

CONFERENCE

# Confidence in the Courts

9–11 FEBRUARY 2007 | CANBERRA



## Judicial Demeanour: Implications for public confidence

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**NATIONAL  
JUDICIAL  
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NATIONAL JUDICIAL COLLEGE OF AUSTRALIA  
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THE AUSTRALIAN NATIONAL UNIVERSITY

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## JUDICIAL Demeanour: IMPLICATIONS FOR PUBLIC CONFIDENCE

by

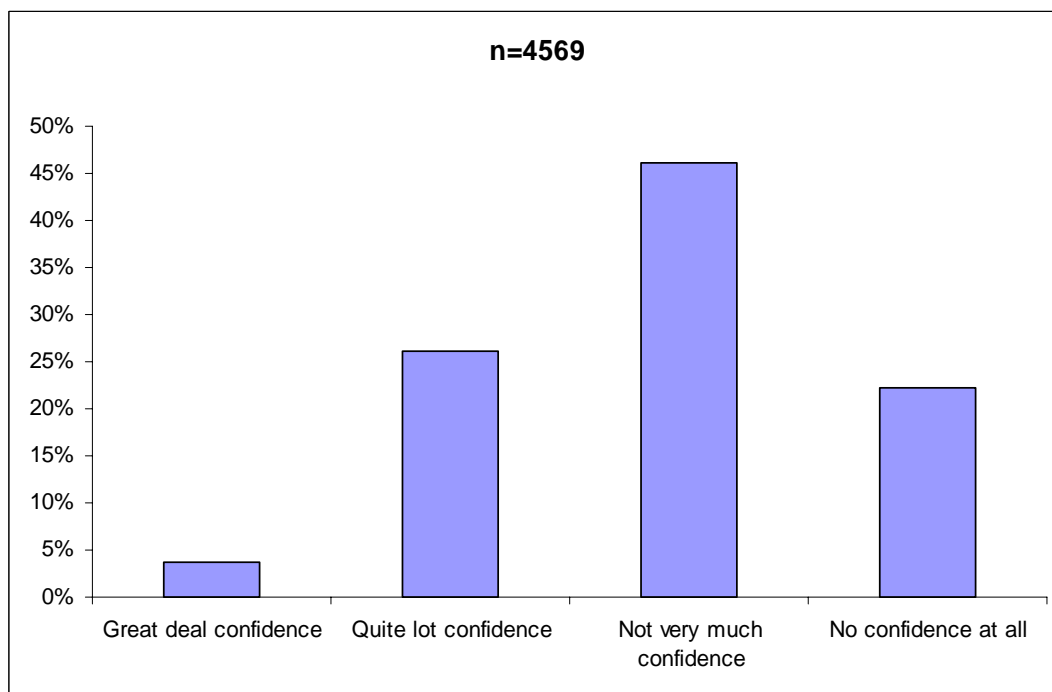
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### Introduction

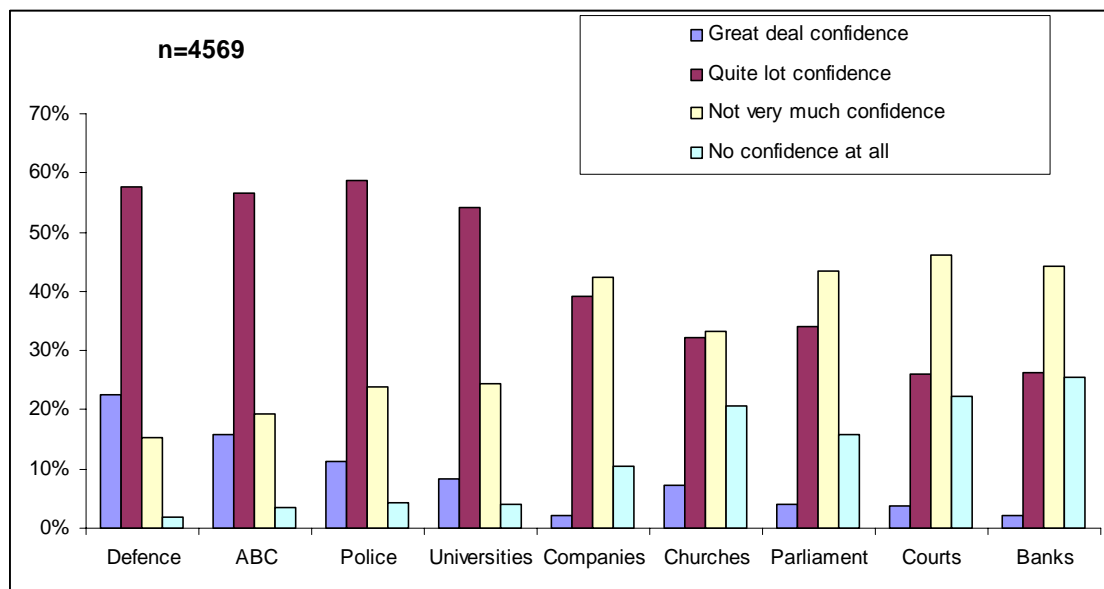
In Australia, levels of confidence in the courts and the legal system are low. Almost half of the respondents (46.1%) to the AuSSA survey<sup>1</sup> reported not very much confidence in the courts and the legal system and 22.2% expressed no confidence at all. Only a few (3.8%) expressed a great deal of confidence and 26.1% of respondents have quite a lot of confidence in the courts and the legal system.

### PUBLIC CONFIDENCE IN THE COURTS AND THE LEGAL SYSTEM - AUSSA 2005



Levels of confidence in the courts are low relative to other important public institutions. Survey respondents reported highest levels of confidence in the defence forces, followed by the Australian Broadcasting Commission, then the police. The lowest level of confidence was reported in relation to banks and financial institutions, with the courts and the legal system the next lowest.<sup>2</sup>

## PUBLIC CONFIDENCE IN THE COURTS AND THE LEGAL SYSTEM - AUSSA 2005: CONFIDENCE IN SELECTED ORGANISATIONS



It is important to note that many respondents to the AuSSA survey (and other surveys) form their views about the courts (and other institutions) without any direct knowledge or experience of them. Their views may be based on media reports - news as well as entertainment or “infotainment” - or perhaps on reports of the experiences of friends, family members or acquaintances (see 20-2, Chapter 6 for the bases of views on courts; Campbell and Lee, 2001: 278).

<sup>1</sup> The Australian Survey of Social Attitudes (AuSSA) 2005 is a biennial mail survey that gathers opinions on a range of topics from approximately 4000 Australians aged 18+, selected randomly from the electoral roll. See for more information <http://aussa.anu.edu.au/>.

<sup>2</sup> For more in depth consideration of public attitudes towards courts, see Parker (1998), especially chapter 6, which includes a review of community perceptions and court user studies. Canadian and other research is reviewed in a report from the Canadian Civil Justice Forum (Stratton & Lowe, 2006).

While the courts have taken steps in recent years to improve media coverage of issues relating to courts and judges, it is essential that the courts focus on their own practices, to ensure that those who do have direct contact with courts have an experience that builds public confidence rather than detracting from it. By improving the experience of those who are actually present in court, it will also impact on others whose knowledge/attitudes towards court is shaped by those with direct experience.

### **The importance of magistrates courts<sup>3</sup> for public confidence**

Magistrates courts have particular significance in affecting public confidence in the courts. For many Australians, their first and often only contact with the court system is in a magistrates court (Parker, 1998: 9). Annually magistrates and their courts deal with over 90% of all criminal filings and over 90% of all civil filings (Steering Committee for the Review of Government Service Provision, 2007). The quality and nature of this experience will shape public perceptions of fairness and justice and public confidence in the courts.

In this paper, we report on findings from a national study of Australian magistrates<sup>4</sup> that involved in-depth interviews with over 40 magistrates, a mail-back survey sent to all magistrates in Australia in 2002 and a national court observation study of the criminal list in magistrates courts.

The National Survey of Australian Magistrates was sent to 434 magistrates throughout Australia in November 2002. Responses were received into January 2003; 210 surveys

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<sup>3</sup> In most jurisdictions, the court in which a magistrate presides is called the Magistrates Court, except in New South Wales where it is the Local Court. In this paper, the term “magistrates courts” will be taken to include the Local Courts of New South Wales, as well as the Magistrates Courts of all other states and territories.

<sup>4</sup> This research was funded by a University-Industry Research Collaborative Grant in 2001 with Flinders University and the Association of Australian Magistrates (AAM) as the partners and also received financial support from the Australian Institute of Judicial Administration. It was funded by an Australian Research Council Linkage Project Grant (LP210306) with AAM and all Chief Magistrates and their courts as industry partners with support from Flinders University as the host institution. Thanks to Ruth Harris, Julie Henderson, Leigh Kennedy, Lisa Kennedy, Mary McKenna, Russell Brewer, Elizabeth Edwards, Rose Polkinghorne, and Wendy Reimens for research and administrative assistance. This research does not include the Federal magistracy. At the time the project began, the Federal Magistrates Court was not fully constituted. It has a substantially different jurisdiction from state and territory magistrates courts, with a different relation to superior courts and a different constitutional status.

were returned, giving a national response rate of 48%.<sup>5</sup> The identity of those who returned the surveys and those who did not is not known. However, those who responded to the survey are generally representative of the population of Australian magistrates in terms of jurisdiction, gender, age, length of time as a magistrate and court location.

Several aspects of the survey show that magistrates are mindful the important social role they and their courts have.

Looking at the factors that magistrates took into account when deciding to become a magistrate, *value to society* rates strongly. For three out of five magistrates who responded to the survey (60.9%), the opportunity to undertake work that has *value to society* was an important (including a very important) reason for becoming a magistrate. Fewer than one in five (16.4%) indicate that *value to society* was unimportant in their decision to become a magistrate. (For 22.7%, it was somewhat important.) This factor was more important to younger, female, more recently appointed magistrates in their decision to become a magistrate.

In regard to magistrates' current attitudes towards their work, two thirds (66.9%) of magistrates are satisfied, including very satisfied, with the *importance to society* of their work, and less than 1 in 10 (6.4%) are dissatisfied. Women are slightly less satisfied than men. Greater proportions of longer-serving and older magistrates express satisfaction compared with more recent appointees and younger magistrates.

Views differ on the significance of *desire to improve the court system* in the decision to become a magistrate, and there are differing attitudes towards satisfaction with that aspect of work as a magistrate. Two-fifths of respondents (41.5%) indicate that *desire to improve the court system* was an important factor in their decision to become a magistrate. Just under two-fifths (37.1%) indicate that *desire to improve the court system* was unimportant in their decision to become a magistrate while for just over one-fifth (21.5%) it was only

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<sup>5</sup> See Sharyn Roach Anleu and Kathy Mack (2003) 'Magistrates survey: Preliminary findings on job satisfaction, workload and stress', *Magistrates Research Project* Report no 1/03, June 2003, Adelaide.p 12 for more detail on

somewhat Important. This factor was more important to younger, female, more recently appointed magistrates in their decision to become a magistrate.

Current attitudes towards satisfaction with *scope to improve the court system* are mixed, as were the views about its importance in the decision to become a magistrate. Just over one third (36.2%) of magistrates was dissatisfied; just over one third was neutral (36.7%) while only one quarter were satisfied (27.1%). Youngest, newest magistrates are more dissatisfied than their counterparts.

The survey does not provide reasons for these differing views. Possible explanations might include a belief that the court system is working reasonably well and does not need substantial changes, or that the role of a judicial officer is primarily to act fairly within the constraints of the system. Others might believe that judicial officers are in a distinctive and influential role, with a special obligation to ensure that the system as whole delivers just outcomes through a fair process, which may sometimes be lacking in the current system.

Parker's research suggests that judicial reluctance to engage with needed change can be an obstacle to public confidence in the courts.

There seems to be a widespread perception that the judiciary as a group constitute an obstacle to desirable change. This is coupled with, and possibly related to a perception that courts are organized largely for the benefit of judicial officers. Of all the groups discussed in the interviews, judicial officers emerged as the least sensitive to the needs of users ...There are [some] judicial officers who are widely regarded as amenable to change ...[The] enthusiasm for these members of the judiciary might be conditioned in part by a pronounced lack of enthusiasm for others. (Parker, 1998: 162)

### **Magistrates everyday work – skills and values**

The survey asked magistrates to identify skills or qualities of magistrates which are important to their every day work. Most important were legal values:

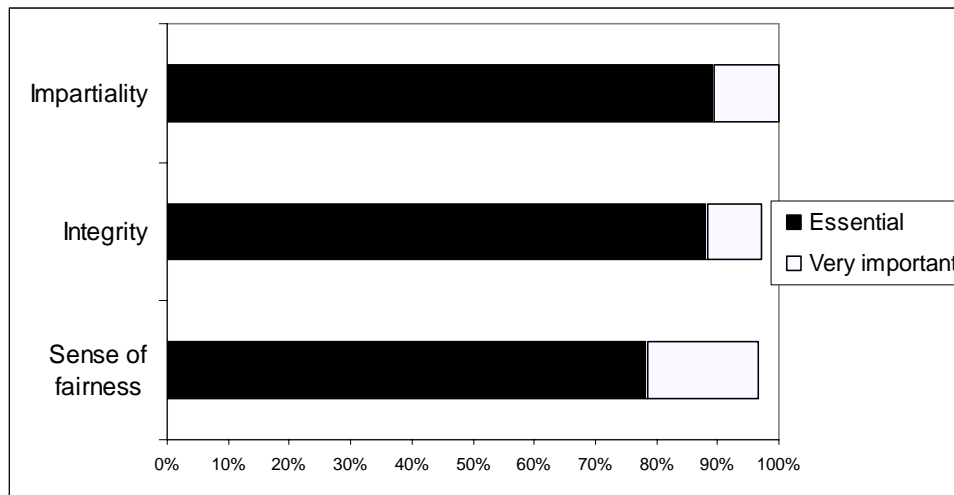
- Impartiality - all respondents (100.0%) identified this quality as essential or very important (essential 89.5%; very important:10.6%).

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survey response rates.

- Integrity/high ethical standards - almost all respondents (97.2%) reported that these qualities were essential or very important (essential: 88.5%; very important: 8.7%).
- Sense of fairness - again almost all (96.6%) reported that these qualities were essential or very important (essential: 78.6%; very important:18%).

## VALUES



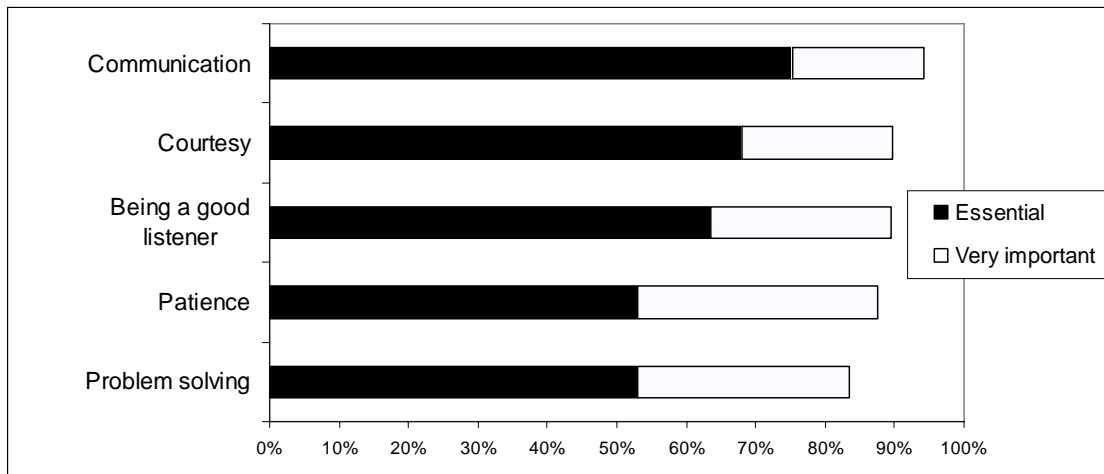
These values underlie substantive fairness and public confidence (see Tyler, 2003; and Tyler, 1990).

Other skills magistrates consider important reflect the need for direct interaction with members of the public and will affect public confidence. Around nine in ten magistrates consider four interactive skills as essential or very important qualities/skills for the performance of daily tasks:

- Communication - 94.2% (essential:75.4%; very important:18.8%)
- Courtesy - 89.8% (essential: 68.1%; very important: 21.7%)
- Being a good listener - 89.5% (essential: 63.5%; very important: 26.0%)
- Patience - 87.5% (essential:53.1%; very important 34.46%)

Just over eight in ten (83.5%) view problem solving skills as essential or very important (essential: 53.1%; very important: 30.4%).

## INTERACTIVE SKILLS



By identifying these interactive skills as important to their work, magistrates are reflecting the publicly visible nature of their work.

### **Magistrates' every day work—visibility**

A magistrate's everyday work in court involves considerable direct interaction with other participants, including the police, the legal profession and ordinary individuals who might be defendants, witnesses, or present in the public gallery. One magistrate during our interviews states:

Magistrates have got to be aware of the fact that many people who appear before them appear before the court for the first time, or even if they're coming as an observer with a relative or a friend who is the defendant or a witness. What these people see will often be their first encounter of what courts are all about, so magistrates have to bear in mind the fact that not only do they have to get through the work quickly, or as quickly as they can, as quickly as the justice of the matter permits, they also have to bear in mind that other people are watching and judging, the members of the public are watching and judging what they do in virtually every move they make, and the perception that they take away from them, from that personal contact with the court, is a perception that will stay with them for a long time and will be far better than anything they read in the paper or see on the news. So, as I said, I think courts have to be very, very conscious of that.

This quotation and other comments made during interviews suggest that many magistrates are very conscious of being the public face of the justice/legal system, which is consistent with the strong emphasis on interpersonal skills shown in the survey findings.

## National Court Observation Study

The National Court Observation Study investigates how magistrates draw on the skills and qualities identified as important in the survey to communicate values of impartiality or fairness, which can develop and maintain public confidence in those who appear before them and in others whose knowledge/attitudes towards court is shaped by those with direct experience. This section will provide some information about the study itself, then it will discuss findings about the interaction between magistrates and other participants, in particular the varied demeanours magistrates displayed.

The study involved observing 27 different magistrates conducting some version of a general criminal list in 30 different court sessions in 20 different locations, including all capital cities, five suburban and four regional locations. This represents more than 6% of all Australian magistrates. The magistrates observed include men and women magistrates covering a range of ages and experience as magistrates. Most observations covered an entire day. The total number of matters observed across all sessions was 1,287.

The cases observed involved managerial/procedural actions such as adjourning or standing down a matter for later action or setting for some other procedure. Other decisions involved more consideration of substantive law, such as bail, convicting on a guilty plea, granting or denying restraining orders, and most important, sentencing. In the matters observed, about one quarter involved guilty pleas (24.7%) or sentencing (25.3%). Bail determinations were slightly more frequent (29.5%), and nearly one-third of matters (32.5%) involved adjournments. Often, there was more than one decision per matter; these four were most frequently observed.

Matters are dealt with very quickly in the criminal list in magistrates courts. Of those matters we observed,

- 5% 15 seconds or less
- 25% 1 minute or less
- 50% 2 minutes 20 seconds or less

- 95% less than 15 minutes
- The average time per matter was 4 minutes, 13 seconds.

When some kinds of cases are moved to the magistrates court from the higher courts to save money or process cases more quickly, these are the time pressures which result.

It is also important to recognize the simultaneous and interactive nature of tasks which the magistrate is performing during the criminal list:

- Listening to and observing participants—usually prosecution, defendant, defence representative and sometimes others
- Reading
- Writing
- Formulating and delivering a reasoned judicial decision

A key element in providing a fair process is the magistrate's own demeanour or orientation towards the other participants. The demeanour magistrates display may enhance public confidence in the legitimacy and authority of the court, communicating neutrality and meeting obligations of procedural fairness to all participants, or it may risk undermining public confidence in the courts. Appropriate demeanours are also required/urged by principles of judicial ethics, for example "courtesy, patience, tolerance and good humour" (Council of Chief Justices of Australia, 2002: 15) or "civil, courteous and reasonably patient" (Wood, 1996: 15).

Parker's interviews with members of the public who have regular contact with the courts and with a separate group of people who work in the courts finds that "[t]he judiciary were generally not mentioned favourably when it came to explaining the system..." (1998: 149). One "prosecuting solicitor" was quoted as saying: "the manner of judicial officers needs improving." At the same time, Parker's research clearly recognises that "In the local and Magistrates Courts there are clearly thought to be limitations on what information can be provided on the day because of the high volume of cases that are dealt with" (1998: 150).

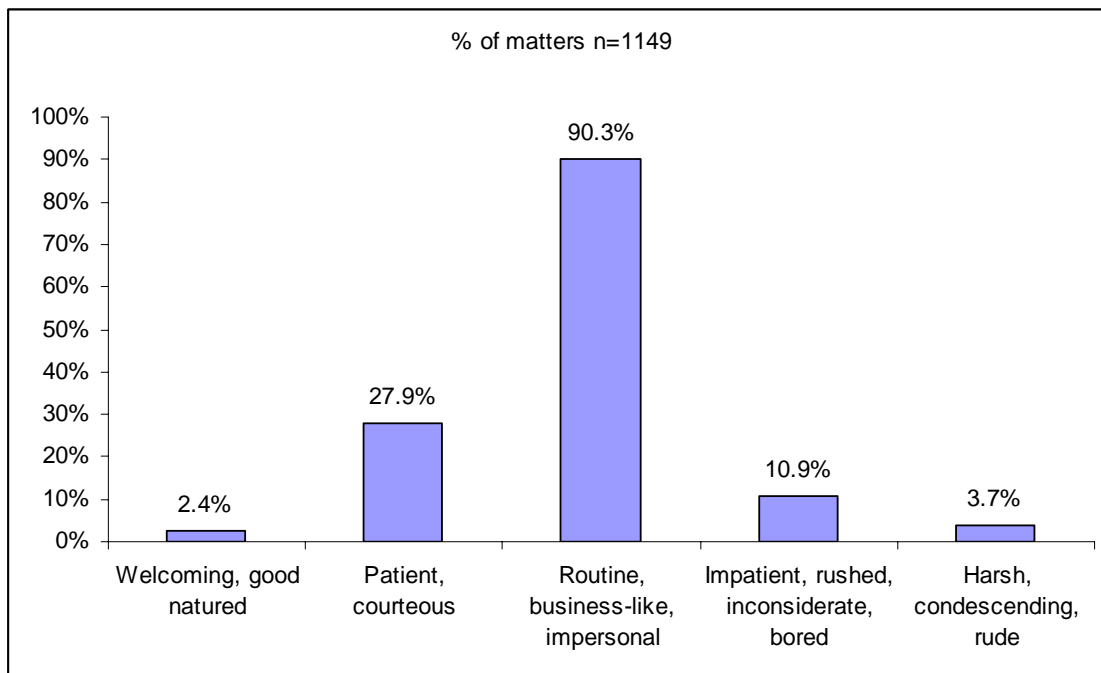
## Magistrates' demeanours

The National Court Observation Study used 5 categories to describe and categorize magistrates' demeanour:

- welcoming, good natured,
- patient, courteous,
- business-like, impersonal,
- inconsiderate, impatient, rushed or bored
- harsh, condescending, or rude.

These categories are based on our preliminary observations and on other judicial demeanour research (Conley and O'Barr, 1990; Hunter, 2005; Mileski, 1971: 523-5; Ptacek, 1999: 97-111).

### MAGISTRATES' Demeanours: PRIMARY & SECONDARY, ALL PARTICIPANTS COMBINED



Often, a magistrate would display multiple demeanours in a particular matter, with different demeanours towards different participants, for example, routine towards the prosecution and patient towards the defendant, or the magistrate might have more than one orientation

towards a participant, perhaps beginning with business-like manner then becoming impatient. To account for this, we recorded both primary and secondary demeanours for 20% of interactions.

Overwhelmingly, magistrates' demeanour was *routine, impersonal*, or *business-like* towards participants in 90.3% of all matters observed in which a demeanour of any sort was recorded. A consistently displayed routine, business-like demeanour appears to link most directly with concepts of formal judicial neutrality. The authority of the law is seen as impersonal and unemotional (Roach Anleu and Mack, 2005). When coupled with other indicia of attention, such as looking at the defendant or speaking directly to the defendant in informal or accessible language, a business-like demeanour can also convey the essential elements of a procedurally fair and meaningful engagement (Tyler, 1990)

Magistrates were often *exceptionally patient/courteous*, with this demeanour being displayed in over one-quarter of all matters (27.9%), and magistrates were some times *welcoming/good natured* (2.4%). The predominance of routine/businesslike and patient/courteous treatment is remarkable, given time pressure and other emotional demands of the criminal list. Exceptional patience and courtesy, especially when displayed towards a defendant, can be important for enabling court users to experience the process as fair and legitimate and to have confidence in the courts.

Being welcoming or good natured is not necessarily or always regarded by other judicial officers as an appropriate judicial demeanour (Philips, 1998: xiii, 88-92). Philips identifies two distinct viewpoints among the judges she studied: “[A] friendly, egalitarian chatty judge is seen by some as inviting rebellion and disorder from defendants and by others as making people feel comfortable and free to talk [to the judge] in a courtroom that they should see as theirs” (1998: xiii).

Exceptional patience or courtesy can be seen as allowing or inviting lengthy pointless submissions, taking up time which could be used on the matters of those participants waiting in the court room. However, from the point of view of the recipient, this patience

may be perceived as an indication that the magistrate is genuinely listening to their claim and so the resulting decision carries greater authority and legitimacy than a more efficient routine, business-like procedure.

Not all court users or participants have the same interests or needs. A routine, impersonal demeanour may avoid the risk of loss of courtroom control, or move matters along more quickly, but it may not produce the same degree of accessibility to court users.

Magistrates appeared *impatient, bored, rushed or inconsiderate* in only 10.9% of matters observed and *harsh, condescending* in only 3.7% of matters. A magistrate's demeanour which is rushed or impatient or bored may sometimes reflect an unavoidable human response to the pressures of a long list, but harsh, rude or condescending treatment is never consistent with the core judicial obligations of neutrality and procedural fairness, and the canons of ethical/professional judicial behavior. A harsh or rude judicial demeanour can imply actual bias or prejudice against the recipient, either personally or as part of a group. More generally, such conduct can undermine public confidence in the courts (*Were v Police* [2003] SASC 116 [15]) and the "impersonal authority of law" (*Magistrates Court of Victoria v Robinson* [2000] VSCA 198 [24]).

Extrapolated across all the matters which magistrates courts hear, such harsh conduct, though rare, raises concerns about the experience of and confidence in the court system which those in court must take away with them. The effects of even a few instances of harsh or inconsiderate treatment may not be fully offset by patience and courtesy, even if these more positive demeanours are displayed more frequently.

### **CONCLUSION: The meanings of demeanours**

The National Court Observation Study shows in a concrete way the emotional demands of working in the magistrates court, especially the criminal list, and the need to

- maintain an appropriate demeanour;

- utilise communication skills to embody the legal values of fairness, impartiality, and so
- improve public confidence in the courts.

As Tom Tyler has demonstrated, public acceptance of the legitimacy of the court system is strongly influenced by a citizen's experience of "neutrality, lack of bias, honesty, efforts to be fair, politeness and respect for citizens' rights" (Tyler, 1990: 7).

There is a great deal of frustration for all participants in the criminal list and there can be considerable provocation. At the same time, it is important to recognise that judicial behaviour that appeared harsh or rude to both observers is not consistent with maintaining public confidence in and respect for the courts.

However, even the "positive" demeanours of being welcoming, patient or courteous can be problematical if displayed inconsistently or worse, characteristically directed at one identifiable group of participants rather than more generally. If one particular defence counsel clearly receives a greater welcome than others generally, or is treated with apparently unjustified impatience, this can appear inconsistent with judicial neutrality. However, if greater patience is displayed towards an obviously distressed defendant or an inexperienced defence representative, this would not violate canons of judicial behaviour or reduce public confidence in the courts.

The important finding from these observations is not that judicial officers sometimes behave rudely or condescendingly or inconsiderately to defendants or others; what is most important to note is how rare it is, given the high volume, time pressures and organisational demands of the criminal list. In nearly all matters observed, the magistrates treated participants in a businesslike, impersonal way, and a significant proportion of matters involved patience and courtesy in many interactions, especially with the defendants. While it is not possible in this study to directly measure the qualitative gain by greater patience, courtesy or good nature, the feeling in the courtrooms was quite perceptibly different.

By displaying an appropriate demeanour in the general criminal list, a magistrate has the opportunity to enhance the legitimacy and authority of the court, communicating neutrality and meeting participants' expectations of procedural fairness. Within the constraints of the high volume and rapid pace of a general criminal list, magistrates overwhelmingly maintain a judicial demeanour which is consistent with and, ideally, reinforces judicial neutrality, a core element in justifying public confidence in the courts.

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