Judicial bullying: the last of the legal bloodsports?

Glen Cash*

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Introduction

In the early 1600s, London's culture-seekers were drawn to the south bank of the Thames. The newly reconstructed Globe Theatre sat on the river near Bankside. From late 1599 it had been the home of many productions of Shakespeare's plays, beginning with *Julius Caesar* and ending in disaster 14 years later with *Henry VIII*.[1] Close to the Globe was another amphitheatre, this one dedicated to less intellectual pursuits. Known variously as the Paris Garden or, more ominously, the Beargarden, this was London's premier venue for bloodsports. On any given day crowds would be treated to the sights of bear and bull baiting. The unfortunate animal was chained to a stake then set upon by a pack of dogs. The animals would fight until bloodied and exhausted, or dead. Even grosser spectacles were not unknown. There exists a description of horses with 'apes' tied to their backs being harassed by dogs, and records indicate the occasional baiting of lions and other animals.

These pursuits, and more, were part of an ancient form of so-called 'entertainment' known as bloodsports. Bloodsports have a dark lineage dating back at least as far as gladiatorial combat. A core concept is the use of violence purely for entertainment. In military combat or hunting for food, violence might be argued to be justified or necessary. Violence as entertainment can make no such claim. With few exceptions, violence of the kind once practiced in bloodsports is no longer acceptable.[2]

This paper is not concerned with bloodsports but with bullying, though the parallel between violence as entertainment and bullying as a practice should be obvious. Both are reliant on an imbalance of physical or social power. In bloodsports animals, or humans, are forced by those with more power to fight for entertainment. It could not occur without this power imbalance. Similarly, what differentiates bullying from conflict is the imbalance of power between those involved.[3] Power is at the heart of bullying.[4]

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* Judge of the District Court of Queensland. I would like to thank Michelle O'Grady, my associate, for her assistance in researching and preparing this paper.

1 One of Shakespeare's lesser-known works which was probably written in collaboration with Fletcher. During a production in 1613 a special effects cannon shot ignited the thatched roof, burning the theatre to the ground.

2 Fights between animals such as dogs and fowl remain culturally acceptable in some parts of the world. It remains to be seen whether other, currently acceptable, pursuits such as horse and greyhound racing will one day be viewed as we view bear baiting or fox hunting.

3 See, generally, the work of Dan Olweus, a Swedish-Norwegian psychologist and pioneer in the research of bullying in schools.

4 Tony Foley, 'The effect of courtroom behaviour on the wellbeing of lawyers new to practice', (2013) 4 WR 19. See also Matthew C Aalsma and James R Brown, 'What is bullying', (2008) 43 *Journal of Adolescent Health* 101, where it was said, 'This imbalance of power in the bullying/victim relationship is important because it distinguishes *bullying* from other acts of violence or aggression.'

The title of this paper, which in accordance with long tradition is intended to be provocative, is drawn from a statement by Jeffrey Philips SC in a speech to New South Wales Magistrates.[5] Addressing the topic of judicial bullying, Mr Phillips said that '[s]ome regard cross-examination as the last of the legal blood sports'. I took this statement to mean that there are some lawyers, I would expect very few, who think that cross-examination is more than just a tool to test evidence and may be deployed to harass or intimidate a witness – or even as a form of entertainment. This would obviously be a kind of bullying. Cross-examination provides a unique opportunity for the abuse of a position of power held by the cross-examiner over the witness, one which judges and counsel must be conscious of and guard against.

But the focus of this paper is not on bullying by lawyers in the court room. I wish to focus on bullying from the bench. When I came across Mr Phillips' paper it led me to wonder whether bullying might be perceived as a 'legal bloodsport' in at least two senses. The first is the literal meaning of the phrase – a kind of bloodsport that takes place in the forensic, rather than gladiatorial, arena. The second sense, and the one I wish to explore in this paper, is the idea that judicial bullying is a bloodsport that is 'legal' because it is, to some degree, tolerated or expected in our adversarial system.

And so, I pose the question: Is judicial bullying the last of the legal bloodsports?

With this question in mind, I intend to explore the nebulous concept of bullying in the courtroom by reference to examples of judicial behaviour and changing attitudes. Next, I will consider attempts that have been made in recent times to address such behaviour through policies, protocols, and oversight. Last, I will leave you with some questions to think about, especially concerning the extent to which bullying may be embedded within our adversarial system.

What is judicial bullying?

As all good lawyers know, consideration of an issue must begin with a definition. Often that is easy. Sometimes it is harder. With bullying, it may be impossible, at least if one is attempting a universal definition. That is because bullying always has a subjective element. The intention of the person who is responsible for bullying will be relevant. The perception of the person being bullied even more so. It follows, then, that discussion of bullying in the legal profession invariably includes use of contrasting language like 'robust' and 'fragile'. Is it 'bullying' to engage in a 'robust' exchange with a person of 'fragile' disposition and who, because of their fragility, perceives they have been bullied?

We find in the writings on this topic questions like

> Is [bullying] prevalent in the jurisdiction in which you practice, or on the Bench on which you sit? Should we be concerned about this, or is it just the rough and tumble of practice that lawyers, and particularly young lawyers, need to get used to quickly? Is there a problem, or are we exaggerating the suggestion that there is a problem?[6]

There have always been those who would consider complaints of bullying to be an indication of a frail character or flawed personality and that 'a judge who is considered weak will be

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5 J. Phillips SC, 'Judicial Bullying' (2018) 8 WR 138.

6 Tony Foley, 'The effect of courtroom behaviour on the wellbeing of lawyers new to practice', (2013) 4 WR 19.

exploited by the Bar'.[7] For them getting yelled at by a judge was a necessary rite of passage, to be repeated from one generation to the next.[8] We have, I think, largely moved on from those days. On the whole, a courtroom is a less challenging place than it was 30 years ago, and the conduct of some judges of 50 years ago would be unthinkable today. The line between what is the inevitable, and acceptable, product of an adversarial system where disputes are settled by a judge whose conclusions can only be challenged on appeal, and what is bullying, has shifted.

It is easy enough to demonstrate this shift – the profession is replete with stories of how much harder everything was in the 'old days'. Some of these stories are even true. Care must be taken when delving back into the dim recesses of the past. Such stories, while enjoyable, may shed little light on the notion of bullying in the courtroom in the 21st century. It is to be remembered that as cultural mores evolve, so does the law. For example, what we now appreciate as the principles of procedural fairness and apprehended bias have been refined in relatively recent cases.[9] Before the mid-20th century, judges commonly conducted themselves in a manner that would offend either, or both, principles. As a result, the conduct of judges in eras long past when, literally, different rules applied may say little about is acceptable today. This is especially so when it comes to the misbehaviour of judges in the United States where, as always, they like to do things bigger, bolder, and better.[10]

But a consideration of past behaviours is at least illustrative of the extent to which things have changed. A consequence of this change is that the line between judicial behaviour that is challenging and that which is bullying is itinerant and therefore hard to locate. It probably does not exist as a 'bright line', but the general area it inhabits can be illustrated with reference to a few anecdotes.

When it comes to truculent judges it is hard to go past Sir Hayden Starke. A Justice of the High Court for 30 years (1920-1950) he is described in *The Oxford Companion to the High Court of Australia* as 'a blunt individual who resembled Barwick in his espousal of the practical effect of legislation, Taylor in his direct and sometimes discourteous style, and Knox in his detestation of philosophy'. During Sir John Latham's tenure as Chief Justice, relations between the members of the court had all but broken down. Starke would not talk to, much less share draft judgments with, Bert Evatt, whom Starke regarded (with good reason) as a blatantly political appointment. Starke's courtroom demeanour was, to say the least, robust. On one occasion Bert's younger brother Clive was arguing a matter before a bench that included Starke and Evatt JJ. Having pushed Clive Evatt into a logical corner, Starke leant back in his chair and said, 'There, let's see Brother Bert get you out of that one!'

Starke was responsible for what must surely be the most lacerating comment directed at an Australian judge. In early 1948 Sir Isaac Isaacs died. After his funeral Isaacs' remains were interred at the Melbourne General Cemetery. The ceremony was attended by sitting Justices, including Starke and Sir George Rich. Rich had been appointed in 1913 and was by then in his mid-80s. As they passed the open grave, Starke is reputed to have leant over to Rich and asked, 'George, are you sure it's worth your while to go home?'

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7 P W Young AO, 'Current issues', (2013) 87 ALJ 371.

8 Hon Michael Kirby AC CMG, 'Judicial stress and judicial bullying', (2013) 87 ALJ 516, 522.

9 *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 and *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337. I say relatively recent as these are decisions occurring during my lifetime – others may take a different view of what is 'recent'.

10 For just some examples see Michael Kirby AC CMG, 'Judicial Stress – An Update', (1997) 71 ALJ 774 and Abbe Smith, 'Judges as Bullies', (2017) 46 Hofstra L. Rev. 253-273.

What of Starke's conduct in the courtroom? He came from an era where there was little tolerance for errant counsel and judges of the High Court did not hold back in expressing views. He was a master of the sardonic comment. Thus, in *Federal Commissioner of Taxation v Hoffnung & Co Ltd*, Starke began his reasons with, 'This is an appeal from the Chief Justice, which was argued by this Court over nine days, with some occasional assistance from the learned and experience counsel who appeared for the parties.'[11] Of more immediate relevance is Starke's intemperance in the face of what he perceived as time-wasting or unhelpful submissions. In May 1944, Garfield Barwick KC sought special leave from the High Court to appeal the convictions of his clients for price fixing offences. Eric Miller KC appeared for the Crown. It was a cold day in Melbourne and Starke kept a rug over his knees for warmth. Starke is reported to have given Eric Miller a particularly difficult time.[12] Miller pushed back, saying to Starke, 'Your Honour is very rude to counsel.' Starke retorted, 'With justification'. Seeking to calm matters, Latham indicated the court would adjourn for lunch and that 'the altercation between Mr Justice Starke and counsel should terminate.'[13] Whatever tension there had been in the room evaporated when Starke got up to leave, tripped over his rug, and fell on his face.[14]

Starke's impatience with and intolerance of Bert Evatt was never more pronounced than during the *Bank Nationalisation Case*.[15] Evatt by this time had resigned from the High Court and was the Commonwealth Attorney-General. In 1947 the Chifley government announced its intention to nationalise private banks in Australia. Evatt drafted legislation to implement the policy. When the legislation passed parliament, it was challenged in the original jurisdiction of the High Court. Evatt, perhaps unwisely, appeared for the Commonwealth to defend the legislation he had drafted.[16] Things got off to a rocky start. The *Newcastle Sun* reported on the afternoon of 9 February 1948, the day the case began:[17]

> Immediately after the legal appearances had been noted of the largest bar representation that Australia has ever seen, Mr Justice Starke himself unexpectedly raised the question of shareholdings.
>
> There was a slight stir in court when he indicated that yesterday the Solicitor-General (Professor K. H. Bailey), who is appearing with Dr Evatt for the Commonwealth, called at his home and discussed shareholdings.

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11 [1928] HCA 49; 42 CLR 39, 62. One of the counsel to whom Starke referred was Owen Dixon KC who would join him on the High Court just three months after the case was decided.

12 It was reported that Starke, without the concurrence of the other judges, told Miller to abandon one of his arguments because it was irrelevant. Latham disagreed and directed Miller to proceed with his argument – 'High Court Judge Rebukes Counsel', *Newcastle Morning Herald and Miners' Advocate* (Newcastle), 1 June 1944, 3 <http://nla.gov.au/nla.news-article134924690>. At another point Starke accused Miller of 'impertinence' – 'Conviction for Conspiracy', *The Advertiser* (Adelaide), 1 June 1944, 3 <http://nla.gov.au/nla.news-article43206731>.

13 Ibid.

14 Jessica Davis and Troy Simpson, 'Humour' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

15 (1948) 76 CLR 1.

16 An unnamed 'senior Federal Minister' was reported as saying 'the move is unwise' and 'would upset the legal profession and probably be frowned upon by the court' – 'Appearance of Evatt Resented', *Maryborough Chronicle*, (Maryborough), 9 February 1948, 3 <http://nla.gov.au/nla.news-article147462492>.

17 'Evatt Challenges Two Judges Of High Court In Bank Case', *The Newcastle Sun* (Newcastle), 9 February 1948, 3 <http://nla.gov.au/nla.news-article158132335>.

> 'The Solicitor-General called upon me at my residence saying that he had come at the request of the Prime Minister and the Attorney-General,' Mr Justice Starke said.
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> 'The Solicitor-General said that they were very much concerned at the fact that my wife held shares in the National Bank of Australasia.
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> 'I said that she did hold shares, but that I had no pecuniary interest in them whatever. We also had current accounts with one of the trading banks and I said probably the other judges had such accounts also.
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> 'Incidentally I said I had some other investments in Commonwealth stock.
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> 'The Solicitor-General said that some of the actions were brought on behalf of the shareholders. I said that I had no knowledge of who brought the actions and I did not suppose any of the shareholders did either.
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> 'I went on to ask whether the suggestion was that I was disqualified, from sitting in these bank cases by reason of bias because of interest or suspected interest.
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> 'The Solicitor-General said that the Prime Minister and Attorney-General were quite confident that that matter would not affect my judgment in any way whatever, but that other people might suspect bias on my part.'

Starke concluded, 'If there is any objection, let it be taken now in open court.' According to the *Canberra Times*,[18] Evatt described the case as 'unusual', and submitted 'My colleagues and I think the matters mentioned constitute disqualification and that it would be improper for us to waive that disqualification.' Latham announced that there was no pecuniary interest that could affect 'the fair and impartial consideration of the matter'. Evatt said he accepted this unreservedly. Starke sat on the case, joining the majority who invalidated the Commonwealth's attempt to nationalise the Australian banking system.

Seen from a 21st century perspective, this appears to have been a plain attempt by the Commonwealth to influence the case by having Starke recuse himself. Chifley and Evatt, employing the Solicitor-General to do the dirty work, were applying the power of the Commonwealth to coerce Starke to withdraw from the case, not because of any real or apprehended bias, but because they suspected (rightly) that he would be hostile to the arguments of the Commonwealth. This was an attempt by counsel to bully the judge. Unfortunately for the Commonwealth, they picked the wrong judge.

Matters did not improve for Evatt. The hearing was long, occupying 39 days over several months in 1948. Evatt alone addressed the court for 17 days. On the ninth day Evatt appeared to become briefly unwell.[19] Starke took relish in quoting to Evatt passages from one of Evatt's own decisions,[20] the effect of which was seemingly unfavourable to the Commonwealth's arguments.[21] On the final day of Evatt's address to the court, he was interrupted by Starke. Starke complained that he had been listening to Evatt for an hour and half but Evatt had added nothing to what he said the day before. Evatt's curt response was to say, 'I have said a lot more

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18 'Government Challenges Impartiality Of Court Judges', *Canberra Times* (Canberra), 10 February 1948, 1 <http://nla.gov.au/nla.news-article2737240>.

19 'Evatt Suffers Turn In Court', *Brisbane Telegraph* (Brisbane), 9 March 1948, 2 <http://nla.gov.au/nla.news-article212771314>.

20 *West v The Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 701.

21 'Evatt, Starke In Legal Jousting', *The Sun* (Sydney), 11 March 1948, 7 <http://nla.gov.au/nla.news-article228999778>.

if your Honour had been listening to me.' Undeterred, Starke replied, 'I have been listening to you for two weeks.'[22] That Starke was applying pressure to Evatt to wrap things up was made clear by discussion later that day about further hearing dates, with Starke suggesting to Evatt he would not be inconvenienced by an adjournment if he could bring himself to conclude his submissions that day.

While perhaps a mild example, Starke's comments can be seen as petulant and unnecessary. By the standards of the day, his behaviour was not bullying. Whether it might be so described today is harder to judge.

The culture of the High Court was soon to change. On his swearing-in as Chief Justice in 1952, Sir Owen Dixon said[23]

> [t]he methods of the court have greatly changed during the period with which I have been connected with it. When I first began to practise before it its methods were entirely dialectical, the minds of all the judges were actively expressed in support or in criticism of arguments. Cross-examination of counsel was indulged in as part of the common course of argument. For myself, that system was advantageous. Apparently I was endowed with a greater degree of endurance or lack of sensibility than most people, but whether because those of greater nervous endurance or physical capacity were not so often to be met with as perhaps they may now be, or for other reasons, there was a large body of counsel who disliked that procedure, and when I came to the Bench I had formed the conviction that it was not a desirable one. I felt that the process by which arguments were torn to shreds before they were fully admitted to the mind led to a lack of coherence in the presentation of a case and a failure of the Bench to understand the complete and full cases of the parties, and I therefore resolved, so far as I was able to restrain my impetuosity, that I should not follow that method and I should dissuade others from it.

Consistent with this statement, the standards now set by the High Court are impeccable. A review of transcripts of more recent special leave hearings, perhaps the most high-pressure advocacy environment in our system, shows nothing but unfailing courtesy. Of course, it has not always been forward progress. Sir Anthony Mason said of Sir Garfield Barwick's time as Chief Justice that he 'conducted a penetrating and, at times, destructive cross-examination of counsel's argument. In this … he was sometimes abetted by other Justices. Presentation of argument to the High Court at that time was not an activity for the faint-hearted.'[24] But overall, counsel is much less likely to experience bullying in the High Court, or our Court of Appeal, now as compared to years past.

But what of the lower courts, where the range of judicial officers is larger and more varied and the potential for different experiences commensurately greater? Again, things have changed. I cannot imagine today conduct like that attributed to Justice Connolly who, upon learning the solicitors in an application were from the Gold Coast, threw the *Supreme Court Rules* over his shoulder while saying, 'Then I won't be needing these.' Nor is there anyone I can think of on the District Court who would imprison a litigant in person for alleged contempt during a jury trial of a civil claim.[25] The conduct of the judge in that case was described by the Court of Appeal as 'impatient and occasionally rude',[26] and involved treating the plaintiffs with

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22 'Mr Justice Starke And Dr Evatt In Court Clash', *Barrier Daily Truth* (Broken Hill), 20 March 1948, 1 <http://nla.gov.au/nla.news-article141687310>.

23 (1952) 85 CLR xiv-xv.

24 Anthony Mason, 'Barwick Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

25 *Barmettler & Anor v Greer & Timms* [2007] QCA 170, [27]-[28].

26 Ibid [21].

'unnecessary severity and ill temper, [albeit] in the course of presenting what was in fact an under prepared and hopeless case.'[27] This was conduct which undoubtedly fell short of the standards expected of a judge. But was it bullying? There is no hint in the reports of the case that the trial judge was attempting to coerce the plaintiffs into discontinuing their claim or had some other ulterior motive. It appears that the trial judge went way too far in attempting to manage a difficult trial with plaintiffs appearing in person to pursue a hopeless claim. The efforts of the trial judge were directed toward the identification of the real issues in the trial and getting to the evidence that might bear on the resolution of these issues. These are legitimate aims of our system of administering justice.

But the legitimacy of the ultimate goal cannot justify the method of achieving that goal. Writing extra-judicially, Justice Glenn Martin has ventured that judicial bullying means

> 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.[28]

Where this occurs, the vice lies in the judge's abuse of the power of their position. Even if the course desired by the judge is the proper one to adopt, it is bullying to seek to achieve it through an abuse of power in place of argument and reason. Applying that definition to the conduct of the trial judge described above would undoubtedly have the result that the behaviour amounted to judicial bullying.

It is difficult, I think, to improve on Justice Martin's definition of judicial bullying. While there will always be marginal cases, an application of this definition to a set of facts will usually make it obvious if the line between judicial robustness and bullying has been crossed.

In my admittedly anecdotal experience, judicial bullying has never been common and is less common now. But that is not to say that it is all 'porter and skittles'.[29] Just a few days ago the Rt Hon Lord Justice Clive Lewis of the Court of Appeal of England and Wales was warned for misconduct following an investigation of a complaint made to the Judicial Conduct Investigation Office in the United Kingdom. Justice Lewis was found to have 'intervened excessively in counsel's submissions, throughout the hearing, in a manner which became increasingly harsh and rude and to the extent that it constituted judicial bullying.' His Honour 'accepted that he had allowed his frustrations at the hearing to show and reflected that he should have handled matters differently' while apologising for his behaviour.[30]

Enduring judicial bullying may no longer be a 'rite of passage', but for reasons I will come to later I doubt judicial bullying will ever go away entirely. As such it is useful to consider how we might respond to, and seek to prevent, bullying of this kind.

Modern responses to concern about judicial bullying

The more recent consideration of bullying within the legal profession can be traced back to the exchange between Michael Kirby, the President of the New South Wales Court of Appeal and

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27 Ibid [40].

28 Glenn Martin, 'Bullying in the courtroom', (2013) 4 WR 16.

29 Charles Dickens, 'The Posthumous Papers of the Pickwick Club' (1837) – 'They don't mind it; it's a reg'lar holiday to them — all porter and skittles.'

30 Statement from the Judicial Conduct Investigations Office, 29 September 2023 <https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement3023/>

later Justice of the High Court, and Jim Thomas, a Justice of the Queensland Supreme Court, and later a Judge of Appeal.[31] While these essays were not directed at the notion of judicial bullying, by reporting some of the more extreme conduct of judges said to have been the product of stress, they obliquely highlighted the issue. Then in 2013 Michael Kirby revisited the topic,[32] at around the same time as a collection of papers on bullying was published in the *Workplace Review*. In 2013 Kirby explicitly considering bullying of, and by, judges and potential responses to such behaviour. One such response suggested by Kirby was the adoption of publicly available protocols for reporting complaints and the existence of independent bodies to investigate and, where appropriate, discipline judges. Of course, these were not novel suggestions and such bodies had by then already existed for a long time – the New South Wales Judicial Commission was established in 1987 – but not in every State.

At the moment there is a Judicial Commission, or equivalent, empowered to investigate complaints about judicial officers in the Australian Capital Territory,[33] New South Wales,[34] the Northern Territory,[35] South Australia,[36] and Victoria.[37] The Commonwealth released a discussion paper, 'Scoping the establishment of a federal judicial commission',[38] in January 2023. It is considering the 57 responses, which are largely supportive of the establishment of such a body. The Western Australian government announced in September 2022 it intended to establish an 'independent judicial watchdog' with the power to reprimand for misconduct, but not much seems to have happened since. Tasmania has most recently joined the party, with it being reported on 3 October 2023 that Justice Stephen Estcourt of the Supreme Court of Tasmania told students at UTAS Law School that one would 'no doubt' be implemented soon.[39]

The value of an independent Judicial Commission with investigatory powers was put succinctly in the Commonwealth discussion paper earlier this year.[40]

> While there is generally a high degree of public confidence in the Australian judiciary, the ALRC Report notes concerns that current complaints-handling mechanisms are not independent from the judicial hierarchy, and lack transparency in the process for considering and addressing complaints. A survey of lawyers found that more effective procedures for complaints concerning judges was considered the most important reform needed in the federal courts to maintain public confidence in judicial impartiality. An independent body could enhance public confidence in how complaints are handled and the broader administration of justice, while protecting the institutional integrity of the court.

It seems inevitable that Queensland too will one day soon have a Judicial Commission. The Queensland Law Society and Bar Association have long called for such an independent commission. The proposal, I think, enjoys the broad support of the judiciary. It was a primary

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31 Michael Kirby, 'Judicial Stress', (1995) 13 Aust Bar Review 101; Michael Kirby, 'Judicial Stress – An Update', (1997) 71 ALJ 774; James Thomas, 'Get Up Off the Ground (a commentary on Hon Kirby J's "Judicial Stress – An Update")', (1997) 71 ALJ 785.

32 Michael Kirby, 'Judicial stress and judicial bullying', (2013) 87 ALJ 516.

33 https://www.actjudicialcouncil.org.au

34 https://www.judcom.nsw.gov.au

35 https://judicialcommission.nt.gov.au

36 https://www.jcc.sa.gov.au

37 https://www.judicialcommission.vic.gov.au

38 https://consultations.ag.gov.au/legal-system/federal-judicial-commission/

39 Ellie Dudley, 'Tasmania next to implement judicial commission', *The Australian* (Sydney, 3 October 2023).

40 'Scoping the establishment of a federal judicial commission', January 2023, n 36, 12 (footnotes omitted). The reference to the ALRC Report is to report 138, 'Without Fear or Favour: Judicial Impartiality and the Law on Bias'.

recommendation of the first report of the Women's Safety and Justice Taskforce chaired by the Hon Margaret McMurdo AC.[41] The Queensland government supports the intent of the recommendation and has said it will consult with the Chief Justice, Law Society and Bar Association in pursuance of it.[42]

The recommendation preferred a commission based on the New South Wales model. This model includes a substantial, and expensive, educative role.[43] Whether this aspect will be adopted in Queensland remains to be seen. But it is reasonable to assume the investigative functions of any Queensland Judicial Commission will share aspects with established commissions. As such a brief tour of existing commissions is useful.[44] I do not propose to cite each piece of legislation. Apart from NSW each establishing Act is short and easy to navigate.[45]

The Commissions may each be described as adopting a protective, rather than disciplinary, model. For obvious constitutional reasons, none have the power to directly discipline a judicial officer who is the subject of a substantiated complaint. As put by the New South Wales Judicial Commission, their role is to 'protect the public from judicial officers who are not fit for office or who lack the capacity to discharge their duties'. Pursuant to the establishing Acts, any person may make a complaint about the 'conduct' (South Australia), 'conduct or capacity' (Victoria), 'ability or behaviour' (New South Wales), or 'behaviour or physical or mental capacity' (ACT and Northern Territory) of a judicial officer. South Australia prohibits a complaint from a person who is a declared vexatious litigant, a provision it would be wise to incorporate in any Queensland legislation. New South Wales gives its Judicial Commission the power to declare a person a 'vexatious complainant', whose complaints may then be ignored. Where appropriate, the remit of the Commissions extends beyond judges and includes Magistrates and some tribunal members. While some Commissions are authorised to investigate conduct that occurred before a person became a judicial officer, if that conduct could warrant removal from office, they have no jurisdiction once the person ceases to be a judicial officer. Recently in South Australia a judge resigned while the Judicial Conduct Commissioner was investigating a complaint, with the result that the investigation was terminated.

While there is some variation, generally it is the case that once a Commission receives a complaint it may be summarily dismissed in defined circumstances. These circumstances include where the complaint is trivial, vexatious, or frivolous, where it is apparent the complaint cannot be substantiated, or where the complaint, even if substantiated, would not provide grounds for taking further action against the judicial officer. If the complaint is not dismissed summarily, it may be referred to the appropriate head of jurisdiction who can take remedial action, such as counselling the judicial officer. This would involve a preliminary finding that the complaint is substantiated but does not warrant removal from office or the

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41 Women's Safety and Justice Taskforce, 'Hear Her Voice – Report One – Addressing coercive control and domestic and family violence in Queensland', (Report 1, December 2021) xlvi (recommendation 3).

42 'Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report One' (May 2022), p. 10.

43 The New South Wales Judicial Commission also performs a function like the Queensland Sentencing Advisory Council – see section 8 of the *Judicial Officers Act 1986* (NSW).

44 Not all are called Commissions. South Australia has a single commissioner, and, in the ACT, the equivalent body is called the Judicial Council. Their functions are, however, essentially the same.

45 The establishing acts are the *Judicial Commissions Act 1994* (ACT), *Judicial Officers Act 1986* (NSW), *Judicial Commission Act 2020* (NT), *Judicial Conduct Commission Act 2015* (SA), and the *Judicial Commission of Victoria Act 2016* (Vict).

further attention of the Commission. In some cases, referral to a head of jurisdiction is at large. In others it will be with recommendations from the Commission in relation to future conduct.

In cases where the complaint is of a kind that, if substantiated, it could warrant the judicial officer's removal from office, an investigating panel is established to conduct a full inquiry. Such panels have a range of coercive powers to compel the production of evidence and testimony. These include a power, in appropriate cases, to require the judicial officer to undergo a physical, psychiatric, psychological, or other medical examination. Investigations are generally conducted confidentially. A complaint that is not substantiated after a full investigation will be dismissed. A complaint that is substantiated but which involves conduct that could not justify the removal of the judicial officer will be reported to the relevant head of jurisdiction, with or without recommendations. A complaint that is substantiated and which could justify the removal of the judicial officer will result in a report to the relevant parliament who may then consider, in accordance with the relevant constitutional arrangements, if the judicial officer ought to be removed from office.

Care has been taken in each of the establishing Acts to preserve judicial independence. Complaints that question the merits or lawfulness of a decision or procedural ruling will be summarily dismissed. The complainant's remedy in such cases lies in an appeal, not a Judicial Commission. Victoria provides that the making of a complaint does not require the judicial officer to disqualify themselves from an ongoing proceeding – a necessary protection to guard against canny litigants manipulating the system.

Were a Judicial Commission of this kind to be established in Queensland, there is no doubt it would be authorised to investigate complaints of judicial bullying. But what could be done now if there was a complaint? There has always been the capacity to raise a complaint with the Chief Justice or other appropriate head of jurisdiction. The process has been informal and beset by the obvious difficulty that practitioners are reluctant to be known as complainants out of concern for their reputation or because of the reality of further appearances before the judicial officer. As Glenn Martin observed, a solution to this difficulty, at least in the instance of repeat offenders, is to collate several complaints to reduce the likelihood of repercussions to any individual.[46]

Recently, things have changed a little. The Supreme, District and Magistrates Courts of Queensland and the Bar Association have in the last few years agreed upon protocols for raising concerns about judicial conduct. These are publicly available on the website of the Bar Association of Queensland. In short, they provide for a member to raise a concern with the President of the Bar Association who may then contact the head of jurisdiction. Whether or not this occurs is for the President to decide, but the wishes of the barrister involved is to be considered. If the matter is raised with the head of jurisdiction, they may investigate it, including by raising it with the judicial officer to decide if there is substance to the concern. The head of jurisdiction may discuss the matter with the judicial officer and inform the President in general terms of the outcome of the discussion and of any step that has been, or will be, taken. The discussions are to be generally confidential but may involve some dissemination.

Beyond this, the Supreme Court has adopted a policy of workplace conduct which is intended

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46 Martin, n 26, 17.

(a) to define clear standards of appropriate conduct by the Chief Justice and Judges towards all persons who are officers, employees, contractors or service providers of the Court;

(b) to provide a safe and secure method by which any officer, employee, contractor or service provider can raise a concern or make a complaint about inappropriate conduct by a Justice; and

(c) to set out the broad framework within which such concerns or complaints will be addressed.

The policy extends outside of the courtroom and covers court staff, associates, and others. It provides that no judge of the Supreme Court is to engage in inappropriate conduct, including bullying, which is defined in the following terms.

> *Bullying*, in the form of belittling, insulting, victimising, aggressive or intimidating conduct. Bullying may include abusive or offensive language or comments, unjustified criticism or complaints, setting unreasonable or constantly changing timelines, or deliberate exclusion from work-related activities. Bullying does not include reasonable allocation of work, justified and reasonable discussion on work performance, differences of opinion and disagreement, and reasonable management action.

A complaint may be made to a range of people, not just the Chief Justice, and may be dealt with formally or informally as the case warrants. An independent external adviser may be appointed to investigate serious allegations.

Obviously, such a policy is no substitute for a Judicial Commission with explicit statutory authority. But the policy at least sets a clear framework by which complaints are be handled.

The District Court is yet to adopt a similar policy.

Is judicial bullying an unavoidable concomitant of our system?

And so, we come to the uncomfortable question I posed at the beginning: Is bullying embedded in the system? I preface what I am about to say by reminding you that I am a lawyer and not a psychologist. But it seems to me that there are some features of our system which are especially conducive to produce bullying. To explain why I think that I want to begin not with the legal system but with the military.

Bullying, mobbing, hazing and other anti-social conduct has long been endemic in military organisations around the world. It has been a constant feature of the evidence before the long-running Royal Commission into Defence and Veteran Suicide. In his address to the National Press Club on 13 September 2023 Commissioner Nick Caldas APM referred to an investigation by the Australian Defence Force between 2012 and 2016. The investigation examined nearly 2,500 complaints of bullying or harassment. A staggeringly high 72% of the complaints were found to be credible.[47]

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[47] Nick Caldas APM, 'The tragedy of veteran suicide: How Australia has failed its finest' (Speech, National Press Club, 13 September 2023) <https://defenceveteransuicide.royalcommission.gov.au/news-and-media/media-releases/tragedy-veteran-suicide-how-australia-has-failed-its-finest-address-commissioner-nick-kaldas-apm-chair-national-press-club>.

It seems obvious that military culture is a significant factor in the creation of bullies. It has been said that

> [p]erpetrators in the military exist in a workplace with an extremely and uncompromising hierarchical structure with defined roles, ranks and career fields. They follow explicit rules of conduct and clearly defined career paths.[48]

Another academic considered the influences of power and culture on bullying and harassment in para-military fire services in the United Kingdom, United States, and Ireland. He identified the strong culture of the military was a matter contributing to a process of indoctrination in which bullying flourishes. That 'strong culture' in the military is typified by ranks, an emphasis on power, a highly prescriptive code of practices, promotion from within the ranks, long-standing traditions, a male-dominated environment that is authoritarian and hierarchical, and the requirement of basic training.[49]

Does any of this sound familiar?

I do not want to go too far in drawing comparisons with the military. There are obvious differences. Our 'combat' is only ever metaphorical, and it must be noted that there is in the military a necessary acceptance of violence under certain conditions. Undoubtedly this is a significant factor when it comes to bullying in the military. But parallels exist as well. The profession of barristers and judges is extremely hierarchical. It requires training for admission into the profession. There is a degree of indoctrination into centuries of tradition. Practice involves a highly prescriptive code of conduct. There is a built-in deference to those of higher rank, coupled with physical gestures intended to reinforce the hierarchy.

When it comes to the judge in court so much of our system is designed to emphasise their power and authority. The imbalance of power is on display for all to see. When a judge enters the courtroom all present stand until the judge is seated. They bow toward the coat of arms to signify respect for the court. (Have you ever thought about how standing and bowing to the court when the judge enters is the equivalent of a military salute?) The judge's seat is elevated above all others in the court. Submissions are advanced 'with respect' – or with 'great respect' if the lawyer is trying to say the judge is wrong. An adverse ruling is met with, 'May it please the court.' Obeisance is the currency of the courtroom.

Add to this the tension inherent in our system, where counsel and judges have different aims. The noted academic lawyer and ethicist Monroe Freedman put it this way.[50]

> The problem is, in part, one of perspective. Along with a great deal of mutual respect between judges and lawyers who appear before them, there is also a considerable amount of tension between them. One probable reason for that tension is the fact that the judge and the advocates have different functions. The lawyers are committed to seek justice as defined by the interests of their clients, while the judge is dedicated to doing justice between the parties. From the perspective of the judge, therefore, at least one lawyer in each case is attempting to achieve something to which her client is *not* entitled. From the perspective of the lawyer, however, the judge is always poised to deprive her client of something to which the client *is* entitled.

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48 Donovan Kalamdien and Audrey Lawrence, 'A proposed typology of the military bully', *Scientia Militaria, South African Journal of Military Studies*, Vol 45, No 1, 2017, 122, 123.

49 David Archer, 'Exploring "bullying culture" in the para-military organisation', *International Journal of Manpower*, 20/1&2, 1999, 94.

50 Monroe H Freedman, *Understanding Lawyers' Ethics* (LexisNexis, 1st ed, 1990), 73.

Lawyers are obliged to seek every advantage for their client, within the bounds of the rules of ethics and the law. Judges must ensure a fair hearing for all parties and that litigation is resolved as efficiently as is consistent with notions of justice. As Michael Kirby wrote in 2013

> [h]ere, then, is the quandary. Judges need to ensure that lawyers, especially advocates, in the testing circumstance of litigation, master their briefs, familiarise themselves with the applicable law, command the detail of the facts, reflect seriously on the structure and content of their arguments, obey the practice rules and help the court to reach a lawful and just conclusion. They need to test the propositions advanced by the advocates and to ask them tough questions. Judges need to insist on efficiency, punctuality and high standards. The judges themselves are often under considerable pressure. The circumstances are often dramatic and emotional.[51]

Is it any wonder that occasionally pressures need to be released? Of course, I am not suggesting that the tensions described above provide an excuse or justification for the judicial bully. Anger, frustration, and impatience are all natural human tendencies, ones that I am sure I share in no small measure. They may be amplified by the pressure of court, but that gives no sufficient reason for judicial conduct which discards intellectual rigour and seeks to force a result through harassment or intimidation. Nor am I suggesting that a radical rethinking of long-accepted practices is warranted or could itself magically make bullying disappear. Even without the rituals and trappings that attend court there will always, and necessarily must, be an imbalance of power between the bench and the bar. Our system only works if we accept that a judicial officer has the authority to make final determinations quelling a dispute between parties, subject only to correction on appeal.

These factors will always be present. They may produce the occasional flash of anger or sigh of impatience from the bench. But that is not bullying. It is confirmation that judges are human too. Still, we must be alert to the unique environment in which judges and advocates operate and its potential to act as a catalyst for worse behaviour.

Conclusion and thoughts

Judicial bullying remains something that I think is impossible to narrowly define. My view of it will differ from yours, especially now that I am a judge and no longer a barrister. So, in the best lawyerly fashion, the answer to the question of whether bullying is tolerated – whether it is a 'legal' bloodsport – must be, 'it depends'. It depends upon your own definition of bullying and even more on your perspective. Something we can all agree on, though, is that politeness and courtesy go a long way. If all those in the courtroom, including judges, kept this in the forefront of their minds there is less chance of any behaviour that might be perceived as bullying.

But is that enough? If, as I have postulated, a significant factor in the occurrence of judicial bullying is internal or systemic, is it enough to trust the better nature of its participants? Might it be that the surest way to prevent systemic pressures producing bad behaviour is by introducing an external factor, such as a judicial commission? Could such a body with both investigative, and perhaps more importantly educative functions add a substantial layer of protection against bad judicial behaviour?

Such policy questions are not for me to answer, so I will leave you to ponder them at your leisure.

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51 Kirby, n 30, 523.