Improving Workplace Culture: Lessons from the Legal Profession

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Abstract In recent years, the legal profession has been rocked by allegations of sexual harassment against senior lawyers, barristers and judges, in Australia and elsewhere. At a local, national and international level, much effort has gone towards improving workplace culture in the law—addressing the drivers of inappropriate behaviour and properly responding to incidents when they arise. Given the structural similarities between parliamentary and legal workplaces, what lessons can those seeking to drive change in the Australian Parliament learn from cognate efforts in the legal profession? This article, drawing on the author's experience leading the International Bar Association's work in this field, identifies transferable best-practice for the parliamentary context. It considers the need for an inclusive campaign for workplace safety, flexible reporting models, quasi-independent oversight and efforts to address the wider context contributing to the unacceptable prevalence of sexual harassment.

[1] The views expressed here are the author's own and do not represent the views of any of the institutions with which he is affiliated. The author thanks Madeleine Castles and Marian Sawer for their helpful comments on an earlier draft.

INTRODUCTION

> There should be absolutely no place in this profession, nor any other, for bullies or sexual harassers. At the very least, people deserve dignity and a safe, supportive environment in return for their work.[2]

Just nine months separated the two news reports that catalysed sexual harassment crises in all three branches of Australian government. The reporting that Dyson Heydon, a former High Court justice, had sexually harassed junior staff while on the bench crystalised a harassment reckoning in the judiciary and in the wider legal profession. Less than a year later, allegations made by former political staffer Brittany Higgins—that she had been sexually assaulted in an office in the Australian Parliament—led to a groundswell of public momentum to address harassment in politics and all areas of life. Australia's own #MeToo moment has arrived. Tens of thousands of Australians took to the streets to say, in the words of one placard waved outside Parliament House, 'enough is enough'. But how do we ensure that this momentum translates into concrete change? That challenging question is the focus of this article.

In June 2020, the *Sydney Morning Herald* reported that Heydon had been found by an independent inquiry commissioned by the High Court to have sexually harassed six young female staff during his tenure.[3] The reporting sparked outcry—more targets came forward alleging past misconduct by Heydon,[4] while others alleged harassment by other senior members of the legal profession.[5] The peak body for the legal profession, the Law Council of Australia, urgently convened an expert panel to develop

[2] Survey Respondent, quoted in Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession.* London: International Bar Association, 2019.

[3] Kate McClymont and Jacqueline Maley, 'High Court Inquiry Finds Former Justice Dyson Heydon Sexually Harassed Associates'. *Sydney Morning Herald*, 22 June 2020. Accessed at: https://www.smh.com.au/national/high-court-inquiry-finds-former-justice-dyson-heydon-sexually-harassed-associates-20200622-p5550w.html.

[4] Kate McClymont and Jacqueline Maley, '"The Judge's Hands Became Very Busy Under the Table": lawyer Says Heydon Groped Her'. *Sydney Morning Herald*, 23 June 2020. Accessed at: https://www.smh.com.au/politics/federal/the-judge-s-hands-became-very-busy-under-the-table-lawyer-says-heydon-groped-her-20200622-p554zg.html.

[5] See, for example, Naaman Zhou, '"Nobody Stood Up for Me": Young Lawyers Say Harassment Rife in Australian Legal Profession'. *Guardian Australia*, 26 June. Accessed at: https://www.theguardian.com/law/2020/jun/26/nobody-stood-up-for-me-young-lawyers-say-harassment-rife-in-australian-legal-profession.

a 'National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession'.[6] The Attorney General and Chief Justice of Victoria ordered an independent review into sexual harassment in the state's court system,[7] and the New South Wales Supreme Court overhauled its harassment policy.[8] The judicial branch had been rocked. (A year later, another inquiry found that another judge, on the Federal Circuit Court, had sexually harassed two women).[9]

Soon it was the executive and legislative branches of government facing the same scrutiny. On 15 February 2021, former ministerial advisor Higgins alleged to *news.com.au* and *The Project* that she had been sexually assaulted at Parliament House (at the time of writing, a prosecution is ongoing).[10] Higgins' story catalysed a movement—other stories of sexual harassment and assault in parliamentary workplaces surfaced. Tens of thousands of Australians took to the streets in the 'March 4 Justice' on 15 March 2021.[11] Ultimately, the Higgins allegations resulted in Prime Minister Scott Morrison commissioning an independent review by the Sex Discrimination Commissioner Kate Jenkins.[12] The movement that followed the Higgins allegations focused attention on widespread inappropriate behaviour in Australian

[6] Law Council of Australia, Release of National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession. Accessed at: https://www.lawcouncil.asn.au/media/media-releases/release-of-national-action-plan-to-reduce-sexual-harassment-in-the-australian-legal-profession-.

[7] Disclosure: the author served on an advisory panel to the Review. Supreme Court of Victoria, 'Review to Address Sexual Harassment'. Accessed at: https://www.supremecourt.vic.gov.au/news/review-to-address-sexual-harassment.

[8] Michaela Whitbourn, 'NSW Supreme Court Appoints Adviser to Handle Complaints about Judges'. *Sydney Morning Herald*, 2 July 2020. Accessed at: https://www.smh.com.au/national/nsw-supreme-court-appoints-adviser-to-handle-complaints-about-judges-20200702-p558fz.html.

[9] Jacqueline Maley, 'Federal Circuit Court Judge Found to Have Harassed Two Young Women'. *Sydney Morning Herald*, 7 July 2021. Accessed at: https://www.smh.com.au/national/federal-circuit-court-judge-found-to-have-harassed-two-young-female-staff-20210707-p587sz.html.

[10] Samantha Maiden, 'Young Staffer Brittany Higgins Says She Was Raped at Parliament House'. *News.com.au*, 15 February 2021. Accessed at: https://www.news.com.au/national/politics/parliament-house-rocked-by-brittany-higgins-alleged-rape/news-story/fb02a5e95767ac306c51894fe2d63635.

[11] 'Australia March 4 Justice: Thousands March against Sexual Assault'. *BBC*, 15 March 2021. Accessed at: https://www.bbc.com/news/world-australia-56397170.

[12] Katharine Murphy, 'Sex Discrimination Commissioner Kate Jenkins to Lead Review into Parliament's Workplace Culture'. *Guardian Australia*, 5 March 2021. Accessed at: https://www.theguardian.com/australia-news/2021/mar/05/sex-discrimination-commissioner-kate-jenkins-to-lead-review-into-parliaments-workplace-culture.

political life and the challenges faced in preventing such misconduct and appropriately addressing incidents when they arise.

Given the similarities between the Heydon findings and the Higgins allegations, it might seem strange to look to the legal profession for guidance in driving positive change in the parliamentary context. But the legal profession (encompassing law firms, other legal practices, barristers' chambers and the court system) has been grappling with how to prevent and address inappropriate behaviour for some time. The first research on the prevalence and drivers of harassment in the legal profession dates back to the 1980s and it has remained an issue of concern ever since.[13] After the #MeToo movement was sparked in October 2017 with reporting by the *New York Times* and *New Yorker* about the misconduct of Harvey Weinstein,[14] the legal profession across the globe has been rocked by sexual harassment scandals. From New York to New Zealand, from Santiago to Singapore, from Lisbon to London, the legal profession has faced a reckoning. In 2019, a report by the International Bar Association (IBA), the peak global body for the legal profession, found that one in three female lawyers globally had been sexually harassed. As the report noted in its opening sentence, '[t]he legal profession has a problem'.[15] That and other research has contributed to momentum for positive change.

That is not to say that the legal profession has all the answers. There are no silver bullets. But the profession has systematically engaged with these issues in different contexts, and different cultures, over the past four years. There is insight to be derived from those efforts for consideration by those attempting to drive positive workplace cultural change in Australia's parliamentary workplaces. This is particularly because of the structural similarities between the two professions. Both have male-dominated senior leadership: judges, senior barristers and law firm partners remain overwhelming male, as are politicians. The structural similarities extend beyond a failure to achieve gender parity. Researchers have identified characteristics that increase the likelihood of negative workplace behaviours—these include 'where leadership is male-dominated … where the power structure is hierarchical, where lower-level employees are largely

[13] See, for example, IBA report p12

[14] Jodi Kantor and Megan Twohey, 'Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades'. *New York Times*, 5 October 2017. Accessed at: https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[15] See, for example, Pender, *Us Too?*, p. 11. The survey was of 7,000 lawyers from 135 countries.

dependent on superiors for advancement, and where power is highly concentrated in a single person'.[16] These characteristics describe most legal and political workplaces.

Sexual harassment is repugnant in any sector, and in any area of life. But it is particularly problematic in the legal profession and the political arena, fields where—by virtue of the special rights, privileges and responsibilities entrusted to our legal and political class—the highest of standards are expected.

In this article, I explore lessons from the legal profession's efforts to drive change that may helpfully inform initiatives to ensure safety and respect in Australia's parliamentary workplaces. For almost three years, from the beginning of 2018 to the end of 2020, I contributed to the IBA's work in this field. Following the publication of the *Us Too?* Report, I led a global engagement campaign involving work in 30 cities across six continents. I have also served on a United Nations expert working group on gender-related integrity issues in the judiciary, and on committees working to address harassment and promote diversity and inclusion for the ACT Law Society and NSW Law Society. In the sections that follow, I share some insight from that work.

CAMPAIGNING FOR CHANGE

Much ink has been spilt on the importance of leadership in driving cultural change. Leadership matters—that much is almost universally accepted. For the legal profession to achieve safer workplaces, senior judges, lawyers and barristers need to lead by example—the same is true in Parliament. Prime Minister Morrison has a centrally-important role; the tone he sets will influence the efficacy of efforts to drive change in politics. But less attention has been paid to the need for inclusive, deliberative change. While the tone may be set at the top, the tenor is influenced by every single person in an organisation. That is particularly true because the campaign to address inappropriate workplace behaviour is not a short-term fix, which means that the leaders of tomorrow must subscribe today.

[16] Nancy Gertner, 'Sexual Harassment and the Bench'. *Stanford Law Review* 71 2018, pp. 88-94. See also Kimberly Schneider, John Pryor and Louise Fitzgerald, 'Sexual Harassment Research in the United States' in Ståle Einarsen and others (eds*), Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice (2nd edition)*. Boca Raton: CRC Press 2011, pp. 250–252.

These issues had been on my mind while drafting the *Us Too?* report. One of our recommendations was to engage with younger members of the profession: 'Younger legal professionals are disproportionately impacted by bullying and sexual harassment. They must be part of this conversation – they will play a major role in developing and implementing solutions and shaping workplace culture'.[17] But it was one thing to say this, and another entirely to do it in practice, given the steeply hierarchical nature of the legal profession. It was not until I arrived in Aotearoa New Zealand, midway through the campaign, that I saw an example of it being implemented in practice.

The New Zealand legal profession had been rocked by several high-profile harassment claims against senior members of a prominent law firm. What began as a handful of allegations led to a flood of truth-telling, facilitated by an anonymous blog. The issue became front-page news and a topic for discussion in New Zealand's Parliament; young lawyers took to the street to protest. Speaking to one major New Zealand law firm, about 18 months after the initial incidents, but at a time when the momentum for change was still fresh, senior partners explained to me that, recognising the moment, they had scrapped their existing harassment policy and framework. They had then invited their entire firm—hundreds of employees—to participate in an inclusive process designed to develop a new framework that accurately reflected what the entirety of the firm wanted, both in terms of substance and process. The partners admitted to me that the redrafting had been a challenge—a committee of several hundred does not move swiftly. But it had been extremely worthwhile, uniting the firm behind a mutual understanding of what they wanted to achieve and maintain as a workplace culture.

This shared ownership of cultural change, and uniform knowledge of standards and processes to be followed where standards are not met, ensured the policy was not just a meaningless piece of paper gathering dust. In contrast, addressing the staff of a major international law firm in Paris, someone raised their hand and admitted: 'If this happened to me, I would not know where to go, what to do, how to report'. This was a global firm with all the infrastructure, policies and training in place but the top-down nature of those efforts had evidently failed to ensure that this particular individual knew what to do in the event they experienced harassment. Subsequently reflecting on my conversation with the New Zealand firm, I was struck by the obvious advantages

[17] Pender, *Us Too?*, p. 10.

of an inclusive approach. Of course, in an organisation of any scale, engaging in a deliberative process with all staff is not easy. But it is not impossible either. Where leadership is committed to change, they can ensure the tone is not only top-down but also bottom-up and side-to-side.

Just as an inclusive campaign for change must include younger members of the workforce, so too must it include men. It goes without saying that men are the predominant perpetrators of sexual harassment. Men also remain disproportionately represented at senior levels of leadership, in law and politics. That means men must be involved in change. There is a difficult balance to be struck here. For too long, men have monopolised the levers of power, so it is understandable to feel aggrieved about efforts to ensure men have a say in something they experience at far lesser rates to women. I recall the uproar when a large British law firm convened a predominantly-male panel for an International Women's Day event to offer an 'alternative spin'.[18] But while the framing might have been tone-deaf, we cannot achieve change with only half of the population engaged in the conversation.

Both of these lessons are, I believe, salient in the parliamentary context. The former, the inclusive approach to inclusion, is made more complex in politics due to the constant movement of staff. The staff entrances to the House of Representatives and the Senate are, quite literally, revolving doors. Ensuring ongoing commitment to a campaign for change in an ever-changing workplace poses distinct challenges. But these are obstacles that must be addressed. The independent review, led by the Sex Discrimination Commissioner, has begun on the right note through a consultative and inclusive interview and submission process. This approach must be carried forward to implementation and then maintained, including through ongoing evaluation and efforts to engage or re-engage on these issues as the parliamentary workforce evolves.

PREVENTING HARASSMENT

The best way to address the corrosive impact of inappropriate workplace behaviour is to prevent it from happening in the first place. But this is easier said than done. The

[18] Thomas Connelly, 'Shoosmiths Faces Social Media Backlash over International Women's Day 'Male Champions' Panel'. *Legal Cheek*, 4 March 2020. Accessed at: https://www.legalcheek.com/2020/03/shoosmiths-faces-social-media-backlash-over-international-womens-day-male-champions-panel/.

efficacy of narrowly compliance-focused anti-harassment training is far from clear. In the *Us Too?* survey there was no statistically significant difference in the prevalence of harassment at workplaces that did or did not undertake harassment training.[19] There are several macro solutions, considered further below. But there are also more immediate, workplace-specific efforts to reduce the occurrence of inappropriate behaviour.

One increasing focus in the legal profession has been to train lawyers to be better managers and better leaders. Traditionally, the law has not valued people skills. The typical trajectory of a lawyer, in a commercial firm, is to be steadily promoted, and gain increasing managerial responsibility, initially for one or two juniors and, by the time of a partnership, perhaps for 10 or 20 lawyers and staff, without receiving any formal management training, coaching or mentoring. But a good lawyer is not necessarily a good manager and a workplace environment without proper management and leadership is one where toxic behaviour can occur and persist. During the *Us Too?* campaign, I spoke to many senior leaders in law firms who underscored the increased focus they were giving to soft-skill training. A similar emphasis in politics, where, like law, career paths typically lack management training, would be welcome.

There must also be a greater focus on addressing all forms of misconduct and inappropriate behaviour and not only severe incidents. The cases that make the headlines are those where the harassment is particularly egregious, inappropriate and often unlawful—the Harvey Weinstein-esque behaviour. The charge brought in the Higgins case is sexual intercourse without consent—sexual assault.[20] But the data suggests, in the legal profession at least, that the more common experiences of workplace sexual harassment are verbal or visual. Sixty-seven percent of sexual harassment targets responding to the *Us Too?* survey said they had experienced sexual or sexually suggestive comments; half had been looked at in an inappropriate manner; a quarter had received sexual proposition.[21] In contrast, only one in five had

[19] Pender, *Us Too?*, p. 81.

[20] 'Man to Face Court over Alleged Sexual Assault of Coalition Staffer at Parliament House'. *Guardian Australia*, 6 August 2021. Accessed at: https://www.theguardian.com/australia-news/2021/aug/06/man-to-face-court-over-alleged-sexual-assault-of-coalition-staffer-at-parliament-house.

[21] Pender, *Us Too?*, p. 56.

experienced seriously inappropriate physical contact (for example, kissing, fondling or groping).

These observations have twofold significance. Firstly, it means that we must focus on eradicating a wider variety of inappropriate behaviour. We must seek to address the more typical forms of harassment—what has been labelled by the American equality regulator as a 'gateway drug' to more severe forms of incivility.[22] As I have written elsewhere:

> [T]he vast majority of harassment in legal workplaces is latent and non-physical. That makes it no less insidious, no less corrosive, and often no less impactful on the targets of the behaviour. More 'serious' incidents may of course have an aggravated impact. Law's harassment problem looks like Heydon's purported wrongdoing; it also more commonly looks like the 'everyday' inappropriate conduct that remains widespread in Australian workplaces.[23]

Secondly, such a focus requires normalising a 'speak up' culture where less-severe forms of harassment are called out (especially by bystanders), rather than laughed off or brushed aside.

SPEAKING UP

When incidents do occur, in the overwhelmingly majority of cases they are not reported. In the *Us Too?* survey data, three-quarters of targets of sexual harassment had never reported the incident. A further 14 percent had only sometimes reported when they had been sexually harassed on more than one occasion. Just seven percent of survey respondents said that they had reported on all occasions.[24] Wider data sets, such as the Australian Human Rights Commission's research on harassment across Australian workplaces, paint a similar picture: the publicised cases of sexual

[22] US Equal Employment Opportunity Commission, 'EEOC Launches New Training Programme on Respectful Workplaces'. 4 October 2017. Accessed at: www1.eeoc.gov/eeoc/newsroom/release/10-4-17.cfm.

[23] Kieran Pender, 'Law's #MeToo Moment: Effecting Change in the Legal Profession'. *Australian Book Review*, August 2020. Accessed at: https://www.australianbookreview.com.au/abr-online/archive/2020/august-2020-no-423/830-august-2020-no-423/6648-law-s-metoo-moment-effecting-change-in-the-legal-profession-by-kieran-pender.

[24] Pender, *Us Too?*, p. 62.

harassment are just the tip of the iceberg. This state of affairs presents a significant challenge—how do we encourage targets of sexual harassment to speak up?

The status quo reporting model for incidents in workplaces involves paved pathways: procedures or guidelines outline who a target of harassment should report to. It might be a human resources manager, a law firm partner, a risk and compliance officer. But by paving this path, we are inhibiting the target from following what in landscape design is known as their desire path. Given all the other barriers to reporting, this is ill-advised. We want targets to feel comfortable speaking up however they wish—to take whichever off-path track they want—and not to feel that, unless they follow the paved walkway, they are better off staying silent.

In practice, this focus on flexible reporting can take different forms. Semi-regular anonymous staff surveys can be a helpful starting point to develop an understanding of the prevalence of inappropriate behaviour in a workplace—staff may feel more comfortable raising concerns when they know they are anonymised and intended to gauge patterns rather than address specific incidents. Some law firms I worked with have adopted models that provide contact points for reporting across the hierarchy. On the sound assumption that it can be easier to report to a colleague at a similar level than a senior partner, firms have given specific training to people at all levels, who are then specifically identified as 'inclusion advocate', 'diversity leads' or similar. Others have prioritised giving as much control over the process as possible to the target. The Victorian Bar, for example, has a three-tier reporting mechanism.[25] A target of harassment can report an incident to the Bar's senior leadership, through a portal whereby the individual's identity and that of the perpetrator remain anonymous. The report is not intended to precipitate any formal investigation, but (a) empowers the individual to speak up on their own terms, which may assist with healing; and (b) can inform the leadership's macro-level approach to addressing culture concerns across the profession. Alternatively, a target can report to a colleague who has been given conciliation training, and they can seek to find an appropriate resolution between the target and the perpetrator. Thirdly, the target may make a complaint to the regulator, which can lead to formal disciplinary action. The guiding philosophy is that targets of

[25] Victorian Bar, 'Internal Conduct Policies and Reports'. Accessed at: https://www.vicbar.com.au/public/about/governance/internal-conduct-policies-and-reports.

harassment should be empowered to speak up in whatever form, and to whatever extent, they feel comfortable.

Technology offers some assistance in encouraging reporting. In recent years, a number of technological solutions have come to market to address the challenge of workplace incident reporting. These have earned the label Trust Tech.[26] While the exact features vary, these solutions typically enable a target of harassment to retain greater control over the reporting process. Some enable anonymous reporting yet ensure the target can retain a communication channel with their workplace if they so wish. This might allow the relevant human resources or risk staff to explain the process and build trust with the target to the point where they feel comfortable dissolving the anonymity and proceeding with a formal complaint. Others allow data capture at the time of an incident or thereafter, without it being instantaneously submitted to internal or external authorities. Thus the target of an incident can record their experience in a secure, time-stamped manner, ensuring the retention of possible evidence while they consider whether or not to proceed with a formal report.

More sophisticated Trust Tech solutions are now also offering information escrow, where reports are held by the third-party provider until they are 'matched' with another complaint against the same perpetrator, which might empower people to speak up knowing their report will only proceed if they have safety in numbers. While these technological developments may contribute – potentially significantly – to developing a speak-up culture within workplaces, they are no panacea. As the co-founder of one such Trust Tech solution, Vault Platform, noted in an interview: 'You can buy tools to help you build a healthy culture, but you can't buy culture itself. If you don't support the creation of that culture organically, there aren't any tools that will save it'.[27]

Lastly, reporting channels should be normalised and embedded into workplace frameworks. This was a lesson I learnt from Sylvain Mansotte, the founder and chief executive of Whispli, a Trust Tech solution. Mansotte encourages his clients to use Whispli for as many staff-organisation interactions as possible, on the basis that it destigmatises use of speak-up tools and ensures familiarity with reporting pathways.

[26] See generally Emma Franklin and Kieran Pender, *Innovation-Led Cultural Change: Can Technology Effectively Address Workplace Harassment?.* London: International Bar Association, 2020.

[27] Neta Meidav, quoted in Franklin and Pender, *Innovation-Led Cultural Change*, p. 10.

If someone experiences a traumatic incident such as sexual harassment, requiring them to speak up using an unfamiliar pathway only adds another barrier to reporting. Some will go ahead but others will not or might get halfway through the process before deciding against it. Mansotte's philosophy, then, is to encourage the normalisation of speak up tools and processes. If staff use the same channels to ask questions about leave, say, as they do about inappropriate behaviour or fraud, the barriers to speaking up will be significantly lowered.

While there is some merit in processes and procedures designed to be target-centric and trauma-informed, such features should be on the back-end, not the front-end. If Parliament establishes a reporting framework that is solely focused on sexual harassment, that very feature will serve as a moat around it, a barrier that must be overcome before it can be used. Some incidents might not be reported through stigma or fear or uncertainty about the process. Others will not be reported because targets feel that their experience was not severe enough to warrant a formal process. In contrast, if reporting channels are normalised and intended to be used in a range of circumstances, and staff are encouraged to speak up about incidents, however 'minor', that design will go a long way towards fostering a culture where it is psychologically safe to raise concerns.

RULES AND REGULATORS

Perhaps the most difficult challenge in the parliamentary context, given the constitutional obstacles to external regulation and the inherent limitations of self-regulation, is in devising an effective oversight model with rules, remedies and consequences. I do not claim to have the answer to this dilemma. But the experience of the legal profession underscores the need for an effective, independent or quasi-independent oversight body and offers some guidance as to the challenges and opportunities such a body will encounter.

Since the 1990s, regulators of the legal profession—which vary globally and in Australia from being an arm of the professional peak body, a standalone statutory body or an offshoot of the court—have explicitly sought to address inappropriate behaviour in their rules and regulations. In 2011, for example, the Law Council of Australia promulgated the *Solicitors' Conduct Rules*, which serve as model law for a number of Australian jurisdictions. These rules provide, relevantly, at clause 42 that 'a solicitor must not in the course of practice, engage in conduct which constitutes: discrimination; sexual harassment; or workplace bullying'.

However, it has only been since the #MeToo movement and subsequent harassment reckoning that regulators have sought to enforce these ethical and regulatory obligations. Globally, there had long been a perception that inappropriate interpersonal conduct was a workplace concern, not a regulatory concern. Regulators instead focused on financial misconduct and malpractice. That prior inaction is no more. Regulators in Australia, the United Kingdom, New Zealand, Singapore, Canada, the United States and elsewhere have launched high-profile disciplinary cases against lawyers for sexually harassing colleagues or third parties. The threat of sanction is significant—among the tools in a regulator's arsenal is disbarment (removal from the profession).

The first lesson for the political context is that external or quasi-external oversight makes a big difference. The starting point must be a clear set of standards—a code of conduct or similar. In law, the expected behavioural standards are clearly set out in the regulatory framework. But having a code of conduct alone is not enough—it needs to be enforced. The legal profession would not have moved so swiftly on harassment, particularly in England, were it not for regulators prioritising the issue. Having a body with sufficient power and autonomy to receive, manage and address complaints is therefore essential. But again, a body of this nature in Parliament, while a necessary step for change, is not in itself a sufficient step. Here the legal profession also offers guidance.

Regulators, like individual workplaces, have struggled to encourage individuals to report incidents. All the regulatory powers in the world come to naught if the regulator cannot investigate and undertake disciplinary action in the absence of an individual's complaint. One regulator identified this as their primary challenge: 'Our survey indicated bullying and harassment was taking place but not being reported'.[28] Regulators have responded by prioritising informal reporting mechanisms. Both the NSW and Victorian legal profession regulators have been innovative in this regard. By removing some of the rigidity of formal reporting requirements and focusing on a 'reporting now (through whatever mechanism possible), details later' approach, regulators have underscored that the most important thing for them is knowledge. Even if some informal reports do not lead to formal investigation, their understanding of an incident is helpful in other ways. For this reason, it is essential that any oversight

[28] Pender, *Beyond Us Too?*.

body in Parliament is empowered to receive informal reports, including anonymously, and explore innovative, technologically-enabled reporting platforms.

Another major challenge faced by regulators in law has been the sanction process. In most jurisdictions, the regulatory body prosecutes disciplinary action but the sanction is determined by an independent tribunal. In recent years, particularly in England, it has become apparent that there are divergent attitudes between regulators and tribunals as to inappropriate behaviour. These cases, and others, including in Australia, have indicated a dissonance between stated regulatory priorities and the nominal penalties delivered by disciplinary tribunals. Given the limitations on sanctions in the parliamentary context (including as a result of constitutional barriers), these risks are particularly pronounced and should be carefully considered in the design of the oversight body.

Ultimately, these challenges can and must be overcome. As part of the IBA survey, one regulator told us:

> Being a fit and proper person is at the heart of what it means to be a member of an esteemed and trusted profession. Regulators need to have the ability to call out and sanction bullying and harassment to maintain a healthy profession for those who work within it, as well as showing the public we care for what it means to be a lawyer. However, any response needs to be compassionate and proportionate and to take care of all people involved.[29]

The same is true, no doubt, of politics and Parliament.

THE BIGGER PICTURE

Finally, it is important to appreciate that inappropriate workplace behaviour does not occur in a vacuum. It is influenced by a wider workplace context and indeed the broader societal setting. The significance of this is twofold. Firstly, efforts to address workplace sexual harassment cannot be undertaken in isolation—they must form one

[29] Pender, *Beyond Us Too?*.

part of a more holistic campaign. Secondly, that campaign cannot be limited to the professional world. I will explore these points in turn.

We know that workplace harassment is a barrier to greater female representation in senior leadership in the law.[30] Equally, research suggests that disproportionately male-dominated leadership in a workplace is a risk factor for inappropriate workplace behaviour. This suggests that there is a two-way relationship between workplace diversity and workplace harassment: efforts to address harassment should have a positive impact on diversity,[31] and greater workplace diversity should contribute to a lower risk of workplace harassment. While neither is a panacea for the other, that does not mean the relationship is insignificant. If Australia had a legal profession—or a Parliament—that more accurately reflected the society each represents, there would be less harassment within it. For this reason, initiatives to ensure positive workplace cultures free from inappropriate behaviour must be part of a wider push to attract, retain and advance women in both the legal and political realm.

The wider workplace context also includes issues like mental health and wellbeing and alcohol. The mental wellbeing of the legal profession is currently a major area of concern. A recent empirical study found that 'lawyers' levels of wellbeing are below the global average in every [region]'.[32] An unhappy workplace is one ripe for toxic behaviour to go unchecked. Over the past decade, a number of studies have highlighted the rising misuse of alcohol and drugs in the legal profession.[33] Alcohol is a common risk factor in sexual harassment cases.[34] While alcohol does not excuse inappropriate behaviour, unfortunately it too often partially explains it. Efforts to reduce the prevalence of alcohol at social events and the centrality of drinking to a

[30] See Jane Ellis and Ashleigh Buckett, *Women in Commercial Legal Practice*. London: International Bar Association, 2017.

[31] While I focus here on gender diversity, the same is broadly true of diversity in all its forms – especially as we know that harassment has an intersectional impact. See Pender, *Us Too?*, p. 31.

[32] 'IBA Releases Interim Survey Results on Wellbeing in the Legal Profession'. International Bar Association, 1 April 2021. Accessed at: https://www.ibanet.org/article/09C3DA0E-723F-4E21-9A7E-AA0DFF1FB627.

[33] Not that these are new issues. See Rick Allan, 'Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial'. *Creighton Law Review* 31 1997 p. 265.

[34] This is both the anecdotal evidence from stories shared with the *Us Too?* survey and the case in a number of disciplinary proceedings brought against solicitors in Australia, New Zealand and the United Kingdom. See, for example, *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin).

profession's culture are therefore welcome steps as part of a wider anti-harassment agenda.

There is a balance to be struck here, though. During the *Us Too?* campaign, I heard from many law firms that had sought to grapple with the relationship between alcohol and inappropriate behaviour. Some had threatened to ban alcohol entirely from workplace-sponsored social events, which had often led to an outcry by junior members of the workplace. Others had focused on limiting excessive drinking at workplace events, providing non-alcoholic options and food alongside alcohol and organising social gatherings in contexts where alcohol was not present (such as breakfasts). These may seem trivial steps but reducing the prevalence of alcohol and addressing the cultural significance of alcohol within the legal profession are both worthwhile initiatives in their own right (particularly given the non-inclusive nature of alcohol-soaked social events for non-drinkers). They will also have a non-negligible impact on the occurrence of inappropriate behaviour. The same points are true of Parliament.

More broadly, efforts to address workplace misbehaviour must begin well outside the workplace. It is not as if individuals arrive in the legal profession, or in politics, and suddenly become perpetrators of harassment. Of course, toxic workplace culture can contribute to behaviour (to quote the title of one landmark report into the drivers of unethical workplace conduct, 'Rotten apples, bad barrels and sticky situations').[35] But the legal profession and Parliament are not unique in experiencing an unacceptable prevalence of inappropriate workplace behaviour. While the problem in those contexts may be acute and, quite rightly, subject to heightened scrutiny, they are connected to the sexual assault epidemic at Australian universities[36] and the prevalence of harassment in everyday life. These, in turn, reflect the underlying gender inequality and entrenched patriarchal norms that still shape Australian society. Efforts to improve consent, relationship and sexuality education in school,[37] eradicate the gender pay gap and take steps to address the imbalance in unpaid domestic duties,

[35] Jonny Gifford *et al*, *Rotten Apples, Bad Barrels and Sticky Situations: An Evidence Review of Unethical Workplace Behaviou*r. London: Chartered Institute of Personnel and Development, 2019.

[36] *Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities*. Sydney: Australian Human Rights Commission, 2017.

[37] Katrina Marson, 'Consent a Low Bar: The Case for a Human Rights Approach to Relationships and Sexuality Education'. *Australian Journal of Human Rights* 2021.

caring and parental responsibilities may seem remote from high-profile allegations of sexual harassment in the High Court or Parliament. But they are not. They are intimately connected.

The problem, when expressed in these macro terms, can seem daunting. But we simply must start somewhere. To comprehensively address workplace sexual harassment, whether in law, politics or society generally, we need to unleash as many of these different initiatives, approaches and strategies as possible. Some will be extremely effective, some will be partly effective, some might have unintended consequences and in fact be detrimental. But there is no silver bullet. If we try and we try and we try—if we revisit, recalibrate and revise—and then go again, and again, ultimately we will see change. We are sadly all too well-informed about the nature, extent and impact of the problem. We have many ideas about potential solutions. Now is the time for action.

CONCLUSION: MAINTAINING MOMENTUM

In late 2018, while researching for the *Us Too?* report, I came across a reference in a journal article of an incident at a prestigious American law firm in the early 1980s. I was astounded – the article described senior members of the firm wanting to hold a 'wet t-shirt' competition for summer interns. 'Reacting to in-house criticism,' the paper explained, 'the firm held a swimsuit competition instead. The winner, a third-year law student from Harvard, was offered a job at the firm'.[38] The journal article cited a *Wall Street Journal* report of the incident. Such was my disgust that I dug through the online archives to find the original reporting. '[The winner] has the body we'd like to see more of', a partner of the law firm had told the newspaper at the time.[39] I could not get these words out of my head—a top-tier American law firm had not only held a degrading, sexist 'competition' for its junior staff, who were in a precious position wanting permanent employment and therefore unlikely to formally complain, but a senior member of the firm had even bragged about it to a national newspaper.

[38] Nina Burleigh and Stephanie Goldberg, 'Breaking the Silence: Sexual Harassment in Law Firms'. *American Bar Association Journal* 75 1989, p.46.

[39] James Stewart, 'Are Women Lawyers Discriminated Against at Large Law Firms?'. *Wall Street Journal*, 20 December 1983, p.1.

I retold this story in the opening paragraph of the introduction to the *Us Too?* report. I retold it to conclude every presentation I gave on the global engagement campaign, retelling it hundreds, perhaps a thousand times in total. I did this to underscore what I consider to be the most important point of the campaign for positive change in workplace culture. Change is not inevitable. We cannot take for granted that the present momentum will inexorably deliver the change we seek.

The swimsuit competition incident generated much uproar in the American legal profession. A few years later a major survey of female lawyers concluded that sexual harassment was widespread. In 1992, the domestic peak body, the American Bar Association, formally recognised that harassment was a 'serious problem' for the profession.[40] But while some progress was made, the results of the *Us Too?* research made clear that the progress had been insufficient. Four decades after the swimsuit incident and subsequent condemnation, sexual harassment remains pervasive in the legal profession. And so I told this story, again and again and again, to emphasise that we must do all we can to maintain momentum. Otherwise, there is a great risk that in four decades time we will look back on the findings against Dyson Heydon, or the powerful truth-telling of Brittany Higgins, and realise that we have not made the progress that was hoped. Change is not inevitable. But it is possible.

We must institutionalise the engines of change to ensure that these concerns are not forgotten. We must ensure that positive workplace culture is a top-priority for our leaders, in individual workplaces, in our courts, in our Parliament and in our Cabinet. There it must stay, embedded as a guiding principle. Otherwise, if it is allowed to slip down the agenda, there is every possibility that in decades to come we will look back forlornly on the reckoning of 2020 and 2021 in Australia and wonder why harassment remains pervasive. That is not a future we should accept – and to ensure it is not our future, we must maintain the present momentum.

[40] Pender, *Us Too?*, p. 12.