Dyson Heydon sexual harassment allegations: Is this the start of the law's 'Me Too' moment?

By Hayley Gleeson

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What is it about the legal profession that means "open secrets" of sexual harassment are tolerated? (ABC News: Emma Machan)

For years, the stories of women who say they were sexually harassed by one of Australia's most powerful judicial figures were kept private, though allegations of his behaviour were apparently an "open secret" circulating among legal circles.

Now those whisper networks have exploded into the public domain after an independent investigation, referred to in a statement from the Chief Justice of the High Court, found former justice Dyson Heydon harassed six female associates during his decade on the bench until 2013.

Some of the women have reportedly said Mr Heydon's alleged behaviour — in the form of unwelcome physical contact, comments about their appearance and other unsolicited advances — left them feeling so disillusioned and unsafe they quit their roles or left the law altogether, unable to summon the courage to report their experiences until recently.
The inquiry's findings and further allegations reported this week as part of a Sydney Morning Herald investigation — all of which Mr Heydon has denied "emphatically" — have shocked and enraged legal professionals around the country, and sparked what some believe is a long-overdue conversation about the unique relationship between judges and younger lawyers, which they say is ripe for exploitation.

But it has also prompted a reckoning within legal institutions more broadly, with many experts and practitioners now calling for an urgent overhaul of cultures and structures within the male-dominated profession that allow sexual harassment to flourish unchecked.

"This isn't something that happens just to very junior people," said Adrienne Morton, president of Australian Women Lawyers. "We are seeing complaints of these issues from people working throughout the legal profession, not just from young people or in very isolated instances."

The nature of the allegations being reported this week, Ms Morton said, would be "very triggering" for women who've had similar experiences, who may now feel compelled to speak out.

"I think this is a 'MeToo' moment," she said. "Sexual harassment can be a very isolating experience until women realise they're not alone. When you realise it's not just you, it makes it more likely you'll come forward."

For some lawyers, though, it's a moment of deep frustration: the pervasiveness of sexual

What is sexual harassment?

Section 28A of the Sex Discrimination Act 1984 (Cth) defines sexual harassment as when a person makes an unwelcome sexual advance, an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature in relation to a person.
harassment in law has been well-documented, with numerous studies and reports in recent years finding the problem is pernicious, but fixable.

Why then, some are now asking, has it taken an inquiry by Australia's highest court — involving allegations against one of the profession's most powerful and respected men — for the sector to shift into gear? And what is it about the legal profession that means "open secrets" of such seriousness are tolerated in the first place?

**Shocking, but not surprising**

"That these allegations were made against an eminent and former senior judicial officer was very shocking to me," said Fiona McLeod, former head of the Australian Bar Association and Law Council of Australia.

"But complaints of sexual harassment more broadly in legal workplaces — at the bar, in legal firms and within the courts — are not at all surprising."

Some of the most recent research into the issue, a survey of more than 2,300 lawyers by the Victorian Legal Services Board, revealed almost two-thirds — 61 per cent — of female respondents (and just over one in 10 men) had been sexually harassed, with many indicating the behaviour had been "highly destructive" to their wellbeing or career.

The study, published in April, also found it was common for incidents of sexual harassment to form part of a "pattern of behaviour", that perpetrators were "almost always male", and that harassers were often
senior to their victims and in the profession. Strikingly, however, the overwhelming majority of those
who said they’d experienced sexual harassment — 81 per cent — did not report it.

This "culture of silence", Ms McLeod said, is often upheld by some women's perception that the
behaviour is not serious enough to act on, because they lack confidence in the system to deal with it, or
fear reprisal for speaking out.

"There is a feature of the legal profession that says, if you raise an issue like this, you are a 'difficult'
woman," she said. "So it is easier, particularly for young people, to decide they shouldn't have to or don't
want to come forward ... without thinking it might be part of a series of events ... or that it might happen
to another person."

**Women on the bench**

Most jurisdictions have far fewer women in judicial roles than men.

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Source: AIJA Judicial Gender Statistics, March 2019 • Get the data

Gender discrimination, of course, is often singled out as a particular obstacle: though women comprise
roughly 60 per cent of law graduates, in New South Wales they make up just 25 per cent of law firm
partners and 11 per cent of senior counsel.

And the lack of gender diversity at the bar (less than a quarter of barristers in NSW are women) goes
some way to explaining the lack of female judges: in most jurisdictions women make up about a third of
judicial officers.

**Power inequality in law the 'true cancer'**

But some experts say one of the biggest issues within the legal sector is not necessarily its lack of
diversity but its hierarchical structure, and the power imbalances it can breed.

"The true cancer in the profession is not gender inequality, as hideous as this is, but inherent power
inequality," Joe McIntyre, a senior law lecturer at the University of South Australia, tweeted this week.
"The legal profession is still very much dependent on personal and hierarchical relationships," Dr McIntyre told ABC News. Even for senior barristers, he said, getting briefs, referrals and other opportunities "still depends on who you know, and there is a real sense that if you complain about anything, you'll be punished".

(Whether or not women actually suffer professional setbacks for reporting harassment or whether it's just the fear of that happening is irrelevant, he added: "The result is the same.")

Junior practitioners generally rely on more experienced lawyers to open doors and build relationships, Dr McIntyre said. But because the law is still "an exclusive male-dominated enclave", those more senior men may, because of their biases, overlook or exclude women.

A competitive culture of working long hours, drinking, and the expectation for practitioners to attend social events can also increase opportunities for harassment, he said: "Exhaustion, power imbalances and alcohol can be a dangerous mix."

Then there's what Dr McIntyre interprets as Australia's "taboo" about criticising judges. "They're treated almost as a priesthood — that their decisions are always correct, that there is no possibility for error — and I think that is dangerous because it hides the fact they're humans making human decisions."

**Complaints and consequences**

It is unsurprising, then, that this week there has been intense scrutiny on the policies and processes for
reporting sexual harassment, which vary between states and organisations. Currently, Ms McLeod said, the onus is on the complainant — not an employer or institution — to raise and pursue complaints, which can be a huge deterrent to coming forward.

"We need some robust institutional mechanisms with real consequences," she said, particularly for the judiciary.

"For example, a judicial commission that is empowered to investigate the conduct of judges fairly and consider what the appropriate consequences [for misconduct] should be. Because at the moment there are no consequences — if there is a complaint against you, all we have is the power of 'name and shame', and that doesn't seem to be working."

It's crucial, Ms McLeod added, that legal institutions lead these kinds of reforms: "It shouldn't take the voices of strong women and men who are their allies saying, 'this has to change' — the institution has to take it upon itself to always make sure there are women in the leadership team, always make sure women are protected and welcome and encourage them to make complaints, if they have them."

For this reason many have praised the swift and decisive response of High Court Chief Justice Susan Kiefel, who said the court had apologised to Mr Heydon's complainants and adopted the investigation's six recommendations for change to better protect associates.

Since then, bar associations and courts across the country have issued strong statements on sexual harassment and launched reviews of their own policies for dealing with it. The bravery of the young associates who came forward was "astonishing", Ms McLeod said, but the Chief Justice's reaction was
"impeccable".

"She undertook a confidential process involving a senior, eminent public servant to investigate, she undertook to implement her recommendations and has apologised without reservation ... And the fact of that happening creates a seismic shift in the expectation of women lawyers that the system can protect them."

**This is not just about women's careers**

For Dr McIntyre, it's encouraging that lawyers are now having difficult conversations "because we too often delude ourselves in thinking this is a problem that will go away over time, and it won't", he said.

"The best that can come from this current situation is that we confront the problems it raises head-on, and excise this cancer, because that will improve not just the lives of women in the legal profession but also young male lawyers, too ... which is likely to lead to a more accessible legal system."

And, for as long as it's not addressed, said Ms Morton, whose organisation advocates compulsory education and bystander training, among other reforms, perpetrators will continue harassing with impunity, women will suffer in silence, and careers and lives will be destroyed.

"I've seen marriages break up, people changing streams in their career or stop working in law — not by their own choice but because it was the only way they could avoid the behaviour continuing," she said.

"And when you've worked so hard to get through law school, to get your first job, to have those decisions..."
effectively made for you, I think it's just wrong."

For some, though, what's at stake are not just the livelihoods of individual women or the opportunity to build a more diverse and healthy workplace for all practitioners, but the reputation of the entire profession.

"The judicial system depends on public confidence, on broad legitimacy," Dr McIntyre said. "Judicial decisions are not just about resolving disputes, they're about shaping the type of society we want. So if events like this are seen to be brushed aside it can be massively corrosive to that confidence.

"And if we replicate the trajectory of the MeToo movement over the last three years for another three years — if the law profession doesn't now shift — it's going to be so far out of balance with the rest of society that ... that social buy-in will evaporate."