

# JUDICIAL HUMOUR IN THE AUSTRALIAN COURTROOM

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*The use of humour by judicial officers is subject to formal and informal regulation. Inappropriate judicial humour may undermine core judicial values of impartiality and neutrality, possibly leading to a loss of public confidence and legitimacy. Appropriate judicial humour can have a valuable role in the courtroom. Data from interviews with judicial officers and court observation studies demonstrate that judicial humour is a reality in the Australian courtroom and can be used positively. These empirical research findings clarify aspects of the form, nature and circumstances of appropriate judicial humour and its positive functions.*

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Humour [in the courtroom] must always be moderate, measured and appropriate to the occasion. But beyond this, humour needs no further justification. It is a legitimate expression of humanity and individuality. These are judicial virtues in the eyes of all except those who want courts to be staffed by robots preferably made in their own image.<sup>1</sup>

## I INTRODUCTION

Determining the appropriate use of humour in the Australian courtroom can present a challenge for judicial officers. Authorities sometimes warn judicial officers about the use of humour. Former Chief Justice Gleeson ‘caution[s] against giving too much scope to ... natural humour or high spirits when presiding in a courtroom’.<sup>2</sup> In the United Kingdom, Ward LJ describes the ‘view that jokes are a bad thing’ in the courtroom as the ‘conventional view’.<sup>3</sup> At the same time, benefits of humour, in particular relieving courtroom tension, are identified.<sup>4</sup> While extreme misuse of judicial humour is regulated as part of judicial conduct generally, how to craft appropriate or positive

<sup>1</sup> Justice Keith Mason, ‘Judicial Humour Law Graduation Address’ (Speech delivered at The University of Sydney, 20 May 2005).

<sup>2</sup> Chief Justice Murray Gleeson, ‘The Role of the Judge and Becoming a Judge’ (Speech delivered at the National Judicial Orientation Programme, Sydney, 16 August 1998).

<sup>3</sup> *El-Faragy v El Faragy* [2007] EWCA Civ 1149 (15 November 2007) [30].

<sup>4</sup> Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2<sup>nd</sup> ed, 2007) 17 [4.1].

humour is less clearly articulated. As with many aspects of judicial work, using humour well requires balancing many, sometimes contradictory, factors.<sup>5</sup>

The focus of this article is on judicial humour in the interactive context of the Australian courtroom. There is an extensive literature on the nature of humour and types of humour in a range of fields,<sup>6</sup> including psychology,<sup>7</sup> literature and language studies,<sup>8</sup> anthropology<sup>9</sup> and cultural studies;<sup>10</sup> and much of this literature is interdisciplinary. However, legal attention to humour tends to be concentrated on specific legal doctrinal areas.<sup>11</sup> Similarly, while there is substantial literature on humorous judicial opinions,<sup>12</sup> judicial humour in an interactional context is rarely investigated. Discussion of judicial humour in the courtroom is limited to a few studies specifically addressing humour or as a minor part of broader courtroom studies.<sup>13</sup> Guides

<sup>5</sup> See generally Herbert M Kritzer, 'Toward a Theorization of Craft' (2007) 16 *Social & Legal Studies* 321.

<sup>6</sup> See generally The International Society for Humor Studies, *ISHS Home Page* <<http://www.hnu.edu/ishs/>>.

<sup>7</sup> See, eg, Rod A Martin, *The Psychology of Humor: An Integrative Approach* (Elsevier Academic Press, 2007) 11.

<sup>8</sup> See, eg, Patrizia Anesa, *Jury Trials and the Popularization of Legal Language: A Discourse Analytical Approach* (Peter Lang, 2012).

<sup>9</sup> See, eg, Elliott Oring, 'Humor in Anthropology and Folklore' in Victor Raskin and Willibald Ruch (eds), *The Primer of Humor Research* (Mouton de Gruyter, 2008) 183.

<sup>10</sup> See, eg, Kazuyo Murata, 'An Empirical Cross-Cultural Study of Humour in Business Meetings in New Zealand and Japan' (2014) 60 *Journal of Pragmatics* 251.

<sup>11</sup> See, eg, Laura E Little, 'Regulating Funny: Humor and the Law' (2009) 94 *Cornell Law Review* 1235.

<sup>12</sup> See, eg, Pamela Hobbs, 'Judges' Use of Humor as a Social Corrective' (2007) 39 *Journal of Pragmatics* 50, 51–4; Marshall Rudolph, 'Judicial Humor: A Laughing Matter?' (1989) 41 *Hastings Law Journal* 175; Lucas K Hori, 'Bons Mots, Buffoonery, and the Bench: The Role of Humor in Judicial Opinions' (2012) 60 *UCLA Law Review Discourse* 16; Adalberto Jordan, 'Imagery, Humor, and the Judicial Opinion' (1987) 41 *University of Miami Law Review* 693.

<sup>13</sup> See, eg, Ryan A Malphurs, "'People Did Sometimes Stick Things in My Underwear": The Function of Laughter at the US Supreme Court' (2010) 10(2) *Communication Law Review* 48; Noraini Ibrahim and Radha M K Nambiar, 'There Are Many Ways of Skinning a Cat, My Lord: Humor in the Malaysian Adversarial Courtroom' (2011) 17(2) 3L: *The Southeast Asian Journal of English Language Studies* 73; Jessica Milner Davis and Troy Simpson, 'Humour' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 328, 328–9; Austin Sarat, 'Judging in Trial Courts: An Exploratory Study' (1977) 39 *Journal of Politics* 368, 391; Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing, 2011) 141; Jennifer A Scarduzio, 'Maintaining Order through Deviance? The Emotional Deviance, Power, and Professional Work of Municipal Court Judges' (2011) 25 *Management Communication*

to judicial conduct and appellate cases on allegations of bias also provide advice about judicial humour, as do occasional speeches by judges.<sup>14</sup>

In this paper, humour involves verbal behaviour including jokes (whether or not ‘prepackaged’ or ‘ending in a punch line’);<sup>15</sup> spontaneous conversational humour (such as jesting, witticisms, quips and wisecracks, anecdotes, wordplay and irony, or puns, self-deprecation and sarcasm);<sup>16</sup> as well as unintentional or accidental humour.<sup>17</sup> Sarcasm is included as humour, though it is recognised as qualitatively different from positive forms of humour.<sup>18</sup>

Humour in this sense is distinct from having a *sense of humour*, which can refer to a demeanour or orientation, rather than behaviour. The term ‘judicial humour’ as used here refers only to the use of humour by a judicial officer in the courtroom, rather than by lawyers, criminal defendants or other court users. In particular, this article considers judicial humour primarily in relation to lay people in the courtroom: defendants, jury members and witnesses.<sup>19</sup>

*Quarterly* 283, 294, 298–300; Anesa, *Jury Trials and the Popularization of Legal Language*, above n 8, 122–6 [5.3.2].

<sup>14</sup> See, eg, Australasian Institute of Judicial Administration, above n 4, 17 [4.1]; *El-Farargy v El Farargy* [2007] EWCA Civ 1149 (15 November 2007) [30] (Ward LJ); Chief Justice Gleeson, above n 2; Justice Mason, ‘Judicial Humour’, above n 1; Chief Justice Gerard Brennan, ‘The Role of the Judge’ (Speech delivered at the National Judicial Orientation Programme, Wollongong, 13 October 1996); Justice Emiliios Kyrrou, ‘Attributes of a Good Judge’ (2013) 23 *Journal of Judicial Administration* 130, 134. In the United States, there is broader and more detailed guidance in the form of the American Bar Association’s *Model Code of Judicial Conduct* and individual state codes: see Center for Professional Responsibility, American Bar Association, *Model Code of Judicial Conduct* (first published 1990, 2011 ed). For an example of a state code, see Supreme Court of California, *California Code of Judicial Ethics* (at 1 January 2013). Misconduct proceedings, which may entail examples of humour gone wrong, are also publicly available: see, eg, Commission on Judicial Performance (CA), *Home* (10 October 2014) <<http://cjp.ca.gov>>. The guide from England and Wales does not address humour specifically: see Judiciary of England and Wales, *Guide to Judicial Conduct* (revised ed, 2013).

<sup>15</sup> Rod A Martin, above n 7, 11.

<sup>16</sup> *Ibid* 12–14.

<sup>17</sup> *Ibid* 14.

<sup>18</sup> Including sarcasm as a form of humour is debatable, as sarcasm is often used aggressively, to criticise or express disapproval without doing so directly: Christopher J Lee and Albert N Katz, ‘The Differential Role of Ridicule in Sarcasm and Irony’ (1998) 13 *Metaphor and Symbol* 1; Rod A Martin, above n 7, 13. At its worst, it can express scorn or contempt. However, as sarcasm is closely related to irony, which is a well recognised form of humour, it will be included as a form of judicial humour. This approach is consistent with other studies: see, eg, Hobbs, above n 12, 57–60; Anesa, *Jury Trials and the Popularization of Legal Language*, above n 8, 124.

<sup>19</sup> Analysis of judicial humour in relation to legal professionals entails consideration of inter- and intra-professional relations, which are beyond the scope of this paper. The authors are

The focus is on the apparently humorous intention of judicial verbal behaviour, as inferred from the context, rather than on whether any courtroom responses to this behaviour indicate a perception of humour, as that cannot always be discerned.

In Part II, the article outlines the regulation of judicial humour in Australia. First, reasons for controlling judicial humour are considered in light of interrelated principles of impartiality, neutrality, legitimacy and public confidence. Second, regulation is considered in terms of the consequences for inappropriate uses of humour, including misconduct proceedings, judicial review where bias or apprehension of bias is alleged, and informal repercussions.

In Part III, the article presents findings from extensive empirical research conducted by the Judicial Research Project, including interviews with judicial officers and observations of court proceedings.<sup>20</sup> This research suggests that, despite advice against judicial humour, it does occur in Australian courtrooms and can have a positive effect. Through analysing these occurrences and the attitudes expressed by judicial officers, the forms, characteristics and circumstances of appropriate humour can be identified and more clearly distinguished from improper judicial uses of humour, and the benefits of greater use of appropriate judicial humour can be more clearly recognised.

## II REGULATION OF HUMOUR

### *A Purposes of Regulation*

Judicial humour is regulated to maintain core judicial values of impartiality and neutrality. Limiting humour can also be important to ensuring appropriate courtroom decorum. These controls on judicial humour are designed to maintain the legitimacy of judicial authority and enhance public confidence in the judiciary.

preparing a separate paper analysing judicial humour in relation to the legal profession in court.

<sup>20</sup> The Court Observation Study entailed observations of 30 different court sessions, most for a full day, of magistrates hearing matters in a general criminal list, including adjournments, guilty pleas and sentencing, but no trials. A total of 38 interviews were conducted with judicial officers from all court levels, in every state and territory, including metropolitan and regional locations, but not federal courts. For more information on the data, see the Appendix, where the methodology is discussed in greater detail.

## 1 *Impartiality, Neutrality and Legitimacy*

Impartiality and neutrality are central to the legitimacy of judicial authority.<sup>21</sup> Formally, legitimacy arises from the judiciary acting impartially according to law.<sup>22</sup> The impartiality of a tribunal is '[f]undamental to the common law system of adversarial trial'.<sup>23</sup> Legitimacy also demands public confidence in the judiciary,<sup>24</sup> which itself 'depends upon the impartial administration of justice'.<sup>25</sup> '[B]road indicia of impartiality in court [are] to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides'.<sup>26</sup>

Former Chief Justice Gleeson notes that judicial humour can be detrimental to the core value of impartiality,<sup>27</sup> in line with international judicial conduct guides which make explicit the possibility of judicial humour eroding impartiality. The American Bar Association identifies 'attempted humor based upon stereotypes' as an example of 'manifestations of bias or prejudice'.<sup>28</sup> The *Commentary on the Bangalore Principles of Judicial Conduct* gives the further examples of

epithets, slurs, demeaning nicknames, negative stereotyping, attempted humour based on stereotypes (related to gender, culture or race, for example) ...

<sup>21</sup> Keith J Bybee and Angela G Narasimhan, 'The Supreme Court: An Autobiography' in Austin Sarat (ed), *Studies in Law, Politics and Society* (Emerald Group Publishing, 2013) vol 61, 179, 183. Impartiality and neutrality are often used to refer to the same principle, and no distinction will be drawn here: see Justice D A Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?' (2000) 19 *Australian Bar Review* 212.

<sup>22</sup> Kathy Mack and Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanour and Legitimacy' (2010) 35 *Law & Social Inquiry* 137, 139, citing Craig A McEwen and Richard J Maiman, 'In Search of Legitimacy: Toward an Empirical Analysis' (1986) 8 *Law & Policy* 257, 258.

<sup>23</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>24</sup> Stephen Parker, *Courts and the Public* (Australasian Institute of Judicial Administration, 1998) 14–20; Deputy Chief Magistrate Andrew Cannon, 'Smoke and Mirrors or Meaningful Change: The Way Forward for Therapeutic Jurisprudence' (2008) 17 *Journal of Judicial Administration* 217, 219. See also Sharyn Roach Anleu and Kathy Mack, 'The Work of the Australian Judiciary: Public and Judicial Attitudes' (2010) 20 *Journal of Judicial Administration* 3.

<sup>25</sup> Justice Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 677.

<sup>26</sup> Australasian Institute of Judicial Administration, above n 4, 3 [2.1].

<sup>27</sup> Chief Justice Gleeson, above n 2.

<sup>28</sup> Center for Professional Responsibility, American Bar Association, above n 14, r 2.3 cmt 2.

suggest[ing] a connection between race or nationality and crime, and irrelevant references to personal characteristics.<sup>29</sup>

Conventional understandings of the judicial role emphasise impersonality and dispassion as central to neutrality and legal authority. The importance of performing neutrality in a certain way was noted by Scarduzio, who commented: ‘In this case, the use of humor was a deviation from the norm of neutrality because it made the judges appear friendly and allowed them to deviate from a “dead-pan” demeanor’.<sup>30</sup>

Even humour which injects human personality in a positive way, with an appearance of friendliness, could possibly indicate that the judicial officer is not sufficiently detached and thus not impartial.<sup>31</sup>

On the other hand, as extensive research has established, ‘the legitimacy of judicial authority rests in part on the extent to which people perceive that they are treated fairly by the judicial officers they encounter’.<sup>32</sup> Humour can be an ‘expression of humanity and individuality’,<sup>33</sup> in contrast to the conventional emphasis on distance. As discussed more fully below, a more individual and human approach to judging can be consistent with impartiality and provide other benefits for judicial legitimacy. From either perspective, legitimacy can

<sup>29</sup> United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) 60 [58]. The *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN ESCOR, 41<sup>st</sup> plen mtg, Agenda Item 14(c), UN Doc E/RES/2006/23 (27 July 2006) annex (*Bangalore Principles of Judicial Conduct*) were developed by the Judicial Group on Strengthening Judicial Integrity, of the United Nations Office on Drugs and Crime, and have been widely adopted throughout United Nations agencies and national and international courts.

<sup>30</sup> Scarduzio, above n 13, 298.

<sup>31</sup> Mack and Roach Anleu, ‘Performing Impartiality’, above n 22.

<sup>32</sup> Kathy Mack and Sharyn Roach Anleu, ‘“Getting through the List”: Judgecraft and Legitimacy in the Lower Courts’ (2007) 16 *Social & Legal Studies* 341, 342. See also Owen M Fiss, ‘The Bureaucratization of the Judiciary’ (1983) 92 *Yale Law Journal* 1442; Tom R Tyler, ‘The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience’ (1984) 18 *Law & Society Review* 51; Tom R Tyler, ‘What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures’ (1988) 22 *Law & Society Review* 103. See also Mack and Roach Anleu, ‘Performing Impartiality’, above n 22, 139; McEwen and Maiman, above n 22, 258–9; Tom R Tyler and Kenneth Rasinski, ‘Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular US Supreme Court Decisions: A Reply to Gibson’ (1991) 25 *Law & Society Review* 621.

<sup>33</sup> Justice Mason, ‘Judicial Humour’, above n 1.

also be supported by maintaining formality and courtroom decorum as a way of treating participants with respect.<sup>34</sup>

## 2 *Decorum and Respect*

Court should be serious for several reasons, most notably to show respect for litigants and for the court itself as a public institution. Former Chief Justice Brennan remarks that ‘the atmosphere of the court is chiefly in [the] hands’ of the judicial officer,<sup>35</sup> and so commentators have ‘criticized [judicial humour] as being antithetical to the seriousness that the public is entitled to expect from the judiciary’.<sup>36</sup>

Several senior judges share the view that litigants do not consider cases to be funny.<sup>37</sup> Gilbert summarises the possible feelings of parties to a case, especially a defendant in a criminal case: ‘For the parties most intimately concerned ... it may be the most traumatic occasion in the whole of their lives. The conclusion of the judge or the verdict of the jury ... could be the prelude to ruin or disgrace’.<sup>38</sup>

However, the need to maintain decorum does not only arise in respect of the parties involved in a case. Decorum should also be maintained to show respect for the court as a public institution, deserving of a ‘formal atmosphere’.<sup>39</sup> Wood comments that behaviour which demonstrates that a judicial officer has a sense of humour may be ‘condemn[ed] as undignified behaviour, displaying [a] lack of respect for judicial office’.<sup>40</sup>

To sum up, judicial humour can undermine the core principles of neutrality and impartiality in a variety of ways. It can give rise to a perception of prejudgment or bias that is inconsistent with impartiality. The judicial officer’s authority can be undermined by sarcasm or a quip, indicating that he or she is not dispassionate and disengaged from the proceedings. The decorum of a

<sup>34</sup> See Kathy Mack and Sharyn Roach Anleu, ‘Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices’ (2011) 37(1) *Monash University Law Review* 187, 192–3.

<sup>35</sup> Chief Justice Brennan, above n 14.

<sup>36</sup> Hobbs, above n 12, 64, citing Rudolph, above n 12, 179.

<sup>37</sup> Former Justice Kirby observed: ‘I learned in my earliest days at the Bar that most litigants do not regard a court case as funny in the slightest’: Michael Kirby, ‘R P Meagher and I: The Best of Times. The Worst of Times’ (2011) 35 *Australian Bar Review* 26, 30. See also Chief Justice Gleeson, above n 2; Justice Kyrour, above n 14, 134.

<sup>38</sup> Michael Gilbert (ed), *The Oxford Book of Legal Anecdotes* (Oxford University Press, 1986) xii.

<sup>39</sup> David Pannick, *Judges* (Oxford University Press, 1987) 81.

<sup>40</sup> David Wood, ‘Judicial Ethics: A Discussion Paper’ (Australian Institute of Judicial Administration, 1996) 2.



courtroom can be lost by a joke which demonstrates a lack of respect for litigants or the court as a public institution. These core principles are enshrined in law, and breaches may have consequences for the judicial officer, or lead to challenges to the validity of a judicial decision. The next section expands on these legal principles and the consequences of breaching them, in relation to judicial use of humour.

### B *Sources and Nature of Regulation*

In light of the concern that misguided judicial humour can undermine confidence in the judicial impartiality necessary for legitimacy, judicial humour is regulated, along with judicial conduct generally, in several ways. This article considers three forms of regulation:

- 1 Misconduct proceedings, which at their most severe may involve the removal of a judicial officer from office;
- 2 Appeal or judicial review which can cause the judicial officer's decision to be set aside. Judicial review is distinct from treating the humour as misconduct — rather than imposing a consequence on the judicial officer, it is a consequence for their decision; and
- 3 Informal consequences for the judicial officer.

While these different modes of regulation do not specifically provide guidance on appropriate judicial humour, they set the outer limit for permissible judicial humour and provide a basis for contrast with other occasions of judicial humour.

#### 1 *Proceedings for Serious Misconduct*

Inappropriate humour may constitute judicial misconduct under the law of the relevant jurisdiction.<sup>41</sup> Judicial officers of superior courts can be removed for 'proved misbehaviour or incapacity' at the Commonwealth level,<sup>42</sup> in New South Wales,<sup>43</sup> Victoria,<sup>44</sup> Queensland,<sup>45</sup> the Northern Territory<sup>46</sup> and the

<sup>41</sup> For an explanation of complaints processes, see generally Kathy Mack and Sharyn Roach Anleu, 'The Security of Tenure of Australian Magistrates' (2006) 30 *Melbourne University Law Review* 370, 392–5; Law Reform Commission of Western Australia, *Complaints against Judiciary: Final Report*, Project No 102 (2013) 19–52.

<sup>42</sup> *Federal Court of Australia Act 1976* (Cth) s 6(1)(b); *Family Law Act 1975* (Cth) s 22(1)(b); *Commonwealth Constitution* s 72(ii).

<sup>43</sup> *Constitution Act 1902* (NSW) s 53(2); *Judicial Officers Act 1986* (NSW) s 41(1).

Australian Capital Territory;<sup>47</sup> as can magistrates in New South Wales,<sup>48</sup> Victoria,<sup>49</sup> Tasmania,<sup>50</sup> and the Australian Capital Territory,<sup>51</sup> as well as Federal Circuit Court judges.<sup>52</sup> In Western Australia, judicial officers in all courts are guaranteed their office ‘during good behaviour’,<sup>53</sup> as are judges of the South Australian Supreme Court.<sup>54</sup> Magistrates can only be removed if ‘proper cause’ exists in South Australia<sup>55</sup> and Queensland.<sup>56</sup> In the Northern Territory, a magistrate can be removed for failing to comply with particular directions from the Chief Magistrate, or for being incapable or incompetent, or ‘for any other reason unsuited’ to perform his or her duties.<sup>57</sup> The possible grounds for removing a judge of the Supreme Court of Tasmania or the District Court of South Australia are not expressly stated in legislation.<sup>58</sup>

Misbehaviour, lack of good behaviour or proper cause as used in these provisions must be so severe that it justifies removal. In construing ‘misbehaviour’ in the context of s 72 of the *Commonwealth Constitution*, Wells writes:

<sup>44</sup> *Constitution Act 1975* (Vic) s 87AAB(1).

<sup>45</sup> *Constitution of Queensland 2001* (Qld) s 61(2)(a).

<sup>46</sup> *Supreme Court Act 1979* (NT) s 40(1).

<sup>47</sup> In the Australian Capital Territory the ground is ‘misbehaviour or physical or mental incapacity’: *Judicial Commissions Act 1994* (ACT) s 5(1). However, a resolution to remove a judicial officer must be made if the Judicial Commission has ‘submitted ... a report ... in which it concludes that the behaviour or physical or mental capacity of the judicial officer concerned could amount to proved misbehaviour or incapacity’: at s 5(3)(a). Thus, it is essentially a ground of proved misbehaviour.

<sup>48</sup> *Constitution Act 1902* (NSW) s 52(1)(f); *Judicial Officers Act 1986* (NSW) s 43B (definition of ‘judicial officer’).

<sup>49</sup> *Constitution Act 1975* (Vic) ss 87AAA (definition of ‘judicial office’), 87AAB.

<sup>50</sup> *Magistrates Court Act 1987* (Tas) s 9(1).

<sup>51</sup> *Judicial Commissions Act 1994* (ACT) ss 2 (definition of ‘judicial officer’), 4–5.

<sup>52</sup> *Federal Circuit Court of Australia Act 1999* (Cth) s 9, sch 1 cl 9.

<sup>53</sup> *Magistrates Court Act 2004* (WA) sch 1 cl 15; *District Court of Western Australia Act 1969* (WA) s 11(1); *Supreme Court Act 1935* (WA) s 9(1).

<sup>54</sup> *Constitution Act 1934* (SA) s 74.

<sup>55</sup> *Magistrates Act 1983* (SA) s 11. Examples of proper cause include if ‘the magistrate is guilty of ... improper conduct in the performance of the duties of the office; or the magistrate is guilty of conduct that renders the magistrate unfit to hold office as a magistrate’: at ss 11(9)(d)–(e).

<sup>56</sup> *Magistrates Act 1991* (Qld) s 46.

<sup>57</sup> *Magistrates Act 1977* (NT) s 10.

<sup>58</sup> See *District Court Act 1991* (SA) s 15; *Supreme Court (Judges’ Independence) Act 1857* (Tas) s 1.

the word ‘misbehaviour’ must be held to extend to conduct of the judge in or beyond the execution of his [or her] judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he [or she] will continue to do his [or her] duty under and pursuant to the *Constitution*.<sup>59</sup>

It is most unlikely that occasional jokes or small witticisms would amount to misconduct so serious as to ‘destroy[] public confidence’ in a judicial officer’s ability to perform his or her duties. However, persistent, extreme sarcasm or ridicule, especially directed towards parties to a case, may be sufficient.

There appears to only be one publicly reported example of misconduct proceedings based on improper humour in Australia.<sup>60</sup> It arises from an investigation by the Conduct Division of the New South Wales Judicial Commission into a series of complaints against a single magistrate in 2011.<sup>61</sup> The report found that the magistrate’s ‘inappropriate conduct [was] substantially caused by’ mental illness,<sup>62</sup> and therefore its findings focused on capacity rather than behaviour.<sup>63</sup> Nonetheless, the report is a rare publicly reported response to inappropriate judicial humour.<sup>64</sup>

In one of these complaints, an unrepresented litigant reported that he had been ridiculed in the Local Court.<sup>65</sup> The Conduct Division reviewed the court

<sup>59</sup> ‘Parliamentary Commission of Inquiry: Re the Honourable Mr Justice Murphy — Ruling on the Meaning of “Misbehaviour”’ (1986) 2 *Australian Bar Review* 203, 230. Andrew Wells was writing in his capacity as a Parliamentary Commissioner on the inquiry into the conduct of Justice Lionel Murphy.

<sup>60</sup> One reason for the lack of publicly available records of misconduct proceedings against a judicial officer for using humour is the limited availability of formal processes. The New South Wales Judicial Commission’s process for response to complaints is unique, compared with the practice in other jurisdictions. As a Senate Inquiry found, generally in Australia there is only an informal process ‘for addressing judicial misconduct which does not justify removal’: Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australia’s Judicial System and the Role of Judges* (2009) 75 [7.2], quoting Kathy Mack and Sharyn Roach Anleu, Flinders University Judicial Research Project, Submission No J4 to Senate Legal and Constitutional Affairs References Committee, *Inquiry into Australia’s Judicial System and the Role of Judges*, 11. Informal professional consequences are dealt with in Part II(B)(3) below.

<sup>61</sup> See Michael Campbell, Deputy Chief Magistrate Mottley and M Jabour, ‘Report of the Conduct Division to the Governor regarding Complaints against His Honour Magistrate Brian Maloney’ (Judicial Commission of New South Wales Conduct Division, 6 May 2011).

<sup>62</sup> *Ibid* 9 [54]; see also at 112 [339]–[340], 125 [386].

<sup>63</sup> See *ibid* 133 [438].

<sup>64</sup> See *ibid* 10–26 [59]–[93].

<sup>65</sup> *Ibid* 13–18 [66].

transcript and audio tape, finding that the magistrate's remarks throughout the proceedings 'were clearly designed to provoke laughter, which came in good measure'.<sup>66</sup> The report found that the magistrate had ridiculed the complainant, as he 'used language intended to raise laughter against [the complainant] and make him an object of jest'.<sup>67</sup> The particular humour complained of included telling the complainant to 'go outside and talk to the senior constable. Just wait, you can lead a horse to water, can't you'<sup>68</sup> and announcing the complainant's name with an 'exaggerated accent'.<sup>69</sup>

Another of these complaints considered by the Conduct Division included the allegation that the magistrate refused an application 'in an inappropriately humorous and loquacious manner not befitting legal proceedings'.<sup>70</sup> In court, the magistrate responded to the complainant's request for an adjournment thus: 'The stadium's been booked, the pies, sausage rolls, fizzy drinks and beer have all been ordered. It's like the Roosters and the Warriors on Friday night'.<sup>71</sup> He continued:

They're on the plane yesterday at 4 o'clock. They're having breakfast or have had breakfast after they've trained this morning, the Roosters, everybody's geared up for Friday night. For all intents and purposes this is your Friday night. It's today.<sup>72</sup>

The Conduct Division agreed with the complainant, stating that 'such an analogy [is] quite out of place in a court room'.<sup>73</sup> Pannick observes that '[s]port is often the stimulus for irrelevant judicial utterances'.<sup>74</sup> As with any form of humour, references to sport may be inaccessible to some listeners or even unacceptable. While this magistrate's comments appear to qualify as humour, as they are framed as jokes or witticisms and apparently elicited laughter, they are clearly inappropriate in light of the central need to maintain impartiality. By treating the matter like a rugby league match, regardless of

<sup>66</sup> Ibid 23 [81].

<sup>67</sup> Ibid 24 [84].

<sup>68</sup> Ibid 21 [76].

<sup>69</sup> Ibid 24 [84].

<sup>70</sup> Ibid 43 [131]; see also at 31–5 [106].

<sup>71</sup> Ibid 43 [132]. The Roosters and the Warriors are teams that play in the National Rugby League competition.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid 44 [134].

<sup>74</sup> Pannick, above n 39, 80.

whether his comments were humorous or not, the magistrate showed considerable disrespect to the plaintiff and the court process itself.

Formal public allegations of misconduct on any basis are very rare in Australia,<sup>75</sup> and those that have been made generally rest on much more extreme grounds than use of improper humour.<sup>76</sup> A more likely consequence of inappropriate judicial humour is a challenge to the judicial decision as affected by actual or apprehended bias.

## 2 Judicial Review

In Australia, the common law requirement of procedural fairness demands that judicial officers must not hear and decide a matter (i) with actual bias; or (ii) in such a way that ‘a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide’ (apprehended bias).<sup>77</sup> Gleeson CJ, McHugh, Gummow and Hayne JJ stated in *Ebner v Official Trustee in Bankruptcy* (*Ebner*) that the apprehended bias principle ‘gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial’.<sup>78</sup> Their Honours continued: ‘Bias, whether actual or apprehended, connotes the absence of impartiality’.<sup>79</sup>

These values, as Gaudron J held in *Ebner*, ‘are directed to maintaining public confidence in the judiciary’.<sup>80</sup> Tarrant suggests that an apprehension of bias can arise if a judge loses his or her temper or shows ‘an extreme dislike of

<sup>75</sup> The Law Reform Commission of Western Australia reports on the incidence of all complaints made against judicial officers, drawing on publicly available data and also private correspondence with chief judicial officers: see Law Reform Commission of Western Australia, above n 41, 5–7, 40, 45, 48, 51, 52. See also Gabrielle Appleby and Suzanne Le Mire, ‘Judicial Conduct: Crafting a System That Enhances Institutional Integrity’ (2014) 38 *Melbourne University Law Review* 1, 5.

<sup>76</sup> See, eg, H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2<sup>nd</sup> ed, 2013) 117–22.

<sup>77</sup> *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>78</sup> (2000) 205 CLR 337, 344–5 [6] (citations omitted).

<sup>79</sup> *Ibid* 348 [23].

<sup>80</sup> *Ibid* 368 [103].

a party',<sup>81</sup> either of which could be manifested by humour such as sarcasm or ridicule.

A number of applicants for judicial review have alleged actual or apprehended bias on grounds including a trial judge's use of sarcasm. *Li v Minister for Immigration and Multicultural Affairs* offers the authoritative statement on bias arising from this kind of judicial conduct.<sup>82</sup> In that case, Drummond J of the Federal Court dismissed an application for review of a Refugee Review Tribunal decision, holding that: 'Though relevant to proof of actual bias, displays of irritation or impatience and *the use of sarcasm by the decision-maker* during the hearing are not, without more, generally sufficient to establish such bias'.<sup>83</sup>

This view that sarcasm alone is not capable of sustaining an allegation of either actual or apprehended bias is well supported in Australia.<sup>84</sup> For example, *Horleck v Horleck* involved a family law dispute that had been ongoing for almost 18 years.<sup>85</sup> During the trial, Bell J stated that he would 'move heaven and earth' to address his concern there was no time limitation upon s 79A applications.<sup>86</sup> In response to the allegation of actual or apprehended bias arising from his 'heaven and earth' comment, his Honour remarked: 'That a judge should preside over matters, and complex matters such as these, completely devoid of expressing any comment which could be construed as less than neutral is ludicrous'.<sup>87</sup>

Tolerating some judicial sarcasm recognises that impartiality can exist even in the presence of judicial reactions manifested as judicial humour.<sup>88</sup> However, extreme sarcasm or other examples of humour may disclose a lack of neutrality on the part of the judicial officer.

<sup>81</sup> John Tarrant, *Disqualification for Bias* (Federation Press, 2012) 197.

<sup>82</sup> (2000) 96 FCR 125.

<sup>83</sup> *Ibid* 134 [42(d)] (emphasis added).

<sup>84</sup> See, eg, *DPP (NSW) v Burns* (2010) 207 A Crim R 362, 374–5 [56]–[63] (Beazley JA); *SZGSI v Minister for Immigration and Citizenship* [2008] FMCA 1649 (17 December 2008) [63]–[66] (Scarlett FM); *SWDB v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FMCA 665 (7 May 2007) [3]–[4], [38]–[42] (Lindsay FM).

<sup>85</sup> [2012] FamCA 120 (15 March 2012) [1]–[2] (Bell J).

<sup>86</sup> *Ibid* [32], citing *Family Law Act 1975* (Cth) s 79A.

<sup>87</sup> *Horleck v Horleck* [2012] FamCA 120 (15 March 2012) [58] (Bell J).

<sup>88</sup> See generally Mack and Roach Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context', above n 34, 209–13; Sharyn Roach Anleu and Kathy Mack, 'Judicial Authority and Emotion Work' (2013) 11 *Judicial Review* 329, 335; Susan A Bandes, 'Empathetic Judging and the Rule of Law' [2009] *Cardozo Law Review De Novo* 133, 146–8.

At the time of writing, no reported decisions have been found in Australia where actual or apprehended bias were found due to judicial humour.<sup>89</sup> Though not considered in the Australian cases, the English case *El-Farargy v El Farargy* exemplifies how humour based on stereotypes can be sufficiently extreme so as to justify a finding of apprehended bias.<sup>90</sup> In that case, the decision of an English High Court judge to not recuse himself from a trial was appealed to the Court of Appeal. Throughout the trial, the judge made 'racially offensive jokes'.<sup>91</sup> On appeal, the Court accepted that 'a fair-minded and informed [observer] would conclude', on the basis of these jokes, 'that there [was] a real possibility of potential bias'.<sup>92</sup>

Analysis of misconduct proceedings and judicial review for bias suggests that formal consequences for inappropriate judicial humour are rare in Australia. Any finding of misconduct or actual or apprehended bias would only arise from behaviour that is seriously or consistently at odds with core judicial values. Informal repercussions to inappropriate judicial humour are more likely.

### 3 *Informal Professional Consequences*

Informal consequences for inappropriate judicial humour can arise from complaints made about judicial behaviour in court to the chief judicial officer or can entail a more general loss of respect for the judicial officer concerned, either among the legal and judicial profession or among the public more widely.

In most jurisdictions, the only avenue to express concerns about judicial behaviour, including improper humour, is to complain to the chief judicial officer. The Law Reform Commission of Western Australia found that protocols for responding to these complaints exist in most states and territories.<sup>93</sup> These are available online for some courts in Victoria,<sup>94</sup> Queensland,<sup>95</sup>

<sup>89</sup> For a recent example of an allegation of apprehended bias based on 'an attempt at comedy', see *Dillon (A Pseudonym) v The Queen* [2014] VSCA 164 (7 August 2014) [25] (Priest JA); cf at [5], where Whelan JA described the same comment by a trial judge as 'flippant'.

<sup>90</sup> [2007] EWCA Civ 1149 (15 November 2007). The English test for apprehended bias is discussed in relation to the Australian test in Susan Bartie and John Gava, 'Some Problems with Extrajudicial Writing' (2012) 34 *Sydney Law Review* 637, 642–5.

<sup>91</sup> *El-Farargy v El Farargy* [2007] EWCA Civ 1149 (15 November 2007) [30] (Ward LJ); see also at [17].

<sup>92</sup> *Ibid* [21]; see also at [31].

<sup>93</sup> Law Reform Commission of Western Australia, above n 41, 23, 47, 48, 51, 53.

Western Australia,<sup>96</sup> Tasmania,<sup>97</sup> the Northern Territory,<sup>98</sup> the Australian Capital Territory,<sup>99</sup> and the Commonwealth.<sup>100</sup> None of these protocols provide publicly available information about the substance or outcome of any complaints, or the identity of the judicial officer involved.<sup>101</sup> More significantly, the actions that a head of jurisdiction may take are very limited, and include such responses as encouraging the judicial officer to apologise or to undertake counselling or appropriate additional training.<sup>102</sup>

Across Australia, there is a movement towards more transparent complaint handling. In New South Wales, complaints are made to the Judicial Commission.<sup>103</sup> The Commission may then refer the complaint to its Conduct Division for investigation.<sup>104</sup> There is now Commonwealth legislation which describes the process for serious complaints,<sup>105</sup> which 'outlines the measures a head of jurisdiction may take ... should [he or she] believe it reasonably

<sup>94</sup> Magistrates' Court of Victoria, *Judicial Complaints Process* (May 2013) <<http://www.magistratescourt.vic.gov.au/publication/judicial-complaints-process>>; County Court of Victoria, *Complaints* <<http://www.countycourt.vic.gov.au/node/154>>.

<sup>95</sup> Magistrates Court of Queensland, *Magistrates Complaints Policy* (27 September 2011) <<http://www.courts.qld.gov.au/courts/magistrates-court/complaints-policy>>.

<sup>96</sup> Supreme Court of Western Australia, *Protocol for Complaints against Judicial Officers in Western Australian Courts* (27 August 2007) <[http://www.supremecourt.wa.gov.au/F/feedback\\_and\\_complaints.aspx?uid=9060-5200-6623-1719](http://www.supremecourt.wa.gov.au/F/feedback_and_complaints.aspx?uid=9060-5200-6623-1719)>.

<sup>97</sup> Magistrates Court of Tasmania, *Judicial Complaints Policy (Magistrates)* (23 April 2014) <[http://www.magistratescourt.tas.gov.au/about\\_us/complaints\\_and\\_feedback](http://www.magistratescourt.tas.gov.au/about_us/complaints_and_feedback)>.

<sup>98</sup> Supreme Court of the Northern Territory, *Protocol for Complaints against Judicial Officers of the Supreme Court of the Northern Territory* (2008) <[http://www.supremecourt.nt.gov.au/about/documents/Complaints\\_Protocol\\_Document\\_Judiciary.pdf#search=%22complaint%22](http://www.supremecourt.nt.gov.au/about/documents/Complaints_Protocol_Document_Judiciary.pdf#search=%22complaint%22)>.

<sup>99</sup> Australian Capital Territory Magistrates Court, *Complaints and Feedback* (16 May 2012) <[http://www.courts.act.gov.au/magistrates/about\\_the\\_court/complaints\\_and\\_feedback](http://www.courts.act.gov.au/magistrates/about_the_court/complaints_and_feedback)>.

<sup>100</sup> Federal Circuit Court of Australia, *Judicial Complaints Procedures* (14 May 2013) <[http://www.federalcircuitcourt.gov.au/html/judicial\\_complaints.html](http://www.federalcircuitcourt.gov.au/html/judicial_complaints.html)>; Federal Court of Australia, *Judicial Complaints Procedure* (3 May 2013) <<http://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>>.

<sup>101</sup> In contrast, such information is publicly available in many United States jurisdictions: see, eg, Commission on Judicial Performance (CA), above n 14.

<sup>102</sup> See, eg, the process in Western Australia: Law Reform Commission of Western Australia, above n 41, 22; Supreme Court of Western Australia, above n 96, 4 [16].

<sup>103</sup> See *Judicial Officers Act 1986* (NSW) s 15.

<sup>104</sup> *Ibid* ss 18–21A.

<sup>105</sup> See *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth).



necessary in order to maintain public confidence in the Court'.<sup>106</sup> In addition to the new Commonwealth regime, there have been ongoing debates in the Victorian Parliament regarding the establishment of a judicial complaints commission.<sup>107</sup> In the Australian Capital Territory there is a push to expand the scope of its Judicial Commission to deal with less serious complaints.<sup>108</sup> In the other states, there has been some recognition of the merits of a judicial commission by members of parliament, but no action has been taken to establish such a body.<sup>109</sup> It is likely that as procedures are developed to enable more public or transparent responses to complaints, the scope of appropriate and inappropriate humour will become clearer, as will the professional consequences.

The Victorian Department of Justice acknowledges the limitations of the informal system, but reports that it is generally effective: 'Peer pressure, embarrassment, fear of loss of reputation, respect for the authority of the head of court, or dislike of confrontation, normally enables this informal system to work effectively'.<sup>110</sup> Even where there has been no formal complaint, there may be a general loss of respect for a judicial officer who regularly behaves at odds with the standards of appropriate judicial conduct.<sup>111</sup>

Baum discusses humour as being at odds with the preferred judicial role in the context of United States Supreme Court appointments:

Consider, for example, the career goals of Samuel Kent and Alex Kozinski. Almost certainly, each would welcome promotion to a higher federal court. ... Their flamboyant expressions in opinions enhance their visibility, and visibility can help in winning promotion. Even so, their opinions probably work against

<sup>106</sup> Explanatory Memorandum, Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Cth) 1 [6].

<sup>107</sup> See Judicial Commission Bill 2014 (Vic); Law Reform Commission of Western Australia, above n 41, 45.

<sup>108</sup> Law Reform Commission of Western Australia, above n 41, 50.

<sup>109</sup> See, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 26 November 2013, 6503–4 (Michael Mischin); South Australia, *Parliamentary Debates*, House of Assembly, 29 March 2012, 972–4 (R B Such); Queensland, *Parliamentary Debates*, Legislative Assembly, 6 October 2010, 3615 (Lawrence Springborg).

<sup>110</sup> Department of Justice (Vic), *Investigating Complaints and Concerns regarding Judicial Conduct* (2009) 18 [3.2.1], quoted in H P Lee, 'Appointment, Discipline and Removal of Judges in Australia' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 27, 41. Cf Appleby and Le Mire, above n 75, 30–1.

<sup>111</sup> Department of Justice (Vic), above n 110, 18 [3.2.1]; Chief Justice Wayne Martin, 'Magistrates' Society Dinner' (Speech delivered at the Magistrates' Society Dinner, Nedlands, 16 November 2012) 6–7.

their promotion. Like other judges who employ humor at the expense of litigants or lawyers, Judge Kent risks annoying both the targets of his words and others who disapprove of their tone. Judge Kozinski's free expression of his views in opinions and out of court makes him controversial and probably rules him out as a candidate for the Supreme Court.<sup>112</sup>

In reference to George Leake, the Acting Chief Justice of the Supreme Court of Western Australia in 1887 and 1888, Chief Justice Martin stated that:

Leake was renowned for his cutting sarcasm. A local author wrote:

With all his acquired and natural gifts, had Mr Leake only realised that humour was preferable to caustic wit, and that solidity and dignity were essential to the exercise of the highest judicial functions, it cannot be doubted that the position of Chief Justice of the colony was within his reach, but, unfortunately for himself, he sacrificed the high office he so much coveted ... to the display of keen wit and sarcasm which often descended into ridicule.<sup>113</sup>

Apart from this, there is no publicly known example in Australia of a judicial officer being ineligible for appointment to a higher court because of his or her reliance on humour. However, because the process and criteria for judicial appointment and promotion in Australia are almost entirely secret, it would be impossible to know if a candidate's use of humour was a factor.<sup>114</sup>

### III A PLACE FOR HUMOUR

The risk that judicial humour may undermine core values, in conjunction with the restrictions and potentially harsh consequences for extreme misuse of humour, may suggest that humour should be absent from the courtroom. However, there is considerable evidence of the presence of some humour in court and a recognition that the courtroom can be a proper place for judicial humour.

<sup>112</sup> Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006) 40.

<sup>113</sup> Chief Justice Martin, above n 111, 6–7.

<sup>114</sup> See Mack and Roach Anleu, 'The Security of Tenure of Australian Magistrates', above n 41, 385; Sharyn Roach Anleu and Kathy Mack, 'Judicial Appointment and the Skills for Judicial Office' (2005) 15 *Journal of Judicial Administration* 37; Lenny Roth, 'Judicial Appointments' (Briefing Paper No 3/2012, Parliamentary Library, Parliament of New South Wales, 2012) 1; George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 161, 161.

In what literature exists on humour in the Australian courtroom, there are suggestions that humour occurs and is acceptable.<sup>115</sup> Deputy Chief Magistrate Cannon writes that '[a]nyone who watches a jury trial will recognise elements of theatre, high drama and humour'.<sup>116</sup> Similarly, referring to the New South Wales Court of Criminal Appeal, Justice Peter McClellan and Christopher Beshara claim that '[i]n spite of the distasteful subject matter with which it sometimes deals, the court can occasionally be the source of humour'.<sup>117</sup> The Australasian Institute of Judicial Administration's *Guide to Judicial Conduct* recognises the presence of humour, commenting that '[t]he trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness'.<sup>118</sup>

Court observation studies from different jurisdictions note the occurrence of humour in courtrooms. Scarduzio states that '[h]umor was employed by many of the 12 judges ... observed' in two United States municipal courts.<sup>119</sup> Also in the United States, Sarat found that some judges in Wisconsin state trial courts 'frequently engaged in conversation and joked with both lawyers and litigants'<sup>120</sup> and Anesa noted that, in one Californian jury trial, 'humor and wittiness emerge[d] constantly'.<sup>121</sup> In England and Wales, Darbyshire observed that 'a few judges used humour in the courtroom to good effect, to ease tension. Several were natural comedians. Counsel and jurors were smiling in anticipation of entertainment as soon as they walked in'.<sup>122</sup>

As discussed in more detail below, interviews with Australian judicial officers suggest that there is an understanding and acceptance of judicial humour in court as well as an awareness of the risks. For example, one judge remarks that humour is

<sup>115</sup> See, eg, Davis and Simpson, above n 13, 329.

<sup>116</sup> Deputy Chief Magistrate Cannon, above n 24, 217.

<sup>117</sup> Justice Peter McClellan and Christopher Beshara, 'A Matter of Fact: The Origins and History of the NSW Court of Criminal Appeal' (Education Monograph No 5, Judicial Commission of New South Wales, June 2013) 41.

<sup>118</sup> Australasian Institute of Judicial Administration, above n 4, 17 [4.1]. See also Courts of New Zealand, *Guidelines for Judicial Conduct* (2013) 14 [49].

<sup>119</sup> Scarduzio, above n 13, 298.

<sup>120</sup> Sarat, 'Judging in Trial Courts', above n 13, 391.

<sup>121</sup> Patrizia Anesa, *Courtroom Discourses: An Analysis of the Westerfield Jury Trial* (PhD Thesis, Università degli Studi di Verona, 2011) 134.

<sup>122</sup> Darbyshire, above n 13, 141.

important to some individuals. It's important to me and I find myself doing it more than I probably should. It's discouraged ... in court ... any number of appeal judges at conferences will tell you there's no place for it ... I find that difficult to accept and there's not much I can do about it and so I restrain myself as much as I can but for me seeing the funny side of things is important and I don't stop myself from doing it sometimes in court.<sup>123</sup>

Another judge comments in an interview that 'there's a place for judicial humour or appropriate levity, not inappropriate levity'.<sup>124</sup>

Similarly, an examination of transcripts from proceedings in Australian magistrates courts provides further examples of judicial humour in the courtroom.<sup>125</sup> While the interview data give the views of the Australian judiciary, the transcript data offer an insight into what actually occurs in court. Analysis of both kinds of data leads to a clearer identification of the ways in which humour can be crafted for use in the courtroom.

#### A Factors Affecting Appropriateness of Judicial Humour

Determining whether judicial humour is appropriate or acceptable is a complex task for judicial officers. As Justice Mason advised, '[h]umour must always be moderate, measured and *appropriate to the occasion*'.<sup>126</sup>

The literature tends to treat instances of judicial humour as either appropriate or inappropriate,<sup>127</sup> reflecting the limited consideration given to judicial humour in court, especially in the Australian context. However, we find that instances of judicial humour cannot be classified into binary categories of appropriate and inappropriate, acceptable and unacceptable, or proper and improper. It is more useful to analyse judicial humour along a continuum with regard to how appropriate or acceptable it is, and to consider the circumstances or ways in which humour might be appropriate and acceptable. This article uses the terms below to describe incidents of judicial humour as revealed through our empirical research, including interviews and a court

<sup>123</sup> Judge 23, male. When referencing interviewees, the term 'judge' will be used for any member of a higher court, whether formally titled 'Judge' or 'Justice'. The number indicates the particular judge or magistrate interviewed, so that it is possible to tell when comments come from the same or different interviewees, while maintaining anonymity.

<sup>124</sup> Judge 27, male.

<sup>125</sup> See Appendix.

<sup>126</sup> Justice Mason, 'Judicial Humour', above n 1 (emphasis added).

<sup>127</sup> See, eg, Justice Mason, 'Judicial Humour', above n 1; Little, above n 11, 1239; Hobbs, above n 12; Ibrahim and Nambiar, above n 13, 74; Malphurs, above n 13, 71.

observation study. Each term should not be understood to form a discrete category of appropriateness, but rather to describe identifiable distinctions between different kinds of humour along a continuum.

- 1 *Appropriate* judicial humour enhances core values by promoting procedural justice, maintaining legitimacy or relieving tension, such as a remark which puts at ease a party or a witness who is unfamiliar or uncomfortable with the court setting.
- 2 *Acceptable* judicial humour neither enhances nor detracts from legitimacy, as in joking with a lawyer at a time or in a way that does not exclude other court users.
- 3 *Inappropriate* judicial humour detracts from impartiality, perhaps through sarcasm or ridicule of a limited or minor kind, but does not breach a regulatory regime. There may be informal consequences for its use, such as loss of reputation.
- 4 *Unacceptable* judicial humour, such as extreme ridicule or sarcasm, detracts from the core values to such a degree that it breaches one or more regulatory regimes. There may be formal and informal consequences.

At its best, judicial humour will be intended to have, and will achieve, a positive effect on courtroom proceedings and on participants. Crafting appropriate judicial humour involves considering a range of factors. These include the intended purpose of the humour, to whom or what it is directed, and the type of humour (jokes; spontaneous conversational humour such as wit, irony or sarcasm; unintentional humour), considered in light of the specific context of the courtroom including features such as who is actually present in the courtroom, the nature of the matter and the type of proceedings.

Balancing these many dimensions requires considerable, skilled court craft, as recognised by a number of judicial officers interviewed, who stress the need to be careful and cautious when using humour. In their interviews, three judicial officers describe their humour as being ‘*a bit* of lightheartedness’<sup>128</sup> or ‘*a little bit* of a joke’,<sup>129</sup> or suggests that judicial officers can use humour ‘*in a mild way*’.<sup>130</sup> Perhaps as a result of this caution, much judicial

<sup>128</sup> Judge 22, male (emphasis added).

<sup>129</sup> Judge 8, male (emphasis added).

<sup>130</sup> Judge 27, male (emphasis added).

humour is comparatively slight and not especially funny, as extracts in this article suggest.<sup>131</sup>

### 1 *Purpose of the Humour*

Appropriate judicial humour will always fulfil some legitimate purpose in the courtroom. Perhaps the most widely approved use for judicial humour is ‘icebreaking’ — relieving tension among the participants in court. The Australasian Institute of Judicial Administration’s *Guide to Judicial Conduct* comments that ‘[i]ndeed [humour] sometimes relieves tension and thereby assists the trial process’.<sup>132</sup> Justice Kyrou also argues that a positive mood in the courtroom ‘can ensure that the hearing is conducted in an efficient and harmonious manner’.<sup>133</sup> This function of humour is also cited in public statements from senior judicial officers,<sup>134</sup> research and commentary.<sup>135</sup> Former Chief Justice Gleeson comments: ‘Some judges, out of personal good nature, or *out of a desire to break the tension that can develop in a courtroom*, occasionally feel it appropriate to treat a captive audience to a display of wit’.<sup>136</sup>

Chief Justice Gleeson’s remarks imply some concern, perhaps for the ‘captive audience’. In our interviews, one judge describes the role of judicial humour to set participants at ease: ‘You try to bring a bit of lightheartedness into the matter or, you know, make, try to make some comment that makes people feel at ease ... the lawyers, the litigants, the witnesses’.<sup>137</sup>

This judge articulates the purpose of his humour as putting the court participants ‘at ease’ in the tense, formal atmosphere of the court. Another judge identifies the utility of judicial humour to relieve tension, recalling that ‘one judge who’d been a judge long before I, sort of told me that it’s always good to be able to make a little bit of a joke just to relax the area in the courtroom’.<sup>138</sup>

<sup>131</sup> See also F E Smith, ‘Introduction’ in Arthur H Engelbach (ed), *Anecdotes of Bench and Bar* (Grant Richards, 1913) 9, 9.

<sup>132</sup> Australasian Institute of Judicial Administration, above n 4, 17 [4.1].

<sup>133</sup> Justice Kyrou, above n 14, 134.

<sup>134</sup> See, eg, Chief Justice Gleeson, above n 2; Justice Mason, ‘Judicial Humour’, above n 1; Justice Michael Kirby, ‘The Seven Deadly Sins’ [1985] (Winter) *Bar News* 10, 11.

<sup>135</sup> See, eg, Anesa, *Courtroom Discourses*, above n 121, 132; Pannick, above n 39, 81; Gilbert, above n 38, xiii; Michael S King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009) 132; Davis and Simpson, above n 13, 329; Scarduzio, above n 13, 298.

<sup>136</sup> Chief Justice Gleeson, above n 2 (emphasis added).

<sup>137</sup> Judge 22, male.

<sup>138</sup> Judge 8, male (emphasis added).

Several judges remark specifically on their use of humour when presiding in a jury trial:

You can easily use [humour] in a mild way with juries because juries are, as I said they are lay people in a very unfamiliar environment doing a very responsible job, very responsible job, and they're just thrown together, 12 people, chances are [they've] never met before ... So I tend to be reasonably personal in my communications, by personal I mean engaging not personal, engaging, and I'll make a joke ... and it just engages and I'm hoping it helps them to feel a bit more comfortable ... just things like ... where I try to help them to encourage them, to relax a bit and to tell them what their job is and make sure they're comfortable.<sup>139</sup>

Another judge remarks:

I think it's quite important to maintain good humour especially in a jury trial but also when it's just barristers ... with the jury I try to develop a relationship ... I'll say well when I'm telling them about the administrative arrangements for lunch, you know, you'll get an allowance but ... I don't suppose you're going to dine high off the whole [sic] or something like that and they'll all smile and a little bit of ice gets broken.<sup>140</sup>

A fundamental feature of humour is alluded to by this judge. Humour is recognised as being distinct from laughter, although the two often coincide.<sup>141</sup> That distinction is particularly important in the context of the courtroom. Laughter is an audible, vocal expression, usually responding to humour which is very funny.<sup>142</sup> The second interviewee suggests that he expects only a limited expression, such as smiles, implying that humour which elicits open laughter may be too far at odds with court decorum.

In addition to the formal atmosphere of a courtroom, these interviewees suggest other causes of discomfort for jury members: the mixture of an 'unfamiliar environment', their 'very responsible job' and being 'just thrown together'. Jury members may be particularly susceptible to feelings of discomfort in the courtroom, and so judicial humour can be especially important to them. Judicial humour is first able to 'relax' or 'help [jury members] to feel a bit more comfortable' by defusing tension; and second, it can 'encourage' or

<sup>139</sup> Judge 27, male.

<sup>140</sup> Judge 8, male.

<sup>141</sup> Malphurs, above n 13, 52–3.

<sup>142</sup> Rod A Martin, above n 7, 2–3.

engage jury members with the proceedings. These examples of humour are therefore appropriate. Anesa's research appears to support this finding, as she noted from her observation study that

[a]t the beginning of the instruction phase, instead of starting immediately to read the jury instructions, the judge spends a few words on extra-textual references and tries to create a more familiar and relaxed atmosphere ... given that it is the first day of the actual trial and for some of them it may be the first time they serve as jurors.<sup>143</sup>

However, judicial humour used when directing a jury has recently been criticised on appeal, though no misdirection was found.<sup>144</sup> Tate JA (with whom Whelan JA and Santamaria JA agreed) commented that the 'amusing' story could have been perceived as 'flippant'<sup>145</sup> or 'distracting' and therefore 'inappropriate to a jury in the very serious task on which they have embarked'.<sup>146</sup>

The utility of judicial humour in relieving tension for lay people extends beyond reassuring jury members. It can also assist people giving evidence as a witness in the unfamiliar courtroom environment.

One judge gives an example of using humour to put witnesses at ease:

If I'm explaining to a witness that they must keep their voice up, I say 'that microphone in front of you will amplify your voice but if you drop your voice you won't hear it, and of course if you lean forward like I am now', and I lean forward into my microphone and talk really loudly, 'you'll blow the ears off the person that's listening to the evidence'. You know, just something to make them feel at ease but to explain to them what they've got to do in terms of giving evidence ...<sup>147</sup>

Even humour which is intended to serve a legitimate purpose may be considered inappropriate if it is directed at a subject matter or person in a manner which is unacceptable in light of norms governing judicial conduct or oversteps some other social or cultural boundary.

<sup>143</sup> Anesa, *Jury Trials and the Popularization of Legal Language*, above n 8, 123.

<sup>144</sup> See *Gui v Weston* (2013) 65 MVR 542.

<sup>145</sup> *Ibid* 557 [54].

<sup>146</sup> *Ibid* 557 [55].

<sup>147</sup> Judge 22, male. Cf Chief Justice Gleeson, above n 2, who said that '[m]ost litigants and witnesses do not find court cases at all funny'.



## 2 Topic of the Humour

There are a number of potential subjects for judicial humour in the courtroom. These include courtroom procedure, the judicial officer himself or herself and other participants (whether present in the courtroom or not), such as criminal defendants, civil litigants, lawyers, court staff, witnesses, juries, government agencies, the media and observers. Some subjects are rarely appropriate for humour while others can be, depending on other aspects of the humour.

Where *the subject of the humour is the procedure of the courtroom*, rather than the substance of the matter before the court, it is more likely to be appropriate, as the following excerpt from the court observations suggests:

Magistrate: If my maths is correct, we've had a lot of maths mistakes so far today.

Prosecutor: I'm not even going to dare enter that, sir.<sup>148</sup>

In the case above, the magistrate crafts a reference to the poor mathematical skills of the court. His remark is slightly humorous because of the irony of casting doubt on his own calculation. In another matter, the defendant was to be sentenced for several driving offences. However, in a protracted process of determining administrative matters, the following exchange, involving a different magistrate, occurred:

Magistrate: ... OK, what's the charge — what's the case number?

Prosecutor: Charge number is H-9-9 ... 9-9-9 ... that's three nines.

Magistrate: That's four nines, isn't it?

Prosecutor: No, there's five.

Magistrate: [laughs briefly]

Prosecutor: Five nines, then one zero ...<sup>149</sup>

The humour in this matter arises from the repeated failure of the magistrate and prosecutor to determine precisely how many nines exist in the charge number. In this circumstance, the magistrate's laughter does not undermine courtroom decorum or show disrespect for any participant.

<sup>148</sup> Magistrate C, male.

<sup>149</sup> Magistrate A, female.

In the matter below, a magistrate does not believe that the Court has jurisdiction:

Magistrate: Generally speaking they haven't quite given the Magistrates Court the, you know, conspiracy and incitement jurisdictions yet, although that will probably come next week.

Defence:<sup>150</sup> Got arson.

Magistrate: We've got arson and we have got some things which are odd, there's no doubt about it.<sup>151</sup>

In this example, the magistrate is referring somewhat wryly to the substantial increase in magistrates courts' jurisdictions as a result of moves in several states and territories to cut costs and reduce pressure on the superior courts. While the substance of this comment could potentially undermine public confidence, by suggesting that courts may be faced with matters they are not suited for, it is not the humour itself that creates concern. In all three extracts above, the comments relate primarily to the business of the court and do not ridicule or demean any individual. In addition, they indicate a frustration which may be shared with other court users. Although their 'in-group' nature may exclude some courtroom participants, these comments are examples of acceptable or appropriate judicial humour because they may relieve tension, improve court user experience and do not appear to detract from core values.

*Self-deprecating judicial humour* happens on occasion and can be appropriate. Former Chief Justice Brennan praises 'a sense of humour that allows the mind to concentrate on the issues without taking oneself and one's preconceptions too seriously'.<sup>152</sup>

In one matter, a magistrate is confused by what a defence lawyer is submitting. He comments:

Magistrate: Sorry, I'm confused *already*.<sup>153</sup>

The use of 'already' suggests that the magistrate was confused more readily than might have been expected. It implies that his confusion was inevitable and not the fault of the lawyer's presentation to the court. Although the magistrate may not have intended for the comment to be understood as

<sup>150</sup> 'Defence' indicates that the person speaking is a defence representative, rather than the defendant himself or herself.

<sup>151</sup> Magistrate F, female.

<sup>152</sup> Chief Justice Brennan, above n 14.

<sup>153</sup> Magistrate B, male (emphasis added).

humour, and may have implied criticism of the submission, its ironic nature provides an example of small and measured judicial humour. Another magistrate uses mild self-deprecating humour by referring to his hearing difficulties. In one matter, he apologises for mishearing a defendant:

Magistrate: I'm sorry, I'll be getting my hearing aid later this week ...<sup>154</sup>

In a later matter, he again references his hearing:

Applicant: I'm a bit hard of hearing.

Magistrate: Well it makes two of us so we'll both speak up, how's that okay, can you hear that alright?

Applicant: Yes thank you.<sup>155</sup>

These comments can be interpreted as using humour to deal with a problem of communication in the courtroom by the magistrate blaming himself rather than the lawyer or a party for any misunderstanding.

Both examples demonstrate that self-deprecating humour is likely to be, at least, acceptable because it does not offend core values of the judiciary, and can be appropriate. In the context of mediation, Coburn, Batagol and Douglas found that humour can have the positive effect of 'demolishing the sense of hierarchy between mediator and party'.<sup>156</sup> Following this reasoning, self-deprecating judicial humour can relieve hierarchical tension between the court users and the judicial officer. The magistrates in the examples above expose human frailties (in the form of confusion and hearing difficulties) and, in the second example, identify a shared difficulty with the defendant. However, such humour could potentially undermine core values. For example, public confidence in the magistracy may be damaged if a particular magistrate routinely quipped that he or she was confused by proceedings or unable to hear the participants. One element in ensuring that self-deprecating humour does not detract from core values is to employ humour that is relatively minor, as the interviewees above suggest.

*Humour directed towards or at the expense of a litigant or defendant* is very rarely acceptable, if ever. The hierarchical relationship between the judiciary and court users, and the power of a judicial officer in court, severely limit the

<sup>154</sup> Magistrate D, male.

<sup>155</sup> Magistrate D, male.

<sup>156</sup> Clare Coburn, Becky Batagol and Kathy Douglas, 'How a Dose of Humour May Help Mediators and Disputants in Conflict' (2013) 24 *Australasian Dispute Resolution Journal* 18, 24.

acceptability of judicial humour. As King advises: 'Humorous language may be appropriate in court situations ... However, care should be taken that the use of humour is not at the expense of the participant or other people involved in the court program'.<sup>157</sup>

In one interview, the judge indicated that he could not laugh in situations where people would otherwise chuckle. He gave the example of where a defendant might be clumsy.<sup>158</sup> These comments reflect the profound distinction between the courtroom and other contexts. The core values, particularly judicial impartiality and court decorum, can be so easily undermined or offended by judicial humour relating to the defendant that it will almost always be considered inappropriate or unacceptable.

Special care must be taken with litigants in person or unrepresented parties, who appear frequently in the magistrates courts. Consider the following example, where an unrepresented defendant was being sentenced for possessing cannabis:

Defendant: I suffer with arthritis and it just helps with those —

Magistrate: I see.

Defendant: — sorts of pain. That's all.

Magistrate: It might be cheaper if you took prescription medicine ...

Defendant: Yeah. Well, if that was available, I would, your Honour.<sup>159</sup>

Here, the comment does not appear to be defusing tension for any court participant or to have any other positive purpose, nor does it appear to be sincere, helpful advice, although the defendant's response suggests that the remark was taken in that spirit. Rather, it appears to be an expression of judicial frustration with the defendant's behaviour, communicated in a way that could be perceived as humorous.

The need to respect individual defendants or litigants as people who expect to be treated fairly is made apparent by contrast with the willingness of judicial officers to make joking remarks about 'faceless' court users such as government authorities or corporate entities:

Magistrate: I am prepared, in those circumstances, to put this down as an isolated incident and I am prepared in such circumstances to allow your record to

<sup>157</sup> King, above n 135, 132.

<sup>158</sup> Judge 13, male, not recorded.

<sup>159</sup> Magistrate I, male.

remain intact insofar as the commission of this offence is concerned by dismissing it. *However, the Roads and Traffic Authority in their infinite wisdom will still apply the demerit points.* I have no power in that regard.<sup>160</sup>

This comment implies a shared frustration with the Roads and Traffic Authority. If the magistrate had made a similarly sarcastic comment about a criminal defendant or civil litigant deciding something in their ‘infinite wisdom’, it would probably be considered inappropriate.

*Members of the legal profession* are regularly the subject of judicial humour. There are many popular anecdotes involving joking between the Bench and lawyers, including accounts of lawyers being targets of judicial wit.<sup>161</sup> Our research also finds that judicial officers often direct quips towards individual lawyers and the legal profession at large. These include banter between the legal representatives and the judicial officer. However, extended analysis of judicial humour directed at or shared with members of the legal profession is beyond the scope of this paper. The appropriateness of such humour is influenced by the professional relationship between the judiciary and lawyers in court, and raises different issues than judicial humour used primarily in relation to lay participants.<sup>162</sup>

### 3 Context of the Humour

Even where judicial humour is appropriate or acceptable with reference to its purpose and topic, it may nonetheless be inappropriate or unacceptable because of particular circumstances in the courtroom. Features of the courtroom context which affect the appropriateness of judicial humour are: (a) who is present in the courtroom; (b) what the nature of the matter is; (c) what the outcome of the matter is; (d) when the humour occurs; and (e) to whom it is accessible.

#### (a) Presence in the Courtroom

The appropriateness of humour may hinge on who is or is not in the courtroom. In particular, the presence of people directly involved in the matter is significant. The two following comments, from a judge and a magistrate

<sup>160</sup> Magistrate H, male (emphasis added).

<sup>161</sup> See, eg, Gilbert, above n 38, 23–4, 36–7; A S Gillespie-Jones, *The Lawyer Who Laughed Again* (Hutchinson, 1980) 4–5.

<sup>162</sup> The authors are preparing a separate paper analysing judicial humour in relation to the legal profession in court.

respectively, demonstrate their readiness to use humour depending on who is present:

I tend to avoid it [humour] because it's not generally, not, look if I'm there with just counsel, umm, and there's something that, you know sometimes you can lighten the mood a bit with, but if there are members of the public, the parties, I tend to avoid it because it's serious for them ... I just don't think that umm, it's respectful to people to be joking about things when they've got very serious matters before the court.<sup>163</sup>

Just got to be so careful with humour I think, and I say if I was to say something that I thought was funny, I would say it possibly to counsel, not with a defendant there, so, you know, just in terms when you relax a bit but I'm a bit careful with humour with defendants.<sup>164</sup>

Both of these judicial officers make two significant points on how the presence of individuals in the courtroom affects the appropriateness of humour. First, they suggest that humour of any kind is less acceptable where there are people directly affected by the case (defendants, parties) or members of the public present in the courtroom. Second, they are more willing to use humour when only legal counsel is present.

A comment from one judge specifically highlights the importance of being careful with humour when people affected by the case are present, even if not directly party to the action: 'One has to be very careful about judicial humour because you've got victims and you've got relatives of families'.<sup>165</sup>

This interviewee specifically identifies victims in criminal matters and relatives of those involved in a case as being the kinds of people who, if present, require the judicial officer to adhere to standards of conduct which clearly communicate respect for the seriousness of the proceedings. This goes beyond the concern previously mentioned, of humour directed at a party. In some circumstances, any humour which undermines the seriousness of the matter, at least in the eyes of those present, would be unacceptable. This is consistent with the need to maintain courtroom decorum and, more importantly, to show respect for the process itself as well as individual participants or parties.

In situations where the defendant does not appear in court, judicial humour appears more relaxed, and joking by the judicial officer is less re-

<sup>163</sup> Judge 36, female.

<sup>164</sup> Magistrate 31, female.

<sup>165</sup> Judge 27, male.

strained. For example, in a matter where the defendant is not present, the magistrate remarks:

Magistrate: What else have we got? Appearance — any appearance of [defendant]? No? Mr [defendant] doesn't like coming.<sup>166</sup>

The humour in this remark may appear to conflict with the principle that humour directed at a defendant is very rarely acceptable. Arguably, the need to respect the defendant individually or personally is reduced slightly because he or she is not there, though it is also important for the magistrate to be seen to protect the interests of an absent party. In any event, an implication of disrespect for defendants as a category would be inappropriate, regardless of the presence of other defendants or public observers.

Humour may be regarded as less appropriate where litigants, defendants or other parties directly affected by the matter are in attendance. On the other hand, lay people in general, such as members of the jury, are considered to be a proper audience for judicial humour, though not a target for it. Where there are only lawyers, or court insiders more generally, in the courtroom, humour seems to be considered more appropriate by the judiciary or other professional participants, including humour at the expense of absent participants or parties, even criminal defendants.

*(b) Nature of the Matter*

Appropriate humour will be crafted in accordance with the nature of the matter. The serious nature of most cases precludes humour in most forms. As one judge remarks:

You try to bring an appropriate amount of humour to the task, in the — you can't make jokes about — some cases are so deadly serious there's not a laugh to be had but at the appropriate time, you know, you try to bring a bit of light-heartedness into the matter ... but humour's a dangerous thing in court. I mean some cases there's no place for humour, deadly serious, there's a lot at stake ...<sup>167</sup>

The interviewee's repeated reference to how some cases can be 'deadly serious' illustrates the importance of the nature of the matter when employing humour in an appropriate or acceptable way. This speaks to a strong belief — even in advocates of judicial humour — that there are occasions where it

<sup>166</sup> Magistrate H, male.

<sup>167</sup> Judge 22, male.

should never be attempted.<sup>168</sup> For example, when talking about the need to be careful with humour, one judge advises greater caution for criminal, as opposed to civil, cases: 'Oh well in a criminal trial you have to be a bit more careful but say in a civil trial if I've got one or two well-known high earning QCs before me ...'<sup>169</sup>

Another judge more specifically warns about the subject matter of a criminal case, as well as concern about those present:

One has to be very careful about judicial humour because you've got victims and you've got relatives of families and you've got really serious stuff like drugs and death and maiming and fraud and sexual assault and stuff like that.<sup>170</sup>

It appears that many criminal cases, especially those involving serious violence or sexual offences, will rarely be occasions for humour. The reason for this is consistent with the need to maintain courtroom decorum, in particular the need to respect the gravity of the matter for court users.

In particular, sentencing is recognised as a proceeding where humour is inappropriate. Holt explains that

[t]he judge's sentence is a very serious matter to almost all defendants and should not be treated lightly. Whatever the offender's attitude, the judge must impress him [or her] with the seriousness of the event if it is to have the desired effect. Levity will not contribute to the sentence becoming a hoped-for turning point in the defendant's life. The offender must feel the gravity of society's commands in order to become fully aware of the need to obey them. In any event, he [or she] or his [or her] plight are not appropriate targets for amusement.<sup>171</sup>

Similarly, in *Were v Police*, Perry J emphasised the need for judicial officers to adhere to particular standards of behaviour during sentencing.<sup>172</sup> His Honour stated that '[m]agistrates and other judicial officers are perfectly entitled to speak in direct, straightforward language to defendants during the course of sentencing remarks ... But a sense of decorum must at all times be maintained'.<sup>173</sup>

<sup>168</sup> See, eg, Justice Mason, 'Judicial Humour', above n 1.

<sup>169</sup> Judge 8, male.

<sup>170</sup> Judge 27, male.

<sup>171</sup> Ivan Lee Holt Jr, 'The Judge's Attitude and Manner at Sentencing' (1964) 10 *Crime & Delinquency* 231, 233.

<sup>172</sup> [2003] SASC 116 (11 April 2003).

<sup>173</sup> *Ibid* [16].



(c) *Outcome of the Matter*

Additionally, the outcome of the matter appears to have some effect on appropriateness. In one matter, the defendant, a student, speaks at length about matters not relevant to the proceedings. At its conclusion, the following exchange takes place:

Magistrate: Yes ... you say ... you're studying Law?

Defendant: I'm not actually. I have a degree in communications.

Magistrate: Well that's probably good, because if you were studying Law, I would have to tell you that the less you say the better off you are.

Defendant: Very well.

Magistrate: Notwithstanding that, I'll dismiss the matter ...<sup>174</sup>

The advice offered by the magistrate was a humorous reference to the defendant's overlong submission. By framing it as advice to a law student, the magistrate avoids making a direct criticism of the defendant who is not a law student. By stating that the decision to dismiss was made 'notwithstanding' the defendant's rambling, the magistrate is making clear that the defendant was not disadvantaged.

In another matter, a member of the Army is charged with an offence arising from public urination. After hearing the defence representative's plea in mitigation, the magistrate speaks directly to the defendant:

Magistrate: I accept that [the defence representative] has said to this court that you endeavoured to use other facilities without success; that's unfortunate and I don't know what the proper remedy to your predicament would have been at this point in time, but this sort of conduct is the sort of conduct which should be anticipated before you leave licensed premises. *The last port of call, to borrow from the Navy for your purposes [defendant], should be the toilet before you go out into a cold night*, because you know, from prior experience, it's not the first time you've drunk too much is it?<sup>175</sup>

After delivering his decision to dismiss the charges, the magistrate concludes the matter by saying:

<sup>174</sup> Magistrate G, female.

<sup>175</sup> Magistrate H, male (emphasis added).

Magistrate: Thank you [defendant]. Off you go to face your Company Commander. It would be easier to face me I think.<sup>176</sup>

There are two instances of judicial humour in the matter: word play ('port of call') which occurs before the magistrate delivers the decision to dismiss the charges; and a reference to military discipline, which occurs at the very end of the matter. The previous example and both instances of humour in this example accompany a favourable decision, and so there is less risk of the magistrate appearing biased. Of course, where the outcome is *not* favourable to the party, the same expression of humour could have a significantly different meaning, as it could suggest the decision may have been affected by bias against the party.

*(d) Timing of Judicial Humour*

These examples suggest that the timing of judicial humour is important. For example, had the Magistrate jokingly rebuked the student defendant well before offering her decision to dismiss the matter, real concerns about her impartiality may have arisen. In another case involving 110 charges, a magistrate makes an ironic comment at the start:

Magistrate: Mr [defence representative], I think your matter might be a shortish matter? I appear to have another one hundred and something charges.

Defence: [laughs] 110, Your Honour.<sup>177</sup>

The defence representative's laughter may suggest that the comment was both intended to be and perceived as humorous. This example occurs amongst a series of questions on administrative and business matters, before any consideration of the substance of the actual criminal offence. At the start of another matter, the defence representative greets the magistrate:

Defence: How are you?

Magistrate: Always the same. It's in the mind, I think. You've got to tell yourself fibs.<sup>178</sup>

Each matter is criminal and the defendant is present, which would ordinarily preclude judicial humour from being regarded as appropriate. Yet both examples are closer to being at least acceptable rather than inappropriate.

<sup>176</sup> Ibid.

<sup>177</sup> Magistrate G, female.

<sup>178</sup> Magistrate E, male.

They do not make fun of a courtroom participant, and they are isolated from serious matters by time; both occur at the very beginning of the matter as part of the business of the courtroom.

(e) *Accessibility of Judicial Humour*

Some judicial humour, even if separate in time from serious matters, can still have the effect of excluding other courtroom participants, especially the defendant. Kalowski stresses that appropriate judicial humour can be characterised by its accessibility: that litigants are able to understand and laugh along with the judge and lawyers.<sup>179</sup> She comments:

I am sometimes asked by judges in workshops ‘is it OK if I crack the odd joke to lighten the mood in the court room?’. Nearly always when a joke is made, it is the judge and legal representatives who laugh. If a litigant is unrepresented, he/she feels left out of ‘the club’. *Spontaneous humour in which all can join is a different thing.*<sup>180</sup>

This view is echoed by one of the judges who distinguishes between spontaneous humour and prepared jokes, approving of the former as it is more appropriate to the courtroom setting:

Yeah, well jokes generally go wrong, just humour, or just observing something that’s funny because it’s happened and it’s funny, umm, generally doesn’t go wrong because most people will find it funny but trying hard to tell a joke, yeah, there’s probably a better place to try, so, yeah.<sup>181</sup>

Another judge comments: ‘You have to have the capacity to have, to see humour in things as much as you can — make people feel that it’s not too stiff’.<sup>182</sup>

In contrast, several interviewees give examples of prepared jokes that they would use to relieve tension in the courtroom with juries and witnesses. Although these were prepackaged, they were crafted deliberately to be inclusive, and the judicial officer would have had an opportunity to observe the response and to reuse or refine those jokes perceived to be effective.

<sup>179</sup> Joanna Kalowski, ‘Managing Courtroom Communication: Reflections of an Observer’ (Speech delivered at the Communication in the Court Room Conference, National Judicial College of Australia, Sydney, 10 November 2007).

<sup>180</sup> Ibid 3 (emphasis added).

<sup>181</sup> Judge 35, female.

<sup>182</sup> Judge 20, male.

Accessibility is closely related to language and the topic of the humour. For example, one magistrate expresses frustration with the delays in a matter by commenting about the date set for the next court appearance:

Magistrate: 14<sup>th</sup> July is Bastille Day. Somebody's head will come off if the matter does not reach finality at that time.<sup>183</sup>

This use of judicial humour requires a somewhat sophisticated understanding to recognise the connections among Bastille Day, the French Revolution and the guillotine as the preferred method of execution. While this may be understandable to the legal professionals in the court, it may be less accessible to other court participants and thus less acceptable. By contrast, as Anesa discusses, judicial humour which is delivered in colloquial or everyday language is more likely to engage litigants, criminal defendants, jurors or witnesses.<sup>184</sup> However, humour which may be colloquial, such as the reference to the Roosters and the Warriors discussed above,<sup>185</sup> can still be inaccessible to some court users and therefore unacceptable.

#### 4 *Perceptions and Power*

Judicial humour must not detract from core values. It should serve a legitimate purpose, address a suitable topic and have regard to the particular context. However, the factors identified above do not form a strict set of rules which dictate the appropriateness of judicial humour. These elements interact in different ways, and even where they all suggest that judicial humour will be appropriate, the result can still be inappropriate because of the influence of perception and power.

The power differential between the judicial officer and other court participants can affect the appropriateness of judicial humour. Scarduzio points out that, because of 'the power of the judge's position ... [j]udges had the ability to make these types of jokes, whereas defendants did not'.<sup>186</sup>

Even a remark made only to lawyers may become inappropriate if the judicial officer is not mindful of the very real power differentials within the courtroom. As Pannick warns, '[o]ccasionally [judicial humour] becomes a misuse of power by holding up to ridicule the unfortunate and defenceless

<sup>183</sup> Magistrate H, male.

<sup>184</sup> See Anesa, *Jury Trials and the Popularization of Legal Language*, above n 8, 124.

<sup>185</sup> See above nn 71–2 and accompanying text.

<sup>186</sup> Scarduzio, above n 13, 298.

butt of the joke',<sup>187</sup> meaning that '[j]udicial humour can turn into judicial scorn'<sup>188</sup> or even judicial bullying.<sup>189</sup>

Another aspect of the power differential is the phenomenon whereby court participants feel compelled to laugh at judicial humour whether or not it is funny. Former Chief Magistrate Fingleton states: 'even if you think, as a judicial officer you are being amusing in court, you never really know, because all parties want to get along with you and will laugh uproariously at anything you say, short of the sentence!'<sup>190</sup>

Similarly, former Justice Kirby describes one of the deadly courtroom sins as 'failing to laugh appropriately at judicial humour, injected deftly to relieve the tension or tedium of the court'.<sup>191</sup>

An aspect of the appropriateness of humour is the point of view or response of listeners. What is perceived as humorous by one person may not be to another, or what is funny to a participant may appear differently to an outsider or vice versa. The following example, in which the defendant is being sentenced for a traffic offence, illustrates this challenge:

Magistrate: The older you get sometimes the powers of concentration diminish ... That's a fair assessment of the way life operates, isn't it? You must be a little more careful that you — that you drive ...

Defendant: [inaudible] I usually have my wife in the car and she makes sure I drive very carefully.

Magistrate: Does she? Wives are like that, so I'm told — by my wife. What are you asking me to do Mr [defendant], let you off?<sup>192</sup>

In this matter, the magistrate appears to be attempting to relate to the defendant in a direct and personal way, showing sympathy for the effects of aging and articulating a shared experience of driving with their wives. While the purpose for which the humour is used is positive, and the specific wife who is the target or object of the humour is apparently absent, the sexism or negative stereotyping on the basis of gender makes it inappropriate. The last sentence

<sup>187</sup> Pannick, above n 39, 80.

<sup>188</sup> Ibid 83.

<sup>189</sup> Michael Kirby, 'Judicial Stress and Judicial Bullying' (2013) 87 *Australian Law Journal* 516, 523.

<sup>190</sup> Chief Magistrate Diane McGrath Fingleton, 'Lecture' (Speech delivered at the T C Beirne School of Law, The University of Queensland, 16 August 1999).

<sup>191</sup> Justice Kirby, 'The Seven Deadly Sins', above n 134, 11.

<sup>192</sup> Magistrate H, male.

also has an air of sarcasm or impatience which does not bode well for this defendant, in spite of the apparent sympathy shown earlier.

One observed matter involving the theft of several pieces of hardware illustrates the difficulty of crafting appropriate humour, the complex interaction of the various factors and the different perceptions which may exist. This Magistrate expresses surprise at the cost of the stolen goods as outlined by the prosecutor:

Magistrate: For two hammers and three pair of pliers, \$450?

Prosecutor: It appears to be so, yes, your Honour.

Magistrate: Silver plated, were they?

Prosecutor: I'm unsure, your Honour. The total cost.

Magistrate: \$450 for two —

Prosecutor: I gather [they] must be of quality, your Honour.

Magistrate: That's unbelievable.<sup>193</sup>

The magistrate's comment — 'silver plated were they?' — entails clear sarcasm, and effectively communicates the magistrate's scepticism towards the size of the claim. The defendant and others in the courtroom may have shared the magistrate's view that the amount was 'unbelievable' and appreciated the robustness of the comment. However, the prosecutor responds literally, as though the magistrate were asking a serious question, and attempts to justify the amount by indicating the tools were 'of quality'.

In spite of the considerable risks in using humour, judicial officers who are able to or take the trouble to craft appropriate humour can have significant positive effects, as discussed in the next section.

### B *The Importance of Appropriate Judicial Humour*

The importance of the subjective experience of court users for their perception of the legitimacy of judicial authority is well established. Lind and Tyler identify the 'capacity of each procedure to enhance the fairness judgments of those who encounter procedures'.<sup>194</sup> The importance for court users to experience procedural justice is emphasised by Tyler, who argues that 'people's

<sup>193</sup> Magistrate I, male.

<sup>194</sup> E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988) 3–4.

willingness to accept the constraints of the law and legal authorities is strongly linked to their evaluations of the procedural justice of the ... courts'.<sup>195</sup> His research shows that procedural justice enhances perceptions of legitimacy.<sup>196</sup>

A court user's experience of procedural justice in this social or psychological sense can be enhanced by the use of humour. Humour used positively can reinforce social relations and connectedness.<sup>197</sup> A judicial officer's demeanour which displays 'some degree of engagement ... [can] communicate fairness in a richer sense and ... reinforce legitimacy'.<sup>198</sup> On this basis, subjective procedural justice can be enhanced by humour because it can show judicial engagement. Humour is a form of human interaction; its use can demonstrate that the judicial officer is listening, show respect for the parties and suggest that the court users and the judicial officers are not entirely distanced by their roles.

Judicial humour which demonstrates that the arguments of litigants, criminal defendants, lawyers or other court users have been 'heard and considered'<sup>199</sup> is likely to promote the feeling that procedural justice has been afforded to them. In one matter, involving a charge of driving under the influence, the magistrate dismisses previous offending with a play on words:

Defence: Sir, the defendant is known, the defendant has two previous priors 14 years ago for similar offending.

Magistrate: We'll say it's a long time between drinks, Mr [defence representative].<sup>200</sup>

Although the defendant has a history of similar offending and so some consideration of that record would be relevant to determining sentence, the magistrate chose to disregard the previous offences. Notably, the magistrate's

<sup>195</sup> Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283, 284.

<sup>196</sup> Ibid.

<sup>197</sup> See Gary Alan Fine, 'Sociological Approaches to the Study of Humor' in Paul E McGhee and Jeffrey H Goldstein (eds), *Handbook of Humor Research: Basic Issues* (Springer-Verlag, 1983) vol 1, 159; Hobbs, above n 12, 59, citing Neal R Norrick, *Conversational Joking: Humor in Everyday Talk* (Indiana University Press, 1993) 133.

<sup>198</sup> Mack and Roach Anleu, 'Performing Impartiality', above n 22, 138. See also Mack and Roach Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context', above n 34; Kathy Mack and Sharyn Roach Anleu, 'In-Court Judicial Behaviours, Gender and Legitimacy' (2012) 21 *Griffith Law Review* 728; Mack and Roach Anleu, 'Getting through the List', above n 32.

<sup>199</sup> Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1990) 176.

<sup>200</sup> Magistrate C, male.

language — the colloquial expression in the formal courtroom — reduces the formality of the occasion in recognition of the defendant's more recent history of good behaviour. Such an approach by the magistrate demonstrates that the defendant is a 'valued, protected member[] of society who will receive benevolence and consideration from the authorities when [he or she] need[s] it'.<sup>201</sup> The correlation between engaged interpersonal communication and a defendant's positive experience is commented on by one magistrate, who responds to a question in the interview asking how she knows that her use of engaged interpersonal communication is beneficial. She says:

Well occasionally you'll get absolute direct feedback in, as in a defendant will actually say to you, umm, 'oh yeah, thanks for that', umm and it's really funny when they thank you for the sentence you've just given them. Umm, or occasionally letters will come in from people or you know in the Children's Court for example I've received a couple of letters from parents saying, 'thank you very much, you know, I understood what's going on'. Umm, certainly in those courts where you're actually building a personal rapport with people like in drug courts and to some extent in the Youth Court too, umm, you will umm, oh you just know from the interaction. I mean you actually develop a personal relationship and if it's a very good trusting one like in the therapeutic type courts you get an enormous amount of feedback so you know it's working and you see, and you see the result in people's changed lives.<sup>202</sup>

This judicial officer has described very clearly the potential benefits of a more engaged, humane approach to judging, in which appropriate humour can play an important part.<sup>203</sup>

#### IV CONCLUSION

Humour in the Australian courtroom has received little attention, either conceptually or empirically. Generally, judicial humour is seen as risky, as it may be inconsistent with core judicial values of impartiality and neutrality, the legitimacy of judicial authority and the maintenance of court decorum. At the extreme, improper judicial humour could lead to a finding of misconduct or a reversal of a decision for actual or apprehended bias. Such formal

<sup>201</sup> Tyler, *Why People Obey the Law*, above n 199, 175.

<sup>202</sup> Magistrate 32, female.

<sup>203</sup> See Mack and Roach Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context', above n 34, 192–3, 215.



consequences are rare in Australia, and inappropriate judicial humour can go unchecked.

Nonetheless, the courtroom can be a place for humour. Appropriate judicial humour will enhance rather than detract from core values. The empirical research presented and analysed in this paper identifies several key factors which influence whether an instance of judicial humour is appropriate or acceptable. These include the purpose, topic and context of the humour, in light of power relations within the courtroom.

Appropriate judicial humour must fulfil a legitimate purpose in the courtroom, such as relieving tension. The judicial officers interviewed stress the importance of relaxing the formal environment for the benefit of non-professional participants, especially witnesses or jurors, who are not used to the courtroom but make essential contributions to a proceeding. Appropriate or acceptable humour may be related to courtroom procedure, or the judicial officer himself or herself. However, if the subject of judicial humour is the criminal defendant or litigants, it will very rarely be acceptable. The context of judicial humour is important. This may include who is in the courtroom, the nature and outcome of the matter, and the timing of the humour. Humour used when people who are directly affected by the case are not in court may be acceptable, but, regardless of who is present, humour should not be used when the matter is 'deadly serious' such as in criminal matters involving substantial violence, sexual offences or where an offender is being sentenced. By contrast, judicial humour is more likely to be at least acceptable where it coincides with a favourable decision or when it is isolated by time from the determination of the case. Finally, even where these factors suggest that judicial humour will be appropriate or acceptable, issues of perception and power can cause an instance of judicial humour to be inappropriate.

Appropriate judicial humour can have an important function in the courtroom. In addition to relieving tension, it can enhance procedural fairness which in turn can increase the perception of legitimacy of judicial authority. Humour which has these effects justifies the use of humour in a setting traditionally opposed to it.

## V APPENDIX: METHODOLOGY

This article draws on data developed on a national basis as part of the Magistrates Research Project and the Judicial Research Project of Flinders University.<sup>204</sup> These projects have undertaken extensive studies of judicial officers from every state and territory as well as all federal courts. The major phases of the research are: initial consultations, national surveys, court observations, and interviews.<sup>205</sup> Data from two particular phases of the research are used in this article: court observations of the criminal list in magistrates courts and interviews of judicial officers.

*A Court Observations*

Observational research provides an opportunity to investigate key features of the everyday work of the judiciary that cannot be identified from other

<sup>204</sup> Further information about these Projects is available on the Judicial Research Project website: Flinders University, *Judicial Research Project* (22 March 2013) <<http://www.flinders.edu.au/law/judicialresearch>>.

<sup>205</sup> Since 2000, the Magistrates Research Project and the Judicial Research Project of Flinders University, led by Sharyn Roach Anleu and Kathy Mack, have undertaken extensive empirical research into many aspects of the Australian judiciary. The research has used interviews, surveys and observation studies to investigate the attitudes of magistrates and judges towards their work, their experiences of their everyday work and how matters are handled in court: see *ibid*. The Magistrates Research Project was funded initially by a University–Industry Research Collaborative Grant in 2001 with Flinders University and the Association of Australian Magistrates (‘AAM’). It also received financial support from the Australasian Institute of Judicial Administration (‘AIJA’). From 2002 until 2005, it was funded by an Australian Research Council (‘ARC’) Linkage Project Grant (LP0210306), with AAM and all Chief Magistrates and their courts as industry partners and with support from Flinders University as the host institution. From 2006, the Judicial Research Project has been funded by an ARC Discovery Grant (DP0665198). The Workload Allocation Study has been funded by an ARC Linkage Project Grant (LP0669168) 2006–09 with the Magistrates Courts of Victoria, South Australia and the Northern Territory as well as the AIJA as collaborating organisations. From 2010 additional funding has been supplied by ARC Discovery Grant (DP1096888). In 2013, further funding was provided by the research grants from the School of Social and Policy Studies, and the Faculty of Education, Humanities and Law, Flinders University. All phases of these research projects involving human subjects have been approved by the Social and Behavioural Research Ethics Committee of Flinders University. We are grateful to Russell Brewer, Carolyn Corkindale, Colleen deLaine, Elizabeth Edwards, Katrina Hartman, Ruth Harris, Julie Henderson, John Horrocks, Lilian Jacobs, Leigh Kennedy, Lisa Kennedy, Mary McKenna, Rose Polkinghorne, Wendy Reimens, Mavis Sansom, Chia-Lung Tai, Carla Welsh, Rae Wood, and David Wootton for research and administrative assistance in connection with this project.

sources.<sup>206</sup> This phase of the research, conducted in 2004 and 2005, entailed observations of 27 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. The magistrates observed include men and women covering a range of ages and judicial experience and closely match the distribution of the Australian magistracy as a whole in gender, age, and years served as a magistrate. The 27 different magistrates observed represent more than six per cent of all Australian magistrates.

Most observation sessions covered the same magistrate in one court for an entire day. In each session, two observers took detailed notes on pre-printed templates, so that all observations recorded the same kind of information about each individual matter and about the court session in general. These templates were derived from notes taken during extensive preliminary observations throughout Australia in 2003 and were pilot-tested in three different magistrates courts in 2004. The combination of all these elements in the research design maximises the validity and reliability of the research findings and is consistent with methodology in other court observation research.<sup>207</sup>

The study produced data on 1287 matters, incorporating 2323 coded interactions between magistrates and other major participants — prosecutors, defence representatives, and defendants — as well as some less frequent actors, such as the staff of social welfare, probation and parole, or corrections departments.

In all but three sessions, where proceedings were not recorded, transcripts, audio tapes or digital audio files of the proceedings were provided at a later date. To maximise confidentiality and consistency, these audio files were transcribed by staff within the Project. To maximise accuracy and complete-

<sup>206</sup> See Maureen Mileski, 'Courtroom Encounters: An Observation Study of a Lower Criminal Court' (1971) 5 *Law & Society Review* 473, 474–5; Sarat, 'Judging in Trial Courts', above n 13, 389–90.

<sup>207</sup> See, eg, Mileski, above n 206, 475–7; Sarat, 'Judging in Trial Courts', above n 13, 389–90; R Douglas and T Weber, 'Research Methods' in Legal Studies Department, La Trobe University, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (1980) 28–34; John M Conley and William M O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press, 1990) 30–3; Susan U Philips, *Ideology in the Language of Judges: How Judges Practice Law, Politics and Courtroom Control* (Oxford University Press, 1998) 3–7; James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999) 185–8; Alfred Allan et al, 'An Observational Study of Bail Decision-Making' (2005) 12 *Psychiatry, Psychology and Law* 319, 323–4; Rosemary Hunter, 'Styles of Judging: How Magistrates Deal with Applications for Intervention Orders' (2005) 30 *Alternative Law Journal* 231, 233.

ness, the transcripts were then checked against the audio record by another staff member.

### 1 *Extraction of Material on Humour*

Due to the embedded nature of humour in the courtroom setting, careful reading, rather than simple electronic searches, was needed to identify instances of humour. One author read through the transcripts of matters observed in the National Court Observation Study, looking for occasions where any person recorded on the transcript said something which was humorous or could have been intended to be humorous. Where it was believed that the situation might involve judicial humour, it was extracted for consideration by the other authors. These transcript extracts were then reread, analysed and categorised to develop a picture of different uses of humour. Not every apparent occasion of humour is extracted in this article. Examples have been selected to illustrate themes.

Because humour is often situation-dependent, other data collected as part of the study were also considered to provide relevant context, such as the nature of the offence or other aspects of the interaction between the magistrate and those in court.

### B *Interviews*

The most recent phase of the Project investigates judicial experiences of and attitudes towards social change and the courts, mainly through interviews with judicial officers. A semi-structured format was used for the interviews, with questions based around a series of key issues that were identified from preliminary consultations and the pilot interviews as well as from earlier phases of the research. This structure enabled the researchers to gather similar information from all interviewees. Interview questions were open-ended, allowing interviewees to discuss a full range of issues from their own perspective and in their own words, based on their experiences and knowledge.

The 38 interviews undertaken include interviewees from all levels of courts in every state and territory in both metropolitan and regional locations (but not federal courts). Interviews ranged in length from 25 minutes to 1 hour and 33 minutes. Nineteen of the interviewees are men and nineteen are women. Seventeen of the interviewees are magistrates (10 women; 7 men); the others are judges (9 women; 12 men). All interviews were conducted by Professor Sharyn Roach Anleu between August 2012 and December 2013. Interviews which were taped were then transcribed within the Project to maximise accuracy and confidentiality. Transcripts were checked against

audio files by a staff member. Two interviewees did not consent to being recorded. Detailed notes were taken by the interviewer during the interview and elaborated on by the interviewer immediately after the interview.

### 1 *Extraction of Material on Humour*

As the interviews were not directed specifically towards humour as an aspect of judicial work, two strategies were used to locate comments about the role or uses of judicial humour. While one staff member was reviewing each interview in detail for accuracy by listening to the audio files, she noted each time there was a discussion of humour. In addition, an electronic search was performed of all transcribed interviews for terms related to humour — ‘humour’, ‘laugh’, ‘jok’ (to capture joke, joking and similar) and ‘funny’. The results of these two strategies produced nearly identical excerpts, suggesting that the interviews have been thoroughly mined for all discussions of judicial humour.

Two authors read the interview excerpts, identifying any discussion relating to the regulation of judicial humour or appropriateness of judicial humour in the courtroom (in contrast to discussions of humour by other court users or judicial humour outside of the courtroom). These parts of the interviews were analysed for common themes, such as factors influencing the appropriateness of judicial humour. Not every discussion of humour is extracted in this article. Examples have been selected to illustrate themes.