



Judicial Conduct Guideline

Judicial Bullying

Section 134 (1) *Judicial Commission of Victoria Act 2016*

May 2023

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

The community expects that judicial officers¹ treat all people with respect, both in and out of the courtroom. There is no excuse for judicial bullying.² Judicial bullying poses a risk to the health and wellbeing of those experiencing it and can impact upon those observing the conduct. It also has the potential to diminish public confidence in the judiciary and legal system more broadly. It is conduct that breaches the standard of conduct expected of judicial officers and is unacceptable.³

Judicial officers have a responsibility to ensure they create a safe and respectful workplace and model appropriate workplace behaviour.

I am grateful for the support already provided by judicial officers to me and the other heads of jurisdiction as we attempt to address the issue of judicial bullying.

This guideline is intended to assist all judicial officers to identify conduct that might amount to judicial bullying, how to respond where they witness judicial bullying, and the possible consequences for those that engage in such behaviour.



The Honourable Chief Justice Anne Ferguson

1 Any reference to 'judicial officers' should be taken to include non-judicial members of VCAT.
2 For simplicity, 'judicial bullying' is used to also refer to bullying by non-judicial members of VCAT.
3 The Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration, 3rd ed, revised December 2022) (the Guide) at 19 [4.1].

1. Introduction

Persons who voluntarily accept public office are accountable for how they conduct themselves in the exercise of their official functions. ... [i]f improper conduct of any officer holder (whether judicial or not) has resulted in appreciable or material harm to a member of the community, the appropriate response is acknowledgement of any wrongdoing and the taking of remedial steps.⁴

Judges must conform to the standard of conduct required by law and expected by the community.[...]. It goes without saying that Judges must not engage in discrimination or harassment (including sexual harassment) or bullying. In relation to these matters, Judges must be particularly conscious of the effect of the imbalance of power as between themselves and others, especially their Chambers staff, Court staff and junior lawyers.⁵

- 1.1** The Judicial Commission of Victoria (the Commission) is a statutory entity established to investigate complaints about the conduct and capacity of judicial officers. Judicial bullying is conduct that can be investigated by the Commission.
- 1.2** The Commission also has professional standards functions, being to make guidelines regarding the standards of conduct expected of judicial officers. This guideline is made pursuant to s 134(1)(a) of the *Judicial Commission of Victoria Act 2016* (the Act).
- 1.3** The Commission has adopted the Council of Chief Justices Guide to Judicial Conduct (the Guide) as the principal source of guidance for judicial conduct in Victoria. The following statement from the Guide serves as the starting point for this guideline:

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular and the public in general, in the ability, the integrity, the impartiality and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour...

[...], the entitlement of everyone who comes to court – counsel, litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind. Bullying by the judge is unacceptable. [...] The absence of any intention to offend a witness or a litigant does not lessen the impact.⁶

- 1.4** This guideline supplements the Guide.
- 1.5** While this guideline deals specifically with judicial bullying, judicial officers should be aware of the strong connections between inappropriate behaviours such as bullying, and other disrespectful conduct such as sexual harassment, victimisation, sexism, and other forms of unlawful discrimination.
- 1.6** 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.
- 1.7** As was stated in the Szoke Report following the review of Sexual Harassment in Victorian Courts:
Judicial officers and VCAT members 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 and VCAT members hold significant leadership responsibilities. When a judicial officer or VCAT member acts inappropriately, it undermines the credibility and legitimacy of the justice system as a whole. This perception is reinforced if judicial officers and VCAT members are not seen to be held accountable for their actions.⁷

⁴ Explanatory Memorandum, *Judicial Commission of Victoria 2015 Bill* (Vic) at 7.

⁵ The Guide (n 3) at 9.

⁶ The Guide (n3) at 19 [4.1] and [4.2].

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

1.8 This is equally applicable when considering the issue of judicial bullying.

1.9 Judicial bullying is a serious issue and one that, depending on the circumstance, may amount to 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.⁸

Application

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

1.11 The Commission can consider complaints that relate to judicial bullying where a judicial officer is engaged in their professional capacity, whether in court⁹ or out of court.

1.12 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.

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

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 VCAT.

2. Meaning of judicial bullying and the standards expected of Judicial Officers

Conduct infringes the standards generally expected of judicial officers where it departs from the three core judicial values of impartiality, independence and integrity of personal behaviour. Judicial ethics have evolved and standards of judicial conduct support those values.

Judicial bullying is unprofessional, transgresses core judicial values and infringes the standards of conduct expected of judicial officers. At its most egregious, judicial bullying or victimisation may demonstrate incapacity or amount to proved misbehaviour warranting removal from office.

Other conduct may still be inappropriate and considered to infringe the standards of conduct generally expected of judicial officers, irrespective of whether it is characterised as judicial bullying. Other offensive behaviours include sexual harassment and discrimination.

2.1 The Commission recognises that judicial bullying is different from bullying in other contexts. This arises by virtue of:

- a judicial officer's position of power and authority;
- the (perceived) subordinate position of those who they deal with;
- the nature of the workplace; and
- the varied role, manner, and circumstances in which persons attend that workplace.

2.2 In this context the court and related spaces is the workplace of many different people attending to carry out the functions of their employment, occupation, business, trade or profession as it relates to the work of the court. The court need not be the person's principal place of business or employment to be considered their 'workplace'.

2.3 In Australian workplace relations law, bullying is generally defined in a consistent way. The definition of judicial bullying must be consistent with existing legal definitions of bullying but it is important that it also takes account of factors unique to the judicial context.

What is judicial bullying?

2.4 The Commission defines judicial bullying as follows:

Judicial bullying is conduct by a judicial officer towards an individual that:

- is unreasonable; and
- includes, but is not limited to, conduct that a reasonable person would, having regard to all the circumstances, perceive as belittling, humiliating, insulting, victimising, aggressive or intimidating.

What is unreasonable is to be assessed objectively, with regard to the following factors:

- the functions of the judicial officer;
- the subject or target of the conduct;
- the tone or nature of the conduct;
- whether the conduct is momentary or sustained;
- the location, including the jurisdiction and type of proceeding (for in-court matters) in which the conduct occurs; and
- the overall context of the conduct.

2.5 See below at 3 – *Assessment of conduct* – for an expansion of these factors.

2.6 The definition of judicial bullying incorporates the tests for assessing judicial conduct and capacity while also replicating key aspects of the definition of bullying in the *Fair Work Act 2009*.¹⁰

¹⁰ *Fair Work Act 2009* (Cth) section 789FD(1). This definition of bullying is used by Worksafe Victoria and Court Services Victoria (CSV) and is consistent with other workplace relation laws.

2.7 Importantly, the definition of judicial bullying does not require that the conduct be repeated. This recognises in particular:

- the unique position of power that judicial officers occupy; and
- that the nature and circumstances in which persons may interact with judicial officers varies in a material way from other workplaces.

2.8 Accordingly, a single occasion of conduct may amount to judicial bullying.

What is victimisation?

2.9 Victimisation in this context means a judicial officer treating or threatening to treat someone less favourably because:

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

The standard of behaviour expected of judicial officers (in court conduct)

2.10 Robust and vigorous legal debate and adversarial exchanges are common in the courtroom. The judicial function often requires questioning and scrutinising evidence or testing and challenging submissions. Such exchanges go to the heart of the adversarial system and the interests of justice, ensuring relevant issues in a proceeding are ventilated and explored.

2.11 Further, judicial officers are responsible for the management and control of the courtroom in which they preside. To the extent that such conduct is respectful and courteous it is consistent with the standards of conduct generally expected of judicial officers.

2.12 Where a judicial officer engages in conduct that meets the definition of judicial bullying, then that conduct breaches the standards expected of a judicial officer. This is consistent with and reflects the principle that all persons coming before the court are entitled to be treated in a way that respects their dignity and with courtesy and respect.

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

Examples of acceptable conduct

2.14 Examples of in court behaviour which will not infringe the standards of conduct expected if directed at the proper discharge of the judicial function include critical comments directed at:

- moving a legal practitioner or unrepresented litigant on from a weak submission;
- addressing a legal practitioner or unrepresented litigant about perceived flaws in their submissions;
- intervening in an overly long or unclear witness examination; or
- suggesting preliminary views as to issues before the Court.

2.15 Similarly, imposing court related deadlines (absent other factors) or exercising proper control of the courtroom to curb or respond to inappropriate behaviour (including bullying type behaviour by others) will not ordinarily infringe the standards of conduct or amount to judicial bullying.

Examples of bullying conduct

2.16 Examples of in court behaviour which do not serve a legitimate purpose and are judicial bullying include:

- any form of shouting, yelling, aggression or offensive language;
- ridiculing or mocking a person;
- making comments or criticisms that amount to a personal attack; and
- making gratuitous comments about the integrity or professional reputation of a legal practitioner or threatening adverse professional consequences.

Examples of indirect or subtle conduct

2.17 The Commission recognises that judicial bullying may arise in a variety of ways; it can be overt, as described above, but it may also be indirect or subtle. It may involve physical demeanour, actions or gestures, differential treatment, tone of voice and may not be easily observable on transcript or audio recordings.

2.18 Examples of indirect or subtle in court conduct that is inappropriate and may or may not amount to judicial bullying include:

- rolling of the eyes;
- purposely turning one's back on persons addressing the bench;
- throwing items across the bench;
- using sarcasm to question or respond to participants in a proceeding; and
- unjustified differential treatment of a legal practitioner or unrepresented litigant compared to another, such as overly familiar and friendly engagement.

2.19 Whether each example amounts to judicial bullying (or not) will be determined with reference to the factors set out at 3 below.

The Commission recognises that some court staff have a unique role in supporting the judicial function in the courtroom. They are not part of the courtroom adversarial process exchange. In that context, the courtroom location does not justify any form of robustness being directed at them.

The standard of behaviour expected of judicial officers (out of court conduct)

2.20 The workplace of judicial officers extends beyond a courtroom or tribunal to wherever they attend in their professional capacity.¹¹

2.21 When a judicial officer is performing work out of court, high standards of ethical and professional conduct are similarly expected. This includes chambers, elsewhere in the court building, circuit locations, attending social functions as a judicial officer and virtual workplaces.

2.22 Judicial bullying or victimisation in any circumstance where a judicial officer is engaged in their professional capacity is not consistent with the standard expected and will not be tolerated.

¹¹ The Commission adopts the definition of 'workplace' outlined in s 94 of the *Equal Opportunity Act 2010* for this guideline.

Examples of acceptable conduct

2.23 Examples of out of court behaviour which will not of themselves infringe the standards of conduct expected include reasonable management action carried out in a reasonable manner.

2.24 Sometimes a court staff member may take offence to an action taken by a judicial officer, but that does not mean in itself the action was unreasonable. The determination for whether management action is reasonable is where it involves significant departure from established policies or procedures, and whether the departure from those policies or procedures

2.25 The following types of behaviour are examples of what may constitute reasonable management action:

- setting realistic and achievable standards and deadlines;
- fair and appropriate requirements for work hours;
- recommending an associate be transferred to another area;
- informing an employee about unreasonable behaviour in a confidential way; and
- providing reasonable feedback.

2.26 While being addressed about performance or appropriate behaviours may cause some discomfort for a staff member, it is not unreasonable for a judicial officer to have reasonable and respectful discussions where relevant.

Examples of bullying conduct

2.27 There is a range of conduct (outlined above) that is not acceptable in court and which is equally not acceptable out of court and includes:

- any form of shouting, yelling, aggression or offensive language;
- ridiculing or mocking a person;
- making comments or criticisms that amount to a personal attack; and
- making gratuitous comments about the integrity or professional reputation of a person or threatening adverse professional consequences.

2.28 In addition, unprofessional, aggressive or rude emails, texts or phone calls to court staff are not acceptable.

Examples of other inappropriate conduct

2.29 Examples of conduct that is inappropriate but may or may not amount to judicial bullying include:

- setting unrealistic or unreasonable timeframes in which to complete work;
- interference with reasonable management action or employee work arrangements and entitlements;
- pressuring staff to depart from established policies and procedures or to influence the rostering and allocation of work; and
- continually requiring court staff to work after hours including weekends outside employment arrangements.

2.30 Whether each example amounts to judicial bullying (or not) will be determined with reference to the factors set out at 3.

3. Assessment of conduct

3.1 In assessing the appropriateness of conduct being complained of and determining when a judicial officer's conduct crosses the line into conduct that is unreasonable, the Commission will balance the following factors, taking into account the circumstances of each matter:

- **Functions of a judicial officer** – This ensures that allegations are assessed in the context of judicial obligations and ethics, which, for example, recognises the legitimate role of the judicial officer in managing proceedings to ensure fairness between parties and that some robustness in courtroom exchanges is legitimate.
- **Subject or target of conduct** – For example, characteristics of the subject or target (such as an unrepresented litigant or junior lawyer) may be relevant to assessing the judicial conduct.
- **Tone or nature of conduct** – For example, the following may be considered: express language, the implicit meaning of comments, tone or volume of voice, and any physical conduct or displays.
- **Frequency** – For example, whether the conduct is momentary or sustained may be relevant to assessing whether the conduct is reasonable or not.
- **Location (whether in or out of court), the jurisdiction or type of proceeding** – specific processes and procedures may 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'.¹²
- **Overall context** – This includes any other factor that may be relevant to the circumstances of the individual complaint.

4. Bystander conduct

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

4.2 Judicial officers are leaders and how they respond to instances or allegations of judicial bullying sets the tone for expected standards of behaviour. The conduct of judicial officers has the potential to instil confidence that people will not be bullied, 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.¹³

4.3 As stated in the report by the Hon Julie Dodds-Streeton KC and Jack O'Connor on *Recruitment and Working Arrangements of Judicial Staff* (the Dodds-Streeton O'Connor Report), sometimes 'only a judge ha[s] sufficient 'status' and authority to curb, question or deal with another judge's problematic conduct.'

4.4 The importance of judicial officers challenging inappropriate behaviour is highlighted by the positive example detailed in the Dodds-Streeton O'Connor Report of a 'bystander' judge confronting another judge over his interactions with an associate.¹⁴

4.5 Judicial officers are encouraged to act if they witness judicial bullying 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.

4.6 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.

¹² Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 98(1)(b).

¹³ 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]

¹⁴ Ibid at 56 [257]

4.7 Judicial officers can also make a complaint to the Commission if they witness or become aware of judicial bullying. For example, if an associate sat with a different judge who yelled at them in court for making a mistake and humiliated them, 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.

5. Risk factors and impacts

5.1 It is important judicial officers are mindful of potential causes and factors which contribute to judicial bullying and the risks it presents for the health and wellbeing of those who experience it. Being aware of these factors may mean a judicial officer is more able to recognise when circumstances might give rise to judicial bullying and understand the negative impacts of the conduct on the profession and broader community.

5.2 These factors can be characterised in one of two ways:

- factors specific to the individual engaging in judicial bullying; and
- factors arising from the organisational setting.

5.3 The following might contribute to judicial bullying:

- Work pressures including the stressful work environment of the court. For example, the pressure of a busy list, the types of cases, and timeframes for making decisions.
- The general culture of a courtroom as adversarial and analytical in nature. There may be competing submissions being scrutinised by the judicial officer, and here is a natural power imbalance between the judicial officer and other court users. This can be exacerbated by the strong degree of formality, ritual and seriousness in most court proceedings.
- An attempt by the judicial officer to influence the performance of practitioners especially in circumstances they perceive such performance to be poor or of limited assistance to the court.
- Individual factors specific to the judicial officer such as issues with self-regulation, confidence or mental health.

5.4 Judicial bullying has a negative impact on the wellbeing and mental health of lawyers, court staff and court users. Further, attempts by judicial officers to influence performance by engaging in judicial bullying can exacerbate the performance issues they were intended to address and impact upon the administration of justice.

5.5 The wellbeing of judicial officers is directly relevant to how they manage stress and conduct themselves, both professionally and personally. Stress is not an excuse for judicial bullying. Judicial officers who take personal steps to mitigate the impacts of working in a stressful environment are less likely to engage in judicial bullying.

5.6 Judicial officers are expected to access the range of tools, training and supports available to assist themselves to self-regulate, deal with stress and prioritise wellbeing. These can be accessed through the Judicial College of Victoria.

6. Bullying of Judicial Officers

6.1 Judicial officers may experience bullying conduct by another judicial officer.

6.2 If a judicial officer experiences bullying by another judicial officer, a report can be made to the head of jurisdiction and/or a complaint can be made to the Commission.

6.3 Support is available to judicial officers through the Judicial College of Victoria.

7. Complaints about judicial bullying

Complaints to the Judicial Commission of Victoria

7.1 Any person can make a complaint to the Commission about judicial bullying. 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.

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

7.3 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.

7.4 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.¹⁵

7.5 Under the Act a head of jurisdiction may make a referral to the Commission about the conduct of a judicial officer.¹⁶ This includes conduct that would amount to judicial bullying.

Potential outcomes

7.6 Judicial bullying infringes the standards of conduct expected of judicial officers and can amount to misbehaviour such as to warrant the removal of a judicial officer from office.

7.7 Factors which may contribute to the conduct falling into the latter category include behaviour that:

- is gratuitous and unrelated to the exercise of a judicial function;
- is repeated or continuous;
- causes the recipient significant humiliation, offence, intimidation or harm; or
- demonstrates that the judicial officer lacks the essential qualities to hold office.

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

7.9 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.

7.10 The Act sets out each of these processes.

Acknowledgment

This guideline was informed by the research discussed and attributed in the Commission’s Consultation Paper: Judicial Bullying (July 2022); and by consultations with current and retired judicial officers and VCAT members, staff of Courts Services Victoria, and legal practitioners.

The Commission acknowledges the valuable insights it received during its judicial bullying consultations and thanks the profession and the courts for their engagement with this important issue.

¹⁵ *Judicial Commission of Victoria Act 2016 (Vic)* s 6.

¹⁶ *Ibid* s 7.