

# 2021 Opening of Law Term Address

## Trust In The Judiciary

Wednesday 3 February 2021<sup>1\*</sup>

By The Hon T F Bathurst AC, Chief Justice of the Supreme Court of New South Wales

Good evening. It is an honour to address you again to celebrate the commencement of the new law term. I am particularly pleased that we are still able to come together in the circumstances. I would like to begin by acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders past, present and emerging.

In recent years, trust in institutions has been the subject of renewed attention. Public trust in institutions is declining not only in Australia but in many other advanced industrialised countries.<sup>2</sup> In Australia public trust in institutions has been understandably shaken by a number of high-profile Royal Commissions which have exposed cause for distrust across a range of institutions from financial institutions, aged care homes to detention facilities in the Northern Territory. This growing distrust of existing institutions is echoed abroad as evidenced by recent scepticism towards the World Health Organisation, the United Kingdom's exit from the European Union and the withdrawal of the United States under former President Trump from various United Nations bodies.

As a result, private and public institutions are coming under greater scrutiny. The public is regularly and deeply questioning the trust they place in institutions, and rightly so. If there was ever a period where we expected the public to blindly trust institutions, it is long gone. We have learnt that public trust in institutions is fragile. Institutions can no longer simply assume the public will trust in them. Instead, all institutions, and particularly public institutions, must continually ask themselves: how we can build trust across all sectors of the community?

The judiciary must take this decline in public trust seriously. Whilst the Australian judiciary has historically enjoyed high levels of trust, we cannot afford to be complacent. We cannot assume that trust is ever-present and uniform across the community we serve. The legitimacy of the judiciary and, in turn, the courts relies upon a certain level of trust in the competency, motivations and values of



its judges. The judiciary, like all institutions, must continue to build and strengthen trust by *all* groups in our society.

In this climate of rising institutional distrust, I would like to use this Opening of Law Term to examine the level of trust placed in the judiciary by the public. I will firstly consider the appointment of judges that inspire trust by all in the community. I will then consider active and defensive measures to foster trust in the judiciary as an institution. First, I will suggest that trust in the competency of the judiciary can be strengthened by improving public understanding of what judges do and how we do it. Secondly, we can promote trust in the integrity of the judiciary by assuring the public of the values at the heart of the institution. We can do this at an institutional level by policies that robustly deal with judicial misbehaviour and at a micro-level in interactions with judges marked by courtesy and tolerance. Finally, we can build and rebuild trust in the judiciary by recognising that trust is not uniform across the community we serve, particularly among Australia's First Nations Peoples and other minority groups and by promoting a diverse and culturally sensitive judiciary that engenders trust across *all* communities.

### Trust matters

It goes without saying that the public should be able to trust public institutions, and particularly, the judiciary. The public entrusts each and every judge with

significant power over their lives and liberty. The public should and must be able to trust in the individual judges and the judiciary as an institution which wields immense power on its behalf.

Whilst trust in political institutions is built and maintained through free and fair elections, this is of course not the case with the Australian judiciary. Given the judiciary lacks any electoral connection with the citizenry, trust by the public in what we do, and how we do it, is crucial.

First and foremost, this is because the legitimacy of the judiciary relies upon diffuse public trust. As Alexander Hamilton famously said, unlike the executive and legislature, the judiciary 'has no influence over either sword or the purse' and 'may truly be said to have neither force nor will, but merely judgment'.<sup>3</sup> Armed with only the power of judgment, the judiciary requires the legitimacy gained from public trust to function effectively. As the former Chief Justice of Australia, the Hon Murray Gleeson AC QC stated, '[t]he general acceptance of judicial decisions, by citizens and by governments, which is essential for peace, welfare and good government of the community, rests, not upon coercion, but upon public confidence', and I would argue, trust.<sup>4</sup> The trust necessary for the public to accept and comply with judicial decisions and court orders - even when unpopular - is fundamental to the rule of law. In the words of Honore Balzac, '[t]o distrust the judiciary marks the beginning of the end of society. Smash the present patterns, rebuild it on a different basis ... but don't stop believing in it'.<sup>5</sup>

Trust in the judiciary is also important because citizens who trust the judiciary, and the courts more broadly, are more likely to engage with the legal system to address their legal issues and to co-operate with its processes.<sup>6</sup> Without trust in the judiciary, no one would bring their legal issue before the court for resolution, nor give up their time to sit on a jury, nor comply with court orders that go against their personal interests. Quite simply, trust matters.

## What does it mean for the public trust in the judiciary?

Before I continue any further, what does it mean for the public to trust in the judiciary?

Trust and confidence are often used interchangeably. Whilst they are related, I think they are separate concepts. One critical distinction is that whilst 'confidence arises as a result of specific knowledge; it is built on reason and fact', trust 'presumes a leap to commitment, a quality of 'faith' which is irreducible'.<sup>7</sup>

The leap of faith inherent in trust is particularly relevant to the judiciary. Public perception of the judiciary is not and cannot be based on full knowledge.<sup>8</sup> I regret to inform my fellow judges here tonight that very few people read the judgments we spend so long agonising over. Furthermore, an even smaller portion of readers can assess the technical soundness of the decisions we make or the robustness of our legal reasoning. Even if a reader can assess the correctness of a decision, the minds of judges will always remain, to some extent, a closed book,<sup>9</sup> and they must still trust that the decision is made for the reason or reasons provided. For most people, they are prepared to take a leap of faith and trust that the judiciary is, by and large, making technically accurate decisions. It is this trust that means that the community generally accepts the decisions made by judges.

I have chosen tonight to focus on trust rather than confidence because I want to consider how the perceived values, motivations and attitudes of the judiciary ensure that the public not only has confidence but *trust* in the judiciary. As a public institution comprised of men and women holding a public position, we must hold ourselves to higher standards to ensure that not only is the public confident in our abilities, but also trust in us, as an institution and as individual judges. It is not enough that there is a deep trust amongst certain sections of the community. Trust in the judiciary must be widespread and present across all sections of the community, and not merely those groups that have had a historically privileged relationship with the law.

There is extensive sociological literature on what trust is (which I won't pretend to be an expert on). However, three dimensions of trust in organisations are frequently identified: competence, integrity and benevolence.<sup>10</sup> The first dimension of competence refers to the organisation acting 'competently in the sense that they are able to perform the functions that are legally or constitutionally assigned to them'.<sup>11</sup> The second dimension, integrity, pertains to the perception by the truster 'that the trustee

adheres to a set of principles that the truster finds acceptable'.<sup>12</sup> The final dimension of benevolence refers to the organisation's commitment 'to act in the interests of the truster because of moral values that emphasize promise keeping, caring about the truster, incentive compatibility, or some combination of all three'.<sup>13</sup> This last dimension is what we most commonly think of when we consider trust.

## Appointing judges that inspire trust in the judiciary

To maintain judicial legitimacy, it is essential that judges are chosen on their ability to inspire trust in the community they serve. In my opinion, these three dimensions of trust are useful in examining the notion of merit in judicial appointments.

These dimensions of competency, integrity and benevolence overlap to a significant degree. Importantly, they are not in competition with each other. Judges not only must be technically competent, but they must first and foremost be men and women of integrity with a deep appreciation of the needs and diversity of the community they serve. We promote trust in the judiciary when we as individual judges, and as an institution are competent, uphold the highest standards of integrity and appreciate and respect difference.

*If there ever was a time  
where a judge was appointed  
merely on their technical  
excellence, it is long gone.*

What does merit mean in the context of judicial appointments? Merit is not simply technical expertise. It is not the best cross-examiner at the bar nor the most skilful solicitor. If there ever was a time where a judge was appointed merely on their technical excellence, it is long gone. It has been remarked that:

'[w]hat constitutes a high quality judiciary or judge is changing and broadening. It will no longer do to juxtapose technical merit against other considerations of character, experience, and background and assume that a strong and effective judiciary requires only the former'.<sup>14</sup>

Judges should be appointed not merely on their technical ability, but also on their ability to inspire trust in the judiciary by the community.

Consistent with the well-known aphorism, 'justice should not only be done, but should ... be seen to be done',<sup>15</sup> mere technical competency is insufficient to earn public trust. Trust is not built simply by producing technically sound judgments. It is also built on the perceived values at the heart of the judiciary.

What constitutes a high-quality judge will depend on the role and responsibilities of the judge in question. The importance of technical expertise in engendering trust varies. It may be that at the appellate level, trust will depend to a significant extent on technical competence. Even at that level, character, experience and empathy with litigants is extremely important. All the more so with judges in trial courts who interact on a daily basis with members of the community.

Trust in those judges will be substantially based on their so-called 'soft skills' and how people, particularly unrepresented litigants, who come before them are treated. These 'soft skills' are crucial to whether all individuals in the courtroom, defendants, victims or witnesses, feel as if they have had a 'fair go' and been treated with the respect they deserve. Take for example, a survivor of domestic violence giving evidence in criminal proceedings before a magistrate. At every stage an enormous amount of trust by the survivor is required. The survivor must first have trust in the police to report the violence. When the matter is brought before the courts, the survivor must trust that the magistrate will listen and deal with them sympathetically. The emotional intelligence and personal attributes of the judge is likely to foster trust in the judiciary more than their technical legal skills.

The importance of these attributes is heightened when one considers that if a person is going to have personal experience with the judiciary in New South Wales, it is overwhelmingly going to be with one of the 139 magistrates sitting in 150 sitting locations throughout the state.<sup>16</sup> These magistrates deal with 96 per cent of all criminal prosecutions and over 90 per cent of all civil litigation in New South Wales.<sup>17</sup> The importance of the 'soft skills' shown by magistrates in building trust at the coalface of the criminal justice system cannot be underestimated.

I will now turn to a closer examination of these three dimensions of trust as they apply to the judiciary: competency, integrity and benevolence.



### Trust in the competency of the judiciary

The first oft-cited feature of trust in organisations is that the organisation can perform the functions legally or constitutionally assigned to them. We cannot expect the public to trust in the judiciary if we do not competently exercise our power and perform our duties.

Does the public trust in the competency of the judiciary? Of course, it is difficult to ascertain levels of trust. Nonetheless, I think the public broadly trusts that the judiciary exercises its functions competently. The level of public trust in judicial decisions means that the enforcement of judgments and orders is generally not an issue in Australia.<sup>18</sup>

A 2018 survey found that 55 per cent of respondents trusted judges in Australia – higher than the level of trust in public servants, journalists, trade unionists and business people and second only to the level of trust in general practitioners.<sup>19</sup> 55 per cent of respondents surveyed in 2020 reported that they have ‘a great deal’ or ‘quite a lot’ of confidence in the courts in Australia.<sup>20</sup> This level of confidence was similar to that in the federal government and public service.<sup>21</sup> Whilst this may not indicate a ‘crisis of trust’, it certainly justifies continual efforts by the judiciary to strengthen trust.

Conventional wisdom holds that the public is largely ignorant of what we do.<sup>22</sup> I do not think this is necessarily the case. In my opinion, most people know we are there to resolve disputes. However, I think most people don’t know how we do it. It is problematic if the public thinks decisions are

*Recently, the feedback inbox of the Supreme Court of New South Wales was inundated by dozens of emails urging the Court to address the recent presidential election in the United States.*

made on the idiosyncrasy or personal whim of the judge. It is also concerning if the public thinks there is disparity in the decisions made by a particular judge and disparity between decisions made by different judges.

How can people trust in the competency of the judiciary without a solid understanding of the role of judges and how they make decisions? I believe improving the accessibility of the Courts is a crucial way to promote trust in the competency of the judiciary. While there have been significant improvements in recent years, I think there is always scope for the courts to strengthen public understanding of what judges really do, and most importantly, how we do it.

I think it is useful at this point to consider the relationship between inter-personal and institutional trust in the judiciary. Inter-personal trust and institutional trust are closely connected.<sup>23</sup> In situations where it is difficult to have inter-personal trust, we rely more on institutional trust. This is particularly important given the unlikelihood of a member of the public developing inter-personal trust in an individual judge. Research shows very

few Australians have any interactions with the judiciary over the course of their lives, although when they do, it is highly influential on their views of the judiciary.<sup>24</sup>

Even when citizens have some background knowledge or history of interactions with a judge, the ancient rituals and symbols associated with the judiciary and courts make it difficult, if not impossible, to develop inter-personal trust. The robes we cloak ourselves in, the wigs we don, and the elevated position we sit in, are designed to mask our individuality and emphasise the values of the institution we represent – fairness, impartiality and independence. These symbols encourage the public to trust in the process by which judicial decisions are made.<sup>25</sup> These performative rituals are designed not to promote inter-personal trust in us individually as judges, but to promote trust in the institution we personify.<sup>26</sup>

Most people derive their information about judges and the courts indirectly, whether that is through the media, word of mouth or ever popular courtroom dramas.<sup>27</sup> Professor Blackshield commented that ‘[t]he work of the courts ... is shrouded in general public ignorance, broken only by occasional stories about sensational cases’.<sup>28</sup>

Recently, the feedback inbox of the Supreme Court of New South Wales was inundated by dozens of emails urging the Court to address the recent presidential election in the United States. Whilst some of these emails are clearly from United States citizens, the nationality of others is unclear. One email demands the Court ‘does our job’ and address electoral fraud, whilst another describes that they are ‘baffled [that] the Supreme Court has not stepped in to list Trump and Pence out of office’. Another states the Court is the ‘last hope’ for the United States. For the first time in my judicial career, I thought I had some real power. Jokes aside, these emails illustrate the limited understanding that many members of the public have about the varying roles and powers of judges from court to court, and country to country.

A study conducted last year suggested that the High Court ‘can increase diffuse support by taking steps to increase familiarity with what it does as an institution’.<sup>29</sup> This rests on the presumption that ‘people who are more familiar with the courts will regard the courts as having greater legitimacy or express more diffuse support for their decisions’.<sup>30</sup> Positivity theory suggests that ‘increased exposure to the symbols of judicial authority stimulates positive associations within individuals that help courts build and maintain their legitimacy’.<sup>31</sup>

I think there is undoubtedly a link between public understanding of the judiciary and trust. This correlation is supported by the 2020 Edelman Trust Barometer, an annual



global survey on institutional trust, which reported that Australia had the highest trust inequality in the world between the level of institutional trust in institutions by the 'informed public' being the 'wealthier, more educated, and frequent consumers of news' and the 'mass population'.<sup>32</sup>

In my opinion, improving public understanding of the role and operations of the judiciary across the community is essential to building trust. We build trust in the competency of the courts when we directly engage with members of the public, when we make court proceedings accessible and when we convey judicial reasoning in a comprehensible manner. The more the public can view court proceedings, whether in-person or from the comfort of their living room, and understand plain English explanations of legal decisions, the more likely they are to appreciate how judges make decisions and therefore trust in those decisions and the people that make them.

I think it is essential that courts continue to innovate to improve accessibility. The COVID-19 pandemic has turbocharged many of these developments, including the number of matters live-streamed. The shift to online courtrooms greatly increased the accessibility of court proceedings. The YouTube live-stream of some of the challenges to the Black Lives Matter protests was a great success. Thousands of people tuned in on whatever device was handy to see the resolution of this significant piece of litigation. The popularity of such measures is further shown by the astounding 42,000 viewers who watched the live-stream of George Pell's appeal to the Victorian Court of Appeal.<sup>33</sup>

Putting the judicial system online, and in forums commonly used by members of the public, revolutionises the accessibility of the Courts. It enables the public to see not only that justice is done but *how* it is done. When it is as simple as clicking on a YouTube link, anyone, irrespective of their familiarity with the Courts, their geographical location, their confidence in entering court buildings, can see justice in action. Mediums such as YouTube allow courts to engage with a new and younger audience who may never observe court proceedings in-person but armed with a device and the internet can engage in a manner accessible to them. We cannot underestimate the significance of this in increasing the public understanding of what we do, and in turn, promoting trust. This doesn't mean I am advocating for a 24-hour cable service streaming court proceedings. There is one in New York City and I can assure you that watching it is the best way to

get some sleep if you are jetlagged. However, I do think such measures are a powerful tool for building trust by demystifying what judges do and how they do it.

### **Trust in the integrity of the judiciary**

The second dimension of trust in organisations is integrity, namely, where the organisation consistently adheres to a set of principles or values that the public finds acceptable. The Rule of Law is premised on judges being of good character in order to preserve judicial legitimacy.<sup>34</sup> The integrity of the judiciary as an institution is dependent on the integrity of each and every judge. When trust in an individual judge is compromised, so too is trust in the institution. Trust will only be maintained if judges maintain the highest standards of integrity in their professional, public and private lives.

### *Putting the judicial system online, and in forums commonly used by members of the public, revolutionises the accessibility of the Courts. It enables the public to see not only that justice is done but how it is done.*

Citizens are more likely to trust the judiciary when they believe that the judiciary, as an institution, will 'represent, enact, and even embody values they share'.<sup>35</sup> The standards required from judges are 'perhaps the highest and most rigorous ... of any profession in the community'.<sup>36</sup> This is because judicial office is 'not simply a role, but a public institution'.<sup>37</sup>

The public entrusts judges with immense power. Day after day, the decisions we make have profound implications on the lives, fortunes and liberty of those who come before the court and frequently 'affect interests far beyond those formally represented in the courtroom'.<sup>38</sup> It is not enough that judges uphold such standards on the bench; they must also demonstrate integrity off the bench. From the perspective of a member of the public, 'it is difficult to dissociate the law from the judges who declare and apply it'.<sup>39</sup>

Knowing that judges understand and reflect societal standards is a crucial element of trust. No member of the public wishes to entrust such power 'to anyone whose honesty, ability or personal standards are questionable'.<sup>40</sup> As a result, trust in the judiciary is eroded when the conduct of a judge, on or off the bench, is perceived as demonstrating a disregard and disrespect for the law or prevailing community standards.

Such transgressions significantly erode trust by those directly impacted. However,

they also pollute trust more broadly. The public will never hear of the vast majority of well-behaving judges but will almost certainly hear of the rare judge that does not live up to community standards. It has been stated that '[b]ad Judges, however few there may be, will always be a stain on the public perception of Justice'.<sup>41</sup>

Almost all Australian judges remain totally unknown to the public. Research shows more Australians recognise Judge Judy than any High Court judge.<sup>42</sup> Public awareness of judges tends to fall into one of three categories: total anonymity for almost all judges, the celebrity judge from overseas, and the odd domestic judge that has achieved notoriety.

Unlike the United States, we have no culture of 'celebrity judges'. Often, one of the only reasons why a judge in Australia is widely known is not because they are a 'celebrity', but because of their perceived deficiencies.

The Edelman Trust Barometer reported that no Australian institution was seen as both competent and ethical.<sup>43</sup> This included the Government. Whilst this survey did not directly report on trust in the judiciary or the courts, I do think it is cause for great concern. The public should not have to choose between competency and ethics in their institutions.

The judiciary does not operate in a vacuum, separate from the people we serve. We cannot be insulated from developments in public attitudes and values. We must review and adapt policies and procedures to ensure we not only meet, but exceed, changing societal standards. Chief Justice Murray Gleeson stated that:

'Confidence [and I would argue trust] in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behaviour impeccable, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully'.<sup>44</sup>

The MeToo movement and recent allegations of sexual harassment by a judge has cast a spotlight on the legal profession and the judiciary. The justified concern and disgust by the public at such allegations shows the degree of trust instilled in the judiciary and the ease in which it can be dismantled.

The legal profession has had a significant problem with sexual harassment. Legal workplaces feature many risk factors for sexual harassment including power imbalances, systems of patronage, interconnectedness, long hours and the reality that men continue to hold most senior positions.<sup>45</sup> Fortunately, all branches of the profession have become acutely aware of the problem and the need to endeavour to eliminate it.

A 2019 survey revealed that 53 per cent of female lawyers and 12 per cent of male lawyers in Victoria had experienced sexual harassment in the legal sector.<sup>46</sup> Only 20 per cent reported it.<sup>47</sup> Furthermore, such incidents were not a relic of the past. 57 per cent said the harassment had occurred within the past five years.<sup>48</sup> The figures are no less concerning in another 2019 survey conducted by the International Bar Association. 47 per cent of Australian female respondents had experienced sexual harassment (compared to 37 per cent globally) and 13 per cent of male respondents.<sup>49</sup>

Tonight, I am of course focusing on trust in the judiciary, not trust in the legal profession. This raises the fundamental question: is trust in the judiciary compromised by poor behaviour in the legal profession more broadly? The answer is undoubtedly yes. The two are inextricably linked. Judges are drawn from the senior ranks of the legal profession and are reliant upon the profession for the performance of its functions.<sup>50</sup> To the extent that sexual harassment within the profession erodes trust in the profession, it also erodes trust in judges who are appointed as leaders of that profession.

Sexual harassment is the current hot button issue. This is understandable. However, most complaints about judges concern bullying, not sexual harassment. Bullying, like all unacceptable behaviour, also erodes trust.

The pervasiveness of unacceptable workplace behaviour in the profession has stayed hidden for far too long due to the power imbalances inherent in many legal workplaces, the stigma associated with reporting and the importance of reputation to a career in the law. Many victims are understandably scared to come forward in

fear of jeopardising their career. It takes real courage to do so.

Whilst many victims of bullying and harassment stay silent, the impacts of such behaviour are pronounced. It is an unfortunate reality that women and men leave the law because of sexual harassment and bullying. Individuals also leave because of bias and discrimination that result in unequal opportunities. Both are deeply troubling. Both behaviours disempower, exclude and silence victims from their rightful place in the law. This undoubtedly builds deep mistrust in the legal profession, and the judiciary in turn. Furthermore, apart from the impact of such behaviour on the reputation of the profession, and a result the judiciary, it also deprives the profession of great talent. This drain in turn impacts the diversity and quality of the judiciary.

Robust mechanisms are needed to prevent and respond to all unacceptable behaviour. Such policies must recognise and overcome the vast power imbalances often present and exploited in such behaviour. These policies serve a range of purposes. First, they serve the interest of complainants who have been impacted by improper behaviour. Secondly, it signals the standards of behaviour expected of all judges and their staff, and therefore can prevent such behaviour in the first place. Most importantly, however, it demonstrates to the public that 'the judiciary is willing to meet proper standards and that action will be taken where poor behaviour occurs'.<sup>51</sup> In this way, the mere existence of transparent and robust policies that address improper behaviour inspires trust in the judiciary. These policies accompanied by the comprehensive resolution of any complaints and swift condemnation of any unacceptable behaviour reflects the values at the heart of the judiciary.

Furthermore, the Judicial Commission of New South Wales has and continues to be an invaluable institution in maintaining and fostering trust in the integrity and competency of the judiciary. The Judicial Commission was born out a perceived crisis in confidence and trust in the judiciary in New South Wales,<sup>52</sup> with a mission of promoting 'the highest standards of judicial

behaviour and decision making'.<sup>53</sup> The Commission promotes and strengthens trust in the judiciary through its work in judicial education and training, community engagement and as an independent body to receive and respond to complaints about judicial officers. The existence of an independent complaints channel and the transparency surrounding the number of complaints and how they were handled significantly enhances trust in the competency and integrity of the judiciary.<sup>54</sup>

We also build trust in the judiciary when we ensure that equal opportunities are afforded to all practitioners. How do we do

*We must ensure that going to court isn't a Darwinian experience where only the ones with thick skin or without children on their back survive.*

this? Trust is not only built at an institutional level by formal policies promoting equal opportunity. It is also built in the interactions that play out between judges and practitioners every day in every courtroom across the country. As Chief Justice Allsop said, courts are 'living institutions and workplaces'.<sup>55</sup> Judges engender trust in the judiciary when we recognise the human side of the lawyers that come before us.

We do this when we afford everyone in our courtrooms respect and courtesy. When we recognise and accommodate the pressures many practitioners face in juggling a career in the law with family responsibilities. Whilst they may appear insignificant, these acts demonstrate the commitment of the judiciary to diversity. We must ensure that going to court isn't a Darwinian experience where only the ones with thick skin or without children on their back survive. This relates back to the idea that judges that engender trust are not necessarily the most technically competent, but the ones that demonstrate the values at the heart of the institution by their tolerance, their respect and their courtesy.

#### **Trust in the benevolence of the judiciary**

The final dimension of trust in organisations is that of benevolence or goodwill. The judiciary promotes trust in this manner when we demonstrate a commitment to act in the interests of the public because of moral values and incentive compatibility. This is consistent with the judicial oath taken by judges who promise to 'do right to all manner of people' according to law 'without fear or favour,

*The legal profession has had a significant problem with sexual harassment. Legal workplaces feature many risk factors for sexual harassment including power imbalances, systems of patronage, interconnectedness, long hours and the reality that men continue to hold most senior positions.*



*Given the historical disenfranchisement, oppression and exclusion of Aboriginal and Torres Strait Islander Peoples by our justice system, it is understandable that Australia's First Nations Peoples do not view the judiciary as favourably as other groups.*

affection or ill-will'.<sup>56</sup> Importantly, trust in the judiciary is built not only on reality, but also on perception.<sup>57</sup> The perception by the public in our performance is just as important as how competently we do in fact perform our functions.

The judiciary in Australia, and particularly in New South Wales, serve extremely diverse communities. The diversity of the community is reflected in the people that come before the courts – whether as litigants, lawyers or jurors. It is not enough that most of the public trusts us. There is no such thing as 'the' public in Australia. The public who the judiciary serves is each and every member of the community, and the community does not feel trust or assess trustworthiness homogeneously.

We would be naïve to think that every member of the community trusts us to 'do right' by them. The level of trust in the judiciary is not uniform across the population we serve. It is well-documented that minority groups are less trusting of courts.<sup>58</sup> A 2019 survey by the Bureau of Crime Statistics and Research on public confidence in the New South Wales criminal justice system found that 'respondents who were more confident in the courts tended to be male, younger and resided in metropolitan areas'.<sup>59</sup> This can be explained by the fact that the production, strengthening and erosion of trust is intimately connected with systems of power and control in society.<sup>60</sup>

The judiciary must be astute to the distrust of many Aboriginal and Torres Strait Islander communities.<sup>61</sup> The Judicial Commission's Equality before the Law Bench Book notes that First Nations Peoples 'frequently' distrust the police and the law and see them as 'tools of oppression'.<sup>62</sup> The Black Lives Matter movement has highlighted the distrust of many towards the ability of our justice system to in fact deliver justice for

Australia's First Nations Peoples. The tens of thousands of people, both Indigenous and non-Indigenous, that took to the streets across Australia demonstrates a deep concern that the police and legal system remain tools of oppression and injustice for Aboriginal and Torres Strait Islander peoples.

Even if much of the distrust highlighted by the Black Lives Matter movement resulted from the conduct of police officers and custodial officers, there is an understandable tendency for the public to amalgamate various justice entities, such as the police force, prisons and courts. We must remember that in the eyes of the public, the judiciary is inextricably linked to any injustices perpetrated by police or custodial officers.

The Law Council of Australia in their recent review on access to justice in Australia noted that 'systemic discrimination, in addition to the law in Australia contributing to the criminalisation of Aboriginal and Torres Strait Islander communities, deaths in custody and the denial of political rights, have created a profound and ongoing distrust'.<sup>63</sup> Similarly, the Judicial Council on Cultural Diversity stated that '[t]he imposition of colonial law and the dismantling of Indigenous 'Lore' has resulted in significant mistrust of the legal system by many within Indigenous communities across the country'.<sup>64</sup>

Given the historical disenfranchisement, oppression and exclusion of Aboriginal and Torres Strait Islander Peoples by our justice system, it is understandable that Australia's First Nations Peoples do not view the judiciary as favourably as other groups. The ongoing impacts of colonisation and past injustices has created a 'legacy of fear, suspicion and distrust' that militates against many Aboriginal and Torres Strait Islander peoples voluntarily engaging with the justice system.<sup>65</sup>

Personal experiences with the legal system strongly influence the level of trust in justice institutions.<sup>66</sup> When examining methods of building trust, we cannot overlook the very real experiences that First Nations Peoples and their ancestors have had with the justice system and how this impacts levels of trust today. We must remember that perceptions of unfairness are grounded in real, lived and traumatic experiences with the justice system. As the Law Council of Australia notes 'many Aboriginal and Torres Strait Islander people have experience of intergenerational trauma linked with the justice system, and many also have personal prior experience of it working 'against them' instead of 'for them''.<sup>67</sup>

The ongoing legacy of past injustices profoundly impacts children who typically learn about the justice system from their families and communities. Past experiences with the police, prisons or judiciary that foster distrust are likely to be passed down from generation to generation. Research in the United States shows that Caucasian children are 'more likely to associate judicial institutions with fairness and justice', while children from minority backgrounds are 'more likely to associate them with discipline and control'.<sup>68</sup>

When one considers the role of the judiciary as part of the criminal justice system that has resulted in Aboriginal and Torres Strait Islander peoples being one of, if not the most, incarcerated peoples in the world,<sup>69</sup> it is easy to see why Australia's First Nations children would associate the judiciary with control and injustice as opposed to fairness and justice. As Leetona Dungay, whose son died in Long Bail jail in 2015 stated, 'year after year, judges and police put more and more Aboriginal people in prison. Too often it isn't a prison sentence, it's a death sentence'.<sup>70</sup>



*Given the historical disenfranchisement, oppression and exclusion of Aboriginal and Torres Strait Islander Peoples by our justice system, it is understandable that Australia's First Nations Peoples do not view the judiciary as favourably as other groups.*

In my opinion, it is deeply concerning when different community groups have different levels of the trust in the courts. The judiciary serves each and every member of the community. Not merely the ones living in cities or those taught from a young age that judges will protect them and their communities or those who speak English as their first language. All members of the community should feel as if they can trust in the judiciary to the highest degree.

Such variation in the levels of trust amongst the community calls into question whether the judiciary is in fact doing right to *all* manner of people. The mere perception (even if unfounded) that there is bias against certain groups in society severely diminishes the trust in and in turn, the legitimacy of the judiciary.<sup>71</sup>

Furthermore, the lack of trust by certain sectors of the community can have devastating impacts. Feelings of distrust may discourage groups from exercising their rights under the law and seeking redress in the courts. Aboriginal and Torres Strait Islander people are less likely to resolve their legal issue or issues.<sup>72</sup> The 'mistrust of the legal system ... because of negative interactions between Indigenous people and the law in the past' is one reason cited for this phenomenon.<sup>73</sup> Unaddressed legal issues can quickly spiral into more complex legal problems, including criminal behaviours,<sup>74</sup> as 'legal problems in civil, family and criminal laws interact ... through a form of 'snowballing''<sup>75</sup>

It is essential that the judiciary continually strives to build and rebuild trust by the public, and especially within communities that have traditionally had poor relations with the justice system. Two key mechanisms come to mind.

We must continue to build trust incrementally and consistently by demonstrating that the judiciary does in fact serve all. We do this when we provide culturally sensitive services that recognise the ongoing impacts of colonisation in Australia. There is an ongoing need for 'culturally competent, community-controlled services engaging with Aboriginal and Torres Strait Islander people to bridge this distrust'.<sup>76</sup> In light of the centuries of injustice inflicted by our 'justice system' towards Australia's First Nations Peoples, it will understandably

take a long time to earn back the trust of many Aboriginal and Torres Strait Islander peoples. We must strengthen trust, bit by bit.

Secondly, improvements in the diversity of the judiciary will also strengthen trust in the judiciary by further challenging any perception that the judiciary does not serve the interests of all. When the judiciary is perceived as homogenous (irrespective of whether that is true), it is harder for the public to trust in its impartiality. People are more likely to trust in the judiciary when, and to the extent, they believe that judges 'represent social groups to which they feel they belong'.<sup>77</sup> If a community cannot not look at their judges and see men and women they identify with, their trust in the ability of the justice system to do right by them may be compromised

It has been pointed out that it is '[s]ymbolically problematic for the judiciary to be dominated by heterosexual, white, middle-class male barristers'.<sup>78</sup> This is undoubtedly true. I am the first to recognise that the power entrusted in the judiciary continues to be welded predominantly by men that both look like me and have been afforded the privileges of a similar background. It has been said, 'it is plainly unfair that we should have an unjustifiable representation of one group'.<sup>79</sup>

Of course, it is not the role of the judiciary to represent any or all communities. However, a judiciary seen to be exclusively drawn from a specific ethnic and socio-economic background, in particular postcodes 2021 to 2030, 2069 to 2076 and 2088 to 2090 will, even with the best intentions and technical skill, find it difficult to convince people from other backgrounds that they are committed to doing right by all. A diverse judiciary is symbolic in representing the values at the heart of the institution. The judiciary must actively promote, and be seen to promote, diversity.

I know there are people, both in this room and the broader community, who will say we've heard this all before and nothing happens. It is true that people have been speaking about improving judicial diversity at least since the time I was a junior silk, which for those of you who can't remember, was about the time the mobile phone that more closely resembled a brick was invented. It is not true that nothing has

happened. There has been improvement and more importantly, a recognition both in Government and in the profession of the importance of judicial diversity and that more needs to be done to address the complex structural barriers faced by women, and people of certain backgrounds.<sup>80</sup>

Improvements will inevitably occur because of the increasing diversity of those being admitted to the profession. However, to maximise the rich talent in the legal profession, it is important that steps are taken to ensure culturally, and gender diverse talent ultimately results in a judiciary in which all members of the community can trust.

## Conclusion

To conclude, the judiciary, like all public institutions, must be alert to the decline in public trust. We cannot afford to be complacent about the levels and uniformity of trust by the public. The legitimacy of the judiciary, and in turn, the courts, rests upon diffuse trust by the public. Anything less is insufficient.

Trust by the public in the judiciary cannot be demanded. It must be earned in how we function and importantly, appear to function. For people to trust in the judiciary, every judge, and the judiciary as a whole, must be more than simply competent. For the public to trust in the judiciary, they must trust in our competency, our integrity, and our commitment to do right by 'all manner of people'. We must, individually and collectively, uphold the highest standards of integrity and respect the diversity of the community we serve. This will ensure that every member of the public takes the leap of faith to trust in judicial decisions.

The judiciary must continually re-evaluate how we can strengthen trust across all sections of the community. This is not just a responsibility for the judiciary as an institution. Each and every judge must strive to build trust where it is lacking and strengthen trust where it exists. Perhaps a small way to do it will be for every judge to reaffirm their commitment to try and ensure every litigant who leaves the courtroom, regardless of whether they win, lose or draw, feels that they've had a fair, independent and courteous go.

BN

## ENDNOTES

- 1 I express my thanks to my Research Director, Ms Jessica Elliott, for her assistance in the preparation of this address.
- 2 The Australian Election Study reported that voter responses showed that trust in government in Australia reached its lowest level on record in 2019 since data was first recorded in 1969: Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study* (Australian National University, December 2019) 15 <<https://australianelectionstudy.org/wp-content/uploads/The-2019-Australian-Federal-Election-Results-from-the-Australian-Election-Study.pdf>>. See also Edelman, '2020 Edelman Trust Barometer' (Report) <<https://cdn2.hubspot.net/hubfs/440941/Trust%20Barometer%202020/2020%20Edelman%20Trust%20Barometer%20Global%20Report-1.pdf>>.
- 3 Alexander Hamilton, 'Federalist No 78' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New American Library, 1961) 465.
- 4 Murray Gleeson, 'Public Confidence in the Judiciary' (Speech, Judicial Conference of Australia, Launceston, 27 April 2012) <[https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj\\_jca.htm#\\_ftnref1](https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_jca.htm#_ftnref1)>.
- 5 Honore Balzac quoted in Otto Kircheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton University Press, 2015) 175.
- 6 Chloé Lelièvre, 'Trust and access to justice' in OECD, *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust* (OECD Publishing, 2017) 141, 144-145.
- 7 Anthony Giddens, *Modernity and Self-Identity* (Polity Press, 1991) 19. See also Robert Shaw, *Trust in the Balance: Building Successful Organisations on Results, Integrity and Concern* (John Wiley, 1997).
- 8 See Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (The University of Chicago Press, 2015) 15.
- 9 Jonathan Soeharno, *The Integrity of the Judge: A Philosophical Inquiry* (Ashgate Publishing Company, 2009) 71.
- 10 Roger C Mayer, James H Davis and F David Schoorman, 'An Integrative Model of Organizational Trust' (1995) 20(3) *The Academy of Management Review* 709; F David Schoorman, Roger C Mayer and James H Davis, 'An Integrative Model of Organizational Trust: Past, Present and Future' 32(2) *The Academy of Management Review* 344. See generally Heather Jackson, 'Trust work: A strategy for building organisation-stakeholder trust?' in Katja Pelsmaekers, Geert Jacobs and Craig Rollo (eds), *Trust and Discourse: Organizational perspectives* (John Benjamins Publishing Co, 2014) 113, 138.
- 11 George W Dougherty, Stefanie A Lindquist and Mark D Bradbury, 'Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary' (2006) 38(3) *State and Local Government Review* 176, 178.
- 12 Mayer, Davis and Schoorman (n10) 179.
- 13 Margaret Levi and Laura Stoker, 'Political Trust and Trustworthiness' (2000) 3 *Annual Review of Political Science* 475, 476.
- 14 Peter H Russell, 'Conclusion' in Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 420, 431.
- 15 *Rev v Sussex Justices Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart).
- 16 Local Court of New South Wales, *Local Court of New South Wales Annual Review 2019* (Report, 2020) 8 <[https://localcourt.nsw.gov.au/content/dam/dcj/ctsdl/localcourt/documents/annual-reviews/Local\\_Court\\_Annual\\_Review\\_2019\\_v1\\_accessible.pdf](https://localcourt.nsw.gov.au/content/dam/dcj/ctsdl/localcourt/documents/annual-reviews/Local_Court_Annual_Review_2019_v1_accessible.pdf)>.
- 17 Ibid 2.
- 18 Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 76 *Australian Law Journal* 558, 560.
- 19 Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy in Australia: Democratic decline and renewal* (Democracy 2025, Report No 1, December 2018) 21 <<https://apo.org.au/sites/default/files/resource-files/2018-12/apo-nid208536.pdf>>.
- 20 Mark Evans et al, 'Political Trust and Democracy in Times of Coronavirus: Is Australia Still the Lucky Country?' (Democracy 2025, Report, 2020) 4 <<https://www.democracy2025.gov.au/documents/Is%20Australia%20still%20the%20lucky%20country.pdf>>.
- 21 Ibid. 54 per cent of participants trusted the federal government and the Australian public service.
- 22 See James L Gibson, 'Public Images and Understanding of Courts' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 828, 831.
- 23 Paul R Ward, 'Trust: What is it and why do we need it?' in Michael Hviid Jacobsen (ed), *Emotions, Everyday Life and Sociology* (Routledge, 2019) 13, 17.
- 24 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39 *Adelaide Law Review* 1, 5; Sharyn Roach Anleu and Kathy Mack, 'The Work of the Australian Judiciary: Public and Judicial Attitudes' (2010) 20 *Journal of Judicial Administration* 3, 3. See generally Craig Jones, Don Weatherburn and Katherine McFarlane, 'Public Confidence in the New South Wales Criminal Justice System' (August 2008) 118 *Crime and Justice Bulletin* 1, 6-7; 20.6 per cent of respondents to a survey conducted in New South Wales in 2007 indicated that 'personal experience' was the most influential source of information about the criminal justice system.
- 25 Ingrid Nielsen, Zoe Robinson and Russell Smyth, 'Keep Your (Horse) Hair On? Experimental Evidence on the Effect of Exposure to Legitimising Symbols on Diffuse Support for the High Court' (2020) 48(3) *Federal Law Review* 382, 385.
- 26 See generally Soeharno (n 8) 85-7.
- 27 Anleu and Mack (n 24) 3.
- 28 A R Blackshield, 'The Legitimacy and Authority of Judges' (1987) 10 *UNSW Law Journal* 155, 160.
- 29 Nielsen, Robinson and Smyth (n 25) 399.
- 30 Ibid 384 citing James Gibson and Gregory Caldeira, *Citizens, Courts and Confirmations: Positivity Theory and the Judgments of the American People* (Princeton University Press, 2009).
- 31 James L Gibson, Milton Lodge and Benjamin Woodson, 'Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority' (2014) *Law & Society Review* 837.
- 32 Edelman, 'Edelman Trust Barometer 2020', *Trust 2020* (Web Page, 20 February 2020) <<https://www.edelman.com.au/research/edelman-trust-barometer-2020>>.
- 33 42,000 viewers live-streamed the hearing in *George Pell v The Queen* [2019] VSCA 186: Supreme Court of Victoria, *Annual Report 2017-19* (Report, October 2019) 17. <<https://www.supremecourt.vic.gov.au/sites/default/files/2020-11/Supreme%20Court%20of%20Victoria%20202017-19%20Annual%20Report.pdf>>.
- 34 Soeharno (n 8) 34.
- 35 Ben Bradford, Jonathon Jackson and Mike Hough, 'Trust in Justice' in Eric M Uslaner (ed), *The Oxford Handbook of Social and Political Trust* (Oxford University Press, 2018) 14 <<https://eprints.bbk.ac.uk/id/eprint/16337/1/16337.pdf>>.
- 36 James Thomas, *Judicial Ethics in Australia* (LexisNexis Australia, 3<sup>rd</sup> ed, 2009) 12.
- 37 Soeharno (n 8) 78.
- 38 Carolo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press, 2002) 9.
- 39 Thomas (n 36) 11.
- 40 Ibid 8.
- 41 Graeme Williams, *A Short Book of Bad Judges* (Wildy, Simmonds & Hill Publishing, 2013) 71.
- 42 Ingrid Nielsen and Russell Smyth, 'What the Australian Public Knows About the High Court' (2019) 47(1) *Federal Law Review* 31.
- 43 Edelman, 'Edelman Trust Barometer 2020: Trust in Australia' (Report) 13 <[https://www.edelman.com.au/sites/g/files/aattus381/files/2020-02/2020%20Edelman%20Trust%20Barometer%20Australia\\_Media.pdf](https://www.edelman.com.au/sites/g/files/aattus381/files/2020-02/2020%20Edelman%20Trust%20Barometer%20Australia_Media.pdf)>.
- 44 Gleeson (n 18) 561.
- 45 See generally Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) <[https://humanrights.gov.au/sites/default/files/document/publication/ahr\\_csh\\_report\\_2020.pdf](https://humanrights.gov.au/sites/default/files/document/publication/ahr_csh_report_2020.pdf)>.
- 46 Victorian Legal Services Board and Commissioner, *Sexual Harassment in the Victorian Legal Sector* (2019) 18 <<https://lsbc.vic.gov.au/sites/default/files/2020-03/Sexual%20Harassment%20in%20the%20Victorian%20Legal%20Sector%20Report.pdf>>.
- 47 Ibid 19.
- 48 Ibid.
- 49 International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, 2019) 87.
- 50 See further Murray Gleeson, 'Bench and Bar' in Geoff Lindsay and Carol Webster (eds), *No mere mouthpiece: servants of all, yet of none* (LexisNexis Butterworths, 2002) 37, 39-40.
- 51 Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 5-6. See also Soeharno (n 8) 129.
- 52 See further T F Bathurst, 'Welcome Address to the 30<sup>th</sup> Anniversary of the Judicial Commission Reception' (Speech, 11 October 2017) 2 <[https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst\\_20181011.pdf](https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20181011.pdf)>.
- 53 Judicial Commission of New South Wales, 'About us' (Web Page) <<https://www.judcom.nsw.gov.au/about-the-commission/>>.
- 54 See Judicial Commission of New South Wales, 'Complaint statistics' (Web Page) <<https://www.judcom.nsw.gov.au/complaints/complaint-statistics/>>.
- 55 Chief Justice Allsop, 'Courts as (Living) Institutions and Workplaces' (Speech, 2019 Joint Federal & Supreme Court Conference, Hobart, 23 January 2019) <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allso-cj-20190123>>.
- 56 *Oaths Act 1900* (NSW) Fourth Schedule.
- 57 Sir Gerard Brennan, 'The Third Branch and the Fourth Estate' (Speech, Faculty of Law, University College Dublin, 22 April 1997) <[https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennan/brennan\\_j\\_english.htm](https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennan/brennan_j_english.htm)>.
- 58 Emily R Berthelot, Britanni A McNeal, Julie Marie Baldwin, 'Relationships between Agency-Specific Contact, Victimization Type, and Trust and Confidence in the Police and Courts' (2018) 43 *American Journal of Criminal Justice* 768, 786; Kenneth E Fernandez and Jason A Husser, 'Public Attitudes toward State Courts' in *Open Judicial Politics* (Oregon State University, 2020) <<https://open.oregonstate.edu/open-judicial-politics/chapter/fernandez/>>; George W Dougherty, Stefanie A Lindquist and Mark D Bradbury, 'Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary' (2006) 38(3) *State and Local Government Review* 176, 187; Tom R Tyler, David B Rottman, Alan J Tomkins, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Members Want from the Law and Legal Institutions?' (2001) 19(2) *Behavioural Sciences & the Law* 215; Ivan Y Sun and Yuning Wu, 'Citizens' perceptions of the courts: The impact of race, gender, and recent experience' (2006) 34(5) *Journal of Criminal Justice* 457; Centre for Justice Innovation, Building Trust: How our courts can improve the criminal court experience for Black, Asian, and Minority Ethnic defendants (Report, March 2017) <<https://justiceinnovation.org/sites/default/files/media/documents/2019-03/building-trust.pdf>>.
- 59 Elizabeth Moore, 'Public confidence in the New South Wales criminal justice system: 2019 update' (2020) 227 *Crime and Justice Bulletin* 1, 10.
- 60 Bruce Tranter and Kate Booth, 'Geographies of trust: Socio-spatial variegations of trust in insurance' (2019) 107 *Geoforum* 199, 200.
- 61 I note that levels of trust are not uniform within a community, including within Aboriginal and Torres Strait Islander communities.
- 62 Judicial Commission of New South Wales, *Equality before the Law Bench Book* (Online Resource) [2.2.2] <<https://www.judcom.nsw.gov.au/publications/benchbks/equality/section02.html#p2.2>>.
- 63 Law Council of Australia, *The Justice Project* (Final Report, August 2018) 29 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20-%20Final%20Report%20in%20full.pdf>>.
- 64 Judicial Council on Cultural Diversity, Submission No 120 to Productivity Commission, *Inquiry into Access to Justice Arrangements* (29 November 2013) 1.
- 65 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012) 23, 40 <<https://www.ag.gov.au/sites/default/files/2020-03/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>>.
- 66 See citations at footnote 24.
- 67 Law Council of Australia (n 63) 30.
- 68 Timothy L O'Brien, 'Racing justice: Mass incarceration and perceptions of courts' (2020) 90 *Social Science Research* 1, 3.
- 69 See Thalia Anthony, 'FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?', *The Conversation*, 6 June 2017 <<https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528>>. See also Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, March 2018).
- 70 @clnsw (Community Legal Centres NSW) (Twitter, 7 December 2019, 2:05pm AEST <<https://twitter.com/clnsw/status/1335782573562195970/photo/1>>).
- 71 Fernandez and Husser (n 58).
- 72 Law and Justice Foundation, *Legal needs of Indigenous people in Australia* (May 2013) 25 *Updating justice* 1, 3.
- 73 Indigenous Legal Needs Project, James Cook University, Submission No 105 to Productivity Commission, *Inquiry into Access to Justice Arrangements* (19 November 2013) 4-5.
- 74 See Productivity Commission, *Access to Justice Arrangements* (Report, 2014) vol 2, 782-3. See also Chris Cunneen and Melanie Schwartz, 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32(3) *UNSW Law Journal* 725, 744.
- 75 Indigenous Legal Needs Project (n 73) 3. See also Law Council of Australia (n 63) 20.
- 76 Law Council of Australia (n 63) 31.
- 77 Bradford, Jackson and Hough (n 35) 14.
- 78 Erika Rackley, *Women, Judging and the Judiciary* (Routledge, 2013) 23.
- 79 Guarnieri and Pederzoli (n 38) 24.
- 80 See further Rackley (n 78) 35.