

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**DISTRICT COURT OF NEW SOUTH WALES ANNUAL CONFERENCE 2021**  
**CHALLENGES TO THE RULE OF LAW IN MODERN SOCIETY**  
**6 APRIL 2021\***

1. I would like to begin today by respectfully acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. As we consider the rule of law, we acknowledge with deep regret the role our legal system has had in perpetrating many injustices against Aboriginal and Torres Strait Islander peoples and pay tribute to those who seek true equality before the law.
2. It is a privilege to speak at the 2021 District Court of New South Wales Annual Conference. This Conference, in its scaled-down form, is probably a little different to how it was first imagined. So too the past year has been different to what we could have envisioned.
3. Today I wish to make some brief reflections on the challenges to the rule of law in modern society. As judges, you are acutely aware of the importance of the rule of law, but I think this is a topic which will benefit us all as we confront current issues and others that are yet unknown.
4. Far from languishing in obscurity, the concept of the rule of law has taken up prime position in recent times. Over the past month in particular, I have been troubled by the discourse around the rule of law playing out amongst politicians, the media and the public. What has become clear to me is that there are profound misunderstandings about what the rule of law actually is, and about the practical consequences of living in a society underpinned by a belief in the rule

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

of law. “Upholding the rule of law” has become the argument in vogue to justify a range of divergent positions on current issues.

5. What we find, then, is that one of our current challenges to the rule of law is a lack of public understanding as to what it really means. We must remember that “[t]he rule of law is such a powerful rhetorical weapon, both in legal and political argument, that care is needed in its deployment.”<sup>1</sup> When the phrase is carelessly or incorrectly bandied around by the loudest voices in society, this undermines the reputation and mandate of rule of law processes. More fundamentally, however, is that the rule of law is weakened when the community or a sector of the community loses trust in its governing institutions.

### ***What is the rule of law?***

6. What, then, is the rule of law? Due to all the current confusion, while this is undoubtedly revision for you all, I shall set out a little of its content.
7. Let me start with what the rule of law is not. It cannot be distilled into one reductionist definition. It is not merely synonymous with the presumption of innocence in criminal trials; it goes much further than that. It is not merely rule *by* law; it requires more than abiding by the law. It is not rule by lawyers, nor is it law of the ruler, nor is it law and order.<sup>2</sup>
8. The rule of law is, at its essence, an overarching concept concerned with protecting against the arbitrary exercise of power. This concept is then elaborated upon by more specific principles.
9. These key principles are characteristic of a society where the rule of law is upheld. While there may be some divergence in agreement on the broader

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<sup>1</sup> Murray Gleeson, ‘Courts and the Rule of Law’ in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 178, 181.

<sup>2</sup> Nicholas Cowdery and Adrian Lipscomb, ‘The Just Rule of Law’ (2000) 4 (December) *Southern Cross University Law Review* 1, 4.

content of the overall concept, there is considerable overlap. Non-exhaustively, these principles include that:<sup>3</sup>

- a. No one, including government, is above the law, and the law should apply equally to persons in like circumstances.
  - b. There must be an independent, impartial judiciary, free from political pressure. As a corollary, there must be a separation of powers between the legislature, executive and judiciary. This works to constrain the exercise of power.
  - c. The content of the law should be accessible, and reasonably clear and consistent. The rights and duties of people in the community should be capable of objective determination.
  - d. Laws must be administered fairly, rationally, predictably, consistently and impartially.
  - e. Everyone must have a right to a fair trial, including the presumption of innocence. They should also have the benefit of procedural fairness.
10. I should also add that from my point of view, it is key to remember that the rule of law is a two-sided covenant. It requires both that lawmakers respect the community, and that the community respect lawmakers. Those in positions of power are equally subject to the law, and the public must trust that this is indeed the case.
11. This, then, is the framework we must keep in mind when we turn to look at some of the challenges facing the rule of law.

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<sup>3</sup> JJ Spigelman, 'The Rule of Law and Enforcement' (2003) 26(1) *University of New South Wales Law Journal* 200; JJ Spigelman, 'Judicial Appointments and Judicial Independence' (2008) 17 *Journal of Judicial Administration* 139; Ruth Bader Ginsburg, 'Foreword' in Robert A Stein and Richard J Goldstone (eds), *The Rule of Law in the 21<sup>st</sup> Century* (International Bar Association, 2015) 7; Robert A Stein, 'The Rule of Law' in Robert A Stein and Richard J Goldstone (eds), *The Rule of Law in the 21<sup>st</sup> Century* (International Bar Association, 2015) 11, 13; Richard J Goldstone, 'Independence of the Judiciary' in Robert A Stein and Richard J Goldstone (eds), *The Rule of Law in the 21<sup>st</sup> Century* (International Bar Association, 2015) 19, 23; Cowdery and Lipscomb (n 2); Gleeson (n 1).

### ***Current rule of law discourse***

12. As I have mentioned, one of the recent challenges to the rule of law stems from a public misunderstanding of what the rule of law entails. I wish to address briefly a few of these misconceptions.
13. First, criminal justice processes should not be conflated with the entire content of the rule of law. Impartial civil processes and inquiries, to which the rules of procedural fairness also apply, are another aspect of the rule of law.
14. Second, insofar as it is a component of the rule of law, the presumption of innocence is not “done away with” in civil matters, but the burden of proof rests with the instigator of the action. Indeed, in civil actions where serious allegations are made against a person, a court is to take into account the gravity of the allegations made in determining whether they have been made out.
15. Third, while the law must apply equally to persons in like circumstances, the standard to which office holders are held is far higher than that of the general population by virtue of their position of public trust. The erosion of this trust may be fatal to the rule of law.
16. One conspicuous difficulty is when the mainstream media, and social media users, pass judgment on persons in the absence of any adjudication or inquiry as to their guilt or otherwise. That does not mean that any inquiry outside the courts as to matters of public interest or civil liability falls outside the rule of law, provided at least the rules of procedural fairness are adhered to, and the proceedings do not have the effect of prejudicing an accused in a potential future trial. Whether such an inquiry should be ordered will always depend on the circumstances of the particular case.
17. To confront these difficulties, I believe that those with knowledge of the law have a responsibility to clarify existing misconceptions. It is possible to do this without bringing a partisan viewpoint to the discussion. The statement released by the President of the New South Wales Bar Association<sup>4</sup> is a good example of what

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<sup>4</sup> ‘Statement from the President of the New South Wales Bar Association Regarding the Rule of Law’, *New South Wales Bar Association* (Media Release, 12 March 2021)

it looks like to respond in this way. As the President set out in that statement, “[c]larity about [the meaning and operation of the rule of law] is critical to the public’s understanding of, and confidence in, our legal and political institutions.”<sup>5</sup>

18. I spoke earlier this year at length about just how important public trust in the judiciary is, and I again emphasise this. The same applies to our political institutions. If the public, or a group within it, loses respect for our lawmakers and leaders, this is when the rule of law is undermined. Those in power within our institutions must remain conscious of their task in retaining the trust of communities. They do this not only by the administration of law, but in their day to day conduct and in maintaining their personal integrity to the highest standard.
19. In saying this, the Australian public has also in recent weeks received revelations into what has been described as the “toxic workplace culture”<sup>6</sup> of Parliament House, and in particular how it relates to entrenched sexism, sexual harassment and inappropriate workplace conduct. This appears to be an issue at both State and Federal levels. Even though media dialogue around these issues has not involved an explicit “rule of law” discourse, it nonetheless has significant rule of law implications. I add that as members of the judiciary, we must also pay close attention to our own institution, which we know too well is not immune from such things.
20. These are significant issues not merely because of the nature of the alleged activities and culture. Inappropriate conduct is never acceptable for lawmakers and representatives of the community, who should be striving to maintain public confidence in their commitment to the highest standard of work and public service. The rule of law is undermined when those in positions of public trust

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<[https://inbrief.nswbar.asn.au/posts/08b347d11316f1372f3414b4c452e82a/attachment/MS\\_rule\\_law.pdf](https://inbrief.nswbar.asn.au/posts/08b347d11316f1372f3414b4c452e82a/attachment/MS_rule_law.pdf)>.

<sup>5</sup> Ibid.

<sup>6</sup> Jennifer Feller and Olivia Rousset, ‘Former Labor MP Kate Ellis Leads Group of Female Politicians Lifting Lid on ‘Toxic Workplace Culture’ in Parliament House’, *ABC News* (online, 29 March 2021) <<https://www.abc.net.au/news/2021-03-29/female-politicians-reveal-toxic-culture-in-parliament-house/13249844>>.

appear to abuse those positions with impunity. Calls for accountability and a change in culture and power structures are necessary if trust is to be restored.

### ***Social media, fake news and challenges to the rule of law***

21. Shifting the focus now, it would be remiss of me to speak about modern society without some discussion of social media and challenges to the rule of law. Social media is more central to people's lives than ever, particularly due to the pandemic and increased virtual interactions in light of physical isolation. My tipstaff was astonished to hear that I know what TikTok is, although you will be unsurprised to know that I don't have an account.
22. The events of February this year threw into sharp relief for us that people are increasingly getting their news from social media platforms rather than directly from traditional media sources. We seemed to go into collective shock when Facebook temporarily removed news pages from its site, which it ostensibly deemed to include organisations such as community legal centres, domestic violence services, the Bureau of Meteorology, and, in bald-faced irony, even Facebook's own Facebook page.<sup>7</sup> We were both relieved and offended when the NSW Supreme Court Facebook page remained active – did Zuckerberg not consider our judgment summaries newsworthy? But I digress.
23. One of the issues with digital platforms is that they are not neutral, but have algorithms designed to manipulate the content presented to individual users.<sup>8</sup> This idea of the “echo chamber”, where users receive targeted content based on their own predispositions, reinforcing their views, was brought to global attention after the shock result of the 2016 U.S. election which brought Donald Trump to the presidency. Another major concern is the “fake news” problem. So ubiquitous is it, that the Macquarie Dictionary announced in February that “fake

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<sup>7</sup> Nicholas McElroy, 'Posts Disappear from Pages of Health Authorities, Bureau of Meteorology amid Facebook News Ban' *ABC News* (online, 18 February 2021) <<https://www.abc.net.au/news/2021-02-18/bom-health-authorities-betoota-caught-in-facebook-news-ban/13166394>>.

<sup>8</sup> Nicolas Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms' (2018) 4(3) (July-September) *Social Media + Society* 3.

news” was its “Word of the Decade” (narrowly beating out “mansplaining” to take the top spot).<sup>9</sup>

24. Lest we think that “fake news” is all about shady, underground trolls, two Australian examples spring to mind. First, in the 2019 Labor party “death tax” controversy, people including politicians and political parties spread false information about the supposed policy on Facebook pages and through Facebook advertisements.<sup>10</sup> Second, social media posts and pages promoting an anti-vaccination agenda and sharing COVID-19 disinformation often circulate for some time before being taken down, if at all. One Australian Facebook group had more than 21,000 members and had accumulated around half a million interactions on 10,000 posts over ten months before Facebook deleted it for repeated breaches of its misinformation policies.<sup>11</sup>
25. There is also a link between accessing news through social media platforms and the risk of exposure to less reliable and lower quality news. According to an ACCC inquiry, “[t]his is because news and journalism accessed via digital platforms has been de-coupled from the news media business, often limiting a consumer’s familiarity with and knowledge of the original source of the story.”<sup>12</sup>
26. One of the serious challenges associated with fake news is the role it has in undermining the two-sided nature of the rule of law covenant. This may be done inadvertently, but more concerning is that it may be done maliciously by domestic

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<sup>9</sup> ‘The Macquarie Dictionary Word of the Decade Winner is...’ *Macquarie Dictionary* (Blog Post, 4 February 2021) <<https://www.macquariedictionary.com.au/blog/article/780/>>.

<sup>10</sup> Danny Tran, Michael Workman and Lachlan Moffet Gray, ‘Federal Election 2019: ‘Death Taxes’ Scare Campaign Continues to be Promoted, but Labor Says it’s Fake News’, *ABC News* (online, 9 May 2019) <<https://www.abc.net.au/news/2019-05-09/money-pumped-into-federal-election-death-tax-scare-campaign/11092802?nw=0>>; Katharine Murphy, Christopher Knaus and Nick Evershed, ‘It Felt like a Big Tide’: How the Death Tax Lie Infected Australia’s Election Campaign’, *The Guardian* (online, 8 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/08/it-felt-like-a-big-tide-how-the-death-tax-lie-infected-australias-election-campaign>>.

<sup>11</sup> James Purtill, ‘Facebook Promised to Ban Anti-Vaxxers. But Pages Are Still Up and They’ve Been Selling T-Shirts’, *ABC News* (online, 19 March 2021) <<https://www.abc.net.au/news/science/2021-03-19/facebook-misinformation-covid-19-coronavirus-anti-vaccine/100015890>>.

<sup>12</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>>.

or foreign actors seeking to bring a destabilising influence to our society. Social media is a relatively easy forum for this, as it provides a platform where content can be posted more or less indiscriminately and anonymously. Further, social media users can be exposed to algorithm-based recommendations to engage with extremist content.<sup>13</sup>

27. Conspiracy theories are one example of the challenge of social media to the rule of law. Earlier this year, a conspiracy theory got major traction on TikTok which alleged that the devastatingly heavy snowfall from Winter Storm Uri in Texas was “government generated”.<sup>14</sup> Closer to home, anti-vaccination and 5G conspiracies which, in the past, would have remained as a fringe view, have been given a stage and pulled into the mainstream. We also saw in the January storming of the U.S. Capitol the significant role of deep-rooted conspiracy theories and disinformation, spread through social media, in inciting violence and the attempted hijacking of democratic processes.<sup>15</sup>
28. Regrettably, fake news is not all that’s fake online. New AI technologies are developing which can be used to create “deepfakes”, which are videos “of a computer-generated likeness of an individual ... often [created] for the purpose of misinformation, vindictiveness, or satire.”<sup>16</sup> These are rapidly becoming

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<sup>13</sup> Olivia Little, ‘TikTok is Prompting Users to Follow Far-Right Extremist Accounts’, *Media Matters* (Web Page, 26 March 2021) <<https://www.mediamatters.org/tiktok/tiktok-prompting-users-follow-far-right-extremist-accounts>>.

<sup>14</sup> Joe Sommerlad, ‘Fake Snow? Conspiracy Theory Claims Texas Weather ‘Government-Generated’’, *The Independent* (online, 22 February 2021) <<https://www.independent.co.uk/news/world/americas/texas-snow-conspiracy-theory-tiktok-b1805616.html>>; Rachel E Greenspan, ‘TikTokers Are Trying To Prove That Snow in Texas Is ‘Fake’, Pushing a False Conspiracy Theory’, *Business Insider* (Web Page, 23 February 2021) <<https://www.businessinsider.in/thelife/news/tiktokers-are-trying-to-prove-that-snow-in-texas-is-fake-pushing-a-false-conspiracy-theory/articleshow/81160359.cms>>.

<sup>15</sup> See James Purtill, ‘Storming of US Capitol and Donald Trump’s Twitter Ban Will Be ‘Tipping Point’ for Social Media Regulation, Experts Say’, *ABC News* (online, 13 January 2021) <<https://www.abc.net.au/news/science/2021-01-13/capitol-storming-trump-ban-tipping-point-social-media-regulation/13052092>>; Rory Cellan-Jones, ‘Tech Tent: Did Social Media Inspire Congress Riot?’, *BBC News* (online, 8 January 2021) <<https://www.bbc.com/news/technology-55592752>>.

<sup>16</sup> *Macquarie Dictionary* (online at 6 April 2021) ‘deepfake’.



increasingly sophisticated and hard to detect as false, even by machines.<sup>17</sup> While such technology is undoubtedly extraordinary, it does have concerning implications for the propagation of disinformation through highly realistic videos which can appear to show whatever the creator desires. There is the potential for much harm to be done here.

29. It is at least a start if digital platforms recognise the problem. Facebook, for example, has stated that it is “working to fight the spread of false news”, including by removing false claims about COVID-19 and vaccines.<sup>18</sup> The success of that policy is debatable;<sup>19</sup> however, it is an example of recognition of the problem. However, Facebook was also criticised, when it removed news content in February this year, as being “prepared to abandon the main source of fact-checked and accurate information on its platform”<sup>20</sup> to avoid negotiating deals with media outlets. It was said that this made “its public commitment to fighting misinformation look farcical”.<sup>21</sup>
30. Fake news aside, social media is also a double-edged sword when it comes to public confidence in our institutions. On the one hand, institutions engaging with social media has positive rule of law connotations, insofar as social media use can enhance accessibility of the law and accountability of decision-makers. On the other hand, it also enables anonymous vilification and denigration of those in public office and their decisions.

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<sup>17</sup> Matthew Bodi, ‘The First Amendment Implications of Regulating Political Deepfakes’ (2021) 47(1) *Computer and Technology Law Journal* 143, 145.

<sup>18</sup> Adam Mosseri, ‘Working to Stop Misinformation and False News’, *Facebook* (Blog Post, 6 April 2017) <<https://about.fb.com/news/2017/04/working-to-stop-misinformation-and-false-news/>>; Guy Rosen, ‘An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19’, *Facebook* (Blog Post, 16 April 2020) <<https://about.fb.com/news/2020/04/covid-19-misinfo-update/#removing-more-false-claims>>.

<sup>19</sup> Purtill, ‘Facebook Promised to Ban Anti-Vaxxers. But Pages Are Still Up and They’ve Been Selling T-Shirts’ (n 11).

<sup>20</sup> Belinda Barnet, ‘Blocking Australian News Shows Facebooks’ Pledge To Fight Misinformation is Farcical’, *The Guardian* (online, 18 February 2021) <<https://www.theguardian.com/commentisfree/2021/feb/18/blocking-australian-news-shows-facebook-pledge-to-fight-misinformation-is-farcical>>.

<sup>21</sup> *Ibid.*

31. Let me take the Supreme Court's social media use as an example. Providing snapshot case summaries in layperson friendly language engages the public with the workings of the court, particularly for high profile matters, and beneficially opens the courts to public scrutiny and criticism.<sup>22</sup> It also helps the content of the law to be accessible and provides transparency as to how those laws are being administered. However, while some engagements on our Facebook posts or tweets are genuine points of view or thoughtful commentary, too many are malicious or demonstrate mere superficial engagement with the content. A recent post on the Supreme Court Facebook page became the fruitless battleground for arguments, couched in abusive language, over the correctness of a decision. Another post received the unqualified comment that "This is a disgusting verdict and [the judge] should be removed from her position."
32. On other occasions, magistrates and judges have received personal threats.<sup>23</sup> Of course, magistrates and judges are routinely criticised for their decisions, which is compatible with judicial accountability in a democracy.<sup>24</sup> One of the difficulties with controlling comments is if they are consistent with free speech and the implied freedom of political communication. We must be careful with solutions that can have a chilling effect. However, the potential for social media to be used to denigrate the judiciary threatens public respect for the courts.

### ***Judges in modern society and challenges to the rule of law***

33. Since this is a judicial conference, let me now turn to where we find ourselves as judges in modern society, and challenges to the rule of law. As judges, we don't need convincing about the importance of an independent and impartial judiciary. However, we should be alert to encroachments to these principles, as they can have severe consequences for the rule of law.

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<sup>22</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 33; [1992] HCA 46 (Mason CJ).

<sup>23</sup> Steven Rares, 'Social Media – Challenges for Lawyers and the Courts' (2018) 45 *Australian Bar Review* 105, 121.

<sup>24</sup> *Ibid* 120.

34. The potential for such encroachments has in recent times shifted from the seemingly theoretical to the possible. We watched on late last year as Donald Trump sought to delegitimise the result of the federal election in the U.S. court system. Perhaps he believed that his judicial appointees would unquestioningly follow his whims; however, judicial independence prevailed. These events were a stark reminder of the centrality of an independent judiciary in preventing arbitrary exercise of power, and hold important reminders for us too. Judges who are not afraid of losing tenure or facing executive sanctions will be more fearless and robust in their decision-making.
35. Even though the courts in that example remained firm against an attempted political intrusion on judicial independence, this is not something to be complacent about. A politicised judiciary weakens the separation of powers. One thing I will ask rhetorically: is it supportive of the rule of law to conduct hearings and inquiries into judicial candidates, including into their political and personal views, such as in the U.S. system of judicial appointments? Perhaps such an emphasis undermines what should be a judge's commitment to political impartiality from an early stage.
36. In a robust system of government where freedom of expression, including the freedom to dissent, is allowed, it is perhaps inevitable that judges will experience political or societal pressure to make certain decisions for certain reasons. This is of course one of the reasons that an independent judiciary is so important, which can resist pressures to conform. However, there is a real danger when commentary is designed to undermine respect for the rule of law.<sup>25</sup> To take another Trump example, this time from earlier events, in 2017 a Republican-appointed, Federal Court judge issued a temporary restraining order against the implementation of a Presidential Executive Order.<sup>26</sup> The President followed the decision up with a tweet which read, "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!" Apart from demonstrating an attitude of being above the law,

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<sup>25</sup> Robert French, 'Rights and Freedoms and the Rule of Law' (2017) 28 *Public Law Review* 109, 113.

<sup>26</sup> *Ibid* 112.

such disdain appears calculated to decrease public respect for the judicial institution, which is so essential to a healthy rule of law. We too are not immune from these challenges.

### ***Lawyers in modern society and challenges to the rule of law***

37. It is not just judges who must be alert to challenges to the rule of law. Lawyers also have a vital role in maintaining public confidence in institutions by communicating the law clearly and ensuring that cases are brought fairly and on their merits in accordance with law.
38. I turn once again to the example of Trump and the 2020 election. To me, far more concerning than Trump's loud assaults on the courts was the way his cause was enabled by lawyers willing to promote his cause, despite the lack of evidentiary basis or sound legal argument upon which a case could be made. This is a most troubling development. In Australia just as in the U.S., our professional conduct rules obligate our solicitors and barristers to not act as the mere mouthpiece of a client and to exercise independent forensic judgment, and to make responsible use of court processes on the merits of a case since they owe their paramount duty to the administration of justice.<sup>27</sup> The advancement of untenable legal arguments runs counter to the constraint of arbitrary power. If any and all arguments can be promoted in defiance of the knowable content of the law and its consistent application, the rule of law is threatened.

### ***Conclusion***

39. I began this morning by saying that I am troubled by the way the "rule of law" has been misunderstood and misapplied in recent public discourse. So too am I troubled by what I see as the current trajectory in social media and the challenges of the spread of disinformation. One of the difficulties is that ethics and the law have always struggled to keep up with advances in technology, particularly as

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<sup>27</sup> *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) rr 4, 42, 60; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) rr 3.1, 4.1.4, 17.1, 19.1, 21; see also for example, New York State Bar Association, *New York Rules of Professional Conduct* (at 31 March 2021) rr 3.1, 8.4(c).

they occur at an extraordinary pace. The judiciary and the legal profession must also be alert to specific threats which can affect public confidence in the rule of law. These are not light or inconsequential issues. At risk of seeming alarmist, we cannot afford to be complacent about these things.

40. The questions we must ask, then, are first, what has happened, second, why has it happened, and third, how can we solve it? All branches of government, within their respective spheres, need to face these questions to ensure that the challenges we have dealt with today do not undermine the rule of law. One important thing is that there is increasing recognition of the problems. And recognition of the problem is always the first step to solving it.