Dyson Heydon harassment case: do his lawyers' claims of an unfair process stack up?

Chief justice praised for not just investigating former judge but promising to improve the culture for future staff

This was not a single inebriated pass, nor a mistimed sexist joke. The allegations against the former high court judge Dyson Heydon are consistent, serious and widespread.

It was not one former associate who alleged Heydon sexually harassed her during his decade on the court until 2013. Two came forward, then a third, and ultimately six women alleged that Heydon variously and without consent kissed, touched or propositioned them at a time when they were junior lawyers and he a powerful judge of the highest court in the country.

On Saturday, the Sydney Morning Herald published additional allegations of sexual harassment unrelated to the high court.

As a Herald investigation found, many other legal figures, including a judge, told similar stories of predatory and possibly illegal behaviour spanning decades. His behaviour, the paper said, was an “open secret”.

None of this means Heydon, 77, is guilty in a legal sense - the process, so far, has not been a judicial one. The confusion over this has allowed his lawyers, Speed and Stracey, to argue that the process, particularly the high court
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Dyson Heydon: high court invites 100 former associates to tell of their experiences

Speed and Stracey did not return Guardian Australia’s calls, but they told the Herald that Heydon “emphatically denies” any allegation of predatory behaviour or breaches of the law. They said in a statement that he was never allowed to confront or cross-examine his accusers to test the veracity of their claims and pointed out that the investigator appointed by the court, Dr Vivienne Thom, was a public servant, not a lawyer, and conducted the inquiry without statutory powers, nor took statements under oath.

All this is true but the claims about the investigation are either beside the point or misinterpret the nature of these kinds of inquiries, say lawyers with expertise in the area. The claim of an unfair process is “just rubbish”, says Josh Bornstein, a principal with Maurice Blackburn who represented three of the women who complained to the high court.

“These investigations go on every week, every day, in various workplaces,” he said. “The investigator meets with and questions the person who makes allegations and then seeks to meet with and question the person against whom allegations are made.

“They’ve said they regarded it as unfair, but having refused to participate they’re now taking potshots at the process.”

Fiona McLeod SC, a former president of the Law Council of Australia, agrees, pointing to numerous professional bodies and employer groups which undertake internal inquiries after a complaint, seeking to understand the issue, to make findings and to resolve the problems if possible. There is no “right” for the person complained about to legally cross-examine those making allegations.

Nonetheless, there are “golden threads” of fairness in these cases. “The first thing is natural justice, the right to respond to the allegations, which does not necessarily entail a right to cross-examination,” McLeod says. “The second is to have an appropriately qualified and neutral or independent person conducting the investigation. In other words, it has to be free of bias. Those are the two pinnacles by which you accord people fairness.”

It is difficult to fully analyse the process without Thom’s report being released. Both the high court and Bornstein say the complainants have not
given permission. A copy has been leaked to the Herald, which has a stake in the matter.

What we do know is that in March 2019, two clients of Bornstein made a complaint to the chief justice of the high court, Susan Kiefel, alleging sexual harassment by Heydon while he was on the bench and they were his associates, essentially personal researchers to the judge. Another complainant engaged Bornstein shortly afterwards, and three others made separate complaints.

‘Impeccable’ response

The court initiated an independent inquiry led by Thom, a respected former inspector general of intelligence and security, with oversight of Australia’s intelligence agencies. She is a former deputy commonwealth ombudsman who has specialised in complex reviews of organisations.

Thom’s inquiry was delayed due to disagreements between the complainants and Heydon about the terms of reference, eventually resolved - although the high court has so far declined to release them. Reportedly, Thom interviewed a dozen witnesses, including five associates. She then asked Heydon to respond to the claims, but he declined to either be interviewed or provide a statement, effectively refusing to be involved in the inquiry.

Thom’s report found that the evidence “demonstrates a tendency by Mr Heydon to engage in a pattern of conduct of sexual harassment”, findings that were accepted by Kiefel. “Their (the complainants') accounts of their experiences at the time have been believed,” she said in a statement. “We are ashamed that this could have happened at the High Court of Australia.”

There are several intriguing issues. One is that the women went to the high court, rather than other possible avenues, such as the Australian Human Rights Commission or even the police. Sexual harassment is complex, traumatic, and there is no one path for redress.

Bornstein says it was the complainants’ choice to take their story to their former employer, and he points out that the initial complaint emphasised that there were “no proper protections or process for these women” to complain at the time, meaning there was an informal system where women warned other women about Heydon’s propensities.

Kiefel accepted those systemic issues and has announced new processes including having a person regularly checking in on associates and making clear to them that their duties did not include compulsory attendance at social functions. The court has already written to more than 100 former associates inviting them to speak about their experiences.

Usually, a complaint to an employer is against someone who currently works there, but in this case Heydon left the court in 2013 and the women had long departed too. McLeod says what was “brilliant” about Kiefel's response was that she wasn’t just investigating past behaviours of a high court judge. “She’s looked at it with a promise to improve the health and safety of the wellbeing in the future of employees. That signal statement of shame which has really put this so squarely on the agenda says that the court as an institution acknowledges the failure to those who came before.”

McLeod believes the high court’s inquiry and response has been “impeccable because of the purpose, the constraint and the structure of it”.

The barrister Greg Barns SC has defended people at universities accused of sexual misconduct. He says it’s “very unusual to be holding an inquiry into an individual who has long departed from the institution and the victims have long departed ... on the other hand, justice sometimes demands that
there be a reckoning of conduct particularly if the allegations are serious.”

Heydon chose not to cooperate with the inquiry, although his lawyer’s statement said that if “any conduct of his has caused offence, that result was inadvertent and unintended, and he apologises for any offence caused”.

Heydon was under no obligation to be interviewed by Thom, who indicated that no adverse inference would be drawn from his silence.

The lawyer Terry O’Gorman, the president of the Australian Council for Civil Liberties, does have concerns about the process.

“Any response he gave would be clearly usable against him in potential criminal proceedings, so that unwillingness to respond if that was his advice was proper advice.”

That may well happen. The Australian Capital Territory’s director of public prosecutions has written to Australian federal police recommending they investigate Heydon in the wake of the high court inquiry.

Separately, Bornstein says his three clients will seek compensation from the federal government and Heydon.

The commonwealth had taken a “cooperative and sensitive approach” and there was an “in-principle agreement” to begin negotiations shortly. Next, he’ll be writing to Heydon seeking compensation, but if that is not forthcoming, consideration will be given to taking it to the Human Rights Commission, which deals with sexual harassment under the Sex Discrimination Act. If mediation fails there, it could end up in the federal court, with all the legal processes of document discovery and cross-examination.

O’Gorman says he is “not a fan” of the conservative judge, but “you don’t apply civil liberties principles just to those people whose views you agree with”. There was no right for review in this process, he says, compared with those complained about in the public or private sector, who could appeal to a higher body or an industrial relations commission. This process caused “maximum damage” to Heydon and if the case ever did end up in the high court, it would be impossible for the judges to deal with it.

Barns says whatever happens in the Heydon case, “it ought not be thought of as some sort of precedent or model for other investigations in other organisations”. Already, there are calls for a federal judicial commission to deal with complaints against judges, which would bring consistency and set up guidelines for judicial behaviour.

There is legal process, and then there is real life. Bornstein says what this case highlights is the problem of behaviour where there is an “extreme power imbalance”. Heydon was in his late 60s; the women were in their 20s, in their first legal job. They were terrified of his power over their careers, and Bornstein’s three clients all left the profession.

For McLeod, this case highlights why sexual harassment is “so pernicious”. These women were junior, but even senior women don’t want to complain because they fear it will adversely impact their career. It’s a cultural issue, and this case and how it’s been dealt with, she says, may change all that.

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