

What is trust and why does it matter: The kind of trust we should want to build and how

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My purpose today is to provide a bridge between a large social science literature on trust, or social capital as it is sometimes called, and the issues confronting our legal and justice system around trust deficits. I hope to present you with some conceptual hooks that may be useful for reflecting on what trust and trust building means in legal practice, in conducting inquiries and royal commissions which we are doing with increasing frequency in Australia, and in safeguarding human and democratic rights.

There is a growing literature internationally on how law is being used to increase social control, restrict human rights and reduce the accountability of powerful institutions. Law has become a tool for authoritarian governments. With a critical mass of unquestioning trust from the community, it is easy for authoritarianism to slip into totalitarianism. With this in mind, my first point is that when we decide we have a trust deficit, our response should not simply be how do we increase trust. What we really want to increase for the future well-being of our society is our capacity to trust well. Or to put it another way, to trust wisely.

How do we get to a position of trusting wisely? And perhaps more importantly, what gets in the way of trusting wisely? By trusting I simply mean putting our well-being in the hands of others, either individuals or organizations, who we expect to act in a trustworthy fashion towards us.

When we see a toddler leave their caregiver to interact with a stranger, we catch a glimpse of our capacity to trust unfolding. Biologists tell us we are hardwired for this instinctive trust – sensing that it is safe to engage in some kind of exchange with someone we don't know. As our experiences of life expand, our capacity to trust and our style of trusting evolves. Jenny Job undertook some research in which she asked how do we get to a point where we trust institutions like the Australian Taxation Office. Jenny used a survey of the general

population to measure trust in family, friends, strangers, community organizations, and government institutions. Her findings showed that trust rippled out from family and friends. If we trusted family and friends, we were more likely to generalise that trust to strangers and in turn to community organizations and government institutions. At any point, however, that trust ripple could stop. It follows that for some people experiences of “unwise trust” may have left their mark, their capacity and willingness to trust may be limited.

We gained some insight into such a group in our research on motivational posturing. Motivational postures are the signals we send to authorities about what we think of them and how much we want to have to do with them. Defiance was the term used for wanting to keep our distance from authorities. We distinguished two different types of defiance – resistant defiance and dismissive defiance. Resistant defiance is expressed when we don’t trust an authority but we would like that authority to change the way it engages with us so we could trust it. Most notably we hear people complain that they are angry with an authority because it treats them badly, as if they are untrustworthy and assumes they are doing the wrong thing. Moving from distrust to trust is a live issue for those expressing resistant defiance. The dismissively defiant group was different and poses the most serious challenge to our legal system. Being dismissively defiant means you do not defer to authority. The authority is irrelevant. Trust is irrelevant. When this group was asked what would make you trust authority more, the answer was nothing. It was not that the dismissively defiant had low trust in authority. Trust was irrelevant because they did not see themselves as having any relationship with authority – they did not accept their role as one in which they were obliged to defer to authority. They competed with authority, and competed to win. Their dealings were purely transactional, and they were adept at using law to achieve their objectives.

In sum, Trust may be irrelevant to us. Or we may trust a close circle and then generalise trust to strangers and organizations, albeit to different degrees.

We may also trust in different ways. When we ask people what makes a person or institution trustworthy we see just how many facets there are to trust relationships.

Interestingly there was a high level of agreement on what a party needed to do in order to earn our trust. Because of that high agreement we call these actions trust norms. The strongest trust norms for government institutions, that is the essential and most important things that needed to be done to win trust were: (a) treating clients and citizens with respect; (b) having interest in the well-being of ordinary Australians; (c) understanding the position of clients/citizens; (d) being accountable for their actions; (e) being efficient in its operations; (f) being consistent in their decision making; and (g) keeping citizens and clients informed.

Trust norms are consistent with what the literature identifies as components of trust: (1) Performance and competence, that is, meeting obligations and delivering on expectations; (2) Establishing relationships of respect and concern, that is, understanding the position of the other and being prepared to go out of one's way to help; and (3) Sharing knowledge and making oneself accountable, that is, communicating with honesty and openness.

When we talk about our capacity to trust well or trust wisely, our life long project is to know which trust norms are in play, or should be in play, when. When an aged care facility advertises its strengths as a pleasing and friendly environment, it is up to us as consumers to ask is this a sufficient basis on which to trust the organization. Is it important to have skilled nursing staff for trust to be maintained? To what extent do I need to know what is happening in the facility, both good and bad? Advertising is a skilled way of downplaying some of our trust norms and bright-lining others. When choosing a lawyer to help me in an emotionally difficult situation, is it best to go to a family friend? Maybe. Or am I allowing trust norms about relational support to outweigh trust norms about honesty and openness or competence? Understanding the trust norms that we need to activate in the role of the person trusting and in the role of the person being trustworthy can be more difficult than it seems at first glance.

Professionals increasingly devote time to clarifying expectations with clients, which undoubtedly guards against the souring of a trust relationship through a misunderstanding of trust norms. But this presupposes a degree of familiarity and knowledge of the context. How often do we hear of people attending an induction or introductory session to

something that is out of their comfort zone, their first financial planning session for instance, and being totally overwhelmed by the information they were given.

Lack of knowledge or an inability to process contextual information quickly enough or remember what has been said creates barriers to trust. Sharynne Hamilton recently completed her PhD thesis on children who were detained in Banksia Hill Juvenile Detention Centre and their primary caregivers. The children were tested for foetal alcohol spectrum disorders. Much to my surprise the children and their carers did not feel stigmatised by receiving such a diagnosis but rather were grateful to know what was wrong. They had spent their lives in trouble with the police, in and out of court rooms, and a significant number seemed truly puzzled by why they could not get things right and were not able to do things that others could do. Sharynne has proposed that these children are not only lacking social capital but also justice capital. They do not have the knowledge they need to access the resources that can help them stay out of trouble with the law and find pathways for leading independent, productive lives. She argues that knowing that children with FASD will have problems with cognitive processing should be a game changer for how the courts and the justice system deal with them.

Lack of knowledge of the worlds of the other is probably the deepest impediment to learning to trust well and being trustworthy. Without doubt it has been an impediment to reconciliation between white and Indigenous Australians. Ignorance about others drives groups apart as we see when racism and nationalism are rampant in society. Inability to communicate across these divides gives rise to misinformation and a contagion of fear and suspicion of the other. In these circumstances, trust building is near impossible.

In summary, all three factors explain why there is such variability among humans in their capacity and willingness to trust well. For some people, trust does not generalise beyond a relatively small circle. Others have had the capacity to trust shaped by how relevant they consider trust norms to be and if they were honoured. And thirdly, our capacity to trust well is seriously undermined by ignorance – simply lacking basic knowledge or awareness of the context in which we are trying to establish a relationship of trust.

If we accept human variability in capacity to trust well, does it matter? Certainly a critical mass of trust is essential for cooperation. We have heard a lot about how “we are all in this together” of late in the midst of the COVID-19 pandemic. The message is that we share a common concern and a common hope, we must rely on each other and be trustworthy to get through the pandemic successfully. Trust and cooperation go hand in hand.

Trust is also essential for hope and innovation. To realise our ambitions we need what Tori McGeer calls social scaffolding to shape our hopes so that they are realistic and to help us find pathways for realization. Changing and adapting in times of crisis becomes near impossible if we have too little trust in each other and our leaders. Effective crisis management is made difficult by too much defiance that distracts and prevents sensible conversations around benefits, fairness and commitment to push on with change. Too much defiance can take the wind out of the sails of the most committed democratically elected leaders.

That said, a bit of defiance, particularly resistant defiance, is good for us. Resistant defiance raises questions. Resistant defiance tells us how we need to change our institutions to make them more responsive to the community and more trustworthy. This is why I emphasize the goal of trusting well and embracing the variability we have in trust. Having everyone in society expressing high trust in an authority lessens that authority’s sense of obligation to make themselves accountable.

The question we need to ask now is do we have the mechanisms in place to bring voices expressing different levels and types of trust together for an informed and thoughtful discussion that will lead to change. We have mainstream media and we have social media. We also have inquiries and reports provided by experts. These are our basic accountability mechanisms for sharing a deeper knowledge of how our institutions function with the public. Arguably what we are exposed to is sensationalised -- and then there is silence. A new exposé arrives on the scene. Sadly it is often not clear what lessons were learnt and what is being done to make things better in the future. Recommendations of Royal Commissions often appear to the public to sit gathering dust, despite the best efforts of those who presided over them. If trust in and cooperation with institutions does not lead to

better outcomes and fairer processes, we risk the kind of dismissive defiance that robs the law of its legitimacy.

So are there new or changing institutional structures that help convince people that the law and the justice system is there to make life better, fairer and safer for them? This symposium undoubtedly will introduce us to a variety of ways in which we can make our legal institutions more trustworthy through doing a better job at meeting community needs. Let me finish by pointing to a few examples that seem to me to be steps in the right direction for bridging the gap between the law books and the community.

I would argue that drug courts and restorative justice interventions are new institutional forms that reach out to build an understanding of the harms that follow from law breaking behaviour and nudge people along pathways for a better life.

I would also argue that alliances across different institutions can produce outcomes that give the community confidence that the law can work for them. The Robodebt scandal came to an end when Victoria Legal Aid acted for a welfare recipient who had been issued with a false debt. The case was won in the Federal Court. Automatically generated Robodebts were declared illegal, and a class action began to gain momentum to reclaim monies paid through false debts. The story as I tell it sounds like a very traditional legal story. But the other part of the story is of a social media campaign, #notmydebt pushing for justice, two Senate Inquiries and an Ombudsman Report scrutinizing the scheme and giving voice to professionals from debt collectors to social workers, consumer law groups to financial advisors, whistleblowers and government lawyers. And last but not least were expert administrative lawyers from the academic community who could explain the legal shortcomings of the system in play and mainstream media that were not prepared to let the issue slide. Robodebt ran for just over 3 years. But without that alliance it could have run for much longer, remaining invisible or under the radar for the community at large. The power of the law combined with the power of a loose, broad ranging coalition kept Robodebt front and centre of public consciousness until it was stopped.

So in conclusion, we want a society where there is enough trust to build cooperative alliances based on knowledge, competence, understanding and respect, honesty and openness. And we want to cultivate the kind of trust between community and legal institutions where the voice of dissidents is listened to and considered seriously, and where every effort is made to find a consensus to take a program of innovation and change forward. After all, we have a wide range of trust norms. This serves us well for getting along and working together. All the trust norms do not need to be in play at the same time to maintain a basic level of trust that allows constructive dialogue, contestation and resolution that everyone can live with.