
The work of the Australian judiciary: Public and judicial attitudes

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Australians place a high value on the importance of courts, though public confidence in the courts and legal system is generally low. Very few Australians have any first-hand experience of their courts, suggesting that most of their information about courts and judges derives from print and electronic news and entertainment or what they are told about the experiences of other people. A disjuncture between the public's high value of courts and low confidence in the justice system can present a profound challenge to Australia's social fabric and its legal integrity. Closer analysis of public attitudes on a range of facets of judicial work generates a more nuanced and complex understanding of public opinion about the justice system.

INTRODUCTION

The legal system, especially courts and judicial officers, constitutes a key social institution. Courts are central for the administration of justice, the protection of legal rights and the enforcement of legal obligations. Courts and judges are also essential for the administration and symbolisation of justice in developed, developing and transition countries.¹

The Australian Survey of Social Attitudes (AuSSA) 2007 indicates that Australians place a high value on the importance of courts, but express lower levels of confidence in the criminal courts.² Previous AuSSA surveys record that public confidence in the courts and legal system has generally been low.³ This tension between high value and low confidence is complicated by the fact that very few Australians have any first hand experience of their courts.⁴ Only one-third indicate presence at a court proceeding during the past decade and only 6% report contact with the criminal courts in the past year.⁵ This data suggests that Australians may derive most of their information about courts and judges from sources such as print and electronic news and entertainment or what they are told about experiences of other people, rather than via their own direct experience or observation. A disjuncture between the public's high value of courts and the judiciary, and low confidence in the justice system, can present a profound challenge to Australia's social fabric and its legal integrity. Alternatively,

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¹ Messick RE, "Judicial Reform and Economic Development: A Survey of the Issues" (1999) 14(1) *The World Bank Research Observer* 117.

² Phillips T, Tranter B, Mitchell D, Clark J and Reed K, *Australian Survey of Social Attitudes, 2007* [Computer file], Australian Social Science Data Archive (The Australian National University, Canberra, 2007).

³ Bean C, "Is There a Crisis of Trust in Australia" in Wilson S, Meagher G, Gibson R, Denmark D and Western M (eds) *Australian Social Attitudes: The First Report* (UNSW Press, Sydney, 2005) p 122. Wilson S, Gibson R, Meagher G, Denmark D and Western M, *Australian Survey of Social Attitudes, 2005* [Data file], Australian Social Science Data Archive, (The Australian National University, Canberra, 2006).

⁴ In all Australian jurisdictions, the first instance civil and criminal court is called the Magistrates Court, except in New South Wales where it is the Local Court. Each Australian State and Territory has a Supreme Court, and a magistrates or local court. Except in the Australian Capital Territory, the Northern Territory and Tasmania, there is also an intermediate trial court, the District or County Court. Some jurisdictions also have specialist courts such as land and environment courts, industrial commissions or children's courts which may operate as separate courts or as a branch of a generalist court. Commonwealth courts include the High Court, the Federal Court, the Family Court and the Federal Magistrates Court. In this paper we use terms such as "the judiciary", "all judicial officers", "judges and magistrates" interchangeably and make it clear when reference is only to some courts or specific judicial officers.

⁵ Phillips et al, n 2.

closer analysis of public attitudes, their formation and meaning, on a range of facets of judicial work, generates a more nuanced and complex understanding of public opinion and the justice system, and identifies areas where the public and the judiciary share views.

In the 2007 Australian Survey of Social Attitudes, respondents were asked to indicate their attitudes towards the judiciary in several respects. This article reports, first, on these public attitudes and perceptions regarding the role and importance of the courts. Second, the paper compares some findings from the AuSSA 2007 with the results of similar questions asked in a national survey of the Australian judiciary, also conducted in 2007.⁶

PUBLIC OPINION AND THE COURTS

Many respondents to the AuSSA survey (and other general social surveys) form their views about the courts (and other institutions) without any direct knowledge or experience of them. Only a small proportion of Australians have direct experience of courts and the judiciary which might form a basis for their attitudes and perceptions. Experience can derive from being a witness or defendant in a criminal matter, a civil litigant, a participant in family court proceedings, an observer in the public gallery, or a member of the legal profession, or other occupational group that works in and around the court, including court administration. Two-thirds (67%) of AuSSA 2007 respondents report that they have not been present at a court proceeding in any capacity in the last decade or so. One in five (20%) report being present once and only 13% report being present at a court proceeding more than once over the past decade. A much smaller proportion (6%) report any contact with the criminal courts (magistrates, district or higher courts) in the past year.

Given this lack of direct experience, public views may be based on media reports – news as well as entertainment or “infotainment” – or perhaps on the experiences of friends, family members or acquaintances.⁷ Courts and the legal system are often the subject of television and movie drama and hold a prominent place in popular culture.⁸ Some court decisions, especially sentencing of people convicted of crimes, are reported widely in the mass print and electronic media.⁹ At other times the courts and judges are topics of media attention, including events such as judicial appointments, reports on judicial pay increases, or judicial deviance, for example individual judges facing criminal

⁶ The Australian judiciary was surveyed through two mail-back questionnaires; one directed at judges of the higher courts and the second to magistrates. The National Survey of Australian Judges was sent to all judges in all State, Territory and Commonwealth courts (including the Federal magistracy) throughout Australia in March 2007. Responses were received into June 2007. Of the 566 surveys mailed out, 309 surveys were returned, giving a national response rate of 54.5%. The judges who responded are generally representative of the judges as a whole, in terms of gender, time on the bench and level of court and appear generally representative in terms of age, though that cannot be calculated fully, as baseline date of birth data for the judiciary as a whole is not available. The second National Survey of Australian Magistrates was sent to all magistrates throughout Australia in May 2007. (An earlier survey was sent to magistrates in 2002; the findings of this survey are not reported here.) Of the 457 surveys mailed out, 243 were returned, giving a response rate of 53.2%. The magistrates who responded are generally representative of the magistracy as a whole, in terms of gender, age and time on the bench, with a slightly higher proportion of magistrates from New South Wales, compared with the proportion of magistrates from other jurisdictions. For more detail about the structure and content of the survey and further analysis of findings from these surveys, see Mack K and Roach Anleu S, “The National Survey of Australian Judges: An Overview of aFindings” (2008) 18 JJA 5. This research is currently funded by an ARC Discovery Project (DP0665198). It was initially 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 Australasian Institute of Judicial Administration. Further funding came from 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. A Flinders University Research Development Grant (2006) enabled purchase of AuSSA questions. All phases of this research involving human subjects have been approved by the Social and Behavioural Ethics Committee of Flinders University. Thanks to Russell Brewer, Carolyn Corkindale, Elizabeth Edwards, Ruth Harris, Julie Henderson, Lilian Jacobs, Leigh Kennedy, Lisa Kennedy, Mary McKenna, Rosemary Williams, Wendy Reimens, Mavis Sansom, Rae Wood and David Wootton for research and administrative assistance. We appreciate the helpful comments made by Fiona Haines on an earlier version of the paper.

⁷ Parker S, *Courts and the Public* (Australian Institute of Judicial Administration, Melbourne, 1998); Schulz PD “Rougher Than Usual Media Treatment: A Discourse Analysis of Media Reporting and Justice on Trial” (2008) 17 JJA 223.

⁸ Valverde M, *Law and Order: Images, Meanings, Myths* (Routledge Cavendish, Oxford, 2006).

⁹ Greer C “Crime, Media and Community: Grief and Virtual Engagement in Late Modernity” in Ferrell J, Hayward K, Morrison W and Presdee M (eds), *Cultural Criminology Unleashed* (Glass House Press, London, 2004) p 109.

charges.¹⁰ Much of this attention is negative and critical. An analysis of newspaper headlines concludes that: “judges are portrayed within the media as ‘other’ – out of touch with the community – and as a consequence, that the justice system is in need of review”.¹¹ Other research – in Australia and overseas – also describes a consistent public image of the judiciary as a closed, self-reproducing entity, embedded in archaic traditions, resistant to change and disconnected from ordinary citizens and contemporary values.¹²

However, research which asks several kinds of questions about the justice system, and relies on different methods, suggests that public attitudes are more varied than responses to a single survey question might imply.¹³ Importantly, this article reports on areas where the Australian public and the judiciary share views, and where they are different, rather than assuming that public and judicial views necessarily diverge.

At a general, fairly abstract level, Australians value highly the work of the courts and judicial officers. Nearly all AuSSA 2007 respondents (95%) agree (including strongly agree (47%)) that “the work of judges and magistrates is important to the community”.¹⁴ This finding signals acknowledgement of the important institutional contribution of the judicial system to the democratic polity. Age, education, social class and political affiliation, but not gender or income, seem to influence the level, but not the existence, of agreement. The higher the age, more education and greater self-identification as not working class all increase the intensity of agreement. For example, older cohorts (55+) are more emphatic: 52% strongly agree and 43% agree compared with 37% of 17-34 day olds who strongly agree and 56% who agree with the statement (Table 1). Interestingly, larger percentages of respondents with a clear political orientation (whether right or left wing) strongly agree that the work of judges and magistrates is important to the community compared with those respondents who indicate they are politically neutral or who cannot choose their political orientation.

TABLE 1 The work of judges and magistrates is important to the community, 2007 (%)*

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
Gender					
Female	47	47	5	1	0
Male	47	48	3	1	1
Have you been present at a court proceeding in any capacity within the past decade or so?					
Yes	50	45	4	2	0
No	46	49	4	1	0
Do you have a religion?					
Yes	49	46	4	1	0
No	43	51	5	1	0

¹⁰ For example, Pelly M, “Einfeld Gets Three Years for \$77 Lie” *The Weekend Australian* (21-22 March 2009) p 3.

¹¹ Schulz, n 7 at 223

¹² Hutton N, “Beyond Populist Punitiveness?” (2005) 7(3) *Punishment & Society* 243; Parker, n 7.

¹³ Gelb K, *Measuring Public Opinion About Sentencing* (Sentencing Advisory Council, Melbourne, 2008), accessed online at <http://www.sentencingcouncil.vic.gov.au> viewed 30 March 2009; Jones C, Weatherburn D and McFarlane K, “Public Confidence in the New South Wales Criminal Justice System” (2008) 118 *Crime and Justice Bulletin* 1.

¹⁴ Phillips et al, n 2.

TABLE 1 *continued*

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
Age					
17 to 34	37	56	6	1	0
35 to 54	47	48	4	1	1
55+	52	43	4	1	0
Education					
10 years or less	47	47	5	1	1
11 through 16 years	44	50	5	1	0
17 years or more	55	42	2	1	0
Political affiliation					
Left	53	43	3	1	1
Neutral	43	52	4	1	0
Right	53	43	3	1	0
Social class					
Upper and upper middle	51	46	3	1	0
Lower middle	50	46	4	0	0
Working	38	54	6	2	1
Gross annual income (\$AUD)					
Nil to 399 per week (20,799)	47	47	5	1	0
400 to 999 per week (20,800-51,999)	44	50	5	1	1
1000 or more per week (52,000+)	51	46	3	1	0
Total (n=2717)	47	48	4	1	0

*Percentages may not total to 100 due to rounding

SOURCE: Phillips T et al, *The Australian Survey of Social Attitudes, 2007* [computer file] (Australian Social Science Data Archive, Australian National University, Canberra, 2007).

The judiciary also displays a strong awareness of the important social and community role of the courts and work of judicial officers. Two-thirds (68%) of respondents to the magistrates' and judges' surveys identify *value to society* as a very important or important factor in their initial decision to become a magistrate or judge (table not shown). Judicial officers also express high levels of satisfaction with the social importance of their work. Four-fifths (80%) of the respondents to these surveys are satisfied (including very satisfied) with the *importance to society* of their work and almost all (97%) agree (including strongly agree) that their work as judicial officers is *important to the community* (Table 2).

TABLE 2 Magistrates and judges satisfaction with the social value of their work, 2007 (%)

		Magistrates (n=235, 240)	Judges (n=301, 302)	Whole judiciary (n=536, 542)
Importance to society	Very satisfied/ Satisfied	82	78	80
My work is important to the community	Strongly agree/ Agree	97	97	97

SOURCE: The National Survey of Australian Judges (2007), The National Survey of Australian Magistrates 2007 (2007).

Despite the high value members of the public place on the work of judges and magistrates, successive AuSSA surveys show that over time public confidence in the courts and the legal system are low both absolutely and relatively.¹⁵ Almost half of the respondents (46%) to AuSSA 2005 reported not very much confidence in the courts and the legal system and 22% expressed no confidence at all.¹⁶ Only a few (4%) expressed a great deal of confidence and 26% of respondents reported quite a lot of confidence in the courts and the legal system. 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.

Questions about levels of confidence in the “courts and the legal system”, provide information on a general public orientation towards the justice system broadly. It is not clear what elements respondents have in mind when answering: the police, lawyers, courts collectively or particular courts – the Family Court, the High Court, or local/magistrates courts – or whether they are referring to a composite, abstract image. Moreover, public opinion surveys create the phenomena they seek to document: members of the public may not have pre-existing, deeply-held views about social or legal institutions, but form opinions when responding to particular survey questions.¹⁷ Thus, questions about confidence in the courts and the legal system cannot generate evaluations of specific courts or judicial performance. One overview of this kind of research cautions:

Generalised surveys are not necessarily helpful as a basis for measuring the efficiency of the justice system or for making operational changes, and care should be taken to ensure that these are used appropriately when commenting on levels of confidence in the system.¹⁸

Regardless of how opinion is formed, general public views about the courts and the justice system, particularly in relation to sentencing and punishment, have become reference points for politicians, policy makers, court administrators and judges.¹⁹ Attitudes towards courts can also influence individuals’ inclination to use the courts as a way of resolving disputes or settling grievances.²⁰

AuSSA 2007 asks four specific questions regarding confidence in aspects of the criminal courts only, without parallel questions regarding general civil, family, industrial or other courts. Respondents express more confidence in criminal courts to have regard for defendants’ rights than for victims’

¹⁵ Bean, n 3.

¹⁶ Wilson et al (2006), n 3.

¹⁷ Osborne T and Rose N, “Do the Social Sciences Create Phenomena?: The Example of Public Opinion Research” (1999) 50 *British Journal of Sociology* 367 at 382.

¹⁸ Van de Walle S and Raine J W, *Explaining Attitudes Towards the Justice System in the UK and Europe* (Research Series 9/08, Ministry of Justice, London, 2008) p iv; accessed online at <http://www.justice.gov.uk/publications/attitude-towards-justice-system.htm> viewed 21 January 2009.

¹⁹ Osborne and Rose, n 17; also see Gelb K, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* (Sentencing Advisory Council, Melbourne, 2006), accessed online at <http://www.sentencingcouncil.vic.gov.au> viewed 30 March 2009.

²⁰ Genn H, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, Oxford, 1999).

rights. Two-thirds (68%) of respondents report a great deal or quite a lot of confidence in the criminal courts' regard for defendants' rights, while just under half (47%) express the same level of confidence with respect to victims' rights (Table 3 below). Neither gender, religion, nor presence at a court proceeding over the past decade seem to affect confidence in the criminal courts' regard for defendants' rights, whereas there are some differences among age and education cohorts, political orientation, and class and income groupings. For example, a lower proportion (60%) of respondents self-identifying as working class contrasting most strongly with 78% of those identifying as upper or upper middle class have confidence in the criminal courts' regard for defendants' rights. Additionally, a lower proportion (56%) of respondents with 10 years of education or less contrasting most with 77% of those with 17 years or more have confidence that the criminal courts regard defendants' rights.

TABLE 3 Public confidence in criminal courts, 2007 (%)*

	A great deal of confidence	Quite a lot of confidence	Not very much confidence	None at all
Regard for defendants' rights (n=5030)	12	56	27	5
Regard for victims' rights (n=5053)	7	40	42	11
To deal with matters quickly (n=5054)	3	19	59	20
To deal with matters fairly (n=5044)	7	45	40	8

*Percentages may not total 100 due to rounding.

SOURCE: Phillips T et al, *The Australian Survey of Social Attitudes, 2007* [computer file] (Australian Social Science Data Archive, Australian National University, Canberra, 2007).

Neither gender, religion, gross annual income nor presence at court over the past decade seems to shape views regarding victims' rights, whereas there are some different attitudes among different age, education, and political orientation and (self-identified) class groupings. For example, as age increases, the proportions of respondents with confidence in the criminal courts to regard victims' rights declines: three in five (63%) respondents in the 17-34 age category contrasting most strongly with two in five (40%) in the 55+ age group indicate a great deal or quite a lot of confidence in the criminal courts' regard for victims' rights.

Only one-fifth (22%) of AuSSA 2007 respondents report a great deal or quite a lot of confidence, with four-fifths (78%) expressing not very much or no confidence in the criminal courts to deal with matters quickly, and there is widespread agreement among different segments of the population. Likely, but not necessarily, this finding demonstrates a negative assessment of the courts and/or judicial decision-making. It may signal a perception of the justice system as over-burdened with technical, legal requirements that impede apparently obvious or straightforward outcomes. Alternatively, this public view may reflect an appreciation of the time that legal processes require and a perception that quick justice is not necessarily good justice.

Australians are split regarding their confidence in the criminal courts to deal with matters fairly: 52% express a great deal or quite a lot of confidence while 48% express not very much or no confidence. Only age, education and political affiliation seem to make any noticeable difference to this finding. Younger cohorts express more confidence than older cohorts, and those with more education also express more confidence. For example, three in five (63%) respondents with 17 years or more years of education express a great deal or quite a lot of confidence in the criminal courts to deal with matters fairly. This contrasts most strongly with respondents with 10 or fewer years of education, two in five (42%) of whom express such confidence. Almost two-thirds (65%) of respondents identifying as left wing, around half (47%) identifying as neutral and half (49%) identifying as right wing express a great deal or quite a lot of confidence in the criminal courts to deal with matters fairly.

These findings might stem from different views about what constitutes fairness, such as differences in emphasis on procedural fairness, the equitable application of law, and just substantive outcomes. A study of court users without legal representation – litigants in person – shows “how confusion over procedure and lay notions of fairness can combine to create a strong perceptual cocktail of unfairness”.²¹

Broad statements about the lack of public confidence in the justice system do not reflect the variation in confidence regarding different aspects of the courts and the legal system. When several questions are asked about different dimensions of the justice system, a more complex picture emerges. For example, Australians are evenly split on whether or not they have confidence in the criminal courts to have regard for victims’ rights or to deal with matters fairly. There is less confidence in the criminal courts to deal with matters quickly and more confidence that defendants’ rights are safeguarded.

The relatively low levels of confidence are not unique to Australia.²² An assessment of citizens’ attitudes towards the justice system and their determinants internationally finds that confidence in the justice system declined substantially in most Western countries over the past two decades, and that the justice system is rarely among the most trusted institutions in any country.²³ Interestingly, few of the conventional independent variables, such as gender, education, age, political self-identification, political interest, feelings of safety and life satisfaction explain variation in the levels of trust in the legal system in Western Europe, including the United Kingdom.²⁴

THE ROLE OF THE COURTS

Confidence in the courts may be derived, in part, from an assessment about whether the courts and judicial personnel are performing their roles appropriately and whether they possess the relevant skills and qualities for judicial office and decision-making.²⁵ There are divergent public as well as academic views about the proper role of courts. In the context of the criminal courts, debate often centres on the relative weight that should be attached to the different, and sometimes inconsistent, purposes of sentencing, including: punishment, rehabilitation, deterrence, and/or incapacitation.²⁶

Some contemporary public and policy debates prioritise criminal punishment and punitiveness and seek legislative change to reduce the scope of judicial discretion, often viewed as a source of sentencing leniency.²⁷ On the other side, various court reforms reflect an increasing recognition that many criminal cases raise not only legal issues but also involve a wider constellation of personal and social circumstances. These reforms develop a role for courts in facilitating the resolution of personal, interpersonal and social problems which can lead to legal disputes or crime. The rationale for this greater judicial involvement is that offending behaviour will diminish if the underlying personal and

²¹ Moorhead R, “The Passive Arbiter: Litigants in Person and the Challenge to Neutrality” (2007) 16(3) *Social & Legal Studies* 405 at 414.

²² Gander L, Stratton M and Lowe D, “The Civil Justice System and the Public: Highlights of the Alberta Pilot” (2005) 42(3) *Alberta Law Review* 803; Gelb, n 19; Rottman DB, “Public Perceptions of the State Courts: A Primer” (2000) 15(3) *The Court Manager* 1, accessed online at http://www.ncsconline.org/d_research/publications.html#C viewed 30 March 2009; Stratton M *Public Perceptions of the Role of the Canadian Judiciary* (The Canadian Forum on Civil Justice, Alberta, 2005), accessed online at <http://www.cfcj-fcjc.org/publications/cjsp-en.php> viewed 31 March 2009).

²³ Van de Walle and Raine, n 18, p ii.

²⁴ Van de Walle and Raine, n 18, p ii.

²⁵ Kritzer HM, “Toward a Theorization of Craft” (2007) 16 *Social & Legal Studies* 321; Mack K and Roach Anleu S “‘Getting Through the List’: Judgecraft and Legitimacy in the Lower Courts” (2007) 16 *Social & Legal Studies* 341.

²⁶ Australian Law Reform Commission, *Sentencing of Federal Offenders: Discussion Paper No 70* (2005) pp 94-106.

²⁷ Freiberg A and Gelb K *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, Sydney, 2008); Hoel A and Gelb K, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council, Melbourne, 2008), accessed online at <http://www.sentencingcouncil.vic.gov.au> viewed 30 March 2009.

social problems which form the context for the crime or harm caused are resolved. This development is most apparent in the problem-oriented or specialist courts.²⁸

There are also various conceptions of the proper role of the judge. Conventionally, the judge in the common law tradition is constituted as a passive, non-intervening adjudicator of a contest between litigants, who are in control of their own cases and legally represented.²⁹ Recent reforms expand judges' scope to intervene in proceedings, such as through case management practices. The increasing numbers of litigants in person create further pressures for more active judicial engagement.³⁰ A more active judicial role is most visible in the problem-oriented courts, for example the drug courts, where punishment and rehabilitation goals fuse and judicial and therapeutic discourses converge.³¹ In these courts, the judicial officer is no longer cast entirely as passive arbiter but as facilitator of outcomes which might have social benefits and bring about social change.³²

In addition, views may differ regarding the skills and qualities which are most important for judicial work. Low levels of confidence in the courts might relate to a perception that judges do not possess, or are not exercising, the appropriate skills and qualities for judicial office and decision-making. Criticisms that the judiciary is primarily appointed from elite, male segments of society may imply that these individuals lack some skills and qualities for judicial office which other kinds of people or those with different backgrounds or experiences might possess. Public confidence is sustained when appointments are based on merit linking a candidate's achievements with appropriate judicial skills and qualities.³³

Within legal and procedural constraints, judges sometimes adopt different styles of judging that may rely on different kinds of skills. A study of housing possession proceedings in the United Kingdom indicates that some judges engaged in active questioning, took an informal approach, were empathic to the situation of the occupier (potentially to be evicted) and emphasised social welfare concerns while other judges typically framed the proceedings as concerning contractual debt, were less active, focused more on the behaviour of individuals and adopted a legalistic approach to the housing dispute.³⁴ These differences of approach raise similar questions about the role of courts and judges in relation to crime, punishment and social problems as discussed above.

Social problems and punishment

Australian attitudes are divided about whether courts should emphasise solving social problems more than punishing offenders. Two-fifths (40%) agree (including strongly agree) and 35% disagree (including strongly disagree) with one-quarter (25%) neither agreeing nor disagreeing with the statement. There are no gender, religious, education, social class or income differences but political orientation seems to make a strong difference. Respondents who identify as right wing politically are more likely to disagree (43%) than those who identify as left wing (25%), while 38% of politically neutral disagree that courts should emphasise solving social problems more than punishing offenders (Table 4).

²⁸ Moore D, "Translating Justice and Therapy: The Drug Treatment Court Networks" (2007) 47 *British Journal of Criminology* 42; Roach Anleu S and Mack K, "Magistrates, Magistrates Courts and Social Change" (2007) 29 *Law and Policy* 183.

²⁹ Davies M, *Asking the Law Question: The Dissolution of Legal Theory* (3rd ed, Lawbook Co, Sydney, 2008).

³⁰ Moorhead, n 21.

³¹ Moore, n 28.

³² Roach Anleu and Mack, n 28.

³³ Roach Anleu S and Mack K, "Judicial Appointment and the Skills for Judicial Office", (2005) 15 *JJA* 37.

³⁴ Cowan D, Blandy S, Hitchings E, Hunter C and Nixon J, "District Judges and Possession Proceedings" (2006) 33(4) *Journal of Law and Society*: 547.

TABLE 4 Courts should emphasise solving social problems more than punishing offenders, 2007 (%)*

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
Gender					
Female	12	30	25	29	5
Male	11	27	24	33	5
Have you been present at a court proceeding in any capacity within the past decade or so?					
Yes	14	28	24	30	5
No	11	29	25	31	5
Do you have a religion?					
Yes	11	29	24	31	5
No	13	28	26	29	4
Age					
17 to 34	13	27	30	25	5
35 to 54	11	30	25	29	5
55+	12	29	21	34	5
Education					
10 years or less	12	29	24	30	6
11 through 16 years	10	27	26	32	4
17 years or more	15	32	23	27	4
Political affiliation					
Left	21	34	21	21	3
Neutral	8	26	28	34	5
Right	9	27	21	37	6
Social class					
Upper and upper middle	13	29	24	30	4
Lower middle	11	30	25	30	4
Working	10	27	27	31	6
Gross annual income (\$AUD)					
Nil to 399 per week (20,799)	13	29	25	28	6
400 to 999 per week (20,800-51,999)	12	29	26	30	4

TABLE 4 *continued*

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
1000 or more per week (52,000+)	10	30	22	32	5
Total (n=2684)	12	29	25	30	5

*Percentages may not total to 100 due to rounding

SOURCE: Phillips T et al, *The Australian Survey of Social Attitudes, 2007* [computer file] (Australian Social Science Data Archive, Australian National University, Canberra, 2007).

The 2007 surveys of the Australian judiciary did not ask directly about judges' views on social problems and punishment, though some questions do bear on their orientation to a broader, more active role. Two-fifths of respondents (40%) to the judicial surveys indicate that desire to improve the court system was an important (including very important) factor in their decision to become a judicial officer; 14% indicate that desire to improve the court system was unimportant in this decision, and for around a quarter (26%) it was only somewhat important. This factor was more important to younger, female, more recently appointed judicial officers in their decision to accept judicial appointment.

Current attitudes towards satisfaction with scope to improve the court system are mixed also. About one-third of the judiciary (35%) is satisfied (including very satisfied) with scope for improving the court system, one-quarter (25%) is dissatisfied; with two-fifths (40%) neutral. Possible explanations for satisfied and neutral responses 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. Respondents who express dissatisfaction may experience some frustration with the resources available and the capacity to deal with the diverse problems court users bring, especially in criminal matters.³⁵

Views among the Australian judiciary are mixed regarding the relevance of social concerns to their judicial role. For example, one magistrate writes:

I think the Magistrates Court, and especially their new approach to therapeutic jurisprudence & specialist courts, to be a very important part of the judicial system & I am happy to be a part of it.

Another magistrate makes a stronger distinction between the jurisdiction and role of legal and social welfare systems:

I believe that the ... Court system is evolving into a social welfare system. There are now various groups getting preferential treatment[.] I took an oath to dispense justice without fear or favour[.]

At first glance, the positive public attitudes towards the courts having a role to address social problems is somewhat surprising in light of media and public attacks often associated with claims of insufficiently harsh punishment of criminal offenders. Indeed, seven in 10 (70%) AuSSA 2007 respondents agree (including 26% strongly agree) that "people who break the law should be given stiffer sentences", and well over half (58%) agree (including 21% strongly agree) that "when sentencing criminals judges should reflect the views of the public".

One possible way to reconcile these apparently conflicting views is to consider that respondents may have included crime as a social problem (as well as unemployment, poverty, drug addiction, welfare dependence and health issues), so those who agree that courts have a role in solving social problems may be endorsing general deterrence and incapacitation as ways to solve crime as a social problem, rather than a general welfare orientation. Under this interpretation both findings suggest a punishment-oriented public that wants the judiciary to mirror this orientation when sentencing; a general finding of much survey research.³⁶ However, research designs that provide participants with details of hypothetical cases, including mitigating information about the offence and the offender, and

³⁵ Roach Anleu and Mack, n 28.

³⁶ Gelb, n 19; Gelb K, *More Myths and Misconceptions* (Sentencing Advisory Council, Melbourne, 2008), accessed online at

allow deliberation and discussion, show that public estimations of appropriate sentences are much closer to sentencing practice than general survey responses imply.³⁷

Public punitiveness may relate more to concerns about social conditions, perceived declines in morality and discipline and increasing feelings of danger and insecurity than to a perception that the courts are too lenient.³⁸ Judges may consider that criticisms of sentencing constitute unwarranted personal attacks on members of the judiciary who must adhere to norms of impartiality and legal rationality.³⁹ For example, a respondent to the judicial survey writes:

My biggest regret is the lack of understanding among many members of society concerning the effort made by almost all judges in ensuring fairness, impartiality and maintenance of the rule of law.

Another respondent's comment shows that impartiality means that judges cannot reflect or engage with public sentiment even when they might personally agree with it:

I am concerned that judges are more & more subject to criticism. I sometimes feel that some of my judicial colleagues deserve the criticism – & resent them for letting “the side down”. Sometimes I feel judges or the judiciary is [sic] unfairly criticized – and there is no voice answering it. Conversely there are times when I am desperate to enter the political debate (eg David Hicks; the War in Iraq; conditions in many Indigenous communities) – but I cannot do so.

In cultural terms, negative public outcries about sentencing are not only about judicial decision making. Punishment and crime constitute a platform for the public expression of collective values and morality. Durkheim⁴⁰ emphasised the affective, emotional dimensions of punishment, recognising it as much more than the technical, rational legal process of assigning penalty to a convicted offender.⁴¹ Justice and the rule of law, as core values underpinning a democratic polity, are symbolised most powerfully in the judiciary. Public claims, especially criticisms which are often highly emotive and expressing anger and distress, may be directed at judges as symbolic representations, not as individuals, of what is perceived to be wrong with the justice system.

However, other survey responses affirm the public's recognition of the importance of the courts and judicial decision-making. In particular, when members of the public and the judiciary are asked about the kinds of qualities and skills necessary for judicial work, there is a high level of congruence.

Skills for judicial work

Levels of confidence in the judiciary may be affected by a perception about the competence or skills of judicial officers, as a group or individually, to carry out the work of the courts. What does the public regard as the skills necessary to perform the everyday work of judges and magistrates, and which skills do the judiciary identify as necessary? To what extent, and in which ways, do the perceptions and attitudes of the general public and the judiciary differ or converge?

Professions and occupations are constituted by practical skills and knowledge acquired through training – education and experience – and values or guiding principles.⁴² Some of these characteristics may be unique to a specific profession while others are more general across different occupations. The 2007 surveys of judges and magistrates asked judicial officers to assess the importance of a number of qualities and skills to their everyday work. These specific items can be grouped: *legal skills*, for example legal knowledge, intellectual skills, and legal analysis; *legal values*, for example impartiality, integrity and a sense of fairness; *interprofessional skills*, such as team work and respect for court staff;

<http://www.sentencingcouncil.vic.gov.au> viewed 30 March 2009; Hough M and Roberts JV, “Sentencing Trends in Britain: Public Knowledge and Public Opinion” (1999) 1(1) *Punishment & Society* 11.

³⁷ Hutton, n 12.

³⁸ Tyler TR and Boeckmann RJ, “Three Strikes and You Are Out, But Why? The Psychology of Public Support for Punishing Rule Breakers” (1997) 31(2) *Law & Society Review* 237.

³⁹ Schulz, n 7.

⁴⁰ Durkheim E, *The Division of Labour in Society*, translated by Halls WD (Macmillan, London, 1984).

⁴¹ Garland D, *Punishment and Modern Society: A Study in Social Theory* (University of Chicago Press, Chicago, 1990); Smith P, *Punishment and Culture* (Chicago University Press, Chicago, 2008).

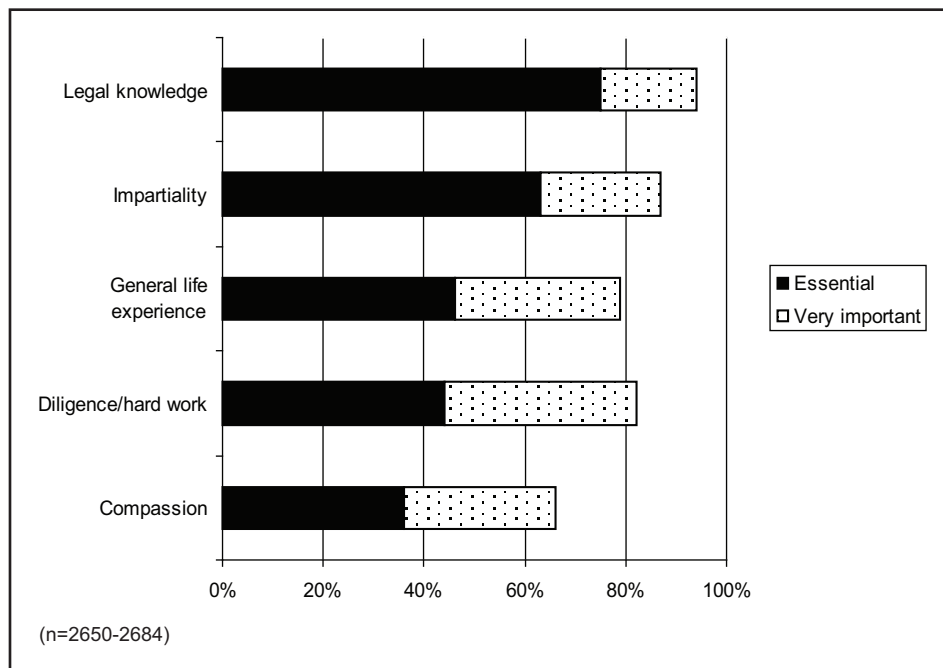
⁴² Hodson R and Sullivan TA, *The Social Organization of Work* (4th ed, Thomson Wadsworth, Belmont, California, 2008).

interpersonal skills, including communication, courtesy, compassion and patience; and *other general skills* such as competency in informational technology, adaptability to change, diligence, and general life experience.

AuSSA 2007 asked respondents to rate the importance of five specific occupational qualities or skills for the work of judges and magistrates: legal knowledge, impartiality, compassion, diligence/hard work and general life experience. Comparing the results of the two surveys enables comparison of the views of the Australian public and the judiciary regarding several important qualities and skills for judicial work.

Figure 1 (below) shows that the largest proportion of respondents to AuSSA 2007 (75%) rates legal knowledge as essential for the work of judges and magistrates, more than their ratings for any of the other qualities. This evaluation of legal knowledge is consistent across sex, religion, age, education, political orientation, social class and income categories.

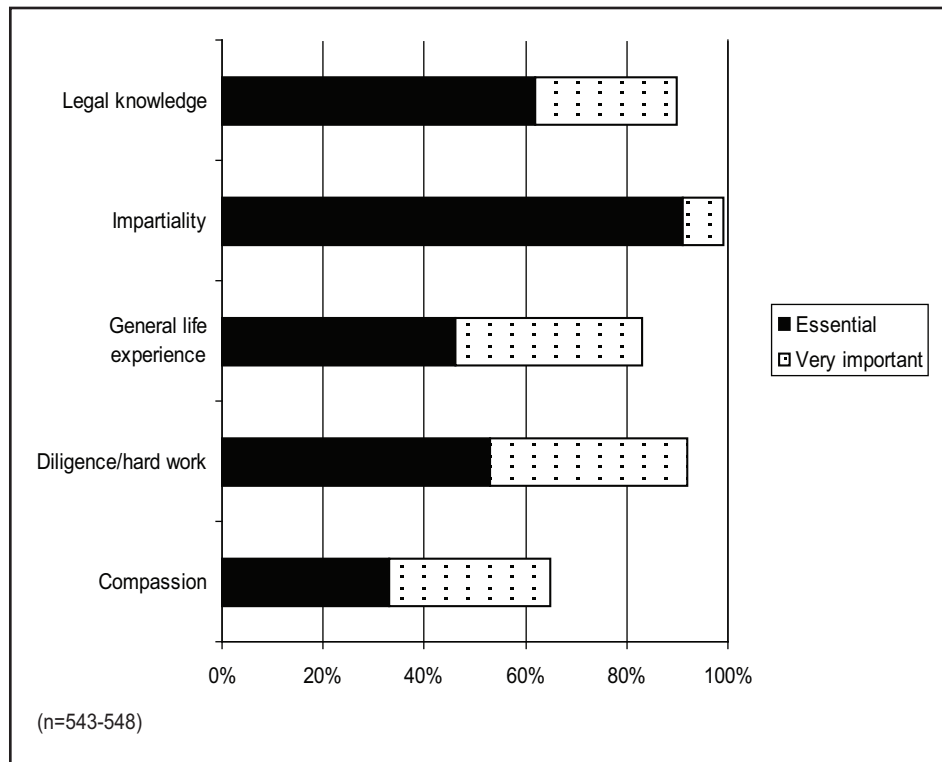
FIGURE 1 Importance of qualities/skills for the work of judges and magistrates: Public attitudes, 2007



SOURCE: Phillips T et al, *The Australian Survey of Social Attitudes, 2007* [computer file] (Australian Social Science Data Archive, Australian National University, Canberra, 2007).

In comparison, 62% of judicial officers rate legal knowledge as essential, but this was not the quality identified as essential by the largest percentage. The Australian judiciary as a whole (magistrates and judges combined) rates impartiality as the most important quality: 91% of the judiciary rate impartiality as essential to judicial work compared with 63% of AuSSA respondents (Figure 2, below).

FIGURE 2 Importance of qualities/skills for the work of judges and magistrates: Judicial views, 2007



SOURCE: The National Survey of Australian Judges (2007), The National Survey of Australian Magistrates 2007 (2007).

There are some slight differences among the AuSSA respondents in terms of age, education, political affiliation and social class, but not gender, religion or income. For example, a greater proportion (69%) of older respondents (55+), consider impartiality essential contrasting most strongly with younger respondents (17-34), half (53%) of whom consider this quality essential for the work of judges and magistrates. Political orientation presents some interesting findings: 61% of respondents identifying as politically neutral regard impartiality as essential, compared with 74% identifying as left wing and 65% of those identifying as right wing.

This difference in public and judicial assessments of impartiality may reflect different understandings of the concept and its significance to judicial office. For the judiciary impartiality is the core judicial value. It is central to the judicial role and judicial identity in an independent judicial system as exists in Australia.⁴³ Impartiality refers to the requirement that judges not be biased, either positively or negatively, towards either party to the dispute and must apply the law independently of external or internal influences, especially government, or financial or personal considerations.⁴⁴ The centrality of impartiality is highlighted in the judicial oath, when judges promise to act “without fear or favour, affection or illwill”.⁴⁵ The emphasis on the impartial application of law delimits the judge’s role to making decisions based on law and evidence, not personal, moral or social values. A judge is obligated to reach a legally correct outcome by impartially applying law to facts.⁴⁶ Judicial

⁴³ Campbell E and Lee HP, *The Australian Judiciary* (Cambridge University Press, Cambridge, 2001).

⁴⁴ Astor H, “Mediator Neutrality: Making Sense of Theory and Practice” (2007) 16(2) *Social & Legal Studies* 221.

⁴⁵ For example, *Oaths Act 1936* (SA), s 11.

⁴⁶ Moorhead, n 28.

impartiality is important to the ideal of the justice system to be fair in its process and outcomes, and to be accessible, at least formally, to all within its jurisdiction.

For some members of the general public, the implications of impartiality may not be as obvious as those of legal knowledge. Specialised knowledge is a more concrete characteristic readily associated with judicial work and the legal system. If the public is especially concerned with punishing those who are believed to have committed crimes or protecting victims' rights, which a judge with specialised knowledge has the capacity and responsibility to do, then the ideological or institutional relevance of impartiality will probably not be given the same weight. The differing views can also be a source of judicial frustration with public criticism: the public or the media criticise judges for the outcomes of cases which judges feel are not their fault, as the outcome was determined by law, not a personal choice.

Aside from these differing views about impartiality, there is a high level of agreement between the general public and judicial officers regarding the importance of certain skills to judicial work. General life experience is valued equally by the judiciary and the public as a whole and within the public there is no disagreement between different segments of the population. Almost half of both the general public and the judiciary (46% in each case) identify general life experience as essential to judicial work, and about one-third regard it as very important (33% of AuSSA respondents and 37% of judicial respondents). These responses also might indicate recognition that the pools from which judges and magistrates are appointed tend to be fairly restrictive and there are skills additional to those typically associated with legal training and experience that are valuable for judicial decision-making.

There is widespread agreement across AuSSA respondents regarding the importance of hard work/diligence to judicial work; there are no differences on any of the observed dimensions. Two-fifths (44%) of the Australian public regard diligence and hard work as essential and another two-fifths (38%) consider it very important to judicial work. This contrasts slightly with judicial personnel; half (53%) of whom agree that diligence/hard work is essential and two-fifths (39%) regard it as very important. It is not surprising that a smaller proportion of AuSSA respondents regard diligence/hard work as essential, as the public is less likely to be aware of the range or nature of tasks, both during and after regular work hours, that many judicial officers undertake. Indeed, some of the judicial respondents commented on their own surprise at the amount of hard work that appointment to the bench entails, for example:

It is a tremendous opportunity, which carries with it some stresses. The downsides are the constant need to prepare reasons and the incursion that makes into "private" time. Bearing responsibility for the effects of the law can sometimes be heavy. The satisfactions come from believing you have intellectually and managerially mastered difficult sets of circumstances.

Compassion is valued equally by the judiciary and the public as a whole, with approximately one-third of each (36% public, 33% judiciary) regarding it as essential, and very important for another third of each (30% public, 32% judiciary). There are no differences among the public in terms of religion, age, education, social class or income and rating of compassion. Interestingly, there are some gender differences in the public responses regarding compassion: 41% of female respondents contrasting with 28% of male respondents assess compassion as essential for the work of judges and magistrates. This gender difference is not mirrored in the judicial assessments of compassion: only a slightly higher proportion of women judges and magistrates (39%) than their male counterparts (31%) regard compassion as essential to their daily work. Among AuSSA respondents there are some differences in the importance attached to compassion in terms of political orientation: 43% of those self-identifying as left wing and 31% self-identifying as right wing rate compassion as essential (and 33% self-identifying as neutral rate it as essential).

These assessments about the qualities and skills necessary for judicial work imply considerable agreement in the desirable qualities for the everyday work of judges as well as different conceptions of the nature and proper role of judges and courts. The difference in attitudes towards impartiality indicates that a proportion of the general public does not view this quality as central to the judicial role and work in the same way or to the same degree as do members of the judiciary. For citizens, the paramount quality for judicial work is legal knowledge. Other more general qualities of diligence/hard work, compassion and general life experience are valued similarly by the public and the judiciary.

CONCLUSION

AuSSA 2007 shows that a very large proportion of Australians regard the work of courts as important to their community, a view which is shared by the judiciary. A desire to undertake work of value to the community was an important factor for many in the judiciary to undertake that role, and most are satisfied with the importance to society of their work.

However, experience with the courts is very limited among the Australian public, and the lack of direct knowledge may contribute to low levels of confidence, especially if the primary source of information is media reports. It is important to recognise that general questions about confidence tend to produce overall negative responses. Specific questions generate a more complex picture: Australians are almost equally split regarding their confidence in the criminal courts to deal with matters fairly – 52% express a great deal or quite a lot of confidence while 48% express not very much or no confidence. Over two-thirds of respondents express confidence in criminal courts to have regard for defendants' rights compared with less than half who think courts have regard for victims' rights. Four-fifths (78%) express not very much or no confidence in the criminal courts to deal with matters quickly, and there is widespread agreement among the AuSSA respondents.

Public confidence in the courts (or lack thereof) may be derived, in part, from an assessment about whether the courts and judicial personnel are performing their roles appropriately and whether they possess the relevant skills for judging. One important judicial role is sentencing persons convicted of crime. A large majority of Australians agree that people who break the law should be given stiffer sentences and a clear majority believe that judges should reflect the (presumably more punitive) views of the public when sentencing. Australian attitudes are ambivalent about whether "courts should emphasize solving social problems more than punishing offenders". Nearly four in 10 Australians agree the court should emphasise solving social problems more than punishing offenders, while one-third disagree. Other research finds that public views are more nuanced about the role of sentencing work and that informed publics share judicial views regarding appropriate sentences.⁴⁷

Moving away from areas where there is a high degree of media attention, such as sentencing, other areas of similarity between the attitudes of the judiciary and the public emerge, particularly in relation to the important skills and qualities for judicial office. In general, similar proportions of the judiciary and the Australian public regard general life experience, diligence/hard work and compassion as essential or very important for the judiciary, while higher proportions of the public regard legal knowledge as essential, compared with the judiciary. The most striking difference is with impartiality, regarded as essential by over 90% of the judiciary contrasting with two-thirds of the Australian public. These findings may suggest that some, though not most, Australians may have a somewhat different understanding of a core attribute of the judiciary and judicial decision-making compared with judicial views. Nonetheless, well over half of the AuSSA and the judicial respondents agree that legal knowledge and impartiality are integral to judicial work.

The findings about impartiality and sentencing may be linked: when imposing sentence, the law requires judges and magistrates to give impartial consideration to a much wider range of factors than simply punishment, which may result in sentences which appear lenient to the large proportions of Australians who indicate they want stiffer sentences. The legal view which emphasises the paramount importance of impartial application of law to judicial decision-making may be an aspect of the judicial role which some members of the public either do not fully appreciate or do not accept.

While responses to concrete, specific questions about judicial work demonstrate more congruence between the general public and the judiciary, especially in relation to the necessary skills for judicial work, there are still significant areas where public and judicial attitudes differ, which can be factors in reducing public confidence in the courts.

⁴⁷ Gelb, n 19.