Judicial Commission of Victoria

Judicial Bullying
Consultation Paper

July 2022

The Judicial Commission of Victoria produced this Consultation Paper for the purpose of consultations on judicial bullying in August and September 2022.

The consultation process has concluded.

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Executive summary

1. The Chair of the Judicial Commission of Victoria, Chief Justice Ferguson, has observed that '[r]obust and vigorous legal debate and adversarial exchanges are common' in the courtroom.[1] Robust judicial exchanges with lawyers and court users is often part of the judicial function and assists to manage proceedings effectively. Such conduct is consistent with the expected standards of conduct and in the interests of justice overall.

2. However, as the Chief Justice emphasises, 'there is no excuse for incivility' including 'in its extreme form, bullying'.[2] There is a challenge in identifying when and where judicial conduct oversteps that mark and can be characterised as bullying, which is discussed in detail below.

3. Evidence indicates that judicial bullying occurs in Victoria, which is inconsistent with the standards of conduct expected of judicial officers.[3] In addition to being unacceptable conduct, judicial bullying can have adverse consequences for the health and wellbeing of those subject to bullying, as well as undermine confidence in the courts and VCAT.

4. The Judicial Commission of Victoria (the **Commission**) has functions relating to:

   (a) professional standards, being to make guidelines regarding the standards of ethical and professional conduct expected of judicial officers;[4] and

   (b) complaints handling, being the receipt, investigation and referral of complaints regarding judicial officers.[5]

   In performing these functions, the Commission's objects include maintaining present and future public confidence in Victorian courts and tribunals, as well as ensuring a transparent and accountable process for investigating the performance of functions of judicial officers.[6]

5. The purposes of this consultation are to propose a Judicial Conduct Guideline directed at judicial bullying, and provide guidance to the Commission on how to deal with complaints about bullying. This Consultation Paper contributes to those purposes by:

   (a) summarising relevant research and commentary to provide context to the consultation;

   (b) identifying issues as they relate to professional standards and complaints handling; and

   (c) proposing a definition of judicial bullying, the elements of a Judicial Conduct Guideline and associated complaint handling practices.

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[1] Chief Justice Anne Ferguson, 'Essential Briefing on the State of the Profession' (Speech, Law Institute of Victoria, 3 March 2022) at 5.

[2] Ferguson (n 1) at 5; see also Chief Justice Anne Ferguson, 'Bullying and Sexual Harassment in the Legal Profession' (Speech, International Bar Association seminar, 13 August 2019) at 2.

[3] For simplicity, 'judicial bullying' is used to also refer to bullying by non-judicial members of VCAT, and 'judicial officers' should be taken to include VCAT members.

[4] *Constitution Act 1975* (Vic) s 87AAL(1)(a).

[5] *Constitution Act 1975* (Vic) s 87AAL(1)(b).

[6] *Judicial Commission of Victoria Act 2016* (Vic) s 4(a), (b); Parliament of Victoria, *Hansard,* Legislative Assembly, 10 December 2015 at 5516 (Second Reading Speech).

6. In essence, the Commission considers that judicial bullying involves (a) conduct that infringes the standards of conduct generally expected of judicial officers; and (b) is belittling, insulting, victimising, aggressive or intimidating conduct.

7. The relevant research and commentary supports the general propositions that:

   (a) judicial bullying occurs in Victorian courts and VCAT. Some evidence suggests it is commonly experienced by lawyers, although it may be that only a minority of judicial officers and/or VCAT members engage in bullying conduct;

   (b) although it is difficult to quantify the prevalence of judicial bullying, the nature of bullying conduct reported (i) is plainly inconsistent with the standards of judicial conduct, and (ii) may have severe consequences. Therefore at any level of prevalence it is a problem requiring attention;

   (c) lawyers and court staff are unlikely to complain through formal channels about judicial bullying. This reluctance may arise from a concern for professional consequences, as well as a perception that a formal complaint will not have meaningful consequences;

   (d) the causes of judicial bullying are multifaceted, but may reflect individual-level factors (eg a lack of self-regulation), and organisational-level factors (eg pressure from workload or a perceived role in responding to improper lawyer behaviour); and

   (e) the Commission has a role in preventing and addressing judicial bullying through (i) expressing clearly how judicial bullying can infringe the standards of conduct generally expected of judicial officers; (ii) receiving complaints from people who have observed or experienced judicial bullying; and (iii) ensuring that complaint outcomes demonstrate that judicial bullying is unacceptable and is not tolerated.

8. The Commission seeks stakeholder views to inform the making of a Judicial Conduct Guideline, pursuant to section 134(1) of the *Judicial Commission of Victoria Act 2016* (Vic) (the ***JCV Act***). In particular, the Commission is interested in stakeholder responses to the following questions:

Question 1	Do you have any comments on the proposed definition of bullying?	*Consultation Paper reference: [64]–[73]*
Question 2	Do you have any comments on the key factors to be considered when assessing complaints about judicial bullying?	*Consultation Paper reference: [79]–[96]*
Question 3	Do you have any further comments on the proposed content of the Judicial Conduct Guideline?	*Consultation Paper reference: [99]*

Question 4	Do you have views as to how professional reluctance to complain about judicial bullying may be addressed?	*Consultation Paper reference: [100]–[110]*
Question 5	Do you have comments on processes and practices that can be adopted in relation to complaints about judicial bullying?	*Consultation Paper reference: [111]–[115]*
Question 6	Do you have comments on how a separate, focused consultation ought to address discrimination by judicial officers?	*Consultation Paper reference: [116]–[118]*

Research and commentary on judicial bullying

Why is judicial bullying a problem?

9. The *Guide to Judicial Conduct* emphasises that '[b]ullying by the judge is unacceptable'.[7] Judicial bullying is antithetical to the standards of conduct generally expected of judicial officers, in that it may:

   (a) demonstrate an unacceptable departure from judicial impartiality; and/or

   (b) be at odds with professional, litigant and public expectations as to professional integrity and personal behaviour.

10. Public confidence is 'held out as the core requirement for the legitimacy of judicial authority'.[8] Conduct which is inconsistent with core judicial values risks undermining professional, litigant and public confidence in the judiciary.[9] As Dr Szoke stated, '[s]ociety will question its trust in a justice system when those responsible for that system do not all abide by expected standards of conduct.'[10]

11. At its highest, bullying may be a misuse of judicial office. As the Hon Michael Kirby remarked, '[t]hose 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.'[11]

12. Further, judicial bullying presents a workplace safety risk.[12] It can have a corrosive effect on the wellbeing and mental health of lawyers, court staff and court users, as well as negative impacts on lawyers' workplaces, the profession and the broader community.[13]

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[7] The Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (AIJA, 3rd ed, amended 2020) at 19 [4.1]. See also 9 [2.3]; Chief Justice TF Bathurst, 'Occasional Address' (2013) 17(1) *University of Western Sydney Law Review* 1 at 9.

[8] Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39(1) *Adelaide Law Review* 1 at 4 (citations omitted); see also *Cesan v The Queen* [2008] HCA 52, 236 CLR 358 at [71] (French CJ remarking '[t]he courts … depend in a real sense upon public confidence in the judicial system to maintain their authority'); Chief Justice Gerard Brennan, 'Foreword to the Second Edition' in James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) vii at vii.

[9] *Guide to Judicial Conduct* (n 7) 5 [2], 8 [2.3], 19 [4]; *Charisteas v Charisteas* [2021] HCA 29 at [21] (the Court remarking that 'standards of impartiality and independence … are essential to the maintenance of public confidence in the judicial system'); *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407 at [161], [163]; *A Judicial Officer v The Judicial Conduct Commissioner* [2022] SASCA 42 at [269]. See also Chief Justice John Doyle, 'Foreword' in James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) v at v; Charles Gardner Geyh et al, *Judicial Conduct and Ethics* (LexisNexis, 5th ed, 2013) at §10.03[3].

[10] Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Report and Recommendations, 2021) at 7. See also Anne Wallace and Jane Goodman-Delahunty, 'Measuring Trust and Confidence in Courts' (2021) 12(3) *International Journal for Court Administration* at 2, 11–15.

[11] Michael Kirby, 'Judicial Stress and Judicial Bullying' (2013) 87(8) *Australian Law Journal* 516 at 526. Gleeson J appears to support that view: Justice Jacqueline Gleeson, 'Advancing Judicial Legitimacy: The Stakes and the Means' (Speech, National Judicial Orientation Program, April 2022) at [41]; see also *Adacot v Sowle* [2020] FamCAFC 215 at [117].

[12] Justice François Kunc, 'Current Issues: The Need for Judicial Bullying Policies' (2019) 93(10) *Australian Law Journal* 807 at 807. See also Chief Justice Anne Ferguson, 'Making Wellness Core Business' (Speech, Wellness for Law Forum, 15 February 2019) at 4, 7–8; Chief Justice James Allsop, 'Courts as (Living) Institutions and Workplaces' (2019) 93(5) *Australian Law Journal* 375 at 382; Gleeson (n 11) at [41]–[44].

[13] As to the effects of workplace bullying generally, see House Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We Just Want it to Stop* (Report, 2012) at [1.30]–[1.44]; Karl Aquino and Stefan Thau, 'Workplace Victimization: Aggression from the Target's Perspective' (2009) 60 *Annual Review of Psychology* 717 at 727–728. As to the effects of bullying in the legal profession, see Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment? Workplace Bullying and Regulation of the Legal Profession' (2014) 37(3) *UNSW*

These effects are highlighted by senior barristers and other lawyers, who consider judicial bullying contributes to lawyers leaving the Bar or profession.[14]

Experiences and perceptions of judicial bullying

13. Significant research and commentary on judicial bullying has been published in the last decade. While no clear definition of 'judicial bullying' appears in those materials, there is a general consensus that merely 'robust' interactions are not bullying.[15]

14. A 2018 survey of the Victorian Bar reported that 502 members had experienced judicial bullying during their careers (59% of all respondents).[16] Female respondents reported higher rates of judicial bullying (66%) than male respondents (55%).[17] Of the barristers who had been practising for five years or less, 93 barristers reported experiencing judicial bullying (46% of respondents in that group).[18]

15. These data are limited in what they can tell us about the prevalence of bullying.[19] However, qualitative data received in response to open-ended questions suggest that judicial bullying is a genuine concern. When asked how the quality of their working life could be improved, barristers stated: '[j]udicial bullying is alive and well' and '[a]ctual consequences and disciplinary action for bad behaviour by judicial officers. This is a MAJOR issue in the profession'.[20] Further, when barristers were asked about the form judicial bullying took, some barristers replied: '[a]buse is the norm', 'I have been regularly bullied and abused by judicial office[r]s in both the County and Magistrates Court', and '"[j]udicial bullying" is all pervasive'.[21]

16. As to the form of bullying, the research summarised that barristers experienced denigration, such as demeaning, belittling, humiliating, ridicule or mocking behaviours; personal attacks, being comments or criticism about barristers personally; rudeness, including sarcasm and patronising behaviour; shouting, including screaming and yelling;

Law Journal 1030 at 1035–1036; Maryam Omari, *Towards Dignity and Respect at Work: An Exploration of Work Behaviours in a Professional Environment* at [88]–[93]; Kieran Pender, International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, 2019) at 32, 37, 47–48.

[14] See, eg, Jeffrey Phillips SC, 'Of Dinosaurs and Bullying Judges' [2004] (December) *Law Society Journal (NSW)* 30 at 31; Kylie Nomchong SC, 'Inappropriate Courtroom Conduct' [2021] (Winter) *Bar News* 44 at 45–46; Geoffrey Steward, 'Judicial Bullying is Real and Still Takes Place' [2018–2019] (164) *Victorian Bar News* 9; Mark Tedeschi SC, quoted in Harriet Alexander, 'DPP Warns Lawyers: Stop Bullying One Another or Else', *Sydney Morning Herald* (online, 23 March 2013); Rebecca Treston QC, quoted in Jerome Doraisamy, 'The Time is Right for a Judicial Bullying Policy in Queensland', *Lawyers Weekly* (16 July 2019); Queensland Police Service, *Task Force Bletchley* (Report, 2016) at 257 ('feedback from police prosecutors over an extended period of time … indicate[s] that it is judicial bullying that causes the most stress and can make all the [other] job stressors seem catastrophic'); Rocco Perrotta, 'Judicial Bullying Can Cause Hurt, and Distress', *The Advertiser* (Adelaide, 19 January 2015) 18; Russell Goldflam and Marty Aust, quoted in Melissa Coade, 'Controversy over Judicial Bullying Claims "Now Finalised", NT Lawyer Says', *Lawyers Weekly* (28 January 2018).

[15] Definitional issues are considered below at [64]–[73].

[16] See Quality of Working Life Research Group, *The Victorian Bar: Quality of Working Life Survey* (Final Report and Analysis, University of Portsmouth, 2018). An online survey was distributed to Victorian Bar Practicing Certificate holders in June 2016. Of the 2,160 people contacted, 856 provided valid responses (40%): at 2.

[17] *The Victorian Bar: Quality of Working Life Survey* (n 16) at 19 (Table 8.2).

[18] *The Victorian Bar: Quality of Working Life Survey* (n 16) at 19 (Table 8.2).

[19] Among other things, the survey question was not specific to a time period. For example, a barrister who experienced bullying once in his or her 30-year career could be expected to answer affirmatively.

[20] *The Victorian Bar: Quality of Working Life Survey* (n 16) at 22.

[21] *The Victorian Bar: Quality of Working Life Survey* (n 16) at 29.

interference with submissions; favouritism or bias; aggression; and interruptions (among other things).[22] A small number reported behaviour in the nature of gender bias.

17. Dr Szoke's 2021 *Review of Sexual Harassment in Victorian Courts* reported on some experiences and perceptions of bullying and discriminatory behaviours by judicial officers. The review heard of 'experiences of everyday sexism and … instances of gendered bullying behaviour from older male barristers and judicial officers'.[23] One participant stated:

> The magistrates set the tone. The way you are spoken to by some would not be tolerated in any other workplace … Some magistrates are well known [for it]. We brace ourselves when certain magistrates are visiting [a regional area]. Sometimes that disrespect is gendered. I think that magistrates do a wonderful job in difficult circumstances but the bad eggs don't shift.[24]

Another participant stated that '[h]ierarchy and ceremony are a real problem and are conducive to a culture of bullying'.[25]

18. The Victorian findings are consistent with research elsewhere in Australia.[26] 66% of respondents to a 2017 survey of barristers in New South Wales stated they experienced judicial bullying.[27] Bullying was experienced through '[b]elittling, patronising or humiliating comments in front of colleagues and a jury'; '[r]epeated intimidation and interruptions'; '[a]ngry outbursts and yelling'; '[u]nreasonable deadlines'; and gender slurs.[28]

19. These findings are generally consistent with research into bullying in the legal profession.[29] For example in 2018, the International Bar Association conducted a survey of lawyers on bullying and sexual harassment.[30] Of the Australian respondents, 61% indicated that they had been bullied in the workplace.[31] Analysing responses from 135 countries, the report found that courtrooms were the third most frequent locations for bullying (the report does not record whether it was a judicial officer or other participant who was the perpetrator).[32]

20. While the research indicates that judicial bullying has been experienced by the majority of practitioners, a prevailing view is that bullying is performed by a minority of judicial officers

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[22] *The Victorian Bar: Quality of Working Life Survey* (n 16) at 27–29.

[23] Szoke (n 10) at 44.

[24] Szoke (n 10) at 44.

[25] Szoke (n 10) at 38.

[26] For international research, see equivalent barrister surveys conducted by the Bar Council in the United Kingdom. In the 2021 survey, 38% of respondents reported personally experiencing and/or observing bullying, harassment or discrimination in the last two years. Of those respondents, the person responsible was frequently said to be 'another barrister' or 'a member of the judiciary': Matthew Williams and Geoff Pike, *Barristers' Working Lives 2021: A Report for the Bar Council* (Institute for Employment Studies, Report 567, 2021) at 56–57, 63. Of the 16,900 people contacted, 3,479 provided valid responses for a response rate of 21%: at 7–8.

[27] Arthur Moses SC, 'Judicial Bullying' [2018] (Autumn) *Bar News* 3. A survey was distributed to NSW Bar Association Practising Certificate holders in March–April 2017. Of the 2,329 people contacted, 947 provided valid responses for a response rate of 41%.

[28] Moses (n 27) at 3.

[29] In addition to the research noted below, see Equal Opportunity Commission (SA), *Review of Harassment in the South Australian Legal Profession* (Report, 2021). The review drew on an open survey of people 'currently working, or who had previously worked, in a legal profession workplace' (which received 600 responses), conducted interviews and received written submissions: at 4–5; Law Council of Australia, *National Attrition and Re-engagement Study* (Final Report, 2014) (open survey of lawyers, former lawyers and people who did not practise law but held a legal qualification, N=3,960; interviews with 82 respondents); Omari (n 13) (survey of all members of the WA Law Society, N=327, response rate of 12%); Le Mire and Owens (n 13) at 1036–1049.

[30] International Bar Association (n 13). 6,980 responses were received from 135 countries: at 8, 25. More responses were received from Australian lawyers than any other jurisdiction (935 responses): at 28.

[31] International Bar Association (n 13) at 86.

[32] International Bar Association (n 13) at 41.

– rather than being widespread across the judiciary. In respect of New South Wales, Ms Nomchong SC wrote:

> 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 similar experiences.[33]

Drawing on consultations with New South Wales barristers, Ms Nomchong SC summarises: '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'.[34]

21. Justice Martin of the Queensland Supreme Court expressed comparable views, referring to his experience as President of the Queensland Bar. His Honour remarked, '[m]ost judicial officers who engage in this type of [bullying] behaviour are repeat offenders. They are known to the profession and, often, to the head of jurisdiction'.[35] Similarly, a 2018 media article reported that '[s]everal leading Melbourne barristers who spoke privately to *The Age*' indicated 'there was a small number [of Victorian judicial officers] whose conduct occasionally went beyond what was acceptable and would likely meet the definition of bullying in other workplaces'.[36] Analogous observations are made by other senior judges and professionals working in law.[37]

22. There is limited data concerning bullying of court staff. However, there is some evidence of it occurring in Australian courts in the research on sexual harassment. One participant in Dr Szoke's review reported:

> I have worked in the court/tribunal for a number of years as a staff member responsible for other staff. I have observed a consistent pattern of behaviour on the part of a handful of judges which is consistent bullying. There are very junior staff in Court Services who have to deal with judges. Staff have reported that they had conversations where they have walked away crying and absolutely torn apart. These judges are arrogant and wield power so consistently that they create a culture of fear. I also have personal experience where judges have written to me and called me names, using a tone that was personal and attacking and unprofessional, have received emails from judges which feel like a hard slap in the face. It feels like there is nowhere safe to go without repercussions for the person who raises issues about the bad behaviour of judges.[38]

In 2021, the Equal Opportunity Commission (SA) examined harassment in the legal profession. One survey respondent wrote that '[t]he numbers of Justices, Judges and

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[33] Nomchong (n 14) at 45.

[34] Nomchong (n 14) at 45.

[35] Justice Glenn Martin, 'Bullying in the Courtroom' (2013) 4(1) *Workplace Relations* 16 at 17.

[36] Richard Baker and Nick McKenzie, '"Bullying" from the Bench: Barristers to be Asked about Judicial Conduct', *The Age* (News article, 6 May 2018) at 1.

[37] See, eg, Kirby (n 11) at 526; Zoe Rathus, Submission 298 to Australian Law Reform Commission, *Review of Family Law System* (November 2018) at 11; John McKechnie QC, 'Courtesy in Court: Cuts both Ways' (2019) 46(8) *Brief (Law Society of WA)* 6 at 11; Mark Tedeschi, quoted in Alexander (n 14); Greg de Moore, 'Bullying: In the Courtroom, in the Playground' (2022) 96(4) *Australian Law Journal* 224 at 225; the Hon Keith Mason QC, 'The Court as a Workplace: Notes for Starting a Conversation within the County Court' (Paper, County Court of Victoria conference, 22 March 2016) at 3. But see Le Mire and Owens (n 13) at 1038–1040 (discussing whether bullying in the legal profession is caused by a few 'bad apples' or if there is a more systemic issue).

[38] Szoke (n 10) at 46.

Magistrates I have seen bullying and intimidating all variety of staff, and court visitors, is disgraceful'.[39]

23. The Commission commenced operations in 2017. Since then, it has received information on judicial bullying through complaints, informal enquiries from lawyers, and stakeholder engagement (particularly in the development of its *Judicial Conduct Guideline: Sexual Harassment*). The Commission observes from those sources that:

    (a) of the many people attending Victorian courts and VCAT each day, very few make a complaint to the Commission. Of the complaints received, 94% are summarily dismissed.[40] These statistics suggest that, overwhelmingly, judicial officers engage in conduct which is consistent with the standards generally expected of judicial officers. However, it is difficult to generalise from complaints data about wider judicial conduct because (i) a significant number of complaints misunderstand the Commission's jurisdiction (ie they seek to challenge the merits of a decision), and so must be summarily dismissed; and (ii) few complaints are received from lawyers, court staff or professional court users;

    (b) some lawyers perceive that bullying is 'rife' in Victorian courts, although tend to focus on a minority of judicial officers as engaging in that behaviour; and

    (c) on the occasions that lawyers have contacted the Commission regarding judicial bullying, a recurring theme in their communications is a concern that judicial bullying presents a workplace safety risk.

Causes of judicial bullying

24. There is some debate in the social science and workplace relations literature as to the definition of bullying. Bullying has generally been defined as involving behaviour of a particular nature, repetition, a power imbalance between the perpetrator and subject, and there being a particular intention by the perpetrator.[41] Such behaviour is complex and its antecedents are multifaceted.[42] Nonetheless, the research suggests bullying can be explained in part by:

    (a) factors specific to the individual engaging in bullying conduct;[43] and

[39] Equal Opportunity Commission (SA) (n 29) at 86.

[40] From July 2017 to June 2021, the Commission finalised 918 complaints. Of these, 862 were summarily dismissed, 12 were referred to the head of jurisdiction (1.3%), four were referred to an investigating panel (0.4%) and 40 were withdrawn (4.4%).

[41] See, eg, Aquino and Thau (n 13) at 720–722; Kari Einarsen and Ståle Valvatne Einarsen, 'Combating Workplace Bullying: Interventions and the Role of the Organization's Ethical Infrastructure' in Peter K Smith and James O'Higgins Norman (eds), *The Wiley Blackwell Handbook of Bullying: A Comprehensive and International Review of Research* (John Wiley & Sons, 2021) vol 1, 538 at 538.

[42] Dieter Zapf and Ståle Valvatne Einarsen, 'Individual Antecedents of Bullying: Personality, Motives and Competencies of Victims and Perpetrators' in Ståle Valvatne Einarsen et al (eds), *Bullying and Harassment in the Workplace: Theory, Research and Practice* (CRC Press, 3rd ed, 2020) 269 at 270; Al-Karim Samnani and Parbudyal Singh, '20 Years of Workplace Bullying Research: A Review of the Antecedents and Consequences of Bullying in the Workplace' (2012) 17(6) *Aggression and Violent Behavior* 581 at 583–586.

[43] See Zapf and Einarsen (n 42); Robert Thornberg et al, 'Personality Factors, Empathy, and Moral Disengagement in Bullying' in Peter K Smith and James O'Higgins Norman (eds), *The Wiley Blackwell Handbook of Bullying: A Comprehensive and International Review of Research* (John Wiley & Sons, 2021) vol 1, 415.

(b) factors arising from the organisational setting.[44]

25. The research provides insights into the possible causes of judicial bullying. Some factors are briefly explored to give context to the consultation, without seeking to be exhaustive.

Individual factors contributing to judicial bullying

26. Some consider that judicial bullying might arise from personal characteristics such as mental health or personality.[45] In reviewing the research on workplace bullying, Professors Zapf and Einarsen summarise the 'main types of bullying related to certain perpetrator characteristics'.[46] These bullying types include:

    (a) bullying as protection of self-esteem. The authors explain that 'one major cause of aggressive response is threatened egotism, that is, a favourable self-appraisal when encountering an external unfavourable evaluation. When favourable views about oneself are questioned, contradicted or impugned, people may resort to aggression';[47] and

    (b) bullying as a lack of social competencies or self-regulation. The authors elaborate that possible antecedents to bullying include a person's 'lack of emotional control', 'a consequence of a lack of self-reflection and perspective-taking' and 'being low in emotional stability'.[48]

27. The valence of the two theories to judicial bullying is suggested by views expressed by judicial officers and senior barristers. Ms Nomchong SC remarked:

> Clearly there is a class of judges who lack the appropriate civil 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.[49]

28. Similarly, the Hon John McKechnie QC commented:

> Bullies, whether judicial officers or counsel, tend to be people who have always been intimidating. They misuse their power to harass others. Sometimes this is temperament … Another characteristic may be incompetence. They feel, and are inadequate for the task and displace their emotions onto others. Training in emotional intelligence can help some.[50]

29. The view that officer-specific factors contribute to judicial bullying is also supported by Australian cases and inquiries where inappropriate conduct has been linked to wellbeing

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[44] See Denise Salin and Helge Hoel, 'Organizational Risk Factors of Workplace Bullying' in Ståle Valvatne Einarsen et al (eds), *Bullying and Harassment in the Workplace: Theory, Research and Practice* (CRC Press, 3rd ed, 2020) 305; Aquino and Thau (n 13) at 726–727; Jordi Escartín, 'Insights into Workplace Bullying: Psychosocial Drivers and Effective Interventions' [2016] (9) *Psychology Research and Behavior Management* 157 at 158.

[45] See, eg, Kirby (n 11) at 526 ('Sometimes … misconduct might be explained as a response to … depression or personality problems [judicial officers] themselves face'); de Moore (n 37) at 226–227; Mason (n 37) at 3; Nomchong (n 14) at 46, citing *Adacot v Sowle* [2020] FamCAFC 215.

[46] Zapf and Einarsen (n 42) at 273.

[47] Zapf and Einarsen (n 42) at 274.

[48] Zapf and Einarsen (n 42) at 277–278. See also psychological research on how 'individual characteristics in terms of personality traits, empathy, and moral disengagement are related to bullying': Thornberg et al (n 43) at 424; James M LeBreton, Levi K Shiverdecker and Elizabeth M Grimaldi, 'The Dark Triad and Workplace Behavior' (2018) *Annual Review of Organizational Psychology and Organizational Behavior* 387.

[49] Nomchong (n 14) at 46.

[50] McKechnie (n 37) at 11.

and mental health issues. For example in 2011, a Conduct Division of the Judicial Commission of New South Wales found that a magistrate engaged in inappropriate behaviour, including using intemperate language in several proceedings, being 'rude, offensive and bull[ying]' a litigant, and 'without justification … threatened' another litigant.[51] There was evidence that the magistrate suffered 'mixed features of anxiety and depression'.[52] The magistrate argued 'that her medical condition [was] the foundation for what [was] conceded … to be quite unsatisfactory and unprofessional conduct'.[53] The Conduct Division accepted 'that the absence of medication was operative in (although not the sole cause of) her unsatisfactory conduct in those hearings'.[54]

Bullying arising from a stressful environment and work pressures

30. While the above research is useful for understanding possible causes of judicial bullying, other perspectives suggest that bullying arises from the courtroom environment.

31. Much commentary associates judicial bullying with the stress and pressures of judicial work.[55] The workplace bullying literature suggests that features of judicial work contribute to, or increase the likelihood of, bullying. As Professors Salin and Hoel summarise, '[b]ullying has frequently been associated with a negative and stressful working environment', and '[w]ork intensification and increasing pressure have also been suggested as precursors of bullying'.[56]

32. Judicial work is often experienced as stressful and draining. Drawing on national surveys conducted in 2007,[57] Professors Mack, Wallace and Roach Anleu reported that '[t]here are some significant sources of stress in the work of magistrates and judges … some of which relate to the way that work is organised.'[58] In particular, the researchers noted that '[t]hree quarters of magistrates and judges agree that the volume of cases is unrelenting'.[59] On the basis of further empirical work (and a review of relevant literature), Professors Roach Anleu and Mack observed that '[j]udicial experience and display of emotion can be elicited by several dimensions of their everyday work, including the behaviour of lawyers, kinds of cases, the conduct or circumstances of people facing court and the many decisions judicial officers must make.'[60]

33. Ms Carly Schrever, a Judicial Wellbeing Advisor at the Judicial College of Victoria, is undertaking psychological research into judicial wellbeing. Ms Schrever's 2017 study of Victorian judicial officers 'found that symptoms of burnout and secondary trauma were

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[51] Conduct Division of the JCNSW, *In re Magistrate Betts* (Report, 2011) at [100]–[101], [129].

[52] Conduct Division of the JCNSW, *In re Magistrate Betts* (Report, 2011) at [44]

[53] Conduct Division of the JCNSW, *In re Magistrate Betts* (Report, 2011) at [102].

[54] Conduct Division of the JCNSW, *In re Magistrate Betts* (Report, 2011) at [129](vii).

[55] See, eg, Kirby (n 11); de Moore (n 37) at 227; Moses (n 27) at 4; CP Shanahan SC, '"Instructions on How to Use a Life-Jacket": Persuading a Hostile Court to Shift its Position' (2013) 38(1) *Australian Bar Review* 76 at 78–80.

[56] Zapf and Einarsen (n 42) at 307 (citations omitted).

[57] See Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) at 176–186. The National Survey of Australian Magistrates was completed by 242 magistrates, for a response rate of 53%. The National Survey of Australian Judges was completed by 309 judges, for a response rate of 55%.

[58] Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (AIJA, 2012) at 31.

[59] Mack, Wallace and Roach Anleu (n 58) at 31. See also Allan Borowski and Rosemary Sheehan, 'The Children's Court in Victoria' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 123 at 131 (interview data from Victorian Children's Court magistrates); Natalia Antolak-Saper, Jonathon Clough and Bronwyn Naylor, *Unrepresented Accused in the Magistrates' Court of Victoria* (AIJA, 2021) at 23 and 37 (court observation and interview study, reporting on the pressures of judicial work in the criminal list).

[60] Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) at 117.

features of the occupational stress experience'.[61] She reported that 'three-quarters … of judicial officers … reported scores on at least one sub-scale that was consistent with some level of burnout risk'.[62] Ms Schrever found that magistrates 'reported significantly higher levels of stress … and significantly lower levels of basic psychological needs satisfaction … than those in the higher jurisdictions'.[63]

34. However, Ms Schrever's study found overall that:

    (a) judicial officers' psychological distress rates were 'considerably lower than all levels of the [legal] profession'; and

    (b) 'judicial officers reported symptoms of depression and anxiety at rates … dramatically lower than those previously found in the legal profession.'[64]

Bullying as part of the courtroom culture and climate

35. Professors Salin and Hoel summarise that organisational culture and climate is a key risk factor for workplace bullying:

> Studies … discussing the role and impact of the culture of the organization have often emphasized that in many organizations associated with high levels of bullying, negative and abusive acts were indirectly 'permitted' …
>
> Organizations characterized by a high degree of conformity and group pressure seem to be particularly prone to bullying. Consequently, bullying seems to flourish in institutions such as prisons, the police and the armed forces, where compliance and discipline are of overriding importance …[65]

36. In this context, courtroom dynamics and the adversarial system may create a culture and climate where bullying is perceived as 'permitted'. Judicial officers necessarily occupy a privileged position in the courtroom, creating an 'imbalance of power between themselves and others'.[66] The power imbalance between judicial officers can be further exacerbated by the strong degree of formality, ritual and seriousness in most court proceedings.[67]

37. The judicial function requires questioning and scrutinising evidence to determine questions of fact (including the weight, credibility and reliability of evidence). Judicial officers will be presented with competing submissions by lawyers and parties; in many circumstances, they must test or challenge submissions in an effort to make correct decisions. As Kirby J observed, those requirements of the judicial role may appear surprising and 'robust':

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[61] Carly Schrever, Carol Hulbert and Tania Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28(3) *Journal of Judicial Administration* 141 at 163 (survey of Victorian judicial officers, N=152, response rate between 51% and 85%).

[62] Schrever, Hulbert and Sourdin (n 61) at 163.

[63] Carly Schrever, Carol Hulbert and Tania Sourdin, 'Where Stress Presides: Predictors and Correlates of Stress among Australian Judges and Magistrates' (2021) *Psychiatry, Psychology and Law* (advance) at 24.

[64] Schrever, Hulbert and Sourdin (n 61) at 163.

[65] Salin and Hoel (n 44) at 309, 311. See also House Standing Committee on Education and Employment (n 13) at [4.1], [4.7], [4.10]–[4.14].

[66] *Guide to Judicial Conduct* (n 7) at 9 [2.3].

[67] Roach Anleu and Mack, *Performing Judicial Authority in the Lower Courts* (n 57) at 44–46; Bridgette Toy-Cronin, *Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person* (PhD Thesis, University of Otago, 2015) at ch 8; Linda Mulcahy and Emma Rowden, *The Democratic Courthouse: A Modern History of Design, Due Process and Dignity* (Routledge, 2019) at 15–18.

> A frank dialogue will commonly be conducive to the avoidance of oversight and the repair of misapprehensions. Uninformed members of the public are doubtless sometimes surprised by the robust exchanges which take place in court, especially between a judge and experienced lawyers. But judges and other adjudicators and lawyers know that such dialogue can have great value.[68]

38. Further, it has been suggested that 'the culture of the legal profession may be one that provides fertile ground for bullying behaviours.'[69] Some accounts suggest that lawyers contribute to the normalisation of bullying behaviours in the courtroom, including through interactions with judicial officers.[70]

39. The potential for these 'culture' and 'climate' dynamics to enable bullying is suggested by research on the Children's Court of Victoria. Professor Borowski and Associate Professor Sheehan reported in 2013:

> the social environment, or 'culture', of the Family Division [of the Children's Court] was described in quite negative terms by many of the focus group participants. They commented that the adversarial nature of the Children's Court encourages a culture of bullying of child protection workers by magistrates, lawyers and clients …[71]

40. Overall, it is apparent that the courtroom setting could, perhaps unavoidably, contribute to the risk of bullying occurring. As Professors Salin and Hoel summarise, 'organizations characterized by a strict focus on power relations, a very formal atmosphere and extreme goal orientation may be associated with bullying'.[72]

Bullying to influence the performance of others

41. Judicial officers are sometimes faced with counsel and lawyers who do not meet their professional expectations or act inappropriately. Empirical research indicates that lawyers and parties will, from time to time, act inappropriately, be unprepared, be unhelpful or otherwise frustrate the efficient operation of courts and tribunals.[73] Some senior judges and barristers have linked complaints about judicial bullying to inappropriate conduct by lawyers and court users.[74]

42. Several theoretical perspectives suggest that bullying is engaged in intentionally as a means of influencing others in the workplace. For example, Professor Ferris et al suggest that bullying may be a 'strategic mechanism[] of influence', where perpetrators seek to 'influence others in order to maximize personal and/or organizational objectives, which can

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[68] *Johnson v Johnson* [2000] HCA 48, 201 CLR 488 at [46](2). See also the Hon James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) at 25 [4.7]; *Bodycorp Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd* [2018] VSCA 33 at [55]; *Michael v Western Australia* [2007] WASCA 100 at [65]–[69]; *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144, 271 FCR 530 at [26], [32]; *Piccolotto v The Queen* [2015] VSCA 143 at [41].

[69] Le Mire and Owens (n 13) at 1045, citing Omari (n 13) at 9; see also Ferguson (n 2) at 2; de Moore (n 37) at 227.

[70] See, eg, Roach Anleu and Mack, *Judging and Emotion* (n 60) at 92, 94; Jeffrey Phillips SC, '"White Line Fever" in the Courtroom' (2013) 4(1) *Workplace Relations* 13 at 14–15; McKechnie (n 37) at 10.

[71] Borowski and Sheehan (n 59) at 136. The research drew upon interviews with 10 magistrates and six focus groups (involving '60 practitioners associated with the courts'): at 129.

[72] Salin and Hoel (n 44) at 311.

[73] See, eg, Roach Anleu and Mack, *Judging and Emotion* (n 60) at 91–94 (court observation and interview data from Australian judicial officers); Mack, Wallace and Roach Anleu (n 58) at 25 (survey data on judicial perceptions of lawyer preparation); Toy-Cronin (n 67) at 187–194 (court observation and interview data from New Zealand civil proceedings); Borowski and Sheehan (n 59) at 134; Antolak-Saper, Clough and Naylor (n 59) at 24.

[74] See, eg, Thomas (n 68) at 26–27 [4.12]; Phillips (n 14) at 30 ('Judges in many of the courts are commonly confronted with practitioners who are lazy, or lacking in diligence and appropriate skill for the cases they are running'); Phillips (n 70) 14; Gleeson (n 11) at [39]; McKechnie (n 37) at 9–10; Shanahan (n 55) 78–79; Acting Justice Peter W Young, 'Current Issues: Judicial Bullying' (2013) 87(6) *Australian Law Journal* 371.

demonstrate both negative and positive consequences'.[75] Separately, Professors Felson and Tedeschi state that aggression may be used by 'agent[s] of social control' to ensure a violation of social norms is punished.[76]

43. These perspectives may explain why some reported instances of judicial misconduct were regarded as 'justified' or contextualised with reference to inappropriate, unprepared or unhelpful behaviours by court users and lawyers.[77]

44. In this way, inappropriate judicial conduct could be characterised as responsive to violations of court norms (eg offensive conduct by counsel and time-wasting behaviour) or as an attempt to ensure trials were conducted within their listed times (and so achieve a broad organisational objective of the courts).

Addressing judicial bullying

45. The reduction and elimination of judicial bullying requires a systematic response targeted at prevention.[78] Safe Work Australia's *Guide for Preventing and Responding to Workplace Bullying* recommends that the risks of workplace bullying be minimised through '[a] combination of control measures aimed at the organisational level and at individual levels'. These include:

    (a) '[d]emonstrated senior management commitment in identifying, preventing and responding to workplace bullying';

    (b) setting and enforcing 'clear standards of behaviour through a code of conduct … that outlines what is and is not appropriate behaviour and what action will be taken to deal with unacceptable behaviour'; and

    (c) implementing 'reporting and response procedures'. These include 'making it clear that victimisation of those who make reports will not be tolerated', 'ensuring consistent, effective and timely responses to reports', and 'being transparent about dealing with workplace bullying by regularly providing information on the number of reports made, how they were resolved and what actions were taken'.[79]

    This consultation draws upon Safe Work Australia's framework.

46. Important work is being performed by the Judicial College of Victoria to raise awareness of, and promote education regarding, judicial bullying.[80] Safe Work Australia and the

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[75] Gerald R Ferris et al, 'Strategic Bullying as a Supplementary, Balanced Perspective on Destructive Leadership' (2007) 18(3) *The Leadership Quarterly* 195 at 197, 203; see also Zapf and Einarsen (n 42) at 278–281.

[76] Richard B Felson and James T Tedeschi, 'Social Interactionist Perspectives on Aggression and Violence: An Introduction' in Richard B Felson and James T Tedeschi (eds), *Aggression and Violence: Social Interactionist Perspectives* (American Psychological Association, 1993) 1 at 3 (citations omitted).

[77] See generally Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'Judicial Impartiality, Bias and Emotion' (2021) 28(2) *Australian Journal of Administrative Law* 66 at 77–78. See also Young (n 74) at 371 (in partial response to judicial bullying discussions, the judge commented: '[i]t seems to me that advocates today are not as psychologically prepared to allow adverse criticism … lead to better performance').

[78] Compare Szoke (n 10) at 56; Omari (n 13) at [129]. See Dieter Zapf and Maarit Vartia, 'Prevention and Treatment of Workplace Bullying: An Overview' in Ståle Valvatne Einarsen et al (eds), *Bullying and Harassment in the Workplace: Theory, Research and Practice* (CRC Press, 3rd ed, 2020) 457 at 479–486; Escartín (n 44) at 165; House Standing Committee on Education and Employment (n 13) at [5.3]–[5.4].

[79] Safe Work Australia, *Guide for Preventing and Responding to Workplace Bullying* (May 2016) at 12–15. See also Omari (n 13) at [110]–[127].

[80] Ferguson (n 1) at 5; Judicial College of Victoria, 'International Women's Day' (Article, 8 March 2022).

research literature suggests the Commission can contribute to the systematic response to judicial bullying in three ways:

(a) establishing standards of ethical and professional conduct expected of judicial officers and VCAT members;

(b) addressing the reluctance for lawyers and others to formally complain to the Commission about judicial conduct; and

(c) ensuring that Commission processes in respect of complaint outcomes are effective in addressing judicial bullying.

Underlying each of these matters is clear leadership by the heads of jurisdiction in denunciating, and committing to addressing, judicial bullying. Further, by taking action through the Commission, their actions can be informed by the insight provided by the Board of the Commission's non-judicial members, who are appointed to represent the Australian community. The above matters are considered in turn.

Establishing standards of judicial conduct

47. As noted above, Safe Work Australia recommends workplaces have clear standards of appropriate conduct.[81] The literature suggests that '[a] common understanding of what bullying and harassment is, and a statement that such behaviours are unacceptable, are elements of a policy which are fundamental for measures of primary prevention' of bullying.[82] Associate Professor Omari's study of Western Australian lawyers reported '[t]he most significant finding … was: that the existence of anti-bullying policies has a significant and positive impact on the prevalence of workplace bullying.'[83]

48. Significantly, two examples of such 'standards' have been published recently, directed at inappropriate workplace behaviours by judicial officers: the High Court's *Justices' Policy on Workplace Conduct* and the Commission's *Judicial Conduct Guideline: Sexual Harassment*.[84] These documents demonstrate judicial leadership in ensuring courts are safe workplaces, and provide transparency as to how allegations of inappropriate conduct are to be addressed.

49. There is no comprehensive statement of the standards of conduct for Australian judicial officers.[85] The *Guide to Judicial Conduct* is generally 'not intended to be prescriptive' but rather provide 'practical guidance' to judicial officers.[86] Standards of conduct are pronounced across a multitude of sources including extra-curial work by senior judges, case law and academic work.[87] A clear statement of the standards of judicial conduct

[81] Safe Work Australia (n 79) at 13.

[82] Zapf and Vartia (n 78) at 474. See also Einarsen and Einarsen (n 41) at 543–544, 546–547.

[83] Omari (n 13) at [53].

[84] High Court of Australia, *Justices' Policy on Workplace Conduct* (March 2022); Judicial Commission of Victoria, *Judicial Conduct Guideline: Sexual Harassment* (22 February 2022).

[85] See Australian Law Reform Commission, *Ethics, Professional Development, and Accountability* (Background Paper JI5, 2021) at [5], [22]; Acting Justice of Appeal Ronald Sackville, 'Judicial Ethics and Judicial Misbehaviour: Two Sides of the One Coin?' (2015) 89(4) *Australian Law Journal* 244 at 259; Sharyn Roach Anleu, Jennifer Elek and Kathy Mack, 'Judicial Conduct Guidance and Emotion' (2019) 28(4) *Journal of Judicial Administration* 226; Suzanne Le Mire, 'Regulation of Judicial Misconduct in Australia: Why, How and Where Next?' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar, 2021) 23 at 40.

[86] *Guide to Judicial Conduct* (n 7) at 1 [1.1] (emphasis omitted).

[87] See especially Thomas (n 68).

would reinforce that bullying is unacceptable, as well as provide transparency about how bullying allegations are considered by the Commission.[88]

Receipt of complaints about judicial bullying

50. Safe Work Australia emphasises that 'reporting and response procedures' are key to managing the risk of bullying. In the context of sexual harassment in courts and VCAT, Dr Szoke emphasised that an effective prevention strategy required (among other things) processes for ensuring integrity and accountability: '[t]he community must have confidence that there are effective mechanisms to identify and sanction misconduct where it occurs.'[89]

51. There are features of a complaints-handling process that may contribute to the reduction of bullying. This section of the Consultation Paper focuses on the research relating to the receipt of complaints, while the following section addresses the outcomes of substantiated complaints.

52. Workplace bullying literature routinely finds that incidents are underreported.[90] Australian research has consistently found that there are especially barriers to, and a reluctance of, people complaining about judicial officers.

53. First, lawyers may be discouraged from making complaints because of concern (or fear) of professional consequences that might arise from complaining. As outlined above, the courtroom dynamics and the adversarial system might contribute to a reluctance to complain or speak up where lawyers may feel they have to be robust at all times and cannot show any signs of vulnerability or having difficulty coping.[91]

54. In the context of sexual harassment in Victorian courts and VCAT, Dr Szoke found that some individuals were 'concern[ed] that they would receive negative treatment from either colleagues or the harasser as a result of reporting'.[92] Further, Dr Szoke stated that '[t]he common thread of many of the stories was that it is not always safe to report sexual harassment', noting that some individuals 'felt it would be impossible to remain anonymous if raising a complaint'.[93] In this respect, the Commission's 'requirement to disclose the identity of the complainant' was identified as a disincentive for people to make complaints to the Commission.[94] These concerns may be heightened for court staff. Dr Szoke's review 'heard of the vulnerability of staff such as associates and junior female staff' who 'spoke of the temporary nature of employment conditions and how this is an obstacle to reporting sexual harassment. Many also felt they were largely at the whim of their individual judge'.[95]

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[88] Perhaps for these reasons, Justice Kunc calls for a model national policy on judicial bullying: Kunc (n 12) at 807. Compare Justice SC Derrington, 'Without Fear or Favour' (Fiat Justitia Lecture, Monash University, 7 June 2022) at [48].

[89] Szoke (n 10) at 58. Complaints about sexual harassment are distinctive from those of bullying. Nonetheless, Dr Szoke's research on reporting systems for those who experience sexual harassment offers insights into the tendency to not complain about inappropriate judicial behaviour.

[90] See generally House Standing Committee on Education and Employment (n 13) at [1.22]–[1.28], [3.55]; International Bar Association (n 13) at 43; Madeline Carter et al, 'Workplace Bullying in the UK NHS: A Questionnaire and Interview Study on Prevalence, Impact and Barriers to Reporting' (2013) 3(6) *BMJ Open* e002628.

[91] See, eg, Omari (n 13) at [82]–[83]; Colin James, 'Towards Trauma-informed Legal Practice: A Review' (2020) 27(2) *Psychiatry, Psychology and Law* 275 at 282–283.

[92] Szoke (n 10) at 48.

[93] Szoke (n 10) at 49.

[94] Szoke (n 10) at 49.

[95] Szoke (n 10) at 48.

55. Similarly, the Equal Opportunity Commission (SA) found that the most common reason that lawyers did not report discriminatory harassment or sexual harassment 'was concern over what might happen to them, including career prospects and retributions'.[96] The concern about professional consequences is further suggested in the commentary.[97]

56. Second, people may not complain because they perceive nothing meaningful will result from a complaint.[98] In relation to sexual harassment, Dr Szoke reported that individuals 'were reluctant to go to the Judicial Commission' because of 'its perceived limited powers to deal effectively and decisively with sexual harassment'.[99] In 2004, Mr Phillips SC wrote of the New South Wales position (where the equivalent judicial commission was already in operation): 'remedies [for bullying] may not always be adequate. Any protection against judicial bullying is more illusory than real.'[100]

57. These concerns are implicitly recognised by the Victorian Bar's *Judicial Conduct Policy*.[101] It is also implicit in protocols between the Bar and each of the Victorian Supreme Court, County Court and Children's Court.[102] These protocols provide 'less formal mechanisms' for barristers to raise concerns about judicial conduct, recognising that '[s]erious complaints … should be made' to the Commission.

58. As noted above, the Commission receives information relevant to judicial bullying from formal and informal sources. Its observations are largely consistent with the research literature in that:

    (a) relatively few complaints are received from legal practitioners, firms or professional bodies. Nonetheless, of the complaints referred to an investigating panel or head of jurisdiction (ie they are substantiated and/or particularly serious), the complainant has usually been a legal practitioner, professional body or professional court user; and

    (b) there is a strong reluctance for lawyers to formally complain about judicial officers. This sometimes arises from a concern about professional consequences of complaining, as well as a view that no meaningful action will follow from a substantiated complaint.

Outcome of complaints about judicial bullying

59. A further issue for this Consultation is how the Commission can address bullying when a complaint is received and found to be substantiated. Theoretical and empirical research from different disciplines indicate that a clear, strong response may have preventative

[96] Equal Opportunity Commission (SA) (n 29) at 84.

[97] See, eg, Nomchong (n 14) at 46; Martin (n 35) at 16–17; Kirby (n 11) at 525; Shanahan (n 55) at 78.

[98] See generally House Standing Committee on Education and Employment (n 13) at [3.107]–[3.109].

[99] Szoke (n 10) at 49. Compare Equal Opportunity Commission (SA) (n 29) at 86–87 (where survey respondents perceived that complaining about judicial harassment would not lead to any consequences for judicial officers).

[100] Phillips (n 70) at 30.

[101] Victorian Bar, *Judicial Conduct Policy* (22 June 2023).

[102] Chief Justice Anne Ferguson, *Protocol for the Bar to Raise Concerns about Judicial Conduct* (2018); Chief Judge Peter Kidd, *Protocol for the Bar to Raise Concerns about Judicial Conduct* (2018); Judge Amanda Chambers, *Protocol for the Bar to Raise Concerns about Judicial Conduct in the Children's Court* (2019). See also, in respect of the Commonwealth Courts, Chief Justice James Allsop, Chief Justice William Alstergren and Jennifer Batrouney QC, *Protocol for the Bar Associations of Australia to Raise any Concern about Judicial Conduct in Commonwealth Courts* (2019).

effects.[103] This work emphasises that workplaces should make clear that such conduct is unacceptable, and that there may be informal or formal consequences for engaging in it.[104]

60. Moreover, an effective response emphasises to the legal profession, court staff and public that bullying does not reflect the values of the courts and VCAT. The Hon Michael Kirby recommended that courts 'should not accept misconduct, discriminatory remarks or more than the most transient instances of judicial bad temper'. He continues, '[w]here it occurs [judicial officers] should place on record their disassociation from it … At least this will signal to litigants … the exceptional and possibly unacceptable character of what has occurred. It will enhance the record.'[105]

61. Comparably, Dr Le Mire and Professor Owens considered in the broader legal profession context, that '[p]rominent examples of bullying behaviours that are not addressed in effective and transparent ways may operate to reduce the capacity of other members of the profession to "see" the problem and be motivated to address it.'[106]

[103] Einarsen and Einarsen (n 41) 550–551.

[104] Safe Work Australia (n 79) 13–14, 21. House Standing Committee on Education and Employment (n 13) at [3.106]; Le Mire and Owen (n 13) at 1049, quoting Maryam Omari and Megan Paull, '"Shut Up and Bill": Workplace Bullying Challenges for the Legal Profession' (2014) 20(2) *International Journal for the Legal Profession* 141 at 152.

[105] Kirby (n 11) at 526.

[106] Le Mire and Owens (n 13) at 1044. See also Omari (n 13) at [110]–[115].

Consultation issues

62. The preceding part of this Consultation Paper has briefly summarised the research and commentary relating to judicial bullying. The remainder of the Consultation Paper seeks stakeholder views in relation to a proposed Judicial Conduct Guideline, and practices relating to complaint handling.

How should judicial bullying be addressed in a Judicial Conduct Guideline?

63. The Commission proposes to make, pursuant to section 134(1) of the *JCV Act*, a guideline relating to judicial bullying. That guideline would state explicitly how the Commission defines 'bullying'; set out the standard of conduct expected of judicial officers; and potential outcomes for breaching those standards.

What is judicial bullying?

64. In Australian workplace relations law, bullying is generally defined in a consistent way. Section 789FD(1) of the *Fair Work Act 2009* (Cth) provides that a worker is bullied if:

    (a) while the worker is at work,

    (b) an individual (or group of individuals) repeatedly behaves unreasonably towards the worker (or a group of workers of which the worker is a member), and

    (c) the behaviour creates a risk to health and safety.

    Section 789FD(2) clarifies 'reasonable management action carried out in a reasonable manner' is not bullying.[107]

65. Relevantly, the *Fair Work Act* definition requires:

    (a) unreasonable behaviour. This is an objective test met by behaviour including 'victimising, humiliating, intimidating or threatening' a person;[108]

    (b) the unreasonable behaviour be repeated;[109] and

    (c) the unreasonable behaviour creates a risk to health and safety.

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[107] Section 789FD(2) was considered in *In re SB* [2014] FWC 2104, 244 IR 102 at [49]–[53], quoted with approval in *Aly v Commonwealth Bank of Australia* [2015] FWCFB 6895 at [4].

[108] See Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth) at [109]. See also *Mac v Bank of Queensland Ltd* [2015] FWC 774, 247 IR 274 at [99] (where Hatcher VP listed 'the features at least some of which one might expect to find in a course of repeated unreasonable behaviour that constituted bullying' which included 'intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination'). Hatcher VP's list has been quoted with approval in subsequent Fair Work Commission cases.

[109] See *Blagojevic v AGL Macquarie Pty Ltd* [2018] FWCFB 4174 at [17] (the Full Bench remarking that '[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' (citations omitted)).

66. The *Fair Work Act* codified a definition developed by Safe Work Australia.[110] A consistent definition appears in other Australian workplace relation laws,[111] is used by WorkSafe Victoria and Court Services Victoria,[112] and has been largely adopted for other legal purposes.[113]

67. In developing a definition of judicial bullying, the Commission notes the importance of defining judicial bullying in a manner consistent with existing legal definitions.[114] The particular nature of a courtroom as a workplace, and the manner and circumstances in which parties attend that workplace, must also be accounted for. Simultaneously, the tests under the *JCV Act* for assessing judicial conduct and capacity must be factored in.

68. A complex definition of judicial bullying will present unnecessary challenges in application during any complaint investigation process. Further, complexity will not provide clarity for judicial officers about the expected standards of conduct, nor for people who may wish to complain about an instance of judicial bullying.

69. Accordingly, in developing a proposed definition for judicial bullying, the Commission seeks to:

    (a) replicate the essential *Fair Work Act* test of unreasonable behaviour, taking into account a court and tribunal context by retaining language appearing in the *JCV Act*; and

    (b) recognise that the public expects a high standard of conduct from judicial officers. As Kunc J remarked, '[c]ourtrooms are workplaces and there is no reason why the behaviour of everyone in a courtroom, including the judge, should not at least be held to standards that now apply in Australian workplaces as a matter of law'.[115]

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[110] Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth) at [108]; House Standing Committee on Education and Employment (n 13) at [1.51].

[111] See, eg, *Local Government Act 1989* (Vic) s 3(1); *Industrial Relations Act 2016* (Qld) s 272(1); *Industrial Relations Act 1979* (WA) s 51BI. See also Tasmania Law Reform Institute, *Bullying* (Final Report 22, 2016) at ix (Recommendation 7).

[112] WorkSafe Victoria, *Workplace Bullying: A Guide for Employers* (2020) at 1; Court Services Victoria, *Bullying Discrimination, Harassment and Victimisation Policy* (8 December 2021) at 3. See also *Andrews v Victorian Workcover Authority* [2013] VCC 1615 at [22].

[113] For example, the South Australian Ombudsman largely adopted the *Fair Work Act* definition for the purpose of a local government misconduct investigation after a detailed analysis of the meaning of 'bullying': Ombudsman (SA), *In re City of Burnside (Conduct of Councillor Bagster)* (Report 24, 2018) at [437].

[114] Compare House Standing Committee on Education and Employment (n 13) at [1.48], [1.63].

[115] Kunc (n 12) at 807. See also *Guide to Judicial Conduct* (n 7) at 8–9 [2.3]; Brennan (n 8) at vii.

Proposed definition of 'judicial bullying'

Judicial bullying is conduct by a judicial officer towards an individual that is unreasonable. What is unreasonable is assessed objectively and having regard to the functions of the judicial officer.

This may include, but is not limited to, conduct that is:

(a) belittling;
(b) humiliating;
(c) insulting;
(d) victimising;
(e) aggressive;
(f) intimidating;
(g) excessively uncivil; or
(h) excessively intemperate.

70. The proposed definition replicates the *Fair Work Act* requirement that a person 'behaves unreasonably towards' another person. Both definitions recognise that 'victimising, humiliating, undermining or threatening' will generally be regarded as unreasonable conduct towards an individual, and so is bullying.

71. The proposed definition requires that, in determining whether conduct is unreasonable, regard be had to the functions of a judicial officer. This language ensures that allegations are assessed in the context of judicial ethics, which recognises that some robustness in courtroom exchanges is legitimate.

72. The proposed definition does not require conduct to be repeated, and recognises that a single occasion of conduct may be as serious as multiple occasions (and have the same consequences). The Commission considers this departure from the *Fair Work Act* definition to be justified because:

    (a) there is contention about whether definitions of bullying should require 'repeated' conduct. The Law Society of New South Wales argued in a submission to a parliamentary committee on workplace bullying that 'a single instance of "unreasonable behaviour" can constitute workplace bullying if sufficiently aggravated'.[116] Primarily, the parliamentary inquiry reasoned that repetition should be required to ensure that 'the responsibility of employers' is not extended 'beyond what is reasonable'.[117] That competing policy interest does not arise for judicial bullying;

    (b) the nature and circumstances in which parties attend a courtroom as a workplace varies in a material way from many other workplaces. An individual may attend before

[116] Law Society of NSW, Submission 123 to House Standing Committee on Education and Employment, Parliament of Australia, *Inquiry into Workplace Bullying* (6 July 2012) at 2.
[117] Cf House Standing Committee on Education and Employment (n 13) at [1.61].

multiple judicial officers, across different courts, in one day or be involved in protracted hearings;

(c) in practice, the Commission is unlikely to consider whether conduct amounts to judicial bullying without first being satisfied that the conduct infringed the standards of conduct generally expected of judicial officers. This assessment involves consideration of the frequency and nature of conduct complained about.

73. Finally, the proposed definition deletes the requirement that conduct creates a risk to health and safety. That expression reflects the policy context of employment law,[118] and so is not necessary for the purposes of a Judicial Conduct Guideline. Judicial ethics recognises that certain behaviour is inappropriate of itself, assuming a mere infringement of the expected standards risks undermining confidence and trust in the judiciary.

Question 1: Do you have any comments on the proposed definition of bullying?

Explicit recognition that bullying may demonstrate incapacity or amount to proved misbehaviour

74. The Commission proposes to include in its Judicial Conduct Guideline a clear statement that, at its most egregious, judicial bullying may demonstrate incapacity or amount to proved misbehaviour.

75. The authoritative view is that 'the term "incapacity" … should be understood as referring to "incapacity to discharge the duties of judicial office in a manner that accords with recognised standards of judicial propriety" … It therefore extends beyond physical or mental impairment caused by an identified disorder. … That inability can … arise from a personality trait'.[119] For example, *Bruce v Cole* concerned the capacity of a New South Wales Supreme Court judge.[120] A five-member Bench of the Supreme Court held:

> The relevant manifestation of incapacity is an inability to write judgments within an acceptable time. There can be no doubt that [the judge] demonstrated such an inability. A personality trait described as "procrastination", of itself and without the intervention of a medical condition …, could entail such inability.[121]

76. With respect to judicial bullying, Chief Justice French wrote that '[t]he negative practical implications of [bullying] for the proper discharge of the judicial function are significant and, if chronic, go to a person's suitability for judicial office.'[122] Similarly, the Hon Michael Kirby considered that '[i]n serious or repeated cases, bullying by judicial officers should be recognised as an abuse of public office, warranting commencement of proceedings for removal of the offender from judicial office, in accordance with law'.[123]

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[118] See, eg, *Fair Work Act 2009* (Cth) s 3(a), (e).

[119] Conduct Division of the JCNSW, *In re Judge Maiden* (Report, 2019) at [13], citing *Bruce v Cole* [1998] NSWSC 260, 45 NSWLR 163 at 191 and Conduct Division of the JCNSW, *In re Magistrate Betts* (Report, 2011) at [158].

[120] *Bruce v Cole* [1998] NSWSC 260, 45 NSWLR 163.

[121] *Bruce v Cole* [1998] NSWSC 260, 45 NSWLR 163 at 191 (Spigelman CJ, with whom Mason P, Sheller and Powell JJA agreed. Priestley JA's separate reasons appear to agree with the Chief Justice's reasoning, at 207).

[122] Chief Justice Robert French, 'The Changing Face of Judicial Leadership: A Western Australian Perspective' (2017) 91(4) *Australian Law Journal* 322 at 328.

[123] Kirby (n 11) at 525.

77. Accordingly, as suggested by French CJ and the Hon Michael Kirby, by engaging in bullying, a judicial officer may demonstrate that he or she lacks the skills or qualities required for office, and so is incapable of fulfilling judicial functions.

78. Further, the potential for bullying to demonstrate proved misbehaviour is suggested by a Conduct Division of the Judicial Commission of New South Wales. The Conduct Division explained:

> There are, of course, grades and variations of misbehaviour. Whether demonstrated misbehaviour warrants parliamentary consideration of removal of a judicial officer from office depends on the gravity of the misbehaviour, and, in some cases at least, the extent (if any) to which conduct of the kind is repeated. A single instance of even serious misbehaviour may not reach the necessary threshold; on the other hand, repeated instances of less serious misbehaviour may do so.[124]

In this way, even where bullying is not of the most serious kind, repeated occasions may be sufficient to demonstrate the requisite misbehaviour.

What distinguishes judicial bullying from acceptable judicial conduct?

79. The Commission proposes that the Judicial Conduct Guideline will clarify the factors relevant to assessing judicial bullying complaints. Doing so:

(a) is consistent with the purpose of the *JCV Act* in providing for 'a transparent and accountable process for investigating the performance of functions of judicial officers';[125]

(b) provides transparency for potential complainants and the public, which in turn contributes to confidence in the system and may address (in part) concerns about judicial bullying; and

(c) will address the uncertainty about how to distinguish between appropriate and inappropriate conduct.

80. The Commission's purpose in assessing complaints about judicial conduct is not to determine ideal or 'preferable' judicial conduct.[126] Rather, the Commission must consider whether:

(a) the matter complained about could, if substantiated, amount to proved misbehaviour or incapacity of the officer concerned such as to warrant the removal of the officer from office;

(b) the matter complained about may affect or have affected the performance of the officer's functions; and/or

(c) the conduct complained about may have infringed the standards of conduct generally expected of judicial officers.[127]

81. The Commission serves a protective function, with its legislation 'designed to protect both the public (from judicial officers who are unfit or incapable or discharging the duties of their

[124] Conduct Division of the JCNSW, *In re Magistrate Betts* (Report, 2011) at [157].
[125] This is expressed as a 'disclosure consideration': *JCV Act* s 4(a).
[126] Compare *Dennis v Commonwealth Bank of Australia* [2019] FCAFC 231, 272 FCR 343 at [35].
[127] See *JCV Act* s 16(1).

offices) and the judiciary (from unwanted intrusions into judicial independence).'[128] By investigating complaints, the Commission seeks to maintain present and future public confidence in the courts and VCAT,[129] and 'the standards of conduct *generally expected*', is understood as the expectations of 'a member of the public served by the courts'.[130]

82. In assessing the appropriateness of judicial conduct, it has been suggested that there is a continuum ranging from:

    (a) appropriate: conduct that enhances or exhibits core judicial values, and so is consistent with the standards of conduct expected;

    (b) acceptable: conduct which is generally consistent with core judicial values. Conduct may sometimes be unusual or out-of-place, but when viewed in context cannot be understood as infringing the standards generally expected;

    (c) inappropriate: conduct which infringes the standards generally expected of judicial officers in that it is inconsistent with core judicial values, but is not so egregious that it may demonstrate a lack of suitability for office; and

    (d) unacceptable: conduct which infringes the standards generally expected of judicial officers in that it is seriously inconsistent with core judicial values. Conduct of this kind may demonstrate a lack of suitability for office (especially where repeated).[131]

83. When assessing where conduct sits along this continuum, the Commission considers the following factors are particularly relevant to judicial bullying.[132] Some are interrelated and some will not be relevant to every allegation. The factors are intended to provide transparency and clarity over how a substantiated allegation will be assessed, rather than be an exhaustive list of matters taken into account by the Commission. Plainly, all complaints will turn on their own facts.

84. Purpose of the conduct (to be determined objectively from all of the circumstances). Reflecting modern expectations as to active case management, Chief Justice French remarked that 'the judicial role does require firmness and seriousness of purpose and a commitment, in the interests of all parties and the public purse, to ensure that litigation is conducted without time-wasting behaviour'.[133] Nonetheless, as Chief Justice Ferguson emphasised, '[r]obust and vigorous legal debate and adversarial exchanges are common for lawyers, but we must always be mindful to treat people with respect and dignity.'[134]

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[128] Conduct Division of the JCNSW, *In re Judge Maiden* (Report, 2019) at [10].

[129] *JCV Act* s 4(b).

[130] See *Charisteas v Charisteas* [2021] HCA 29 at [21]. See also *Cesan v The Queen* [2008] HCA 52, 236 CLR 358 at [71] (French CJ remarking '[t]he somewhat elusive criterion of "public confidence" is in some cases … subsumed in what a fair and reasonable observer would think'); Wallace and Goodman-Delahunty (n 10) at 8–9.

[131] Adapted from Sharyn Roach Anleu, Kathy Mack and Jordan Tutton, 'Judicial Humour in the Australian Courtroom' (2014) 38(2) *Melbourne University Law Review* 621 at 640–641.

[132] These factors are distilled from superior court decisions (generally in relation to allegations as to apprehended bias, denial of the right to a fair trial, denial of procedural fairness or excessive judicial intervention: see, eg, *Galea v Galea* (1990) 19 NSWLR 263 at 273, 281(4); *Michael v Western Australia* [2007] WASCA 100 at [77]; *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113, 271 FCR 461 at [105]–[141]) or socio-legal research on judicial conduct (eg Roach Anleu, Mack and Tutton (n 131)).

[133] Chief Justice French (n 122) at 328, citing *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, 239 CLR 175. See also *UBS AG v Tyne* [2018] HCA 45, 265 CLR 77 at [38].

[134] Chief Justice Ferguson (n 12).

85. It is widely understood that courtroom interactions may involve (and require) a degree of robustness, as an incident of the judicial function (as discussed above at [35]–[40]). Conduct directed at the proper discharge of the judicial function is less likely to infringe the standards of conduct. Examples may be critical comments from the Bench directed at moving a lawyer from a weak submission,[135] '[c]onfronting counsel with perceived flaws in the submissions',[136] intervening in an overly-long or unclear witness examination,[137] or suggesting preliminary views as to issues before the Court.[138]

86. However, conduct which does not appear related to the judicial function is more likely to infringe the standards of conduct. Critical comments that are purely gratuitous or serve only to insult, harass or threaten a person do not serve a legitimate purpose.[139] They are inconsistent with core judicial values and are likely to undermine public confidence in the courts and VCAT. Relevantly, in this respect, the Hon James Thomas QC believed:

> [c]ensure should be reserved only for genuine bullying. That usually involves abuse of the judge's privileged position, the levelling of gratuitous insults, the gratification of an unhealthy personality that feeds upon the discomfort of others, or sometimes plain hooliganism.[140]

87. Subject or target of the conduct. It is one thing to be critical of a submission or line of questioning; it is another to be personally critical of the person making that submission or asking those questions.[141] If a critical comment is to serve a legitimate purpose, it is unlikely to require a personal attack on a lawyer or court user.

88. Characteristics of the subject or target may also be relevant to assessing the judicial conduct. Some senior judicial officers have expressed their expectation that judicial conduct be more restrained with unrepresented litigants (especially of culturally diverse

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[135] See, eg, *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144, 271 FCR 530 at [32]; *Bodycorp Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd* [2018] VSCA 33 at [55]; *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407 at [162]; *Bowers v Judicial Commission of New South Wales (No 2)* [2021] NSWSC 917 at [50].

[136] *Bodycorp Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd* [2018] VSCA 33 at [55] (Ferguson CJ, Whelan and McLeish JJA).

[137] See, eg, *Piccolotto v The Queen* [2015] VSCA 143 at [41]; *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113, 271 FCR 461 at [102], [106]; *Nwagbo v The Queen* [2021] VSCA 93 at [31], quoting *Anderson v National Australia Bank* [2007] VSCA 172 at [83] (Maxwell P); *McPadden v The Queen* [2018] VSCA 57 at [37]–[43]; *R v T, WA* [2014] SASCFC 3, 118 SASR 382 at [53], [56]; *R v Senior* [2001] QCA 346 at [36].

[138] See, eg, *Chamoun v District Court of NSW* [2018] NSWCA 187 at [41]–[45]; *Anderson v National Australia Bank* [2007] VSCA 172 at [81].

[139] See, eg, *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407 at [43], [46], [81], [83]; *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144, 271 FCR 530 at [29], [32] (where 'many of the primary judge's interruptions appear to have been made merely to harangue [a litigant] into agreeing with propositions raised by [the primary judge]' and so 'went well beyond the legitimate ends of seeking to clarify, understand and test [a party]'s case'); *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113, 271 FCR 461 at [106]–[107], [119], [126] (distinguishing it being 'no doubt legitimate for the primary judge to intervene at times for the purpose of seeking clarification to aspects of [a party]'s evidence' from the trial judge making 'threatening or accusatory statements to [a party]' and the trial judge 'frequently [being] critical, disparaging [and] sarcastic towards [the party] and his evidence'); *George v Fletcher (Trustee)* [2012] FCAFC 148 at [160]–[167] (insulting comments by trial judge described as 'inappropriate' and 'injudicious'). Justice Martin gave the example of a judge remarking to counsel: 'You're an idiot. Do your clients know you're an idiot?': (n 35) at 16. In surveying the different views offered on judicial bullying in Australia, Mr Shanahan SC observed that '[i]t seems that on whatever side of [the] debate one falls everyone agrees' that this example 'is a form of "judicial bullying"': at (n 55) 79, citing Young (n 74).

[140] Thomas (n 68) at 27 [4.12].

[141] See, eg, *Finch v Finch* [2020] FamCAFC 60 at [30], [40]–[46], [65] (where the Full Court found that the trial judge's conduct was inappropriate, based in part of the 'unduly personalised' comments by the judge); *Cook v The Queen* [2016] VSCA 174 at [99] ('the judge should not have allowed his exasperation with counsel to descend into verbal abuse. … [T]o insult and demean counsel, even in the absence of the jury, is not only likely to offend and embarrass counsel but also to risk impeding counsel in conducting the trial and thus risk giving rise to a miscarriage of justice'); *Adacot v Sowle* [2020] FamCAFC 215 at [103].

backgrounds) and junior lawyers,[142] in contrast to senior counsel or experienced litigants.[143]

89. Tone or nature of the conduct. Qualitative aspects of the conduct will inform whether the conduct is acceptable, inappropriate or unacceptable. These include express language,[144] the implicit meaning of comments,[145] tone or volume of voice,[146] and any physical conduct or displays. Conduct directed at a legitimate purpose (such as moving a lawyer from a weak submission) may be:

    (a) acceptable, even if delivered in a 'vigorous and robust' way;[147] involving justified reprimands, rebukes or criticism;[148] intemperate behaviour (such as displays of irritation, frustration or annoyance);[149] or using direct or plain language;[150] or

    (b) inappropriate or unacceptable, if it is belittling, insulting, victimising, intimidating, offensive, overbearing, abusive, demeaning or disproportionate to any 'justification' for the conduct.

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[142] *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407 at [163].

[143] See, eg, *De Alwis v Western Australia* [2017] WASCA 164 at [71] (McLure P stating '[g]reater robustness is permissible when the litigant in person has legal qualifications and significant courtroom experience'), [80]; Roach Anleu, Mack and Tutton (n 131) at 652 (quoting a judge who commented that 'in a criminal trial you have to be a bit more careful [with judicial humour] but say in a civil trial if I've got one or two well-known high earning QCs before me…'. The judge was interpreted as implying that in the later scenario there was less need for caution with humour).

[144] Vulgar language, discriminatory language or swearing are extreme examples of inappropriate/unacceptable conduct. See, eg, *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407 at [43] (Mason P, Sheller JA and Rolfe AJA describing a judge's comment 'shut up' as 'most unseemly' and falling 'far short of acceptable judicial behaviour'), see also [74], [151]–[152] (describing the comment 'I will permit this representative and her client as much rope as they choose to hang themselves with' as 'disgraceful and totally unjudicial'); *Were v Police (SA)* [2003] SASC 116 at [13] (Perry J describing a magistrate's 'diatribe … expressed in abusive terms … coupled with personal abuse of the defendant, [as] entirely inappropriate'); *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, 89 FCR 435 at [29]–[34]. Compare, eg, *Percival v The Queen* [2015] VSCA 200, 49 VR 238 at [77].

[145] See, eg, *Adacot v Sowle* [2020] FamCAFC 215 at [24]–[67] (where the trial judge was found to have impugned the honesty and professionalism of counsel without basis). Threats to a lawyer or party are often seen as inappropriate or unacceptable absent a clear justification. For examples where threats were expressly made, see *Magistrates' Court of Victoria at Heidelberg v Robinson* [2000] VSCA 198, (2000) 2 VR 233 at [12], [25]–[26] (lawyer threatened with contempt); *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144, 271 FCR 530 at [38] (litigant threatened with contempt); *Barmettler v Greer & Timms* [2007] QCA 170 at [40] (litigant threatened with contempt and perjury charge); *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407 at [78]–[83], [94], [98] (different threatening behaviours by trial judge).

[146] Shouting or speaking in a menacing tone is, on its face, inappropriate conduct. See, eg, *Dennis v Commonwealth Bank of Australia* [2019] FCAFC 231, 272 FCR 343 at [35], [37] (an audio-recording 'indicate[d] that the primary judge raised his voice and spoke in an aggressive and sometimes intimidating tone of voice on a number of occasions when there was no apparent need to do so'), [38], [48].

[147] *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144, 271 FCR 530 at [26].

[148] *Michael v Western Australia* [2007] WASCA 100 at [64] ('A trial judge is entitled to reprimand an accused person … when the accused person's behaviour calls for it:'), [87]; *Piccolotto v The Queen* [2015] VSCA 143 at [42] ('as the conduct of counsel affected the proper course of the proceedings, the judge was entitled to reprove counsel to ensure that witnesses were treated fairly and that the court's time was not wasted'); *Toner v Attorney-General (NSW)* [1991] NSWCA 267 at 8.

[149] *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 872, 131 FCR 102 at [81]; *Piccolotto v The Queen* [2015] VSCA 143 at [42] ('judges, being human, can be expected to react with impatience or irritation from time to time').

[150] *Anderson v National Australia Bank* [2007] VSCA 172 at [95] (Nettle JA remarking 'trial litigation often calls for plain speaking, directness and sometimes asperity'), quoted with approval in *George v Fletcher (Trustee)* [2012] FCAFC 148 at [159].

90. Frequency of the conduct. The authoritative view is that core judicial values are not offended by '[o]ccasional displays of impatience and irritation, whether justified or not'.[151] Absent anything further, a single unseemly remark by a judicial officer is unlikely to infringe the standards of conduct and so not amount to judicial bullying.

91. However, a one-off inappropriate comment is different from a series of inappropriate comments made throughout a hearing. Repeated or persistent inappropriate conduct is less likely to be regarded as an instance of unavoidable frailty,[152] and may suggest to the community that the judicial officer lacks the appropriate temperament. Moreover, persistent comments are more likely to have deleterious effects on the legal process,[153] which in turn renders the overall conduct as falling below the standard expected of a judicial officer.

92. Jurisdiction and type of proceeding. Sometimes specific processes and procedures will shape expected standards of behaviour. For example, VCAT 'is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices and procedures'.[154] Members 'must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as … a proper consideration of the matters before [them] permit'.[155] Similar requirements apply in the VOCAT.[156] Special court programmes, such as Drug Court or Indigenous sentencing courts, may also require judicial officers to engage with court users in different ways.[157] A member of the public would expect these jurisdictional requirements to influence conduct in those fora.

93. The type of proceeding may also be relevant to assessing judicial conduct. There are often stricter expectations as to judicial conduct in criminal trials, especially matters before a jury or those involving sexual offences.[158] The judicial officer may be subject to specific legislation governing the conduct of the trial (this may require particular interventions by the judicial officer),[159] or ensuring a fair jury trial may require additional judicial restraint.[160] In contrast, a judicial officer may legitimately 'denounce' an offender during sentencing,[161] and in civil litigation the overarching purpose to 'facilitate the just, efficient, timely and cost-

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[151] *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 872, 131 FCR 102 at [81] (Kenny J), quoted with approval in *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [31] (Flick J), [90]–[91] (Robertson J).

[152] *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407 at [158]–[159]. Compare *McPadden v The Queen* [2018] VSCA 57 at [52].

[153] *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144, 271 FCR 530 at [30]–[31] (where a litigant's 'submissions were interrupted so frequently that he was given no real opportunity to develop his case'); *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113, 271 FCR 461 at [113], [139]; *Piccolotto v The Queen* [2015] VSCA 143 at [43], [45]; *Edwards v Police (SA)* [2004] SASC 419 at [41];

[154] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b).

[155] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d).

[156] *Victims of Crime Assistance Act 1996* (Vic) ss 32(1), 38(1).

[157] See Magistrate Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders* (Federation Press, 2016) at 48–51, 57; Magistrate Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) at 15–16, 192–193, 243–244.

[158] Roach Anleu, Mack and Tutton (n 131) 651–652.

[159] For example, section 41(1) of the *Evidence Act 2008* (Vic) imposes on judicial officers the duty to disallow improper questioning of a witness (or inform the witness that the questioning need not be answered). See, eg, *R v T, WA* [2014] SASCFC 3, 118 SASR 382 at [58]–[59]; *Cook v The Queen* [2016] VSCA 174 at [32].

[160] *Galea v Galea* (1990) 19 NSWLR 263 at 281(2), 282; *De Alwis v Western Australia* [2017] WASCA 164 at [72]; *Percival v The Queen* [2015] VSCA 200, 49 VR 238 at [74]; *Cook v The Queen* [2016] VSCA 174 at [32].

[161] *Sentencing Act 1991* (Vic) s 1(d)(iii); *Ford v The Queen* [2016] NSWCCA 69 at [22]–[28].

effective resolution' of a dispute may inform the degree of rigour with which a judicial officer conducts hearings.[162]

94. Overall context of the conduct. French CJ observed, '[t]he courts are human institutions operated by human beings and there must be a margin of appreciation for human limitations. Otherwise the judicial system would be rendered unworkable by the imposition of unachievable standards.'[163] This reflects an assumption that the public knows judicial officers are human and so '[d]espite their professional training [judicial officers] are, in varying degrees, likely to show the range of emotions to which humanity is heir'.[164] Accordingly, public, lawyer and court user confidence is not undermined where conduct can be understood as a human incident. A contrary expectation is not realistic.

95. Nor is it desirable that judicial officers seek to be 'mindless automatons'.[165] As others have remarked more positively, court craft demonstrating human and personal qualities can be an important part of judicial work: it engages court users and can have a positive effect on proceedings. Professors Roach Anleu and Mack summarise: '[l]egitimacy of judicial authority, especially in the lower courts, derives from judicial practices that entail more engagement with those appearing before the court.'[166]

96. Accordingly, judicial conduct must be assessed in its overall context so as to account for realities of courtroom interactions and human nature. These include having regard to the:

    (a) broader court and work context: see above at [30]–[34].

    (b) behaviour of others: see above at [41]–[44]; and

    (c) timing of the conduct.[167]

    However, the Commission acknowledges that many professionals work in high-pressure environments or with challenging behaviours by others, and that does not excuse bullying behaviours. Likewise, these contextual factors do not 'excuse' or 'justify' inappropriate judicial conduct. Rather, they might contextualise behaviour in a way that a member of the public would not perceive it as unacceptable, and in turn there is less risk to public confidence in the judiciary.

Question 2: Do you have any comments on the key factors to be considered when assessing complaints about judicial bullying?

Out-of-court bullying

97. So far, the Consultation Paper has focused on in-court bullying of lawyers, counsel and parties. For the avoidance of doubt, the Commission considers that when a judicial officer

[162] *Civil Procedure Act 2010* (Vic) s 7(1), see also ss 8(1), 9.

[163] *Cesan v The Queen* [2008] HCA 52, 236 CLR 358 at [71].

[164] *Galea v Galea* (1990) 19 NSWLR 263 at 279 (Kirby ACJ).

[165] *Long v Mayger* [2004] WASCA 41 at [42] (McKechnie J).

[166] Roach Anleu and Mack, *Performing Judicial Authority in the Lower Courts* (n 57) at 164. See also Roach Anleu, Mack and Tutton (n 131) at 642–644, 658–660.

[167] *Galea v Galea* (1990) 19 NSWLR 263 at 281(5); *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113, 271 FCR 461 at [116].

is performing work out-of-court, 'high standards of ethical and professional conduct' are similarly expected.[168]

98. The community expects employees to be treated respectfully, and without employees being treated in an unreasonable way that presents a risk to health and safety. The Victorian heads of jurisdiction have strongly rejected 'improper and unethical behaviour' by judicial officers, 'committ[ing] to making sure that our courts and tribunal are safe, healthy and respectful workplaces.'[169] In the Commission's *Judicial Conduct Guideline: Sexual Harassment*, it emphasised that '[j]udicial officers have a responsibility to model appropriate respectful workplace behaviour'.[170]

99. The Commission proposes to confirm that when assessing whether judicial conduct towards an individual is reasonable (in accordance with the definition above), the degree of 'robustness' to be expected in the courtroom does not have the same justification in chambers or elsewhere in the court building.

Question 3: Do you have any further comments on the proposed content of the Judicial Conduct Guideline?

What should or can be done to address professional reluctance to complain about judicial bullying?

100. A key issue for consideration is how to address the difficulties facing those with legitimate complaints who decide not to complain to the Commission. As noted above, reluctance to complain appears to primarily arise from (a) concerns about professional consequences; and (b) a perception that complaining will not have any meaningful consequences.

101. This Consultation Paper cannot address some issues raised above at [52]–[58] because of *JCV Act* requirements as to the receipt and outcome of complaints. Crucially, Australian judicial commission legislation is not regarded as creating 'disciplinary' bodies. The Commission cannot:

(a) impose formal sanctions for inappropriate judicial conduct; or

(b) commence investigations into the conduct of judicial officers of its 'own motion'.[171]

Nonetheless, there is scope to adopt practices and policies to address some matters that may discourage lawyers from making complaints about judicial bullying.

102. First, the Commission proposes to emphasise that victimisation by judicial officers occurs where the judicial officer treats or threatens to treat someone less favourably because:

(a) they have made a complaint about bullying;

[168] Chief Justice Anne Ferguson, quoted in Judicial Commission of Victoria, *Judicial Conduct Guideline: Sexual Harassment* (22 February 2022) at 1.

[169] Chief Justice Anne Ferguson et al, *Joint Statement on Safe, Healthy, and Respectful Workplaces* (6 July 2021).

[170] Judicial Commission of Victoria, *Judicial Conduct Guideline: Sexual Harassment* (22 February 2022) at 2.

[171] The Commission can only investigate complaints about judicial conduct or capacity, or referrals received under the *JCV Act*. It cannot initiate its own investigations into a judicial officer's conduct or capacity.

(b) it is believed they have made or might make a complaint about bullying;

(c) they have assisted someone else to make a complaint about bullying;

(d) they gave or will give evidence in support of another person's complaint about bullying; and/or

(e) they refused to do some act because it would amount to bullying or victimisation.[172]

Such victimisation breaches the standards of conduct generally expected of judicial officers.

103. Second, the Commission proposes to continue to emphasise that third parties can make complaints as a means of removing the burden from the individual, and placing emphasis on standards of conduct as an issue for the court system.

104. The Commission has received no complaints from the Law Institute of Victoria or Victorian Bar about judicial conduct. Section 6 of the *JCV Act* is intended to allow those organisations to:

> make complaints to the Judicial Commission on behalf of their members about the conduct or capacity of a judicial officer or non-judicial member of VCAT. Such complaints may be made … without including details of the identity of the Law Institute of Victoria or Victorian Bar Council member. The relevant professional body is the complainant for the purposes of the [Act] …[173]

105. Further, while a complaint to the Commission (under section 5 of the *JCV Act*) requires an identified complainant, in the case of larger firms, professional associations or agencies, a senior representative can make complaints on behalf of colleagues (especially junior colleagues).[174]

106. On the one hand, it might be thought that a complaint made by professional body or individual in relation to bullying directed to another is unlikely to address the concern about professional repercussions for lawyers. In reality, the identity of the person who experienced the bullying will be ascertained from the subject of the complaint.

107. On the other hand, the organisation (or nominated complainant) making a complaint would be aware that senior judges and barristers emphasise that a complaint about bullying should permit 'a case to [be] put to the judge in question'.[175] Martin J has highlighted that 'it is tactically better, and more likely to reduce the likelihood of repercussion to individuals, to provide as many examples [of judicial bullying] as possible. It is the same as mounting any sort of case. Detailed particulars and the use of only the strongest examples will be more likely to result in success'.[176]

108. The commentary suggests that the most egregious judicial bullying is engaged in by known judicial officers. In other words, the judicial officer is well known to the profession to be engaged in this type of behaviour. In circumstances where a complaint gives a

[172] Compare Judicial Commission of Victoria, *Judicial Conduct Guideline: Sexual Harassment* (22 February 2022) at 3.

[173] Explanatory Memorandum, Judicial Commission of Victoria Bill 2015 (Vic) at 10 (clause 6).

[174] See Explanatory Memorandum, Judicial Commission of Victoria Bill 2015 (Vic) at 9 (clause 5, where Parliament confirms that 'any person, including an individual or body corporate' is allowed to complaint).

[175] Martin (n 35) at 17.

[176] Martin (n 35) at 17.

multitude of examples as to bullying, the risk of professional repercussions against lawyers might be regarded as less likely to arise.

109. Complainants do not need to undertake investigation or be in possession of all relevant information in order to complain to the Commission.[177] The Commission has, to date, been able to act on complaints with relatively limited detail or information, particularly where they are articulated clearly. A complaint merely needs to provide sufficient information to allow investigation (ie the nature of the conduct complained about, a range or particular dates/proceedings where the alleged conduct occurred). The Commission is then required to investigate the complaint. The Commission, as part of its investigation, may request copies of recordings and transcripts for numerous, separate proceedings.

110. The Commission has received 'consolidated' complaints in the past. For example, the Commission has received and investigated complaints about a single officer, from an organisation, which alleged instances of misconduct across multiple court dates and proceedings, where different lawyers appeared.

Question 4: Do you have views as to how professional reluctance to complain about judicial bullying may be addressed?

What should or can be done to ensure outcomes of substantiated complaints are effective in addressing judicial bullying?

111. As noted above, judicial bullying might be sufficiently severe to warrant the Commission referring a complaint for full investigation by an investigating panel (which in turn, if appropriate, could refer an officer to Parliament for consideration of whether to remove the officer).[178]

112. In cases where the Commission finds that a complaint has been substantiated but cannot be referred to an investigating panel, the Commission must refer the matter to the relevant head of jurisdiction.[179]

113. When referring matters to a head of jurisdiction, the Commission has on occasion published a statement that an identified officer infringed the standards of judicial conduct.[180]

114. There is force in the view that upon finding a complaint of judicial bullying has been substantiated, the Commission adopt the practice of issuing a media statement confirming that finding (subject to the disclosure considerations).[181] The statement may

[177] Sections 5 and 6 require that: (a) there be a 'complaint'; (b) the complaint be about a 'judicial officer' or 'non-judicial member of VCAT', as defined by *Constitution Act 1975* (Vic) s 87AAA(1); and (c) the complaint be about the 'conduct or capacity' of that judicial officer or non-judicial member of VCAT.

[178] A referral to an investigating panel is made where the Commission 'is of the opinion that the complaint … could, if substantiated, amount to proved misbehaviour or incapacity such as to warrant the removal of the officer': *JCV Act* s 13(3). In turn, an investigating panel may prepare a report to the Governor if it 'forms the opinion that facts exist that could warrant the removal of [a] judicial officer on the grounds of misbehaviour or incapacity': *JCV Act* s 34(4).

[179] *JCV Act* ss 13(4), 19.

[180] See Judicial Commission of Victoria, *Statements* (Website, 22 February 2022).

[181] *JCV Act* ss 4, 139. In applying the disclosure considerations, it could reasonably be said that the problem of judicial bullying presents such a risk to public confidence that there is substantial public interest in publishing the complaint outcome.

identify the conduct complained about, identify the judicial officer, explain why the conduct infringed the standards of conduct, and explicitly state that the Commission regards it as unacceptable judicial bullying.

115. In seeking views as to this proposal, the Commission notes that equivalent complaints-handling bodies readily publish information about complaint outcomes. For example, the Judicial Conduct Investigations Office (England and Wales) 'will normally' publish a disciplinary statement 'when a disciplinary sanction has been issued to a judicial office holder'.[182] Further, comparable Victorian disciplinary jurisdictions publish a range of information regularly regarding outcomes and findings.

Question 5: Do you have comments on processes and practices that can be adopted in relation to complaints about judicial bullying?

How should discrimination be addressed in a future consultation?

116. Although conduct may be characterised as both bullying and discrimination, they are distinct concepts. Although discrimination can sometimes be a subset of bullying conduct, the Commission acknowledges that discrimination can take other forms.

117. Discrimination, unlike bullying, is often associated with particular beliefs about, or feelings towards, a person's attributes (such as gender or race).[183] In judicial work, it may manifest less visibly than bullying.[184] Further, discrimination will more readily offend against core judicial values of impartiality and equality before the law.

118. The Commission considers that any guidance to judicial officers about discrimination should be the focus of a separate, evidence-based consultation.

Question 6: Do you have comments on how a separate, focused consultation ought to address discrimination by judicial officers?

[182] Judicial Conduct Investigations Office, 'Publication Policy', *Disciplinary Statements* (Website). See also Lord Chancellor and Lord Chief Justice of England and Wales, *Judicial Discipline: Consultation on Proposals about the Judicial Disciplinary System in England and Wales* (November 2021) at [188]–[191].

[183] Mikki Hebl, Shannon K Cheng and Linnea C Ng, 'Modern Discrimination in Organizations' (2020) 7 *Annual Review of Organizational Psychology and Organizational Behavior* 257; Lisa A Marchiondo, Shan Ran and Lilia M Cortina, 'Modern Discrimination' in Adrienne J Collella and Eden B King (eds), *The Oxford Handbook of Workplace Discrimination* (Oxford University Press, 2018) 217; see also *Equal Opportunity Act 2010* (Vic) s 7.

[184] See, eg, the empirical research on bias and judicial decision making: Australian Law Reform Commission, *Cognitive and Social Biases in Judicial Decision-Making* (Background Paper JI6, 2021) at [28]–[38]; Allison P Harris and Maya Sen, 'Bias and Judging' (2019) 22 *Annual Review of Political Science* 241; Jeffrey J Rachlinski and Andrew J Wistrich, 'Judging the Judiciary by the Numbers: Empirical Research on Judges' (2017) 13 *Annual Review of Law and Social Science* 203. See also Derrington (n 88) at [39]–[40].