Court of Australia Div 2 by Act No 13 of 2021 on 1 September 2021.

142 Federal Court of Australia, Judicial complaints procedure, accessed 22/2/24.

143 ibid.

144 Federal Court of Australia, *Annual Report 2021–2022*, 19 September 2022, at p 18, accessed 6/2/24.

145 Federal Court of Australia, *Annual Report 2022–2023*, 19 September 2023, p 238, accessed 22/2/24.

The Federal Circuit and Family Court of Australia's complaints procedure for practitioners is broadly similar to the Federal Court process.[146]

Upon receiving a complaint, the Chief Justice may summarily dismiss it, deal with the complaint privately with the judge concerned, establish a Conduct Committee, or refer the complaint to the Attorney-General.[147]

A Conduct Committee will undertake an investigation and report to the Chief Justice. It may conclude the matter should be dismissed, or that the complaint could justify parliamentary consideration of removal from office, or that the conduct at least should be noted as having "affected the performance of the judge's duties" or "adversely affects the reputation of the judiciary". It will then be a matter for the Chief Justice whether to act on the Committee's advice.[148]

Concluding comments

As the legal profession continues to expand and becomes more diverse, there are opportunities to draw on the best of the traditions of the profession but also evolve to walk from practices and rituals that no longer serve a modern legal system capable to endangering the trust and confidence of the community and safeguard the rule of law.

146 Federal Circuit and Family Court of Australia, *Judicial complaints procedure*, 3 May 2013, accessed 6/2/24.
147 See *Federal Court of Australia Act* 1976 (Cth) s 15(1AAA).
148 Federal Circuit and Family Court of Australia, above n 146.

Judicial Commission
of New South Wales

Level 5, 60 Carrington Street,
Sydney NSW 2000 Australia
GPO Box 3634 Sydney NSW 2001

+61 2 9299 4421
judcom@judcom.nsw.gov.au
www.judcom.nsw.gov.au