JUDICIAL COMMISSION OF VICTORIA

Judicial Conduct Guideline
Judicial Discrimination

SECTION 134 (1) Judicial Commission of Victoria Act 2016

September 2025

Message from the Chair of the Judicial Commission Board, the Chief Justice of Victoria

1. Equality before the law is foundational to our court and tribunal system. Discrimination is antithetical to the judicial function and incompatible with maintaining trust and confidence. Our courts and tribunals must be places of respect and inclusion for all members of our thriving and diverse community.
2. We are all shaped in different ways by our attributes and life experience and judicial officers are no different. Judicial officers[1] have a responsibility to examine their unconscious bias, to gain an understanding of the different experiences of others so that those who interact with the courts experience them as places of fairness and impartiality.
3. The familiar historical representation of these concepts is embodied in a figure of justice that is blinded to difference. Our contemporary understanding is more nuanced. It is of self-awareness and insight with eyes and ears open to learning about the experiences of others. It encompasses an awareness of the importance not only of impartial decision making, but of respectful professional conduct free from discrimination in all that we do.
4. This guideline is the product of an extensive consultation process, hearing from many different people. I thank them for sharing their experience and insight. I hope that they see within the guideline an understanding of the harms caused by discrimination and our continuing commitment to maintaining high standards of judicial conduct.

[1] Any reference to 'judicial officers' should be taken to include non-judicial members of the Victorian Civil and Administrative Tribunal (**VCAT**).

Introduction

Purpose of the Guideline

5. The Judicial Commission of Victoria (**the Commission**) is a statutory entity established to investigate complaints about the conduct and capacity of judicial officers. Judicial discrimination is conduct that can be investigated by the Commission.

6. The Commission also has professional standards functions, being to make guidelines regarding the standards of conduct expected of judicial officers. This guideline is made under s 134(1)(a) of the *Judicial Commission of Victoria Act 2016* (Vic).

7. The Commission has adopted the Council of Chief Justices Australia and New Zealand '*Guide to Judicial Conduct*'[2] (**the Guide**) as the principal source of guidance for judicial conduct in Victoria. The following statements from the Guide serve as the starting point for this guideline:

   It goes without saying that [judicial officers] must not engage in discrimination...

   It is the duty of a judge to be free of bias or prejudice on any irrelevant grounds.[3]

8. This guideline supplements the Guide.

9. While this guideline deals specifically with judicial discrimination, judicial officers should be aware of the strong connections between inappropriate behaviours such as discrimination, and other wrongful conduct such as bullying, sexual harassment, victimisation and sexism.

10. Charter rights (such as the right to equality and non-discrimination before the law)[4] apply to courts and tribunals as 'public authorities' when acting in an administrative capacity[5], as well as when acting in a judicial capacity when applying or enforcing Charter rights that relate to a court or tribunal proceeding.6[6]

11. However, it is not the Commission's function to assess whether a judicial officer's conduct, decision or procedural ruling was lawful, including whether it complied with the Charter or anti-discrimination laws. Rather, this Guideline sets out the standards of professional conduct expected of judicial officers, that is to treat all parties fairly and act without discrimination.

12. Judicial officers have a responsibility to model respectful behaviour at all times, and to challenge and actively discourage poor behaviour in the workplace by others. Judicial officers, as leaders, are expected to contribute to a culture of zero tolerance for any judicial discrimination in the court environment.

13. Judicial officers must be independent in their decision-making but must also be held to high standards of behaviour and be accountable for their actions. Judicial officers hold significant leadership responsibilities. When a judicial officer acts inappropriately, it undermines the credibility and legitimacy of the justice system as a whole. This perception is reinforced if judicial officers are *not* seen to be held accountable for their actions.[7] Although originally framed in the context of sexual harassment, this notion is equally applicable when considering the issue of judicial discrimination.

14. Judicial discrimination, depending on the circumstances, may amount to a misuse of judicial office. As the Hon Michael Kirby

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[2] The Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (AIJA, 3rd rev ed, 2023).

[3] Ibid at 9.

[4] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

[5] Committal proceedings, issuing of warrants, listing cases and adopting practices and procedures are express examples of when a court or tribunal is acting in an administrative capacity. See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4.

[6] *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624; [2017] VSC 61.

[7] Dr Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Report and Recommendations, 2021) at 58.

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.'[8]

Application of the Guideline

15. When investigating a complaint about judicial discrimination the Commission will apply this guideline which sets out the standards of expected conduct and the potential outcomes for any breach of those standards.

16. The Commission can consider complaints that relate to judicial discrimination where a judicial officer is engaged in their professional capacity, whether in court or out of court.[9]

17. This guideline is intended to apply to all judicial officers:

    - undertaking any work-related activities, including interactions with legal practitioners, court users and court staff;
    - whether working at their respective court or tribunal or from another location (including from home);
    - attending work related events such as conferences, training programs or social functions (regardless of whether they occur during normal work hours or outside those hours);
    - engaging in professional support of junior staff or lawyers, for example, in the role of mentor or referee; and
    - participating as a member of a committee or working group,

    regardless of whether the interaction be in person, online or through other means of communication.

18. This guideline is not intended to provide an exhaustive list of the standard of expected or prohibited conduct.

Meaning of judicial discrimination and the standards expected of judicial officers

19. The Commission defines judicial discrimination as follows:

    a. *Direct discrimination is conduct by a judicial officer that treats, or proposes to treat, a person with an attribute unfavourably because of that attribute*.

    b. *Indirect discrimination is conduct by a judicial officer that imposes, or proposes to impose, a requirement, condition or practice—*

        i. *that has, or is likely to have, the effect of disadvantaging persons with an attribute; and*

        ii. *that is not reasonable.*

[8] Michael Kirby, 'Judicial Stress and Judicial Bullying' (2013) 87(8) Australian Law\ Journal 516 at 526.

[9] Any reference to 'courts' should be taken to be inclusive of the VCAT.

20. Attribute is defined as:

> *age, breastfeeding, employment activity, gender identity, disability, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, profession, trade or occupation, race, religious belief or activity, sex, sex characteristics, sexual orientation, an expunged homosexual conviction, a spent conviction and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.*

21. Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, and may include consideration of:

    a. **Nature and extent of disadvantage** – This includes the circumstances of the disadvantaged person and the impact of the conduct on them.

    b. **Purpose** – That is, the specific purpose of the requirement, condition or practice.

    c. **Proportionality** – Whether the disadvantage is proportionate to the result sought.

    d. **Reasonable adjustments** – This includes whether any reasonable adjustments could be made to reduce the disadvantage caused and whether there are any alternate approaches.

    e. **Jurisdiction or type of proceeding** – For example, whether the conduct occurred in a specialist court or list and the subject matter of the proceeding.

    f. **Knowledge or awareness of a person's attributes** – For example, whether the person's attribute is raised in court.

    g. **Overall context** – This includes any other factor that may be relevant to the circumstances of the complaint.

22. The above is not an exhaustive list of the factors that the Commission may consider.

23. The definitions and concepts in this Guideline replicate those found in the *Equal Opportunity Act 2010* (Vic). In determining whether a judicial officer directly discriminates, it is irrelevant whether or not the attribute is the only, or dominant reason for the unfavourable treatment, provided that it is a substantial reason.[10] Judicial discrimination includes discrimination on the basis of characteristics connected with the attribute, past or future attributes and attributes that a person is presumed to have. [11]

24. It is irrelevant whether or not the judicial officer is aware of the discrimination[12] or considers the treatment to be unfavourable.[13] Direct discrimination may also occur through 'unintentional discrimination or unconscious bias'.[14]

25. Measures taken for the purposes of promoting or realising substantive equality for members of a group with a particular attribute do not constitute judicial discrimination.[15]

26. The Commission may consider the *Equal Opportunity Act 2010* (Vic), the Charter and anti-discrimination law more broadly in its assessment of discriminatory conduct, to the extent it is relevant to the judicial context.

[10] *Equal Opportunity Act 2010* (Vic) section 8(2)(a).
[11] *Equal Opportunity Act 2010* (Vic) s 7(2).
[12] Note that this is different to being aware of the attribute.
[13] *Equal Opportunity Act 2010* (Vic) section 8(2).
[14] *Tsikos v Austin Health* [2022] VSC 174.
[15] *Equal Opportunity Act 2010* (Vic) s 12. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4).

Judicial function

27. Conduct that is the proper exercise of the functions of a judicial officer is not judicial discrimination. This includes determining the relevant facts in issue in a proceeding and appropriately controlling and managing the court.

28. Further, conduct that is necessary to comply with, or is authorised by, a provision of an Act or enactment is not judicial discrimination. This is consistent with the *Equal Opportunity Act 2010* (Vic).[16]

29. As part of the discharge of the judicial function, judicial officers may need to treat people differently in order to achieve an equal and fair outcome. This does not constitute judicial discrimination. As McHugh J explained, 'discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different'.[17]

Assessment of conduct

The standard of conduct expected of judicial officers

30. The Commission makes an objective assessment, on the material before it, as to whether the judicial officer has infringed the standards of conduct generally expected of judicial officers.

31. As with any conduct, the Commission, in assessing whether conduct is judicial discrimination, may have regard to how a reasonable person would perceive or experience the conduct in all the circumstances.

32. Where a judicial officer engages in conduct that meets the definition of judicial discrimination or victimisation by judicial officers, then that conduct infringes the standards generally expected of a judicial officer. This is consistent with and reflects the principle that all persons coming before the court are entitled to be treated equally.

Examples of potential judicial discrimination

33. Examples of conduct that may amount to judicial discrimination include:

- not shortlisting an associate because of an attribute;
- humiliating or denigrating a person on the basis of an attribute; and
- refusing to engage with a person because of an attribute.

[16] *Equal Opportunity Act 2010* (Vic) s 75.
[17] *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 402.

Examples of other potentially inappropriate conduct

34. It is important to note that certain conduct may not amount to judicial discrimination but may still be considered inappropriate. Such behaviour could nevertheless be considered to infringe the standards of conduct generally expected of judicial officers.

For example:

- unnecessarily commenting on a person's attribute;
- inappropriate questioning about a person's attribute; and
- trivialising the experience of discrimination.

Examples of potentially acceptable conduct

35. Examples of conduct which in and of themselves are unlikely to infringe the standards of conduct expected include:

    - referencing or asking questions about an attribute where it is relevant to a proceeding;
    - asking how to correctly pronounce a person's name; and
    - making a finding about the relevance of a person's attribute.

Victimisation

36. A person may be concerned about making a complaint about judicial discrimination if they, for example, will continue to work with or appear before, the judicial officer. They may be concerned that they will be victimised or treated poorly if they make a complaint. Victimisation in this guideline means a judicial officer treating or threatening to treat someone less favourably because:

    - they have made a complaint about judicial discrimination;
    - it is believed they have made or might make a complaint about judicial discrimination;
    - they have assisted someone else to make a complaint about judicial discrimination;
    - they gave or will give evidence or information in support of another person's complaint about judicial discrimination; or
    - they refused to do some act because it would amount to judicial discrimination or victimisation.

37. Victimisation is conduct that infringes the standards of conduct generally expected of judicial officers.

Bystander conduct

38. A bystander is a person who witnesses judicial discrimination or victimisation or becomes aware of judicial discrimination after it has occurred. An active bystander is a person who acts after witnessing or becoming aware of an incident of judicial discrimination or victimisation.

39. Judicial officers are leaders and how they respond to instances or allegations of judicial discrimination sets the tone for expected standards of behaviour. The conduct of judicial officers has the potential to instil confidence that people will not be penalised or victimised for speaking up. On the other hand, being passive in the face of inappropriate conduct by another judicial officer may signal that such conduct is tolerated, inevitable or normal.[18]

40. Judicial officers are encouraged to act if they witness judicial discrimination or victimisation or if it is reported to them, having regard to the circumstances and the wishes of the person who has experienced the conduct.

41. A judicial officer can be an active bystander by trying to stop the behaviour, providing support to the person subject to the behaviour and calling out the behaviour (preferably at the time it occurs or in the case of becoming aware of an incident at another appropriate time). In all cases, a judicial officer should report the matter to their head of jurisdiction.

42. Judicial officers can also make a complaint to the Commission if they witness or become aware of judicial discrimination. For example, if an associate sat with a different judge who made discriminatory comments towards a party about their race in court, that associate may disclose this to their usual judge. The usual judge may then, taking into account the impact on the associate and with their permission, make a complaint about that conduct to the Commission. Doing so sends a clear message that such behaviour is unacceptable.

Risk factors and impacts

43. Historically, courts have not always been inclusive of all communities, including LGBTQIA+ communities, First People, and others, who have faced systemic challenges due to institutional design. Acknowledging this context is important to prevent ongoing judicial discrimination.

44. The following are risk factors which may contribute to judicial discrimination:

    - a lack of understanding about unconscious bias;
    - lesser-known attributes such as certain disabilities and gender identities; and
    - a lack of cultural capability in relation to culturally and racially marginalised communities.

45. Judicial officers are expected to have a reasonable understanding of the range of values, cultures, lifestyles and life experiences of people from different backgrounds. Further judicial officers should endeavour to understand the potential difficulties, barriers or inequities

[18] Julie Dodds-Streeton and Jack O'Connor, *Review of Recruitment and Working Arrangements of Judicial Staff who Work in a Primary Relationship with Judicial Officers in* Victorian Courts and VCAT (Report, 2022) at 80 [358].

people from different backgrounds may face in relation to court proceedings.[19]

46. Judicial officers should also be aware of the possibility of conscious and unconscious personal biases or prejudices about people from different backgrounds and actively seek to neutralise these.[20]

47. As noted in the Guide:

> *Judicial officers should strive to be aware of, and understand, diversity in society and differences arising from various sources… Consciousness of social and cultural factors is desirable not just for the purpose of avoiding inadvertently giving offence, but also to achieve equality before the law, judicial impartiality and the appearance of impartiality.*[21]

48. It is important that judicial officers educate themselves about how to ensure equal treatment for persons coming before them as well as limit any perception of bias which has the potential to fundamentally undermine the administration of justice. For example, judicial officers should know and use appropriate terminology in relation to relevant attributes.

49. The Yoorrook Justice Commission's second interim report considered measures to address systemic injustice affecting First Peoples in the criminal justice system, including increasing cultural competence for judicial officers.[22]

50. Judicial officers should also be aware of the impact of intersectionality whereby different aspects of a person's identity can expose them to overlapping forms of judicial discrimination. Intersectional discrimination refers to the additional and compounding discrimination experienced by some groups. For example, women with a disability may experience discrimination not only because of their gender but also, and in different ways, because of their disability.

Complaints about judicial discrimination

51. Any person can make a complaint to the Commission about judicial discrimination. A complaint can be made by the person who has experienced the conduct or by a third party who has witnessed or becomes aware of the conduct.

52. For example, the head of an organisation may make a complaint to the Commission about the conduct of a judicial officer towards their employee.

53. Complaints can be made via the online portal on the Commission's website. Alternatively, the Commission can arrange a time for a specially trained complaints officer or a Commission lawyer to discuss a potential complaint either over the telephone, or in person. The complaints process allows First Peoples to self-identify when making a complaint in order for the Commission to adapt its processes to ensure they are culturally safe.

54. The Law Institute of Victoria or the Victorian Bar can make a complaint on behalf of one of their members. A complaint made by either body is taken to be a complaint from that body rather than the individual.[23]

55. Under the *Judicial Commission of Victoria Act 2016* (Vic) a head of jurisdiction may make a referral to the Commission about the conduct of a judicial officer.[24] This

[19] Judicial Commission of New South Wales, *Equality before the Law Bench Book* (last updated February 2024) at [1.4].
[20] Ibid.
[21] The Council of Chief Justices of Australia and New Zealand, Guide to Judicial Conduct (AIJA, 3rd rev ed, 2023) at 19.
[22] Yoorrook Justice Commission Report into Victoria's Child Protection and Criminal Justice Systems at 95.
[23] *Judicial Commission of Victoria Act 2016* (Vic) s 6.
[24] Ibid, s 7.

includes conduct that would amount to judicial discrimination.

Potential Outcomes

56. Judicial discrimination and victimisation infringe the standards of conduct generally expected of judicial officers and can amount to misbehaviour such as to warrant the removal of a judicial officer from office.

57. Factors which may suggest conduct reaches this level include behaviour that:

    - is blatantly racist, sexist, homophobic or otherwise clearly discriminatory in relation to any attribute;
    - causes a person significant humiliation or disadvantage; or
    - demonstrates that the judicial officer lacks the essential qualities to hold office.

58. Where the Commission is of the opinion that a complaint (or referral) could, if substantiated, amount to prove misbehaviour such as to warrant the removal of the judicial officer from office, the matter will be referred to an investigating panel.

59. In circumstances where the Commission does not dismiss the matter or refer the matter to an investigating panel, the matter will be referred to the head of jurisdiction.

60. The *Judicial Commission of Victoria Act 2016* (Vic) sets out each of these processes.