

INDEPENDENCE AND INTEGRITY AS A CRITERION FOR JUDICIAL PERFORMANCE EVALUATION

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Abstract

This article examines aspects of independence and integrity as a potential measure of judicial performance for use in judicial performance evaluation programmes and examines the results of a national survey of barristers and judicial officers conducted by the author. These aspects include identifying measures of judicial independence and integrity, whether ratings of independence and integrity differ between trial and appellate judges, whether judicial gender affects ratings of independence and integrity, whether judicial age or barrister experience have an effect, and the importance of judicial independence and integrity as a measure of judicial performance.

INTRODUCTION

There is no doubt that independence and integrity are essential requirements for a judge, the importance of which has been recognised internationally.

Article 14.1 of the *International Covenant on Civil and Political Rights* states:

'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, *independent and impartial* tribunal established by law.'¹

The *Beijing Statement on the Independence of the Judiciary* states in Article 7:

'Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their

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¹ *The International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, Art 14.1 (entered into force March 23 1976). (Emphasis added).

² *Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia*

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activities.²

These principles are embedded in the United States and Australian Constitutions and in English convention. Without judicial independence, there can be no rule of law.³ In Sir Anthony Mason's view, 'integrity (a quality which includes independence of mind) is a quality of vital importance. It is the only guarantee of independence in judicial decision-making'.⁴

Judicial independence is guaranteed by security of tenure and remuneration, social status and rank, immunities in performance of duties, a free and self-confident legal profession and a sustaining political culture. The principles are reflected in the common words of the judicial oath 'without fear or favour, affection or ill-will'.

Procedural fairness is a fundamental aspect of judicial integrity and a basic postulate of the common law.⁵ Each party has a fair opportunity to present their case - unrepresented criminal defendants are to be informed of their procedural rights.

Justice Brennan argues judicial integrity in 'a system that applies the rules of law equally to all is manifested by impartiality between the parties, procedural fairness, and a rigorous application of the law'.⁶

The National Center for State Courts states:

'Courts must be faithful to the laws that they are expected to apply to maintain their position as independent and fair arbiters of disputes. The court's integrity in upholding the law can be measured by the extent to which the court's actions are in accordance with the requirements specified in substantive and procedural laws.'⁷

Chief Justice Rehnquist said 'He or she must strive constantly to do what is legally right, all the more so when the result is not the one the

Region (accessed 11 June 2000) <<http://wwwlaw.murdoch.edu.au/icjwa/beijst.htm>>.

³ Lord Irvine of Lairg The Lord Chancellor, Speech delivered at the Third Worldwide Common Law Judiciary Conference, University of Edinburgh Conference Centre, 5 July 1999.

⁴ Mason, A. 'The State of the Judicature' (1994) 20 *MonLR*, 1.

⁵ Brennan, G. 'Courts for the People - Not People's Court' Speech delivered at the Inaugural Deakin Law School Oration, 26 July 1995; see also: *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; (1863) 143 ER 414.

⁶ Brennan, G. 'Courts for the People - Not People's Court' Speech delivered at the Inaugural Deakin Law School Oration, 26 July 1995, 3-7.

⁷ 'Trial Court Performance Guidelines Guiding the Courts into the Future' paper presented at the National Center for State Courts seminar held at the Institute for Court Management, 19-21 February 1997, 28. See also: *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; (1863) 143 ER 414.

⁸ Ginsburg, R. 'Judicial Independence' (1998) 72 *ALJ*, 611. See also Kirby, M. 'Independence of the Judiciary - Basic Principle, New Challenges' Speech delivered at

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Congress, the President, or the home crowd wants'.⁸ Courts traditionally have been perceived as legal institutions applying the law without reference to social or community attitudes⁹ or criticism.

Legal independence of the judiciary coexists with practical dependence on the executive for funding. Murray Gleeson suggests that 'This reflects the principle that, in a parliamentary democracy, those responsible for spending public funds, and determining priorities as to expenditure, must be accountable to parliament and ultimately to the electorate'.¹⁰ He continues, 'However, it creates a particular problem in relation to accountability for court performance. Such performance is substantially affected by the extent of the resources made available to courts, but that is a matter over which judges have no control, and very little influence.'¹¹ Judicial independence is the 'primary source of the assurance of judicial impartiality'.¹²

Justice Kirby suggests 'A judge without independence is a charade wrapped in a farce inside an oppression'.¹³ The fundamental nature of independence of the bench is also supported by the Australian Bar Council and the Law Council of Australia¹⁴ in considering the issue of judicial appointment. Integrity is also recognised as a required personal

the Hong Kong International Bar Association Human Rights Institute Conference, 12-14 June 1998.

- ⁹ Dixon, O. 'Concerning Judicial Method' Lecture delivered at Yale University, 19 September 1955. See also: Dixon, O. *Jesting Pilate*. Melbourne: The Law Book Company, 1965, 165. Cited in: Nicholson, P. 'Does the System of Appointing Australian High Court Judges Need Reform?' Discussion Paper no 48. The Australian National University Graduate Program in Public Policy, 1995, 4.
- ¹⁰ Gleeson, M. 'Current Issues for the Australian Judiciary' Lecture delivered to the Supreme Court of Japan, 17 January 2000.
- ¹¹ Gleeson, M. 'Current Issues for the Australian Judiciary' Lecture delivered to the Supreme Court of Japan, 17 January 2000.
- ¹² Gleeson, M. 'Who do Judges Think They Are?' (1998) 22 *CrimLJ*, 10.
- ¹³ Kirby, M. 'Independence of the Judiciary: Basic Principle, New Challenges' Speech delivered at the Hong Kong International Bar Association Human Rights Institute Conference, 12-14 June 1998.
- ¹⁴ Australian Bar Association. *Submission in Response to Judicial Appointments: Procedure and Criteria*. 1 December 1993; Law Council of Australia. *Submission in Response to Judicial Appointments: Procedure and Criteria*. 8 December 1993; Australia. Attorney-General Michael Lavarch. *Judicial Appointments: Procedure and Criteria*. Discussion Paper. Canberra: Attorney-General's Department, 1993; Meagher, D. 'Appointment of Judges' (1993) 2 *JJA*, 190; Gleeson, A. 'Judging the Judges' (1979) 53 *ALJ*, 338 at 347; Nicholson, P. 'Does the System of Appointing Australian High Court Judges Need Reform?' Discussion Paper no 48. The Australian National University Graduate Program in Public Policy, 1995, 4.
- ¹⁵ Gibbs, H. 'The Appointment of Judges' (1987) 61 *ALJ*, 7; Australian Bar Association. *Submission in Response to Judicial Appointments: Procedure and Criteria*. 1 December 1993; Law Council of Australia. *Submission in Response to Judicial Appointments: Procedure and Criteria*. 8 December 1993; Australia. Attorney-

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quality.¹⁵ There can be no independence without integrity.

The Law Council of Australia agrees with the Attorney-General's recognition of the 'capacity to uphold the rule of law and act in an independent manner'¹⁶ as relevant criteria for merit.

The National Center for State Courts suggests two approaches to measuring integrity; the survey approach adopted in this article, or forming panels of specialists to randomly examine cases for such things as whether orders have all requirements stated and whether bail guidelines have been met.¹⁷ A third alternative would be for a judicial mentor to observe cases in action and resultant files. The first alternative is cost effective. The second alternative is resource intensive and costly and may attract criticism of judges who fear their independence is being compromised, though may in some senses be more objective. And the third alternative has synergies with a judicial mentoring and a judicial development programme.

In Australia, there has been no attempt to measure judicial independence and integrity as an aspect of judicial performance. Debate has been limited to discussing desirable qualities for judicial appointment.

The Law Council of Australia argues that a critical part of being a good judge is to 'fairly reflect society in the general sense of having a cultural sensitivity, gender sensitivity, wisdom in a very broad sense, and an understanding of the community's aspirations and objectives'.¹⁸ Such characteristics should not preclude a judge making decisions without regard to possible public criticism.

Independence and integrity can be assessed by any participant in the litigation; judges, barristers, jurors, witnesses, litigants, court staff and court watchers. In this sense independence and integrity are clearly matters of perception.¹⁹

MEASURES OF JUDICIAL INDEPENDENCE AND INTEGRITY

Nova Scotia and several American States include measures of judicial independence and integrity in judicial performance evaluation

General Michael Lavarch. *Judicial Appointments: Procedure and Criteria*. Discussion Paper. Canberra: Attorney-General's Department, 1993.

¹⁶ Australia. Attorney-General Michael Lavarch. *Judicial Appointments: Procedure and Criteria*. Discussion Paper. Canberra: Attorney-General's Department, 1993, 6.

¹⁷ The National Center for State Courts also recommends record searches, observation of proceedings by an expert panel, and conducting interviews with judges, court employees and the bar.

¹⁸ Australia. Attorney-General Michael Lavarch. *Judicial Appointments: Procedure and Criteria*. Discussion Paper. Canberra: Attorney General's Department, 1993, 8.

¹⁹ 'Trial Court Performance Guidelines Guiding the Courts into the Future' paper

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programmes. These programmes have various aims ranging from voter advice in retention elections through to strategies assisting judicial self-improvement. The latter has direct relevance to Australia.

'Alaska pioneered the concept of judicial performance evaluation by adopting a statutory judicial evaluation program in 1975.'²⁰ Alaska conducts judicial performance evaluation with a primary focus on informing citizens about applicants for judicial retention elections. Judicial self-improvement is of secondary concern though this is becoming increasingly important. The Alaskan programme measures independence and integrity by having attorneys rate whether judges conduct cases free from impropriety or the appearance of impropriety and whether they make decisions without regard to possible public criticism. Court employee questionnaires also seek a rating on judicial integrity and fairness.

The Nova Scotia Judicial Development Project²¹ included the following measures of independence and integrity:

- Ability to decide issues without concern for the popularity of the decision;
- Projection of an impartial image;
- Even-handed treatment of litigants; and
- Even-handed treatment of counsel.

Utah²² asks attorneys to rate trial and appellate judges on many criteria including whether their professional behaviour is free from impropriety or the appearance of impropriety.

Colorado²³ includes the following measures of independence and integrity of trial judges under the heading 'Integrity' included in lawyer and court personnel surveys:

- Displays a sense of basic fairness and justice;
- Finds facts and interprets the law without regard to possible public criticism; and
- Treats all parties equally, regardless of race, sex, ethnicity, social or economic status.

For law enforcement officers the Colorado measures include:

- Conducts self in a manner free from impropriety;

presented at the National Center for State Courts seminar held at the Institute for Court Management, 19-21 February 1997, 3-11.

²⁰ Pelander, J. 'Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns' (1998) 30 *Arizona State Law Journal* 643; *Alaska Election Code (Alaska Statute 15.58.050* (Michie 1996)); Alaska Administrative Rules, 23(C).

²¹ Poel, D. *The Nova Scotia Judicial Development Project: A Final Report and Evaluation*. This report is available directly from the author, Dale Poel.

²² *How Judges are Selected And Evaluated in the Courts*, Judge Selection and Evaluation - Utah State Courts (accessed 22 July 2003)

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- Treats all parties equally regardless of (separate questions for) race, sex or social/economic status;
- Behaviour is free from favouritism; and
- Displays a sense of basic fairness and justice.

Colorado trial judge self-evaluations include rating strengths and weaknesses on measures including:

- Conduct free from impropriety;
- Equal treatment regardless of race, gender or economic status;
- Avoids prejudging the outcome of cases; and
- Basic fairness and impartiality.

Similar questions are also asked of appellate judges.

The Arizona judicial performance evaluation programme²⁴ has more extensive data sources than the programmes previously mentioned. Questions are asked of attorneys, litigants, witnesses, self-litigants, jurors and court staff concerning judicial independence and integrity including separate questions on equal treatment regardless of race, gender, economic status and basic fairness and impartiality. Attorneys are also asked to rate whether a judge's conduct is free from impropriety, whether the judge avoided prejudging the outcome of a case, and the basic fairness and impartiality of the judge.

Administrative judges are rated by attorneys on the following additional criteria:

- Accepts responsibility;
- Is free from impropriety and the appearance of impropriety;
- Demonstrates personal integrity; and
- Displays organizational integrity.

Judges also complete self-education surveys on the same criteria.

In 1985, the American Bar Association²⁵ adopted guidelines for the evaluation of judicial performance. The guidelines contain judicial performance evaluation criteria, methodological and administrative guidelines and proposals on the use and dissemination of results. Independence and integrity is included in the guidelines under the heading 'Integrity' and is measured by:

- Avoidance of impropriety and appearance of impropriety;
- Freedom from personal bias;
- Ability to decide issues based on the law and the facts without regard to the identity of the parties or counsel, the popularity of the decision and without concern for or fear of criticism; and

<<http://www.utcourts.gov/knowcts/judsel.htm>>.

²³ Sterling, J. Stott, K and Weller, S. 'What Judges Think of Performance Evaluation: A Report on the Colorado Survey' (1981) 64 *Judicature*, 414.

²⁴ Esterling, K. and Sampson, K. *Judicial Retention Evaluation Programs in Four*

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- Impartiality of actions.

Consistent with the United States and Canadian approaches, two measures of judicial independence and integrity are proposed for the purpose of this article:

- Displays conduct free from impropriety or the appearance of impropriety; and
- Makes decisions without regard to possible public criticism.

Independence and integrity can be assessed by any participant in the litigation: judges, barristers, jurors, witnesses, litigants, court staff and court watchers. The data sources used in this article are derived from a national survey of barristers and a national survey of judicial officers.

DO INDEPENDENCE AND INTEGRITY RATINGS DIFFER BETWEEN TRIAL AND PERMANENT APPELLATE JUDGES?

Judicial performance evaluation programmes should be structured to take into account unique jurisdictional characteristics. For example, an analysis of specialist courts should include questions specifically directed to the unique responsibilities and workload of that court as distinct from courts of more general jurisdiction. Appellate programmes may differ from those used at first instance to reflect the unique characteristics of the appellate court's functions. Sterling, Stott and Weller²⁶ argue that separate questionnaires should be developed for appellate and trial judges to reflect their unique characteristics.²⁷ Other levels in the judicial hierarchy may require tailor-made analysis, since the functions and duties of judicial

States: A Report with Recommendations. American Judicature Society, 1998, 84.

²⁵ Kuh, R. 'What is the ABA Evaluations of Judicial Performance Project?' (1987) Summer *The Judges' Journal*, 16.

²⁶ Sterling, J. Stott, K. and Weller, S. 'What Judges Think of Performance Evaluation: A Report on the Colorado Survey' (1981) *64 Judicature*, 414.

²⁷ See also: Hanson, R. *Appellate Court Performance Standards*. Submission to the State Justice Institute by the National Center for State Courts and the Appellate Court Performance Guidelines Commission, December 1995. The Utah Administrative Office of the Courts provides an example of where appellate judges are assessed on additional criteria not present in assessments of first instance judges, including: Demonstrates knowledge of substantive law; Demonstrates an awareness of recent legal developments; Opinions demonstrate scholarly legal analysis; and Demonstrates preparation for oral arguments. *Utah Administrative Office of the Courts 1996 Survey* (accessed 10 December 2000). <<http://alt.xmission.com/~jrp/aoc-survey.html>>; *How Judges are Selected and Evaluated in the Courts*, Judge Selection and Evaluation (accessed 3 March 2001) <<http://www.utcourts.gov/knowcts/judsel.htm>>.

²⁸ There is also an argument that Chief Justices should be evaluated differently from other judges on the basis of their need for developed communication and organisational skills. The nature of their duties would suggest such a separate analysis is appropriate.

²⁹ Johnston, N. 'Devil is in the Details of Court Performance Data' *The Australian*

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officers may differ.²⁸ It may be unwise to compare jurisdictions as geographic location may be a relevant factor. Judicial and other resources, and the nature of business brought before the court may impact differently on the judges in each jurisdiction.²⁹ The professional background and level of experience³⁰ of the judicial officer are also relevant considerations. In Australia, only the New South Wales, Victorian and Queensland Supreme Courts, the High Court and the Family Court have dedicated appellate judges. All Australian superior courts, except the High Court, have rotating trial judges sitting on appellate benches.

Even within a jurisdiction consideration should be given to different evaluation programmes for appellate as distinct from first instance judges. The prospect of professional collegiality may be soured by competition, personality clashes and irrational behaviour.³¹ This is in stark contrast with judges who sit alone or at first instance. Group dynamics would suggest variation in judicial evaluation criteria. According to Justice Kirby 'It then becomes the duty of the judges to sort out the stresses and pressures and to restore, so far as can be done, working arrangements which ensure the discharge of their duties in a proper manner'.³²

The debate concerning whether to establish a separate court of appeal is instructive: 'appellate work involves functions and skills different in kind <than that> performed by trial judges'.³³ It is possible to compare the performance ratings given by barristers to appellate judges with trial judges in those jurisdictions with full-time appellate judges, for example Queensland, New South Wales and Victoria. This is the subject of hypothesis 2.

ARE JUDICIAL INDEPENDENCE AND INTEGRITY RATINGS AFFECTED BY JUDICIAL GENDER?

An interesting question is whether or not women judges decide cases in a manner different from that of their male counterparts. Should this be the case, it could be argued that performance evaluation should be modified to take this into account. Unfortunately the literature is equivocal.³⁴ Some suggest a difference, others not. There are also disputes over appropriate methodologies.

Financial Review, 26 February 1999. Compare: Merritt, C. 'Audit Office to Check on Courts' *The Australian Financial Review*, 26 February 1999, 28.

³⁰ Armytage, L. *Educating Judges: Towards a New Model of Continuing Judicial Learning*. The Hague: Kluwer Law International, 1996, 98.

³¹ Kirby, M. 'Judicial Stress' (1995) 13 *AustBarRev*, 101 at 111-112.

³² Kirby, M. 'Judicial Stress' (1995) 13 *AustBarRev*, 101 at 112.

³³ Clarke, M. 'Delay Reduction in the New South Wales Court of Appeal' (1996) 6 *JJA*, 88; citing: Evershed, R. 'The History of the Court of Appeal' (1951) 25 *ALJ*, 386.

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The debate occasioned by governments using judicial appointments as a means of redressing gender and racial imbalances on the court has led to derogatory and anecdotal comments on the perceived lacklustre performance of the female judiciary.

Even the American Bar Association model has been criticised as being too crude a measure of judicial social, economic and gender biases.³⁵ 'Gender based myths, biases and stereotypes <in particular> are deeply embedded in the attitudes of many male judges as well as in the law itself.'³⁶

'Men and women have different perceptions of human relationships and of society, <such> perceptions have an influence on judicial decision making in general.'³⁷ In areas where these features are highlighted there is an argument not only for greater female judicial representation but, also, that women judges should be evaluated differently from their male counterparts. Alternatively the criteria and measures adopted should be sensitive to gender issues and the evaluators non-partisan.

Judicial gender may also impact on evaluations by barristers.

'While legal skills are fundamental to the judiciary no consideration is given as to how these skills should be assessed or whether there is bias in the assessment of those skills. Studies in other jurisdictions suggest that precisely the same task is differently evaluated depending on whether it is performed by a man or a woman (for example the same paper read to different audiences by men and women is likely to be assessed overall as more scholarly when read by a man). There are also anecdotal examples of women lawyers being thought of by their male colleagues as younger and less experienced than they actually are.'³⁸

Such bias may also be evident in assessments of judicial independence and integrity.

Clare Burton argues 'Men and women tend to rate men's work more highly than women's and men's performance on tasks more highly than women's identical performance. When the participants <in research interviews> are asked to explain the causes of successful performance of men and women, they attribute the male's performance to ability and

³⁴ See generally: Martin, E. 'Women on the Bench: A Different Voice' (1993) 77 *Judicature*, 126.

³⁵ Malcolm, D. *Report of Chief Justice's Task Force on Gender Bias*, Western Australia, 30 June 1994, 89.

³⁶ Malcolm, D. *Report of Chief Justice's Task Force on Gender Bias*, Western Australia, 30 June 1994, 89 referring to Johnston, J. and Knapp, C. 'Sex Discrimination by Law: a Study in Judicial Perspective' (1976) 46 *NYULRev*, 675.

³⁷ Malcolm, D. *Report of Chief Justice's Task Force on Gender Bias*, Western Australia, 30 June 1994, 90.

³⁸ Malcolm, D. *Report of Chief Justice's Task Force on Gender Bias*, Western Australia, 30 June 1994, 94.

³⁹ Burton, C. *Redefining Merit*. Canberra: Australian Government Publishing Service,

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the female's to the greater effort put into the task, males are seen as more able than females'.³⁹

These assertions are the subject of hypothesis 3 which questions whether judicial gender has any association with judicial independence and integrity ratings.

DOES JUDICIAL INDEPENDENCE AND INTEGRITY DETERIORATE WITH AGE OR EXPERIENCE?

The Constitutions of the Commonwealth and the States require that judges are to retire at the age of 70 or 72.⁴⁰ The rationale is that they are too old to suitably carry out their duties at the required standard. There has been a trend towards early retirement from the bench. It is unclear whether the reason is stress related burnout or economic factors.⁴¹

Justice Thomas when referring to judicial stress said:

'You may feel an excitement in the lower intestine as you prepare to walk into court. The reason is that you are expected to perform. It gets worse as you get older. It is so easy to lose whatever reputation you have built up through one silly statement. And there is constantly that pressure to get it right. You need adrenalin, or pressure, to produce your best work.'⁴²

The effects of judicial age and experience on independence and integrity are the subject of hypotheses 4 and 5.

DO OLDER JUDGES GIVE JUNIOR BARRISTERS A HARD TIME?

Anecdotal evidence would suggest that judges tend to give junior counsel a harder time in court than more senior counsel. It might be expected that junior counsel as a group would give lower ratings of judicial independence and integrity than more senior counsel. This perception is the subject of hypotheses 6 and 7.

HYPOTHESES

A national study of Australian Barristers tested the following six hypotheses:

- **Hypothesis 1**
Judicial independence and integrity can be reliably measured by using survey instruments with barristers and with judicial

1998, 3; Shepela, S. and Viviano, A. 'Some Psychological Factors Affecting Job Segregation and Wages.' IN Remick, H. (ed) *Comparable Worth and Wage Discrimination: Technical Possibilities and Political Realities*. Philadelphia: Temple University Press, 1986.

⁴⁰ *Judges' Retirement Act 1921* (Qld) 12 Geo 5 v No 14 (rep 1991 no 68 s110 sch 1) s3; *Commonwealth of Australia Constitution Act 1901* (Cwlth) s72; *Judicial Officers Act 1986* (NSW) s44(1).

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officers.

- **Hypothesis 2**
Permanent appellate judges will have higher independence and integrity performance ratings than first instance judges.
- **Hypothesis 3**
Female judges will have lower independence and integrity performance ratings than male judges.
- **Hypothesis 4**
Judges 65 years of age or older will have lower independence and integrity performance ratings than younger judges.
- **Hypothesis 5**
Judges in their first five years of office will have higher independence and integrity performance ratings than more senior judges.
- **Hypothesis 6**
Experienced barristers give higher independence and integrity performance ratings than inexperienced barristers.

SURVEY INSTRUMENTS AND SAMPLING PROCEDURES

Barristers' Survey

The first study was a national survey⁴³ of barristers' opinions on judicial independence and integrity.⁴⁴ Using performance evaluation constructs found in recent judicial retention studies carried out in Alaska, Arizona, Colorado and Utah⁴⁵ as a basis for an Australian model, Australian barristers were asked to evaluate the performance of sitting Supreme and Federal Court judges. The evaluation focussed on relevant performance standards and adherence to principles of law not personal, social or political philosophies.

⁴¹ Young, P. 'Judges' Retirements' (1997) 71 *ALJ*, 733 at 735.

⁴² Thomas, J. 'Get up off the Ground. A Commentary on Hon Kirby J's "Judicial Stress - an Update"' (1997) 71 *ALJ*, 785 at 787.

⁴³ The survey instrument is available from the author.

⁴⁴ Neither the covering letter nor barristers' survey instrument defined 'judicial performance'.

⁴⁵ See generally: Esterling, K. and Sampson, K. *Judicial Retention Evaluation Programs in Four States: A Report with Recommendations*. Chicago: American Judicature Society, 1998.

⁴⁶ It would be wrong to assume respondents only read survey forms linearly.

⁴⁷ One survey instrument was created for each State and Territory, except New South Wales and Victoria. Two survey instruments were created for New South Wales and Victoria due to the large number of Superior Court judges in those jurisdictions. Each survey instrument contained a separate document containing an alphabetic list of no more than 32 judge names. The remaining survey instruments are available from the

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The survey instrument was constructed to gather barristers' general impressions concerning performance evaluation before they attempted a structured analysis of the independence and integrity of sitting Supreme and Federal Court judges.⁴⁶ The instrument was pre-tested with thirty experienced barristers before being finalised. Ten jurisdiction specific survey booklets were created.⁴⁷ The survey instrument was written in Plain English.⁴⁸

Survey booklets containing the names of all sitting Supreme and Federal Court judges were distributed to the population of 4218 practicing barristers listed in the Law Council of Australia Australian Legal Directory 1999 edition, double checked against the Yellow Pages® Online.⁴⁹ No follow up survey instrument was used. The potential for bias from barristers with an axe to grind against a particular judge or court duplicating low ratings presented an unacceptable risk. Ethics requirements precluded identification of barristers who had completed a survey booklet.

The initial mailing or delivery to barristers occurred on 13 September 1999. In each case a self-addressed, reply paid return envelope was enclosed. The data was collected over a stated time period (13

Population				Sample response					Chi-square
Jurisdiction	Barrister (N)	Male	Female	Barristers N (% N)	Male	Female	Judicial evaluations	Experience Mean	Male/Female bias
ACT	67	62	5	10 (14.93)	9	1	72	19	0.09 NS
NSW	1689	1515	174	91 (5.39)	70	10	462	18	0.42 NS
NT	34	32	2	8 (23.53)	8	0	60	22	0.50 NS
Qld	583	522	61	39 (6.69)	34	3	386	14	0.22 NS
SA	218	197	21	19 (8.72)	18	1	183	23	0.42 NS
Tas	7	6	1	6 (85.71)	3	1	24	21	0.00 NS
Vic	1281	1088	193	85 (6.63)	61	18	494	19	3.68 Sig. 0.10
WA	339	330	9	11 (3.25)	9	2	105	18	10.26 Sig. 0.01
Fed Ct	-	-	-	-	-	-	456	-	-
Totals	4218	3753	465	270 (6.40%)	212	36	2242	18.3	-

September 1999 - 21 December 1999) rather than on a case specific basis.

By the final cut-off date of 21 December 1999, a total of 270 survey booklets were returned.⁵⁰ The overall response rate for barristers was 6.40%. In total, 107 survey booklets were returned to sender. The

author.

⁴⁸ For assistance in drafting Plain English documents refer to Eagleson, R. 'Writing in Plain English' Canberra: Australian Government Publishing Service, 1990; reproduced in: Condie, B. and others. *Client Services in Local Courts The Review Process*. Wollongong: The Centre for Court Policy and Administration, University of Wollongong, 1996, 99.

⁴⁹ A further 202 survey booklets were distributed to solicitors firms in the Australian Capital Territory, Northern Territory and Tasmania due to the relatively small number of practicing barristers in those jurisdictions. No firms responded.

⁵⁰ A random sample of 5% of the barristers' survey booklets were re-examined to determine the accuracy of data entry. Frequencies of values for each variable were

population and sample response rates broken down by jurisdiction appear in Table 1.

*Table 1: Barristers' survey population and sample response rates*⁵¹

The low response rate raises questions as to how representative the sample is. Comparisons with known population statistics indicate no statistically significant bias based on jurisdiction or gender, except for Victoria and Western Australia. In these jurisdictions relatively more female barristers responded to the survey than would be expected from the population.

There is no easy way of determining whether non-response was due to lack of knowledge about the judges concerned or for other reasons. The results of this study are presented as that of the survey respondents only.⁵²

Barristers who appear as advocates before the court are the most knowledgeable about judicial performance. They are an appropriate and reliable source of data. The barrister, more than anyone else, has repeated opportunities over extensive periods to view different judicial behaviour in different contexts and to compare them. Barristers can make judgments and comparisons with an educated appreciation of how the judicial system works in actual practice in the context of the cases in which they appear. Barristers' research, writing and oral skills are very similar to those of judges. This fact, combined with their experience with the judicial function, makes them the cohort of individuals from which superior court judges are appointed.⁵³

It is useful to consider those who didn't answer the survey instrument.⁵⁴ Six percent of respondents who fell within the 0-5 years range of experience did not respond. This was to be expected since barristers with little experience are unlikely to frequently practise in

checked for outliers and data entry errors.

⁵¹ The only available population data on male versus female barristers in Queensland was for 2001. The Queensland Bar Association indicated there were 637 full time barristers, 89.6% of which were male. This percentage was used to estimate the population breakdown in 1999.

⁵² An alternative strategy would involve intensive follow up on a random sample of non-respondents. These results can then be compared with the results derived from the entire population. This was not possible since respondents were not identified. Another alternative would be a random sample of the entire population to compare with original results. See Meidinger, E. 'Bar Polls: What They Measure, What They Miss' (1977) 60 *Judicature*, 468 at 475; Maddi, D. *Judicial Performance Polls*. Chicago: Research Contributions of the American Bar Foundation, 1977, 8.

⁵³ See de Jersey, P. 'The Merit Test' (2000) 4 *Queensland Bar News*, 8.

⁵⁴ Two methods could be utilized to identify non-respondents: a double envelope or a separate postcard procedure. In the first procedure respondents complete the survey then seal their response in the inner envelope. The outer envelope is signed. The outer envelope records a response, the anonymous inner envelope is put with the

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superior courts such as the Supreme or Federal Court, the subject of this study.

Other potential bias in the method of data collection relates to the fact that certain types of people do not fill in forms, but may respond to other data collection methods, such as a telephone interview.

The Judicial Officers' Survey

The second study conducted was a national survey of judicial officers (Justices, Masters, Judges and Magistrates) in all Australian jurisdictions to document their views on judicial independence and integrity. The judicial officers' survey instrument duplicated the barristers' survey in most respects, including the data reduction techniques. Background information collected included year of birth and experience of the judicial officer respectively. In each case, time was broken down into six ranges to help protect respondent anonymity.

The judicial officers' survey was distributed to all justices, judges masters and magistrates in Australia on 26 June 2000. In total, 885 survey instruments were posted.⁵⁵ A follow-up survey instrument printed on different coloured paper was sent on 31 July 2000. Each judicial officer received a self-addressed envelope, and a reply paid return envelope.

By the final cut-off date of 1 September 2000, a total of 127 survey booklets were returned. The original survey mail out produced 94 responses (74% of responses) and the follow up survey produced 33 responses⁵⁶ (26% of responses). The follow up survey proved a worthwhile exercise for encouraging this target group to respond. The population and sample response rates broken down by jurisdiction appear in Table 2. The overall response rate was 14.32%.⁵⁷ There was no evidence that the second mail-out was perceived by judicial officers

unopened questionnaires. The separate postcard procedure requires a separate cover indicating a response sent at the same time as the unidentifiable questionnaire. Follow up letters and telephone calls can be made to non-respondents. See Maddi, D. *Judicial Performance Polls*. Chicago: Research Contributions of the American Bar Foundation, 1977, 8.

⁵⁵ Findlay suggests that 'issues such as the timing, format, and follow-up of the research instrument have a significant effect on response'. Findlay, M. *Jury Management in New South Wales*. Melbourne: Australian Institute of Judicial Administration, 1994. This is also said to be the experience of the New South Wales Judicial Commission.

⁵⁶ Including one response which did not disclose the respondent's jurisdiction or gender.

⁵⁷ The response rate takes into account completed surveys. A judicial officer who chose not to respond is not counted as a 'response'. A random sample of 5% of the judicial officers' survey booklets were re-examined to determine the accuracy of data entry. Frequencies of values for each variable were checked for outliers and data entry errors.

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in a negative manner.⁵⁸

Population Court	N	Male	Female	Sample response				Total	Total court%	Chi-square Male/ Female bias
				N mail out 1		N mail out 2				
				Male	Female	Male	Female			
High	7	6	1	-	-	-	-	-	-	N/A
Federal	49	44	5	2	1	1	-	4	8.16	0.96 NS
Family	55	42	13	9	2	3	-	14	25.45	0.68 NS
ACT Supreme*	2	2	0	-	-	-	-	-	-	N/A
ACT Magistrates	10	6	4	-	-	-	1	1	10.00	1.6 NS
NSW Supreme	55	51	4	3	-	1	-	4	7.27	0.31 NS
NSW District	66	55	11	8	1	2	-	11	16.67	0.45 NS
NSW Local	126	101	25	14	4	5	-	23	18.25	0.08 NS
NT Supreme*	7	6	1	-	-	2	-	2	28.57	0.33 NS
NT Magistrates	11	9	2	2	-	-	1	3	27.27	0.46 NS
Qld Supreme	28	22	6	3	1	-	1	5	17.86	1.02 NS
Qld District	36	33	3	5	-	1	-	6	16.67	0.55 NS
Qld Magistrates	76	65	11	7	3	5	4	19	23.69	7.68Sig 0.01
SA Supreme	18	17	1	3	-	2	-	5	27.78	0.29 NS
SA District	29	26	3	2	-	-	-	2	6.90	0.23 NS
SA Magistrates	37	32	5	10	-	-	-	10	27.03	0.48 NS
Tas Supreme	7	7	0	2	-	-	-	2	28.57	0.00 NS
Tas Magistrates	12	10	2	1	-	-	-	1	8.33	0.99 NS
Vic Supreme	34	32	2	-	-	2	-	2	5.88	0.12 NS
Vic County	52	44	8	-	-	-	-	-	-	N/A
Vic Magistrates	95	76	19	4	-	-	-	4	4.21	1.00 NS
WA Supreme**	19	17	2	-	-	-	-	-	-	N/A
WA District	21	16	5	1	1	1	-	3	14.29	0.15 NS
WA Magistrates	37	32	5	4	1	-	-	5	13.51	0.18 NS
Not disclosed	-	-	-	-	-	1	-	1	-	N/A
Totals	889	751	138	80	14	26	7	127	14.35	

* excluding Federal Court judges

** including Western Australia Family Court judges

In order to determine whether there was any evidence of sample bias against known population parameters, an analysis of the jurisdiction and gender of the respondents was conducted. These are also summarised in Table 2.

Only one out of twenty tests revealed a statistically reliable level of difference and this was within the range we would expect by chance. The result was discounted on this basis. There was hence no evidence of sample bias based on respondent jurisdiction or gender.

Table 2: Judicial officers' survey population and sample response rates

Controlling for Demographic Response Bias

In this section the focus shifts from the representativeness of the sample to the known population to examining whether the gender, jurisdiction or level of experience of respondents is related to judicial independence and integrity. In the absence of demonstrated demographic bias the data can be combined. For example, if preliminary tests showed that male and female respondents viewed an issue the same way, then we can ignore differences in the gender of the respondents in subsequent analyses of determinants of the behaviour. However, if the preliminary results suggested that bias was present, then subsequent analyses would need to control for these differences through separate analysis of parts of the data (e.g. separate analyses of male versus female respondents) or through analyses that co-vary out the impact of a demographic factor on

⁵⁸ The Australian Institute of Judicial Administration has suggested that open-ended

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the behaviour of interest.

My objective was threefold:

- To present the survey items relevant to each hypothesis;
- To address the issue of whether or not there was any gender, jurisdiction, or experience bias in the sample; and
- To indicate if there was a bias, how it would be dealt with in later analyses.

I had a choice of presenting this information in terms of the items as listed on the questionnaire or in terms of the items of the hypotheses. I chose the second route.⁵⁹

HYPOTHESIS 1

Hypothesis 1 addresses the question ‘can reliable indices of the core construct, judicial independence and integrity, be measured?’ It is different from the remaining hypotheses, as it has a methodological basis. The literature on judicial performance evaluation presents a diversity of views as to whether reliable (in this case, agreement across items that are supposed to measure the same thing) measures can be formed to reflect aspects of judicial performance.

The Alpha (Cronbach) model of internal consistency, based on average inter-item correlation suggests a high degree of consistency between the measures of judicial independence and integrity, particularly for barristers. The result is 0.84 for barristers and 0.72 for judicial officers.⁶⁰ This data is only consistent with acceptance of hypothesis 1 with respect to barristers and judicial officers.

HYPOTHESIS 2-6

The data for hypotheses 2-6 were derived from question 11 of the barristers’ survey, which stated:

‘In this question you will be asked to rate the performance of sitting Supreme and Federal Court judges based on criteria developed by the American Bar Association. The names of the judges are listed on the accompanying Judicial Names Legend. Please only rate the performance of judges with whom you have had actual court experience in the period January 1997 - August 1999, not merely by reputation.⁶¹ Place an “x” in the box beneath the names of those judges with whom you have had no direct experience during this period, then leave the column blank.

designs, and not making repeated requests for participation, may have a detrimental effect on response rates: Findlay, M. *Jury Management in New South Wales*. Melbourne: Australian Institute of Judicial Administration, 1994.

⁵⁹ The questionnaires are available from the author.

⁶⁰ For judicial officers the scale related to the importance of these measures.

⁶¹ Information as to the actual experience before each judge was not sought. Pilot surveys indicated that barristers were unlikely to keep, nor access, such records.

⁶² This replicates the scale used by the Alaska Judicial Council: *Attorney & Peace Officer*

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If you do not have sufficient personal experience to rate a given characteristic of a particular judge, place an "x" in the row for that characteristic. Please rate each judicial performance characteristic according to the following five point "acceptance scale".⁶²

- | | |
|-----------------|---|
| 1. unacceptable | Seldom meets minimum standards of performance |
| 2. deficient | Does not always meet minimum standards of performance |
| 3. acceptable | Meets minimum standards of performance |
| 4. good | Often exceeds minimum standards |
| 5. excellent | Consistently exceeds minimum standards |

Please write a score out of 5 in the column beneath the name of each judge on the row for each of the stated performance characteristics.⁶³

An accompanying 'Judicial Names Legend' stated the names of each judge within each jurisdiction in alphabetic order.

The ratings for each judge based on the two measures of independence and integrity were further classified depending upon whether the judge was an appellate judge or a first instance judge. A multi-variate analysis was conducted based on composite means to isolate whether there were any main effects for barrister gender, jurisdiction or experience.⁶⁴ Statistically significant main effects were evident for jurisdiction and experience but not gender. In the case of all hypotheses (2-6) based on the results to question 11, barrister experience and jurisdiction were treated as co-variates.

Hypothesis 2 was tested from data derived from question 11 of the barristers' survey combined with separate data concerning the characteristics of the judicial officer.

Hypothesis 3 was tested from data derived from question 11 of the barristers' survey combined with separate data concerning the gender of the judicial officer.

Hypothesis 4 was tested from data derived from question 11 of the barristers' survey combined with separate data concerning the age of the judicial officer. The dates of birth of judicial officers were obtained from *Who's Who*⁶⁵, *Australian Law Journal Biographies*⁶⁶, and in some cases directly from the judicial officer.

Hypothesis 5 was tested by question 11 of the barristers' survey combined with separate data concerning the experience of the judicial officer. The dates of appointment of judicial officers were obtained

Survey Overview for Judges on the Ballot in 1998 (accessed 23 November 2000) <<http://www.ajc.state.ak.us/Retention98/retgen1.htm>>.

⁶³ Barristers' Survey. See author.

⁶⁴ Missing values for individual measures were replaced with the group mean of all participants for the criterion judicial independence and integrity.

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from law reports.

Hypotheses 6 was tested from data derived from question 11 of the barristers' survey combined with question 12 which asked barristers how many years or equivalent full-time years they had been in practice.

Measures	Barristers' survey				Judicial officers' survey				Chi-square
	N	Important	Unimportant	Non-responses	N	Important	Unimportant	Non-responses	
Displays conduct free from impropriety or the appearance of impropriety	111	107 (96.4%)	4 (3.6%)	159	116	116 (100%)	0 (0%)	11	4.255 Sig. = 0.039*
Makes decisions without regard to possible public criticism	109	103 (94.5%)	6 (5.5%)	161	116	114 (98.3%)	2 (1.7%)	11	2.342 Sig. = 0.126

p < .05, two tailed, df = 1

RESULTS

Barristers and judicial officers were asked to rate the two proposed measures of independence and integrity on a 4-point scale from '1 - Very unimportant' to '4 - Very important'. A fifth category of '5 - Don't know' was included on the scale. The data was collapsed into absolute values of important and unimportant, with 'Don't know' and missing responses reported together as non-responses. The results appear in table 4.

Table 4: Summary of the importance of independence and integrity

Of those who responded, all judicial officers and 96.4% of barristers agreed that a judge should display conduct free from impropriety or the appearance of impropriety and that this was an important measure of judicial performance. Judicial officers perceived this to be a more important requirement than barristers. Judicial officers are much more sensitive to this requirement than barristers. It is an essential requirement for a judge as commonly reflected in the judicial oath. The judiciary are more conservative than barristers.

Judicial officers (98.3%) and barristers (94.5%) both agreed that whether a judge makes decisions without regard to possible public criticism is an important measure of judicial performance. Once again this is an essential requirement for judicial office.

⁶⁵ See: Herald and Weekly Times, Melbourne, 2001.

⁶⁶ See: 'People in the Law' section appearing since the inception of the *Australian Law Journal*.

⁶⁷ At the time of survey there was a total of 430 appellate judges (N = 430).

⁶⁸ At the time of the survey there was a total of 1780 non appellate judges (N = 1780).

⁶⁹ (Mean non-appellate = 4.08, Mean appellate = 4.34, F = 27.08, numerator df = 1, denominator df = 2214, Sig. = 0.000). Since each barrister only rated judges who they had appeared before, and barristers often rated more than one judge, the observations

Appellate Versus First Instance Judges

Hypothesis 2 states 'Permanent appellate judges will have higher independence and integrity performance ratings than first instance judges'. A multi-variate analysis of variance was used to examine if significant statistical differences existed in how barristers rated appellate judges⁶⁷ versus non-appellate judges⁶⁸ on independence and integrity, while co-varying out the effects of barrister jurisdiction and experience.

The results indicated that appellate judges were rated significantly higher than trial judges on independence and integrity.⁶⁹

Old Versus Young Judges

Hypothesis 4 states 'Judges 65 years of age and older will have lower independence and integrity performance ratings than younger judges'. A multi-variate analysis of variance⁷⁰ was used to examine if significant statistical differences existed in judges 65 years of age or older⁷¹ versus judges less than 65 years of age⁷² on each measure of judicial independence and integrity, while co-varying out the effects of barrister jurisdiction and experience. There is a significant judicial age effect for independence and integrity. The results suggest that ratings of judicial independence and integrity decline as judges reach 65 years of age.⁷³

The performance results related to judicial gender and age are contentious, and rightly so. The observed pattern of lower performance results for judges 65 years or older raises many questions. For example, is lengthy experience always beneficial to performance? What impact does stress and age really have on performance? These are questions relevant to the entire population, not just to the judiciary. Many differing interpretations follow from the results, for example:

- Judges 65 years or older are discriminated against by biased

are not independent. Analysis of variance that treat the judges as within a comparison was performed, albeit with large numbers of missing values. The resulting patterns were the same.

⁷⁰ This analysis breached the assumption for independent samples resulting in higher Fs.

⁷¹ At the time of survey there was a total of 421 judges over 65 (N = 421).

⁷² At the time of survey there was a total of 1789 judges under 65 (N = 1789).

⁷³ (Mean <65 years = 4.16, Mean 65 years = 4.02, F = 8.25, numerator df =1, denominator df = 2214, Sig. = 0.004).

⁷⁴ In Canada, federal legislation creates the category of a supernumerary judge, being a federally appointed judge who, having served 15 years on the bench and having attained the age of 65 (whichever last occurs) then has the right to elect supernumerary status. This entitles a judge on full salary and status to sit about a third of the time, as the Chief Justice may arrange. The legislation applies to the Court of Appeal and trial court of Ontario but not the Supreme Court of Canada. See Estey, W. *The North American Experience: A Theorem on Judicial Administration*. IN Maloney, G. (ed) *Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive*. Canberra: Australian Institute of Judicial Administration, 1986, 35. This approach implicitly

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respondents;

- The retirement age of judges should be lowered to 65 to be consistent with the norm society has placed on all other workers;
- Elderly judges have the 'right' perspective and that their younger peers and the profession need enlightenment;
- The workload of judges 65 years or older should be lowered. This is consistent with the supernumerary status of some judges in Canada⁷⁴; or
- The workload of judges 65 years or older should be lowered and judicial education training courses designed for their specific needs. This recognises the vital contribution elderly judges make, but reduces their work load to take account of factors such as age and stress, and caters for educational programmes designed for their specific needs in relation to judicial self-improvement.

There are numerous other views which may be argued in response to the observed results. Further research is needed to address why elderly judges adopt the views and approaches they do, and why the profession reacts adversely to them when considering their performance.

Female Versus Male Judges

Hypothesis 3 states 'Female judges will have lower independence and integrity performance ratings than male judges'. A multi-variate analysis of variance was used to examine if significant statistical differences existed between male⁷⁵ and female judges⁷⁶ on the independence and integrity performance composite, while co-varying out the effects of barrister jurisdiction and experience.

The results indicated a statistically significant difference between male and female judges concerning judicial independence and integrity.⁷⁷ Male judges are perceived as having significantly greater independence and integrity than female judges.

The observed pattern of results for male versus female judges can also be interpreted in many different ways. For example:

- There is a significant gender bias evident in the data against female judges, at least on the criteria for which they have

recognises the reduced workload capacities of such judges due to age, while maintaining the useful contribution of the experienced judiciary. The other reason for this practice is the recognition of inadequate pension schemes. The latter reason is not relevant to Australia.

⁷⁵ At the time of survey there was a total of 2013 male judges (N = 2013).

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significantly lower ratings than male judges;

- The movement for gender equality on the bench has led to an adverse effect on performance in some areas; or
- The makeup of males and females differ. The results reflect this, and also reflect how a predominantly male profession reacts to this.

Once again there are many other conflicting views to explain the observed result. What is clear is that further research is needed on judicial age and gender effects in relation to judicial performance.

Inexperienced Versus Experienced Judges

Hypothesis 5 states 'Judges in their first five years of office will have higher independence and integrity performance ratings than more senior judges'. A multi-variate analysis of variance⁷⁸ was used to examine if significant statistical differences existed between judges in their first five years of office⁷⁹ versus more senior judges⁸⁰ on each performance criteria, while co-varying out the effects of barrister jurisdiction and experience. There is no significant judicial experience effect for judicial independence and integrity.⁸¹ The results do not confirm hypothesis 5. There was no statistically significant difference in the independence and integrity of judges in their first five years of office compared with more senior judges.

The Effect of Barrister Age and Experience

Hypothesis 6 states 'Experienced barristers will give higher independence and integrity performance ratings than inexperienced barristers'. A multi-variate analysis of variance was used to examine if significant statistical differences existed between three levels of barrister experience⁸² on each measure of judicial independence and integrity, while co-varying out the effects of barrister gender.

There was no significant barrister experience effect for the judicial independence and integrity.⁸³ Given this analysis breached the assumption for independent samples resulting in higher Fs, the result for judicial independence and integrity is dubious, but nevertheless cannot

⁷⁶ At the time of survey there was a total of 197 female judges (N = 197).

⁷⁷ (Mean male = 4.15, Mean female = 3.96, F = 7.33, numerator df = 1, denominator df = 2214, Sig. = 0.007).

⁷⁸ This analysis breached the assumption for independent samples resulting in higher Fs.

⁷⁹ At the time of survey there was 697 judges in the first 5 years of office (N = 697).

⁸⁰ At the time of survey there was 1547 judges with more than 5 years in office (N = 1547).

⁸¹ (Mean <5 years = 4.16, Mean 5 years = 4.12, numerator df = 1, denominator df = 2214, F = 1.12, Sig. = 0.291).

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be said to confirm hypothesis 6.

CONCLUSION

Barristers and judicial officers who answered the survey instruments overwhelmingly thought that the following measures of judicial independence and integrity were important measures of judicial performance:

- Displays conduct free from impropriety or the appearance of impropriety; and
- Makes decisions without regard to possible public criticism.

The internal consistency of the measures was very strong for both barristers and judicial officers, but more so for the former. This would suggest that the measures are measuring the same thing in much the same way.

Both the gender of the judge, or whether they were a permanent appellate judge or otherwise, had a statistically significant relationship with judicial independence and integrity. Male judges were perceived to be statistically significantly better performers on independence and integrity than their female counterparts. Appellate judges were perceived to be statistically significantly better performers on independence and integrity than judges at first instance. However, care should be exercised with interpreting these findings.

The literature across a wide variety of disciplines suggests that females suffer performance bias when compared with males. The results suggest that in evaluating judicial performance based on independence and integrity, female judges should be analysed separately from males. The differences in the nature of the work performed by appellate judges compared with those at first instance would also suggest that permanent appellate judges should be evaluated separately from judges at first instance.

Judicial independence and integrity ratings appeared to decline with judicial age and experience. Judicial officers 65 years of age and older have statistically significantly lower independence and integrity ratings than younger judges. The corollary that judges in their first five years of office will have higher independence and integrity performance ratings than more senior judges was not affirmed. There are various explanations for these results all of which need to be explored by further research.

Consistent with the approaches adopted in Alaska, Nova Scotia, Utah, Colorado, Arizona and by the American Bar Association, any pilot judicial performance evaluation programme in Australia should include measures related to judicial independence and integrity.