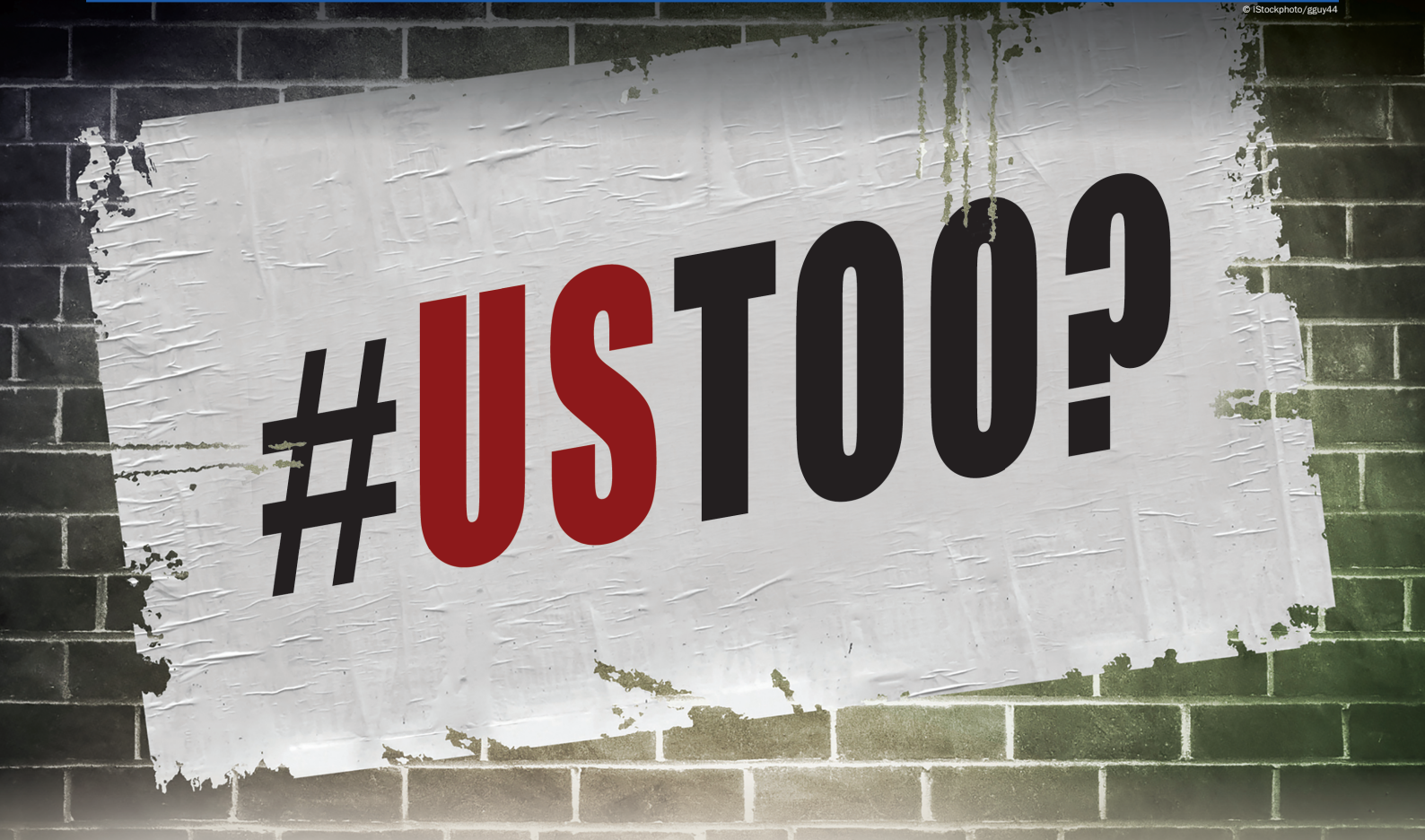

John Gould discusses what role professional regulation should play in tackling bullying & sexual harassment in the legal profession

IN BRIEF

- The concept of professional misconduct and what should attract the attention of regulators?

In May of this year the International Bar Association published its report on bullying and sexual harassment in the legal profession ('Us Too? Bullying and Sexual Harassment in the Legal Profession', International Bar Association, May 2019). It was based on 6,980 responses from 135 countries. The conclusions of the report were that bullying is rife in legal workplaces and sexual harassment is common. The majority of those on the receiving end do not report it because of factors such as the status of the perpetrator, the fear of repercussions and the problem being endemic to the workplace. Policies and training aren't making much, if any, difference, with the position being just as bad in firms with policies and training as those without.

Although it would be tempting to think that the problems are worse in other countries where old fashioned macho cultures still prevail, that would be wrong. The UK comes out in the second highest category with around half of respondents reporting bullying and around a quarter reporting sexual harassment. Although it could be fairly said that the survey results are mainly about the perceptions of those responding, it is those perceptions which drive some of the damage done by misbehaviour. It is how people feel that makes them want to leave unsupportive workplaces, so that 65% of respondents bullied and 37% of those sexually harassed have left or are considering leaving. Feelings are also key to happiness, well-being and mental health. The problem is obviously widespread and real whatever statistical quibbles may exist.

In this article I want to explore the extent to which professional regulation should form part of the solution. The issue raises some fundamental questions as to the limits of what should attract the attention of regulators and even the concept of professional misconduct itself.

Bad behaviour

A lawyer who is convicted of a criminal offence, except of the most minor kind, undermines public confidence in him or herself and the profession. A conviction for a sexual assault should self-evidently be a concern of the regulator. Findings by an employment tribunal of unlawful discrimination would also tend to undermine confidence although seriousness will depend on the degree of culpability evidenced by the findings. Culpability is not an essential element in a finding of discrimination. If, however, there is no conviction or employment tribunal finding, how far should the regulator be concerned with bad behaviour by lawyers?

There are two particular preliminary problems.

- The first is that, as the IBA reports, misbehaviour is very widespread. This means that the traditional benchmarking of conduct against norms in the profession may be unrealistic until general behaviours have changed sufficiently to identify conduct which is outside of acceptable norms.
- The second problem is that behavioural norms in society generally are changing both rapidly and inconsistently. What might be considered now to be unacceptable in one type of practice might perfectly reasonably have been considered acceptable even a few years ago or in a different type of practice.

Other than as expressed in the criminal law, views of what is or is not unacceptable behaviour in society generally are likely to vary considerably. It is not for individuals at a regulator to seek to apply their personal beliefs or to simply adopt views which are vocally expressed or strongly held by influencers.

Seriousness & sanction

If policies and training in law firms are not effective to produce a cultural change, it is doubtful whether regulatory action could be based on an allegation that a firm's culture fell short of best, or even good, practice. Policies and training are not legal requirements in any event. In the absence of a conviction or findings, it is inevitable that regulatory action becomes focused on individual actions or events. This means that a lawyer does something which requires regulatory action and a sanction. The key question is when does a particular behaviour cross the line?

At present there is less of a line than an ill-defined zone—a little like a minefield ending in a cliff. If a lawyer enters the zone they may be blown up and if they press on they will usually see the fatal drop ahead. Unfortunately this means that responsible lawyers will wish to stay as far away from the zone as possible and become unnaturally inhibited. A minority of risk takers may actually be tempted to run in and out of the zone to show that they can.

Paradoxically the forthcoming SRA Standards and Regulations have, probably unintentionally, made an allegation that sexual harassment shows a lack of integrity more difficult by bracketing integrity with dishonesty. *BSB v Howd* [2017] EWHC 210 (Admin) shows that this may colour the meaning of integrity to link it more closely to the kind of issues where honesty is relevant rather than a more general adherence to the ethical standard of the profession. Standing alone, the word integrity may be sufficient to include unethical behaviour involving bullying or sexual harassment.

Assessing the seriousness of particular inappropriate behaviour is a fact-sensitive exercise. The conduct must be serious not trivial. The intention behind the action is relevant as is the harm or impact caused. It is relevant if the victim has a vulnerability or the behaviour exploits a position of power. Actions by a senior person may be more culpable. A pattern of behaviours represents more of a risk of recurrence. It is more serious if the behaviour is witnessed by other people. Strong internal disciplinary action which makes the firm's attitude to the behaviour clear both to those involved and more broadly is relevant. Genuine apologies coupled with remorse and insight may reduce the assessment of risk going forward. A real impact from medication is material but intoxication is a weak mitigation. A claimed lack of recollection through alcohol may be treated sceptically. Alcohol is a very common factor in unwanted sexual advances. As a generalisation, physical contact is likely to be viewed as more serious than inappropriate words alone.

> *"The regulator has a role to play but firms need to take the lead not only by training & policies but also by the transparency & deterrence of their disciplinary processes"*

A key factor is the degree of foreseeable injury to the victim's feelings. Belittling as part of bullying or obviously disrespectful conduct based on gender is obviously inappropriate but more may be required to cross the threshold of seriousness for professional misconduct. That extra factor will often relate to harm or repetition. This is particularly the case if the belittling or disrespect is deliberate.

The IBA report responses suggested that sexual harassment of women was five times more common than of men. Where no criminal conviction is involved, a typical situation giving rise to a regulatory concern involves a drunken lawyer at a firm's social event behaving inappropriately towards a more junior female. This may involve repeated distasteful sexually provocative comments presented as light hearted banter. Hugging and touching of breasts, buttocks or thighs may be involved and persist even after objection. Misconduct may involve more than one woman. This is professional misconduct and requires a report to be made to the SRA. Seriousness and sanction would depend on the factors already discussed.

Words alone (unless they were exceptionally egregious) would, in my view, rarely amount to professional misconduct unless some additional element was present. This might, for example, include an intention to cause harm or an element of public humiliation. Persistence after objection may also be significant. This is not because words do not matter—they do—but rather that inappropriate remarks are usually closely linked to cultural deficiencies in the firm which are not best remedied by a forensic investigation of particular conversations by a regulator.

The absence of a complaint is relevant but not determinative. As the IBA report shows, people are reluctant to complain. Firms should make it clear that the raising of issues is welcome because the firm wants to identify and remedy problems.

So how much further should regulators go in confronting the issues of bullying and harassment by enforcement? The answer, in my view, is not very far. Criminal convictions, tribunal findings and specific seriously culpable actions all may quite properly raise questions of regulation. The regulator is right to seek to facilitate non-discriminatory approaches to practice in accordance with the law. This means that insisting on policies and training is clearly reasonable and necessary even if their effectiveness in isolation is doubtful. It is not, however, for the regulator to attempt itself to adjudicate on whether legal duties not to discriminate have been breached; that is for the specialist employment tribunal. If a finding shows culpability, it is the finding itself which is of proper regulatory interest. It is not for the regulator to attempt to prove unlawful discrimination any more than it would be for the regulator to prove the commission of a criminal offence.

The regulator is also right to require that the complaints, grievance and disciplinary procedures of regulated firms operate fairly and robustly. There is a close relationship between bullying and harassment and the legal rights and obligations of those involved whether by reason of employment law or under partnership agreements. It is right that the processes which resolve those issues should, in most cases, take priority. Unless the facts suggest an unfitness to practise or a clear public interest in a transparent public process, an internal disciplinary procedure which meets all of the regulatory objectives in relation to risk and deterrence and is satisfactory to the firm and the victim should usually be sufficient. This is not to say that serious misconduct should not be reported to the regulator not least because they need to be aware of the possibility of serial offenders and to oversee the internal process and outcome. It does recognise, however, that the prospect of SRA action or a prolonged process is not what the victim usually wants. The deterrent effect of regulatory action may be more than outweighed by the risk of making the problem of under-reporting worse.

There is obviously an urgent need for many firms to reform the cultures which give rise to these issues. The regulator has a role to play but firms need to take the lead not only by training and policies but also by the transparency and deterrence of their disciplinary processes. They are in the best position to bring about the changes needed and have a strong reputational and commercial interest in getting it right. **NLJ**

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