

JUDICIAL BULLYING

I feel I have been extremely fortunate as far as bullying from the Bench is concerned. I put it down to a very early and particularly unpleasant experience as a young trial lawyer some 32 years ago when I was employed by the Public Solicitor's Office in Papua New Guinea and had the misfortune to appear before the late Judge Greville-Smith.



This is not him, but there is an intangible quality that is terrifyingly similar.

He was a Judge from the old school. I say old school, as there was at that time and there had been for some time, a culture of rudeness and often offensive behaviour by the Bench to barristers and, it must be said, from barristers to the Bench. This might have been a particular feature of practice in New South Wales, which is where I came from, and it appeared to influence some of the Judges who went to work in Papua New Guinea at that time.

Judge Greville-Smith was about to retire and my trial was his swansong. In what I regard as my own personal experience of judicial savagery,¹ I was berated by him in the way I chose to conduct the defence of my client. The case adjourned over lunch and I raced back to the Public Solicitor's Office to seek advice from older, more experienced trial counsel most of whom, by the way, went on to be appointed Public Defenders in New South Wales soon thereafter. I was assured I was acting correctly and told to go back, "tough it out" and to "just stand my ground". My predicament was regarded somewhat as a rite of passage and something that I just had to endure.

I returned to face Judge Greville-Smith. I was young, relatively inexperienced and had a huge responsibility to do the best for my client in all the circumstances and thus stand up to the Judge. As I stood to address His Honour, I recall vividly that my legs were shaking, I was wondering whether the words would actually come out of my mouth as I struggled to control my voice and inform the Judge that I would not resile from my earlier submissions and the defence would be conducted accordingly. After immediate and intimidating admonishment the trial went on and

¹ In his chapter in *Appealing to the Future: Michael Kirby and his Legacy*, Ian Barker QC refers to a "disgraceful display of judicial savagery" that occurred in the NSW Court of Appeal during the hearing of the case of *Livesey v NSW Bar Association* [1982] 2 NSWLR 231.

ultimately the defence was successful. The Judgement (it was a Judge alone trial) was referred to colloquially as “The State v Suzan Cox” as it was such a personal tirade by the Judge against me. To my relief and the relief of many others, Judge Greville-Smith then retired and returned to Australia but not before writing a letter of complaint about me to the then Public Solicitor, who was my employer. Thankfully he totally disregarded the letter.

Since this experience I have gone on to experience other bullies on the Bench: as angry Judges, rude Judges, sarcastic ones and some who were smiling assassins. But after Judge-Greville-Smith such experiences always paled into insignificance compared to what I had experienced before him. It was a baptism of fire which I survived. But I may not have. It could very well have put me off ever appearing again in a courtroom. I guess it made me tough and probably a little impervious to any unpleasantness I suffered thereafter in the courtrooms in which I practised. I must say that of course I have also experienced exceptionally kind and courteous Judges with appropriate judicial temperaments and such judges have thankfully made up for the rest.

Ian Barker QC, former Solicitor General of the NT, a frequent attendee of CLANT conferences over the years, reflected on his own experience as follows.

Personally, I have found practice as a barrister to involve as much unpleasantness as goodwill. To say I love the law rather glosses over the many occasions when loving the law is as difficult as loving some of its Judges. As I see it, if a barrister does not enter the profession suffering from some bipolar disorder, the chances are he or she will eventually leave it enduring at least some form of depression.²

Mr Barker went on to say that some of the unpleasantness can be because of the very nature of the work we do, that as barristers we deal with people in conflict with other people and the law, but often the unpleasantness can be caused by those Judges who seem to be possessed with “an inherent hostility towards barristers, even though they may have once so practised It is a truism, often noted, that it does not take a lot to convert a Judge hating barrister into a barrister hating Judge”.³

I often wonder if it is the adversarial, sledging and aggressive lawyer culture that inevitably presages the bullying judicial officer.

The subject of judicial bullying was addressed by both a retired High Court Judge and a serving Judge of the Supreme Court of Queensland early this year. At the National Forum on Wellness for Law, at Melbourne Law School in February, the Honourable Michael Kirby made the connection between the stress associated with judicial office and the bullying behaviour of judicial officers. He said:

Judicial officers (Judges, Magistrates) are subject to particular risks of stress, depression and pressure and that in responding to the pressures exerted on them, some Judicial officers become part of the problem, some are bullies, some misuse their power and create intolerable pressures for lawyers and others working in the law.

But he also noted:

² Appealing to the Future; Michael Kirby and his Legacy, at 563.

The “Courting the Blues Report” published in 2009 extensively detailed the findings of a study in relation to mental health in the legal profession. The study revealed the high levels of psychological distress and risk of depression in law students and practising lawyers when compared with Australian community norms.

³ Appealing to the Future: Michael Kirby and his Legacy, at 364

*... the fact is that judicial officers can sometimes be a cause, and occasion, of stress. Within their Court room they can produce stress in judicial colleagues. From a position of power and substantial invulnerability to complaint, they can also inflict needless stress on those junior to them. In the legal profession this means advocates, lawyers, clerks, employees, litigants, witnesses and officials who are subject to their conduct and humours”.*⁴

Justice Glen Martin of the Supreme Court of Queensland in his article, “Bullying in the Court Room”,⁵ recounted an incident in which a junior counsel stood up to address his written submissions and was told from the bench: “You’re an idiot, do your clients know you are an idiot?”.

The counsel managed to continue in the face of other similar but less offensive comments to him. Justice Martin then went on to say that he had heard many times that the modern Judge is a much gentler task master than those of decades past but he said it really depended on the perspective from which that view was formed as it changes with experience and with the inevitable build up of scar tissue. Memory, he said, is a fragile thing and capable of great deception and, in any event, is of little comfort to a bruised and battered barrister to be told that the Judges used to be worse:

*The proper conduct of trial is not aided by the knowledge that in decades past the conduct would have been more appalling.*⁶

Justice Martin defined bullying in the context of a trial as being

... conduct engaged in by the Judge against counsel which is designed to coerce that counsel into taking a particular course, not through the strength of any intellectual argument, but simply through the application of the power of the position of the person involved. Of course, bullying and rudeness are not the same. They can overlap but they are not congruent. A polite but relentless Judge can be just as overbearing as a rude one.

*Rudeness becomes bullying when words or conduct are used to coerce to a particular end. That end might be the curtailing of argument, the abandonment of a particular point, or the settlement or adjournment of the matter.*⁷

I might have been guilty of believing things had really improved by the inevitable build up of my own scar tissue, my fragile memory and an ability to deceive myself but the sad truth is that judicial bullying still occurs. Thankfully, it is not as wide spread and happens less often than what was the case, but the fact that both Michael Kirby and Justice Glen Martin only this year have written about judicial bullying, and that in February this year the National Judicial College hosted a conference which included a presentation by Jeffrey Phillips SC on “Overbearing conduct by Judges and Lawyers”, is indicative.

The issue of bullying was really brought home to me quite recently at a meeting I chair which is made up of the managers of each of the criminal law sections of the state and territory Legal Aid Commissions across Australia. At our last meeting, the issue of judicial bullying loomed large. This was in no small part due to the relatively recent and tragic suicide of a Legal Aid Commission solicitor in Western Australia who had been bullied by a particular Magistrate in

⁴ Judicial Stress and Judicial Bullying at p.9.

⁵ (2013) 4 Work Place Review 16

⁶ (2013)4 WR 16

⁷ Ibid, at 16

that jurisdiction.⁸ It was because of the concern of the managers of criminal law practices across the legal aid commissions in Australia, that I agreed to seek to address the issue at this Conference.

As managers of criminal lawyers and as employers of criminal lawyers, we have to manage work hazards and ensure that we don't expose our employees to such hazards. If one of our lawyers returns from Court having endured rougher than usual treatment by a judicial officer and, as a result, the lawyer does not want to return to what he or she perceives as an offensive, aggressive or hostile environment, what do we do? The Courtroom is for all intents and purposes the workplace for the criminal advocate. Do we, as employers, say "take a teaspoon of cement and toughen up, princess, deal with it, stand your ground"? Do we send the lawyer back to the same Court, the same "unsafe" workplace? And what if the lawyer sustains a psychological injury as a result of being sent back there? Causation is easily established and we as employers have a work health claim, at the very least or, at worst, a tragedy such as occurred at the WA Legal Aid Commission.

So it is this perspective that I am really coming from here today. I was bullied in the past and I got over it. I may or may not be a better person or an advocate as a result of it. But now as an employer of criminal lawyers who go off to Court each and every day, I have a duty of care. And, I do care. I don't want them to be psychologically damaged, made sick or even lose their confidence.

I want to say something about the work of the Legal Aid lawyers practising in the criminal jurisdiction. I have said, a little flippantly, in the past that we act for the mad, the bad and the sad. I could add, "and the very rarely glad".

I am not going to whinge about the pressures and workloads on our Duty Solicitors, the lack of adequate funding or the under resourced legal assistance sector generally, but the nature of the work itself. The majority of our clients are socially disadvantaged and are often products of broken and dysfunctional families. They are often poorly educated, have learning difficulties or cognitive deficits. They are usually damaged at least in some ways, often many ways, because of physical and/or emotional abuse. Often, they are alcohol and/or drug dependent. Most of our clients have mental health issues or personality disorders.

We see most of our clients in the cells, interview rooms close to cell areas and in the prisons. Legal Aid lawyers spend at least some time each week of every month of every year that they survive as legal aid lawyers seeing clients in prisons. Prisons are, to say the least, extremely unpleasant places in which to do your work. The factual circumstances of many of our cases are disturbing and often unpleasant. Our clients are often extremely emotional and psychologically fragile. Often they are withdrawing from drugs and/or alcohol. In the NT we have had clients suicide mid-trial, in prison and in their homes. Such events have enormous impacts on our lawyers. And of course we have clients who have threatened and attacked lawyers to the extent that all Legal Aid Commissions around Australia have practices and procedures to protect lawyers and staff in this regard. Most of our work in representing this client base is in the adversarial setting of the Courtroom where we oppose prosecutors and police. It is an inherently stressful work environment. And if you throw into this already toxic mix a bullying judicial officer then it may well be the perfect storm.

I am not asserting that legal aid lawyers are the only ones to feel the pressures.

⁸ Legal Aid WA has never explicitly drawn the direct link between the suicide by the legal practitioner and the judicial bullying but did complain about the behaviour of the magistrate concerned which is documented in the LRCWA Discussion Paper, Complaints against the Judiciary, September 2012.

Earlier this year Senior NSW Crown Prosecutor Mark Tedeschi SC commented on the problem for Crown Prosecutors saying that belittling by judges was the greatest source of stress faced by advocates,

I've had Crown Prosecutors come back from court in tears or virtually in tears wondering how they are going to muster the strength to go back to court the next day ... the vast majority of judges aren't like that but there are some – and there are a few who are renowned for it – who are bullies. If they engaged in the same sort of conduct within the workplace they would be taken to task and would be counselled and disciplined.⁹

Or, might I add: sacked.

So what can we do, what is the solution?

His Holiness the 14th Dali Lama visited Darwin in June and I managed to attend his talk. I have included his photo to remind us of his very important message:



Be kind whenever possible. It is always possible.

It is a simple message but I believe it to be an enormously important one and behaviour to which we should aspire. In some ways it is the antithesis of the adversarial system in which we all partake but I believe it can temper that system. Kindness and courtesy go hand in hand and can bring out the best in the advocate.

Dennis Mahoney, who succeeded Michael Kirby as President of the NSW Court of Appeal described the change in culture that occurred with the appointment of Michael Kirby:

⁹ Quoted in an article by Harriet Alexander, “DPP warns Lawyers: stop bullying one another or else”, published by Fairfax media Network, March 23, 2013

*During the Kirby Presidency there was a change in the kindness ... the courtesy ... shown to the Bar ... and a patient courtesy in a Court is no small thing. For myself I found the Court to be a more pleasant place in which to be.*¹⁰



Ralph Heimans, "Radical Restraint Justice Michael Kirby" (Oil on canvas 1998 National Portrait Gallery, Canberra)

Michael Kirby set the standard in the NSW Court of Appeal. He changed the court culture that had dominated. He led from the top and transformed what had been an unpleasant Court, where two of the Judges were described in one application before them as "sarcastic, contemptuous and personally abusive of counsel".¹¹ The change that Kirby effected was recognised by the current NSW Chief Justice Tom Bathurst recently, when he said that from the time that Kirby became president of the Court of Appeal it was recognised that the wheels of justice would function more efficiently if judges behaved courteously to advocates and if advocates behave courteously to the Bench.¹²

So kindness and courtesy to one another is a big start to changing the culture and delegitimising bullying behaviour. It should be the norm and the lead needs to come from the Bench.

What else?

A complaint mechanism is necessary.

Some years ago in the NT we had an inquiry into the bullying conduct of one NT magistrate. The Inquiry was established by the Department of Justice in response to a litany of complaints concerning the judicial officer's behaviour. The Inquiry was headed by retired Supreme Court Judge, John Nader QC but the magistrate concerned resigned during the Inquiry. As a

¹⁰ D. Mahoney (Speech, Unveiling of a Portrait of Justice Michael Kirby, Supreme Court of NSW, 19.11.2007, referred by I. Barker in *Appealing to the Future: Michael Kirby and his Legacy* at 565-566).

¹¹ *Ibid*, at 565. The counsel concerned was LJ Priestly QC who was himself on the Court when Kirby was appointed.

¹² "Judicial bullying? Not in my courts", article by Chris Merritt in *The Australian*, 7.06.2013. Although the NSW Chief Justice was quoted in the article as being of the view that bullying from the Bench "is virtually unheard of in the courts of NSW" that is at odds with the experience of legal practitioners particularly in the District and Magistrates courts of that jurisdiction.

mechanism to deal with the behaviour the Inquiry was effective. There could be a person who is appointed but only “sits” when a situation calls for an investigation of, for example, judicial bullying. I understand that such a mechanism was suggested at the time to the then CEO of the Department of Justice.

In NSW there is the Judicial Commission and other jurisdictions are either establishing their own or like the NT have a Protocol¹³ to deal with complaints against judicial officers which at the same time recognise that Judges are not subject to direct discipline by other persons, apart from extreme cases. That is, in the performance of their judicial functions they are not subject to the Chief Justice or Presiding Officer of their Court or Tribunal so as to protect the constitutional independence and integrity of the Judge concerned.¹⁴ The Chief Justice of NSW is also president of the NSW Judicial Commission and in his view that body has played a role in improving judicial conduct in NSW. This is not, however, the view of legal commentator Richard Ackland who in an opinion piece in June 2011 referred to the way the Judicial Commission dealt with complaints saying “most of the complaints about judges are either dismissed or referred back to the “head of jurisdiction “ for a quiet chat in the library over tea and a sponge cake”.¹⁵ In other jurisdictions it may happen over a glass of wine on a Friday afternoon. The problem with the quiet chat approach is that if the chat does not produce improved behaviour the first time, it is unlikely to work at all and this is because the bully inevitably has no insight into his or her behaviour. The bullying will be flatly denied or blame shifted to counsel.

Nevertheless, complaints about judicial bullying should be made to either a Judicial Commission or by way of the protocols for bringing complaints to the attention of the judge concerned. But even before Judges are appointed their behaviour and reputation as counsel should be investigated and canvassed- were they bullies as counsel? The personalities of potential appointees and particularly their reputation and temperament should be assessed prior to appointment.

I would like to suggest that the problem of bullying by lawyers and judicial bullying, if it isn't already, be part of judicial and advocacy training. Examples of language and conduct should be gathered together and used to illustrate what is unacceptable behaviour, whether by an advocate or by an officer holder exercising public power. In advocacy courses appropriate strategies and responses should be incorporated to arm advocates with the necessary skills to deal with both counsel and judicial bullying. One senior counsel in NSW, for example, has responded to a Judge's raised voice and rudeness by saying something along these lines, “Your Honour, in my submission, is not maintaining the appearance of judicial impartiality and I will not continue to participate and make submissions in these proceedings if that continues”. Such a response may, of course, be a big call for a more junior counsel.

There needs to be discussion about how we should best deal with the issue and by starting the conversation we begin the process of delegitimising the behaviour. We “out” it. And that is a start. This very conference provides but one opportunity

Senior members of the legal profession must have zero tolerance for bullying behaviour at all levels, between counsel, between senior and junior counsel and between the Bench and the Bar. Senior counsel should also be vigilant in respect to more junior counsel and try to ensure that they are equipped with strategies to deal with such behaviour.

¹³ The Protocol in the NT is for complaints against Judicial Officers of the Supreme Court of the NT and does not cover Magistrates.

¹⁴ Michael Kirby, *Judicial Stress and Judicial Bullying*, at 17.

¹⁵ High time to put an end to clubby protection”, Richard Ackland 17.06.2013.

We must look out for our fellow practitioners. If we witness it in Court we should make sure we speak to the particular counsel as soon as possible, follow them out of court, make sure they are alright. Disassociate from the behaviour, condemn it as wrong. Don't condone it.

Judges should not abide such behaviour by their fellow judges in collegiate courts. They should disassociate themselves from any bullying behaviour and make it part of the record that it is not condoned.¹⁶

Legal Aid Commissions and the Offices of the DPPs need to put in place proactive support schemes to protect their lawyers and provide them with resilience strategies and not accept bullying behaviour towards our lawyers. Legal WA has led the way in this regard.¹⁷ We need to spend time with our junior lawyers helping them to better understand the difference between the normal rough and tumble of the courtroom and when the line is actually crossed into judicial bullying or other inappropriate behaviour. Protocols of incident reporting which includes obtaining of transcripts should be implemented. If a formal complaint is to be made, a proper case has to be established and the evidence garnered. This is all part of delegitimising the behaviour and saying it is not the norm and it is not acceptable behaviour. In some cases the ordering of the transcript may even have a salutary impact.

In some circumstances arrangements will necessarily have to be made so that we, as employers, are not exposing our lawyers to psychological injury. We may very well need to contact the head of the jurisdiction and advise that we will not be sending our lawyers into an unsafe work place where there is a bullying judicial officer.

I spoke earlier about the kinds of client we often contend with, and the various dysfunctions in their lives. A key part of those life stories is that many, many of our clients have experienced *bullying*: in the family, in school, in the workplace. The outcome of bullying is now well acknowledged as having a major impact on the lives of so many of us, to the extent there are now major anti-bullying programs in schools.¹⁸

Let it not be said that we need programs within the judicial system: surely we can deal with it collegially, and with justice in mind.

Suzan Cox

Sanur, 27 June 2013

¹⁶ Judicial Stress and Judicial Bullying, Michael Kirby at 20 [8].

¹⁷ Legal Aid has incorporated resilience training in recognition of the fact that work carried out by Legal Aid staff can have a direct impact on their health and wellbeing. Further, Legal Aid WA has developed an informal resilience incidents reporting process, a log of these matters is kept and watched for trends, particularly in the area of judicial bullying. The mandatory in person resilience training is currently being converted into an online resource.

¹⁸ "Judges learn to be bullies in culture of the boarding school", by Richard Ackland, Sydney Morning Herald, 12.12.2004.

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Ian Barker QC “Judicial Practice” chapter 22 in *Appealing to the Future: Michael Kirby and His Legacy*;

Justice Glenn Martin, *Bullying in the courtroom*, (2013) 4 WR 16;

Jeffrey Phillips SC, *Overbearing Conduct in Court by Judges and Lawyers*, National Judicial College of Australia/ ANU College of Law Managing People in Court Conference, Canberra 9 and 10 February 2013;

Jeffrey Phillips SC, *Bullying in our legal workplaces*, NSW State Legal Conference, 27 March, 2013;

Jeffrey Phillips SC, “White line fever” in the courtroom, (2013) 4 WR 13

Jeffrey Phillips SC, “Of Dinosaurs and bullying judges”, 30 *Law Society Journal* (December 2004);

Michael Kirby AC, CMG, *Judicial Stress and Judicial Bullying*, delivered at National Forum on Wellness for Law, Melbourne Law School, 21 February, 2013;

Douglas R Richmond, *Bullies on the Bench*, [2012] vol. 72 *Louisiana Law Review*, 325;

Justice Keith Mason, *Throwing Stones: Cost/benefit analysis of judges being offensive to each other* (2008) 82 *ALJ* 260;

Legal Aid WA Submission and Discussion Paper, December 2012, *Complaints against Judiciary*, Law Reform Commission of WA Discussion paper Project No. 102;

Dr Christopher Kendall, *Report on Psychological Distress and Depression in the Legal Profession*, March 2011, Law Society of WA;

Chris Merritt, “Call for curb on bench bullies”, *The Australian*, 17.05.2013;

Richard Ackland, “Judges learn to be bullies in culture of the boarding school”, *Sydney Morning Herald*, 17.12.2004;

Richard Ackland, “High time to put and end to clubby protection”, *The Age*, 17.06.2011;

Harriet Alexander, “DPP warns lawyers: stop bullying one another or else”, *Sydney Morning Herald*, 23.03.2013.

Josh Bornstein, “Bullying the final frontier of workplace rights”, *The Drum*, 05.12.2012;

“Who Judges the judges?”, *The Age*, 07.12.2012;

Chris Merritt, “Judicial bullying? Not in my courts”, *The Australian*, 07.12.2013;

I also had very helpful discussions with Peter Hamill QC of the Sydney Bar and Judge Ian Gray of the District Court, Victoria.