

Restorative Process Guideline accompanying the *Protocol for the Bar to Raise Concerns about Judicial Conduct*



Introduction

1. This Guideline should be read as a further explication of the Protocol for the Bar to Raise Concerns About Judicial Conduct ('the Protocol').
2. This Guideline builds on a longstanding but informal process for the Victorian Bar to raise concerns about judicial conduct with the Chief Judge. It exemplifies one way in which the Protocol can be implemented in practice.
3. The procedure for raising concerns in an informal way with the Chief Judge about the conduct of a judicial officer is an alternative to the complaint process provided under the *Judicial Commission of Victoria Act 2016* (Vic).
4. The Commission will remain the most appropriate forum for some matters in relation to the conduct of a judicial officer including:
 - (a) Where members of the Bar seek a formal finding, determination, or outcome in relation to the conduct of a judicial officer, the appropriate venue in which to pursue the matter will be the Commission.
 - (b) Serious complaints about a judicial officer's conduct should be made to the Commission.
5. The Commission is the independent body established to deal formally with such matters, and has a prescribed procedure where complainants and judicial officers alike receive the benefit of procedural fairness.
6. Nevertheless, members of the Bar may prefer to raise their concerns through a less formal mechanism.
7. Concerns raised by a member of the Bar can be addressed through an informal restorative practice.
8. This Guideline is designed to encourage and support members of the Bar in such cases.
9. Its aim is to enable members of the Bar to raise concerns with the President (or their nominee), who may then raise them with the Chief Judge.
10. The practice is intended to result in an improved working relationship between the Bar and Bench.
11. There is flexibility around the form which an expression of concern may take — for example, it can be directly raised by the aggrieved member with the President (or their nominee), or indirectly raised (for example, by a bystander or by the Bar on its own motion).
12. It will also be at the discretion of the President as to whom they nominate as their nominee(s) generally or in any given case, bearing in mind the objective of the Guideline is to lower barriers to members pursuing issues of concern (while still maintaining oversight by the senior Bar).

13. However, the Chief Judge will not act upon rumour and talk outside the process set out in the Protocol and this Guideline. The process has been designed to strike a balance between a number of interests. It takes account of the need to preserve judicial independence, the need to treat all those involved fairly, the need to promote confidentiality and consistency in approach, and the need to set out the expectations and role of each participant.

Raising concerns with the Chief Judge

14. If the President (or their nominee) is satisfied that the relevant judicial officer's conduct is of the type that warrants being dealt with in accordance with this Guideline, the President (or their nominee) may raise the matter with the Chief Judge. The President (or their nominee) plays a role in evaluating and identifying those cases which require some intervention.
15. If the Chief Judge agrees that the matter is appropriate to be the subject of this Guideline, the following procedure will apply.

Informal restorative process

16. Broadly, the informal restorative practice encompasses the following:
 - (a) Once an issue about a judicial officer's conduct is raised with the Chief Judge, the Chief Judge will engage with the relevant judicial officer separately about the matter.
 - (b) The relevant judicial officer will be given the opportunity of offering to the Chief Judge any reflections and / or feedback about their conduct.
 - (c) The Chief Judge will discuss these reflections and / or feedback with the relevant judicial officer.
 - (d) The Chief Judge will advise the President (or their nominee) of the outcome of the discussions with the relevant judicial officer, including any feedback or reflections offered by the relevant judicial officer.
 - (e) The President (or their nominee) may communicate any feedback or reflections offered by the relevant judicial officer back to the member of the Bar in question.
 - (f) Any further steps or action as appropriate can be taken by the Chief Judge and / or the President (or their nominee) in order to facilitate an appropriate restorative justice outcome.
17. The process is aimed at striking the right balance between preserving independent judicial decision making, on the one hand, while providing members of the Bar with a meaningful and confidential opportunity to have concerns about judicial conduct informally addressed, on the other, through a process where expectations are managed.
18. This process does not contemplate a resolution in the nature of a formal determination, outcome, or finding. The process is founded on notions of restorative justice or informal resolution. It is non-adversarial, and carries an expectation of confidentiality by all participants. It is designed to be as accessible and expeditious as the circumstances allow.

Timing of the process

19. It may not be appropriate to engage with this Guideline in circumstances where the member of the Bar affected by the conduct retains the brief and:

- (a) the proceeding is part heard before the relevant judicial officer; or
 - (b) a subsequent hearing or hearings are listed before the relevant judicial officer.
20. If a concern is raised with the Chief Judge in these circumstances, the Chief Judge may defer consideration of the matter until the proceeding has concluded or until such time as the relevant judicial officer is no longer seized of the matter.

Access to audio-recordings and/or transcript more generally

21. To ensure that members of the Bar, or the President (or their nominee) are able to consider making a complaint under the *Judicial Commission of Victoria Act* or raising an issue under the Protocol (including this Guideline):
- (a) the President (or their nominee) may make a request to the Chief Judge or the Deputy Chief Judge for a copy of the transcript (where one has been produced) or audio-visual recording of the hearing(s) relevant to the conduct; and
 - (b) the Chief Judge or the Deputy Chief Judge will review any request and will do so as expeditiously as possible.
22. If the Chief Judge or Deputy Chief Judge approves a transcript / audio-visual request, the material will be provided to the President (or their nominee) upon conditions which control the appropriate use, confidentiality, and return of the material.
23. To preserve the confidentiality of any action being considered in respect of the conduct of the relevant judicial officer:
- (a) neither the Chief Judge nor the Deputy Chief Judge will notify the relevant judicial officer (other than where there may be a concern about the confidentiality of matters recorded); and
 - (b) if it is necessary to notify the relevant judicial officer, the Chief Judge or the Deputy Chief Judge will consult the President (or their nominee) (who may, in turn, consult the member of the Bar who was the subject of the relevant conduct) prior to the relevant judicial officer being notified.
24. The Chief Judge or the Deputy Chief Judge will waive any fees that would ordinarily be incurred in the provision of the transcript or audio-visual recording of the relevant hearing(s).

Chief Judge Peter Kidd

31 July 2024