



## NSW Bar Association Protocol for Dealing with Complaints of Judicial Conduct

The *Judicial Officers Act 1986* (NSW) provides a means for any person to complain about the ability or behaviour of judges, associate judges and registrars (together **judicial officers**) but not their decisions. Complaints about a judicial officer's conduct may be made in accordance with those procedures.

Depending on the nature of the judicial conduct, however, barristers may prefer to raise their concerns through a different mechanism. This protocol is designed to support barristers in such circumstances. Its aim is to enable a barrister to raise concerns with either:

- (a) the President of the Bar Association (**President**); or
- (b) an independent contact person nominated by the Executive of Bar Council after consultation with the Chief Justice, being a Senior Counsel appointed for this purpose (**Judicial Conduct Liaison Officer**).

The Protocol is not intended to be exhaustive of the mechanisms that barristers may wish to invoke, but is intended to provide a means by which barristers can be supported and assisted in making both formal and informal complaints about judicial conduct.

Should barristers wish to take up this approach, the steps will involve the following subject, of course, to the facts and circumstances:

### Raising concern about conduct of a judicial officer

1. A barrister or clerk on behalf of a barrister may contact the President or the Judicial Conduct Liaison Officer by telephone, email or in person to raise concerns about the conduct of a judicial officer. The raising of the concern will be treated confidentially, save to the extent that disclosure to others is necessary for the purposes of this protocol. If the barrister or clerk raises the concern with the Judicial Conduct Liaison Officer and requests that the matter not be disclosed to the President, this request will be respected. The same will apply if the barrister or clerk raises the concern with the President. The barrister raising a concern need not be the person who has been the subject of the conduct, but should have knowledge of the conduct sufficient to raise the concern.
2. The Bar Association will maintain a confidential **register** that will record in summary form the information provided by barristers or clerks under this Protocol, the advice provided to barristers by the President or the Judicial Conduct Liaison Officer, the steps taken by the President or the Judicial Conduct Liaison Officer and the communications between the Chief Justice and the President or Judicial Conduct Liaison Officer (where there have been such communications).
3. The President or Judicial Conduct Liaison Officer will make an assessment of the conduct and, for this purpose, may ask for more information from the barrister, clerk or others about the

nature of the conduct and its impact. The Court will take all steps necessary to make available transcript and/or recordings to enable an expeditious assessment to occur.

#### Formal complaint

4. If the President or Judicial Conduct Liaison Officer is of the view that the conduct is sufficiently serious to warrant a report to the Judicial Commission under the *Judicial Officers Act 1986* (NSW), the barrister or clerk is to be advised of that fact and asked if the barrister wishes to make the complaint himself or have the President make the complaint in his or her capacity of the President of the Bar Association. The Judicial Conduct Liaison Officer may request the President to make such a complaint.
5. If the barrister does not wish to pursue a formal complaint (themselves or via the President), the barrister or clerk may take up one of the informal processes below.

#### Informal processes

6. The barrister or clerk may request that no further steps be taken by the President or the Judicial Conduct Liaison Officer. In such circumstances, the President or the Judicial Conduct Liaison Officer may provide advice to the barrister and record the communications on the register, but will not take any other steps.
7. Otherwise, the following may occur, if the barrister so wishes:
  - (a) the President or Judicial Conduct Liaison Officer is able to meet with the Chief Justice of the Supreme Court of New South Wales on a confidential basis;
  - (b) at such a meeting the identities of barristers and other persons will not be disclosed without consent;
  - (c) the Chief Justice may:
    - (i) have the matter brought to the attention of the relevant judicial officer (without disclosing the identity of any person without consent) if that is appropriate having regard to all the circumstances;
    - (ii) give the judicial officer the opportunity to express his or her views;
    - (iii) examine or have examined any in-court recording relevant to the conduct;
    - (iv) read or have read any transcript of hearing/s relevant to the conduct;
    - (v) discuss the conduct or have the conduct discussed with the judicial officer,
    - (vi) discuss or have discussed with the judicial officer what is the appropriate course to take, including where appropriate counselling the judicial officer;
  - (d) the Chief Justice will respond to the President or Judicial Conduct Liaison Officer as appropriate of the steps if any which it is proposed to take as a result of his or her investigation of the complaint;
  - (e) the President or the Judicial Conduct Liaison Officer will inform the barrister or clerk on a confidential basis of the effect of discussions he or she has with the Chief Justice that relate to the concern raised by the barrister or clerk;

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- (f) steps taken will be recorded in the register, as indicated at [2] above.
- (g) insofar as the concern raised by the barrister or clerk is communicated to the Chief Justice, who may in turn bring the matter to the attention of the relevant judicial officer, the barrister who raises the concern and/or the barrister who was affected by the judicial officer's conduct ought not be prejudiced.
8. This protocol is not intended to create any legal rights or obligations. Nor does it affect any existing legal rights or obligations.



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The Honourable T F Bathurst AC  
Chief Justice of New South Wales

13 October 2020



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Mr Tim Game SC  
President, NSW Bar Association

14 October 2020