



Intellectual Humility: A Necessary Precondition to Building Trust in Courts

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ABSTRACT

This article explores the role of intellectual humility as a necessary condition for building trust within public institutions, such as courts and tribunals. The article seeks to build a bridge between the external elements of accountability with the intention and conduct of the individuals who constitute and lead courts and tribunals.

By considering the recent approach of the High Court of Australia to allegations of sexual harassment by a judicial officer, the article reveals the ways in which the choices of individuals in responding to criticism that may threaten an institution can build or undermine trust in that institution. The article invites reflection on how individuals, including those who judge and assess the conduct of others, may engage in reflection to inform their approach to their functions today while remaining open to valid criticism now and in the future.

Public confidence has long been considered as essential to the legitimacy of judicial authority.¹ Yet, trust in public institutions is no longer a given. In the words of one (anonymous) judicial officer, 'you... have to earn respect'.²

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¹ K. Mack, S. Roach Anleu and J. Tutton, The Judiciary and the Public: Judicial Perceptions. *Adelaide Law Review* 39(1) p. 33; Chief Justice Murray Gleeson, Public Confidence in the Judiciary. *Australian Law Journal* 76(9) p. 558.

² Mack et al, supra note 1, p. 8.

The challenge of Australian courts and tribunals³ in building and maintaining public confidence, respect and trust has been a topic of academic and extra-judicial discussion since at least the turn of the century.⁴ This discussion has been pragmatic and action oriented, identifying the work that Australian courts and others can do to shape and enhance the public's understanding and appreciation of the work of Australian courts, their methods and their contributions to a well-functioning democratic society. The focus is on informing the public by publishing on websites general information about Australian courts, as well as judgments and summaries of judgments that may attract significant public interest; live streaming judgments; participating in open days; and presenting to schools, community groups and professional associations.⁵

While these actions have an external focus, they have required Australian courts to consider and reflect upon criticism from within and outside of the court about the ways in which Australian courts operate. Such reflections have engaged and challenged some of the principles, doctrines and philosophies that were previously seen as immutable or compelling a singular mode of operation, such as the notion that judges do not speak to the media. In the 20th century, it was rare for a judge to speak to the media. In the 21st century, court podcasts win awards.⁶

In this article, I argue that this transformation is possible only where an institution operates with intellectual humility. In this essay, I argue that intellectual humility is a necessary precondition to courts and tribunal building and maintaining trust with their communities. I use the case study of the High Court of Australia's response to allegations that a former justice engaged in sexual harassment to illustrate the role and necessity of intellectual humility in matters of trust.

TRUST AND COURTS – WHAT IS IT AND WHY IS IT IMPORTANT?

Trust is important for courts for a number of reasons. From an instrumentalist perspective, trust enhances compliance with the law, including the decisions and orders of the court. Trust is efficient, promoting 'self-regulation', whereby people

³ In this article, I use the word 'courts' to include both courts and tribunals. While they are constitutionally and operationally different, the challenges in building trust and the importance of intellectual humility are similar.

⁴ Gleeson, *supra* note 1; C. Bean, Is There a Crisis of Trust in Australia? in S. Wilson et al (eds.), *Australian Social Attitudes: The First Report*, UNSW Press, Sydney 2005, p. 122; J. Plunkett, The Role of the Attorney-General in Defending the Judiciary. *Journal of Judicial Administration* 19(3) p. 160; P. Fulton Hora, *Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System*, Government of South Australia, 2011; Mack et al, *supra* note 1; J. Johnston, *A History of Public Information Officers in Australian Courts: 25 Years of Assisting Public Perceptions and Understanding of the Administration of Justice (1993–2018)*, Australian Institute of Judicial Administration, 2019.

⁵ Mack et al, *supra* note 1, pp. 21–24.

⁶ In 2020, the Supreme Court of Victoria's podcast won a New York Festival Radio Gold Award in the Education category. 'Winners Gallery – New York Festivals', *New York Festivals Radio Awards* (2020) <<https://radio.newyorkfestivals.com/Winners/WinnerDetailsNew/b78ebcc2-123f-4784-9c19-1f6c059d44af>> [all internet URLs last accessed 18 October 2021].

comply with the law voluntarily, rather than through coercion, surveillance and intervention.⁷

Such voluntary compliance stems from an acceptance of the court's legitimacy, rendering compliance an obligation, rather than a matter of self-interest in avoiding punishment and other costs of non-compliance.⁸ Acceptance of the legitimacy of the courts similarly has both an instrumentalist and a normative purpose; it both increases compliance with the law, as well as providing judges and government more broadly with 'a normative (rather than merely prudential or consequential) justification for support [of courts]'.⁹ In short, trust in, and legitimacy of, courts are important to ensure that the public continues to support and submit to the roles and functions of the court in our society and democracy.¹⁰

Trust itself is a polysemous concept, with different interpretations shaped and influenced by the specific context and object of inquiry. Conceptions of trust generally involve considerations of reliance or vulnerability to the person or body being trusted.¹¹ That vulnerability is generally reflective of a difference in power, the cause of which may be many. Such differences in power are commonly attributable to differences in knowledge. This is commonly seen in professions, where the professional has specialised or superior knowledge or expertise, upon which the 'epistemologically disadvantaged' client or patient relies.¹²

In the case of courts, the vulnerability is multiple. The court exercises powers of the state, including coercive powers and power to determine parties' legal positions. In some jurisdictions, such as criminal law, child protection and family law, the powers are monopolistic, with parties having little choice in whether they participate in the court proceedings. In common with the legal profession more broadly, there is epistemological disadvantage, in respect of both the content and procedures of law, as well as the rituals and symbols through which the court expresses its values, history and purpose. Courts are confusing, hectic place for those who are outsiders or infrequent participants.

Given that trust involves an element of vulnerability to another person or body, a component of trust is a person's belief in the intentions and motives of the repository of trust. We trust people or organisations when 'we believe they have good intentions and will behave well towards us'.¹³ The latter and former are related, since we can only truly observe and know another's conduct, from which we draw inferences about their intentions. As such, the trust of citizens in courts and other entities in the legal system is 'primarily dependent on citizens' perceptions of... the extent to

⁷ T. R. Tyler and Y. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*, Russell Sage Foundation, New York 2002, p. xiii.

⁸ Ibid, p. xiv; M. Krygier, *The Rule of Law and State Legitimacy*, in: W. Sadursky et al (eds.) *Legitimacy: The State and Beyond*, Oxford University Press, Oxford 2019, p. 126.

⁹ Krygier, *supra* note 8, p. 108.

¹⁰ Gleeson, *supra* note 1.

¹¹ A. Jacovi et al, *Formalizing Trust in Artificial Intelligence: Prerequisites, Causes and Goals of Human Trust in AI*, *arXiv preprint arXiv:2010.07487*, 2020, p. 2.

¹² D. E. Wueste, *Trust Me, I'm a Professional: Exploring the Conditions and Implications of Trust for the Professions*, in: M. Schwartz and H. Harris (eds.), *Ethics, Values and Civil Society*, Emerald Group Publishing Limited, Bingley 2013, p. 3.

¹³ S. J. Sucher and S. Gupta, *Broken Trust*. *Harvard Business Review: The Big Idea*, July 2019, p. 2.

which institutions and organisations are thought to deliver procedural justice and be motivated by trustworthy motives – judgments that are, in turn, intertwined’.¹⁴ Courts have long recognised this relationship between motive and outcome, hence the oft quoted principle that ‘justice must not just be done but be seen to be done’.¹⁵

WHAT IS INTELLECTUAL HUMILITY?

Like trust, there are many definitions of intellectual humility, a concept that is distinguished from the religiously derived concept which involves ‘a low view of one’s accomplishments or self-worth’.¹⁶ I use the definition advanced by Tangney, who says that ‘humility is grounded in a willingness to acknowledge mistakes [and] intellectual openness’. The key elements of Tangney’s intellectual humility include ‘an ability to acknowledge one’s mistakes, imperfections, gaps in knowledge, and limitations... [and] openness to new ideas, contradictory information and advice’.¹⁷

In the context of institutions, intellectual humility involves a willingness to acknowledge mistakes, shortcomings and different views about the institution itself. It is directly relevant to the way in which institutions respond to criticism or complaints. People and institutions that are intellectually humble will ‘not be defensive when challenged... even when the critics are not authority figures’ and will be more open to acknowledging mistakes and shortcomings.¹⁸ Where an institution is criticised for causing harm in its operations or conduct, intellectual humility involves a subordination of any individual discomfort prompted by hearing the criticism in favour of identifying and taking action to reduce or eliminate any harm experienced by others.

INTELLECTUAL HUMILITY, JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

Intellectual humility can form a bridge between accountability and trust. Accountability has been recognised as one of the elements of institutional integrity, together with legality, fidelity to purpose and fidelity to public values.¹⁹ The principle that the judiciary is independent from government makes it difficult to identify a body or person to whom courts are accountable. While courts are accountable to the public in a broad sense, it is difficult to see the mechanism through which that accountability manifests.

One approach to the tension between judicial independence and judicial accountability has been an attempt to remove the problem by requiring courts and

¹⁴ Krygier, *supra* note 8, pp. 126–7.

¹⁵ *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256, p. 259.

¹⁶ M. Hannon, Intellectual Humility and the Curse of Knowledge, in: A. Tanesini and M. P. Lynch (eds.), *Polarisation, Arrogance, and Dogmatism: Philosophical Perspectives*, Taylor & Francis Group, London 2020, p. 106.

¹⁷ J. P. Tangney, Humility, in: C. R. Snyder and S. J. Lopez (eds.), *Handbook of Positive Psychology*, Oxford University Press, Oxford 2002, p. 413.

¹⁸ Hannon, *supra* note 16, p. 108.

¹⁹ L. Burton and G. Williams, The Integrity Function and ASIO’s Extraordinary Questioning and Detention Powers. *Monash University Law Review* 38(3) p. 24.

judges to 'be above criticism'.²⁰ The problem is that no one is above criticism. Everyone – even judges – make mistakes. No one – not even the judiciary – has a monopoly on life experiences, leading to real possibilities that our actions and conduct will be experienced in ways we did not anticipate or intend. The judiciary is increasingly aware of unconscious biases and the need for judges to become better practised at reflecting on their own 'unarticulated and unexamined values' and how they influence their actions and decisions.²¹ Taking an approach that a person must be 'above criticism' quickly becomes a foundation for defensiveness and avoiding criticism at all costs. The disastrous consequences of such an approach can be seen in the responses of institutions to child sex abuse, including denial, cover up and obfuscation.²²

The need for some tolerance in the standards expected of individual judges was recognised by Chief Justice Gleeson of the High Court of Australia, who argued that the public does not require courts to be perfect in order to have trust and confidence in them. His Honour suggested that public confidence in Australian courts recognises that the values of independence, impartiality, integrity and professionalism are pursued 'within the limits of ordinary human frailty'.²³

The tension between judicial independence and judicial accountability can be seen in the ongoing discussion about the appropriate way for courts to respond to criticism, especially criticism expressed through media channels. This discussion was prompted by the decline of the traditional role of the Attorney-General in 'defending the judiciary and their judgments against unjustified attack'.²⁴ Since the early 2000s, Australian courts have accepted that they can no longer rely on attorneys-general to defend them from public criticism.

Such acceptance, however, did not translate into an embrace of criticism or the media. Courts have generally been reticent to engage directly with criticism out of concern that direct engagement will result in allegations of apprehended or actual bias. The requirement that judges be free of actual or an apprehension of bias is recognised as 'vital to public confidence in the administration of justice'.²⁵

An appeal court found an apprehension of bias in the case of *Gaudie v Local Court (NSW)*²⁶ when a magistrate provided a media interview in order to respond to criticisms made by a solicitor from the Aboriginal Legal Service about the severity of sentences imposed on Aboriginal offenders compared to non-Aboriginal offenders. This resulted in the magistrate being prohibited from hearing the proceeding against the solicitor's client. Observers and commentators took the case as a lesson that courts should not engage directly with such criticism, preferring instead a passive approach to 'let

²⁰ A. Cooray, Standards of Judicial Behaviour and the Impact of Codes of Conduct, in: S. Shetreet and C. Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, Brill, Leiden 2011, p. 349.

²¹ Justice John Basten, Judicial Education on "Gender Awareness" in Australia. *International Journal of the Legal Profession* 22(2) pp. 160–162.

²² See e.g. K. McPhillips, Silence, Secrecy and Power: Understanding the Royal Commission Findings into the Failure of Religious Organisations to Protect Children. *Journal for the Academic Study of Religion* 31(3) pp. 135–136.

²³ Gleeson, *supra* note 1, p. 561.

²⁴ Justice Geoffrey L Davies, Judicial Reticence. *Journal of Judicial Administration* 8 p. 88.

²⁵ *Re Minister for Immigration and Multicultural Affairs; ex parte Epeabaka* (2001) 206 CLR 128 [12].

²⁶ [2013] NSWSC 1425; 235 A Crim R 98.

it pass' or 'raise above it'. Direct engagement was to be reserved for criticism that is so egregious and unfounded that it 'has the capacity to seriously undermine public confidence in... courts generally and ultimately the rule of law'.²⁷

An active approach to public engagement has generally been limited to 'awareness raising', whereby courts seek to inform the public about court processes as a form of immunisation or defence against future criticism.²⁸ While such an approach can be effective in the face of uninformed or misinformed criticism, it is less effective in the face of warranted or reasonable criticism.

The focus on the tension between judicial independence and judicial accountability appears irreconcilable when one focuses only on the external aspects of judicial accountability, such as reporting, judgment and consequences.²⁹ The twofold nature of judicial accountability advanced by McIntyre seeks to reconcile this tension by calling for 'an internalised ethical and aspiration conception' of judicial accountability.³⁰ The internal elements of McIntyre's concept of judicial accountability focuses on the individual judge's 'professional ethos', ensuring that justice is done.³¹ The external elements ensure that justice is seen to be done and reflects the accountability mechanisms familiar in many institutions, 'from informal censure to elaborate disciplinary procedures'. Working together, McIntyre argues that the internal and external elements promote both integrity and the appearance of it.³²

McIntyre also recognises that the split between the internal and external elements can result in a greater focus on appearances over actuality.³³ Intellectual humility may have a role to play in ensuring that the internal and external elements operate harmoniously. By taking complaints and criticisms seriously and acknowledging mistakes and shortcomings, an intellectually humble court can engage with external mechanisms such as disciplinary processes, without fearing that such engagement will create an appearance or perception that undermines perceptions of integrity. Intellectually humble courts are capable of recognising that an appearance without actuality is a shaky foundation upon which to build public confidence and trust.

Looking through the lens of intellectual humility, a further lesson to draw from *Gaudie* may be the pitfalls and challenges of a defensive approach. An intellectually humble approach may have seen the court take seriously the concerns of the solicitor from the Aboriginal Legal Service that court sentences were disproportionately harsh on Aboriginal offenders. The court could have conducted an inquiry or audit to ascertain if there was any basis to the concerns and engaged with the solicitor privately to understand better the basis for his concerns. Had such an approach been taken, engagement with the media about the criticisms may have been unnecessary.

27 Justice Robert Beech-Jones, *The Dogs Bark But the Caravan Rolls on: Extra Judicial Responses to Criticism* (at the Judicial Conference of Australia, Conference of South Australian Magistrates, 8 May 2017), p. 12 <https://www.qjoa.asn.au/wp-content/uploads/2017/07/P83_02_02-Extra-Judicial-Responses-to-Criticism-for-publication.pdf>.

28 Ibid, pp. 11–12, 16; Mack et al, *supra* note 1, pp. 18–19.

29 J. McIntyre, Chapter 13: Principles of Judicial Integrity and Accountability in: *The Judicial Function*, Springer, Singapore 2019, p. 234.

30 Ibid, pp. 235–241.

31 Ibid, p. 237.

32 Ibid, pp. 239–240.

33 Ibid, p. 240.

Alternatively, such engagement could have been conducted in a manner that built trust with the solicitor, Aboriginal people and the public more broadly by acknowledging the concerns, explaining the steps that the court had taken to understand the concerns and any actions that would be taken in the future.

The case of *Gaudie* occurred almost 15 years ago, at a time when Australian courts were grappling with its relationship with the media and public opinion and the realisation that attorneys-general could no longer be relied upon to come to the public defence of courts.³⁴ A more recent example of a court responding to criticism illustrates the ways in which intellectual humility can promote better outcomes for both court and complainant.

A CASE STUDY OF INTELLECTUAL HUMILITY – THE HIGH COURT’S APPROACH TO ALLEGATIONS OF SEXUAL HARASSMENT

BACKGROUND

In 2019, the High Court of Australia was advised of allegations that a former Justice of the High Court had sexually harassed a number of women who had been employed as his associates.³⁵ The allegations against the Honourable Dyson Heydon (Heydon) related to incidents which occurred while Heydon was a sitting member of the High Court. The allegations were made after Heydon had left the court, having reached the statutory age of retirement of 70 years of age. Heydon has denied ‘any allegation of sexual harassment or any offence’.³⁶

The allegations of sexual harassment were made by women formerly employed as Heydon’s associates. In the High Court, an associate to a justice performs legal research, tipstaff duties and administrative duties associated with the running of the justice’s chambers.³⁷ A justice and their associate spend significant amounts of time together. In addition to the long working hours of a court, the justice and their associate will travel and dine together when the court is on circuit. There can be expectations that the associate attends social functions to which the justice is invited. The result is a relationship that can be ‘both professional and deeply personal’.³⁸

High Court associates will generally be appointed in the early years of their legal career and sometimes immediately after completing university.³⁹ In contrast, High

³⁴ Plunkett, *supra* note 4.

³⁵ Chief Justice Susan Kiefel, Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia. High Court of Australia, 2020. <<https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>>.

³⁶ E. Byrne and M. Doran, ‘High Court Statement Reveals Investigation Findings of Sexual Harassment, Denied by Former High Court Judge Dyson Heydon’, ABC News, 22 June 2020. <<https://www.abc.net.au/news/2020-06-22/former-high-court-judge-sexually-harassed-several-associates/12381236>>.

³⁷ A. Leigh, Associates, in: M. Coper et al (eds.), *The Oxford Companion to the High Court of Australia*, Oxford University Press, 2001, p. 34.

³⁸ G. Appleby, Australia Urgently Needs an Independent Body to Hold Powerful Judges to Account, *The Conversation*, 24 June 2020 <<https://theconversation.com/australia-urgently-needs-an-independent-body-to-hold-powerful-judges-to-account-141272>>.

³⁹ A. Leigh, Behind the Bench: Associates in the High Court of Australia. *Alternative Law Journal* 25(6) p. 291.

Court justices are in the apex of their career and ‘occupy an extraordinary, status-based position within the legal profession’.⁴⁰

Each Justice of the High Court holds their own commission as a judicial officer.⁴¹ While the Chief Justice is responsible for the leadership and administration of the High Court, the role is considered one as being ‘first among equals’.⁴² Significantly, the Chief Justice is *not* the employer of other High Court justices and has no power to remove a justice from office.⁴³ The only body with that power is the Australian Parliament and is limited to the grounds of ‘proved misbehaviour or incapacity’.⁴⁴

There is no formal process to determine misbehaviour or incapacity on the part of a High Court justice. Further, there is no formal complaints process in respect of High Court justices. The High Court is expressly excluded from the *Judicial Complaints Act 2012* (Cth), which provides for heads of federal courts to seek assistance in investigating complaints and empowers them to take steps to maintain public confidence in the court, such as temporarily restricting the judge to non-sitting duties.⁴⁵ This leaves complainants with no clear process for raising a complaint with the High Court or understanding of how any such complaint will be considered or resolved.

Understood through the workplace or ‘organisational’ model, sexual harassment can be seen as the ‘result of an exploitative, unequal power relationship within the workforce’.⁴⁶ Sexual harassment is also understood to have a gender element and, from a feminist perspective, is explained as ‘the outcome of patriarchal systems that enable men to exercise sexual power to assert and maintain male dominance’.⁴⁷

As an appellate court, the High Court is regularly called upon to hear disputes of family or gendered violence and workplace bullying and harassment, some of which could be said to arise out of ‘exploitative, unequal power relationships within the workforce’ and ‘patriarchal systems’ that enable or tolerate certain conduct by men. During Heydon’s tenure, the High Court heard a matter involving questions about the rules of evidence in criminal trials involving allegations of sexual offending by a male medical practitioner against female patients.⁴⁸

⁴⁰ Appleby, *supra* note 38.

⁴¹ Chief Justice David Malcolm, Role of the Chief Justice (at the Lunch with the Press, Law Week 2004, Perth, 5 May 2004) p. 2. <https://www.supremecourt.wa.gov.au/_files/Law%20Society%20Press%20Lunch%205%20May%2004.pdf>.

⁴² Malcolm, *supra* note 41; Sir Anthony Mason, Chief Justice, role of, in: M. Coper et al (eds.), *The Oxford Companion to the High Court of Australia*, Oxford University Press, 2001, p. 90.

⁴³ Mason, *supra* note 42.

⁴⁴ *Australian Constitution* s 72(ii); T. Blackshield, Removal of Justices, in: M. Coper et al (eds.), *The Oxford Companion to the High Court of Australia*, Oxford University Press, 2001, p. 594.

⁴⁵ G. Appleby and A. Blackham, The Shadow of the Court: The Growing Imperative to Reform Ethical Regulation of Former Judges. *International & Comparative Law Quarterly* 67(3) p. 514.

⁴⁶ J. Wynen, Sexual Harassment: The Nexus Between Gender and Workplace Authority: Evidence from the Australian Public Service. *Australian Journal of Public Administration* 67(3) p. 346.

⁴⁷ *Ibid.*

⁴⁸ *Stubbley v Western Australia* (2011) 242 CLR 374, discussed in J. Gans, The Enemy Within. *Inside Story*, 26 June 2020. <<https://insidestory.org.au/the-enemy-within-jeremy-gans/>>.

The Heydon allegations therefore represented a significant challenge to the integrity of the court and public trust in the court. Parties could be expected to be less likely to accept or trust judgments in matters involving unequal power relationships or gendered violence or discrimination more broadly if the court's own handling of sexual harassment allegations is seen as deficient or departing from the standards applicable to other organisations.

THE HIGH COURT'S APPROACH TO THE ALLEGATIONS

Upon receiving the allegations, the Chief Justice of the High Court commissioned an independent investigation by Dr Vivienne Thom AM, a former inspector-general of intelligence and security. The investigation found that six former associates were harassed by Heydon. The High Court apologised to the six women, which in some instances was delivered in person by the Chief Justice. In making the apology, the Court acknowledged the difficulty in coming forward and that the complainant's accounts of their experiences 'have been believed'. The Court also accepted the six recommendations made in the investigation, which related to court processes and staffing to provide a respectful workplace and avenues of complaint if such conduct occurred in the future. The Court also made a public statement about the allegations, investigation and the court's response.⁴⁹

The Chief Justice's approach reflects an orthodox approach to the external mechanisms of judicial accountability identified by McIntyre, with an investigation, report containing findings and recommendations and the Court's acceptance of those recommendations. Yet, the choices of the Chief Justice were arguably only made possible through intellectual humility. At every decision point, the Chief Justice chose the intellectually humble approach, rather than one of defensiveness which sought to immunise the court from criticism by muting criticism or setting high thresholds for such criticism to be sustained.

The Chief Justice took ownership of the allegations and the need to respond to them, even though she was not Chief Justice at the time of the alleged conduct and neither Heydon nor the complainants were still with the Court. The complaints and complainants were taken seriously, even though there was arguably the largest of power differences between the complainants and the subject of the complaints.

The lack of an established process for such complaints to be made or investigated was not treated as a barrier to considering the complaints. The Chief Justice initiated an investigative process, making decisions about the nature of the inquiry to be conducted and the investigator to conduct the inquiry. The Chief Justice chose to approach the inquiry from the perspective of workplace safety, rather than as a matter of criminal conduct.

By framing the issue as one of workplace safety, the investigation had greater scope to consider the experiences of the complainants and the context of the conduct than may have been possible had the investigation proceeded purely on the basis of inquiring into whether any criminal conduct had occurred. A workplace safety investigation considers conduct of both individuals and institutions. By adopting this approach, the Chief Justice opened the court to an examination of its possible failings and shortcomings and acknowledged that the Court had obligations to the complainants. The Chief Justice retained an independent investigator with significant

⁴⁹ Kiefel, *supra* note 35.

experience in conducting investigations in the workplace. Dr Thom's experience in investigating matters of integrity also reflected that the Chief Justice recognised that conduct could be a breach of integrity and serious, even if it were not a crime.

Of most significance to the issue of trust was the Chief Justice's decision to make a public statement about the allegations, investigation and the Court's response. By issuing a media release, the Chief justice brought into public view that which was subsequently described as an "'open secret" in legal and judicial circles'.⁵⁰ On one view, it was a potentially risky move, as it brought to public awareness an issue that presented a significant challenge to public trust in the court. The courage to expose the Court's shortcomings and open the Court to judgment was an act of intellectual humility. Furthermore, it recognised the ongoing maturation of courts' engagement with the media and the public, which recognises that 'most people engage with the courts only indirectly via media reports'⁵¹ and that 'the media plays an important intermediary role in providing access to the court's work'.⁵²

The language used by the Chief Justice attracted significant attention. In recounting the findings of the investigation, the Chief Justice stated: 'We're ashamed that this could have happened at the High Court of Australia'.⁵³ This choice of language was noted by legal professionals as 'powerful and important' and contrasted with the language traditionally used by institutions to distance themselves from accusations and perpetrators of sexual harassment.⁵⁴ It is arguably an example of intellectual humility *par excellence*, by incorporating a humility that is not only acknowledged, but felt.

The ways in which the Chief Justice's approach built public trust can be seen by considering the counterfactual; that is, the ways in which the court could have responded in a way that would have eroded public trust.

Responses which may have been expected to corrode or undermine trust could have included dismissing the claims without investigation on the basis that the conduct was historical and, since the complainants and Heydon were no longer with the court, there was no apparent remedy for any wrongdoing that might be found. Such a response would have left a cloud of suspicion without resolution. It would have undermined the trust current and future complainants in the court's willingness and ability to handle complaints. The court could have responded defensively, requiring the complainants to present evidence additional to their own accounts before the court would take the complaint seriously. Such an approach would have ignored the significant experience of women, with surveys revealing that one third of women report experiencing sexual harassment in the workplace in the five years to 2018, the majority of which are not witnessed.⁵⁵

⁵⁰ M. Grattan, High Court Apologises for Dyson Heydon's Sexual Harassment of Six Associates. *The Conversation* <<http://theconversation.com/high-court-apologises-for-dyson-heydons-sexual-harassment-of-six-associates-141215>>.

⁵¹ Mack et al, *supra* note 1, p. 5.

⁵² Ibid, p. 7.

⁵³ Kiefel, *supra* note 35.

⁵⁴ R. Doyle, Heydon Case: The Word "ashamed" Hit Me between the Eyes. *The Sydney Morning Herald*, 24 June 2020. <<https://www.smh.com.au/national/heydon-case-the-word-ashamed-hit-me-between-the-eyes-20200624-p555sn.html>> ('Heydon Case').

⁵⁵ Australian Human Rights Commission, *Everyone's Business: 2018 Sexual Harassment Survey*. Australian Human Rights Commission, 2018, p. 48.

The Court could also have approached the investigation in an overly narrow manner, thereby ignored some of the broader concerns and objectives of the complainants. The Court could have restricted consideration to whether criminal conduct had occurred and/or ignored the broader context of the court environment and how it may have contributed to the opportunity for such conduct to occur or inhibit complaint about such conduct. Such an approach would have undermined trust by focusing on the actions of the individual and sanctioning past conduct, without providing any confidence that such conduct would not occur in the future or, if it did, that it would be easier to raise concerns.

Contrary to the view that the court must be 'above criticism', the court's approach builds trust because it demonstrated that the court is not perfect and does not pretend to be so. The Court has demonstrated that it can be open to hearing criticism of the most serious nature and dealing with it in a way that renders the court vulnerable to public judgment. It has committed to improvements for the future, including establishing a clear pathway for future complaints. In short, it has demonstrated integrity between its expectations of other employers and its own conduct.

LESSONS FOR THE FUTURE

The High Court's approach to the Heydon allegations provide useful indicators for courts and organisations in responding to criticism in a way that builds trust.

COURTS NEED INTELLECTUAL HUMILITY – AND A COMPLAINTS PROCEDURE

Courts need to be open to criticism and complaints being made. The position that the appropriate response to criticism need be one of defence is no longer sustainable.⁵⁶ Courts need to have processes and procedures by which complaints can be received and considered. The High Court's response to the Heydon allegations was arguably more challenging than necessary due to the absence of an existing process for receiving and investigating complaints. As recommended by Dr Thom, the Court has agreed to establish such procedures for the future.

The need for a court to have complaints procedures and intellectual humility in receiving complaints is not relieved in jurisdictions in which governments have established independent commissions of inquiry to receive and handle complaints about judicial conduct.⁵⁷ Such commissions do not receive every single complaint about a court. Complaints about court processes and approaches that fall short of misconduct are unlikely to fall within the jurisdiction of a judicial commission. At the end of an investigation, a commission will generally produce a report, to which a court must respond. Where a court has not been involved in setting up the process of investigation, it has a choice about how it will respond to the findings and recommendations arising from that investigation. It can be defensive, seeking to find holes or criticisms in the process, or intellectually humble, remaining open to the possibility of gaps, imperfections and deficiencies in its own processes and conduct.

⁵⁶ Plunkett, *supra* note 4, p. 162.

⁵⁷ For example, the Judicial Commission of Victoria has been established to investigate complaints about the conduct or capacity of judicial officers and members of the Victorian Civil and Administrative Tribunal: see e.g. <<https://www.judicialcommission.vic.gov.au/>>.

A court establishing procedures for receiving and investigating complaints will first need to determine which types of complaints will be entertained. Complaints can be about the conduct of individual judges (such as the allegations against Heydon) or systemic issues affecting the court as a whole (such as the allegations of biased sentencing alleged in *Gaudie*). Complaints could be about the administrative processes of a court. It is entirely foreseeable that aggrieved litigants may seek to complain about specific decisions of the court, but less likely that a court would entertain such complaints, especially if there are rights to appeal.

Given the resources involved in handling complaints, it can be tempting to limit complaints to those that involve specific conduct that is clearly inconsistent with judicial conduct, such as unlawful conduct or sexual harassment. However, a limited approach runs the risk that a court misses information that would facilitate and enable a proactive and preventative approach. Preventative approaches are always preferable because people would prefer that the incidents not occur at all – especially those who are the victim of such incidents.

A preventative approach arguably requires a greater degree of intellectual humility, as there is more room for dispute and criticism about practices that are not clearly misconduct, but which some people experience as harmful, offensive or as prejudice. An intellectually humble court will be open to the discomfort and lack of certainty involved in engaging with complaints that not only require the ascertainment of facts, but a revisiting of worldviews. An intellectually humble court entertains criticisms of sexism, racism, ableism and colonialism without needing to evidence that such worldviews have manifested in individually discriminatory, prejudicial or harassing behaviour. A court that is willing to continuously improve the experiences of all citizens, not just in process, but in justice, is more likely to build, maintain and have the trust and confidence of all of citizens.

Having decided which complaints to receive, a court will then need to determine how complaints will be handled. It is open to a court to have different approaches for different types of complaints. For example, a court may decide to restrict investigations to complaints about the conduct of individual judges made by a person directly affected by the conduct where the complaint contains an appropriate level of detail about the conduct alleged. A court may decide that concerns about systemic issues, such as the effect of court practices on marginalised members of the community, are best dealt with by internal audits or reflective practice.

Where a court decides that a class of complaints warrants investigations, it will be necessary to consider the scope and framing of the investigation. As the High Court's response to the Heydon allegations demonstrates, complaints of individual misconduct can be considered as matters of criminal conduct or as matters of appropriate workplace behaviour. The scope and subject of an investigation can be limited to ascertaining the facts of an alleged incident or can include consideration of organisational or systemic factors that contributed to, or enabled, the alleged incident. A court's complaints process needs to address the role of complainants and subjects of complaints within an investigation. Decisions on these matters are ultimately a statement by a court about what it values and the matters on which it is open to criticism and alternative views.

A court may also wish to consider how it will deal with complaints that are unmeritorious, misinformed or motivated by bad faith. For example, a court may choose to adopt an educative approach of explaining judicial methods in response to criticism or complaints assessed as mis- or ill-informed. For complaints and criticism that appear to be motivated by sensationalism or malice, a passive 'let it pass' approach may be considered appropriate. A court may choose a direct, even defensive response, for personally denigrating criticism that, on its face, repudiates the role of courts in our democracy.⁵⁸

Having decided the types of complaints a court will entertain and how such complaints will be considered, a court should publish information about its complaints processes. Such information should be sufficient to inform the public about how complaints can be made and to manage public expectations about a court's response to complaints.

A CLOSING OBSERVATION ON HUMILITY

Trust involves vulnerability. Institutions that seek public trust can build trust by demonstrating a different form of vulnerability by exercising intellectual humility, even where it may expose the institution to criticism and judgment.

Humility is a practice and one that needs to be exercised regularly and in advance of the crisis that calls for a humble response. Reflective practice⁵⁹ and regularly asking for feedback can create and support cultures of intellectual humility.

On a personal note, I find statues an interesting way of practising intellectual humility. In Melbourne, Victoria, there are several statues that commemorate the women and children who were the subject of forced adoptions. Forced adoptions occurred in Australia between the late 1950s and the mid-1970s and involved children 'given up for adoption because their parents, particularly their mothers, were forced to relinquish them or faced circumstances in which they were left with no other choice'.⁶⁰ One of the statues recognising forced adoptions can be found at the end of St Andrew's Place, just outside the offices of the Victorian Government. The statue, titled 'Taken, Not Given'⁶¹ involves a young woman, holding out her empty arms as though she is carrying something. A toddler sits by the young woman's feet, close to her, but looking away, unaware of the young woman's presence. Just in front of the young woman, but out of reach, is a young girl, holding flowers and looking off into the distance.

I often walk past the statue and reflect on the reality that the policies that enabled and condoned forced adoptions were administered by people like me – public servants and lawyers – and people whom I admire – judges and ministers. No doubt they were all good people and thought they were doing the right thing for mothers and children

⁵⁸ Beech-Jones, *supra* note 30, p. 10; G. Reinhardt, Symposium: Challenges of Social Media for Courts & Tribunals. *Australian Law Journal* 90 p. 543.

⁵⁹ M. Leering, Conceptualizing Reflective Practice for Legal Professionals. *Journal of Law and Social Policy* 23 pp. 97–99.

⁶⁰ Senate Standing Committee on Community Affairs Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices*. (Report, 29 February 2012. Paragraphs [1.18], [1.20].

⁶¹ Unveiling of the Memorial Statue in Melbourne 26th October 2018. *ARMS Victoria*, 28 October 2018. <<http://www.armsvic.org.au/blog/unveiling-of-the-memorial-statue-in-melbourne-26th-october-2018>>.

when they administered the laws and policies that enabled and permitted forced adoption. We now know that forced adoption caused significant harm and pain, some of which continues to this day. When I walk past the statue, I reflect – what might I be doing in my career that I think is right, proper and lawful and which may, one day, be seen in a different light? How will I respond? Will I seek to defend my actions by reference to what I thought was right at the time? Or will I be open to the views and experiences of those who are different to me, had less power than me, discomfort me? I hope – more than trust – that my response will be one deserving of public trust and confidence.

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The author has no competing interests to declare.

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