



Foreword by the Editors

KATHY LASTER 

ANNE WALLACE 

**Author affiliations can be found in the back matter of this article*

PROFESSIONAL ARTICLE



CORRESPONDING AUTHOR:

Kathy Laster

Former Director, Sir
Zelman Cowen Centre
(SZCC), Victoria University,
Australia; Lead, SZCC's
Ngarnga Nanggit 'Wisdom
of the Elders' project,
Australia

kathy.laster@vu.edu.au

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Machiavelli cautioned his intended protagonist in *The Prince* that, 'it is much safer to be feared than loved'. That advice might work well for a despot, but for quite some time now, democratic governments and institutions have sought, if not to be loved, then to at least to be respected or, as we explore in this special issue, to be *trusted* by the populations they serve.

The articles in this special issue explore the nature and role of trust in democratic institutions, particularly the courts. The collection grew out of a (virtual) Symposium on Trust in Courts hosted by the Sir Zelman Cowen Centre at Victoria University, Melbourne, Australia in early 2019, just as the COVID-19 pandemic was beginning to take hold of the world.

Australia is the case study for this collection but the themes and strategies should resonate across jurisdictions far from 'la fine del mondo'. Australia has a stable political and legal system, with a steady baseline of relatively high levels of trust in courts. Judges also enjoy a high status as lawmakers in their own right under the common law system. Australian judges may have their individual lapses, but thus far, Australian courts have avoided extreme scandals. Similarly, there is no evidence of widespread corruption anywhere in the hierarchy, nor are our judges appointed through a highly politicized public system, the like of which tends to polarize populaces. Australia's juridical blandness provides a useful vantage point from which to examine trust in courts without the distortions of jurisdiction specific historical-cultural overlays.

The contributors in this special issue address key questions: 'Why does trust matter for courts?', 'How do we define the elusive element we call trust?' and 'How do we measure it?' And finally, in different ways, the authors tackle the pragmatic implications of these questions by exploring 'How can courts build and sustain the vital social elixir of trust?'

WHY TRUST IN COURTS MATTERS

After the experience of the global pandemic it seems axiomatic that trust is essential. Trust in experts, science, health care systems and in politicians has been sorely tested over the last two years. As we have seen, a loss of public trust has a profoundly adverse impact on all societies. In less graphic ways, trust in legal institutions, particularly the courts, is part of the same endangered democratic ecosystem.

Trust in courts is important, according to our authors, for a mixture of ideological, normative and instrumental reasons which are not mutually exclusive.

The legitimate exercise of power by the courts is universally accepted as a central tenet of the rule of law and thus a vital component of both democratic theory and practice. Citizens who have confidence in their courts are well disposed to obey the law and to respect the decisions of courts. Conversely, a lack of trust in courts can lead to various forms of lawlessness, including failure to report crime or unwillingness to participate in legal proceedings and, in extreme cases, can even prompt citizens to take matters into their own hands - evidenced by the insurrection at the US Capitol in the wake of Trump's 2020 Presidential election loss. This kind of complete disillusionment with key institutions is what Valerie Braithwaite terms 'dismissive defiance'.

Katie Miller contends that institutions that enjoy the trust of their communities are also more efficient. Respect for law and the courts promotes self-regulation and voluntary compliance, minimising the need for surveillance and coercive (and expensive) state interventions such as investment in punishment.

In the sentencing context, Arie Freiberg maintains that penal populism, a largely media inspired perception that judges' sentencing practices are 'too soft' or 'out of touch', can lead to legislative intervention to curtail judicial discretion. This not only leads to less effective sentencing of individual offenders, but also undermines the independence of the judiciary. The delicate balance of power between the executive, legislature and judiciary, a cornerstone of the Westminster system of democratic government, is thereby compromised.

In various ways, our contributors urge courts to adopt a strategic approach to building and maintaining community trust not just for themselves but also for the good of the wider polity.

But what is this fragile concept of trust and how do we know when we 'have it' or are 'losing it'?

DEFINING TRUST

Like 'motherhood', 'trust,' as Katie Miller observes, is a polysemous concept with layered meanings. Its definition and interpretation is influenced by the context and the purpose of inquiry.

There are varying disciplinary definitions of trust but the contributors to this collection apply that of a leading interdisciplinary social scientist in this field, Valerie Braithwaite, who shaped the discussions at the Symposium. When we trust, according to Braithwaite, 'we place our well-being... in the hands of another...in the belief that one course of action is preferable to other options, and that the preferable course of action will be followed by the other party.' The decision or behaviour is grounded in 'trust norms' or, 'beliefs held by individuals, shared widely across society, about the conditions necessary if trust is to be placed in other persons, organisations or institutions.'

The trustor, according to Braithwaite, bequeaths their vulnerability as a 'gift' to another on the basis of their positive expectation that the future intention/behaviour/actions/decisions of that other person or institution towards them will be the least harmful to the trustor's well-being, ideally even beneficial but, at the very least, well-intentioned.

Arie Freiberg summarizes trust as having both performance and competence elements as well as a relational dimension underscored by respect and concern, openness, accountability, transparency and independence on the part of the 'entrusted' individual or institution. Anne Wallace and Jane Goodman-Delahunty talk of the trustor having confidence in the ability, benevolence and integrity of the trusted decision maker or body. Trust is a very tall (and risky) order.

But trust, as Wallace and Goodman-Delahunty contend, is not an absolute but rather a relative and variable concept. It is best conceived of as spectrum which includes related concepts such as 'confidence' which they hold is the institutional or organisational manifestation of what, at the interpersonal level, we term trust.

Defining trust and its constituent elements allows us to measure and evaluate the level of trust across time and space. We can also begin to make strategic decisions about how we maintain and grow trust in the courts.

As a number of the authors observe, our current methods for measuring trust are far from adequate. The most ubiquitous approach is via surveys; often using broadly based questions and a comparative approach. These approaches, while appealing on cost grounds, can be quite difficult to extract meaningful results from, as Wallace and Goodman-Delahunty point out.

Marcia Neave notes the methodological double bind - the instrument itself forces respondents to form an opinion about something they probably haven't experienced firsthand and don't actually know much about. And, as Freiberg contends, aggregate trust scores about sentencing practices might be politically persuasive but are unreliable. Public views are far more complex and nuanced, influenced by a host of factors including the choice of information source, both public and social, and individuals' personal (or vicarious) experiences of the criminal justice system as victim, juror or witness as well as their socio economic status. In this delicate and volatile area, opinions about trust in the courts cannot be measured in the simplistic way in which we might gauge the popularity of say, a rock star or celebrity.

Building on approaches used in some court survey instruments, and in measuring trust in other parts of the justice system, Wallace and Goodman-Delahunty propose measures grounded in procedural justice theory which shift the focus away from responses based on broad trust norms to a more granulated approach based on behaviour and experience. They suggest that the principal components of procedural justice i.e. 'trust', 'voice', 'neutrality' and 'respect' are a better framework. They eschew a 'one size fits all' approach preferring to survey particular populations with significant contextual, including demographic, information about the respondents as well as their actual experience of particular jurisdictions as part of the data set. These findings would allow us to test and interpret movements in perceived levels of trust in particular jurisdictions, between different categories of court users, and to make more meaningful comparisons. Such richer data sets can also assist courts to devise more successful trust building interventions.

BUILDING AND SUSTAINING TRUST

All the authors engage with trust and related theories but their contributions are also pragmatic and practical, sharing views on what works and what innovations might be borrowed from other contexts to help build trust in courts.

Courts are of course already actively engaged with the publics they serve. Things have improved markedly since the days when judicial independence was interpreted as not only requiring judges and courts to remain aloof from the litigants appearing before them, but also from the public more broadly. These days, as many of our authors observe, courts in Australia are keen to engage with the community in a variety ways including open days at courts and speaking engagements for schools and other groups, as well as through more formal means such as the appointment of media liaison officers in courts, the publication of judgements, live streaming of cases, and in one instance, developing a podcast featuring conversations with judges on diverse topics. But our authors urge more – especially a systematic rather than ad hoc approach to trust building endeavours. Both Braithwaite and Neave, for instance, contend that the threat and promise is that good experiences in one jurisdiction 'rub off' on each other but correspondingly, bad individual experiences taint impressions of the courts and the legal system as a whole.

Some of the suggestions advanced in the papers include a fundamental shift in the values and responses of courts to criticism. Miller uses a complaint of sexual harassment against a former High Court justice to illustrate the benefits of courts demonstrating 'intellectual humility' in dealing with inevitable mistakes and social missteps. As Braithwaite observes, questioning and responsiveness to criticism are welcome forms of 'resistant trust' which supports reform and continuous improvement and actually enhances trust in the integrity of our institutions.

One solution, as Ingo Karpen and Melis Senova propose, is to see courts, and the experience of court users, holistically. Every 'touchpoint', from the summons to appear to the physical environment inside and outside of the courtroom, creates an opportunity to build or lose trust. Human centred design, Karpen and Senova contend, recognises and respects that co-designed efforts often lead to more responsive, innovative and practical outcomes. Like Miller, this approach requires courts to cast off traditional attitudes and ways of doing things. Prioritizing the experiences of people means displacing the long held belief in the primacy of procedural and technological considerations above the human and humane considerations of the court experience for users.

Neave outlines the methods developed by Royal Commissions, and notes that these measures can be much more sensitive and attuned to the sensibilities of people who are vulnerable and often traumatised.

Freiberg's experience of the work of the Sentencing Advisory Council is that much can be done to alleviate the public's 'information deficit', not just through the provision of accurate, authoritative and transparent data but also through experiential approaches which invite the public to experience the challenges of sentencing for themselves.

Both Neave and Freiberg recognise that the wider public policy shift away from organisational and professional paternalism to collaborative, participatory engagement with the public as full partners is a more promising way of achieving positive interactions and promoting trust.

CONCLUSION

As many of our contributors observe, there are no silver bullets. Trust is fragile and hard won. As Kathy Laster's account of Francis Fukuyama's analysis of the economic impact of trust demonstrates, trust is the 'social glue' of social capital which in turn determines the fortunes of not only economies but vital institutions like the courts.

But, at time when the legitimacy of, and confidence in, the legal system has been caught up in the crisis of public trust in professionals, institutions and systems, public confidence can no longer be taken for granted. For those who administer courts and those who serve on them, the task of building and maintaining trust is now more critical than ever. It is our hope that the contributions in this special issue will make a thoughtful and constructive contribution to advancing that important work.

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COMPETING INTERESTS

The authors have no competing interests to declare.

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AUTHOR INFORMATION

Professor Kathy Laster is the former Director of the Sir Zelman Cowen Centre (SZCC), Victoria University, and currently leads the SZCC's Ngarnga Nanggit 'Wisdom of the Elders' project, focussed on the history of Victoria's indigenous sentencing courts. Kathy has held senior academic positions in a number of Australian universities and has also served in leadership roles in the public, philanthropic and government sectors. Her expertise includes the fields of criminology, legal history and gender and multiculturalism in relation to the law. In her role as Director, she created the SZCC's Courts and Tribunals Academy, which has run a series of successful of thought leadership and professional development events for the courts and the legal sector in Australia. kathy.laster@vu.edu.au

Dr Anne Wallace is an Adjunct Professor with the Zelman Cowen Centre at Victoria University and with Law Trobe University Law School in Melbourne. Anne has a lengthy record of research in the areas of judicial and court administration. She has specialised in the study of the impact of information and communications technology on justice processes, as well as exploring aspects of court management and the interactions between courts and their users. Anne also has a long-standing involvement with several programs directed to improving the experiences of Aboriginal and Torres Strait Islander Australians in the court system, and has served on several working groups for Australia's Judicial Council on Cultural Diversity. anne.wallace@vu.edu.au

AUTHOR AFFILIATIONS

Kathy Laster  orcid.org/0000-0001-7041-5955

Former Director, Sir Zelman Cowen Centre (SZCC), Victoria University, Australia; Lead, SZCC's Ngarnga Nanggit 'Wisdom of the Elders' project, Australia

Anne Wallace  orcid.org/0000-0002-3825-9558

Adjunct Professor with the Zelman Cowen Centre at Victoria University, Australia; Law Trobe University Law School in Melbourne, Australia

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