

DILIGENCE AS A CRITERION FOR JUDICIAL PERFORMANCE EVALUATION

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This article examines aspects of judicial diligence as a measure of judicial performance. Consistent with US and Canadian approaches to judicial performance evaluation, five measures of judicial diligence were proposed to test several hypotheses. The results of a national barristers' survey indicate that appellate judges have significantly higher diligence ratings than trial judges. Female judges scored significantly lower diligence ratings than male judges. The survey indicates that judicial diligence deteriorates with judicial age or experience. Also, experienced barristers did not rate judicial diligence differently from inexperienced barristers. A national survey of judicial officers revealed that the proposed measures of judicial diligence were all regarded as important. These results are discussed in the context of judicial diligence as a potential measure of judicial performance.

Introduction

The *Macquarie Dictionary* (3rd edition) defines diligence as the 'constant and earnest effort to accomplish what is undertaken; persistent exertion of body or mind'. For judges, this means hard work,¹ together with an ingrained work ethic nurtured and brought from life at the Bar.

Wood summarises the position of judges in this way:

Another obvious requirement is that judicial officers hear and decide cases with reasonable efficiency, and not unwillingly extend the length of trials. They should achieve an acceptable rate of disposal of cases compatible with maintaining high guidelines of justice and fairness. They should not by their own tardiness exacerbate court delays. Neither should they unnecessarily postpone the handing down of reserved judgments. Similarly, it goes without saying, judicial officers should adequately perform the administrative functions associated with their role. They should maintain accurate court records, and resist any temptation to edit or 'doctor' transcripts to their own advantage.²

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¹ Gotterson (1999); Beaumont (1999), p 744.

² Wood (1996), p 16.

Diligence is reflected in many aspects of judicial life such as avoiding judgment delay and impatience with counsel and others involved in litigation.

Delay is one of the three primary issues confronting the judiciary and the administration of justice generally. The others are reducing cost and encouraging access to justice. For judges, delay is raised in several contexts including the amount of time between the conclusion of a hearing and the delivery of judgment — known as judgment delay. There is no doubt that, as Sir Harry Gibbs correctly observed, a satisfactory judgment usually involves 'painstaking arduous effort'.³ The ability to deliver reasoned judgments without delay is an acquired judicial skill.⁴

Promptness is equally important for both trial and appellate judges, though it should be noted that trial judges are more in control of case disposition than appellate judges who are influenced by the abilities of and interactions with other members of appellate panels.⁵

Justice Thomas argues that inefficiency needs to be distinguished from misconduct. The former is a human weakness from which we all suffer in varying degrees from time to time.⁶ Judicial misconduct is a rare event. Judges vary in the quantity and quality of their judgments and the speed at which they are produced but, as Justice Thomas observes, 'it is more important to get it right than to do it quickly'.⁷

The flip side of delay is impatience: 'Impatience is judicial weakness that threatens a fair hearing.'⁸ — it challenges a judge's diligence. Judges need to be diligent in ensuring their temperament does not interfere with the efficient and just disposition of a case: 'Judicial impatience has been appropriately criticised and if it is proved to have prevented a fair trial, it can be corrected by a court of appeal.'⁹ While judges should not engage in bullying, they need to run a tight ship to contain costs. Managerial judging and the rise of the movement for caseflow management necessitate increased judicial control over the litigation process:

The conduct that is condemned in this discussion is not the ordinary cut and thrust of court room debate or even of occasional duelling when passions rise. Politeness is a necessary ingredient of the role, but censure should be reserved only for genuine bullying.¹⁰

³ Gibbs (1993), p 502.

⁴ de Jersey, Justice Paul *Just Justice*, www.courts.qld.gov.au/publications/articles/speeches/dj010300.htm, accessed 3 March 2001.

⁵ American Bar Association (1985), p 18.

⁶ Thomas (1997), p 44.

⁷ Thomas (1997), p 44

⁸ Thomas (1997), p 20. See *R v McKenna* [1960] 1 QB 411; *R v Hircock* [1970] 1 QB 67.

⁹ Thomas (1997), p 23.

¹⁰ Thomas (1997), p 24.

The majority of complaints to the New South Wales Judicial Commission describe judicial officers unfairly 'preventing the losing party from properly putting his or her case, favouring the winning party, or displaying hostility or discourtesy towards the losing party'.¹¹

The link between diligence and judicial performance evaluation can be seen in two judicial performance evaluation guidelines developed by the American Bar Association in 1985:

- 3-5 A judge should be evaluated on his/her skills as a manager including:
 - 5.1 Devoting appropriate time to all pending matters;
 - 5.2 Discharging administrative responsibilities diligently;
 - 5.3 Where responsibility exists for a calendar, knowledge of the number, age, and status of pending cases.
- 3-6 A judge should be evaluated on his/her punctuality including:
 - 6.1 The prompt disposition of pending matters; and
 - 6.2 Meeting commitments on time and according to the rules of court.

While diligence is an important aspect of judicial performance, the question remains as to how it can be measured.

Measures of Judicial Diligence

Several American states (Alaska, New Jersey, Hawaii, Utah, Connecticut, Colorado, and Arizona) and Nova Scotia include measures of diligence in judicial performance evaluation programs. These programs have various aims, ranging from voter advice in judicial retention elections through strategies to assist with judicial self-improvement.

Alaska pioneered the concept of judicial performance evaluation by adopting a statutory judicial evaluation program in 1975.¹² 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 program measures judicial diligence by having attorneys rate whether a judge displays reasonable promptness in making decisions, a willingness to work diligently, and prepares for hearings. Court employees are also surveyed as to a judge's management abilities and diligence.

¹¹ Thomas (1997), p 24.

¹² Pelander (1998), p 651; Alaska Stat. 15.58.050 (Michie 1996); Alaska Admin R. 23(c).

New Jersey was the second American state to explore judicial performance evaluation.¹³ Unlike the first experiments in Alaska, which focused on judicial retention elections, the New Jersey program focused on judicial self-improvement. This is an approach directly relevant in the Australian context. The New Jersey program is a well established and widely respected program, often copied to varying degrees by other jurisdictions — for example, Hawaii and Nova Scotia.

The New Jersey program measures judicial diligence according to attorney ratings of judges according to the following measures:

- punctuality;
- doing the necessary preparation for the case; and
- rendering decisions promptly.

The Hawaii program has exactly the same measures as New Jersey. Nova Scotia is also similar to New Jersey but with slight variations in wording: adequate preparation, rendering rulings and decisions without unnecessary delay, punctuality. The New Jersey, Hawaii and Nova Scotia programs are largely based on attorney surveys.

Connecticut was one of the six original pilot jurisdictions in the National Center for State Courts' effort to develop judicial performance evaluation in the 1980s.¹⁴ The program has gone through many changes over the years and, like the New Jersey program, is widely respected. The main objectives of the program are the development and improvement of the individual judge and the Bench as a whole.¹⁵ Secondary goals include assisting the Chief Court Administrator in the assignment of judges and in the development of seminars and continuing judicial education programs.¹⁶ The Connecticut program includes in attorney surveys the following measures related to judicial diligence:

- preparation (reading briefs, motions, etc);
- attention/staying on top of proceedings;
- patience during proceedings; and
- whether the decision was timely after hearing and/or briefs.

¹³ In the early 1980s, the Supreme Court established a permanent committee on judicial evaluation and performance. Members included lawyers and judges. Chief or presiding judges evaluated other judges. The focus was on competence, productivity and conduct. A consultant from the Graduate School of Management of Rutgers University was used to determine suitable methodological approaches. Four years of planning resulted in a pilot program. The pilot program ran from 1983 to 1987. The program became permanent in 1988.

¹⁴ In 1984, Connecticut's judicial evaluation program developed on a case-specific basis for all 131 trial judges of the Connecticut Superior Court.

¹⁵ State of Connecticut Judicial Branch (1996), p 1.

¹⁶ State of Connecticut Judicial Branch (1996), p 1.

Under the Utah Constitution, judges stand for retention election at the end of each term of office. Before the public votes on whether to retain the judge for a further term, the judge is evaluated by the Judicial Council. The Judicial Council is established by the Utah Constitution as a policy-making body for the judicial branch of government and is required by its own rules and statutes to evaluate the performance of all judges.¹⁷

The purpose of the Utah program is, first, to provide each judge with information for his or her self-improvement and, second, to provide information to the public upon which to make knowledgeable decisions regarding retention elections. The criteria and measures directed to attorneys are as follows:

Questions of attorneys about appellate judges:

- Demonstrates preparation for oral arguments.

Questions of attorneys about trial court judges:

- Demonstrates a familiarity with the pleadings, record, memoranda; and/or briefs that reflects preparation; and
- issues orders, judgments, decrees, or opinions without unnecessary delay.

Questions for self-improvement (relevant to both trial and appellate):

- Displays patience;
- displays attentiveness;
- maintains the quality of questions and comments during oral argument; and
- issues opinions without unnecessary delay.

The Colorado Commissions on judicial performance¹⁸ have had two goals — first, to provide voters with information on judicial retention election candidates, and second, to provide the judiciary with information for self-improvement. Both goals are seen as equal in importance. The program is unique in being run independently of the judiciary and, like those of Utah and Alaska, provides information to the public.¹⁹ There is a strong participation by non-attorney citizens, which also makes the Colorado approach unique.

Litigant and law enforcement questionnaires include the following measures under the heading of preparation, control and attentiveness:

- courteous to all participants;
- patient with all participants;

¹⁷ <http://courtlink.utcourts.gov/knowcts/judsel.htm>;

<http://courtlink.utcourts.gov/knowcts/adm/index.htm>, accessed 2 March 2001.

¹⁸ A detailed report into the implementation of the Colorado program can be found in Stott (1985). The most recent report is the Colorado State Commission on Judicial Performance 2000 Report presented to the Colorado General Assembly, 5 March 2001.

¹⁹ Bush (1991).

- maintains firm control of the courtroom.

The measures also address whether the judge is punctual in commencing proceedings.

The judiciary do participate in some questionnaires. For example, the appellate judge self-evaluation questionnaires include the following measures under the heading 'Communication skills and deportment at oral argument':

- attentiveness;
- patience;
- appropriate restrictions on counsel during argument; and
- relevant questions.

Under the heading 'Administrative performance', the following measures are included:

- promptness in making rulings and rendering decisions;
- hard worker;
- working effectively with other judges;
- working effectively with other court personnel;
- handling ongoing workload; and
- timeliness of issuing written opinions.

The Arizona program has more extensive data sources. Questions are asked of attorneys, litigants, witnesses, self-litigants, jurors and court staff concerning judicial diligence based on measures including a judge's punctuality in conducting proceedings, maintenance of control over the courtroom, and whether the judge is a hard worker. Arizona surveys attorneys and asks them to also rate a judge's:

- promptness in making rulings and rendering decisions; and
- efficient management of calendar.

In 1985, the American Bar Association adopted the previously mentioned 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. Legal ability is included in the guidelines under the heading 'Skills as a manager', as measured by 'Discharging administrative responsibilities diligently' and 'Devoting appropriate time to all pending matters'; and under the heading 'Punctuality', as measured by 'The prompt disposition of pending matters' and 'Meeting commitments on time and according to rules of court'.

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

Consistent with the United States and Nova Scotia approaches, five measures of judicial diligence are proposed for the purpose of this article:²⁰

- preparation;
- attentiveness to oral argument;
- prompt disposition of pending matters;
- willingness to work diligently; and
- reasonable promptness in writing judgments.

While some aspects of diligence, such as attentiveness to oral argument, can be assessed by any participant in the litigation (judges, barristers, jurors, witnesses, litigants, court staff and court watchers), most aspects are best commented on by barristers and judges. The data sources used in this article are derived from a national barristers survey and a national survey of judicial officers.

Does Diligence Differ Between Trial and Permanent Appellate Judges?

Judicial performance evaluation programs 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 a more general jurisdiction. Appellate programs may differ from those used at first instance in some respects to reflect the unique characteristics of the appellate court's functions. Sterling et al²¹ argue that separate questionnaires should be developed for appellate and trial judges to reflect their unique characteristics.²² Other levels in the judicial hierarchy may require tailor-made analysis, since the functions and duties of judicial officers may differ.²³ 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

²⁰ See Wyoming Code of Judicial Conduct Canon 3: 'A judge shall perform the duties of judicial office impartially and diligently.'

²¹ Sterling et al (1981).

²² See also Hanson (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.

<http://alt.xmission.com/~jrp/aoc-survey.html> [accessed 10.12.00];

<http://courtlink.utcourts.gov/knowncts/judsel.htm> [accessed 03.03.01].

²³ 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.

impact differently on the judges in each jurisdiction.²⁴ The professional background and level of experience²⁵ of the judicial officer is also a relevant consideration. Appellate judges are often the most experienced on the Bench.

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 programs for appellate as distinct from first instance judges. The prospect of professional collegiality may be soured by competition, personality clashes, and irrational behaviour.²⁶ 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.'²⁷

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'.²⁸ Given the caveats mentioned above, 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 Diligence 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.²⁹ Some suggest a difference, others not; there are also disputes over appropriate methodologies.

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.³⁰

²⁴ Johnston (1999); cf Merritt (1999).

²⁵ Armytage (1996), p 98.

²⁶ Kirby (1995), p 112.

²⁷ Kirby (1995), p 112.

²⁸ Clarke (1996), p 88, citing Evershed (1951).

²⁹ See generally Martin (1993).

³⁰ Malcolm (1994), p 88.

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.³¹

Men and women have different perceptions of human relationships and of society, [such] perceptions have an influence on judicial decision making in general.³²

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 should be 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.³³

Such bias may also be evident in assessments of judicial diligence. Clare Burton³⁴ argues that:

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

These assertions are the subject of hypothesis 3, which questions whether judicial gender has any association with judicial diligence ratings.

Does Judicial Diligence 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 72.³⁵ The rationale is that they are too old to

³¹ Malcolm (1994), p 89, referring to Johnston and Knapp (1976).

³² Malcolm (1994), p 90.

³³ Malcolm (1994), p 88.

³⁴ Burton (1988), p 3; Shepela and Viviano (1986).

suitably carry out their duties to 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.³⁶ 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.³⁷

The effects of judicial age and experience on diligence 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 diligence 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 diligence can be measured reliably by using survey instruments with barristers and judicial officers.
- *Hypothesis 2:* Permanent appellate judges will have higher diligence performance ratings than first instance judges.
- *Hypothesis 3:* Female judges will have lower diligence performance ratings than male judges.
- *Hypothesis 4:* Judges 65 years of age or older will have lower diligence performance ratings than younger judges
- *Hypothesis 5:* Judges in their first five years of office will have higher diligence performance ratings than more senior judges.
- *Hypothesis 6:* Experienced barristers give higher diligence performance ratings than inexperienced barristers.

³⁵ 70 years: Constitution, s 72; *Judges' Retirement Act of 1921* (Qld), 12Geo v No 14, s 3; *Supreme Court Act 1887* (Tas), s 6A; *Judges Retirement Act 1937* (WA), s 3. 72 years: *Judicial Officers Act 1986* (NSW), s 44(1). The *Constitution Act 1975* (Vic), s 77 provides for a retirement age of 70 years, or 72 years for the president of the Court of Appeal and appeal judges appointed before the *Court Amendment Act 1986* (Vic).

³⁶ Young (1997).

³⁷ Thomas (1997), p 787.

Survey instruments and sampling procedures

Barristers' survey

The first study, was a national survey³⁸ of barristers' opinions on judicial diligence.³⁹ Using performance evaluation constructs found in recent judicial retention studies carried out in Alaska, Arizona, Colorado and Utah⁴⁰ as a basis for an Australian model, Australian barristers were asked to evaluate the performance of sitting Supreme and Federal Court judges. The evaluation focused on relevant performance standards and adherence to principles of law, not personal, social or political philosophies.

The survey instrument was constructed to gather barristers' general impressions concerning performance evaluation before they attempted a structured analysis of sitting Supreme and Federal Court judges.⁴¹ The instrument was pre-tested with 30 experienced barristers before being finalised. Ten jurisdiction specific survey booklets were created.⁴² The survey instrument was written in plain English.⁴³

Several scales were used in the barristers' survey. In question 1, a four-point scale was adopted, ranging from *strongly disagree* (1) through *strongly agree* (4). An additional *Don't know* response (5) was also included. Neutral was not adopted on any scale as that result would tend to be ambiguous and impossible to interpret. *Don't know* was treated as 'don't know' rather than 'neutral'. A Chi-square evaluation was done to test whether *Don't know* was sensitive to barrister experience⁴⁴ or gender.⁴⁵

For the purposes of the analysis, the data were reduced by creating absolute values of 'agree' and 'disagree'. Responses (1) and (2) were recoded as 'disagree' and 'agree' respectively. Category 5, 'don't know' was ignored. In question 3, the same approach was adopted for a scale ranging from 'very unimportant' (1) through 'very important' (4).

Survey booklets containing the names of all sitting Supreme and Federal Court judges were distributed to the population of 4218 practising barristers

³⁸ The survey instrument is available from the author.

³⁹ Neither the covering letter nor barristers' survey instrument defined 'judicial performance'.

⁴⁰ See generally Esterling and Sampson (1998).

⁴¹ It would be wrong to assume respondents only read survey forms linearly.

⁴² 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 author.

⁴³ For assistance in drafting plain English documents, refer to Eagleson (1990), reproduced in Condie et al (1996).

⁴⁴ *Don't know* was sensitive to experience for the question of 'whether performance appraisal may lead to a beneficial change in judicial behaviour'. The lower the level of experience the more likely barristers would respond *Don't know*.

⁴⁵ Chi Sq = 7.05, df = 2, Sig = .03 (2 sided).

listed in the Law Council of Australia *Australian Legal Directory* 1999 edition, double checked against the Yellow Pages® Online.⁴⁶ 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 were collected over a stated time period (13 September 1999 to 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.⁴⁷ The overall response rate for barristers was 6.4 per cent. In total, 107 survey booklets were returned to sender.⁴⁸ The population and sample response rates broken down by jurisdiction appear in Table 1.

The low response rate raises questions as to the representativeness of the sample. 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 as a whole.

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.⁴⁹

Barristers who appear as advocates before the court are 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,

⁴⁶ 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 practising barristers in those jurisdictions. No firms responded.

⁴⁷ A random sample of 5 per cent of the barristers' 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.

⁴⁸ ACT 2, Qld 14, SA 10, Vic 11, WA 16, NSW 38. The response rate accounts for completed surveys — a person who chose not to respond is not counted as a 'response'.

⁴⁹ 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 (1977), p 475; Maddi (1977), p 8.

Table 1 Barristers' survey population and sample response rates¹

<i>Population</i>				<i>Sample response</i>					<i>Chi -square</i>
<i>Jurisdiction</i>	<i>Barrister (N)</i>	<i>Male</i>	<i>Female</i>	<i>Barristers N (% N)</i>	<i>Male</i>	<i>Female</i>	<i>Judicial evaluations</i>	<i>Experience mean</i>	<i>Male/female bias</i>
ACT	67	62	5	10 (14.93)	9	1	72	19	.09 NS
NSW	1689	1515	174	91 (5.39)	70	10	462	18	.42 NS
NT	34	32	2	8 (23.53)	8	0	60	22	.50 NS
Qld	583	522	61	39 (8.72)	34	3	386	14	.22 NS
SA	218	197	21	19 (9.17)	18	1	183	23	.42 NS
Tas	7	6	1	6 (85.71)	3	1	24	21	.00 NS
Vic	1281	1088	193	85 (6.63)	61	18	494	19	3.68 Sig. .10
WA	339	330	9	11 (3.25)	9	2	105	18	10.26 Sig. .01
Fed Ct	-	-	-	-	-	-	456	-	-
Totals	4218	3753	465	270 (6.40%)	212	36	2242	18.3	-

¹ 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.

combined with their experience with the judicial function, makes them the cohort of individuals from which superior court judges are appointed.⁵⁰

It is useful to consider those who did not answer the survey instrument.⁵¹ Six per cent of respondents fell within the 0–5 years range of experience. This was to be expected since barristers with little experience are unlikely to frequently practise in 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 diligence. 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 as a 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 and magistrates in Australia on 26 June 2000. In total, 885 survey instruments were posted.⁵² 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 per cent of responses); the follow-up survey produced 33 responses⁵³ (26 per cent 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

⁵⁰ See de Jersey (2000), p 8.

⁵¹ Two methods could be utilised 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 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 or telephone calls can be made to non-respondents. See Maddi (1997), p 8.

⁵² Findlay suggests that 'issues such as the timing, format, and follow-up of the research instrument have a significant effect on response': Findlay (1994). This is also said to be the experience of the New South Wales Judicial Commission.

⁵³ Including one response which did not disclose the respondent's jurisdiction nor gender.

Table 2 Judicial officers' survey population and sample response rates

Population				Sample response						Chi-square
Court	N	Male	Female	N mail out 1		N mail out 2		Total	Total court%	Male/female bias
				Male	Female	Male	Female			
High	7	6	1	-	-	-	-	-	-	N/A
Federal	49	44	5	2	1	1	-	4	8.16	.96 NS
Family	55	42	13	9	2	3	-	14	25.45	.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	.31 NS
NSW District	66	55	11	8	1	2	-	11	16.67	.45 NS
NSW Local	126	101	25	14	4	5	-	23	18.25	.08 NS
NT Supreme*	7	6	1	-	-	2	-	2	28.57	.33 NS
NT Magistrates	11	9	2	2	-	-	1	3	27.27	.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	.55 NS
Qld Magistrates	76	65	11	7	3	5	4	19	23.69	7.68Sig.01
SA Supreme	18	17	1	3	-	2	-	5	27.78	.29 NS
SA District	29	26	3	2	-	-	-	2	6.90	.23 NS
SA Magistrates	37	32	5	10	-	-	-	10	27.03	.48 NS
Tas Supreme	7	7	0	2	-	-	-	2	28.57	.00 NS
Tas Magistrates	12	10	2	1	-	-	-	1	8.33	.99 NS
Vic Supreme	34	32	2	-	-	2	-	2	5.88	.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	.15 NS
WA Magistrates	37	32	5	4	1	-	-	5	13.51	.18 NS
Not disclosed	-	-	-	-	-	1	-	1	-	N/A
Totals	889	751	138	80	14	26	7	127	14.35	

* excluding Federal Court judges

response rate was 14.32 per cent.⁵⁴ There was no evidence that the second mail-out was perceived by judicial officers in a negative manner.⁵⁵

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 factors are also summarised in Table 2.

Only one out of 20 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 no evidence of sample bias based on respondent jurisdiction or gender.

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 diligence. 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 could 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 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.⁵⁶

⁵⁴ 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 per cent 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.

⁵⁵ The Australian Institute of Judicial Administration has suggested that open-ended designs, and not making repeated requests for participation, may have a detrimental effect on response rates: Findlay (1994).

⁵⁶ The questionnaires are available from the author.

Hypothesis 1

Hypothesis 1 addresses the question of 'whether reliable indices of the core construct, judicial diligence, can 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 diligence, particularly for barristers. The result is .94 for barristers and .80 for judicial officers. The judicial officers' scale related to the importance of these measures. This data is only consistent with acceptance of hypothesis 1 with respect to barristers, not judicial officers.

It may be wrong to assume that measures of the same criteria will be perceived in similar ways by different respondent categories, in this case barristers and judges.

Hypotheses 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.⁵⁷ 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.

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'.⁵⁸

- | | | |
|---|---------------------|--|
| 1 | <i>unacceptable</i> | Seldom meets minimum standards of performance; |
| 2 | <i>deficient</i> | Does not always meet minimum standards of performance; |
| 3 | <i>acceptable</i> | Meets minimum standards of performance; |
| 4 | <i>good</i> | Often exceeds minimum standards; |

⁵⁷ 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.

⁵⁸ This replicates the scale used by the Alaska Judicial Council: www.ajc.state.ak.us/Retention98/retgen1.htm [accessed 23/11/00].

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.

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 six measures of diligence were further classified depending upon whether the judge was an appellate judge or a first instance judge.⁵⁹ A multi-variate analysis was conducted based on composite means to isolate whether there were any main effects for barrister gender, jurisdiction, or experience.⁶⁰ 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, Australian Law Journal* biographies, 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 from law reports.

Hypothesis 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.

Results

Importance of the Measures of Diligence

Barristers and judicial officers were asked to rate each measure of diligence on a four-point scale from *very unimportant* (1) to *very important* (4). A fifth category of *don't know* (5) was included on the scale. The data were collapsed into absolute values of *important* or *unimportant*, with *don't know* and missing responses reported together as non-responses. The results appear in Table 3.

⁵⁹ Appellate judges only hear appeals. First instance judges hear matters at first instance and may on occasion sit on courts of appeal.

⁶⁰ Missing values for individual measures were replaced with the group mean of all participants for the criterion judicial diligence.

Table 3: Summary of the importance of diligence

<i>Measures</i>	<i>Barristers' survey</i>				<i>Judicial officers' survey</i>				<i>Chi-square</i>
	<i>N</i>	<i>Important</i>	<i>Unimportant</i>	<i>Non-responses</i>	<i>N</i>	<i>Important</i>	<i>Unimportant</i>	<i>Non-responses</i>	
Preparation	114	100 (87.7%)	14 (12.3%)	156	115	109 (94.8%)	6 (5.2%)	12	3.583 Sig. = .058
Attentiveness to oral argument	113	108 (95.6%)	5 (4.4%)	157	118	118 (100%)	0 (0%)	9	5.337 Sig. = .021*
Prompt disposition of pending interlocutory matters	115	109 (94.8%)	6 (5.2%)	155	116	115 (99.1%)	1 (0.9%)	11	3.728 Sig. = .054
Willingness to work diligently	116	111 (95.7%)	5 (4.3%)	154	118	118 (100%)	0 (0%)	9	5.197 Sig. = .023*
Reasonable promptness in writing judgments	114	108 (94.7%)	6 (5.3%)	156	117	116 (99.1%)	1 (0.9%)	10	3.819 Sig. = .051

$p < .05$, two tailed, $df = 1$

Of those who responded, 94.8 per cent of judicial officers and 87.7 per cent of barristers agreed that preparation is an important measure of judicial performance. Judicial officers who are prepared are more efficient in dealing with the matters before them.

Judicial officers (100 per cent) and barristers (95.6 per cent) both agreed that a judge's attentiveness to oral argument was an important measure of judicial performance. Judicial officers perceived this to be a significantly more important requirement than barristers.

Judicial officers (99.1 per cent) and barristers (94.8 per cent) both agreed that prompt disposition of pending interlocutory matters was an important measure of judicial performance. Interlocutory matters require prompt disposition. The litigation system would grind to a halt without this.

Judicial officers (100 per cent) and barristers (95.7 per cent) both agreed that a judge's willingness to work diligently was an important measure of judicial performance. Judicial officers perceived this to be a significantly more important requirement than barristers. Judicial officers are largely workaholics, and their position requires them to be so.

Judicial officers (99.1 per cent) and barristers (94.7 per cent) both agreed that reasonable promptness in writing judgments was an important measure of judicial performance. Judicial officers are particularly sensitive to judgment delay.

There is no doubt that diligence, in its various forms, is an essential criterion for measuring judicial performance.

Appellate Versus First Instance Judges

Hypothesis 2 states: 'Permanent appellate judges will have higher diligence performance ratings than first instance judges.' A multi-variate analysis of variance was used to examine whether significant statistical differences existed in how barristers rated appellate judges⁶¹ versus non-appellate judges⁶² on diligence, 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 diligence (Mean non-appellate = 3.81, Mean appellate = 4.12, $F = 38.61$, numerator $df = 1$, denominator $df = 2214$, $Sig. = .000$).⁶³ Several factors could explain this difference: unique functions and duties of appellate judges and the effects of group dynamics. Further research is necessary to investigate these issues.

⁶¹ N = 430.

⁶² N = 1780.

⁶³ Since each barrister only rated judges whom they had appeared before, and barristers often rated more than one judge, the observations are not independent. Analysis of variance that treat the judges as a within comparison was performed, albeit with large numbers of missing values. The resulting patterns were the same.

Female Versus Male Judges

Hypothesis 3 states: 'Female judges will have lower diligence performance ratings than male judges.' A multi-variate analysis of variance was used to examine whether significant statistical differences existed between male (N = 2013) and female judges (N = 197) on the diligence 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 diligence (Mean male = 3.90, Mean female = 3.62, $F = 16.15$, numerator df = 1, denominator df = 2214, Sig. = .000). Male judges were perceived to be significantly better performers on diligence.

Old Versus Young Judges

Hypothesis 4 states: 'Judges 65 years of age and older will have lower diligence performance ratings than younger judges.' A multi-variate analysis of variance⁶⁴ was used to examine whether significant statistical differences existed in judges 65 years of age or older⁶⁵ versus judges less than 65 years of age⁶⁶ on each performance composite, while co-varying out the effects of barrister jurisdiction and experience. There was a significant judicial age effect for diligence. The results suggest that ratings of judicial diligence decline as judges reach 65 years of age (Mean <65 years = 3.91, Mean ≥ 65 years = 3.72, $F = 14.94$, numerator df = 1, denominator df = 2214, Sig. = .000).

In Canada, federal legislation creates the category of a supernumerary judge, being a federally appointed judge who, having served fifteen years on the Bench and having attained the age of 65 (whatever last occurs) then has the right to elect supernumerary status with the approval of the Chief Justice. This entitles a judge on full salary, and status, to sit about one-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.⁶⁷

This approach implicitly 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.

Inexperienced Versus Experienced Judges

Hypothesis 5 states: 'Judges in their first five years of office will have higher diligence performance ratings than more senior judges.' A multi-variate analysis of variance⁶⁸ was used to examine whether significant statistical

⁶⁴ This analysis breached the assumption for independent samples resulting in higher Fs.

⁶⁵ N = 421.

⁶⁶ N = 1789.

⁶⁷ Estey (1985), p 35.

⁶⁸ This analysis breached the assumption for independent samples resulting in higher Fs.

differences existed between judges in their first five years of office⁶⁹ versus more senior judges⁷⁰ on each performance criteria, while co-varying out the effects of barrister jurisdiction and experience. There was a significant judicial experience effect for judicial diligence (Mean <5 years = 3.96, Mean ≥ 5 years = 3.84, numerator df = 1, denominator df = 2214, F = 8.25, Sig. = .004). The results confirmed hypothesis 5. There was a statistically significant difference in the diligence of judges in their first five years of office compared with more senior judges. Younger judges were perceived by barristers as more diligent than more experienced judges.

The Effect of Barrister Age and Experience

Hypothesis 6 states: 'Experienced barristers will give higher diligence performance ratings than inexperienced barristers.' A multi-variate analysis of variance was used to examine whether significant statistical differences existed between three levels of barrister experience⁷¹ on each performance composite, while co-varying out the effects of barrister gender.

There was no significant barrister experience effect for the judicial diligence (Mean 1-10 = 3.86, Mean 10-18 = 3.81, Mean 18-40 = 3.91, numerator df = 1, denominator df = 2214, F = 2.44, Sig. = .088). Given this analysis breached the assumption for independent samples resulting in higher Fs, the result for judicial diligence is dubious, but nevertheless cannot be said to confirm hypothesis 6.

Conclusion

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

- preparation;
- attentiveness to oral argument;
- prompt disposition of pending matters;
- willingness to work diligently; and
- reasonable promptness in writing judgments.

The internal consistency of the measures was very strong for both barristers and judicial officers, but more so for the former.

Both the gender of the judge and whether they were a permanent appellate judge or otherwise had a statistically significant relationship to judicial diligence. Male judges were perceived to be statistically significantly more diligent than their female counterparts. Appellate judges were perceived to be statistically significantly more diligent than judges at first instance. Care should be exercised with interpreting these findings for females. The literature

⁶⁹ N = 697.

⁷⁰ N = 1547.

⁷¹ 1-10 years N = 306, 10-18 years N = 654, 18-40 years N = 1250.

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 diligence, female judges should be analysed separately from males. Further research is needed in relation to the findings concerning appellate judges. The research should examine the unique functions and duties of appellate judges and the effects of group dynamics.

Judicial diligence ratings appeared to decline with judicial age and experience. Judicial officers' 65 years of age and older have statistically significantly lower diligence ratings than younger judges. The corollary that judges in their first five years of office will have higher diligence performance ratings than more senior judges was also affirmed. One view of the results would suggest that elderly judges' workloads should be reduced in line with the Canadian approach of appointing supernumerary judges. Another view would suggest that older judges may benefit from judicial education programs targeted to their specific needs.

There was no evidence to suggest that experienced barristers rate judicial diligence differently from junior barristers. Both groups could differentiate judges who are prepared, attentive, work diligently and who are prompt in disposing of pending matters and judgements.

Consistent with the approaches adopted in Alaska, New Jersey, Hawaii, Utah, Connecticut, Colorado, Arizona, Nova Scotia, and by the American Bar Association, any pilot judicial performance evaluation program in Australia should include measures related to judicial diligence.

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