

# Judicial **Bullying**

*Sticks and stones may break my bones, but names may break my **reputation**...*



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# A court room is a **work place**

- **Court rooms** of Supreme and Local Courts are workplaces - section 8, Work Health and Safety (National Uniform Legislation) Act (WHS Act)
- **Judges** presiding over proceedings in courts are workers or other persons – sections 28 or 29, WHS Act.
- **Legal practitioners** appearing before courts are workers carrying out work in these workplaces – section 7, WHS Act
  - Government lawyers, court staff, DPP and Legal Aid staff are public servants whose employers are subject to relevant State, Territory or Cth WHS laws

# Legal Duties under the WHS

- Judges have a duty to take reasonable care that their conduct does not adversely affect the physical or psychological health of legal practitioners appearing before them

## Section 28 Duties of workers

- While at work, a **worker** must:
- (b) take reasonable care that his or her acts or omissions **do not adversely affect the health and safety of other persons ...**

## Section 29 Duties of Other Persons at the workplace

- A **person** at a workplace ... must:
- (b) take reasonable care that his or her acts or omissions **do not adversely affect the health and safety of other persons**



# Workplace bullying contravenes WHS Act

- Workplace bullying by a Judge of a legal practitioner appearing before that Judge is a **risk to health and safety** and is unacceptable

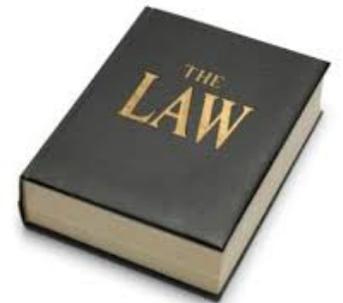


- Workplace bullying
  - contravenes the WHS duties the Judge owes to that legal practitioner
  - can adversely affect the psychological and physical health of a legal practitioner
- In other workplace environments, conduct amounting to bullying the type experienced at the bar can give rise to causes of actions calling on legal remedies:
  - Defamation
  - Anti-discrimination
  - Fair work / adverse action / bullying and harassment



# Other Legal Duties that apply to the Workplace

- **Anti-discrimination laws** (both Commonwealth and State/Territory)
  - it is unlawful to treat a person less favourably on the basis of particular attributes such as a person's gender, sexual orientation, race, disability or age
  - Unlawful actions can include harassing or bullying a person and/or engaging in conduct that offends, humiliates or intimidates a person
  - Specific legal provisions and legislation govern:
    - sexual harassment – eg. section 28A of the *Sex Discrimination Act 1984* (Cth)
    - racial hatred – eg. section 18C of the *Racial Discrimination Act 1975* (Cth)
    - disability harassment – eg. section 25 of the *Disability Discrimination Act 1992* (Ct)
- Bullying is also defined under **Fair Work legislation** (Cth and S/T)
  - Eg. section 789FD of the *Fair Work Amendment Act 2013* (Cth) definition involves when an individual or group of individuals repeatedly behave unreasonably towards a worker and that behaviour creates a risk to health and safety.



# Definition of **bullying** in the **workplace**

- **Workplace bullying** is **repeated** and **unreasonable** behaviour directed towards a worker (or group thereof) that creates a **risk to health and safety**
- **Repeated** behaviour: Persistent and / or taking place over time
- **Unreasonable** behaviour
  - behaviour that a reasonable person, having considered the circumstances, would see as unreasonable, eg. behaviour that is victimising, insulting, humiliating, intimidating, malicious or threatening



# Examples of workplace bullying



- Repeated and unreasonable conduct such as:
  - Persistent unwarranted criticisms of Counsel
  - Abusive or offensive language or comments
  - Personal attacks and insults
  - Shouting, aggressive and intimidating behaviour
  - Demanding justification in circumstances that are unfair
  - Belittling, Berating, Badgering, Battering and behaviour towards Counsel and behaviour intending to humiliate
- Legal test for whether an event can cause psychological injury – Spigelman CJ in *State Transit Authority of NSW v Chemler* [2007] NSWCA 249
  - Employers take their employees as they find them
  - “egg-shell psyche” principle, equal to “egg-shell skull” principle

# Understanding Why Judges might Misbehave

- Consider a judge's multi-faceted world-view:
  - High workload, long hours and “decision fatigue” / potential indecisiveness
  - Stressful work and impact on mental health
  - Long and complex criminal trials – cases with novel and complex issues
  - Exposure to trauma especially through increased use of audio-visual evidence
  - Public scrutiny/pressures to perform combined with high expectations of self
  - Threats to personal and family security and inherent loneliness of the job
  - Denial about stress, fatigue and mental health issues
- However, excessive/extreme offending behaviour is not acceptable:
  - Short temper and personality disposition
  - Power play and exploitation of public position
  - Lack of compassion and respect for fellow human beings



# Consequences of Bullying

- **Psychological harm** – adverse impact on practitioner’s mental health
  - depression; anxiety, in the worst of cases, suicide
  - Feelings of being humiliated, victimised
  - Reduced self-confidence; self-doubts
- Being publicly **defamed**, de-skilled, humiliated
  - Public nature of the profession means media exposure
  - Prior good reputation and work ethics now questioned
  - Potentially, reduction in briefs
- Adverse impact on **physical health**
  - Ongoing performance and motivation problems
  - Not wanting to return to an unsafe workplace (court)
  - Leaving the profession





# An Abuse of Power

Quotes from Michael Kirby, *Judicial Stress & Judicial Bullying* (2013) 87 ALJ 516

- “In serious and repeated cases, bullying by judicial officers should be recognised as an **abuse of public office** warranting commencement of proceedings for the removal of the offender from judicial office”.
- “Those who deploy **public power** do so on behalf of the people and for the limited purposes and period for which the power is conferred. It is **not granted to bully or intimidate or to discriminate unlawfully or misbehave or to humiliate or belittle others.**”
- *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 503, Callinan and Kirby JJ:
  - “All repositories of public power in Australia ... are confined in the performance for their functions to achieving the objects for which they have been afforded such power. **No Parliament of Australia could confer absolute power on anyone** ... Officers of the Commonwealth are always answerable to the court, in accordance with the constitutional standard. Judges within the integrated judicature of the Commonwealth are answerable to appeal and to judicial review ... there are legal controls which it is the duty of courts to uphold when their jurisdiction is invoked for that purpose.”

# Wise words from Michael Kirby AC CMG

Michael Kirby, on judicial bullying at the National Wellness for Law Forum on 21 February 2013 (as cited in *Sydney Morning Herald*, 23 March 2013); Paper first published in (2013) 87 ALR 516

- “**To allege bullying is not to establish that it has occurred.** Judges, like the rest of the population, have variable temperaments. And whatever their attitudes, they are entitled to express displeasure where they feel that a lawyer ... is impeding the proper performance of the judicial function or the attainment of justice.”
- “There is less excuse for rudeness and disrespect on appeal, where judges and counsel have the luxury of more time to scrutinise the words and conduct of the court below.. **While holding the adversaries to a high standard and ensuring efficiency, there is no place for rudeness or insults.** The supposed excuse that I have sometimes heard advanced is that appellate judges are cleverer and therefore entitled to demand brilliance from those appearing before them. However, **displaying rudeness; attempting to isolate or ignore a colleague; arrogance towards advocates or colleagues;** gossiping and laughing in private conversations with other judges during argument; and forgetting the litigant and the impression that such conduct makes, **are all conduct that amounts to forms of bullying.**”

# What to do if you are bullied by a Judge



- **Remain dignified** and poised (as far as you can!)
- Maintain a public stance of **self-respect** and worth
  - [Compose yourself until you get back to the office and close your door shut!]
- Be prepared to **address the issue**
  - Word is likely to have circulated by media or through the profession – you may be asked about it
  - Separate the issues, as appropriate – eg:
    - (1) the issue which triggered the judge’s criticism (eg. alleged incompetence of counsel etc), and
    - (2) the judge’s conduct towards the practitioner
  - Consider an appropriate response [pending any action or complaint] – eg:
    - “I don’t consider it was fair to say I [am or did whatever is alleged]”
    - “If my conduct can be shown to be [as alleged], I am prepared to work on improving it”
    - “However, the treatment I received was unjustified.”

# What to do if you are bullied by a Judge

- **Document** the incident
  - Make a contemporaneous file note
  - Consider what you have done, could/not have done to handle it
  - Obtain and review the transcript
- **Inform** someone you trust in the workplace for a second opinion (eg Head of Chambers)
- **Notify** your professional indemnity insurance (if appropriate)
- **Check** if there is a Judicial Commission, bullying policy or complaints procedure in your jurisdiction
- If no independent mechanism exists in your S/T, then:
  - **Protect yourself against risk of judicial retaliation** – approach an institution for support such as the Bar Association, Criminal Lawyers Association, Women Lawyers Association etc
  - request the complaint be made by the institution on your behalf



# Adverse Impact on **Client's Case**

- **Consider** whether the judge's conduct has adversely impacted upon your client's case
  - Was the behaviour done before a jury?
  - Could it have affected the jury's impression of the defence case?
  - If it has affected your client's rights to a fair trial, consider appeal mechanisms – independent advice and assessment for appeal should be sought especially if Judge criticised competence
- Consider Potential **Appeal Grounds**:
  - Did excessive judicial interventions / interruptions / unfair criticisms / inappropriate cross-examination from the Bench / unbalanced summing up / judge's conduct towards counsel in front of jury etc, result in a miscarriage of trial?
  - Are these matters curable by directions to the jury or is it too late?



# Bearing witness to judicial bullying



## 1. Never gloat on a judge's derision of your colleague

- If a Judge dislikes your opponent, **you are already at some advantage**
  - A judge's criticism of an opponent's work may *usefully* provide notice of an approach they will take – nothing wrong with advancing legal arguments in that direction
  - BUT – do not take advantage of a judge's *unwarranted* criticism, bullying or humiliation of your opponent to gain favour in your own case – you will be remembered in the profession for it forever!

## 2. Acknowledge it – even if you are on the opposite side of the bar table

- **We are all human before we are lawyers**
  - Acknowledging wrong-doing against another is an act of human kindness – it doesn't cost a cent – it can facilitate trust & repair morale that may be reduced or broken
  - Acknowledgement can be, “I saw how you were treated”; “That was not called for”; “You handled that as well as one could” – or even just a sympathetic glance
  - Acknowledgement is recognition that:
    - Any one of us can experience – and likely already has suffered – from judicial bullying in our careers
    - Being at the private bar can be a very lonely journey
    - It is not ok for anyone – including Judges – to another human being – including a legal practitioner, in a way that would give rise to defamation action, fair work claims, or disciplinary proceedings in any other workplace

# Mechanisms for complaints about Judicial Officers:

## Jurisdictions with Independent Judicial Commissioner

- **NSW** – Judicial Commission of NSW established under *Judicial Officers Act 1986 (NSW)* - <https://www.judcom.nsw.gov.au>
  - The Act provides that where a judicial officer is assessed by the Conduct Division to be “physically or mentally unfit to exercise efficiently the functions of judicial office”, a report can be forwarded to the Governor (s 39G). Both houses of parliament may \ vote to determine dismissal of the judge.
- **Victoria** – Judicial Commission of Victoria established under *Judicial Commission of Victoria Act 2016*
  - Complaints Process Diagram: <https://www.judicialcommission.vic.gov.au/complaints/complaint-process-diagram>
- **ACT** – ACT Judicial Council established under *Judicial Commissioner Act 1994* - <http://www.actjudicialcouncil.org.au>
  - Council comprised of ACT Chief Justice, Chief Magistrate, an appointed legal practitioner and appointed member of community
- **SA** – Independent Judicial Conduct Commissioner appointed 2016 - <https://jcc.sa.gov.au>
  - Online complaints process / form

# Mechanisms for complaints about Judicial Officers:

## Jurisdictions with no Independent Judicial Commissioner

- **QLD** – Under s61, *Constitution of Queensland Act 2001* (Qld), Governor can remove a judge on grounds of misbehaviour or incapacity, following Legislative Assembly accepting a finding from a tribunal that the misbehaviour has occurred
- **WA** – AG may give a magistrate notice to show cause why s/he should not be suspended from office
- **TAS** – Supreme Court (Judges Independence) Act 1857 (Tas) s 1 – the only legal requirement for removal is an address requesting removal by both Houses of Parliament
- **NT** – Non-legislated *Protocol for Complaints against Judicial Officers of the Supreme Court of the NT*: [http://www.supremecourt.nt.gov.au/about/documents/Complaints\\_Protocol\\_Document\\_Judiciary.pdf](http://www.supremecourt.nt.gov.au/about/documents/Complaints_Protocol_Document_Judiciary.pdf)
  - [Informal] Anti-Bullying Protocol as agreed btw NT Bar Association w/ Judges of Supreme and Local Court
  - *Supreme Court Act 1976* (NT) provides that a judge may be removed from office by the Administrator on an address from the Legislative Assembly only on the grounds of proved misbehaviour or incapacity

# 5 Steps in Building Resilience

From Jerry White, "I Will Not Be Broken: 5 Steps to Overcoming a Life Crisis" (2008)



- 1. Face the facts** – Accept that you were bullied / denigrated / humiliated

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- 2. Choose life** – Look forward to the future, not back in the past
- 3. Reach out** – Speak to colleagues (“connect with other survivors”)
- 4. Get moving** – Set goals; take action
  - Consider how you have learnt from it and what you would do if it happens again
- 5. Give back** – Be an asset rather than a victim
  - Share your experience; acknowledge it when you see bullying happen to others

# What should be done about Judicial Bullying

10 Points and associated quotes taken from Michael Kirby, *Judicial Stress and Judicial Bullying* (2013) 87 ALR 516; also *QUT Law Review* (2014) Vol 14 (Special edition: Wellness for Law)



**1. Anecdotal war stories at the pub are not enough – more research, data and statistics needed before the scope of the problem can be fully appreciated**

- “Empirical evidence is the foundation of good public policy – not gossip, suspicion, hunch or personal belief”

**2. “Judicial officers themselves should discuss the problem of JB in their conferences”**

**3. Bar Associations & Law Council should advance this topic for examination at conferences**

**4. Complaints made to Chief Justices or presiding judges should proceed via publicly available protocols for bringing to light the complaint to the offending judges**

- Complaints should be anonymised where desirable and/or possible
- “In serious and repeated cases, bullying by judicial officers should be recognised as an abuse of public office warranting commencement of proceedings for the removal of the offender from judicial office”.

**5. Judicial induction and orientation courses should include education to new recruits about judicial misbehavior and bullying**

- Such courses should also include a component on stress management and available assistance

# What should be done about Judicial Bullying

## **6. Members of the Legal Profession should not suppress complaints about JB.**

- “Lawyers ... should include in their training polite ways of communicating complaints about bullying or like misconduct so that the complaint can be recorded in the transcript ... to be available ... for appellate review”

## **7. “Senior members of the profession have a responsibility to stand up to bullying ... on behalf of more junior practitioners who may be anxious to avoid harming their careers and reputations”**

## **8. Judges should not condone other judges engaging in judicial bullying.**

- “Judges in collegiate courts should not accept misconduct, discriminatory remarks or more than the most transient instances of judicial bad temper by members of the same Bench. Where it occurs they should place on record their disassociation from it”.

## **9. “Where statutory provisions are enacted, or subordinate legislation made, to address misconduct warranting discipline or even removal from judicial office, bullying should be expressly included”**

- This gives an explicit foothold for complaint and appropriate action as well as to support judicial education.

## **10. “Legal and civil society ... as well as medical and legal academics and the media, should maintain an involvement with the problem of judicial bullying”**

- “As with cases of child abuse, empirical data should be gathered. It seems likely that abusers have sometimes themselves been abused. They may be in need of help, therapy and guidance. Occasionally they may need to find another vocation which is not one of public trust involving the exercise of significant power over others.

# Useful Reading

- Michael Kirby AC CMG, *Judicial Stress and Judicial Bullying*, QUT Law Review (2014) 14:1, Special Education: Wellness for Law
- Suzan Cox SC, *Judicial Bullying*, paper presented Criminal Lawyers of the NT Bali Conference, June 2013
- Jeffrey Phillips SC, *Judicial Bullying*, paper presented on 4 August 2017 at annual conference of NSW Magistrates
- Adiba Bassam, *Judicial Bullying affects aspiring barristers too* - [www.legalcheek.com](http://www.legalcheek.com)
- Geoff Adlam, *Bullying from the bench*, New Zealand Law Society, 4 May 2018
- Jo Delahunty QC, *Judicial conduct: when it goes wrong*, Counsel Magazine, March 2018
- Wellbeing at the Bar, UK Bar Council - [www.wellbeingatthebar.org.uk](http://www.wellbeingatthebar.org.uk)
- The Hon RG Atkinson AO, *Judicial Accountability: An Australian Perspective*, Supreme Court Library Queensland (October 2016) - <http://classic.austlii.edu.au/au/journals/QldJSchol/2016/20.pdf>

