



Australian  
Bar Association

*The ABA acknowledges the relationship between the land on which it and its members work and the First Nations' peoples of Australia*

4 September 2020

Dear Members

## **JUDICIAL CONDUCT**

Many of you will be aware of federal appeal courts considering complaints about the conduct of federal judges sitting at first instance. Some of these have attracted the attention of the media, including in the last week.

In those circumstances, I thought it helpful to remind members of the Protocols which the ABA entered into with the Heads of federal jurisdictions in August 2019, and which were recently refreshed. I have attached copies of the Protocols for ease of reference and note that they can also be found on the ABA's website.

It is important to emphasise that under the Protocols complaints can be made or concerns raised on an anonymous basis with the President of the ABA.

The work of Courts is far too important to be compromised by inappropriate behaviour and they should at all times be places where the adjudication of contested rights can occur in a sombre, respectful way.

Related to the Protocol the Council of the ABA (on 29 August 2020):

- supported the establishment of a federal judicial Commission; and
- made a statement on the ABA's position on harassment, including sexual harassment (a copy of which is attached, again for ease of reference).

Kind regards

**Matthew Howard**  
**President**

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# AMENDED PROTOCOL FOR THE BAR ASSOCIATIONS OF AUSTRALIA TO RAISE ANY CONCERN ABOUT CONDUCT OF COMMONWEALTH JUDGES

August 2020

The Chief Justice of the Federal Court of Australia, the Chief Justice of the Family Court of Australia and the Chief Judge of the Federal Circuit Court of Australia have agreed with the President of the Australian Bar Association and, through him, the Presidents of the State and Territory Bar Associations the terms of a protocol for the President of the Australian Bar Association and the Presidents of State and Territory Bar Associations to raise any concerns from time to time with the heads of those jurisdictions about conduct of a Judge within their jurisdiction. This protocol amends the existing protocol dated 30 August 2019 which was restricted to conduct in court.

Commonwealth legislation prescribes procedures in relation to complaints about judicial officers.<sup>1</sup> 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 less formal 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 of which he or she is a member; or
- (b) the President of the Australian Bar Association,

('President'), who may then raise concerns with the relevant head of jurisdiction.

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<sup>1</sup> See *Federal Court of Australia Act 1976*, s15 (1AAA)–(1C); *Family Law Act 1975*, s21B(1B)–(5); *Federal Circuit Court of Australia Act 1999*, s12(3AA)–(3AB).

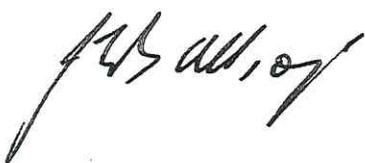
The steps in the procedure are:

1. A barrister may contact the President 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. 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 President will make an assessment of the conduct and, for this purpose, may ask for more information from the barrister or others about the nature of the conduct and its impact.
3. If the President is of the view that the conduct is of the type that warrants action, the President may:
  - (a) encourage the barrister to make a complaint in accordance with the applicable legislative procedure;
  - (b) consider whether the Bar Association should itself initiate a complaint in accordance with the applicable legislative procedure; or
  - (c) raise the matter with the relevant head of jurisdiction on a confidential basis.
4. In appropriate cases, the President may raise concerns with the relevant head of jurisdiction in accordance with this protocol of his or her own motion. Before doing so, the President will take into account, but not be bound by, the wishes of the aggrieved barrister/s.
5. After a matter has been raised with the relevant head of jurisdiction, the relevant head of jurisdiction may consider the matter, or cause the matter to be considered, and, amongst other things, may:
  - (a) have the matter brought to the attention of the relevant judicial officer (without, so far as is possible, identifying which barrister has raised the concern where the President has advised that the barrister would prefer not to be identified) either at the time it is raised or at a subsequent time if that is appropriate having regard to all the circumstances;

- (b) give the judicial officer the opportunity to express his or her views;
  - (c) examine or have examined any in-court recording relevant to the conduct;
  - (d) read or have read any transcript of hearing/s relevant to the conduct;
  - (e) discuss the conduct or have the conduct discussed with the judicial officer;
  - (f) discuss or have discussed with the judicial officer what is the appropriate course to take.
6. Thereafter the head of jurisdiction will respond to the President, as considered appropriate which may include:
- (a) informing, in general terms, the President of the outcome of discussions with the judicial officer;
  - (b) informing the President that in his or her view, the judicial officer's conduct does not warrant any action.
7. Communications between the head of jurisdiction and the President are confidential.
8. The President may inform heads of jurisdiction about any matters in relation to the operation of this protocol or judicial conduct more generally.
9. 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 James Allsop AO  
Chief Justice, Federal Court of Australia



August 2020

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The Honourable William Alstergren  
Chief Justice, Family Court of Australia and  
Chief Judge, Federal Circuit Court of  
Australia



August 2020

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Matthew Howard SC  
President, Australian Bar Association

August 2020

# AMENDED PROTOCOL FOR THE BAR ASSOCIATIONS OF AUSTRALIA TO RAISE ANY CONCERN ABOUT CONDUCT OF MEMBERS OF THE ADMINISTRATIVE APPEALS TRIBUNAL

August 2020

The President of the Administrative Appeals Tribunal ("**AAT**") has agreed with the President of the Australian Bar Association and, through him, the Presidents of the State and Territory Bar Associations, the terms of a protocol for the President of the Australian Bar Association and the Presidents of State and Territory Bar Associations to raise any concerns from time to time with the President of the AAT ("**AAT President**") about the conduct of members of the AAT ("**Members**"). This Protocol amends the existing protocol of December 2019.

The aim of this protocol is to allow barristers to raise their concerns about the conduct of Members with either:

- (a) the President of the Bar Association of which he or she is a member; or
- (b) the President of the Australian Bar Association,

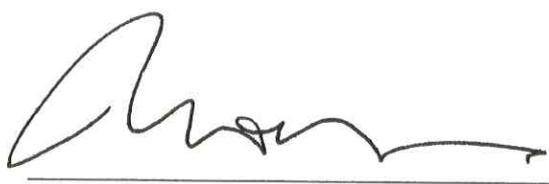
('President'), who may then raise concerns with the AAT President.

The steps in the procedure are:

1. A barrister may contact the President by telephone, email or in person to raise concerns about the conduct of a Member. 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. 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 President will make an assessment of the conduct and, for this purpose, may ask for more information from the barrister or others about the nature of the conduct and its impact.
3. If the President is of the view that the conduct is of the type that warrants action, the President may raise the matter with the AAT President on a confidential basis.
4. In appropriate cases, the President may raise concerns with the AAT President in accordance with this protocol of his or her own motion. Before doing so, the President will take into account, but not be bound by, the wishes of the aggrieved barrister/s.
5. After a matter has been raised with the AAT President, he may consider the matter, or cause the matter to be considered, and, amongst other things, may:
  - (a) have the matter brought to the attention of the relevant Member (without, so far as is possible, identifying which barrister has raised the concern where the President has advised that the barrister would prefer not to be identified) either at the time it is raised or at a subsequent time if that is appropriate having regard to all the circumstances;
  - (b) give the Member the opportunity to express his or her views;
  - (c) examine or have examined any in-court recording relevant to the conduct;
  - (d) read or have read any transcript of hearing/s relevant to the conduct;
  - (e) discuss the conduct or have the conduct discussed with the Member;
  - (f) discuss or have discussed with the Member what is the appropriate course to take.
6. Thereafter the AAT President will respond to the President, as considered appropriate, which may include:
  - (a) informing, in general terms, the President of the outcome of discussions with the Member;
  - (b) informing the President that in his or her view, the Member's conduct does not warrant any action.

7. Communications between the AAT President and the President are confidential.
8. The AAT President and the President may exchange information about any matters in relation to the operation of this protocol or Member conduct more generally.
9. This protocol is not intended to create any legal rights or obligations. Nor does it affect any existing legal rights or obligations.



The Honourable David Thomas  
President  
Administrative Appeals Tribunal



Matthew Howard SC  
President  
Australian Bar Association

## **A Statement of the ABA's Position on Harassment including Sexual Harassment**

This Statement should be read with the Australian Bar Association's Diversity and Inclusion Principles adopted in February 2020.

The Australian Bar Association is committed to zero tolerance of any form of harassment, victimisation and vilification at the Australian Bar and in the legal profession. The Australian Bar Association is committed to the eradication of such conduct from the profession.

The Australian Bar Association recognises the devastating impact that such conduct can and does have, and has had, on victims including causing them to leave the Bar or the legal profession.

The Australian Bar Association recognises the hierarchical structure of the Bar and legal practice create power imbalances which have contributed, and continue to do so, to harassment, victimisation and vilification.

The principles of justice, integrity and equity, which are the best aspirations of the Bar, demand respectful behaviour by all members.

It considers that all Australian barristers are responsible for providing and contributing to a work environment where all (whether barristers, those engaging barristers, employees of barristers or visitors to chambers) are free from harassment, victimisation and vilification.

The ABA encourages its member Bars to work with their members and chambers to:

- Develop and adopt appropriate best practice guidelines or codes of conduct to deal with harassment, victimisation and vilification by barristers.

- Provide effective education and training and promote that training to their members.
- Develop best practice complaints handling procedures and work with regulators and law societies in this task to ensure a whole of profession approach.
- Develop methods for collecting data on complaints made concerning harassment, victimisation and vilification.

The Australian Bar Association acknowledges this as a profession wide problem which can only be tackled by all parts of the profession working together to eradicate such behaviour.

Adopted by the Council of the ABA, August 2020.