

Inappropriate Courtroom Conduct¹

By Kylie Nomchong SC

Legislative and community admonition against bullying in the workplace is well known in Australia. This is evident from current media attention to the issue, including calls for an investigation into allegations of bullying in politics². It is also entrenched in the anti-bullying regime under the *Fair Work Act*³.

So where does judicial bullying fit into the picture? In what ways is it similar to the bullying experienced in other spheres of public life and in what ways does it differ? Can we pick and mix from reform efforts elsewhere or does it require a uniquely tailored response?

Discussion of judicial bullying in Australian courts often commences with the qualification that instances are rare.⁴

This assumption needs to be reconsidered. In January 2018, 66% of the respondents to the Quality of Working Life survey (**QoWL Survey**) conducted by the NSW Bar Association indicated that they had experienced judicial bullying.⁵

This is not unique to NSW courts. Advocates in the United Kingdom have also raised concerns that judicial abuse is going unchallenged.⁶ Similarly, a 2018 wellbeing survey of criminal lawyers conducted in New Zealand found that 88.1% of respondents had personally witnessed or experienced bullying, and that in 65% of those instances the 'bully' was a judge.⁷

First and always the most contentious issue is the definition of 'judicial bullying'. Trying to find the line between an acceptable robust line of questioning from the bench and an episode of bullying is not always an easy task. As such, the development of protocols or guidelines, a complaints framework or educational programs to address judicial bullying must grapple with that issue. Consensus must be reached between the bench and the bar as to what is and what is not judicial bullying. This includes consideration of whether, unlike the common conception of bullying⁸ or how it is defined under the *Fair Work Act*⁹, which requires repeated conduct, one instance of judicial bullying is sufficient to justify a complaint, investigation or potential action.

How is bullying defined?

There is no universal definition of bullying. *The Fair Work Act, 2009 (Cth)*¹⁰ stipulates that bullying occurs towards an individual (or group of individuals) in a workplace where there is repeated unreasonable behaviour towards the worker (or group of workers); and that behaviour creates a risk to health and safety.¹¹ However, access to the anti-bullying orders are only available to employees of the same employer.

More generally, bullying encompasses a range of behaviour but for the purposes of this discussion, it includes a *'threat to another's professional status (e.g., belittling opinion, public professional humiliation, accusation regarding lack of effort); threat to personal standing (e.g., name-calling, insults, intimidation, devaluing with reference to age)...overwork (e.g., undue pressure, impossible deadlines, unnecessary disruptions)...'*¹² Power imbalance is an integral part of bullying because the perpetrator perceives that the victim has little or no ability to retaliate.¹³

What is judicial bullying?

It is sometimes said that intemperate and/or inappropriate behaviour by the judge may be an understandable by-product of the adversarial nature of the courtroom. The pressures of managing ballooning dockets and lengthy directions lists – often with fewer resources – should not be underestimated. However, while the occasional intemperate comment or moment of obvious exasperation by the judge is likely to be inevitable, directed intimidation, sarcasm, discriminatory remarks and outbursts of temper, on the other hand, have the capacity to cause humiliation, stress and more serious psychological reactions in the barrister to whom the remarks are directed. Further, judicial bullying may also cause dysfunction in the judicial process, bring the process into disrepute and ultimately, affect public confidence in the administration of justice.

The relationship between the bench and the bar is one of trust, confidence, competence, integrity and honesty. It is

crucial to the efficient disposal of litigation that that relationship is not undermined.

In his 2013 comments, Chief Justice Bathurst noted that 'an integral part of the adversarial process' involved judges questioning propositions advanced by counsel, correcting errors and drawing to a close misguided lines of argument. However, while being 'curt' in order to achieve these objectives would not amount to bullying, it has been suggested that it might nevertheless give the impression that there had not been a fair hearing.¹⁴

Justice Peter Young, former judge of the NSW Court of Appeal, expressed his view in a 2013 article in *The Australian* titled 'Thin-skinned advocates should take a spoonful of cement and harden up'. In the article, Justice Young suggested that the increase in the number of alleged instances of judicial bullying could be attributed to the 'growth of 'self-esteem' as a virtue ... so that any adverse statement which has a tendency to deflate self-esteem even slightly is taken as unfair bullying.'¹⁵

In a similar vein, judges (and more senior barristers) often respond to the topic of judicial bullying by asserting that many alleged instances arise where incompetent advocates seek to justify their position when their lack of preparation or misconceived arguments are the subject of adverse comment by the bench. In that regard, there is no doubt that the bar must accept responsibility for the ongoing role of education and disciplinary control over its members, particularly for those whose lack of diligence add to the pressures of hearings. It is essential that the reaction of judges, even to poor advocates remains civil and professional.

Most instances of judicial bullying are unlikely to be characterised as intentional public ridicule or harassment. However there are examples. Justice Glenn Martin, former President of both the Queensland and Australian Bar Association recounted a complaint from a junior barrister who had been told by a judge in open court: *'You're an idiot. Do your clients know you're an idiot?'*¹⁶

Although it is comments like this that make it to the airwaves, the spectrum of

behaviour considered to be unacceptable is not and should not be limited to explicit verbal abuse.

Justice Michael Kirby was one of the first judges to speak publicly on the issue of judicial bullying. His Honour believed that this included conduct such as *'displaying personal animosity, disrespect towards advocates or litigants or their arguments, courtroom rudeness, arrogance towards advocates or colleagues and gossiping and laughing in private conversations with other judges during argument.'*¹⁷ This sort of conduct is clearly designed to, and has the effect of, alienating the advocate and the litigant. Such conduct creates an unfavourable impression of the judge and the court process.

It is also worth noting Justice Kirby consistently articulated the view that a civil and courteous court was more likely to be an efficient one.

NSW Bar Association Quality of Working Life Survey

The NSW Bar Association conducted a survey of its members about their level of wellbeing including factors influencing the quality of their working life (**QoWL Survey**). One of the questions was directed to judicial bullying.

The qualitative responses from barristers 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.¹⁸ In addition, and disturbingly, there were also some accounts of inappropriate gender-based adverse comments. Barristers also reported judicial bullying in the form of the imposition of unreasonable deadlines which demonstrated favouritism or bias towards one side.

The QoWL Survey replicated the anecdotal information that has been voiced by barristers during seminars, discussions and informal complaints. More often than not, the narrative of unacceptable bullying relates to the same judges, all known by name and notorious for their inappropriate and unwarranted behaviour. In many cases, these well-known judicial offenders have gone unchecked for years with barristers each lamenting their similar experiences. All such stories involve a recitation of how demoralising and stressful the litigation became.

The Victorian Bar Association Survey found that 55% of male barristers and 66% of female barristers reported they had experienced judicial bullying.¹⁹

While, at first sight, the QoWL survey findings are concerning, it is possible that some of the complaints, if properly investigated, would not amount to bullying. Any conclusion depends on what behaviour is said to 'cross the line'.

Following up on the QoWL survey, in 2021 the Wellbeing Committee reached out to a wide range of barristers at the NSW Bar to hear about their personal experiences of judicial bullying. The results were extremely interesting and in summary were as follows:

- the number of judicial/ tribunal officers in each jurisdiction that engage in bullying behaviour is relatively small – but those persons account for the vast majority of the reports of bullying in that court/ tribunal;
- when speaking of inappropriate judicial conduct, most barristers interviewed compared the behaviour of the few poorly behaved judges/ tribunal members to the remainder of the members of that bench who they described as civil, polite, intelligent, well-prepared and fair and in many instances described some judges/ tribunal members as a *'delight to appear before'*;
- there were more reports of judicial/ tribunal officers engaging in bullying behaviour in courts/ tribunals that were less well-resourced and busier;
- following the introduction of AVL hearings and the more prevalent use of telephone directions hearings following the COVID-19 pandemic, the type of bullying behaviour has widened to incorporate judicial and tribunal officers blatantly looking at other devices while practitioners are addressing them, increased aggressive language and in the case of one judge, becoming enraged and hanging up on practitioners mid-submission;
- the barristers who have been subjected to judicial bullying were not restricted to members of the junior bar but rather there appeared to be equal numbers of reports from silks, senior juniors and the junior bar.
- the immediate effects of bullying involved humiliation and embarrassment with many barristers reporting that they felt sufficiently intimidated to curb their comments and some barristers reporting that they became tearful;

- the longer term effects involved days, weeks or even months of rumination – *'What did I do wrong?' 'I should have stood up to it' 'I looked like an idiot'*. Some barristers said that they considered giving up the Bar after a particularly violent episode of judicial bullying, having lost all their confidence.

Why does judicial bullying matter?

Judicial bullying necessarily compromises the integrity and the efficiency of the court.

While it is properly the role of the judge to question counsel, aggressive or pejorative comments or interjections from a judge do not assist on this front. Justice Kirby observed that far from prompting an advocate to do better, *'a speaker will rarely give his or her best for the client, or the cause, or the court, when subjected to undue pressure.'*²⁰ This has certainly been reflected in the sentiments expressed in the QoWL survey and the more recent interviews. As stated above, repeated pejorative, sarcastic or intimidatory remarks often result in advocates becoming intimidated and retreating from the process.

Justice Young, although somewhat dismissive of the 'problem' of judicial bullying, similarly conceded that *'most judges understand that they are more likely to gain assistance from counsel if relations between the bench and the bar are kept cordial than if counsel is unsettled.'*²¹ Bullying behaviour can disrupt and disturb counsel which in turn prevents them from performing their task to the standard they might otherwise be capable of.

In order to avoid further hostile attention, an advocate may be coerced into making potentially disadvantageous or unnecessary concessions. The fear of being subjected to further humiliation from the bench also deters advocates from advancing their arguments.

For judges, judicial bullying can also demonstrate or give rise to perceptions of pre-judgment. *'Arrogant, rude and inappropriate'* behaviour from the bench can also impact a litigant's opportunity to effectively present their case.²² Judicial bias of that kind may in turn compromise public confidence in the legal system.

Not a Rite of Passage

The idea that judicial bullying is a necessary 'rite of passage' for junior counsel is outdated, dangerous and wholly unacceptable. 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 current generation of barristers. Rather, it should be the trigger for right-thinking members of the bench and bar to ensure that such behaviour is treated with opprobrium.

Christopher Shanahan SC, in a discussion on effective advocacy and judicial bullying, noted the following:

'No workplace training should be predicated on the need to learn to absorb bullying – that cannot be an appropriate 'rite of passage.' Indeed advocates subjected to such conduct in their formative years should be at the forefront of measures to eradicate it.¹²³

The psychological and adverse reputational damage of being a victim of judicial bullying are significant. The suicide of a young WA Legal Aid solicitor in 2010, regrettably linked to a magistrate recently 'berating' her,²⁴ was an unacceptable cost of a culture which tolerates judicial bullying. Beyond that very serious case, judicial bullying causes psychological stress and may contribute to the development of psychological disorders such as depression and anxiety.²⁵ The very fact that 66% of barristers in the QoWL Survey stated, in the context of a questionnaire about their mental health, that they had been subject to judicial bullying indicates that causative link. For those who do not suffer psychological injury, judicial bullying has other less visible effects on the profession at large, including emotional exhaustion as well as high levels of burnout and withdrawal from work – all of which have a corrosive effect on the operation of our judicial system.

Who are the victims?

Victims of judicial bullying are often reluctant to speak out for fear of retaliation from the bench which could in turn jeopardise their reputation and future livelihood. However, judicial bullying extends to others. Court staff who are required to bear witness to the humiliation of barristers and advocates would no doubt experience embarrassment, if not shame at having to be a participant in a process where that sort of conduct occurs.

There is also the effect on the judge him or herself.

Clearly there is a class of judges who lack the appropriate civil judicial temperament. It is possible that these judges boast about how clever they are because they have had to berate and 'correct' barristers appearing in their courtroom. It is also possible that other judges lack any self-awareness of the effect

of their conduct. If that be the case, then it is a sad indictment on them and a system which permits them to continue to engage in judicial bullying.

More likely, however, any judge with empathy or conscience, would experience feelings of shame and distress if they reflected on their poor conduct. They may want to blame others but they know that they should not have reacted in the way in which they did. The factors which may play a part in that behaviour include vicarious trauma from dealing with a litany of distressing cases, the pressure of being the person who determines an outcome which will always be adverse to the losing side, their own work schedules and their own personal circumstances.

The court room as a workplace

While the courtroom is the workplace for barristers, it is a workplace where the anti-bullying provisions of the *Fair Work Act* do not protect barristers. Although the ethical principles which underpin the federal anti-bullying legislation apply equally in the courtroom, the relevant provisions of the *Fair Work Act* only apply to 'workers' in the 'workplace' as statutorily defined. This does not include barristers and solicitors who are bullied in court.²⁶ In contrast, employees who have been bullied have an opportunity to seek redress in the Fair Work Commission because the legislation imposes a positive obligation on employers to ensure that workers do not experience bullying or harassment in the workplace.

However, courts are a workplace for court staff and judicial bullying (particularly ongoing behaviour) may result in a risk to the mental health and safety of those employees. In that circumstance, there is an argument that the court system is a 'person conducting a business or undertaking' within the meaning of s 5 of the *Work, Health and Safety Act 2011* (NSW) (**WHS Act**). If so, court staff are workers pursuant to s 7 of the WHS Act, and courts are a workplace under s 8 of the WHS Act. If that be the case, then 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. If that be the case, under s 19(2) of the WHS Act the courts must ensure, so far as is reasonably practicable, that the health and safety of other persons are not put at risk from work carried out in that workplace. Barristers and solicitors are capable of being 'other persons' in that context.

In any event, notwithstanding any statutory obligation, court staff, solicitors and barristers are equally entitled to a workplace which is free of bullying.

Possible causes of judicial bullying

A further initiative is to seek to work with the courts/ tribunals to understand the causes of the poor behaviour – whether it be a matter of resourcing, isolation, lack of collegiality, the loneliness of the role, the strain of constant non-delegable decision-making, the potential exposure to criticism from the media and the increasing demand on finite judicial resources often resulting in mounting caseloads.²⁷

Despite the emergence of counselling services and wellbeing programs, the mental health issues consequent upon dealing with a long running hearing into child sexual abuse was made clear by Magistrate Heilpern in his address at the 2017 Tristan Jepsom Memorial Foundation Lecture. The suicide of Melbourne magistrate Stephen Myall in 2018 demonstrated that crippling caseloads is still an issue of critical importance.²⁸ More recently, Judge Andrew of the Federal Circuit Court had engaged in conduct described as 'hectoring, bullying, insulting and demeaning' towards a QC and a solicitor and was transferred to Brisbane. However, tragically Judge Andrew committed suicide in October 2020.

While judicial stress does not justify bullying behaviour, it is a contributing factor and one which must be addressed in a thoughtful way. Our judicial system relies on both judges and advocates in order to operate efficiently and fairly. Judges are equally entitled to a workplace free from the overwhelming pressure caused by unmanageable caseloads and inadequate resources.

Addressing the issue

The Wellbeing Committee has considered a number of initiatives to address judicial bullying.

The first has already been put in place and this is the gathering of first-hand information from barristers about their experiences. The results to date are set out above.

However, it is thought that in order to support the proposition that judicial bullying brings the administration of justice into disrepute, eyewitness information ought be gathered. Heads of jurisdiction and other judges rarely observe their brethren and so, the Wellbeing Committee is considering a scheme whereby lay persons are asked to observe live courtroom behaviour (in person, on AVL or by listening to telephone hearings) – of a random sample of judges including those who have been identified as engaging in inappropriate courtroom behaviour and those who have not. It is considered that such reports would assist to understand whether an ordinary reasonable person at the back

of the courtroom would conclude that the parties (and their advocates) were being given a 'fair go' in the legal process or whether the conduct of the judge/ tribunal member had impaired that process.

The response of the courts/ tribunals

There is no standardised process for making complaints about judicial bullying.

In New South Wales, for members of State courts, complaints may be made to the Judicial Commission of NSW: <https://www.judcom.nsw.gov.au/complaints/>

However, some jurisdictions in New South Wales have responded to the issue.

The Supreme Court of NSW has adopted a comprehensive approach in its Policy on Inappropriate Workplace Conduct, which states:

'The Supreme Court recognises the importance of fairness, dignity and respect for others in the workplace and that each person has a safe and secure place in which to work. The court does not tolerate inappropriate workplace behaviour, which includes bullying, harassment, sexual harassment, and other forms of unlawful discrimination, vilification and violence.'

The objects of the Policy are twofold: first, to define clear standards of appropriate behaviour and, second, to provide a safe and secure method by which any person who is concerned that these guidelines are being or have been breached can raise the matter in confidence. The Policy also sets out the framework within which any such concerns will be addressed.

It contains a clear complaint making process: <https://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/Unacceptable%20Workplace%20Conduct%20Policy,%2014%20October%202020.pdf>

The NSW Civil and Administrative Tribunal has a Member Code of Conduct which states that the Tribunal will not tolerate inappropriate workplace behaviour, which includes bullying and NCAT also has a complaint making process: https://ncat.nsw.gov.au/documents/policies/member_code_of_conduct.pdf

The Land and Environment Court and the District and Local Courts of NSW refer to the NSW Justices and Communities website which directs complaints to the Judicial Commission: <https://courts.nsw.gov.au/courts-and-tribunals/help-and-support/feedback-and-complaints.html>

In the federal jurisdiction, there is no similar body to the NSW Judicial

Commission. Federal judicial officers can only be removed from office, after proved misbehaviour or incapacity by the Governor-General upon a request from both Houses of the Parliament.

However, the Federal Court of Australia has adopted a Judicial Complaints Procedure which allows for complaints to be made to the Chief Justice and sets up a comprehensive procedure for the assessment and dealing with complaints about judicial conduct: <https://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>

The Family Court of Australia adopted a similar protocol recently: http://www.familycourt.gov.au/wps/wcm/connect/fcoawe/about/policies-and-procedures/fcoa_judicial_complaints_proc

On 9 June 2021, the Federal Circuit Court adopted a Judicial Workplace Conduct Policy in which it states that '*judges of the court accept if they engage in unacceptable workplace conduct as described in this policy towards members of the court staff, people who perform their work in the court or another judge, they may cause harm to another person and will undermine the court and community's trust and confidence in the court.*' The Policy includes a complaint making process which is administered by the Chief Judge: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/policies-and-procedures/fcc-judicial-workplace-conduct-policy#_Toc74647692

However, due to the inherent reluctance in making complaints, attention needs to be given to how judicial bullying may be investigated without identifying any particular complainant. Moreover, there is room to consider a system of intervention that does not result in a formal disciplinary investigation, particularly given the fact that the causative basis for judicial bullying may involve health or personal issues affecting the judicial officer him/herself.

Bar Associations and Law Societies should also ensure that solicitors and barristers are in a position to respond appropriately to judicial bullying. As suggested by Justice Kirby, on occasions where there is flagrant misconduct, lawyers should act to ensure that there is a verifiable record of the misconduct by confirming that the words and actions appear on the transcript.²⁹ There is also a role for practitioners, particularly senior practitioners, who may be present in court when judges act inappropriately to intervene by perhaps seeking to speak to the judge in chambers during a break, or in serious instances, to intervene in the courtroom. **BN**

ENDNOTES

1. An earlier version of this article was published by the Judicial Commission of New South Wales in its Bulletin November 2018, Volume 30 No 10.
2. 'Scott Morrison says Liberals will deal with bullying claims inside our Team', 4 September 2018, *The Guardian*.
3. *Fair Work Act 2009* (Cth), ss 789FA to 789FL.
4. Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38 *Melbourne University Law Review* 1, at 5.
5. Arthur Moses, 'Judicial bullying can't be tolerated' *The Australian* (online), 10 May 2018, <<https://www.theaustralian.com.au/business/legal-affairs/judicial-bullying-cant-be-tolerated/news-story/850efa45c56de5cd2b8696410546c71d>>.
6. See Jo Delahunty, 'Judicial conduct: when it goes wrong' *Counsel* (online), March 2018, <<https://www.counselmagazine.co.uk/articles/judicial-conduct-when-it-goes-wrong>> and Paramjit Ahluwalia, 'Judicial behaviour: Bullying in the courtroom' *The Law Society Gazette*, 13 November 2017, <<https://www.lawgazette.co.uk/practice/judicial-behaviour-bullying-in-the-courtroom/5063614.article>>.
7. Ruth Hill, 'Judges worst offenders in law harassment survey' *Radio New Zealand* (online), 25 March 2018, <<https://www.radionz.co.nz/news/national/353269/judges-worst-offenders-in-law-harassment-survey>>.
8. For example, The Oxford Dictionary defines a bully as a person who habitually seeks to harm or intimidate those whom they perceive as vulnerable.
9. Section 789FD of the *Fair Work Act 2009* (Cth) refers to 'repeatedly' behaving unreasonably towards a worker.
10. *Fair Work Act 2009* (Cth), ss 789FA to 789FL.
11. *Fair Work Act 2009* (Cth), ss 789FD.
12. Rayner and Hoel, A Summary Review of Literature Relating to Workplace Bullying (1997) 7 *Journal of Community & Applied Social Psychology* 181, 183 cited in Worth & Squelch Stop the Bullying: The Anti-bullying Provisions in the Fair Work Act and Restoring the Employment Relationship (2015) 38(3) *University of New South Wales Law Journal* 1014.
13. Einarsen, 'The Nature and Causes of Bullying at Work' (1999) 20 *International Journal of Manpower* 16 cited in Worth & Squelch op cit.
14. Merritt, above n 2.
15. Peter Young, 'Thin-skinned advocates should take a spoonful of cement and harden up' *The Australian* (online) 11 July 2013 <<https://www.theaustralian.com.au/business/legal-affairs/thin-skinned-advocates-should-take-a-teaspoon-of-cement-and-harden-up/story-e6frg97x-1226677873326>>.
16. See Jeffrey Phillips SC, 'Judicial Bullying' (2017), at 10.
17. Michael Kirby, 'Judicial Stress and Judicial Bullying' (2014) 14 *QUT Law Review* 1, at 10.
18. Quality of Working Life Survey, conducted by the NSW Bar Association, January 2018.
19. Quality of Working Life Survey, conducted by VicBar: <https://www.vicbar.com.au/sites/default/files/Wellbeing%20of%20the%20Victorian%20Bar%20report%20final%20Oct%202018.pdf>.
20. Kirby, above n 9, at 8.
21. Young, above n 7.
22. See *Reznitsky v Director of Public Prosecutions* (NSW) [2014] NSWCA 79 at [38] (Tobias AJA).
23. C P Shanahan SC, 'Instructions on how to use a life-jacket: Persuading a hostile court to shift its position' (2013) 38 *Aust Bar Rev* 76.
24. Josh Jerga, 'Lawyer 'berated' in court before death' *The Sydney Morning Herald* 20 August 2010 <<https://www.smh.com.au/national/lawyer-berated-in-court-before-death-20100820-138pm.html>>.
25. Phillips, above n 8, at 13.
26. Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment? Workplace Bullying and Regulation of the Legal Profession' (2014) 37(3) *UNSW Law Journal* 1030, at 1055.
27. See Kirby, above n 9 at 3 and Shanahan, above n 19.
28. Noel Towell and Adam Cooper, 'Struggling magistrates cry for help' *The Age* 2 April 2018, <<https://www.theage.com.au/national/victoria/struggling-magistrates-cry-for-help-20180401-p4z7bh.html>>.
29. See Kirby, above n 9, at 13.