

2660

NATIONAL FORUM ON WELLNESS FOR LAW

MELBOURNE LAW SCHOOL

21 FEBRUARY 2013

JUDICIAL STRESS AND JUDICIAL BULLYING

The Hon. Michael Kirby AC, CMG

NATIONAL FORUM ON WELLNESS FOR LAW

MELBOURNE LAW SCHOOL

21 FEBRUARY 2013

JUDICIAL STRESS AND JUDICIAL BULLYING *

THE HON MICHAEL KIRBY AC CMG**

JUDGES SUBJECT TO STRESS

A national forum on wellness in Australian legal practice is well timed. Recent editions of professional journals in Australia and overseas bear witness to the increasing attention to, and concern about, stress, depression and pressure amongst law students¹ and legal practitioners². The new-found attention is commendable. It was not always so.

The change may have something to do with the increasing numbers of women entering the legal profession. On the whole, women appear more willing to speak about these formerly unmentionable topics than men. They do not so commonly feel inhibited, as men do, in recognising that wellness is not simply the absence of debilitating depression or feelings of abject failure. It may, or may not, be significant that the participants attending the Melbourne forum were overwhelmingly women: on my count, a proportion of more than 4 women attendees to 1 man. Many male

* Text for a lecture to the National Wellness for Law Forum, Melbourne University Law School, 21 February 2013.

** Patron of the Tristan Jepsen Memorial Foundation. Former Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of New South Wales (1984-5). Personal views.

¹ W. Larcombe, I. Malkin and P. Nicholson, "Law Students' Motivations, Expectations and Levels of Psychological Distress: Evidence of Connections" (2010) 22 *Legal Education Review* 71, 76-79; K.M. Sheldon and L.S. Kreiger, "Does Legal Education Have Undermining Effects on Law Students? Evaluation Changes in Motivation, Values and Well-being", *Behavioural Sciences and the Law* 22:261 (2004).

² L. Mezrani, "Feeling the Pressure" *Lawyers Weekly*, 8 February 2013, 24; L. Mezrani, "Poor Mental Health Programs Failing Lawyers", *Lawyers Weekly*, 19 February 2013, 2; "Big Firms' Mental Health Façade", *Lawyers Weekly*, 15 February 2013, 3; S. Quine, "Bullying 'Pandemic' in Law Firms" *Lawyers Weekly*, 1 March 2013, 1. See also "Executive Health" in *CPA Australia*, ITB, February 2013, 58.

lawyers still feel that talking about stress, pressure and depression constitutes an admission of personal inadequacy or weakness. Or is embarrassing or irrelevant. They are afraid that they will be seen as 'sooks' or 'cry-babies. This is something men, from early childhood, have been told they must never be. As Neville Wran QC once famously observed in a political context: "Balmain boys don't cry." The equivalent professional motto seems to be: "Barristers don't blub." "Lawyers aren't lachrymose." We have to move beyond this.

A criticism of the program of the forum was that it contained no session to address the problems caused to, and by, judicial officers. They are, after all, the iconic figures of legal practice, or so they like to think. Normally, they are the symbolic leaders, and standard bearers, of the culture and traditions of the law. Members of the community, and not just lawyers, generally look up to them. They are supposed to be paragons of virtue, industry, judgment, courtesy and efficiency. So can we put judicial officers on such a high pedestal as to be completely out of account in a discussion about wellness in the law?

Those who designed this forum appear to have thought that we could. This represents a misjudgement. Judicial officers (judges, magistrates and some tribunal members) are subject to particular risks of stress, depression and pressure. This is so, however some of them may deny that fact. Moreover, 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. It is time that judges were added to the agenda of a national wellness forum. Particularly if they are a *cause* of unwellness in others, it is time for the law to provide appropriate responses.

AN UNMENTIONABLE SUBJECT

Shortly before I moved from my office as President of the New South Wales Court of Appeal to take A seat on the High Court of Australia, I was invited to a judges'

conference in Canada. Many topics were discussed. One that caught my eye was judicial stress. Because this was a topic that I had never heard discussed in Australian judicial circles, I paid close attention. I became convinced that there was more in the topic than sceptical commentators seemed inclined to admit. Accordingly, when I returned to Australia, I resolved to share my insights. I found that the organisers of judicial conferences were willing to give me a platform. Yet I discovered that Australian judicial audiences were rather resistant.

I addressed the inaugural Judicial Orientation Program of the Judicial Commission of New South Wales on the topic³. I elaborated this talk in an address for the Australian Institute of Judicial Administration⁴. I even undertook a stressful interview on the subject, on video, that could be shown forever to magistrates and others.⁵ Drawing on the Canadian material, I sought to explain the physiological and psychological features of stress in a judicial context.⁶ Ever helpful, I offered ways in which a judicial officer might be able to promote self-relaxation and diminish feelings of stress when it arose in judicial life.⁷

Appointed to the High Court of Australia in 1996, I received an invitation to address the annual conference of Supreme Court and Federal Court judges, in January 1997, at their meeting in Brisbane. To them, I delivered a paper “Judicial Stress – An Update”.⁸ In it, I recounted six then recent cases in the United States of America where judges, Federal and State, had suffered “crack ups”⁹.

The American cases included the Chief Justice of the State of New York, Hon. Sol Wachtler. He had been convicted and imprisoned in 1992 of harassing his ex-lover,

³ M.D. Kirby, “Judicial Stress”, (1995) 2 *Journal of Judicial Commission of New South Wales* (Number 3), 199-210.

⁴ M.D. Kirby, “Judicial Stress”, (1995) 1 *Australian Bar Review* 101.

⁵ (1997) 71 ALJ, 774.

⁶ *Panorama* (August 1996), 36.

⁷ (1997) 71 ALJ 774 at 778.

⁸ (1997) 71 ALJ 774.

⁹ *National Law Journal* (US), vol 18 no. 32, 8 April 1996 A1.

including by threatening to kidnap her teenage daughter, demanding a ransom and mailing a condom to the girl. In the course of reading about Judge Wachtler's case, and his response to the combined effects of personal and judicial pressures, I read of how Justice John Paul Stevens of the Supreme Court of the United States, as a private citizen, had visited Sol Wachtler in prison as a mark of their previous friendship. I was to remember this in 2010 when Marcus Einfeld, former judge of the Federal Court of Australia, a friend from law school days, was convicted and sentenced to imprisonment for perjury offences. I visited him in Silverwater Prison in Sydney¹⁰. Judges are human.

Before and after the paper I gave in January 1997, there were a number of Australian instances involving judicial officers exposed to great public stress. Confining the list to New South Wales, they included Chief Magistrate Murray Farquhar (who was imprisoned); Justice Lionel Murphy (who faced trial and was acquitted) and; Justice David Yeldham (who committed suicide after untested allegations were made against him in State Parliament). Later was to come Justice Vince Bruce and two magistrates against whom removal proceedings were commenced following adverse reports of the Judicial Commission of New South Wales. None were removed. Removal proceedings have also been brought against senior judges overseas, including the contested, but ultimately successful, removal from office of the Chief Justice of Gibraltar.¹¹

My paper in 1997 sought to explain how the inherent features of the judicial function were prone to occasion stress amongst office holders. The isolation and frequent loneliness of the work. The pressure of growing case loads without commensurate increases in support, resources and salaries. The common lack of specific training, save for on-the-job observance of earlier appointees. The incapacity (available in most other senior positions) of delegation of the essential decision-making responsibility. The frequent lack of feelings, and expression, of appreciation for work

¹⁰ M.D. Kirby, "The Graduating Class of Sydney 1962: Talented, Lucky, Unquestioning" (2012) 36 *Australian Bar Review* 189 at 192.

¹¹ *In re Chief Justice of Gibraltar* [2010] 2 LRC 450 (PC).

conscientiously performed. The susceptibilities to mid-life pressures, emotional, sexual and physical crises. The added stress of frequent changes in the law and the need to adapt to new and unfamiliar legal doctrine and to technological innovations. The particular stresses of rural, appellate and leadership positions in the judiciary were all mentioned. As well, I described the media and political attacks on the judiciary, who were usually disabled from responding. This constitutes an added occasion of stress in the present world.¹² Little did I know that, in 2002, such an attack was just around the corner waiting for me.¹³ My paper for the Brisbane Judges' Conference was a review of themes regularly explored in judicial conferences in North America. Yet I had not counted on the *macho* hostility even to discussing those themes that then prevailed in parts of the Australian judiciary.

Justice Jim Thomas of the Supreme Court of Queensland (a civilised man, later a Judge of Appeal) signalled his distaste for my temerity in raising the unmentionable subject by the title of his commentary on my paper: "Get Up Off The Ground".¹⁴ With an advocate's flair, he blamed his wife for the type of derision that, he said, talk of judicial stress would occasion in the community, reflecting the hardnosed culture of Australia.¹⁵

"You lot, says my wife, are surrounded by people who jump when you say. You are used to people who bow and scrape and tell you how clever you are. You get so that you can't take it when you don't get your own way. You don't know how pampered your really are."

Justice Thomas regarded my paper as one that wrongly saw judges as "victims"; and was "look[ing] for sympathy". I was accused of jumping on the "stress band wagon"

¹² M.D. Kirby "Attacks on Judges – A Universal Phenomenon" (1998) 73 ALJ 599. See also P. Schulz, "Courts, the Media and Infotainment: A Disclosure of Disrespect" in Australian Institute of Judicial Administration, *Australian Courts: Serving Democracy and its Publics*, AIJA, Melbourne, 2103, 69 at 72-74.

¹³ A.J. Brown, *Michael Kirby: Paradoxes/Principles* (Federation, Sydney, 2009), 319. The reference is to the attack without notice (later withdrawn) by Senator Bill Heffernan, based on false evidence.

¹⁴ (1997) 71 ALJ 785.

¹⁵ *Ibid* at 785.

in a way likely to “release howls of derision”.¹⁶ He charged me with failing to define “stress”. Of referring to descriptions of feelings that were of nothing more than “normal reactions”. And of trying to make judges join the “whingers” who, inferentially, pester social security officials and increasingly the courts themselves. Judges, he declared “need adrenalin, or pressure, to produce [their] best work”.¹⁷ Barristers were blamed for “half baked submissions”. Judicial vanity was essential to provide the cure for delay in tackling reserved decisions. Money for judges’ salaries was woefully inadequate. Publicity given to cases of judicial breakdown should not be emphasised as it damaged the public’s perception of the judicial institution. Untoward events had “more to do with character than stress”.¹⁸ My closing remarks, with their tribute to the advantages and nobility of the judicial calling, were condemned as inadequate “lip service”.¹⁹ Nobility, it was suggested, required a noble reticence about judicial stress.

The presentation of Justice Thomas’s paper produced waves of delight amongst the judicial audience in Brisbane that hot summer’s day in 1997. In the individual comments that followed, several of the participating judges appeared to line up with Justice Thomas. Only Justice Jane Matthews of the Federal Court explored the particular stress that she felt was involved in sentencing convicted prisoners. And Justice Brian Cohen of the Supreme Court of New South Wales acknowledged that “stress may be something we see in others but deny in ourselves”.²⁰

I responded to Justice Thomas’s paper. My reply was published with his commentary²¹. I regretted the tendency amongst some judicial officers to ignore the topic, or to laugh it away.²²

¹⁶ *Loc. cit*

¹⁷ *Ibid* 787.

¹⁸ *Ibid* 788.

¹⁹ *Ibid* 789.

²⁰ Cited (1997) 71 ALJ 793 .

²¹ M.D. Kirby, “Judicial Stress – A Reply” (1997) 71 ALJ 791.

²² (1997) 71 ALJ 592-3.

“We can keep our anxieties and concerns strictly to ourselves. We can exclude non-lawyers with insight and expertise to offer. We can react by trying to laugh the subject away. Or we can bring time-honoured judicial qualities to bear. Open-mindedness to new ideas. Honesty about newly perceived facts. Attention to people with relevant expertise and experience. Courage on our own part. Compassion and respect for fellow human beings.”

The intervening 15 years, since this topic was opened up in Australia, have seen much greater attention to the topics of stress, depression and pressure in the legal profession. Whilst it is true that the pressure upon judges is different, sometimes easier to control and probably less intense in degree than that upon advocates, from whom most Australian judges are derived,²³ this does not necessarily say very much. The pressure on advocates and other lawyers, as well as on law students, is a subject of increasing concern. That pressure even appears to be escalating. It risks diminishing the effectiveness, and output, of those subjected to the pressure. It has lessons for the organisation of legal work and the training and instruction of novices. If this is true of practitioners and students, it is likely to be true, to an appropriate degree, also for judges.

The passage of the intervening years has not necessarily vindicated the attention to the problem of judicial stress that I called for in 1997. If they live long enough, it is the fate of those who provide discordant opinions in the law, as elsewhere, to see some of their opinions vindicated, as some of mine will be. Occasionally, as Steve Jobs showed in another field, it is the role of outsiders to stimulate their more orthodox and unquestioning colleagues to think fresh thoughts. In the law, this is sometimes met with derision or rejection. But occasionally the message gets through.

²³ Justice K.R. Handley’s comment: (1997) 71 ALJ 791 at 792. A recent survey of Australian judges confirmed the perceptions of stress in judicial work but reported that this was often counterbalanced by the high satisfaction of much of the work: K. Mack and S.R. Anleu, *Judicial Workload: Time, Tasks and Work Organisation*, AIJA, Melbourne, 2012, 38-39. See also S.R. Anleu and K. Mack, “The Work of the Australian Judiciary: public and Judicial Attitudes” in Australian Institute of Judicial Administration, *Australian Courts: Servicing Democracy and Its Publics*, AIJA, Melbourne, 2013, 149 at 167.

My purpose is reviving the memories of the exchange between me and Australian judicial colleagues in 1997, is to introduce now a second aspect of some judicial lives, namely the judicial imposition of stress on others. The fact is that judicial officers can sometimes be a cause, and occasion, of stress. Within their courtrooms 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.

JUDGES OCCASIONING STRESS

The judiciary's work involves an inescapable component of stress. The circumstances of a matter may be extremely urgent, requiring frantic endeavours to deal with the problem within a deadline occasioned by circumstances outside the control of the lawyers, outside the control of the client and, in part at least outside the power of the judge. Attempts to stop an urgent medical procedure²⁴; or to deal with an important and novel constitutional question before it is overtaken by events²⁵; or to prevent the broadcast of a program said to be highly damaging to the litigant's interests²⁶, are just a few examples. In such matters, judges and lawyers are subjected to stress by the very circumstances. Those circumstances demand a high degree of efficiency and effectiveness in the performance both of the lawyerly and judicial functions. With that effort comes stress.

Moreover, some cases involve inescapable elements of high drama and pressure on advocates and judges alike. No amount of sermonising about stress will entirely

²⁴ *In re B (a Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421 (CA).

²⁵ *Cormack v Cope (1974)* 131 CLR 432.

²⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Australian Broadcasting Corporation v O'Neill* (2008) 235 CLR 334.

banish such pressure from the courtroom. Long and complex criminal trials, nearing their conclusion, final addresses to the jury and the judicial summing up, will present such circumstances. A big civil case with millions of dollars and people's livelihoods and reputations at stake, is another. The advocates and the judge will be alive to the risks and dangers of miscarriage by decisions that they each are obliged to make *instanter*, without the benefit of lengthy contemplation. Necessarily, this produces stress.

The special leave list in the High Court of Australia is another occasion where, because of the stakes, and the very short time limits for oral argument and judicial disposition that are imposed, both the lawyers and the judges are often under great pressure. They are working in taut circumstances that demand the delivery of outcomes, in a few minutes, which may have very serious consequences both for the litigant's interests and for the law itself.²⁷

I acknowledge that such occasions test the capacity both of lawyers and of judges to act with efficiency, courtesy, restraint and mutual respect. Occasionally, the performances of each will leave something to be desired. Doubtless in my own judicial life, in such circumstances and others, I have been guilty of occasional lapses.

However, I did try to avoid such errors and, in particular, the sin of bullying fellow judges, lawyers and others with whom I dealt. Although at school I achieved success in debating, I never forgot the anxiety produced by the combination of talents demanded of good debaters: intellect, efficiency and public performance. In debating, as in practice moots at law school, I was often trembling like a leaf and sweating profusely because of the stress that the performance imposed. Yet

²⁷M.D. Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30 *UNSW Law Journal*, 731.

something drove me on to continue the attempts at public persuasion that was inherent in my later life in the courts. Something spurred me on, yet again, to approach the jaws of danger.

I have never forgotten how terrified I was before my first student moot in 1959. It was on a contract law problem before Justice B.P. Macfarlan, Judge of the Commercial List in the Supreme Court of New South Wales. Fortunately, he was a perfect gentleman: careful, courteous and kindly. I will never forget how grateful I was to him for encouraging me to put my propositions as well as I could, without collapsing in a heap of nerves. In my earliest days of legal practice, as a young articulated clerk, I saw angry judges. I saw bullies. Judges with favourites. Nasty performers. I also saw excellent judges, who had fine judicial temperaments. Amongst the good I would name Judge Theo Conybeare and Judge Colman Wall, each of them of the then Workers' Compensation Commission (NSW).²⁸ Amongst the terrifying judges, whom I prayed to avoid, were Justice Edward ("Dumbo") Dunphy (Commonwealth Industrial Court); Justice Freddie ("Funnelweb") Myers of the Supreme Court of NSW;²⁹ and Justice J.J. ("Black Jack") McKeon of the Industrial Commission (NSW). By and large, the legal profession gets to know judges who are unsuitable to judicial office, either because of intellect or lack of judgment or temperament. In my youth, there was virtually nothing that could be done to secure redress against such judicial officers, except to appeal against their orders or to resolve to try to do better, if ever a judicial appointment came one's way.

The High Court of Australia has not been exempt from unpleasant behaviour and attempted bullying. In my 1997 paper, I drew on earlier published histories to describe the "pitiless"³⁰ conduct of Justice Hayden Starke, Justice of the High Court

²⁸ M. D. Kirby, "Conybeare, A. T." In J. Ritchie (ed.) *Australian Dictionary of Biography*, Melbourne University Press, 1993, Vol 13, 489.

²⁹ Frederick George Myers was a Judge of the Supreme Court of New South Wales in the Equity Division, (1953-1971), known for his contra-suggestibility and having favourites.

³⁰ This was Justice Dixon's word. See Anderson, "Sir Owen Dixon" (unpublished monograph) cited by K. Santow, "Transition to the Bench" (1997) 71 ALJ 294 at 301. Clem Lloyd "Not Peace but a Sword: the High Court under J.G. Latham" (1971) 11 *Adelaide Law Review* 175 at 182.

between 1920-50. Upon the appointment of Justices H.V. Evatt and Edward McTiernan in 1930, Justice Starke refused to have any dialogue with them or even to supply final drafts of his reasons before delivery.³¹ These internal difficulties affected the collegiate operations of the High Court during this period. Justice Thomas, in his Brisbane commentary, denied that such conduct represented an example of judicial stress. He regarded the circumstances, whilst “titillating”, as having “more to do with temperament” or with “character” than stress.³² Still the judicial behaviour, as described, sounds pretty stressful to me. It would have diminished the possibility even of the minimum internal co-operation necessary for the operation of an appellate court.³³ Essentially, it represented an attempt by one Justice (Starke) to delegitimise the constitutional commissions of two others (Evatt and McTeirnan) and to destabilise the efforts of Chief Justice Latham, as he endeavoured to ensure that the court, as an institution, could operate as the Constitution envisaged.

In the 1950s and 60s, as a clerk and young solicitor, I regularly witnessed the arguments of counsel before the High Court. Justice Frank Kitto, indisputably a great judge, was sharp, brusque and ill-humoured, at the expense of many of the barristers appearing before him.³⁴ Years later I came to know him quite well. Out of court, and following his judicial retirement, he was charm itself. But he struck terror in the hearts of most advocates appearing before him. Justices Fullagar and Taylor were not much better and Taylor often more brutal. At that time, the High Court was a fearful place for most advocates.

Taking their cue from this practice, when the Court of Appeal of New South Wales was created in 1965, some its judges sought to out-Kitto, Kitto. Justice Athol Moffitt (later President) and Justice Ray Reynolds were much feared. Justices Kenneth Manning and Frank Hutley could be extremely sharp because of their withering

³¹As Justice Evatt complained. C.Lloyd, “Not Peace But a Sword – The High Court Under J.G. Latham” (1987) 11 *Adelaide Law Review* 175 at 182.

³²(1997) 71 ALJ 785 at 788.

³³(1997) 71 ALJ 774 at 779.

³⁴M.D. Kirby “Kitto, Frank Walters” in T. Blackshield, M. Coper and George Williams (eds), the *Oxford Companion to the High Court of Australia* (OUP), Melbourne 2001, 398 at 400. Ibid, 564-565.

comments and sustained questioning. Of course, there were exceptions to this pattern, including Justices Cyril Walsh and Kenneth Jacobs – both later appointed to the High Court. They were invariably calm, efficient and courteous. Many members of the legal profession at the time excused such misbehaviour as a “rite of passage” that those who wished to succeed as advocates in the upper echelons of the law had to go through to “earn their stripes”.

A story of the unpleasantness that existed in the NSW Court of Appeal in the early days has been told by Ian Barker QC.³⁵ Because Justice Athol Moffitt was my predecessor as President of the Court of Appeal of New South Wales, I came to enjoy a good professional association with him. Our differing views about the law and society meant that our relationship never developed into a friendship. On my arrival in the Court, I was determined to change the atmosphere I inherited. My own experience at school, as a solicitor and at the Bar had taught me that a speaker would rarely give of his or her best for the client, or the cause or to the court, when subjected to undue pressure. Securing change was made easier by the retirement of some of the worst offenders. In the High Court, the retirement of Chief Justice Barwick from the central seat led to a change in the atmosphere there. His successors, Chief Justices Gibbs, Mason, Brennan and Gleeson were polite and cool. I have no doubt that Chief Justice French, whose arrival in the High Court coincided with my departure, is likewise an exponent of courtesy, with due efficiency.

This is not to say that individual judges, even in my time, did not occasionally fall short of the best standards. In the Court of Appeal, Justice Roddy Meagher, although brilliant and often charming and engaging, could sometimes give advocates a very hard time and be guilty of seemingly prejudiced expostulations.³⁶ Occasionally, he would also fall asleep on the bench. Because I was normally presiding, I tried, where appropriate, to step in to uphold my view of the Court’s

³⁵ Ian Barker, “Judicial Practice” (Ch22) in I Frechleton and H. Selby (eds) *Appealing to the Future, Michael Kirby His Legacy*, LawBook Co., 2009, Sydney, 564-5.

³⁶ *Loc.cit.*, Barker at 567, 573. See also M.D. Kirby, “R.P. Meagher and I: The Best of Times The Worst of Times” (2011) 35 *Australian Bar Review* 26 at 29-31.

standards. I was influenced by something I had heard at the Canadian conference which had first set my mind thinking about issues of stress and courtroom behaviour by judges. Justice Louise Arbour, then a Judge of Appeal in Ontario, later a Justice of the Supreme Court of Canada and later still the United Nations High Commissioner for Human Rights, observed: 'I do not accept prejudice or misconduct on the part of a litigant. Nor of an advocate. Nor of a judicial colleague. I always disassociate myself from it.' Dissociation is easier, of course, for a judge than for an advocate. It is also easier in a collegiate court, if one is presiding.

In the New South Wales Court of Appeal, in the decade before my appointment, where it had normally been Justice Moffitt presiding, the atmosphere was frequently, to use Ian Barker's expression, "unpleasant".³⁷

"The Court of Appeal was not a happy forum for lawyers, largely because of the malign influence of Moffitt P and Justice Ray Reynolds."

In his elaboration of this assessment, Ian Barker explained how a senior and experienced barrister reacted to a situation that arose in that court. The barrister, Mr L.J. Priestley QC, was later himself to be appointed to be a Judge of the Court of Appeal and served between 1981 - 2001. In a case concerning an application to remove the name of Peter Livesey from the roll of barristers, Justices Moffitt and Reynolds had earlier delivered a decision which, Mr Priestley contended, disqualified those judges from sitting in the subsequent strike off application, because of the appearance of prejudgment. As Ian Barker describes it:³⁸

"The responses of Moffitt P and Reynolds JA to Priestley during argument in the application, that they disqualify themselves, was sarcastic, contemptuous and personally abusive of counsel. As observers saw it, the conduct of the two judges, particularly Moffitt P, was a disgraceful display of judicial savagery."

³⁷ Barker, *loc cit*, 566.

³⁸ Barker, *ibid*, at 564-565.

Fortunately, Mr Priestley had laid the ground to take the matter further. He sought, and obtained, on behalf of Mr Livesey, special leave to appeal to the High Court of Australia. In that Court the bench unanimously, and in joint reasons, upheld the contention advanced by Mr Priestley. The High Court offered “due respect to the members of the Court of Appeal who saw the matter differently” .³⁹ But they ordered that the proceedings be returned to the Court of Appeal, to be heard afresh. It was a very obvious rebuke.

The change in the atmosphere of the New South Wales Court of Appeal following the retirement of Justice Moffitt has been mentioned by several observers. My successor as President of the Court, Justice Dennis Mahoney, observed:⁴⁰

“In earlier times, when I was in practice at the Bar, one did not expect kindness from the Bench. That was not the custom. Those who remember their appearances before Sir Alan Taylor, Sir Frank Kitto and later before Sir Garfield Barwick will understand what I mean. The Court of Appeal, understandably perhaps, adopted a similar ethos. The Moffitt Court believed that one procured most help from the Bar by the whip rather than a kind word. Perhaps that was right.”

Nevertheless, the Court of Appeal changed. Justice Mahoney went on to describe the change:

“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.”⁴¹

Here, 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

³⁹ *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 297.

⁴⁰ D.L. Mahoney, Speech on the unveiling of a portrait of Justice Michael Kirby, Supreme Court of New South Wales, 19 November 2007, quoted Barker, above n35 at 565-566.

⁴¹ D.L. Mahoney quoted in Barker, above n.35, 565.

court to reach a lawful and just conclusion. They need to test the propositions advanced by the advocates and to ask them tough questions. The judges themselves are often under considerable pressure. The circumstances are often dramatic and emotional. Judge Learned Hand remarked in the United States:

“Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trial needs a firm hand as much as constant determination to give each one his due.”⁴²

There is less excuse for rudeness and disrespect on appeal, where judges and counsel have the luxury of more time to scrutinise the words and conduct of the court below. While holding the adversaries to a high standard and ensuring efficiency, there is no place for rudeness. The excuse that I have sometimes heard advanced is that appellate judges are cleverer and therefore entitled to demand brilliance from those appearing before them. However, displaying personal animosity; disrespect towards advocates or litigants or their arguments;⁴³ courtroom rudeness; arrogance towards advocates or colleagues; gossiping and laughing in private conversations with other judges during argument; and forgetting the litigant and the impression that such conduct makes, are all conduct that amounts to forms of bullying.

RESPONSES TO JUDICIAL BULLYING

Judicial bullying, in whatever form, should not be tolerated or excused on the footing that ‘it was ever thus’. Nevertheless, at the outset, it is essential to keep the problem in perspective. Any response to instances of judicial bullying should not inhibit disproportionately the robust independence of, and candid speaking by, those who hold judicial office. Executive government and the media are often jealous of the independence of the judiciary and desirous of challenging it. Although there are a

⁴² *Dennis v United States* 18F 2d 201 (Second Circuit) cited by Justice Glenn Martin, Supreme Court of Queensland, “Overbearing Conduct in Court by Judges and Lawyers” unpublished, 9 February 2013 para 22. Cf. J. Phillips, “Managing People in Court” unpublished 9 February 2013. See also *Galea v Galea* (1990) 19 NSWLR 263 (CA) at 277-278.

⁴³ *Ex parte Corbishley; re Locke* [1967] 2 NSWLR 547 (CA), per Holmes JA..

few serial judicial offenders in the judiciary, who are widely known in the legal profession, in my experience, the problem of judicial bullying is not widespread. Most judges are aware of the need to keep their personalities in check when they are exercising public power.

The circumstances of litigation are often highly charged. The pressure on judges themselves is great and it appears to be increasing. Occasional evidence of judicial ill-temper may simply indicate that the judge, under much provocation, has exhibited human emotions of impatience, anger at time-wasting and distaste for poor professional performance. Above all, any system for complaints against judicial officers must be compatible with the independence enjoyed by each of them. Judges are not employees of the state or government. Statute apart⁴⁴, in the performance of their judicial functions, they are not subject to the chief justice or presiding officer of their court or tribunal.⁴⁵ Outsiders and even lawyers sometimes think that a chief justice or presiding judge, receiving a complaint, has power *ex officio* to decide the complaint and pull the alleged offender into line. Especially in the higher courts, the powers of discipline over judges are strictly limited and generally reposed elsewhere. Basically, this is so to protect the constitutional independence and integrity of the judge concerned, including from other judges.

A number of steps might be taken to deal with the problems presented by judicial bullying:

1. Empirical evidence is the foundation of good policy: not gossip, suspicion, hunch or personal belief. Progress is evaluating and tackling judicial bullying depends evidence and data. Empirical evidence should be gathered by responsible institutions of the judiciary and legal profession. Instances said to

⁴⁴ Recent legislation has enhanced the powers of chief justices or presiding members of tribunals to give directions but typically this does not relate to decision-making. See *Federal Court of Australia Act, 1976* (Cth), 515 (IAA) and esp. *Fair Work Act 2009* (Cth), s582. In 2012, ss 581B were added to the *Fair Work Act* empowering the President of the Fair Work Commission to deal with complaints against Members and to promulgate a code of conduct for Members.

⁴⁵ *In re Richard Crane; Rees v Crane* [1994] 1 LRC 57 (PC).

amount to judicial bullying and anonymised, but authenticated, examples of judicial bullying should be collected and written up so that unacceptable judicial conduct can be illustrated and considered with actual instances in mind. Talk of judicial bullying is sometimes vague, imprecise and only dimly remembered. Virtually every judge and every barrister has a story of bullying to tell. Transcript will occasionally be available to verify unacceptable instances. Hard examples help to demonstrate the type of language and conduct that is unacceptable in an officeholder exercising public power. It is by such illustrations that the education of the judiciary will be improved and a body of principles derived that judicial officers, members of the legal profession and others become familiar with, understand and accept.

2. Judicial officers themselves should discuss the problem of judicial bullying in their conferences. Like the associated problem of stress and depression in the judiciary, legal practice and at law school, the topic should not be off the agenda, as it has tended to be. Uncomfortable as it may sometimes be to address the defaults of each other, it would be desirable for the matter of bullying to be on the calendar for consideration by bodies such as the Conference of Australasian Chief Justices, the Australian Institute of Judicial Administration, the Judicial Commission of New South Wales and other bodies concerned with judicial administration and education.
3. The Australian Bar Association and State and Territory Bar Associations, as well as the Law Council of Australia, should accept this topic as one suitable for examination by the organised legal profession. Practical solutions, including procedures and facilities of mentoring, counselling and complaint, should be explored in dialogue with senior members of the judiciary.
4. Complaints about judicial bullying and misconduct will commonly be made to chief justices and presiding judges. They, in turn, should adopt publicly available protocols for bringing such complaints to the attention of the judges who are the subject of them and, where necessary, taking them further. So far as possible, complaints about judicial conduct should be anonymised to avoid risks of retaliation against complainants, although in some cases anonymity will be impossible because the circumstances described will be

remembered. Consideration should be given to counselling, support and providing therapy for judicial officers, especially those who are repeatedly identified as causing a sense of bullying in litigants and members of the legal profession. Independent bodies with disciplinary authority in respect of judges should initiate, and publish, protocols for receiving complaints about judicial bullying and like misconduct. In serious and repeated cases, bullying by judicial officers should be recognised as an abuse of public office, warranting commencement of proceedings for removal of the offender from judicial office, in accordance with the law.

5. Judicial education and orientation courses should include lectures to new recruits that refer to judicial misbehaviour and bullying as well as to stress management and identification of any available assistance. Some Bar Associations, such as the Victorian Bar, have instituted a facility of psychological support for members of the practicing profession. This is provided in circumstances of strict privacy and confidentiality. Of course, many judges are also members of the Bar Association and thus have access to these facilities. However consideration should be given by the Associations to the provision of specifically targeted therapy and advice, on a confidential footing, for members of the judiciary. This would be in the interests of Bench and Bar, and litigants.
6. Members of the legal profession should not suppress complaints about cases of bullying by judicial officers, especially serious and repeated cases. I recognise that there is a natural reluctance on the part of legal practitioners, to complain about the conduct of a judicial officer lest doing so might have a deleterious effect on their careers or on the interests of their client in the case at hand. Still, absence of complaint will reduce the possibility of effective redress and the termination of unacceptable conduct. It may permit a course of conduct to take root, to the disadvantage of later practitioners and litigants. Lawyers, and in particular members of the Bar, should include in their training polite ways of dealing with complaints about bullying or like misconduct so that the complaint can be recorded in the transcript, to be available in appropriate cases for appellate review. In many courts, oral argument (which

is where instances of judicial bullying will often arise) may not be recorded in the transcript. It is then the duty of lawyers, on the record, to ask that particularly egregious words and actions on the part of judicial officers should be recorded on the transcript. The request can be made politely, respectfully but firmly. The fact of doing so may have a corrective effect, at least in courts that are subject to appeal and review. Appellate courts should, in appropriate cases, overcome a reluctance to embark upon such subjects.

7. Senior members of the legal profession, in particular, have a responsibility to stand up to bullying. In effect, they do so on behalf of younger and more junior practitioners who may be anxious to avoid harming their careers and reputation. The actions of Bill Priestley QC in the *Livesey* case, described by Ian Barker, represented a template for what should be done. In some cases, it will be appropriate, to seek, as Mr Priestley did, to meet the judge(s) with other counsel, in private chambers so as to foreshadow the intended application. But the application should certainly be made where serious misconduct has occurred or is threatened. In significant instances, where bullying might have affected the outcome of the case, the application should be taken on appeal or review. Appellate courts are, or should be, guardians of proper judicial standards, as the High Court proved to be in *Livesey*.
8. Judges in collegiate courts should also accept the standard that Louise Arbour stated (above). They should not accept misconduct, discriminatory remarks or more than the most transient instances of judicial bad temper by members of the same bench. They should immediately place on record their disassociation from it. At least this will signal to litigants, who are the most important observers of judicial conduct, the exceptional and possibly unacceptable character of what has occurred. It will enhance the record.
9. Where statutory provisions are enacted, or subordinate legislation authorised, to address misconduct warranting discipline and removal from judicial office, bullying and intimidation should be expressly included, so as to give an

explicit foothold for complaint and appropriate action. And to support judicial education.⁴⁶

10. Legal and civil society organisations and community groups, and medical legal academics and the media, should maintain an involvement with the problem of judicial bullying. Whilst the responses must avoid the imposition of public forms of bullying against the judiciary and whilst the importance of judicial tenure and independence for the effective judicial management of litigation must be recognised, this topic should be kept alive. It is not sufficient that the repeat offenders are known to the *cognoscenti*. Sometimes their misconduct might be explained as a response to the problems of pressure and depression earlier faced by them. As with cases of child abuse, empirical data should be gathered. It seems likely sometimes to demonstrate that abusers have themselves been abused. Sometimes they are in need of help, therapy and guidance. But occasionally they need to find another vocation which is not one of public trust involving the exercise of power over others.

Justice in our courts is human justice. Human beings are subject to the imperfections of human nature. The stress and pressure of litigation, in particular, is to some extent unavoidable. However, bullying at work in other vocations is now recognised as a serious problem. Often it gives rise to legal redress.⁴⁷ Remedies have been increasingly provided against such conduct because of the inimical consequences for the economy, for the rights of subordinates and the vulnerable and the due operation of institutions and of those working within them. In the case of the judiciary, there are special difficulties in providing effective responses lest such responses interfere with the capacity of judges to perform their functions strongly and robustly, without fear or favour, affection or ill-will. The initiatives that I have suggested may be a beginning for a calibrated response to a largely unaddressed

⁴⁶ United Nations, Office on Drugs and Crime, Judicial Integrity Group, *Commentary on the Bangalore Principles of Judiciary Conduct* (Vienna, 2007), 124 [87]-[188]. The author is rapporteur of the Judicial Integrity Group.

⁴⁷ Bullying at work is increasingly the subject of legislation, judicial decisions, scientific scrutiny and education. See e.g. *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249.

and unmet problem that is as old as our judicial tradition. Finding solutions to stress *received* and stress *imparted* is a challenge for the law and for the judiciary in Australia.

Those 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. As Callinan J. and I said in our joint reasons in *Gerlach v Clifton Bricks Pty Ltd*⁴⁸:

“All repositories of public power in Australia... are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No Parliament of Australia could confer absolute power on anyone. Laws made by the Federal and State Parliaments are always capable of measurement against the Constitution. Officers of the Commonwealth are always answerable to this court, in accordance with the constitutional standard. Judges within the integrated judicature of the Commonwealth are answerable to appeal and to judicial review. This [means] that there are legal controls which it is the duty of courts to uphold when their jurisdiction is invoked for that purpose.”

⁴⁸ (2002) 209 CLR 478 at 503.