

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
AFFINITY IFTAR DINNER 2018
KEYNOTE ADDRESS: TRUST IN THE JUDICIARY
TUESDAY 29 MAY 2018*

1. Distinguished guests, ladies and gentlemen. It is an absolute pleasure to have been invited by the Affinity Intercultural Foundation to offer a few remarks at this evening's Iftar Dinner. I too wish at the outset to acknowledge and pay my respects to the traditional custodians of the land on which we meet – the Gadigal people of the Eora nation, and their elders past, present and emerging.

2. Tonight's Iftar is an important opportunity for members of the community, both Muslim and non-Muslim, to come together and share a meal, to talk, and to recognise the significance of this time for our Muslim friends and colleagues. Because of this, I will try and be brief. I don't want to distract from the company, the conversation, and especially the catering.

3. From what I understand, Ramadan and the Iftar are special times in the Islamic community. There are rites and traditions, some of which have been passed down through generations, like a special recipe or particular sweets. But while each family and culture brings difference and diversity to their practice of Ramadan, there is a significant commonality in the ritual observed. It is sobering to reflect on the fact that every day this month there are over half a

* I express my thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

million people around this country performing the same rites, and breaking bread together at the same time, in their various homes, communities, towns, and cities.

4. The Muslim community in Australia has a long and proud history. From the early 1700's, Muslim fisherman from Indonesia made annual voyages to the northern parts of Australia and a trading relationship developed between the communities living there. Islamic motifs have been identified in some north Indigenous Australian mythology and ritual. In mortuary ceremonies in the community of Galiwinku on Elcho Island, for example, there is reference to the dreaming figure "Walitha'Walitha", an adaptation of an Arabic phrase meaning "God, the exalted".¹

5. The first official Australian Muslim settlement was in the early 1860's, when thousands of cameleers, mainly from Afghanistan, worked the inhospitable inland tracks, transporting supplies and contributing enormously to economic growth in that era. Australia's first mosque was constructed in the outback of South Australia, in the town of Marree, during that time.² While the nature of migration has shifted through the decades, multicultural diversity has been an enduring theme of Australia's growth. Nearly half of all Australians are either born overseas or have at least one parent born overseas.³

¹ See Peta Stephenson, *Islam Dreaming: Indigenous Muslims in Australia* (UNSW Press, 2010).

² See B Cleland "The History of Muslims in Australia" in A Saeed and S Akbarzadeh (eds.), *Muslim Communities in Australia* (UNSW Press, 2001) 12-32. An exhibition regarding the contribution of Muslim cameleers, *Pioneers of the Inland: Australia's Muslim Cameleers 1860s - 1930s*, has toured locally and internationally. See http://www.cameleers.net/?page_id=779.

³ See generally Australian Bureau of Statistics, *Migration, Australia, 2015-16* (3412.0, 30 March 2017).

6. This diversity culminates in nights like this one. It is a wonderful thing that in this country, everyone is welcome to celebrate their religious traditions, whatever they may be, and that we have the freedom to share those traditions with others. In doing so, we can strengthen the ties between our various communities. This is of particular importance in the current climate of increasing fear and distrust of people who are different to us – whether it is different cultures, ethnicities or religions. These gestures are important at a time when some voices in our society use their position to stoke mistrust rather than quell it.

7. This distrust is something I want to focus on tonight, because it is a phenomenon that has taken hold of society more broadly. The 2018 Edelman Trust Barometer, a global survey on institutional trust, registered declines in Australia in public confidence in government, media, business and even non-governmental organisations. All four are at five year lows, and all four are below 50% trust – that is, they are more distrusted than trusted.⁴ It is not clear from the survey the extent to which this distrust in government extends to the judiciary. Nevertheless, this phenomenon is of concern to me, as a member of the judicial branch of government.

⁴ KPMG, 'Maintaining the Social Licence to Operate' (2018 Australian Institute of Company Directors Trust Survey) 4 citing the 2018 Edelman Trust Barometer.

8. Public confidence in the courts is a guiding principle in relation to the conduct of individual judges, and the institutional conduct of the courts.⁵ This is because of the principle, stated by Alexander Hamilton, that the legislature controls the money, and the executive controls the force, but the judiciary controls neither.⁶ The general acceptance of judicial decisions, essential to the maintenance of the rule of law in a liberal democracy, relies on confidence, not coercion.⁷ Sir Gerard Brennan made the same point over 12 years ago, that in order “to maintain the rule of law in a free and confident nation”, the judiciary must meet four requirements: it must be impartial and independent, it must be competent in the law, it must have “the confidence of the people”, and it must be “reasonably accessible to those who have a genuine need for its remedies”.⁸
9. “The people”, who must have confidence in the Courts, includes those who are culturally, religiously or linguistically diverse, those without access to financial resources, and those subject to disabilities. Judicial officers are required by oath to “do right to all manner of people ... without fear or favour, affection or ill-will”.⁹ This precept reflects the fundamental goal of the legal system to give equal access and protection, regardless of race, ethnicity, language, socio-economic status, political opinion, gender or sexual orientation.

⁵ Murray Gleeson, ‘Public Confidence in the Judiciary’ (Speech given at the Judicial Conference of Australia, Launceston, 27 April 2002) 1.

⁶ Hamilton, *The Federalist Papers*, No 78, New York, Random House, 504.

⁷ Gleeson, above n 6.

⁸ Sir Gerard Brennan, ‘The State of the Judicature’ (1988) 72 *Australian Law Journal* 33, 33-34.

⁹ *Oaths Act 1900 No 20* (NSW) sch 4.

10. The four requirements that Sir Gerard Brennan mentioned all have particular application when it comes to the interaction of minority communities with the justice system. In regard to the first requirement, one aspect of impartiality is that the judiciary possess knowledge of the unique ways in which people might be disadvantaged within the legal system. In regard to the second, part of developing the law to answer the needs of society requires that we develop more inclusive procedures. The final requirement speaks for itself – like all people, culturally and linguistically diverse Australians, including Aboriginal and Torres Strait Islander peoples, have a genuine need for the protection of the law and must be provided with reasonable access to it.

11. There are two important points that I want to pause and make note of in this context. Firstly, it is important not to confuse confidence with popularity. Judicial decisions may sometimes displease the public, even a majority of the public – but the trust I am talking about is the trust that courts will pursue justice, not applause.¹⁰ Secondly, while the Court must strive to adequately serve all members of the public, this commitment is premised on the legitimacy of the laws of parliament and the supremacy of the rule of law. When I use that phrase, I am referring to the idea that everyone is both bound by the law and entitled to the benefit of the law.

12. With that in mind, I want to outline four ways I think we can work to combatting this crisis of trust, at least in terms of trust in the judiciary, particularly from the

¹⁰ Murray Gleeson, 'Public Confidence in the Courts' (Speech delivered at the National Judicial College of Australia, Canberra, 9 February 2007) 15.

perspective of the culturally and religiously diverse. One of the first steps is ensuring that the legal system is viewed as legitimate from all perspectives. The Australian National Imams Council has been invaluable in putting out guidelines that explain the interaction between religious obligations and legal obligations. They have explained, for example, the obligation of compliance with the laws of a country of residence as a Muslim under the Holy Qu'ran. In response to some community confusion on whether Muslims can, consistent with their religious obligations, stand for a judge in court, the Council took the step of issuing an explanatory note. They stated that “[t]here is no prohibition or restraint on a Muslim standing up for the Magistrate or Judge as a sign of respect ... to the court”, explaining their position by reference to religious authorities. This document was enormously helpful to the judiciary, and I imagine to the Muslim community, in clarifying an issue that had raised concern in some courtrooms. It was also one of the myriad ways in which the Muslim community has helped foster trust in the judiciary.

13. It is not just the case that these efforts must come from within. The Courts must also work to gain the community's trust, and this is of particular importance with communities that have traditionally had poor relations with the justice system, such as Indigenous people. One way this has formally been addressed by the Courts is through the “Equality before the Law” Bench Book, the first edition of which was released by my predecessor, the Honourable Jim Spigelman. It embodies our recognition that injustice inheres as much in treating unequals the same, as it does in treating equals differently.¹¹

¹¹ Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2017) iii.

14. The Bench Book explains that judicial officers may need to adapt the conduct of court proceedings to ensure that individuals receive a fair hearing – for example, by employing a different style of communication for someone with poor English, using appropriate terminology so as not to cause offence, or being able to understand a culturally-specific practice that might influence a person’s behaviour in Court, so that judgment of their credibility is not based on misunderstood cultural differences.¹²

15. The Court has also worked to build trust in more informal settings. For the last seven years, judges of the Supreme Court, other courts, and members of the profession have attended a service at the Auburn Gallipoli Mosque to mark the opening of the new law term. Like this evening’s Iftar, the service at Auburn is an occasion to celebrate the diversity of both the legal profession, and our society more broadly. It also provides an opportunity for members of the judiciary and the profession to learn more about the Islamic faith. I know many judges and their staff look forward to the service as an important annual event on the Court’s calendar. There is always great excitement about meeting members of the community, touring the Mosque and, admittedly, sampling the array of sweets that are on offer after the service.

16. Finally, trust in the judiciary requires that it reflect the diversity of the society it purports to serve. Former High Court Justice Michael McHugh has observed that “when a court is socially and culturally homogenous, it is less likely to

¹² Ibid 1106-7.

command public confidence in the impartiality of the institution”.¹³ Confidence in the courts, and in the legal profession more generally, will strengthen as the breadth of those practising in the law increasingly reflects the diverse make-up of our communities.

17. Now, it would be impossible to deny that diversity, both in terms of gender and culture, continues to be a trial for the legal profession. It is plain that gracing the benches of most of the Courts in this country there are more judges who look like me than anyone else in the community. We have, of course, come a long way. This year marks the 100th anniversary of women being admitted to the profession in this state, following a tireless campaign on behalf of Ada Evans, the first female law graduate who was prohibited from practising under the laws of her time. A few years ago, I had the privilege of presiding over a ceremony which saw the first Indigenous person appointed as Senior Counsel. In 2016 Victoria appointed its first Muslim woman to the bench. Her Honour Magistrate Urfa Masood, who is of Sri Lankan background, had worked for both the Victorian Women’s Legal Service and the Aboriginal Legal Service prior to becoming a barrister. Finally, each month I preside over ceremonies in which new lawyers are formally admitted to the profession, and witness firsthand the increasingly diverse profile of the profession, with each new wave of admittees.

18. Of course, success in the law should depend always on merit, and nothing else. However, it is important to heed the words of Dame Brenda Hale, that “the word

¹³ M McHugh, ‘Women Justices for the High Court’ (Speech delivered at High Court Dinner, Western Australia Law Society, 27 October 2004).

‘merit’ only emerges when the appointment of women and other non-standard candidates is being discussed”.¹⁴ And it should be noted that the idea of what constitutes “merit” is itself debatable and often highly subjective. At its worst it is simply the tendency to see “merit” in those who exhibit the same qualities as ourselves, and can result in a perpetuation of homogeneity in hiring or appointments. The fallacy was highlighted during a House of Lords committee discussion on judicial appointments – Lord McNally was asked about merit and responded “I have only one problem about the merit criterion. It is often deployed by people who, when you scratch the surface, are really talking about ‘chaps like us’”.¹⁵

19. Research from the Australian National University confirms the difficulties often faced by people from diverse backgrounds, finding that job applicants with non-Anglo names had to submit more resumes to be offered an interview. For example, Chinese applicants had to submit 68% more applications and people of a Middle Eastern background had to submit 64% more.¹⁶ Discrimination related to social class, gender and background can be insidious, rearing its head in simple statements that someone was “not a good fit” to explain vague feelings that are, in fact, based on unrecognised biases.¹⁷ In another study

¹⁴ Dame Brenda Hale, ‘Equality and the Judiciary: Why should we want more women judges?’ [2001] *Public Law* 489, 493.

¹⁵ Transcript of Proceedings, *Judicial Appointments Process*, (House of Lords Select Committee on the Constitution, Lord McNally, 18 January 2012) 5 <https://www.parliament.uk/documents/lords-committees/constitution/JAP/corrCNST180112ev12.pdf?_sm_a_u_=iMV6knZrtqS6NRFQ>.

¹⁶ Alison Booth, ‘Job hunt success is all in a name’ (ANU Crawford School of Public Policy, 4 March 2013) <<https://crawford.anu.edu.au/news-events/news/104/job-hunt-success-all-name>>.

¹⁷ The Law Society of New South Wales, ‘Diversity and Inclusion in the Legal Profession: The Business Case’ (June 2017) <https://www.lawsociety.com.au/sites/default/files/2018-03/DIC%20business%20case_0.pdf> 7.

done by the Asian Australian Lawyers Association, it was revealed that Asian Australians account for almost 10% of the Australian population and yet only 0.8% of the judiciary.¹⁸ Studies like these evidence the need to continue to support programs that encourage diversity and combat biases, both overt and unconscious. This is of importance in the legal profession because the law underpins the everyday conduct of individuals, of business and of government. It must reflect a diverse range of individuals and views and it can only do this if it is infused with diversity from top to bottom. When diversity of values and backgrounds are reflected in those who administer, uphold and defend our laws, this improves trust and confidence in the judiciary, the law, and lawyers.

20. Finally, I would like to finish today by emphasising that we must maintain our commitment to these measures, and continue to vocally celebrate multiculturalism in this country. There is increasing pressure to abandon such ideals, and suggestions from various corners that they lack benefit or value. They do not. To the contrary, they are of fundamental importance in turning around the tide of distrust – both in institutions and between communities – that threatens to take hold of our community. Events like tonight, and indeed the whole month of Ramadan, are an opportunity to reaffirm such commitment.

21. While this month is a time for deepening faith, it is also a time to be spent with the broader community, strengthening social ties. Sharing a meal with people from different backgrounds goes a long way to quelling distrust of difference

¹⁸ Asian Australian Lawyers Association, 'The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015' (2015) <<http://www.aala.org.au/Resources/Documents/aala-cultural-diversity-analysis-2015-infographic-final.pdf>>.

and instead promoting mutual respect and understanding. I look forward to learning more and gaining a deeper understanding of the traditions of Ramadan these evening – whether they be universal or unique to your families. Thank you for the opportunity to join in tonight's Iftar dinner, and I extend my best wishes to you and your family during this holy month. Ramadan Mubarak.