The culture of the legal profession: lessons of the past and hope for the future

Queensland Law Society Symposium

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Good morning. I acknowledge the traditional custodians of the land on which we meet and I pay my respect to all First Nations people here and watching today.

Throughout the last decade, and particularly the last few years, we have seen a fundamental shift in society as to the standards of behaviour expected in the workplace. Much of this has been due to the voices of brave, young women, who have exposed the systemic (perhaps better said as insidious) sexual harassment and bullying in our community at large and in our workplaces. We, that is lawyers and judges have not been immune. Individual reports and wide-ranging studies have revealed that instances of sexual harassment and bullying remain frequent, widespread and persistent.[2]

Everything that I intend to say is supportive of and likely to enhance excellence in the profession and the administration of justice. This is not about compromising excellence. Rather, it is to reflect upon how culture and perspective create the foundation of good (or bad) systems and environments.

I will begin with sexual harassment and bullying: It is necessary to differentiate between sexual harassment and bullying. The first is explicable in meaning without the need for definition; it is descriptive. It is not defined in the *Fair Work Act 2009* (Cth), it does not need to be. Nevertheless it is defined at the Commonwealth level in the *Sex Discrimination Act 1984* (Cth) under s 28A as: the making of an unwelcome sexual advance, or request for sexual favours, or engaging in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Bullying is a term which is, to a degree, obtuse and to a degree imprecise, but nevertheless real. It is defined widely in s 789FD of the *Fair Work Act* as follows: a worker is bullied at work if an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and that behaviour creates a risk to health and safety. Health, self-evidently includes mental health and wellbeing.

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[1] Chief Justice Allsop of the Federal Court. I am indebted to my Associate, Ms Sarah Horton, for her invaluable and invoking assistance in thinking about and in drafting and expressing the ideas in this speech.

[2] See, eg, Kate Allman, '#TimesUp for the legal profession' (27 November 2018) *Law Society of NSW Journal Online*; Maryam Omari, Law Society of Western Australia, *Towards Dignity & Respect at Work: An Exploration of Work Behaviours in a Professional Environment* (Final Report, August 2010); Victorian Equal Opportunity and Human Rights Commission, *Changing the Rules: the Experiences of Female Lawyers in Victoria* (Report, 2012).

In 2013, the Law Council of Australia conducted a comprehensive survey and found that one in four women had experienced sexual harassment in the legal profession and one in two women and one in three men had been bullied or intimidated.[3] In 2019, the International Bar Association reported that 73% of Australian female and 50% of male respondents had been bullied at work and 47% of female and 13% of male respondents had been sexually harassed.[4] These rates are significantly higher than the global average. According to this report, legal workplaces in Australia were more likely to have in place relevant behavioural policies, but Australian lawyers had less confidence in the proper implementation of those policies.[5]

This has caused and should cause serious self-examination for each of us, personally and as a profession. Sexual harassment and bullying are an affront to human dignity. The impact on the individual, on the workplace and on the profession can be devastating. Why, despite the increased diversity in the profession and the existence of laws[6] and policies addressing such behaviour, does this behaviour continue on such a scale?

We must turn our attention to culture.

The profession has typically in the past been dominated by a culture of male, Anglo-Celtic, self-absorbed, adversarial, lawyering. Whilst those characteristics have not been universal, and their dominance has waned, more than its vestiges remain. The adversarial system remains the basal architecture of litigation. This culture has, in the past, fostered an environment in which poor behaviour could occur with impunity, either rationalised as the inevitable collateral of stressful or important work or aggressive adversarialism; as beyond reproach when perpetrated by someone powerful, successful or revered; or even encouraged as a badge of honour or rite of passage.

A period of reckoning or revaluation has and should cause us to reflect on the unique and powerful positions we occupy in this conversation: as a profession, with the levers of access to the law; as judges exercising public power; as lawyers being directly involved in that exercise of power; and all as leaders in the community. We are also people who will act for, prosecute, defend or judge this behaviour in the legal system and who will be intimately involved in advocating for and bringing about amendments to laws and practices considered inadequate or unfit to address this behaviour.

To maintain the public's trust and confidence in our positions, which hold power and privilege, our actions must be in keeping with our words. We must demonstrate that we understand the impact of that power and privilege on human lives, in our daily interactions. Justice and fairness are not only legal

[3] Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (Final Report, 2013) 32, 76.
[4] International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, 2019) 86–87.
[5] Ibid.
[6] *Sex Discrimination Act 1984* (Cth) ss 28A and 106; *Fair Work Act 2009* (Cth) Part 6-4B.

objectives; but they are also normative principles guiding our work and our interactions with all those who come into contact with the law. Acting with justice and fairness also necessarily entails dignified politeness as a mark of respect for people's humanity and entitlement to dignity.

In addition to the 'Us Too'[7] ("We Too"?) movement which challenged and continues to challenge standards of workplace conduct in the profession, the COVID-19 pandemic has forced new ways of working and so has demanded a re-evaluation of the status quo and some acceptance or accession to change.

Today I would like to reflect on the impact of the disruptive forces of the last few years. What has changed, what hasn't and why? How can we harness this momentum and spirit of change in order to improve the lives of those within the profession and improve the administration of justice?

First, to the changing face of the profession.

Once, the legal profession was almost wholly comprised of white males. The first woman entered the legal profession in 1905 as a barrister in Victoria, the next in 1924 as a solicitor in Sydney.[8] The first female judge was appointed in 1965. Now, it is commonly reported that women make up the majority of legal graduates and members of the profession.[9] In 2020, in a National Profile of Solicitors it was reported that in Queensland, 52% of solicitors are female, a growth of 80% since 2011, and 36% of the profession are under the age of 34.[10]

The face of the profession is also increasingly diverse, culturally and in other ways.[11] I sat in admission ceremonies in the Supreme Court of New South Wales, from 2008 to 2013, and know this from observation.

Despite the profession's increasingly diverse composition, men continue to dominate at the Bar and on the bench, as well as in senior positions in practice. In 2013, although some time ago now, it was reported that over one in three women in the law were considering moving to a new job. [12] The pandemic seems to have exacerbated rates of turnover and resignation.[13] By many reports, sexual harassment and bullying remain pervasive.

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[7] *Us Too?* (n 4).
[8] See Law Society of New South Wales, *After Ada: a new precedent for women in law* (Report, 29 October 2002) 5.
[9] See, eg, Margaret Thornton, 'Hypercompetitiveness or a Balanced Life – Gendered Discourses in the Globalisation of Australian Law Firms' (2014) 17 *Legal Ethics* 153.
[10] The Law Society of New South Wales on behalf of the Conference of Law Societies, *2020 National Profile of Solicitors* (Final Report, 1 July 2021) 9–10, 13.
[11] See Law Society of New South Wales Diversity and Inclusion Committee, *Diversity and Inclusion in the Legal Profession: the Business Case* (Report, October 2021).
[12] *NARS Report* (n 3) 7.
[13] See, eg, Angela Tufvesson 'Staying Put' (13 December 2021) *Law Society of NSW Journal Online.*

I believe this phenomenon is inextricably linked to the historically dominant culture of the legal profession: one that is male, combative, self-absorbed and narrow-focused.

Our system is hierarchical, characterised by an independent judiciary, an independent bar and adversarialism.[14] There is nothing wrong with independence, especially of the judiciary. Hierarchy is to a degree necessary. Adversarialism is what our legal system has given us. But, somewhere along the way, the adversarial system blended with the power of men to create a norm of combative lawyering, which has been described as a form of unconstrained tactical warfare.[15] It was one which encouraged self-aggrandisement, bursting egotistical confidence and physical power or overtly expressive intellectual power. This is different from true intelligence. It was one that lacked awareness of the impact of predominantly white male behaviour on those who were different. It was one in which expressing emotion or struggle were seen as a sign that you simply couldn't hack the tough world of the law.

This culture does not describe the behaviour of all people in the legal profession, by any means. But it does account for its tough edges, many of which remain and which underlie the conditions which reinforce power imbalances and gender-based discrimination in the workplace.

The revelations over the past few years, as well as involuntary workplace disruption by way of the pandemic, have illuminated these dynamics and spurred conversation and action.

In order to dislodge this formerly dominant culture and to make the legal profession a safer, more inclusive, welcoming (and so I would suggest more productive) place conformable with the standards expected of modern professionals, I think we need to do the following:

First, we must lead by an example of politeness as a recognition of the dignity of those with whom we deal.

Secondly, we must recall our professional obligations, particularly the fiduciary relationship.

Thirdly, we need to think openly and laterally in a number of ways: we need to be flexible; we need to commit to ongoing education in the full breadth of the general law; we need to be open to new ways of doing things which are more inclusive and we need to contribute to services which support equality of protection before the law.

Fourthly, we should be candid about addressing mental health concerns and stress in the legal profession.

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[14] Honourable Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135.

[15] See, eg, S Parker, 'Islands of Civil Virtue – Lawyers and Civil Justice Reform' (1997) 6 *Griffith Law Review* 1, 5, citing Lord Woolf in *Access to Justice: Interim report to the Lord Chancellor on the Civil Justice system in England and Wales* (1995) 7.

Fifthly, we need to be proactive and transparent about putting in place effective policies and procedures which set clear standards of behaviour and which provide robust complaint mechanisms and methods of support.

All these things are interconnected. They tend to feed each other. None undermines, indeed all support and reinforce, a demand for excellence in the administration of justice.

The Law Council of Australia has pointed to the typically hierarchical nature of the legal profession and predominance of men in more senior roles as a key 'driver' of sexual harassment.[16] We first must continue to support and encourage progression and leadership in the workplace of women and those who make up our diverse society. But we, that is judges and lawyers in management and senior roles, must also be cognisant of the power imbalances that exist; of how they may reduce the propensity to report poor behaviour; and how our own behaviour can counteract or reinforce a sense of powerlessness or agency. Hierarchies of some kind will be inevitable in the legal profession. What is important is that we encourage diversity in leadership and value leadership qualities which support a communicative, safe and positive working environment.

Author Andrew O'Keefe, with the assistance of Jane Goodall, studied closely the chimpanzees of Gombe National Park in Tanzania and those in Taronga Zoo Sydney.[17] He argues that by observing chimp behaviour we can understand hardwired, human instincts. Most fundamentally, that humans like to be a part of a socially cohesive group. However, in order to maintain harmony there must be a leader and that leader must employ good and kind leadership. O'Keefe writes that in his observation the most constructive leader of the Gombe chimpanzees was not a bully and did not intimidate but rather "use[d] his power to insist on appropriate behaviour".[18] As leaders of the profession, whether as judges, presidents, counsel, partners or managers, if we wish to create an inclusive, safe and encouraging environment, one that brings together rather than tears apart and one that brings about the best in people, we must insist upon and act in a way consistent with the standard of behaviour we expect. Our own behaviour must be respectful and courteous, recognising the dignity of others.

This applies equally to the way we treat our colleagues as it does to the way judges treat the practitioners and parties that come before the court.

In a time gone by, when I began practice, appearing in the New South Wales Supreme Court sometimes felt like participating in a dangerous blood sport. Some judges appeared to enjoy pulling the wings off baby barristers. Some were the opposite to the bullies, I remember them: John Kearney, David Hodgson,

[16] See, eg, Law Council of Australia, *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* (Report, 23 December 2020) 11.
[17] Andrew O'Keefe, *Hardwired Humans: Successful Leadership Using Human Instincts* (Roundtable Press, 2018).
[18] Ibid 39.

Dennis Mahoney, Michael Kirby, Brian Cohen and Jane Mathews. They did not behave like that. They were gentle and kind. They were also the most intellectually demanding.

Most current judges are now generally far more aware of the impact of their behaviour on the profession. However, not all are and sometimes a reminder is needed. As judges, we occupy positions of immense privilege and hold great power over the lives of the people who appear before us, litigants and practitioners alike. Such power and privilege demands that we treat those who come before us with politeness, decency and courtesy, both as a mark of respect for, and appreciation of, the impact of the exercise of power, but especially as a mark of dignity and in order to maintain public trust and confidence.

Martyn Newman, in his Ultimate Guide to Developing Emotional Intelligence for Leaders, posits that business success depends upon more than intellectual capital, but on 'emotion capital' being the promotion of positive emotional responses from both within and outside the organisation.[19] The court is not a business, but the emotional responses of the people within its structure and the public at large are indispensable forms of capital, which is, of the upmost value, to a judicial system. How members of the public respond to the wielding of power by the judiciary will in part depend upon how they are treated and the emotional response evoked by that treatment. Of course, provoking positive emotions is not the objective of the judicial system. In litigation, there will always be a winner and a loser and that loser will probably be unhappy about that loss. A judge should feel in no way constrained by the prospect of a negative response to the exercise of their judgment in the administration of justice. Such is critical to independence. But we should be concerned about whether the participants in the court process feel that they have been treated with a fundamental level of respect and dignity commensurate with this important problem and a recognition of the impact of public power on their lives.[20] One great Australian judge, the late John Kearney, used to quote a great English judge Sir Robert Megarry in saying that the most important person in the courtroom was not the judge, not the QC, but the future loser of the case whoever he or she may be.

The public's democratic consent to power is born out of mistrust of power in the hands of one.[21] The maintenance of trust and confidence is an ongoing task which requires that not only the application of the law, but also the management of the court's work, is just and has integrity and recognises the dignity of those who come before it.

We should be aware of the impact of judicial behaviour on the practitioner. Humiliation, aggression or animosity, even sometimes careless abrupt dismissal, can erode the fundamental relationship of mutual

[19] Martyn Newman, *Emotional Capitalists: the Ultimate Guide to Developing Emotional Intelligence for Leaders* (RocheMartin, 2014).
[20] See The Australian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (3rd Ed) 19.
[21] See James Allsop 'Thinking about Law: The importance of how we attend and of context' (Speech, Australian Academy of Law Tenth Annual Patron's Address, 21 October 2021) 4.

trust and respect between practitioner and judge vital to ensuring the full and proper ventilation of all issues and fulfilment of the duty to the court. It can undermine the capacity for practitioners to perform at their best and their willingness to remain within the profession. It can cause mental harm. As Lord Denning said in *Jones v National Coal Board*, the object of a judge, 'above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role.' [22] That role should be valued and respected. I recall being told by a barrister that I had spoken in a harsh way to another barrister (who was quite senior) in a case in which both were briefed. I was shocked. Surely I had only been demanding of clarity? But on reflection I understood. I was under stress and had projected that. Many judges cannot see themselves. I did not on that day. Helping barristers and practitioners perform at their best can only help the judge.

We are now at a moment in time where, overwhelmingly, the public and the profession, rightly so, expect a higher standard of behaviour from each other and from judges. We must meet those expectations. As repositories of privilege and power, judges are leaders in the community and so play an important part in setting or reinforcing a standard of behaviour in the legal profession generally and for the judges around them and barristers before them.

There may be moments when tempers flare, or when stern words are required to manage an unruly matter or misbehaving parties or practitioners. The role of the judge, like the practitioner, can be immensely stressful, a topic to which I will come. But poor behaviour should not be the norm. It should be the rare exception. We should have empathy and employ politeness, indeed why not kindness, and put aside ego in recognition of our public duty.

The lessons of Martyn Newman on emotional intelligence also apply to law firms, practices, chambers and departments, although in a slightly different way. First, it is clear that now, perhaps more than ever, emotional and reputational capital, not just financial and intellectual capital, are important to success. Increasingly, if internal culture, policies or leadership do not meet expectations, clients may take their business elsewhere and employees may turn to other opportunities. The imperative of emotional capital is not just moral, it is also financial and reputational. Further, lawyers are part of more than a business, they are part of a profession: and a search for truth which has privilege and public responsibility.

Professional bodies were long ago granted the power to self-regulate standards of entry into the profession. Those who wish to have the privilege of practicing must satisfy certain educational and character requirements: they must be fit and proper persons,[23] they must take an oath or affirmation of office[24] and they must engage in ongoing legal education and comply with profession rules and obligations in order to maintain and retain a practising certificate. The stated purpose of which is to, in

[22] *Jones v National Coal Board* (1957) 2 QB 55, 63.
[23] See, eg, *Legal Profession Act 2007* (Qld) s 31.
[24] See, eg, *Supreme Court (Admission) Rules 2004* (Qld) rr 17–18.

the words of the *Legal Profession Act 2007* of Queensland, "provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally."[25] So the profession exists to serve and protect the public interest and relatedly, the system of justice, by setting guidelines as to the standard of conduct expected of those wishing to earn the privilege of knowing and so having the power to pursue, defend and judge the law.

We must recall and take seriously our professional obligations. They are not a courtesy or guide, but *obligatory* checks on the power of the lawyer *vis a vis* the client and seen as critical to public confidence in the right of lawyers to hold such power and the right of the profession to self-regulate.[26] Honesty and courtesy in dealing with other practitioners is *required*.[27] Sexual harassment is unlawful and brings the profession into disrepute.[28]

In this context, we would also do well to recall the writings of the Honourable Paul Finn, a former judge of the Federal Court, on fiduciaries. In 1989, he wrote that:

> [t]he fiduciary principle…is, itself, an instrument of public policy. It has been used, and is demonstrably used, to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And it is used to protect interests, both person and economic, which a society it perceived to deem valuable.[29]

It is axiomatic, but sometimes forgotten, that a lawyer is first and last a fiduciary, not a businessperson. Fidelity to the interests of the client is not aspirational, it is obligatory and foundational. As Finn emphasised, this is not a question of avoiding negligence, it is about undivided loyalty. The culture of bullish competition and aggressive behaviour in the legal profession can at times cause a distortion of, or distraction from, professional legal obligations. Addressing cultural change requires refocusing on fiduciary obligations and on the role of lawyers as members of a profession first and foremost.

We must also acknowledge and take seriously the tensions between compliance with professional obligations and commercial pressures and goals, particularly for corporate law firms and in the context of increased commercialisation. An undue focus on revenue can pervert incentives, including a willingness to do whatever it takes for powerful clients.[30] Of course lawyers need and are entitled to

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[25] *Legal Profession Act 2007* (Qld) s 3.
[26] But see Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment? Workplace Bullying and Regulation of the Legal Profession' (2014) 37(3) *UNSW Law Journal* 1030.
[27] See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.2.
[28] See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* rr 4.1.5 and 5.1.2.
[29] Paul Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 26.
[30] See eg, Justine Rogers, Dimity Kingsford-Smith and John Chellew, 'The Large Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40 *University of New South Wales Law Journal* 218, 232–233 citing Royston Greenwood, 'Your Ethics: Redefining Professionalism? The Impact of Management Change' in Laura Empson (ed), *Managing the Modern Law Firm: New Challenges, New Perspectives* (Oxford University Press, 2007) 186.

earn a living from their work. However, the living to be earned is from the practice of a profession, in the fullest sense.

Lawyers occupy a critical position of public trust and service and so should have a broad understanding of the world in which they operate. If State Supreme Courts can be constitutionalised in the Australian Constitution: *Kable*,[31] *Kirk*[32]; so can the profession and its true independence. A narrow focus, including through, at times, the siloing of lawyers into areas of specialisation and technical expertise, needs to be counteracted to ensure perspective and to ensure that advice comprehends the real world context to which it applies. This tendency to silo hasn't been aided by the proliferation of sometimes absurdly complex legislative instruments. This siloing can also encourage a culture which focuses on the language of the law to the exclusion of its human context. To do so forgets the very purpose of the law, which is ultimately the regulation of human relationships and the answering of social, not purely legal questions.[33]

As I spoke about in a recent speech, the work of neuroscientist, psychiatrist and polymath, Ian McGilchrist, is greatly illuminating in this respect.[34] McGilchrist's study reveals that the two sides of the brain have a tendency to bring opposing types of attention to our way of thinking: the left focuses on the immediate, precise and narrow and the right on the whole, flexible and relational context. This is fundamental to the success of any animal, including the human species, as it allows both abstraction from and so the making sense of reality, but at the same time being *within* reality. I think it can also teach us much about our approach to the law. Language and so the reduction of the human experience into symbols and categories is a necessary part of the law, which is the ordering and regulation of social behaviour through rule and principle. But there are limits to definition and text. If we seek answers to our legal problems solely through literal application of language and increasing textual precision, we may find the answers are quite abstracted from the realities whence the language came. To remain comprehensible and just, the practice and application of the law needs emotional intelligence, intuition and empathy, so as properly to comprehend and to apply the moral values underpinning the rules and principles, expressed through the language of the law. To know the language of the law is not enough; we have to look at what motivates that law and think intuitively about how it applies to the realities and variances of human experience. These lessons are applicable to both the way we approach the law and in the way we treat others.

Laws and rules regulating workplace behaviour cannot encapsulate the human distress nor the essence of the moral values which motivated their promulgation. The broad picture is a desire for a workplace

[31] (1996) 189 CLR 51.
[32] (2010) 239 CLR 531.
[33] See James Allsop 'Thinking about Law: The importance of how we attend and of context' (Speech, Australian Academy of Law Tenth Annual Patron's Address, 21 October 2021) 3-4.
[34] Iain McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, 2009) 43–58.

in which all people feel safe to go about their work and to excel, without fear of debasement of their dignity and wellbeing. The underlying values include inalienable human dignity, non-discrimination and self-determination. How we treat our colleagues in the workplace should be consistent with those underlying values. The existence of robust laws which protect workers from sexual harassment and bullying in the workplace are vital, but the words don't alone encapsulate their full human importance.

A comprehensive and lateral approach to the law *and* to our workplace enables us to attend to the human consequences of our own behaviour and the behaviour of others, where our view might have otherwise been obscured by narrow focus on the task at hand; on our own insular perspective; on defeating the opposing side or on competing with our colleagues. By stepping back we are reminded that there are views and experiences other than our own, which creates fertile ground for reciprocated engagement. By having such a perspective, we combat a false reliance on perfectionism and see that there are creative and different ways of doing things which are more inclusive of those outside the traditional, narrow mould and perhaps, better.

The COVID-19 pandemic has revealed this in many ways. As many lawyers were forced to work from home, employers realised that flexibility in working arrangements may in fact be possible, and positive. For some employees, control and autonomy over their working arrangements made them happier and just as, if not more, productive. For some, the opposite. Flexibility also helps breakdown the barriers which may have otherwise deterred or excluded, including because of caring or child-rearing responsibilities, disabilities or even distance from the workplace. In many courts, judges and practitioners alike had to adapt to conducting hearings over video-conference. In my experience, whilst this presented its own new set of challenges (many, perhaps, showing the age of some judges), there have been many benefits. I have found that the personalities of some barristers and practitioners are far more conducive to the intimate and less intimidating environment of the video-conference. Some say that the lack of physical proximity means the experience is less personal and makes it challenging to detect subtle signs of body language. Sometimes the video view, if you have a much closer view of the faces of judge and practitioner, is more personal. Further, some practitioners seem to be calmer, less nervous and more willing to engage in a discussion with the judge online, perhaps owing to being in the comfort of their own home or office rather than in the grandeur of the courtroom environment. Apart from the fact that video-conferences, where appropriate, can be an important and responsible cost-saving measure, I think we need to reflect on how it may be bolstering the confidence and participation of practitioners who do not fit the traditional mould of combative courtroom performer.

These changes to ways of working have been subject to much analysis in the last year. They are not going to work for everyone and there are drawbacks. But I think we must not lose the spirit of creativity, flexibility and open discussion. We should continue to evaluate whether our ways of working are fit for purpose; whether they are unacceptably exclusionary and what we could do better. That the strong and

confident lions call for a return to the arena, should not distract us from the utility of the quieter space where aggressive declaimers are at a disadvantage.

To that end, we should also support interdisciplinary discussion, learn from and engage with the diverse members of the legal community and the non-legal community.[35]

We should also reflect on how we can take practical steps to support equality, inclusion and human dignity in our legal work. When I commenced as Chief Justice of the Federal Court, I proposed to the profession an idea about how properly to fund pro bono legal work in a systematic way. Salvos Legal, at least at that time, was funded by the profits of a private law firm through a charitable trust. This flow of funds enabled the employment of several full time lawyers on a proper salary, around whom volunteers worked, dedicated to providing free legal advice through centres which also provided available counselling services, and other kinds of financial and interdisciplinary support to address the complex legal and non-legal needs of their clients. There was little appetite for such a suggestion. I perceived a contrary view based on the desire to internalise this charitable work to bolster goodwill amongst graduates. I think modern law firms should reconsider this model by setting up a combined fund to run an independent and non-affiliated pro bono network. A form of private legal aid. Our commitment to reforming the formerly dominant culture should be multi-faceted.

Why should not Queensland lead the country in this too?

When speaking about ways of working and legal culture, we must also acknowledge and address stress and mental health concerns; endemic symptoms of the dominant culture and at times causes of unacceptable workplace harassment and bullying.

Many of us do not need to read the research in order to know that stress and mental health concerns have been and continue to be prevalent amongst members of the profession.[36] Whilst the forms of Australian legal practice are diverse, the profession can generally be highly demanding on time, intellect and emotion, including because central to the work of many lawyers is the resolution of problems for clients in distress or in need of quick advice with much at stake. The consequences of getting it wrong can be enormous and so the pressure is high, as it the expected standard of performance. For many years, battling through and enduring mental anguish was seen as a mark of honour, a badge of toughness and a necessary prerequisite to success and therefore not a problem. Accompanying these conditions was a culture which has been described as 'predominantly conservative with a predisposition towards

[35] See even in 1999 discussions around the need for broad professional skill development: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System Report No 89* (Final Report, 31 December 1999) at 2.78.
[36] See, eg, in the US context, Martin Seligman, Paul Verkuil and Terry Kang, 'Why Lawyers Are Unhappy' (2005) 10(1) *Deakin Law Review* 49.

preserving the status quo'.[37] It is also, as I have said, a culture that generally favoured an archetypal male stoicism; uncompromising and inflexible; and blind to the value of emotional expression or support, perhaps both in the output and approach to the work of the law.

So, despite growing awareness of the harm caused by perpetuating this narrative, it has persisted in a profession slow to change with a culture with gears against it. Stress and high demands can also leave little room to contemplate professional obligations, resolve ethical concerns, and maintain a health perspective to enable this.

It is also now well understood that stress can lead to unintentional bullying in the workplace. This bullying can cause serious harm to the individual, as well to the workplace generally in the form of dysfunction and fear. That fear can manifest as fear of speaking up about said dysfunction, about unethical conduct or even about abuse. It can stifle and hold back the cultural changes that we so desire, and it can reinforce the formerly dominant culture. To acknowledge that bullying may be borne out of stress is not to excuse it and I do not wish to: bullying can be truly belittling and harmful. Rather, it is to interrogate the pieces of a culture caught in a feedback loop, so that we may dismantle and address them. I should say that what one person considers to be bullying, may be different to what another person considers to be bullying. It is an experience to be evaluated from at least two perspectives. There are forms of behaviour which may not amount to bullying, but are nonetheless poor. A negative performance review is not bullying, though much depends on how it is behaved.

The Honourable Michael Kirby has written much on the topic of judicial stress.[38] In 2013, he turned his attention to judicial wellbeing and sent out a call to judges to think on how they may be inflicting their stress on others through bad tempered or unreasonable behaviour, or even bullying.[39] I think the call bears reiterating. As I have said, to treat people poorly and to bully is to fail to respect that person's dignity, even if unintentionally. Judges occupy positions of immense power and control, partly and importantly, as a feature of the guaranteed and constitutional independence of the judiciary. It can be a position in which, if you aren't careful, you can be blinded by your position and carried away with your own importance in the context of the lawyer's duty to the court.

To address judicial behaviour, amongst other things, we need to help judges to address their own stress and wellbeing.[40] The Federal Court has had in place for a number of years a confidential judicial counselling service and recently, under the guidance of Justice Katzmann, the Federal Court's Judicial Wellbeing Committee have established a comprehensive gateway to expert resources, tips on managing

[37] Janet Chan, Suzanne Poynton and Jasmin Bruce, 'Lawyering Stress and Work Culture: An Australian Study' (2014) 35(3) *UNSW Law Journal* 1062, 1073.
[38] See, eg, 'Judicial Stress' (1995) 2 *Judicial Review* 199; and (1995) 13 *Australian Bar Review* 101; (1997) 71 *Australian Law Journal* 774.
[39] 'Judicial stress and judicial bullying' (2014) 87 *Australian Law Journal* 516.
[40] See also Magistrate Heilpern 'Lifting the Judicial Veil – Vicarious Trauma, PTSD and the Judiciary: a personal story' (Tristan Jepson Memorial Foundation, 25 October 2017).

stress and mindfulness techniques. As similar portal exists for staff, which provides confidential, independent call assistance and resources. The Court also runs resilience and wellbeing programs throughout the year. Further, in the pandemic as we switched to remote work, the Court utilised Microsoft Teams to help staff and judges maintain connection: there are forums to share recipes, pet photographs, participate in yoga or trivia or learn about your colleagues through interviews with our head of human resources.

Just like all other members of the profession, and might I say modern society generally, judges should be proactively concerned with their own wellbeing. Emotional expression, self-reflection and self-awareness can greatly benefit ourselves and our colleagues. Normalising such conversations can reduce a sense of isolated struggle and enable problem-solving. It can also aid in avoiding unintentional bullying and unkindness.

The COVID-19 pandemic has compounded the demands and stresses on many lawyers, including through home-schooling obligations, loss of work, the need to adapt to new working environments, and human disconnection. But it has also thrown into the mainstream discussions about mental health and wellbeing. It has offered liberation from old shackles and engendered a new appetite or at least begrudging acceptance of change and flexibility.

Law schools, bar associations and law societies and law firms and agencies have become acutely aware of the need to educate their members on mental health, to provide training in anticipation of stress and support for when it arises.[41] These initiatives have, in many cases, been on foot for a number of years. The pandemic has given the efforts new energy and brought them to the attention of the formerly disengaged.

At the same time, courts, firms and government have been working to formulate a robust framework of policies and procedures to address misconduct.

In this respect, I acknowledge in particular the work of Chief Justice Kiefel and the Council of Chief Justices, which has been proactive and cooperative in responding to the problems facing the legal profession.

In respect of Federal judges, Commonwealth legislation provides mechanisms through which complaints about judicial conduct can be made.[42] In the Federal Court, s 15(1AAA) of the *Federal Court of Australia Act 1976* (Cth) provides for complaints to be made to the Chief Justice, which is complemented by a longstanding *Judicial Complaints Procedure* publicly available on the Court's website. In addition, in August 2020, Chief Justice Alstergren of the now Federal Circuit and Family

[41] See a list of national services available at https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/mental-health-and-wellbeing-in-the-legal-profession.
[42] Sections 15(1AAA)–(1C) of the *Federal Court of Australia Act 1976* (Cth); ss 48-49 and 145 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

Court of Australia and I, together with the President of the Australian Bar Association, and through him, the Presidents of the State and Territory Bar Associations, agreed to a new protocol for an alternative, less formal mechanism of reporting judicial conduct. The protocol enables members of the Bar to raise concerns about judicial conduct with any President of any Bar Association, who then may raise the concern directly with the relevant Chief Justice.

Further, in light of some then recent events, the Federal Court engaged independent external consultants to undertake an audit of workplace behaviour and conduct. Those consultants produced a report based on confidential discussions with staff and judges. The Court then established a Judicial Workplace Conduct Committee comprised of judges and the Executive Director of People, Culture and Communications to examine the findings and assist in the development of a Judicial Workplace Conduct Procedure. Separately, the Court developed in consultation with staff, the Respectful Workplace Behaviour Policy, applicable to all staff.

I think it is important that I set out, transparently, some of the content of the Judicial Workplace Conduct Procedure. It commences with a statement of commitment by the judges of the Federal Court to contributing to a culture of respect and courtesy in the workplace; it acknowledges the right to a safe and respectful workplace; it derides bullying, harassment, sexual and non-sexual in nature, discrimination, victimisation and behaviours that are offensive, abusive, belittling or threatening as unacceptable. The stated goal of the Procedure is to provide a sensitive, prompt and effective means of resolving complaints about judges, including by ensuring accountability for unacceptable behaviour, support for participants involved, confidentiality and procedural fairness. The Procedure enables the Court to obtain external assistance to ensure impartiality and fairness and it sets out the avenues of assistance put in place by the Court if any person wishes to make a complaint: staff members may contact the Chief Justice or instead trained Harassment Contact Officers, People & Culture team members, employee assistance providers or an external provider for confidential support, information and advice.

The message, I hope, is clear: harassment, abuse and bullying will not be tolerated; you should have a right to feel safe, included and respected at work. You should feel safe to speak up; you will be listened to and matters will be dealt with, with confidentiality, due process and integrity.

Professional bodies have a key role to play in upholding the ethical and moral standards of the legal profession in the public interest.[43] Many codes of conduct now make clear that lawyers must not engage in bullying or harassment and that any such behaviour may be investigated and may be found to constitute professional misconduct.[44] Pleasingly, the law societies and bar associations, as well as other

[43] The Large Professional Service Firm (n 30), particularly the discussion at 225 that Emile Durkheim 'saw the professions as a bulwark of ethical stability in an increasingly disrupted society'.
[44] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 42 and *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 123.

professional organisations appreciate that these rules must be accompanied by genuine measures addressed at reforming the cultural and structural problems facing us. They see the need to proactively address power imbalances, lack of inclusion[45] and diversity, mental health and wellbeing.

For example, in 2016, the Law Council of Australia launched an equitable briefing policy to support and encourage women at the Bar and in superior courts. This policy has been endorsed by Bar Associations and Law Associations across the country. In 2019, the Office of the New South Wales Legal Services Commissioner launched a program with a new trauma-informed reporting process aimed at improving the culture in the NSW Legal Profession. In July 2020, the Law Council convened a National Roundtable to address sexual harassment and in December 2020 published the National Action Plan to Reduce Sexual Harassment in the Legal Profession, following the Australian Human Rights Commission's Respect@Work report.

In Queensland, the Law Society has established a support line through their Ethics and Practice Centre designed to assist practitioners dealing with harassment, bullying and discrimination in the workplace. They also provide an on-demand toolkit to combat those behaviours in the profession, in relation to which training sessions can be undertaken for CPD points.

Law firms, particularly large ones with considerable influence, should, and many have, taken up similar commitments.

Conclusions

Society at large and members of the profession, rightly so, expect a high standard of behaviour from the legal profession. In order to maintain the standing of the profession; to meet intergenerational expectations; and to encourage and support the inclusion of women and people from diverse backgrounds to enter and remain in the profession and to take up positions of power and leadership, we must change. We should support diversity in our leadership positions, including to further public confidence in the judiciary.[46] We need to encourage safe and respectful relationships and take genuine measures to support diversity and inclusion so that our culture and composition reflects that of general society.

In order to support the mental health and wellbeing of our members and colleagues, we need to speak about it and we need to turn a critical eye to our ways of working; what are we doing and why and could it be done differently? What can we learn from the pandemic and how might our usual way of doing

[46] See Heather Douglas and Francesca Bartlett, 'Practice and Persuasion: Women, Feminism and Judicial Diversity' in Rebecca Ananian-Welsh and Jonathan Crowe (eds) *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (The Federation Press, 2016) 76, 77 citing Advisory Panel on Judicial Diversity, *Report of the Advisory Panel on Judicial Diversity 2010* (Report, 2010). See also the Honourable Margaret McMurdo, 'Women in Law in Australia 2015: Celebrations or Commiserations?' (Speech, Bond University Women in Law Dinner, Gold Coast, 10 March 2015) 5.

things be supporting or hindering the work of our varied lawyers, many of whom do not fit the traditional mould of the confident declaimer.

We need to recall the primacy of our professional obligations, particularly in the face of competing revenue pressures. We need to examine our ways of thinking and working; are they connected to the human context in which they reside and to which they relate?

There is always the danger of abstracting these issues with words and labels: transforming an important discussion into an almost meaningless collection of clichés. However, sexual harassment and bullying are not words, they are misconduct, misconduct that harms, sometimes deeply, and is an affront to the dignity of the person. They are antithetical to the sponsoring and flourishing of talent and to the administration of justice in a just society.