

High Court of Australia comes a cropper

The High Court has been rudely bucked off its high horse.

Chief judge Susan Kiefel has been forced to confess that one of its former most high profile judges, Dyson Heydon, had been found “guilty” by an external adjudicator of serially harassing six female associates.

The current High Court has endorsed the finding. It believes the allegations by the six women are true.

But you had to wait until the third paragraph of the chief judge’s admission statement to find out that harassment is formally found to have occurred (allegations “borne out”, Kiefel weasels), and until the sixth paragraph to find out who the ex-judge is.

Heydon (photo from ABC TV) has denied the allegations/findings through his lawyers.

A retired former Inspector General of Intelligence and Security (IGIS), Dr Vivienne Thom, examined the allegations...though why she was chosen by Kiefel and crew is a mystery.

Thom has zero published experience in the sexual harassment area. Her main role in recent years has been keeping secrets and not finding any major illegal behaviour in Australia’s mushrooming spook agencies.



There should have been a judicial, or at least a quasi-judicial inquiry, into the allegations. But the High Court chose purposely to employ a non-judicial, retired Public Service mandarin for the role.

It certainly knew what it was doing when it made the choice: it owes the Australian people an explanation. We’ve now had allegations of sexual harassment accepted as proven by the High Court of Australia, but no charges laid.

Kiefel, the judges and the court heavies – all “ashamed” – have apologised (Kiefel personally) to the six young women, the puzzling media statement says.

It’s puzzling how long the investigatory/confirmation process took. The court was told “last year” of the allegations apparently. The *SMH* reports* it was told in March 2019. Thom took “some months” to complete her investigation, Kiefel’s statement says.

That timetable leaves about a year of the High Court fumbling and stumbling around to try to find a way to announce the devastating news in the least damaging fashion to its now-shattered reputation.

A rapid and transparent public disclosure this was not. It was a classic case of the High Court on its high horse, digging in its heels and trying desperately not to be thrown off.

* The *SMH* also reports that “A *Herald* investigation has also uncovered further allegations from senior legal figures of predatory behaviour by Mr Heydon, including a judge who claims that he indecently assaulted her.” <https://tinyurl.com/yasgb6ts>

* One of those ‘senior figures’ is a former Vice-President of Civil Liberties Australia. The *SMH* recounts her story: see below and here:

Who are ‘associates’?

High Court judges’ associates are the brightest of the bright recent graduates from Australia’s top law schools.

Judges have the pick of countless applicants who would “kill” for the role as an associate, particularly so for the High Court.

They work as researchers for judges of the High Court and other higher federal and state/territory courts for a year or so on the most influential cases of the day.

The associates, female and male, usually go on to glittering legal careers.

The are obviously constrained by employment confidentiality agreements about their work, but should not be constrained from speaking out about bad workplace behaviour by their employer(s). All associated, but young female lawyers in particular, would not want to speak out, and be singled out, for fear their future work prospects would be damaged.

While they have not been named, within the profession it is well known who served as associates of High Court judges during the relevant years, 2003 to 2013, that Heydon sat on the court. To some extent, because of the privacy around the six, all females who were High Court judges' associates during that time are possibly implicated by association.

Nevertheless, CLA congratulates the six women for their courage.

How widespread in the courts and legal profession is sexual harassment?

If such behaviour as former judge Dyson Heydon's was allowed to permeate the High Court of Australia, it is highly likely there is widespread sexual harassment of young female lawyers in the Federal courts and state Supreme courts, in the top law firms and throughout the legal profession, CLA believes.

For fairness, it is appropriate to note that the acid-tongued Heydon denies it all..except he admits he might have done things "inadvertently". His lawyers, on his behalf, deny any allegation of predatory behaviour or breaches of the law "categorically".

"Our client says that if any conduct of his has caused offence, that result was inadvertent and unintended, and he apologises for any offence caused. The inquiry was an internal administrative inquiry and was conducted by a public servant and not by a lawyer, judge or a tribunal member. It was conducted without having statutory powers of investigation and of administering affirmations or oaths," Heydon's lawyers said.

CLA notes that Kiefel's active decision to NOT invite a judicial figure to carry out the inquiry permits Heydon this level of claimed disassociation from the findings.

However, Kiefel says she had spoken with many of the women about their experiences, and that "their accounts of their experiences at the time have been believed".

With the High Court of Australia having declared the six associates' accounts true, and Heydon's denials therefore not true, the big question is whether Heydon will be charged with one or more offences.

Has the High Court referred his behaviour to the federal or ACT Directors of Public Prosecutions Kiefel's statement is silent on the question.

However, if the High Court of Australia believes the women, and doesn't believe the ex-judge, that would appear to be about the strongest prima facie case for legal action – criminal or civil – possible. It has been reported some of the women at least plan to sue Heydon.

Heydon has form, according to former CLA Vice-President

The *Sydney Morning Herald* has reported the account of Noor Blumer (photo), a principal of Blumers' Lawyers in the ACT and a Vice-President of Civil Liberties Australia at the time of the ball and the story recounted here:

"The University of Canberra was delighted to invite the eminent judge as guest speaker for its annual Law Ball, held on a chilly evening on April 19 (2013).



Noor Blumer, a prominent Canberra lawyer who was then President of the ACT Law Society, was delighted to be seated next to the guest of honour, whose brilliant legal mind she admired.

But the evening ended with Ms Blumer leaving in distress, disgusted after Mr Heydon groped her under the table, she says, before trying to kiss her against her will.

Ms Blumer,...took a lengthy contemporaneous file note of the evening, which the Herald has seen.

The University of Canberra said in a statement Mr Heydon was "removed from the event and returned to his accommodation" following a complaint of "inappropriate behaviour" from a student on the same evening.

In a statement through his lawyers, Speed and Stracey, Mr Heydon denied "emphatically any allegation of sexual harassment or any offence". <https://tinyurl.com/ybl4td7b>

Will Heydon keep his gongs?

A significant question is whether Heydon will retain his honorific QC title, as a Queen's Counsel, which is awarded by the legal profession.

Will the Australian government cancel his prestigious Honours award, the AO. A NSW judge was stripped of his honours award for lying over a speeding ticket?

– with thanks to cartoonist John Ditchburn, *Inkcinct*

People may not recall that a retired judge

Heydon was appointed by then Prime Minister Tony Abbott to run the Royal Commission into Trade Union Governance and Corruption in 2015.

Critics said the RC was a political ploy to damage the Labor Party because of its close ties to the union movement. The report was a fizzer. ANU History Professor Frank Bongiorno wrote: "Heydon's eventual report had all the impact of last year's telephone book being dumped in a wheelie-bin." <https://tinyurl.com/y737ubeo>

During the RC, Heydon came under heavy criticism for being partisan, and was formally accused of apprehended bias because of agreeing to give a speech at a Liberal Party fundraiser.

Heydon ruled himself not biased. He said he had "overlooked" the fact that the person inviting him to speak was a Liberal Party member, and had not read email attachments which explained the nature of the event as a Liberal fundraiser. (Ultimately, Heydon did not speak at the event).

High Court judges can't be trusted over human resource management



Chief judge Susan Kiefel says the High Court has adopted/acted on the six recommendations of investigator Vivienne Thom, including:

- as High Court judges can no longer be trusted, there will be a special new HC human resources policy around employing their personal staff;
- new personal staff of HC judges must also receive a special warning when they start;
- the HC needs a special mentor for associates, to make sure they are not being harassed; and
- there's to be a new investigation into what's going down currently in the court...the Heydon harassment happened during his term on the court from 2003 to 2013.

Who knows how many other harassers have been, or are being, harboured in the High Court?

The High Court should re-think its most basic operating mode

While the High Court has suffered a deserved comeuppance by the sexual behaviour of one of its judges, that is not its main problem.

Its main problem is that it won't ever look at new evidence that has emerged since an original trial and any appeal, when a case comes before it.

And it suffers from the judge's disease, particularly in deciding whether or not to take an appeal. It presumes lower court judges are right, righteous, competent and unbiased. CLA believes it is in error in doing so, based on overturning as wrongful convictions numerous Australian cases the High Court has refused to hear, or has heard and judged wrongly.

Critics say the High Court manages its workload by the number of cases it accepts or rejects. If so, it has no business managing its workload in that fashion: it should accept cases solely on their merits.

Based on the findings of the Criminal Cases Review Commission in England and Wales, senior appellate courts do not have an even near-perfect record – and especially the High Court – and should examine their own behaviour.

Certainly a thorough reappraisal of the High Court of Australia is warranted and timely, and would be a positive outcome from the Heydon affair. An inquiry should not be restricted to its internal management and administrative issues, but should examine the core of the court's being and practices after about 120 years.

Rather than devoting special people and financial resources to chasing down the ramifications of one apparently randy old judge, the court should self-examine the number of times it has got it wrong on appeal over recent decades in major criminal cases (and in civil cases, if error can be later proven).

For far too long, the High Court of Australia has believed itself and its judges to be superior to the people. This episode is, at last, an opportunity for it to re-learn its limitations, and to do something about them.

COPY THIS! How much superior to the Federal Court does the HC believe it is?

Four times better.

The quality of mercy (or cruelty) attached to the High Court costs \$4 per page for photocopying HC documents, whereas photocopying cost \$1 per page for documents of the Federal Court of Australia.

Fees apply from 1 July 2020 in both cases.

Civil Liberties Australia wonders whether the HC photocopiers are more expensive, or is their output recompensed because of the HC's Canberra lakeside view?

Or are the HC clerks less skilled at pressing buttons than Federal Court clerks, and hence each button press takes them four times longer? Perhaps the ink is four times weightier on the page at the High Court, which has traditionally seen itself as constituted by paragons of virtue and unbridled scholarship?

CLA judges this – no appeal allowed – to be a classic case of High Court hubris and unjustifiable rip-off. Most instant print places charge around 20-25 cents a page. Even \$1 a page is too much.

– source: Government Notices Gazette C2020G00465 09/06/2020 Annual federal courts and tribunals fee increases from 1 July 2020, Attorney-General’s Department <https://tinyurl.com/yayyejb8>

...and repeating what we said back in May 2020:

CLA’s criticism of the High Court of Australia and its hubris is not new – we are not jumping on a bandwagon over the now-agreed failings of one old judge.

This is what we said back in the May edition of our CLArion monthly newsletter:

High Court too clever by half

The High Court is too clever by half. Exactly half, in the AFP journo raids/Smethurst decision.

The High court said, on the Annika Smethurst case:

“As the decision turned upon the validity of the warrant used to conduct the search of Ms Smethurst’s property, there was no requirement for the High Court to engage with broader questions of the adequacy of public interest considerations within Australia’s national security legal framework and whether the power under which the warrant was issued breached the implied freedom of political communication,” the Law Council of Australia said. <https://tinyurl.com/y9zdtfgp>

What Australia wanted to know – journalists, media consumers, lawyers, lower court judges, police and spooks, Ministers and others – is whether the law allows the black hats to raid the white hats when they are doing investigating on behalf of the people, putting things at their simplest.

What a twee, wimpish High Court Australia has that always tries to find ways of NOT answering the genuine and important questions the people want answered.

Instead, it self-serves its own hyper-legalistic interests at great expense and usually after an excessively long time deliberating.

The Smethurst case decided in mid-April 2020 first entered the court for judgement in June 2019.

Come on girls and boys of the Big Bench, you can – and ought to – do better, much better, CLA says.

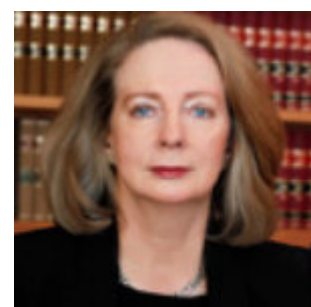
Even that bastion of the status quo, the Law Council of Australia, was critical of the decision, and the government: “The law continues to leave journalists and media organisations exposed to possible police investigation and prosecution,” LCA President Pauline Wright said. <https://tinyurl.com/y9zdtfgp>

Come on Kiefel, cough up!

While we’re on about it, how about the Chief Justice publishing her more than a year old ruminations on an important topic: what she as the nation’s top judge thinks of the human rights legal regime in Australia?

Why is she keeping it secret?

About 15 months ago, Susan Kiefel CJ (photo) gave a speech in NZ...but she has allowed her thoughts to be kept hidden from the Australian people. Here’s what the High Court website says about the speech:



“*Human rights without an enacted statement of rights*“, Legal Research Foundation Conference; farewell conference to mark the retirement of Dame Sian Elias GNZM (31 January - 1 February 2019), Auckland University, New Zealand, 1 February 2019, (to be published together with other conference papers at a later date) <https://tinyurl.com/y8vtgyog>

There has been no public publishing (at April 2020), even though there has been public delivery of the speech...in NZ, at a pals conference of old legal mates of an old judge retiring.

Australians who pay her salary have a right to know what the CJ thinks of Australian human rights law. Those thoughts should not be kept secret from us, or be reserved for private publishing.

Publish, or be damned, CLA says to the Chief Justice.

ENDS May 2020 items.

NB: This speech is still not published (late June 2020, nearly 18 months after the event), so far as CLA knows. It is certainly not published on the Kiefel's speeches page of the High Court's website. The High Court's arrogance continues.