



We're All In This Together

Civility and Institutional Trust

Australian Judicial Officers Association Colloquium

Perth

The Honourable Justice Peter Quinlan
Chief Justice of Western Australia

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On 26 July this year, in recognition of its 50th anniversary, radio Triple J broadcast the result of a nationwide poll to identify the Hottest 100 Australian Songs. Over 2,650,000 votes were cast in the poll. Ranked at number 83 was the 1998 single *Cigarettes Will Kill You*, by the *enfant terrible* of the late 1990s indie scene, Ben Lee. It was Ben Lee's only entry in the Hottest 100 Australian Songs. Which is a shame, because it was another single released by Ben Lee, in 2006, that provided the title of my remarks this afternoon: *We're All In This Together*.

It was not, however, that song that provided the inspiration for these remarks. That inspiration was provided by a speech delivered at this very conference in October 2007, the year after the release of *We're All In This Together*. That speech was delivered by the then President of the New South Wales Court of Appeal, the Hon Justice Keith Mason. The title of the speech was '*Throwing Stones: A cost/benefit analysis of judges being offensive to each other*'.²

Throwing Stones caused quite an impact when it was first presented; an impact that spread well beyond the membership of this Association, then known as the Judicial Conference of Australia. I am sure that many of you in this room today will remember the speech, notwithstanding that few (if any) of us were judicial officers in 2007. When I mentioned to a number of colleagues and former colleagues that I was going to speak this afternoon on a topic that was the subject of a speech at this very conference approximately 20 years ago, more than one person immediately said, 'Oh, you mean the speech by Keith Mason'.

The impact of *Throwing Stones* at the time can, I think, be attributed to a number of factors.

First, it dealt with a topic that had not previously been addressed in public in this country before (although it must be said that judges being offensive to one another had long been a popular source of Bar common room gossip and *schadenfreude*). Justice Mason himself observed that he was unaware of any previous writing on the topic in Australia. To address the issue in public was, therefore, to some extent, breaking an unspoken agreement that such matters were best not aired in public, and so for that reason the speech attracted particular attention.

Secondly, the context in which *Throwing Stones* was delivered gave it a particular resonance in judicial, legal and wider circles. No one could fail to notice that Justice Mason, together with colleagues on the New South Wales Court of Appeal, had been the subject of some rather sustained criticism by the High Court of Australia in a significant decision delivered only months earlier. His Honour alluded to this context when he referred to the chosen title 'Throwing Stones' as a 'double entendre'. The double entendre lay in the proverb that persons in glass houses should not throw stones, with Justice Mason observing that he had 'written or joined in judgments offending the standards that I now propound', a matter which his Honour said was cause for regret.³ That acknowledgement, of course, made the speech all the more powerful; for it made it a call for collective self-examination.

Despite, and perhaps because of, its impact at the time, the question of incivility between judges has not been the subject of significant public discussion since Justice Mason delivered *Throwing Stones*. That may be, of course, because there is nothing more that needs to be said. As the first word on the topic, perhaps it should also be the last. If that is the case, then at least I will be satisfied at having introduced, and provided the citation for, *Throwing Stones* to a potentially new audience.

Nevertheless, as I hope to suggest this afternoon, almost 20 years on, I think there is more that we can say about the topic of 'studied harshness'⁴ and offensive language by judicial officers towards one another. That's the thing about standing on the shoulders of giants: it doesn't take much to be able to see just that little bit further. This is particularly so given the challenges that the judiciary, *as an institution*, faces today; challenges that were, no doubt, present in 2007, but which have continued to grow in the last 20 years.

And it is the *institutional* significance of judges being offensive to each other that I want to explore this afternoon.

I recognise, of course, that Justice Mason did refer to the institutional effects of such incivility. The institutional effects that Justice Mason described were at the level of morale and collegiality. He said, for example:⁵

In my opinion, the topic also deserves attention because offensive discourse undermines the mutual respect that should exist as between the different layers of the judicial hierarchy. It promotes an 'us/them' mentality. It reinforces unhelpful perceptions that the higher court lacks understanding of the dynamics of life in the trenches. And it saps the institutional morale of the lower court, especially if reportage of a rebuke attributes fault to the court as a whole. Fear of a second personal attack may provoke inertia by stemming the flow of judgments by nervous judges. These consequences apply whether or not the content or language of the reproof was justified.

These institutional effects are, of course, all too real. They alone are sufficient to give all judicial officers pause before making personal attacks, or offensive remarks, about other judicial officers. In this, I include not only judges of appellate courts (both intermediate and final) in relation to the language they use concerning the members of courts under appeal. That need for pause applies

equally to first instance judges (and appeal judges) adopting a disrespectful or sneering tone towards courts higher in the judicial hierarchy. And, indeed, it applies to the remarks made by judges concerning other judges on multi-member courts, including (and perhaps especially) judgments involving dissent or disagreement in particular cases.

The impact of personal attacks on institutional morale and collegiality is therefore of significant importance.

The institutional effect that I want to focus on, however, is the effect of a lack of civility on institutional *trust*. That is, the effect of incivility not only *within* the institution of the judiciary but *upon* that institution, and its place within contemporary Australian public and social life.

I use 'institutional trust' in this context, as (at least) a partial synonym for what the Hon Stephen Gageler AC described as 'judicial legitimacy' in an address at this colloquium in 2022, namely:⁶

[T]hat level of public confidence which needs to exist for a competent and impartial judiciary to do its job of deciding controversies according to law without fear or favour. Judicial legitimacy depends on the public maintaining a level of confidence that controversies will in fact be so decided. It depends on the public understanding, and respecting, the distinctiveness of the judicial function. It depends on the judiciary being able to draw on what has been described as 'a reservoir of goodwill' that runs deeper than the outcome of the judicial resolution of the politically charged controversy of the moment.

The reason for my focus on the effect of civility on institutional trust is two-fold.

First, it cannot be doubted that institutional trust (or judicial legitimacy) is, in

varying ways and to varying degrees, under threat in our contemporary world, both in Australia and throughout the Western world (most notably in the United States of America).

The most conspicuous version of that threat can be seen in the sovereign citizen movement, so familiar to all of us in this room; and so much more prevalent now than when *Throwing Stones* was delivered. The sovereign citizen movement is the most conspicuous version of the threat to institutional trust because it represents an *explicit* denial of trust in the institution of the judiciary (as in other governmental institutions). To use our other synonym, judicial legitimacy, the sovereign citizen movement explicitly *denies* the legitimacy of the judiciary.

But the sovereign citizen is by no means the only, or indeed the most dangerous, threat to institutional trust in the judiciary. Trust in the institution of the judiciary is diminished by every utterance that seeks to undermine confidence that controversies are in fact decided according to law without fear or favour; and everywhere that public understanding of 'the distinctiveness of the judicial function' is sought to be eroded. We find such attacks in sections of the media and in public and political discourse. Unlike attacks by sovereign citizens, however, these attacks do not explicitly deny judicial legitimacy; indeed they are often accompanied by formal or perfunctory acknowledgement of the 'independence of the judiciary'. But their effects are the same: a waning of institutional trust.

And so it is only proper that we should ask ourselves: what might we in the judiciary be doing that is contributing, however subtly or insidiously, to an erosion of public understanding of the distinctiveness of the judicial function?

The second reason for my present focus on civility and institutional trust, relates

to civility itself. It could hardly be gainsaid that a lack of civility is on the rise in our public discourse. Rancour and vitriol are the *lingua franca* of our age. The 'hotter' the 'burn' delivered by one interlocutor, the better. And the more likely it is to gain praise from one or other of the partisan tribes that make up our contemporary political and social landscape. Judges are hardly immune to the temptation of such a culture and of such praise. It behoves us, then, to reflect on the larger risks associated with giving in to that temptation.

Before turning to those risks, it is worth looking a little more closely at public or institutional trust and how it differs from other forms of trust, and in particular the form of trust associated with friendship and other personal relationships.

Aristotle identified friendship as 'a kind of virtue and necessary for living'.⁷ And he invoked 'trust' as a necessary condition for the existence of perfect friendship. In his *Nichomachean Ethics*, Aristotle said:⁸

[Perfect friendship needs] time and intimacy; for as the saying goes, you cannot get to know each other until you have eaten of the proverbial quantity of salt together. Nor can one [person] accept another, or the two become friends, until each has proved to the other that [they are] worthy of love and so has won [their] trust.

Trust in this context, then, is something that is 'won', that requires time and intimacy, and is the product of affection.

But what of 'public trust', that which is reposed in an institution such as the judiciary, and which is necessary for the legitimacy of that institution? How does it compare to the 'trust' that exists between friends and, how does Aristotle's necessary relationship of 'friendship' compare with the relationship between the public and the judiciary.

There are, of course, some similarities. Like the trust between friends, public trust in institutions is built up over time. As I will come to, however, the 'time' over which public trust is established for the judiciary, is not measured in weeks or months but in years and decades.

So public trust is, in this sense, 'won' and so, conversely, it can be 'lost'.

But unlike the trust between persons, public trust is not 'won' through intimacy or affection. Indeed, quite the opposite. The distinctiveness of the judicial function is such that the trust reposed in it is only 'won' in the *absence* of intimacy and affection. And, importantly, not 'won' *despite* the absence of affection but precisely *because* of that absence. While the trustworthiness of a friend is 'won' through time, intimacy and affection, the judge explicitly swears or affirms that he or she 'will do right to all manner of people, according to law, *without* fear or favour, affection or ill will'.

This is because trust in any individual judge (public trust) is inseparable from, and indeed synonymous with, trust in the judiciary *as a whole*. Trust in the judiciary, or any other governmental body, is necessarily *institutional*.

Professor Robert Sokolowski captured the idea of public (or professional) trust in this way:⁹

The professional is presented as trustworthy not primarily in the way a friend is found to be faithful, by having proved himself or herself in many situations, but by having been certified as a professional. There is an elegant anonymity to professional trustworthiness; if I get sick away from home and must go to the emergency room of a hospital, I can in principle trust doctors and nurses I have never met before. I enter into a ... relationship with them because they

are presented as members of the medical *profession*, persons who are certified by the profession and who can, *prima facie*, be taken as willing to abide by its norms. I do not have exactly the same kind of trust if my car breaks down somewhere away from home; I am delivered over rather to the personal honesty, trustworthiness, and competence of the local mechanic. It is as though I had to find a temporary friend rather than being able to appeal to a professional.

As Professor Sokolowski makes clear, the 'elegant anonymity of professional trustworthiness', what I have called institutional trust, is precisely the *opposite* of the trustworthiness of a friend, which is 'won' through intimacy and affection. If I can trust a public institution, I do not need to find a 'temporary friend'. That is because, whatever trust I repose in an individual member of the judiciary must be reposed in them precisely other than by reason of their personal honesty, trustworthiness, and competence. I must be able to repose trust in the judge by reason of, and only by reason of, their forming part of the *institution* of the judiciary.

This serves to explain why the 'time' over which public trust is acquired can differ to that between persons. Public trust in an institution is not 'won' through grand gestures or moments of intimacy, but through consistent and conscientious adherence to duty. 'The competent and conscientious performance by judges of the duties of office', Sir Gerard Brennan once observed, 'is the most effective way to maintain respect for the rule of law'.¹⁰ More specifically, as Sir Gerard said (again, at this conference in 2005):¹¹

The work-a-day aspect of the rule of law may not be very glamorous, yet it is the role of the judge in the run of the mill cases in the trial courts which commends the rule of law to most of the people involved in litigation.

Institutional trust, in this way, is acquired 'anonymously'.

This is not to say that personal integrity, and personal adherence to the virtues inherent in our legal tradition, are not essential to the discharge of judicial office. Of course they are. As the late Alasdair MacIntyre put it:¹²

Lack of justice, lack of truthfulness, lack of courage, lack of the relevant intellectual virtues – these corrupt traditions, just as they do those institutions and practices which derive their life from the traditions of which they are the contemporary embodiments.

It is precisely *as institutional integrity*, however, that personal integrity must be manifest; not over against it. To use Professor Sokolowski's phrase, we must at all times seek to maintain the 'elegant anonymity' of our trustworthiness.

I return then to my original topic: judges being offensive to each other and its impact on institutional trust or judicial legitimacy.

And what I want to suggest, is that the judge who makes a personal attack on another judge or other judges – as to those judges' capacity, their competence or the quality of their reasoning – does not simply sap the morale of the other judge or judges concerned or the institutional morale of the court to which they belong. He or she is contributing to the erosion of the institutional trust due to the judiciary as a whole.

That is because a personal attack by one judge of another is precisely that: *personal*. It is a tacit, if not explicit, assertion by that judge that, 'I, by reason of my personal intellectual virtues, can be trusted to provide justice, whereas the other judge cannot'. It is a *display* of the judge's personal trustworthiness. And as a display of *personal* trustworthiness, it seeks to elevate the speaker over the institution to which he or she belongs. And for this reason, such a display, no matter how much the subject of approval or adulation, is corrosive of the trust upon which the judiciary's legitimacy depends. It is an assertion of personal integrity over and against institutional integrity.

And this is corrosive because, as I have sought to demonstrate, trust in the judiciary is necessarily *institutional* and not *personal*. And just as the trust to which each individual judge can lay claim is *derived* from that institutional trust, so too it is necessary for the individual judge to recognise that he or she is responsible to maintain that trust precisely as *institutional* trust, rather than *personal* trust.

None of which is to suggest that there is no place in the judiciary for legitimate disagreement, collegiate correction and indeed, on rare occasions, formal reproach. Of course, there is. The identification of error as part of the appeal process is an essential part of the judicial function; and serves, in part, to mark out the judicial function's distinctiveness. Of all of our public institutions (governmental or otherwise), it is the judiciary that can best lay claim to be self-correcting: to have, within its very structures, a regular, publicly accessible mechanism for self-correction. I venture to suggest that no other institution so explicitly and publicly takes responsibility for its own errors.

This capacity for self-correction is one of the judiciary's institutional strengths, not one of its weaknesses. It is to be celebrated rather than lamented. And yet, so often, appellate correction is used by some in the public sphere as evidence of failure, or of weakness, in the institution itself. Recently, in this State, for example, significant media attention was given to the fact that, in the last year, 14 sentences imposed by the District Court of Western Australia (a total of 0.84% of all sentences imposed in that year) were increased by the Court of Appeal on appeals brought by the State. The subtext, if not the text, of these reports was that this minute proportion of cases that were the subject of successful appeal reflected the personal failings of 'soft judges' who were said to be in the 'firing line'. And if the online comments on the reports were anything to go by, this is precisely how the reports were understood.

Which is all the more reason to recognise that appellate correction is *institutional*. It is not intended to, and it does not reflect, save in the rarest of cases, on the personal capacity, integrity or intellectual virtues of the individual judges concerned, either the appellate judge or the judge from whom the appeal is brought. That being the case, our language should reflect the reality. And there can be no doubt that our language matters. Interestingly, in the reporting I referred to earlier in relation to a small number of successful State appeals, the reporting itself made much of the use of the expression 'manifest inadequacy'. That is, of course, a technical legal expression used to describe an error that is not discernible from the lower court's expressed sentencing remarks but is to be implied from the result in the particular case. Taken out of that context, however, the expression 'manifest inadequacy' is used as if it were describing a personal failing on the part of the sentencing judge, in the same way that technical expressions such as 'miscarriage of justice' or 'denial of procedural fairness' can be misinterpreted as findings of misconduct.

If the necessary use of technical expressions such as these are able to be misused and taken out of context, how much more so when a judge chooses to describe a fellow judge's (or fellow judges') reasons, or reasoning, in terms that are mocking or which adopt a tone of intellectual superiority. When we disagree with each other (and disagree on occasion we must), how does it assist public confidence in the distinctiveness of the judicial function, when we suggest that our fellow judges are lacking in understanding, insight or even a sense of justice? When we describe their reasoning as 'fallacious', 'incoherent' or 'unjust'? Does it communicate to the legal and wider public that all judges have taken an oath to deliver justice according to law, without fear or favour, affection or ill will, and that the public can have confidence that those judges are adhering to that oath? Or does it communicate that the conscientious adherence to that oath is the province of a privileged few? In the same way, to what extent does a personal

attack on a fellow judge convey, or confirm, the erroneous view that, in the end, controversies are not resolved according to law but according to the personal gifts and virtues (or flaws) of each individual judge? Indeed, when we use language that mocks or belittles a colleague, is that not, in its own way, a form of 'ill will' and therefore at odds with the very oath we have sworn to uphold?

And make no mistake, there are sections of the legal community and wider public that just love a judge who takes pointed aim at their colleagues. In a media and wider culture that thrives on conflict and controversy, there are many who love nothing more than a 'hero' judge, who rises out of the elegant anonymity of the institution, and of the unglamorous exercise of the duties of their office, to send pointed barbs at some, if not all, of their colleagues.

But, as I have sought to suggest, the 'hero judge' can be as dangerous to the judiciary as a whole as the 'bad' judge, and indeed, in the long term might be even more dangerous. The 'bad' or 'corrupt' judge is clearly an exception or aberration; a betrayal of the public trust reposed in the institution of the judiciary; an exception that can, if the institution is functioning properly, be reformed or removed. The 'hero judge', on the other hand, sets himself or herself up as a rival to that institutional integrity and so, even if subtly so, serves only to undermine it.

As Gageler CJ recently described the constraints upon individual members of a court: the 'foundational conception is that the function of declaring the law is vested in the Court rather than in the Justices who from time to time comprise the Court'.¹³ This constraint, as his Honour described it, is an 'institutional imperative'.¹⁴ For present purposes, I would add that this institutional imperative extends to each and every aspect of the judicial function. The judicial function, and all judicial power, is vested in and exercised by the *court* rather than the judge who from time to time comprises that court. We should be careful not to pretend

that it is otherwise.

As Justice Mason did in *Throwing Stones*, I have, in these remarks, avoided making reference to specific examples in which I have considered that a particular judge's language has crossed the line from civil disagreement, collegiate correction or necessary rebuke, into unnecessary offence, disrespect or personal abuse.

There are a number of reasons for this.

First, I am acutely conscious that the views I have expressed today will be regarded by some of my colleagues as a personal attack on their particular judicial style or, indeed, on their conception of the judicial function. I do not intend that to be the case and I apologise if I have failed in that regard. At the very least, however, I have endeavoured to avoid contributing to the very problem that I have identified by singling out any individuals.

The second reason for avoiding specific examples, is my hope that all of us, including myself, can benefit from reflecting on the language we use in our public pronouncements and on the effect that those pronouncements have on each other, and on the community that we serve. None of us are immune from the temptations to which I have referred.

And related to this is the fact that the line between civil disagreement, collegiate correction or necessary rebuke, on the one hand, and offence, disrespect or personal abuse, on the other, is not mine to draw. If my thesis as to the nature of institutional trust and the effect of incivility on that trust means anything, it is that *we as an institution* must actively seek to identify and draw that line.

Rather than seeking to draw the line itself then, can I conclude with a few broad principles that I suggest we might keep in mind in seeking to communicate in a way that promotes, rather than undermines, institutional trust and judicial

legitimacy.

First, that we consciously frame our disagreements *institutionally*. That we recognise and emphasise that correction, including appellate correction, is institutional and not personal. And that we consciously avoid language that could be perceived as a commentary on the competence, diligence, or intellectual virtue of another judge, so as to reinforce that the appellate process is an institutional mechanism for self-correction, not a forum for personal rebuke.

Secondly, that we have a heightened awareness that even orthodox legal terminology – like 'manifest inadequacy' or 'miscarriage of justice' – can be stripped of its technical meaning and misinterpreted as findings of personal failure. This involves being more judicious with language that carries a risk of being sensationalised, especially in judgments likely to attract media attention.

Thirdly, when we do disagree (which, as I have said, on occasion we must), to consciously avoid rhetoric that positions our own judgment as a solitary voice of reason against a flawed colleague or a misguided court. This includes, for example, resisting the temptation to frame a dissent as a heroic correction and instead presenting it as a different, principled interpretation within a healthy, functioning institutional framework.

And, finally, to be conscious that the public trust and confidence, upon which the legitimacy of the judiciary rests, depends upon the competent and conscientious discharge of our duties by *all* of us, and that it cannot be sustained by the few. To remember, at all times, with or without the musical backdrop, that 'We are all in this together'.

¹ Presented to the 2025 Australian Judicial Officers Association Colloquium, Perth, 9 October 2025. A number of the ideas in this address also appeared in *The Impact of Social Media and AI on Public Trust in the Judiciary*, a paper presented at the Global Summit of Hellenic Lawyers, Athens, Greece on 9 July 2025.

² Mason, *Throwing stones: Cost/benefit analysis of judges being offensive to each other* (2008) 82 ALJ 260 (**Throwing Stones**).

³ *Throwing Stones*, 263.

⁴ *Throwing Stones*, 260.

⁵ *Throwing Stones*, 261.

⁶ Gageler, *Judicial Legitimacy* (2023) 97 ALJ 28, 28.

⁷ Aristotle, *The Nichomachean Ethics* (**Ethics**), 1155a.

⁸ *Ethics*, 1156b.

⁹ *Ethics, Trust and the Professions, Philosophical and Cultural Aspects*, Pellegrino et al (editors), (Georgetown University Press, 1991), 31.

¹⁰ *Gerard Brennan's Articles and Speeches, Volume 1*, F Brennan SJ, editor (Connor Court Publishing), 281.

¹¹ *Gerard Brennan's Articles and Speeches, Volume 1*, F Brennan SJ, editor (Connor Court Publishing), 37.

¹² MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 1981), 223.

¹³ *Ravbar v Commonwealth of Australia* [2025] HCA 25 [26] (Gageler CJ).

¹⁴ *Ravbar v Commonwealth of Australia* [2025] HCA 25 [25] (Gageler CJ).