THE NEED FOR CONTINUING JUDICIAL EDUCATION

LIVINGSTON ARMYTAGE*

It is assumed that years of practice as a barrister is the necessary and sufficient qualification for judicial office. So it has been for hundreds of years. I believe we could do better....we need a national [judicial training] institute.[1]

The last thing we need is educated judges. Educated, that is, not in the law but in the various fashionable theories and political orthodoxies which are current among feminists, environmentalists, social reformers, deconstructionalists or whatever.[2]

The best way of maintaining judicial competency is to appoint reasonably competent judges, who already know enough to embark on their task with tolerable efficiency. If it is recognised that a large proportion of new appointees cannot perform competently without prior instruction, then the system of selection has failed, and basic training is little more than a means of propping it up.[3]

The justification for judicial orientation should not depend upon proof that it has become necessary. It would be almost impossible to prove whether that was the case or not. The more relevant consideration is whether such a system would be desirable and beneficial for judicial officers in this country.[4]

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1 MD Kirby "The Judges" *The Boyer Lectures* (1983), ABC, Sydney p 24-6.

2 P McGuinness "No Case for Judgement by the Instant Lynch Mob" (1993) *The Australian* 20 January 1993 and reprinted in 67 *ALJ* 324-5.

3 G Samuels "Judicial Competency: How it can be Maintained" (1980) 54 *ALJ* at 585.

4 J Wood "The Prospects for a National Judicial Orientation Programme in Australia" (1992) unpublished paper presented at the 11 AIJA Conference, Brisbane on 22 August 1992 p 22.

I. INTRODUCTION

This article argues that there is an emerging consensus within the literature on the need for continuing judicial education. The nature of this need is defined by the findings of empirical research which provide a useful framework to conceptualise and develop any program of judicial education by content, level of application and manner of delivery.

II. THE CONCEPT OF EDUCATIONAL NEED

Any discussion of the need for continuing judicial education should, from the outset, define the concept of educational need upon which it is based.

For educators, an important distinction exists between education, training and development. In the words of Grabowski:

> Training prepares an individual to acquire a skill that will result in a specific kind of behaviour, whereas education generally provides opportunities to live and perform better in every dimension of life. Thus, training narrows whereas education broadens an individual's range of responses.[5]

In this sense, the education/training paradigm can be described as education being concerned with knowing, and training being concerned with doing. Inevitably, this is an over-simplification. There is a need in any adult education to reconcile the tension which exists in balancing these two major roles of education: that is, in learning for the sake of learning (knowing), and in learning as an agent of change (doing). Ultimately, these concepts are irretrievably interrelated, and reconciliation of competing roles must be found rooted in the philosophy of education and learning. For practical purposes, however, Houle found that while some adults learn for its own sake, most professionals pursue learning as a means to an end: learning is associated with work, careers, and professional development. Thus, in this discussion, the term 'education' will be defined generically to incorporate the separate concepts of education, training and development within an over-arching recognition of the need for the process and its outcomes to have a practical, job-related orientation.

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5 SM Grabowski "How Educators and Trainers can Ensure on-the-job Performance" in SM Grabowski (ed) *New Directions for Continuing Education, "Strengthening Connection between Education and Performance"* (1983) San Fransisco, Jossey-Bass p 6. "Both training and education, however, must prepare an individual to transfer knowledge, skills and attitudes as conditions and circumstances change. Training, no less than education, seeks (at least implicitly) to effect change in individuals, groups, organisations, and institutions as well as in society at large. Thus, both training and education share a proactive process of planned change."

Within this context, need is most commonly defined as a deficiency, or a gap between an actual situation and a preferred situation, in terms of job performance, knowledge, skills, abilities and competence.[6] Queeney, for example, sees needs as identified discrepancies, or gaps, between prevailing knowledge, skill and performance levels and the desired levels.[7] Hardly surprisingly, this process is also sometimes referred to as gap analysis.

A second approach in practice is to describe need in terms of want or preference. Although, as Suarez points out, there are many purists who oppose the use of this definition, many needs assessments are in fact heavily based on this approach, and it is perhaps the most popular in practice.[8]

Another less used approach to the concept of need is that of a deficit, which brings with it the notion of a problem or weakness.[9] A need is said to exist if the absence or a deficiency in the area of interest is harmful - a state in which a minimum satisfactory level has not been reached or cannot be maintained. Few practitioners use this method owing to the difficulty in determining the point at which a deficit or minimum satisfactory level can be said to exist. However, observation suggests that this is the definition most commonly adopted by critics of the need for continuing education, who claim that any call for education is by implication to deprecate existing levels of proficiency.[10]

Finally, need can be defined in terms of discrepancy. Sork argues that discrepancy, like the notion of deficiency, involves identification of a gap between what is and what ought to be but, additionally, incorporates a developmental or remedial connotation.

> The use of the word 'discrepancy' accommodates both a remedial orientation in which the purpose of the assessment is to uncover deficiencies (discrepancies between actual and expected mandated standards) and a growth orientation in which the purpose of the assessment is to reveal *differences* [sic] between acceptable present conditions and more desirable future conditions.[11]

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6 See, for example, JH Hudzik *Judicial Education Needs Assessment and Program Evaluation* (1991) Judicial Education Research and Information Technology Transfer Project (JERITT), Michigan State University p 7; and F Ulschak *Human Resource Development: The Theory and Practice of Needs, Assessment* (1983) at xiv.

7 DS Queeney *Needs Assessment* (1992) Adult Education Perspectives for Judicial Education, Judicial Education Adult Education Project (JEAEP), University of Georgia 3.2.

8 TJ Suarez "Needs Assessment in Adult Education" (1985) in T Hugen and N Postewaite (eds) *International Encyclopaedia of Education* p3497.

9 *Id.*

10 *Id.*

11 TL Sork "Needs Assessments as Part of Program Planning" (1987) in Q Gessner (ed) *Handbook on Continuing Higher Education* 125 at 128.

This approach is endorsed by Pennington.[12] The effect of this subtle but important distinction is to provide to the notion of needs assessment a general improvement thrust rather than a specific remedial focus.

It follows that the threshold of need upon which any educational intervention may be based can vary depending on whether that need is defined as a deficiency, a want, a discrepancy or a deficit. For the purposes of this study, the definition to be adopted is that of discrepancy. It is argued that, in practice, this conceptualisation is both the most useful and the most consistent with adult learning theory by defining the issue in terms of an opportunity for development rather than remedy.

The concept of need connotes issues of some complexity more than purely the semantic. There are difficulties of distinguishing an 'authentic' need from a 'felt' need;[13] the fact that needs are probably infinite in number and cannot all be identified; that there are often conflicting needs; and, finally, that needs may not be conscious in the person having them. Pennington observes that each of these complexities conspire to make needs assessment a poorly understood concept.

> It is impossible to plan without the type of data generated by such studies but much work remains to be undertaken to improve such studies before they can be used in a routine way.[14]

At an early stage, a number of questions must be asked: "whose needs are being assessed?; "are they the judges', or the community's?" and; "are these needs synonymous or even compatible?" In this discussion, it will be argued quite simply that as only people can have educational needs (communities have social needs, which must be addressed through other means), so, the question can only be addressed in terms of the needs of judges.

Another issue relates to the question of standards. The concept of educational need embodies a critical notion of expectations and ideal standards. Defining need is inescapably a value judgment, and must be described in terms of desired levels of knowledge, skill or performance. Indeed, need has no meaning without a defining

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12 FC Pennington "Needs Assessment: Concepts, Models and Characteristics" Assessing Educational Needs of Adults (monograph 1980) in *New Directions for Continuing Education (no. 7)* 5; and FC Pennington "Needs Assessment in Adult Education" (1985) in T Hugen and N Postewaite (ed) *International Encyclopaedia of Education* 3492.

13 On the issue of discerning needs from wants, Knowles describes an educational need in terms of interests. He defines need as "something people ought to learn for their own good, for the good of an organisation or for the good of society." He sees the role of the educator in stimulating a translation of needs into interests. If a need is expressed behaviourally as a want or a desire, then an interest can be said to be expressed as a liking or a preference. An educational interest is an expressed preference as potentially satisfying educational needs. Interests serve as incentives for adult learning. MS Knowles *The Modern Practice of Adult Education: From Pedagagy to Andragagy* (1980) 88-90.

14 FC Pennington (1985) note 12 *supra* at 3495.

standard or norm.[15] Thus, the process of determining levels by which need will be identified involves setting normative standards against which measurements of need can be made, and below which a professional is to be considered "needy". For example, educational goals are usually set as ideal standards as a preliminary of any assessment against which actual status is compared to determine needs. The acceptable standard may, for example, be defined in terms of career stage of the practitioners being assessed. The needs of a newly appointed judicial officer will be defined differently to those of an experienced one with regard to the same knowledge, skill or competence. Once this particular standard has been set, it is then possible to apply a discrepancy model to identify the particular educational need.

The outcome of this standard setting process hinges on the critical question "who sets the standards?" and, indeed, "whose standards are selected?" Once again, it will be argued that the answer to these questions must invariably be the judges.

Accordingly it is argued that needs assessment in adult educational relates to discrepancies in work performance and, as such, has a distinctive practice orientation. However, while all educational needs must relate to performance, Ulschak points out that not all performance deficiencies can be resolved by redressing shortcomings in knowledge, skills, attitudes or competence.[16] There may be a plethora of non-educational impediments to optimal performance which are quite unrelated to any educational solution: understaffing, defective equipment, low morale and organisational mismanagement amongst others.

III. THE NEED FOR JUDICIAL EDUCATION - THE PHILOSOPHIC DEBATE

In civil law countries, with their tradition of career appointments, aspiring or probationary judges are trained accordingly. In common law countries, however,

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15 FC Pennington (1980) note 12 *supra* at 3 and 102. The concept of need has no meaning without a set of norms, without which it cannot be identified. The value question emerges when trying to decide who sets the standards or whose standards will be accepted. The question of which needs should be dealt with within the nearly infinite number and which course of action for meeting needs should be selected can be perplexing. Diagnostic procedure may be politically neutral or may assume values of client system. Institutional goals influence priorities and ranking, as must be perceptions of participants be mediated by the qualitatively and quantitatively limited perspectives of participants and observers, including their goals and philosophies. See also S Brookfield *Understanding and Facilitating Adult Learning* (1980) 261-2.

16 Ulschak discusses two types of deficiency: deficiency of skills, and deficiency of execution. Deficiencies of skills are training targets. When skill is needed, a training intervention is appropriate. However, deficiencies of execution are not effectively addressed by training interventions. Deficiencies of execution include task interference (interruptions that interfere with the task being done), a lack of motivation/reward, and so on. F Ulschak note 6 *supra* at xv-xvii.

with their preference for mid-career appointments, the process has until recently been entirely unformalised. There has, however, recently emerged an increasing recognition of the need for and value of structured training or education for the judiciary. This tendency has not, however, emerged without considerable debate and controversy.

The question whether there is any need for continuing judicial education is explored in this study primarily by researching the literature in terms of its recognition within the ranks of the judiciary itself.

An orthodox approach to assessing need would normally rely heavily on sources of data beyond the client body, in order to attain objectivity and perspective. To the extent that the judiciary as a body is charged to reflect communal values, the community would normally be expected to play a role in assessing these needs. In the case of the judiciary, however, this approach raises unique problems affecting the actual and perceived independence of the judiciary.[17]

McGuiness describes the difficulties which flow from responding directly to calls from beyond the judiciary for judicial education. Such calls, he argues, are inescapably value-laden and reflect particular sectoral interests. How can one discern which interests are representative of a broad social interest, as distinct from a disproportionately vocal lobby group? Furthermore, it can be argued that such interests, if genuinely communal, are already reflected within the judiciary to the extent that may be appropriate. As McGuiness expounds:

> It is clear that the chorus of condemnation (concerning a judge's handling of a particular trial)...is meant to intimidate...the judiciary into behaving according to the "politically correct" views of those who have invented, or subscribed to, the false theory that the judiciary should reflect the views not just of society (as they inevitably do) but of the most vocal and aggressive advocates of a particular view of society which is not held by the community as a whole.[18]

This dilemma raises some of the unique and profound considerations which surround any independent judiciary operating as a third branch of government in a Westminster system. It is also typical of some of the vexing complexities which must be addressed as part of the broader issue of judicial accountability, and how an independent judiciary should and should not exercise accountability.[19] For an

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17 See, for further discussion, notes 19 and 46 *infra*.

18 Note 2 *supra*.

19 How do you reconcile the doctrines of independence and accountability? American jurists point to the election of judges as a solution to the dilemma; in Australia and Britain, the debate is much less simplistic. For a more detailed discussion of the problems see, for example, RE McGarvie "The Foundations of Judicial Independence in a Modern Democracy" (1991) 1 *Journal of Judicial Administration* 1 at 3-45; RE McGarvie "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence" (1992) 1 *Journal of Judicial Administration* 236; and RD Nicholson "Judicial Independence and Accountability: Can They Co-Exist?" (1993) 67 *ALJ* 404.

independent judiciary, the danger associated with listening too closely to external calls for education is that they may be the very antithesis of independence. Notwithstanding these very real ideological constraints, however, it is observed that the judiciary is acutely sensitive to external criticism and, as a result, does monitor, evaluate and informally responds to external indications of need.

Thus, for the purpose of this study, it is necessary to modify what might be seen as the more conventional means of recognising the need for judicial education, by researching the literature in terms of its recognition within the ranks of the judiciary itself.

Although it has been demonstrated that there are limitations on the efficacy of adult learners to diagnose their own learning needs, and while it is clearly true that need can be usefully assessed from outside any constituent body - there are a number of compelling reasons for this approach:

1. the judiciary is the best informed of its own affairs and has the greatest interest in the resolution of the question;
2. the doctrine of judicial independence has the effect of imposing considerable ideological - albeit constitutional - obstructions across any other practical course being taken, as has been discussed;
3. the extent of control that judges can exercise over the development of their own education has a direct relationship with their stake in the process, motivation and voluntary participation. In educational terms, these ingredients are essential for effective learning and any meaningful outcome.

Sork endorses this approach. Although there is evidence of the limited competency of individuals to conduct self-assessments, the primary strengths of the self-assessment are that it places the educator in direct contact with the client, creates awareness that the educator is available and willing to provide educational services, causes the client to examine the nature of what he or she does, and places responsibility for making value judgments about the desirable state of affairs with the people who have to act to make it happen.[20]

Recognition of the need for judicial education by judges in the United States has become generally accepted over the past 25 years. According to Li:

> The American judiciary, in addressing the long-pressing needs of the state courts, has come to realise that judicial education is one of the most effective, and perhaps an indispensable, means of enhancing the fair and efficient administration of justice.[21]

In 1974 in Britain, the Lord Chancellor commissioned an investigation into arrangements for preparing judicial officers to exercise the sentencing function.

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20 Note 11 *supra* p 130.

21 PM Li *The Judge's Journal* (1976) 15, 78.

The report of the committee chaired by Lord Bridge found a need for a more formalised approach to judicial induction which ultimately lead to the establishment of the Judicial Studies Board. This report recognised that neither the process of self tuition nor the occasional one day conference was adequate to prepare judges in Britain for their responsibilities.[22]

In Australia, the call for a more formalised approach to judicial education was first made in 1983 by Justice Michael Kirby, then Chairman of the Australian Law Reform Commission and later President of the New South Wales Court of Appeal:

> It is assumed that years of practice as a barrister is the necessary and sufficient qualification for judicial office. So it has been for hundreds of years. I believe we could do better...we need a national (judicial training) institute.[23]

Kirby argued that the need for judicial education was due to the rapid change in the law, to provide a more self-critical approach to judicial functions, to promote a greater awareness of the need for principled and conceptual thinking. Kirby observed that:

> The replication of specialist judges from specialist barristers, with only the most occasional external stimulus, is the surest formula for narrow tunnel vision, resistance to reform ideas and complacent self-satisfaction. These attitudes have no proper place in a modern Australian courtroom.[24]

As he foreshadowed, the response to this call was at first less than enthusiastic. Members of the judiciary raised many objections which, in essence, claimed that education was not needed, was incapable of meeting whatever need might in fact exist, or was inappropriate for the standing of judges and inconsistent with the notion of independence. Some of these objections have considerable force.

In Britain this opposition was taken by Lord Hailsham who attacked what he described as the "ignorant clamour" in support of the findings of the Bridge Report that judges should be made to undergo specialised training:

> I also regard with a degree of indifference verging on contempt the criticism of judges that demands for them a type of training which render them more like assessors or expert witnesses than judges of fact and law... The judge's function is to listen intelligently and patiently to evidence and argument...to evaluate the reliability and relevance of oral testimony...and finally to reach a conclusion based on an accurate knowledge of law and practice... The capacity of being a judge is acquired in the course of practising the law.[25]

In Australia, the argument was taken up by Dowsett of the Supreme Court of Queensland, who saw no need for judicial education:

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22 Judicial Studies Board *Report for 1987-1991* (London HMSO: 1992). In particular see Appendix I "Strategies" p 51-9.

23 Note 1 *supra* at 24.

24 *Ibid* at 26.

25 Lord Hailsham *"Hamlyn Revisited: The British Legal System Today* (1983) 50/1.

> I have never seen a new judge flounder because he was a new judge, nor have I heard of such a thing. Indeed, my experience is that very few judges really improve in the job. We seem to be either good at it or bad....[26]

While Dowsett acknowledged that continuing education was theoretically an essential element of all professional life, he postulated:

> Why can we not trust judges to keep up to the extent necessary without creating another level of bureaucratic supervision? Of course, there is no reason.[27]

Ultimately, the problem of judicial education was one which pertained to its institutionalisation, that is, to the implications and effects of acknowledging a need. Dowsett concluded:

> There is a serious threat to our status and our independence in accepting a systematised judicial education program.[28]

Samuels, a brother to Kirby on the New South Wales Court of Appeal, found other objections. For Samuels, the argument came down to consideration of the technical equipment, experience and character which the new judge can, or cannot, himself muster. He concluded that these characteristics should be addressed at the level of selection, not training:

> Most of (these judicial characteristics) are qualities which cannot be instilled in the classroom. If they are to be acquired at all, it is through a good many years of experience. I wonder therefore whether it may not too readily be assumed that basic judicial training can supply not only deficiencies in legal knowledge and procedural acumen, but defects of judicial character as well.[29]

He argued that while the need for judicial education might be recognised in the United States, this should not readily be adopted in Australia because of differences in legal systems, operations of the courts and the basis of selection and appointment of judges.[30] The American method of judicial selection on the one hand, and the English and Australian practice on the other, are significantly different. In the majority of American States judicial selection at some point involves a form of election; in Australia judges are appointed, generally after extensive consultation, from the ranks of experienced barristers, who are usually Queen's Counsel. This difference in methods of selection has, in Samuels' view, a critical impact on the existence and nature of any educational need:

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26 JA Dowsett *Judicial Education: Where are the Emperor's New Clothes?* (1991) unpublished conference paper, p 2.

27 *Ibid* p 4.

28 *Ibid* p 11. Concerns at the possible adverse impact on the standing of the judiciary, and potential incursion of its independence are also observed by GA Kennedy note 33 *infra*. McGuinness, note 2 *supra*, argues that whenever the term education is used as a substitute for indoctrination it ought to be treated with the greatest suspicion.

29 G Samuels note 3 *supra* at 586-7.

30 *Ibid* at 584-5.

> The system of orientation training now well established in the US has developed in response to a specific need stemming from methods of judicial selection which permit, or even entail, the choice of judges who lack the fundamental knowledge and techniques which the office demands.[31]

Samuels concedes, however, that the Australian system of merit selection from the ranks of experienced counsel does not obviate the need for further learning on the bench.

> I do suggest that judges ought not to stand in need of instruction in the elementary principles and precepts which they must apply and observe...(however) I strongly favour regular judicial conferences, run by judges themselves...to enable judges to meet and discuss problems of many different kinds; and, secondly, to keep them in touch with developments in disciplines other than law which impinge upon and may influence the administration of justice.[32]

Opposition has, more recently, been weakened by an increasing expression by judges of a recognition for the need for judicial education and the benefits which it can offer. This recognition is generally of the assistance which educational support can provide, and has dissipated some of the earlier concerns that any acknowledgment of the value of continuing education must bring with it an implication of professional incompetence. Now, a greater confidence on the part of judges that their position, status and indeed the substance of their independence, can be consolidated rather than denigrated through continuing education is evident.

Kennedy, a judge of the Supreme Court of Western Australia, supports Kirby in advocating a more formalised approach to judicial education. The practice in Australia has been to rely almost exclusively upon the selection of the "gifted amateur", the self-education of judges and the acquisition of the necessary knowledge by informal consultation with colleagues.[33] In practice, there is the expectation that newly appointed judges are fully equipped immediately to discharge their responsibilities in whatever field of law they may be called to. This derives from a confident belief that there is no better training for judicial work than active practice as a barrister.[34] However, Kennedy argues, it cannot be doubted that the transition from advocacy to adjudication can be as substantial as it is abrupt. The difference between counsel's seeking to persuade a court to the point of view which he is advocating and a judge's having to determine a dispute can be profound.[35]

> There does appear to be a special need for assistance to be made available for newly appointed magistrates and trial judges... The purpose of that assistance would not

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31 *Ibid* at 585.
32 *Ibid* at 587.
33 GA Kennedy "Training for Judges?" (1987) 10 *UNSWLJ* 47 at 47-59.
34 *Ibid* at 47.
35 *Ibid* at 50.

> be, of course, to improve the general level of knowledge of substantive law on the part of new appointees, but to inform them of possible solutions to particular problems which they might encounter and of which they might not have had previous experience.[36]

Kennedy concludes that there are very considerable advantages to be gained from a more structured process of learning to enable judges to add to their knowledge, for example, in sentencing, evaluation of witnesses, computer technology and the social and behavioural sciences, while at the same time ensuring that the independence of the judiciary is safeguarded. For this reason, he argued, this education should not be compulsory.[37]

This approach was endorsed from New Zealand by Sir Ivor Richardson:

> We can no longer depend almost entirely on self education by the individual judge, supplemented by informal discussions with judicial colleagues. A more systematic and professional approach is needed.[38]

On this issue, Richardson adopts the American approach described by Li by observing:

> The reservoir of knowledge and social experience of judges needs to be supplemented by an educational programme... [F]ormal judicial education programs are, I believe, the most effective means of gaining information and insights; of stimulating awareness of changing social and economic perspectives and values; and generally of enabling us to keep abreast of all those facets of our work in changing times.[39]

Most recently, Wood, a justice of the Supreme Court of New South Wales, argues that it is virtually impossible to justify or measure the success of judicial orientation upon proof of need. The more relevant consideration is whether it is desirable and beneficial for judicial officers. Unlike Samuels, Wood asserts that the fact that continuing judicial education is rapidly growing in the US and Canada is a good starting point that it is strongly accepted in England and Wales and is expanding there, is stronger evidence of its value.[40]

Wood argues after an examination of judicial education in various countries that judicial orientation training and continuing education are valuable and should be pursued.[41] He argues the case for judicial education - specifically orientation - in terms of the prevention of error:

> Avoidable errors in the conduct of trials, whether civil or criminal, involve considerable wastage of direct costs to the parties and the community. They are

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36 *Ibid* at 56.

37 For this reason, judicial education should not be compulsory, *ibid* at 58.

38 Sir Ivor Richardson "Changing Needs for Judicial Decision-Making" (1991) 1 *Journal of Judicial Administration* at 61 at 61.

39 *Ibid* at 68.

40 Note 4 *supra* at 22.

41 *Ibid* at 24.

> measurable; the indirect costs in terms of delayed lists, wasted demands on hard pressed prison and support services and the social services system, and the social and emotional harm to prisoners and civil litigants are not so easily measurable but they are nonetheless real.[42]

Inevitably, Wood argues, there will be error and serious error, at first instance. Much of that error is obvious to experienced judges sitting at appellate level, and commonly the impression is gained that with orientation training and systematic dissemination of relevant decisions, it could have been prevented. The possibility that a judge will ultimately be held to be in error is an "inescapable" part of our system of administration of justice, which is also acknowledged by Gleeson.[43]

Wood argues that the avoidance of obvious mistakes in even a small proportion of the many thousands of trials conducted in Australia each year would justify orientation training in the crude terms of cost benefit alone.[44] The benefits are, however, much wider, because what is on offer is the enhanced respect for a judiciary which is able to deliver justice more efficiently and effectively.

This recognition of need is shared by the Bar from where most judges are selected. Chernov, as President of the Law Council of Australia, argues:

> There is a real risk if the pressures continue to grow (increased workload, lower quality appointees, less retention) and the conditions of service further erode, that it (orientation training) will become essential so as to guarantee minimum standards of competence... At the expense of stating the obvious, none of those aids is a substitute for the diligence, learning or the decision-making process that forms part of the onerous task that a judge is required to fulfil. But, properly understood and applied, skills training can facilitate a more efficient disposition of cases and thereby reduce the cost of justice.[45]

These calls have from time to time been taken up by government or in the press, as was seen in a recent case involving public censure of a judge's remarks in a "rape in marriage" case.[46]

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42 *Ibid* at 24.

43 AM Gleeson "Judging the Judges" (1979) 53 *ALJ* 338 at 344.

44 Dowsett dismissed an earlier argument similar to this as reflecting a "rather superficial and crude approach" to the function of appeals (note 26 *supra* p10); Wood cites 783 new appeals filed in the Court of Appeal, and 885 additional new appeals in the Court of Criminal Appeal in the Supreme Court of NSW during 1991. In the Court of Criminal Appeal the overall success rate of appeals ran at about 40 per cent, although it obviously differed according to the type and origin of the appeal, *ibid* at 23. Any fractional reduction in the volume of these appeals would create substantial cost savings in direct and systemic terms.

45 A Chernov, unpublished occasional address, 27th Australian Legal Convention (1991), referred to in Oct 1991 26 *Australian Law News* 9 at 14.

46 This case involved a judge of the Supreme Court of South Australia, Bollen J, and incited vigorous public debate centring on the comments and attitudes of the judge, leading to calls for judicial education: see also, in this regard, McGuinness note 2 *supra*. This case was ultimately taken up by the Prime Minister in the 1992 federal election as allegedly evidencing a need for judicial education. This education is to be government funded with accountabilities attached. The manner of the government's response to this case was seen in judicial circles as not being warranted in the absence of any judicial needs assessment; and as being self-

Finally, it is argued that empiric research confirms a recognition of the need for judicial education broadly held both within the ranks of the judiciary itself, and throughout all branches of the legal profession. The detailed findings of this research are outlined beneath.

To sum up, the intensity of this debate may, at first, seem surprising - that is, until the significance of any suggestion of an underlying threat to judicial independence, and the traditionally informal and self-directed judicial approach to professional development are fully recognised.

Judges, by reason of their position and experience, have had difficulty acknowledging a need for formalised continuing education, particularly if it is externally imposed.[47] Judges are also understandably challenged by any suggestion that they may be anything but consummately competent.

It is argued by Lord Hailsham and Justice Dowsett, at one extreme, that judicial education is anathema to merit selection: properly selected appointees to judicial office are innately experienced and skilled - if you're good enough to become a judge, then you're good enough not to need to be educated how to become a judge - a delightfully self-serving position. At the other extreme, it is argued that formalised judicial training is essential.

More recently, there is growing evidence of an emerging moderate view which acknowledges that continuing education can assist judicial officers to perform their duties. It is argued by Kennedy and Wood, proponents of this middle view, that judicial induction training and continuing professional development can reduce the incidence of "inescapable" judicial error, and facilitate the continual enhancement of judicial competence.

Ultimately, this debate must be resolved at the philosophic level. On detailed analysis, the objections of opponents to judicial education are predicated on the view of need as a deficit. This pre-supposes shortcomings in the competence of the judiciary and, arguably, implies judicial incompetence. Having regard to the merit selection process for appointment to judicial office in Australia, this is inappropriate and provides the basis for a forceful distinction with the American situation. However, if need can be seen in terms of development rather than deficit, then this objection is irrelevant in any debate on the need for education. The effect of this is to re-focus the debate from the need to remedy deficiency to the need for

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serving, opportunistic, intrusive and a deliberate violation of judicial independence - hardly conducive to generating a credible and effective learning environment. The episode illustrates some of the many practical difficulties of relying on external appraisal of the need for judicial education.

47 An example of the volatility of this issue was illustrated in the unusually public judicial furore surrounding the establishment of the Judicial Commission of New South Wales, which was perceived as being externally imposed by the executive onto the judiciary in 1986. See media coverage of debate between Chief Justice Sir Laurence Street and Justice Samuels reported in *The Sydney Morning Herald* during 1986.

ongoing professional development. What remains of the arguments opposing the need for education are in fact arguments against excessive institutionalisation of the education process, which relate essentially to the means of providing education, rather than whether or not it is needed.

If this is accepted, then the critical question in this debate is ultimately the extent to which meeting educational needs should be formalised and systematised. This question - to what extent judges should continue to meet educational need through informal self-directed learning as opposed to a formalised education program - becomes critical at the curriculum development and instructional design stages in providing that education. At that point, the objections relating to impairment of status and independence can more properly be addressed.[48]

Thus, it is argued that there is increasingly a recognition of the need for and value of continuing education within the ranks of the judiciary. This need comprises two elements:

(a) a need to train and educate new appointees to assume office, to facilitate the transition from advocate to adjudicator, and to bridge the gap between inexperience and experience; and,

(b) a need to facilitate the ongoing professional development of judicial officers.

V. TRAINING NEEDS ANALYSIS - THE RATIONALE

Education needs have been assessed over the centuries. However, it was only in the 1960s that they become more formalised when federal grant programs for education responded to calls for increased accountability and performance in the United States. In Brockhaus' words:

> Need assessment is both cost effective and essential for adult education programs which are very expensive to run. Accountability is increased because needs assessments provide a rational basis for decisions and increase the likelihood that

48 Many judicial apprehensions towards Continuing Judicial Education are compounded by inappropriate connotations arising from "an awkward question of nomenclature" of judicial 'training' and even 'education', suggesting a schools-based pedagogical approach to the process. These problems are so acute that they are specifically commented on by the Judicial Studies Board, *Judicial Studies Board Report for 1983-1987.* The other objections can also be addressed at this stage, for example, to ensure preservation of the proper status and independence of the judiciary by conducting education programs controlled by judges themselves, in a process discrete from public scrutiny, which is also sensitive to the essentially self-directed character of much judicial learning.

> programs will be successful. As the cost of programs increases, the importance of needs assessments increases.[49]

What has followed in the succeeding thirty years has been a steady increase in the systematisation of this process. In broad terms, training needs analysis is the means by which educators justify educational intervention. It is the first step in identifying educational activities that will help judges or any other personnel improve their performance.[50]

Hudzik defines educational and training needs assessment in terms of problem diagnosis. He sees it as a process of gathering and analysing information which identifies problems and opportunities which can be addressed through education and training. Educational needs assessment is concerned with providing data which leads to instructional solutions for performance deficiencies for those working in the court system.[51]

> Needs assessment helps identify what should be taught to whom, when, how and why. In a world of limited resources, needs assessment also helps set educational priorities.[52]

Not all planning situations, however, may require a needs assessment. The resources of time, energy or money may not be available. As Sork argues:

> Needs assessment is not an essential step in designing effective and efficient continuing education programs. Some method of justifying and focusing programming efforts is often required, but legitimate alternatives to needs assessments should be considered.[53]

The purpose of any training need analysis is to provide information for planning and may result in identification of goals, determination of goal attainment, and the specification of what resources should be allocated for the exercise.[54] Pennington argues that training assessments accomplish three purposes. They promote analysis of clientele, identify program topics or content, and provide a means for the systematic identification of discrepancies that can be reduced by instructional intervention.[55] The results of need assessment activities accordingly can have a major impact on persons who provide instructional leadership by providing

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49 B Brockhaus "Needs Assessment in Adult Education: Its Problems and Prospects" (1984) 34 *Adult Education Quarterly* 237.

50 Note 7 *supra* at 3.1.

51 JH Hudzik note 6 *supra* p 8-10.

52 *Ibid* p 2.

53 Note 11 *supra* at 127.

54 Note 8 *supra* at 3496.

55 FC Pennington (1985) note 12 *supra* at 3493.

reasoned descriptions of the clients and their needs. In addition, needs assessment can be useful in eliciting political support for programs and services.[56]

Pennington recounts that needs assessment has been called "a difficult process surrounded by fuzzy thinking" on the one hand, and the most persistent shibboleth in the rhetoric of adult education program planning, on the other.[57] He argues a middle course: that training needs analysis brings with it the notion of methodological validity and systematic rigour which can make "a potent contribution" for allocating resources to plan, implement and evaluate programming for adult learners.[58] He argues that the literature indicates widespread dissatisfaction with the infrequency of careful assessment activities and the lack of clear guidelines for such activities, adding that:

> [n]eeds assessment studies do not necessarily produce sound "hard" data; rather, they are imperfect efforts for assessing, as yet, poorly understood concepts. It is impossible to plan without the type of data generated by such studies but much work remains to be undertaken to improve such studies before they can be used in a routine way.[59]

Despite these shortcomings, Pennington argues that results from needs assessment studies provide both baseline data for making summative evaluation judgments regarding program impact, and planning data for projecting alternative mechanisms to reduce the gap between current and desired circumstances. These results can:

> help curtail the application of anaemic interventions by zealous continuing education practitioners to problems of major complexity and substantial difficulty.[60]

For Hudzik, the outcome of the needs assessment process should include the documentation of a gap in performance terms, which is attributable to discrepancies in knowledge, skills, attitudes or competences, which can be addressed and which stands a reasonable chance of positively affecting performance.[61]

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56 JH Hudzik note 6 *supra* p 9. "Training needs analysis can serve as a marketing device for convincing the judicial education governing authority and potential participants that educational resources should be applied to addressing the problem or opportunity".

57 FC Pennington (1980) note 12 *supra* at 1.

58 *Id*

59 FC Pennington (1985) note 12 *supra* at 3495.

60 FC Pennington (1980) note 12 *supra* at 100.

61 JH Hudzik note 6 *supra* p 36. Well designed programs must deal directly with specific, achievable performance changes that are important to the adult learner, are amenable to educational intervention, and can be readily documented beginning with a careful description of current and desired behaviours. The process of generating this description and understanding the magnitude of the discrepancy between the current and desired situation is the core of an effective needs assessment strategy.

In essence, therefore, the rationale for formalised needs analysis is primarily accountability. Overlaid on this usually externally-imposed requirement has been a trend towards an increasingly "scientific" approach. This has often led, it is suspected, to the effect of confounding the obvious - that is, to meet the simple need to research and plan the nature of any educational intervention to ensure its effectiveness.

VI. TRAINING NEEDS ANALYSIS - METHODOLOGY AND TECHNIQUES

Educational needs analysis identifies instructional solutions for performance discrepancies. This process has until recently been non-formalised and, in practice, frequently retains an intuitive component. For informed and systematic educational planning, however, there is clearly a need for data. This data plays an important role in integrating objectives with outcomes, and reconciling needs assessment to evaluation, in what Ulschak has described as a perpetual training cycle.[62]

There is no single "right" methodology for data collection, provided that the data collected has validity and reliability.[63] Most needs assessments employ a variety of

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62 Training operates within a cycle comprising the following spokes: first, analyse the performance (what problem or discrepancy is the education supposed to solve?), then set performance standards, conduct the assessment, then define training objectives, design curriculum, select delivery methods to match learning styles; design evaluation approach, conduct training, measure results, review attainment of objectives against the initial assessment and finally refine and recommence the cycle. Where educational programming is ongoing, evaluation provides data directly to the next round of needs assessment and program planning. In this sense, needs assessment and evaluation are closely linked and integrated within a perpetual cyclical relationship. For a classic conceptualisation of the training cycle see F Ulschak note 6 *supra* p 9.

63 According to Witkin, there is no one model or conceptual framework for needs assessment that has been universally accepted, and there is little empiric evidence of the superiority of one approach over another. Moreover, there often appears to be an inverse relationship between the elegance and completeness of a model and its widespread acceptance and implementation - BR Witkin *Assessing Needs in Educational and Social Programs* (1984) p 29.

There is a general set of steps associated with nearly all systematic educational needs assessments:

(a) Planning - to determine general parameters and direction of inquiry, how wide to cast the assessment.

(b) Data selection - objective data is hard, verifiable data which can be objectively analysed (eg case processing records, court performance audits, research findings on court operations, expenditure on problems and reports etc), or judgmental/opinion data which may be a substitute for opinions on problems and solutions too expensive or clumsy to measure objectively; or a combination; encompasses experts' observation, experience, understanding, and personal anecdotes can be supported by data.

(c) Sources - staff, advisory bodies, consultants, target audience, clients, employees.

(d) Collection methods -

i. document search regarding courts' operations which may support an inference of educational and training needs (eg bench guides, legislation, journals, court rules and procedural manuals);

systematic methods to collect data from persons who can affect or are affected by the problem being examined.[64] The data can be objective and quantitative, or more subjective and qualitative.[65] Traditionally, there has been a leaning towards the former, scientific approach as being more credible and likely to supply valid and reliable data upon which to base planning and decision making. However, more recently, the value of combining qualitative, even anecdotal, data has become recognised, resulting in greater integration of both approaches of methodology.

There are a number of different approaches to assessment methodology. Some of these include what Pennington describes as:

(a) *diagnosis or medical model* - this approach describes need in terms of a performance deficit, and views need as something whose absence or deficiency proves harmful;

(b) *analytic model* - defines a direction in which improvement would occur given information about the status of a person or a program, focusing on improvement rather than remediation;

(c) *democratic model* - involves interactive and collaborative efforts using nominal/delphi methods to problems, establishing consensus and addressing dissonance.[66]

In practice, realities of staff, time and money, availability of expertise and organisational politics will contribute as much as any other reasons to the final selection of approach.

The approach most frequently used in judicial education is the democratic model of assessment. Experience illustrates that the classic diagnostic model is, at least for judicial officers in New South Wales, inappropriate for three reasons. First,

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ii. observation of job analysis; performance appraisal method called the critical incident technique - and identifying performance gaps on which to focus priority programming;

iii. focus groups, committees, brainstorming; problem diagnosis (gap analysis/condition analysis/strategic thinking);

iv. surveys, questionnaires and interviews: oral written, open (qualitative interviews) and closed (scaled question instrumentation eg y/n ranking, Likert Y-Neutral-N; 6-point scale incidence scale, importance/priority ranking). Provides information directly from participants, and involves them in process; job-analytic survey instruments job/task and performance, or anecdotal inquiry: task inventory; perceptions of proficiencies and deficiencies: self-report.

(e) Sampling issues - population, random, purposive, convenience, stratified.

64 FC Pennington (1980) note 12 *supra* p 8.

65 "Qualitative" research favours the view of social reality which stresses the importance of the subjective experience: the principal concern is with an understanding of the way in which the individual creates, modifies and interprets the world in which he or she finds herself; compared with a view which treats the social world like the natural work - as if it were a hard, external and objective reality: this investigation analyses the relationships and regularities between selected factors in that world, and is described as "quantitative".

66 FC Pennington (1980) note 12 *supra* p 5-7.

judges appointed on merit challenge any implicit premise of a need for remediation which may be inherent in alternative approaches. Secondly, judges generally hold strong views on collegial equality, as an integral element of the doctrine of judicial independence (that is, judges must remain free from influence - both from outside and also, within the judiciary). Finally, judges tend to regard any suggestion of performance appraisal - other than through the formal appeal process - as anathema to judicial independence.

As a result, educators usually adopt the democratic approach to identifying need as the means most likely to secure judicial support and a sense of ownership in the process, rather than hostility and non-participation. The shortcomings of this approach are, of course, that it frequently lacks critical or analytical vigour, and its insights may be limited to the perspicuity of its participants. Reliance on self perceived needs is potentially useful, but hardly sufficient. The limitation of individuals to diagnose their own needs, as distinct from wants, is well documented.[67]

Within the framework of these broad approaches, there is a choice of techniques which is outlined by Ulschak:

(a) *Classic methods* - these consists of obtrusive techniques such as surveys and questionnaires, consultations, interviews, group discussions, and skill tests; and unobtrusive techniques, such as observation of work performance, inspection of records and work samples.

(b) *Workshop methods* - these consist of more innovative, participatory techniques including search conferences, delphi, critical incident, nominal group and functional job analysis techniques, performance appraisal and exit interviews. Brainstorming is an essential element of many of these approaches where there is a need to obtain a broad range of ideas, without any initial critique, in order to undertake detailed analysis and appraisal subsequently.[68]

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67 Note 7 *supra* at 3.2. Notwithstanding, self-diagnosed needs, whether authentic needs or really simply wants, have a special significance for adult educators. They reflect the perceived concerns and priorities of the client body whose motivation and participation is integral to any effective educational response. Conversely, there will of course also exist needs which may not be consciously felt, but which can nevertheless still be real and of particular importance.

68 F Ulschak note 6 *supra*:
Nominal group is a group process which incorporates the creative features of brainstorming into a controlled framework for needs analysis, problem-solving and decision-making. Using groups of experts selected to frame an answer to a specific research question (eg what are the essential competences a judge must exhibit on day one of the job). A common variant of this method in judicial education is the *focus group*, which can be special gatherings of standing education committees with a designated needs analysis project. This approach can be more dynamic than survey technique, but can also be frustrating and diverting with the usually dysfunctional dynamics of any such group of experts. (p 101-2)

It can be observed that many of the theoretical techniques of data collection[69] are drawn from the literature of human resource development or corporate settings. In practice, many of these are not appropriate or applicable in the judicial context where decentralised, independent or semi-independent trial court personnel systems predominate.[70] Skills testing, for example, while conventional in occupational training or any schools-based systems, is unacceptable to judges who are sensitive to preserve the independence of their position, and uncomfortable in surrendering the authority and credibility of their role in any other than a formal appellate process; inspections of management records may only be possible through the co-operation of separate court service departments; and appraisal of work is limited in any judicial management model to an analysis of appeals and complaints data.

For this reason, the practice usually adopted by judicial educators in the United States makes heavy use of information coming from surveys, questionnaires and interviews of participants and program evaluations. Formal needs assessments are

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Delphi is a forecasting and planning methodology developed in the 1950s for organisational purposes. The technique involves a series of questionnaires which successively refines and recirculates participants' responses providing an anonymous process within which to reflect and refine responses against the responses of others in the group, until ultimately a consensus evolves. Delphi technique has particular potential usefulness with participants where individuals can dominate by status - such as in a mixed workshop of judges and administrators - rather than ideas. The approach is flexible and provokes reflective appraisal, but requires considerable time from participants and active management by the facilitator. (p 111-2)

Critical incident is perhaps the most direct behavioural link of any needs assessment approach, which consists of brainstorming over direct observations of job related incidents and behaviour which have special practical significance in solving key work problems. The ultimate outcome of these workshops is a description of observable behaviours that are "critical" to the effective performance of a defined activity. The incident must occur in a situation where the action and its consequences are determined to be critical to performance of the work, either negatively or positively, such as, for example, particular techniques in managing counsel expeditiously in complex litigation. (p 133-4)

69 Some different techniques for collecting data include:

(a) *participation-demand approach*: this draws its information from the records of adult-learning institutions regarding course usage and requests. It describes actual user-behaviour as the indicator of need;

(b) *educational experts approach*: involves a committee of expert program planners who share experience and rests on actual participation and vested interests of providers;

(c) *key-informant approach*: key persons are selected on the basis of prestige-rating questionnaires or by public officials; defines need in terms of own perspectives;

(d) *community forum approach*: information gathered from broader community meetings. Simple and cheap to design; obvious needs, limited perceptions.

(e) *community survey approach*: this is the only systematic process by which data is collected directly from a sample of the entire population living in a community. The personal expression of needs by all adults serves as the basis of the establishment of new educational programs. The major advantage of this approach is that well conducted surveys can give the most valid and reliable information on all needs existing in a community. Each of the above strategies has an implicit theoretical orientation towards the definition of need and each varies in the degree of reliability and validity of the obtained measures and utilised different measuring instruments. FC Pennington (1985) note 12 *supra* p3494-5.

70 JH Hudzik note 6 *supra* p10.

used "only occasionally or not at all". Both national and state judicial education organisations rate the impact of "external influences" (that is, new legislation or court decisions), as providing informational input to the planning process relatively highly.[71] As will be outlined below, the approach adopted in New South Wales is somewhat more methodical.

Data from surveys, questionnaires and participant interviews provides, at best, a barometer of participant satisfaction - a very distant measure of educational effectiveness. Such data frequently ranges from the incidental to the anecdotal and, in formalistic terms, has limited quantitative value. For this reason, Pennington observes that meaningful surveys are much more difficult to conceptualise and undertake than any of the other form of needs assessment.[72] Such instruments can, nevertheless have value as an important visible means to promote a sense of ownership within the client body, thereby instilling a participant's stake in the process, and enhancing the integrity of the outcome and its likely implementation.

It follows, therefore, that the literature on educational needs analysis is frequently inappropriate or inapplicable to the judicial context. This calls for the development, application and testing of distinctive needs analysis techniques for judicial education.

VI. EMPIRIC RESEARCH

A study of the motives of participants in continuing education is revealing of their perception of the need for continuing education and, in particular, their assessment of the nature and character of specific educational needs, their importance, and how these needs can be met. Such studies usually rely heavily on survey techniques which can supply a volume of both quantitative and qualitative data. This data is likely to be integrated with data from a range of other sources to contribute to the overall findings of the needs analysis process.

A. ADULTS' REASONS FOR PARTICIPATION

The formal study of reasons for participation in continuing education commenced in the United States with research of adult learning practices in the mid 1960s. This research enjoyed rapid growth in the 1970s largely due to increases in tied funding flowing from the *Omnibus Crime Control and Safe Streets Acts* 1968 and 1976 under the federal Law Enforcement Assistance Administration program.

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71 JH Hudzik "Issues and Trends in Judicial Education" (1991) 132.

72 FC Pennington (1985) note 12 *supra* p 5.

The pioneer research into reasons for participation in adult continuing education was undertaken by Maslow and Houle and resulted in the development of a number of motivational models, which have been widely endorsed and have served as the basis for most subsequent research.[73] Research methodology was developed in 1964 with Sheffield's *Continuing Learning Orientation Index* which assessed the learning, sociability, personal-goal, societal-goal and need-fulfilment orientations of adults. Shortly afterwards, the research of Johnstone and Rivera in 1965 recognised that adults participate in continuing education for a variety of reasons: to become a better informed person, prepare for a new job, improve present job abilities, spend spare time enjoyably, meet interesting people, carry out everyday tasks, and get away from daily routine.[74]

In 1971, Boshier developed an *Educational Participation Scale* which built on Houle's learners' typology with a number of qualifications, noting greater complexity in his findings on the reasons for participation.[75]

At about the same time, Burgess developed a *Reasons for Educational Participation Scale* which identified seven key factors or desires influencing participation. These were the desire to know, the desire to reach a personal goal, the desire to reach a social goal, the desire to reach a religious goal, to take part in social activity, to escape, and to meet formal requirements.[76]

B. PROFESSIONALS' REASONS FOR PARTICIPATION

While the preceding discussion demonstrates that a body of study on the reasons for participation in adult education has recently emerged, there has been a relative dearth of research on the reasons for participation in continuing professional development.

In his seminal study of twenty-three professional groups, Houle concludes that continuing professional education is distinct from other forms of adult education and involves a separate body of knowledge , inquiry, research and practice. Houle demonstrates that professionals' reasons for participation in continuing education

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73 Maslow, for example, developed a conceptualisation of need in terms of a hierarchy of five levels of needs in response to which human behaviour could be categories. These levels are survival, security, acceptance, esteem and self-fulfilment. This model was endorsed and adopted by SM Knowles *The Modern Practice of Adult Education* (1980) and *The Adult Learner: A Neglected Species* (1984) as a fundamental part of his theory of adult learning, A Maslow *Motivation and Personality* (1970).

74 JW Johnstone and RJ Rivera *Volunteers For Learning* (1965).

75 Houle classified adults in terms of their learning predisposition from laggard, at the one extreme, to pacesetters at the other; and further developed a learners' typology which classified learners as being goal orientated, activity orientated, or learning for its own sake, CO Houle *Continuing Learning in the Profession* (1980). See also KP Cross *Adults as Learners* (1981).

76 P Burgess "Reasons for Adult Participation in Group Educational Activities" (1971) 22 *Adult Education* 1 at 17-18.

generally tend to be more refined that adults at large, and are usually job related. They participate in continuing education for functional purposes rather than for the sake of learning per se, and focus more closely on the job relationship and career development. For most professionals, continuing education is seen as a means to assist them with new duties or to prepare them for promotion.[77]

In 1979 Groteleuschen, Harnish and Kenny developed the *Participants' Reasons Scale* (PRS) for use with business executives. This approach involved a refinement of methodology as the result of finding that the previous general research methodologies and instruments were too broad to be of practical value in a study of continuing professional development. The PRS developed a more narrowly focused model with supporting instruments and research methods - including sophisticated factor analysis techniques[78] - to identify reasons, variable characteristics and factors influencing the participation of professionals in continuing education.[79] Subsequently, other researchers have adopted and developed the PRS to a number of other studies of professionals' reasons for participating in continuing education.[80]

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77 CO Houle note 75 *supra* at 96-120. Groteleuschen endorses this conclusion, and argues that there is a need for an alternative approach to research on reasons for participation in CPE which will both address the particular needs of this area of practice and narrow the gap between educational theory and practice. He argues that the specialised status of CPE affects how we conceptualise, study and practice it AD Grotelueschen "Assessing Professionals' Reasons for Participating in Continuing Legal Education" in R Cerveno (ed) *Problems and Prospects in Continuing Professional Education* (1985) 33 at 34.

78 Factor analysis is a statistical method to determine the degree to which a large number of variables, in this case the judges' responses to the PRS items, cluster together to form identifiable underlying patterns of relationships. These empirically identified relationships, referred to as "factors", theoretically represent the dimensions underlying judges' reasons for participation (see AD Groteleuschen *ibid*). Many subsequent studies have used factor analysis to test this typology; also a number of instruments to operationalise the typology:
Sheffield's Continuing Learning Orientation Index (1964) identified five factors: learning, sociability, personal-goal, societal-goal and need-fulfilment orientations.
Boshier"s Educational Participation Scale (1971) identified four factors: other-directed advancement (probably vocational environmental pressure), learning orientation, self v other centredness, and social contact.
Burges Reasons for Educational Participation Instrument (1971) pp 17-18: identified factors of desire to know, reach a personal goal, reach a social goal, reach a religious goal, take part in a social activity, escape, or to meet formal requirements.

79 AD Groteleuschen, DL Harnish and WR Kenny "Research on Reasons for Participation in Continuing Professional Education: A Statement of Position and Rationale" (1979) *Occasional paper no 7*, Office For Study Of Continuing Professional Education, University of Illinios at Urban-Champaign. The PRS is based on three assumptions: that attendance is purposive - PRS statements are attainment orientated and yield purposive explanations of participation rather than causal explanations; that reasons have a primarily educational focus (and do not deal with PR etc); and that it is necessary to explore non-traditional reasons which are responsive to the demands of the professional role.

80 DL Harnisch *The Continuing Education Reasons of Veterinarians* (1980) unpublished doctoral dissertation, University of Illinois-Urbana; Cervero R (1981), "A Factor Analytic Study of Physician's Reasons for Participation in Continuing Education" 56 *Journal of Medical Education* 29-35, where a 34 point PRS was

In 1991, Roper undertook a study of the reasons of senior solicitors in New South Wales, which is of specific relevance to any study of judges' reasons for participation. Roper used a PRS modified on the methodology of Groteleuschen. He identified and tested a number of underlying factors into which reasons for participation could be classified. These were immediate professional improvement and service, collegial learning and interaction, longer term professional improvement and service, professional commitment and preferred way of learning.[81]

The conclusions from this study found that keeping up to date and improving abilities in areas of regular day to day work were the first two reasons for participation by respondents. Conversely, the study found that respondents ranked the use of continuing legal education (CLE) in non-regular areas of work much lower. Roper found a strong client service orientation disclosed by respondents who then ranked meeting clients' requirements, improved proficiency and productivity as the next most popular reasons for participation.

Of less significance as reasons for participation, Roper found that mandated requirements were ranked relatively lowly. He found that respondents did not see CLE as a preferred way of learning by reason of its structure, digestibility and efficiency; improvement of income was not identified as a strong reason for participation, nor did specialists rate the reason 'back to basics' highly; respondents did not rank the development of new professional knowledge of skills in new areas or other disciplines highly, nor was CLE seen as a means to meet new clients.[82]

Analysis of the underlying factors influencing reasons for participation identified the dominant underlying factor influencing participation as professional improvement, which translates itself into service to clients. Collegiality, translated into learning and interaction with professional peers, was next in significance. In addition to the primary finding of responding to the immediate need of keeping up to date and improving in areas of current practice, the study also differentiated longer term needs underlying participation (such as widening knowledge in other areas of law and non-legal areas, as well as career redirection). Finally, the study found that professional commitment served as a factor which encompassed an orientation of practitioners to use CLE to reflect on their professional

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used: and C Roper *Senior Solicitors and their Reasons for Participation in Continuing Legal Education* (1990) unpublished masters thesis, Macquarie University.

81 Roper researched the relationship between a number of practice-related variables and their influence on practitioners' reasons for participation. These variables include demographic and work environment characteristics, respondent role in their practices, the extent of participation in CLE, time in practice, and the extent of current work involvement, C Roper note 80 *supra* p 146-56.

82 *Ibid* p 181.

responsibilities, assess the direction of the law, and to meet professional mandatory requirements.[83]

Although there is no equivalent data available on barristers who practice in the other branch of the legal progression - and while there are a number of significant differences between the occupations of solicitors and barristers - it is surmised that many of the attitudes to professional development and the underlying factors influencing participation may be common to both branches of the profession. It is from the ranks of these legal practitioners, most commonly practising at the bar, that judges are selected.

It follows that the extent and nature of any commonality between legal practitioners and judges regarding the attitudes and underlying factors influencing participation should be assessed.

C. JUDGES' REASONS FOR PARTICIPATION

It has previously been remarked that reasons relating to job promotion and financial reward have been empirically identified as featuring significantly in the motivation of adult and professional learners generally.

Appointment to judicial office and the environment surrounding judicial tenure are distinctively different to most career development opportunities. Appointment, at least in Australia and Britain, is on merit from the selected ranks of the most able members of the profession, rather than seniority or popularity. Once appointed, there is generally no further prospect of promotion. Nor is there a prospect of increased remuneration in response to the acquisition of further qualifications.

Under these circumstances, it should not be assumed that the reasons of judges for participation in continuing education will be the same as for other adults or professionals. It follows that a specific study of judges' reasons is important to shed light on the characteristic attitudes, reasons and underlying factors influencing judges' participation in Continuing Judicial Education (CJE). Such a study would assist in defining the nature of the need for continuing judicial education, and appropriate means of meeting that need.

The reasons for judges' participation in continuing education were extensively researched by Catlin in 1981. The purpose of Catlin was to study the relative importance which judges as a group place on reasons for participation in CJE, identify factors which represent the underlying dimensions of reasons for participation, analyse the relationship between selected judicial characteristics and

83 *Ibid* p 182.

the identified participation factors, and examine the implications of the research findings for CJE planning.[84]

Catlin surveyed the population all Michigan trial judges (n 532) in 1980 utilising a Participants Reason Scale, with a rate of response of 76 per cent. Responses underwent factor analysis to identify participation factors representing underlying patterns of relationships in the responses. These findings were then employed to examine relationships between the empirically derived participation factors and the personal and professional characteristics of respondent judges.[85]

The findings of this research disclosed that judges as a professional group place high importance on the reasons for participation which are related to keeping abreast of new developments in the law, being competent in their judicial work, matching their knowledge and skills with the demand for their judicial activities and improving their ability to respond better to the questions of law presented to them.

Judges' reasons for participation were found to be multi-dimensional and more complex than might previously have been believed.[86] Three factors emerged from representing the underlying dimensions of the respondents' reasons for participation which, in rank order of importance, were judicial competence, collegial interaction, and professional perspectives:[87]

(a) *judicial competence* - The need to maintain an acceptable level of competence and develop new judicial skills, to develop proficiencies necessary to maintain quality performance, and to keep abreast of new developments are all regarded as very important reasons for participation. The emergence of the judicial competence factor in these findings suggests

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84 DW Catlin *The Relationship Between Selected Characteristics of Judges and their Reasons for Participation in Continuing Professional Education* (1981) unpublished doctoral dissertation, Michigan State University; and DW Catlin "An Empiric Study of Judges' Reasons for Participation in Continuing Professional Education" (1982) 7/2 *The Justice System Journal* 236 at 256.

85 The independent variables tested were age, sex, marital status, time since degree, whether other degrees, tenure as judge, tenure on current bench, current court level , number of judges on court, status as chief judge, levels of past participation in CJE.
The means and standard deviations for responses to the participation scale were computed to examine the relative importance judges placed on the reasons for participation. A factor analysis was then conducted to identify the major participation factors. Coefficient alpha estimates of scale reliability were computed for the emerging factor scales. Correlation and discrimination analysis techniques were then employed to examine the relationship between the characteristics of the respondents and the participation factors, *ibid* p70.

86 Catlin argues that it is wrong to assume that participation is primarily a function of program content, and thus to concentrate solely on assessing content needs in formulating curricula and designing programs. Other planning issues identified as factors and variables in this research must also be taken into account. DW Catlin note 84 *supra* at 237 at 237.

87 DW Catlin (1981) note 84 *supra* at 120.

that judges do place significant importance on maintaining and developing their professional skills and keeping abreast of the law.[88]

(b) *collegial interaction* - This relates to the need for interaction, exchange of ideas and thoughts, and the need to be challenged by the thinking of colleagues. This factor suggests that program design must allow adequate time for judges to interact constructively and learn from their colleagues through a variety of structured educational experiences including problem solving workshops, and small group discussions.

(c) *professional perspective* - Items loaded on this factor are associated with the professional role of the judge, such as to assess the direction their profession is going and to maintain identity with their profession. This factor suggests that judges participate to reinforce their identity in that profession. The factor indicates that judges see in CJE the opportunity to develop a perspective of their professional role, review their commitment to their profession and develop leadership capabilities in their profession.

These findings have been colloquially endorsed by the findings of a survey conducted by the Canadian Judicial Centre in 1991:

> Judges felt the best part of the training was to meet and share with other judges, that the education was practical and the instructors good, as was the updating on substantive law.[89]

Catlin found that significant relationships exist between judges' orientation to these participation factors which vary according to their sex, years since qualifying, tenure on current bench and court level currently served. Non-significant results were found with characteristics of age, marital status, tenure, number of judges in the court, and status as chief judge.[90] The significant relationships include:

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88 DW Catlin (1982) note 84 *supra* at 253-4.

89 Canadian Judicial Centre *Standards Survey Results* (March 2, 1992) unpublished memorandum. These findings reflect the strong and widely held view of most participants that judicial (or indeed any other continuing) education must be relevant and useful on the job: participants must acquire the knowledge and master the skills that constitute day to day practice. To do so, they must be sufficiently motivated to change their behaviour by applying their new proficiencies to their work situations.

90 For example: more female judges placed a high value on competence than did male - this was consistent with women professionals tending to be more highly concerned with their professional competence in order to prove themselves in their professional role (DW Catlin (1981) note 84 *supra* at 128-9); more recent graduates were orientated to the reasons associated with the professional perspective factor and development of a professional identity; newer judges placed greater importance on the judicial competence factor than did older judges, having new skills to learn; DW Catlin (1981) note 84 *supra* at 115-118.

i. sex of responding judges is significantly correlated to judicial competence - female judges placed a higher value on the participation reasons on this scale than did males;

ii. years since law degree is significantly correlated to professional perspective;

iii. tenure on the current bench is significantly correlated to judicial competence;

iv. level of court is significantly correlated to professional perspective and collegial interaction;

v. level of past CJE participation is significant for all three factors.

In the light of these findings, Catlin concludes that:

> Judges' reasons for participation in continuing professional education revolve around a complex set of needs and may vary based on personal and professional characteristics.[91]

While these results confirm the findings of Groteleuschen and others that reasons for participation may vary within a professional group based on various personal and professional characteristics, they also display a number of significant differences to the findings of other comparable research. In particular, the judges' factor scale, while similar to comparable PRSs administered by Cervero on physicians,[92] display some significant differences, which include:

(a) analysis of judges' responses disclosed greater homogeneity as a professional group than was evident in studies of physicians and veterinarians. This may be consistent with judges really representing a speciality of a larger legal profession;[93]

(b) factors relating to personal benefits, professional advancement and job security were ranked highly by physicians and veterinarians, but significantly lower by judges. This may be consistent with judges perceiving themselves as public officials, now behaving differently from professionals in the private sector.

Catlin observes that "the difference appears most dramatic when the reward system is examined".[94] Judges may participate to develop new skills in order to be more competent but not to increase their income; thus, the development of

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91 DW Catlin (1981) note 84 *supra* at 119.

92 R Cervero "A Factor Analytic Study of Physicians' Reasons for Participation in Continuing Education" (1981) 56 *Journal of Medical Education* 29.

93 DW Catlin (1981) note 84 *supra* at 123.

94 *Ibid* at 125.

competence, in the case of the judge, must be a reward itself. The lack of importance of job security, professional advancement and personal benefits have "serious implications" for purposes of planning education programs.

Comparison between groups suggests that for judges the concept of judicial competence is a factor much broader than professional service, as identified by Cervero or Roper. In addition, judges operate in an environment where there is a lack of any distinctly identifiable patient or client relationship.[95]

It is argued that these distinctions have very significant implications for judicial educators in terms of specially developing the content, planning, promotion and delivery of any program of continuing judicial education.

VIII. THE JUDICIAL COMMISSION EXPERIENCE

The Judicial Commission of New South Wales (the Commission), as part of conducting a scheme of continuing education for judicial officers of the state, has conducted a number of educational needs analyses.[96] These analyses apply various methodologies for a range of purposes, which provide extensive data on the reasons of judicial officers (judges and magistrates) for participating in continuing education and, more broadly, the need for continuing judicial education. Empiric data obtained in the course of this experience is outlined beneath.

A. MEMBERS OF THE NSW JUDICIARY (1988)

At the outset of the Commission's operations in 1988, Riches reports that the Commission conducted a needs analysis which was limited to a survey of reasons for participation by judicial officers in the state, with an overall rate of response of 80 per cent... While this survey adopted the appearance of the PRS model, the findings were not however submitted to factor analysis. These findings disclosed a very low level of continuing education practice.[97] Almost half had not participated recently in any formalised education: fewer than 20 per cent listed their last continuing education activity as a formal seminar or lecture, and a further 25 per cent reported not having participated in CJE at all.[98]

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95 *Ibid* at 126.

96 L Armytage "Towards a Charter of Continuing Judicial Education - The New South Wales Experience" (1991) 9(2) *Commonwealth Judicial Journal* 3

97 Riches defined 'education' for the purpose of this survey as any form of organised activity excluding informal reading of reports or journals. A Riches "Continuing Judicial Education in NSW" 6.2, *Journal of Professional Legal Education* 150 at 155.

98 *Id.*

Riches reports that the findings of this survey disclosed that reasons relating to judicial competence were the strongest motivators. The most important reasons were to:

- keep abreast of current developments;
- maintain quality of my judicial service;
- help me be more competent in my judicial work;
- maintain my current abilities;
- help me improve the quality of service being rendered to the public; and
- exchange thoughts with other judicial officers.

Despite the absence of any factor analysis, Riches noted that the reasons for participation appeared to fall within the three factor groupings identified by Catlin, being professional perspective, judicial competence and collegiate interaction.

In other respects, the survey focused on topic research by ascertaining the views of respondents on useful topics for educational programming. While it may be observed that topic research of this type has a strictly limited value, it is more useful as a means of establishing client relations and has particular importance at the inception of any education program.[99]

B. MAGISTRATES IN NSW (1991)

In 1991, Armytage reports that the Commission conducted an analysis of the specific needs of new magistrates which combined survey and brainstorming techniques in order to justify the perceptions of appointees of their needs on induction, and to obtain an appraisal of perceived usefulness of the existing program.[100]

New magistrates ranked their perceived needs in the following order: collegiate networking and experience-sharing; skills development in the practice of court management and administration, court-craft and the 'art of judging'; information on substantive law; and information on court procedure. Respondents ranked the usefulness of existing educational services.[101] Calls were also made for the

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99 Riches reports that the topics which attracted the largest number of high priority ratings were ranked in the following order: evidence, sentencing, legislative developments, current issues in criminal law, management of complex litigation, and the judicial decision-making process; *Ibid* at 157.

100 L Armytage *Some Insights into the Needs of Magistrates* (1991) conference paper, Annual Magistrates Conference: these findings were integrated with those of the comprehensive survey of judicial officers in 1991, respective to the Local Courts of New South Wales.

101 These were ranked in descending order as being: pre-appointment skills training on court-craft, bench books, and post-appointment refinement of skills based on experience. The court's annual conference, regular update seminars and monthly digest were ranked significantly less highly.

development of an orientation handbook, more update seminars and bulletins, and bench observation and mentor programs.[102]

C. MEMBERS OF THE NSW JUDICIARY (1991)

In the same year, the Commission undertook a comprehensive educational need analysis of judicial officers in New South Wales[103]. The methodology triangulated a range of techniques,[104] which included extensive consultation and brainstorming with standing judicial education committees, open and closed interviews of selected judicial officers and others, a 35-point survey of all judicial officers, appraisal of courts' management data, observations of judicial practice, resource analysis and occupational task analysis.[105] Certain elements of this research warrant specific comment.

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102 L Armytage "New South Wales, Australia Mentoring Profile" (1992) in *Mentoring in the Judiciary*, Michigan State University: JERITT Monograph 2, 52-59: the Local Court developed a formal mentor scheme in 1991 in response to this call, which was evaluated and refined in the following year and now operates to supplement the structured orientation program of the court.

103 L Armytage "Continuing Judicial Education: The Education Programme of the Judicial Commission of NSW" (1993) 3(1) *Journal of Judicial Administration* 28 at 31.

104 Triangulation involves the use of multiple methods of data collection in the study of the same aspect of human behaviour, such as the use of both qualitative and quantitative data comprising observation, interviews, survey results and testing. This approach is suitable where a more holistic view of educational outcomes is sought, and provides a practical means of cross checking validity of data and findings.

105 *Methodology*: At the outset, a number of *key consultations* were undertaken in unstructured discussions with the heads of jurisdiction of each of the state's six courts (Supreme, Land and Environment, Industrial Commission, District, Compensation and Local). These discussions were designed to provide an opportunity for each head of jurisdiction to outline his perception on the role and usefulness of CJE, and served to:

1. establish a core of shared perceptions on the role and usefulness of CJE;
2. nominate preferred strategies, generally directions and management priorities from the point of view of each head;
3. delineate parameters for what was seen as being within the domain of CJE, as distinct for example, from other management strategies such as new technology implementation, caseload management, etc.

These key consultations were then followed by a secondary series of forty-seven *interviews* with those persons having an interest in CJE as designated by pre-defined criteria (including education committee chairmen, interested judicial officers, representatives of Bar and Law Society, public law officers, legal aid, DPP, and central governmental agencies). These interviews were extended both within and beyond the judiciary in order to obtain an informed cross reference of views, on the basis that external perspectives from clients or stakeholders in the justice system are as important as those from within.

These interviews were based on a series of structured questions drawn from the information supplied from the key consultations. The purpose of these interviews was to test the validity of the findings from the key consultations, to assess the degree of variation in the perspective of heads of jurisdiction, and those "experts" with an interest in CJE.

These findings then formed the basis of definitive questioning by *survey* of all judicial officers (258 in total) in relation to actual education experiences, perceived needs, and occupation analysis. Findings were collated, edited and analysed on an SAS database where mean and standard deviations were obtained and the findings were cross-tabulated to a range of variables and characteristics; owing to the survey addressing educational

(i) Interviews

Consultations and interviews for this assessment extended beyond the judiciary itself for the first time to include stakeholders in the justice system who could provide data external to the judiciary to complement that which was available internally.

These external sources of data included profession and client representatives from the Bar, the Law Society and the Legal Aid Commission; representatives of public law officers including the Attorney General, the Solicitor General, and the Public Defender; senior judicial administrators; and others with a declared interest in judicial administration and education. Overtures inviting input were also made to representatives of central governmental agencies, such as the Premier's Office, and the Office of Public Management in the State Treasury.

Data supplied from the interviewing process - both from within and beyond the judiciary - defined specific issues and delineated the broad parameters of expectations held on the need for and possible role of continuing judicial education. As might be expected, sometimes significantly divergent perspectives on particular issues were revealed as being held by judicial officers and those operating outside the judiciary. Two obvious examples of such differences were regarding the need for more methodical introduction of new appointees, and improved case-flow management skills.[106] The data supplied in these interviews was then used to form the basis of the subsequent survey of all judicial officers.

(ii) Survey

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practices and task analysis in addition to reasons for participation, the PRS format was considered to be inappropriate.

In addition, findings from *observations* were supplied by judicial officers, senior administrators, practitioners and client representatives.

Management data was appraised of courts' annual reports, departmental case management data, analysis of appeals and complaints, and related data.

Triangulation of data from all sources of information was relied upon for the findings.

106 *Interviews* generated valuable qualitative data in the form of a spectrum of ideas on the need for CJE which was then the subject of quantitative assessment in the survey of judicial officers. This qualitative input came from within and beyond the judiciary:

Within Judiciary: don't teach judges the law; need practical assistance, "nuts and bolts"; stretch judicial minds, intellectual challenges; self-directed learning; judicial individuality, independence; address the novel and contentious; skills - judgment writing; ancillary support; case indexing, computers, case management, library; facilitate networking, exchange conferences; courts in business of providing service of justice; judges as managers of courts; no problem with competence; pursuit of excellence; model of education with professional standards and selection criteria.

From beyond the judiciary: need efficiency-increasing skills -case/time/people management and communication skills; moderate pursuit of efficiency; quality v quantity; accountability means what; bigger justice issues confronting the judiciary; promote uniformity of practices; loneliness; redress horrendously chronic delays; self realisation; establish community contacts; pursuit of excellence; judge led, from the top.

In 1991, the Judicial Commission administered a 35-point survey to all judicial officers in New South Wales. This instrument was developed on data first obtained from key consultations, interviews within and beyond the judiciary, observations and analysis of management information. This survey canvassed data in three principle areas: prior experience of continuing professional education, perceived needs for continuing judicial education, and an occupation/task analysis. The data obtained was analysed to ascertain the mean and standard deviation; cross tabulation, correlation and discriminant analysis techniques were also used.[107]

Selected findings are outlined below as having specific bearing on the issue of defining the need for continuing judicial education.

1. *Respondents* - There was an overall rate of response to this survey of 52 per cent from 129 judicial officers.[108] The average experience of respondents on the bench was 10 years. More than half the respondents were located in the Sydney CBD, with one quarter in the suburbs, and the remainder in the country. Most judicial officers undertake circuit or rotation works, and for most this involves a significant proportion of their total working year.[109]

   Analysis of responses disclosed a number of significant underlying factors influencing the findings. These were identified as including:

   (a) Nature of court (approximates Catlin's "level of court" factor).

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107 Factor analysis technique was not used in this survey for a number of reasons. First, reasons for participation had already been grouped or pre- "factored" into principle clusters in the design of the instrument. It was considered inappropriate to confine this research to the relatively well documented grounds of reasons for participation. In addition to reasons for participation, the survey was designed to canvas a range of other issues, particularly, experience of and attitudes to continuing education, and elements of a task/occupation analysis. It was considered that it would have been unduly onerous on respondents to add what, in effect, amounted to an additional 30-point PRS sub-survey to this 35-point instrument: to have done so would have had direct implications on impairing the likely rate of response. Instead, it was proposed to test the particular findings within the factor framework already devised by Catlin

108 This compares acceptably with Babbie who described a rate of response of 60 per cent by judges to a survey as "very high". The use of surveys is not new for judges. Particularly in the past two decades, the judiciary has become involved in responding to a range of surveys on different matters. It is difficult to establish normative rates of response. In a 1985 survey of judicial attitudes to drink driving laws in the United States a rate of response of 60 per cent was described as very high, and was attributed to be partly "the result of some extraordinary preliminary and follow-up steps" because of concerns that judges might hesitate to respond to a survey. Other surveys have reported both higher and lower rates of response. Babbie 1973, *Survey Research Methods*, Belmont: Wadsworth Publishing.

109 Circuit affects the work of most judicial officers. Only 30.2 per cent do not do circuit/rotation work: these are mainly Supreme Court judges. Members of the District Court are most involved in circuits (90.1 per cent) and to a lesser extent the Local Court (67.3 per cent). The time spent on circuit/rotation by both District and Local court members is significant: 50 per cent of all District judges spend half or more of their total annual time on circuit, compared with 40.1 per cent of all magistrates. About one third of both courts spend 75 per cent or more of their time on circuit/rotation.

(b) Seniority, as measured by extent of judicial experience (approximates a combination of Catlin's "years since law degree" and "tenure on bench" factors).
(c) Geographic location (not tested by Catlin).

2. *Experience and qualifications* - The pre-bench experience of judicial officers varies: almost all Supreme and District Court judges were barristers, whereas most members of the Local Court previously acted as court officers, or solicitors. Qualifications also varied significantly between courts: the most common qualification in the Supreme and Districts courts is the LLB degree or other post-graduate degrees, whereas in the Local Court the usual qualification is the SAB/BAB certificate.

3. *Quantity and nature of work* - Members of the Supreme Court work the longest hours, and the Local Court work the least. Supreme Court judges spend most time working in chambers, that is, an additional two hours in chambers for each hour sitting in court. Magistrates spend most of their time in court, that is, for each hour sitting in court, another forty-five minutes in chambers. In chambers, the nature of work varies: in the Supreme Court, almost all time is spent in writing judgments and legal research. In the Local Court, half non-sitting time is spent on administration.

4. *Reasons for, and barriers against, education usage* - Respondents ranked in descending order of importance the following reasons for participating in continuing judicial education: keeping abreast of recent developments, maintaining current abilities, enhancement of professional competence and the development of new knowledge and skills. Shortage of time, geographic inconvenience and irrelevance/impracticality to work were ranked as the main barriers against usage; the issue of whether services were too basic or too esoteric was rated as being not significant.

5. *Use of education services* - Respondents reported extremely high levels of regular usage of bench books and the Judicial Commission's monthly bulletin.[110] Seminars and published monographs are rarely used, which mainly reflects availability at the time of survey. The Commission's library is hardly used.

6. *Usefulness of education services* - Respondents ranked as most useful the following areas in descending order: substantive law, procedure, and

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110 84.6 per cent and 83.8 per cent of all respondents use them at least monthly, respectively. In those courts where bench books are available, they were used by 92.9 per cent of District Court and 91.1 per cent of Local Court members on at least a monthly basis.

updates on recent developments. They rated as least useful: social issues, and juristic dilemmas affecting the role of the judge. Significant differences were identified in these findings on further analysis by court and by seniority.[111] Respondents ranked a number of proposed services in the following order: production of a bench book for each jurisdiction, update seminars on major recent changes in law, publications on selected judgments with or without commentary, an induction handbook for new judicial officers, and annual court conferences. Proposed services least highly rated include visiting/exchange jurist programs, and a research project into public perceptions of the judiciary. Again, some significant differences were expressed between courts, and seniority.[112]

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111 There were some very significant differences expressed between members of respective courts regarding certain areas:

- Substantial law was regarded as less useful by Supreme court members;
- Caseload management was described as more useful by members of the Supreme Court, and less useful by the District Court;
- Personal skills and developmental courses were more highly valued by magistrates, and least valued by the Supreme Court;
- Juristic dilemmas were more valued by the Supreme Court, and less by both the District and Local courts;
- Orientation courses were very highly ranked by the Local Court, and lowly ranked by both the Supreme and District Courts;
- Refresher courses were valued by the District and Local courts, but not by the Supreme;
- Specialist courses were least valued by members of the District Court.

Significant differences also emerged on analysis by seniority by years of experience:

- Education areas most valued by more experienced judicial officers included: judicial skills and "the art of judging"; personal skills; judicial conduct and ethics; and juristic dilemmas affecting the role of the judge. Refresher courses were favoured by those with over twenty years experience.
- Education areas most valued by less experienced judicial officers included case management and complex-trials computer programs; access to legal databases; and personal computer facilities. Orientation and induction courses were favoured by those with less than three years experience.

112 These findings were rated significantly differently by court characteristic:

- Judicial Fellowships for overseas study were highly rated by the District Court;

  Inter-curial conferences were very lowly rated by the Supreme and District Courts, but highly rated by the Local Court;
- An induction video was rated lowly by the Supreme court, but highly by the Local Court;
- Orientation programs were favoured by the District and Local Courts, but not by the Supreme;
- Bench observation programs were favoured by the Local Court but not by the Supreme Court or District Courts;
- Learned articles were favoured by the District and Local Courts, but not by the Supreme;
- How-to-do-it guides were rated positively by the Local Court, but negatively by the Supreme and District Courts.

Other differences emerged on analysis by seniority of experience:

- New judicial officers rated the following proposed new services more highly than their seniors: an induction handbook, and induction video, an orientation program, a bench-observation program, visiting exchange scheme and how-to-do-it guides.

7. *Preferred form of education* - The universally preferred format is the small-group workshop, followed by informal collegial discussion, self-directed research and reading, and then the large-group conference. Audio and video tapes are not favoured, nor are post-graduate studies or correspondence courses. Judges are universally preferred as presenters, followed by qualified experts and then respected counsel. Solicitors are universally least regarded. Distinguished academics are favoured by the Supreme Court.
8. *Decisions* - Most judicial decisions are delivered ex tempore, except in the Supreme Court where most are reserved.[113]
9. *Workload* - Most respondents reported a significant and excessive increase in caseload in the past five years.[114]
10. *Supply of superior court and appeal decisions* - There are significant levels of universal dissatisfaction recorded in all courts regarding too few judgments being supplied. Significantly, there are no complaints of excessive supply of judgments. Significant levels of universal dissatisfaction were again recorded on the supply of appeal decisions: more than half of all judicial officers indicate receiving too few appeals from their decisions.[115]
11. *Professional networking* - Most judicial officers described having occasional or regular inter-curial meetings, which were 'about right'. Most judicial officers also exercised occasional or regular informal collegial consultation. There was, however, universally less informal professional consultation exercised by judicial officers.

- Judicial Fellowships for overseas studies, and a mentor-judge scheme for new appointees were favoured by those with between 10-19 years experience.
- Research into the public perception of the judiciary was most highly rated by those with more than 20 years experience.
- Bench-observation programs were most favoured by those with less than 3 years and more than 20 years experience.

113 A mean of 81 per cent of all decision-making is ex tempore. This comprises 81 per cent and 92 per cent in the District and Local Courts respectively, compared with 36 per cent in the Supreme Court. Most judicial officers state they have insufficient out-of-court time for writing judgments (68 per cent of all respondents, which includes all Supreme Court judges).

114 79 per cent of respondents reported an increase of between 25-50 per cent. Two-thirds of respondents describe their workload as too high, which includes all (100 per cent) of Supreme Court judges and 75 per cent of District Court judges.

115 The majority come from the Local Court, from where most appeals are disposed of in the District Court by conducting the hearing de novo. The implication of this is that magistrates have specific feedback from review of their decisions only in the relatively rare number of questions of law being stated in the Supreme Court.

12. *Stress and burn-out* - Most judicial officers describe their work as stressful and lonely. Most, however, describe this as a "minor" concern.[116] Most judicial officers indicate that burn-out does occur on the bench, and two-thirds describes this as a major concern.[117]

D. MEMBERS OF THE FEDERAL ADMINISTRATIVE APPEALS TRIBUNAL (1992)

In 1992, the Judicial Commission provided consultancy services to the Administrative Appeals Tribunal, a body responsible to review administrative decision making of the federal government. As a part of this consultancy, the Commission administered at 31-point survey to all members of the Tribunal. This instrument was developed on data first obtained from key consultations, interviews within and beyond the Tribunal, observations and analysis of management information. The design of the instrument was based on the survey used on judicial officers in the previous year. Like that survey, this instrument canvassed data relating to prior experience of continuing professional education, perceived needs for continuing judicial education, and an analysis of occupational tasks. The data obtained was analysed to ascertain the mean and standard deviation; and cross tabulation, correlation and discriminant analysis techniques were also used.

Selected findings are outlined below as having specific bearing on the issues of defining the need for continuing judicial education.

1. *Respondents* - The questionnaire was distributed to all 118 members of the Administrative Appeals Tribunal around Australia, with a rate of response of 61 per cent.[118]

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116 80.5 per cent of respondents reported stress, indicating that they worry about the consequences of decisions, and about making mistakes, and, more particularly, indicating that they find the job lonely (86 per cent). In relation to loneliness, judicial officers working in the suburbs and country report markedly more loneliness than their counterparts working in the CBD. The causes of stress are ranked in order as high workload/caseload, incompetent practitioners, and difficult cases/decisions.

117 85.1 per cent of respondents reported burn-out. The onset of burn-out is reported to occur mainly in the period 11-plus years, but also between 6-10 years to a lesser extent. The reasons for burn-out are ranked in order as high workload/caseload, lack of variety/repetition, pressure of work and stress. When further analysed by years of seniority, interestingly, we observe that as the number of years on the bench increases, so the problem of burn-out becomes described as less of a problem. This may suggest, firstly, that those in the burn-out stages perceive the problem differently from those at earlier stages, and/or that burn-out may be as much a problem of apprehension as it is one of preoccupation. Most judicial officers describe their work as "satisfying" and over a quarter describe it as "completely fulfilling". Descriptions of what is most liked about work on a day-to-day basis include challenge, sense of usefulness, variety, stimulation and problem-solving. Descriptions of what is least liked about work on a day-to-day basis include inefficient/ill-prepared practitioners, and high workload.

118 Membership of the Tribunal is categorised as Presidential (President, Judges and Deputy Presidents), and Non-presidential (Senior Members and Members). The highest rate of response (68.1 per cent of surveys distributed) and the largest number of responses (47 in number and 65.3 per cent of total responses) was from

Analysis of responses disclosed a number of significant underlying factors influencing the findings. These were identified as including:

(a) class: presidential members (President, Judges and Deputy-President), and non-presidential members (Senior Members and Members) (not tested by Catlin);
(b) nature of appointment: full or part time (not tested by Catlin);
(c) registry size and location (not tested by Catlin);
(d) educational qualification: legal or other (not tested by Catlin); and
(e) seniority (approximates Catlin's "years since law degree" and "tenure on current bench" factors).[119]

2. *Experience and qualifications* - The academic qualifications of members were widespread. For purposes of this report, analysis of variable

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Members, which is proportionately more than the number of Members in the Tribunal (69 in number and 58.5 per cent of total membership). The lowest rate of response (25 per cent of surveys distributed) and the smallest quantity of responses (4 in number and 5.6 per cent of total responses) was from Judges, which is proportionately less than the number of Judges in the Tribunal (16 in number and 13.6 per cent of total membership).

119 Profiles of Respondents: from this data it is possible to profile the characteristics of respondents, which are consistent with those of AAT members generally, in a number of ways which may be useful for planning purposes:

(a) *by class*: presidential members (President, Judges and Deputy Presidents) are most likely to be full time (75 per cent), have professional/academic qualifications in law (100 per cent), have between 1-6 years experience on the Tribunal (75 per cent), and be located at the New South Wales, Victorian or Queensland registries (75 per cent); non-presidential members (Senior Members and Members) are most likely to be part time members (85 per cent), have professional/academic qualifications other than law (77.6 per cent), and be located at the New South Wales, Victorian or Queensland registries.

(b) *by nature of appointment*: full time members are most likely to have qualifications in law (100 per cent), hold between 1-6 years experience (66.7 per cent), and be located in the New South Wales, Victorian or Queensland registries (72.2 per cent); part time members are most likely to be non-presidential members (94.4 per cent), hold non-legal qualifications (84.9 per cent), have less than one year experience (42.6 per cent) and be located at the New South Wales, Victorian or Queensland registries.

(c) *by registry*: members from large registries are most likely to be non-presidential members (81.2 per cent), part time (72.9 per cent), and hold non-legal qualifications (62.2 per cent); members from small registries are most likely to be non-presidential members (87.5 per cent), part time (79.2 per cent), hold non-legal qualifications (70.8 per cent), and have more than 6 years of experience (41.7 per cent).

(d) *by qualification*: legally-qualified members are most likely to be full time (66.7 per cent), have been 1-6 years experience (62.5 per cent) and be located at the New South Wales, Victorian or Queensland registries; those members without qualifications in law are most likely to be part time members (100 per cent), non-presidential members (100 per cent), have had one or less years experience at the Tribunal (46.7 per cent), and be located at the New South Wales, Victorian or Queensland registries (62.6 per cent).

(e) *by seniority*: those with one or less years are likely to be non-presidential (100 per cent), part time members (100 per cent), qualified other than in law (91.3 per cent); those with 1-6 years are most likely to be non-presidential members (64 per cent), qualified in law (65.2 per cent); those with more than 6 years are most likely to be non-presidential (87.5 per cent), part time (75 per cent), and qualified in other than law (69.6 per cent).

responses is undertaken where appropriate on the basis of *legally qualified* and *non-legally qualified* members.[120]

3. *Quantity and nature of work* - AAT members reported working a mean of 24 hours each week: one third of this time was spent in hearings and a further third was spent working in chambers. The length of the working week ranges from 73 hours for one full time Deputy President to 1.75 hours for a part time member.[121]

4. *Reasons for, and barriers against, education usage* - The single most important reason for using education services was keeping abreast of recent developments, followed by maintaining current abilities and development of new knowledge and skills; however, once the graduated scale of response was aggregated, the most important reason for education usage was enhancing professional competence. Socialising with colleagues, followed by making sure that you have missed nothing were the least important.[122] The most important single reason against educational usage was rated as geographic inconvenience. Once the graduated scale of responses was aggregated, the most important reason against usage was that it was considered to be irrelevant or impractical to work. The least

120 The most common qualification was in law (34.8 per cent of respondents); followed by medicine/pharmacology and social work (27.5 per cent); accountancy/economics (15.9 per cent); physical sciences (14.5 per cent) and defence forces (7.2 per cent).

121 Full time members reported working an average of 51 hours compared with 16.3 hours by part time members. This time was spent by full timers as follows: 18.8 hours in hearings and 22.8 hours in chambers with the balance working at home or in job travel; part timers spent 6.3 hours in hearings and 4.1 hours in chambers; proportionately, part time members spent a much larger percentage of their total work time in job travel and working at home (12.3 per cent and 25.9 per cent, compared with 4.1 per cent and 14.5 per cent) but about the same quantities in actual time.

122 A number of differences in reasons for education usage emerged on more detailed analysis. By nature of appointment, full time members rated confirming that you have missed nothing (86.7 per cent: 60 per cent), and sense of public responsibility (80.4 per cent: 62.5 per cent) as significantly more important, and exchanging experience with peers as less important (66.7 per cent: 77.4 per cent) than part time members. These variations were reflected on an analysis of class of member, although presidential members rated the exchange of experience with peers (45.5 per cent: 80.7 per cent) and socialising with colleagues (27.3 per cent: 46.4 per cent) less importantly than non-presidential members. Similar characteristics emerged on analysis by qualification. However legally qualified members found keeping abreast of recent developments and enhancing professional competence were of paramount importance, and confirming they had missed nothing as significantly more important (84.2 per cent: 55.5 per cent) than non-legally qualified members.
Analysis by experience disclosed certain other significant differences which included: those with less than one year's experience rated developing new knowledge more highly than other members, and confirming that they had missed nothing less importantly; those with between 1-6 years rated keeping abreast of paramount concern, and maintaining current abilities, exchanging experience with peers and socialising with colleagues to be of less importance: those with more than 6 years experience rated socialising with colleagues and sense of public responsibility more highly than their colleagues.

significant reasons against usage in descending order (ie least important) were too basic, unsuitable format and impaired quality. Further analysis by nature of appointment, class of member and qualification disclosed other significant variations.[123]

5. *Use of education service* - The most frequently used educational service over the past twelve months on an aggregated monthly basis was the *AAT Bulletin*, followed by *Support Staff*, *Current Awareness Bulletin*, loose-leaf update services, and District Registry libraries.[124] One quarter described their day to day engagements in professional practice and their experience on the job as their most useful professional development

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123 Analysis by nature of appointment disclosed part time members rated too esoteric and geographic inconvenience as barriers significantly more highly that full time members (45.8 per cent and 63.8 per cent: 28.6 per cent and 53.3 per cent); full time members rated impaired quality and unsuitable format more highly than did part time members (46.7 per cent and 46.7 per cent: 37 per cent and 34.7 per cent respectively).
Analysis by class of member disclosed presidential members rated impaired quality or unimpressive presenters, unsuitable format and too basic as more important barriers to usage; while non-presidential members assessed geographic inconvenience more highly than presidential members (65.4 per cent: 40 per cent). In other respects these characteristics mirrored the variations identified on analysis by nature of appointment.
Other significant variations disclosed by qualification included: legally qualified members rated shortage of time more importantly than non-legally qualified (71.4 per cent: 54.8 per cent); non-legally qualified members rated too esoteric as a significantly higher barrier than legally qualified (52.4 per cent: 17.6 per cent).
Analysis by seniority disclosed some interesting variations: those members with less than one year's experience rated unsuitable format, irrelevance, impracticality to work and too basic less importantly than their colleagues; those with between 1-6 years of experience rated geographic inconvenience as less important than other members; those with more than six year's experience rated impaired quality, geographic inconvenience, too basic and too esoteric more highly than other members.
Finally, analysis by registry disclosed that those members in small registries rated geographic inconvenience more highly than their colleagues in large registries (70.8 per cent: 55.3 per cent).

124 Predictably, all education services were more frequently used by full time members than part time members, although it should be noted that on an aggregated monthly basis the AAT Bulletin was as regularly used by part time members. However significantly less regular usage is made by part time members of the following: loose leaf update services, all library services, Tribunal databases and collegial advice. These findings are similar on analysis of responses by class of member, that is, non-presidential members behave in a generally similar manner to part time members. (This is not surprising since 85 per cent of non-presidential members are also part time). The characteristics are also generally mirrored on analysis by professional/academic qualification, although the disparity in regular loose-leaf usage becomes increasingly more pronounced, that is, non-legally qualified members use these services less than part time members.
Analysis by seniority highlights a range of markedly divergent educational behaviours which are characterised by extreme differences in the groups of those with experience of less than one year and those with between one to six years. The most significant variant characteristics include the following: those with less than one year of experience tend to under-utilise education services and never or rarely use the Principal Registry Library and Tribunal databases, and use loose leaf services, library research assistance and support staff significantly less than other members; those with between one to six years of experience tend to use education services the most regularly and use a number of services significantly more than other members which include loose-leaf updates, library services and Tribunal databases; those with more than 6 years of experience tend to use these services less than the middle group and tend toward the mean behaviour.

activity. Other useful activities described were formal studies, and mediation/awareness courses, followed by self-directed research and reading.

6. *Usefulness of education services* - Overall, the areas of education rated the most useful by all members were in terms of content; procedure and substantive law, and in terms of pitch; updates on recent developments. The services rated least useful were social issues, ethical conduct and computer support and word processing training. The main topics described were new laws and recent amendments, and writing reasons for decision. Again, further analysis of variations disclosed some significant relationships with certain characteristics.[125] Proposed new education services universally rated most useful by all members were the production of an induction handbook, an orientation program for new members, training assistance in Tribunal decision making, publication of selected judgments with or without commentary, and a mentoring scheme between experienced and new members. Services rated as least useful by all

125 Further analysis disclosed a number of differences by nature of appointment: more full time members rated current technical problems useful than part time members (88.2 per cent: 63.3 per cent), and more part time members rated the following as useful: hearing management (72.9 per cent: 52.9 per cent), Tribunal skills (84 per cent: 64.7 per cent), personal skills (72 per cent: 52.9 per cent), managing transition (74.5 per cent: 46.7 per cent) and refresher courses(75.6 per cent: 68.8 per cent).

Analysis by class of member disclosed that there were significant variations. More presidential members rated substantive law and current technical problems useful (100 per cent and 91.7 per cent: 79.6 per cent and 64.8 per cent), while more non-presidential members rated the following useful: hearing management (75.9 per cent: 27.3 per cent), case flow administration (71.2 per cent: 45.5 per cent), Tribunal skills (85.7 per cent: 45.5 per cent), personal skills (76.4 per cent: 25 per cent), ethical conduct (61.1 per cent: 27.3 per cent), managing transition (75 per cent: 30 per cent) and updates on recent developments (96 per cent: 72.7 per cent).

Similar variations emerged on analysis by qualification, but the following warrant attention. Significantly more legally qualified members rated substantive law and current technical problems useful (100 per cent and 90.9 per cent: 73.2 per cent and 56.1 per cent respectively); while more non-legal members rated hearing management (78 per cent: 47.6 per cent), Tribunal skills (88.1 per cent: 68.2 per cent), managing transition (84.6 per cent: 40 per cent) useful.

Analysis by experience disclosed other significant variations. More members with less than one year's experience rated the following as useful: hearing management, case flow administration, personal skills and ethical conduct; while more members with between 1-6 years experience rated current technical problems, computer support and personal computer facilities useful. More members with at least six years experience rated managing the transition useful than other members, while more senior members rated substantive law less useful than other groups of members.

Analysis by registry disclosed other variations. More respondents in large registries rated case flow management, computer support and training useful, while more members in small registries rated juristic dilemmas and managing the transition as useful.

members included tours of government departments, background briefings on other disciplines and fellowships for overseas study.[126]

7. *Preferred form of education* - The form of education universally rated as the most effective was the small group workshop, followed by self-directed research or reading and informal collegial discussion. Correspondence courses, large group conferences and audio tapes were not considered effective. Self-directed research and reading was preferred by full time, presidential or legally qualified members; small group workshops, audio tapes and video tapes were preferred by part time, non-presidential, non-legally qualified members or those in small registries; and post-graduate studies were preferred by those with less than one year experience. Qualified experts and respected senior counsel were seen as the most effective presenters by all members, followed by respected solicitors, superior court judges and finally distinguished academics.

8. *Decisions* - Respondents reported that delivery of eight out of every ten reasons for Tribunal decisions were reserved. Further analysis shows that more full time members delivered ex-tempore reasons for decisions than did part time members. Most respondents reported having sufficient time for preparation of written decisions.[127]

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126 Significant variations were identified on analysis by nature of appointment: more full time members valued background briefings, rotations with other jurisdictions, fellowships and visiting/exchange programs than part time members; and fewer found how-to-do-it guides useful.

Analysis by class of member disclosed that more presidential members preferred bench observation programs, training in decision writing, overseas fellowships and exchange programs; more non-presidential members preferred induction videos, background briefings and how-to-do-it guides.

These variations are mirrored on analysis by qualification, although more legal members preferred learned articles than non-legally qualified members who, in turn, preferred how-to-do-it guides more frequently.

Analysis by experience disclosed the following particular variations: more members with less than one year's experience valued training in procedural fairness and bureaucratic decision making than the mean of members; more members with between 1-6 years experience valued tours of government departments, how-to-do-it guides, overseas fellowships and bench books for the Tribunal; while more of those with at least six years experience valued an induction video, bench observation program, and selected judgments that did other groups of members.

Analysis by registry size disclosed generally low levels of variation but, significantly, members in small registries rated update seminars as paramount (100 per cent, compared to 89.4 per cent in large registries).

127 Two thirds of respondents reported that they did have sufficient non-sitting time for the preparation of reserved decisions. The time needed for delivery of a reserved decision was on average reportedly 5.5 weeks (range: 1-14), while the longest period needed was on average 14.5 weeks (range: 2-64 weeks). Further analysis disclosed the following variations: proportionately more full time, non-presidential and legally qualified members specified they had insufficient time to prepare reserved reasons: while part time, non-presidential and non-legally qualified members reported needing and, actually, taking the longest periods of time to deliver reserved decisions.

9. *Workload* - One third of respondents described their workload as the same over the past five years. Almost half of respondents reported a decrease in workload.[128] Further analysis disclosed that proportionately more full time members reported an increase in workload, and more part time members reported a decrease in workload.

10. *Supply of superior court and appeal decisions* - Most members described receiving "some" decisions from the High and Federal Courts which they considered "just right". About one quarter of the overall membership described the supply of superior court decisions to be inadequate. Half of respondents reported receiving all rulings; of those who were not normally supplied with all appeal rulings, three quarters indicated that they were supplied with too few.

11. *Professional networking* - Most members participated in at least some meetings and other networking arrangements, which were described as being "about right" in frequency. On further analysis, it was found that proportionately more full time members have regular meetings, as do those with legal qualifications, and those in smaller registries.

12. *Stress and burn-out* - Almost one third of members described their job as stressful. Of these a further third considered the problem to be of "major" concern.[129] Almost one third of respondents reported that burn-out did occur at the Tribunal, and one half of these described this as a "major" concern.[130]

E. REGISTRARS OF THE SUPREME COURT OF NSW (1993)

In 1993, the Judicial Commission undertook an informal educational needs analysis of the Registrars of the Supreme Court. The registrars, who are all legally qualified, exercise a range of quasi-judicial duties in addition to any administrative

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128 44.8 per cent of respondents; compare to response of judicial officers, note 114 *supra*.

129 The major cause of stress was reported to be high workloads and pressure to prepare and complete reserve decisions. Over half stated that they did worry about the consequences of their decisions, nearly two-thirds worried about making mistakes, and some found the job lonely. Further analysis disclosed that full time members find the job more stressful than part time members, and more lonely.

130 The onset of burn-out was reported equally at 6-10 and 11 plus years. The major cause of burn-out was reported to be lack of variety/repetition and lack of government/administration/community support. Burn-out was reported to occur more frequently by full time and presidential members. Almost all members of the Tribunal describe their work as satisfying. Members described the most likeable aspects of their job as being that it was challenging, stimulating/interesting, and gave them a sense of usefulness and importance. Members described the least likeable aspects of their job as being the frequent cancellation of hearings at short notice - without remuneration, not enough work, and inefficient/ill-prepared representatives.

role. These duties include conducting preliminary hearings usually relating to the application of procedure, or the resolution of minor or uncontested issues.

The methodology adopted was simplified to combine critical incident and nominal group technique involving a specially formed education committee of registrars. This data was correlated with "client" feedback from the Bar and Law Society, and the professional assessment from the educational staff of the Judicial Commission to identify the following findings:

1. *Key professional competences* - These include communication skills, analysis, decision-making, knowledge, management and dispute resolution.
2. *Education needs* - These were ranked, in priority order, as decision making and decision writing, evidentiary and procedural issues in relation to conducting hearings.

IX. OBSERVATIONS ON EMPIRIC FINDINGS

The empiric data supports and goes beyond the findings contained in the literature.

In general, the empiric data for judicial officers, tribunal members and registrars are consistent both with each other, and with the literature identifying relationships between the three factors identified by Catlin (judicial competence, collegial interaction and professional perspective), and the designated characteristics (sex, years since graduation, tenure on current bench court level served, and levels of past participation). However, further analysis of this data also reveals a number of additional - and unidentified - factors which influence participation in continuing education by judges, magistrates, registrars or tribunal members. Significantly, responses of registrars and new magistrates diverged from these findings: new magistrates diagnosed particular needs for collegiate networking, experience-sharing and skills development in a number of areas; while registrars put priority on the development of "judicial" skills specifically.

The findings provide an abundance of empiric data for researchers on the perceptions of judicial officers, registrars and tribunal members exercising quasi-judicial roles, and on the existence and nature of the need for continuing education. This data includes:

i. *Reasons for participation* - Judicial officers in NSW ranked keeping abreast of recent developments, enhancement of professional competence and the development of new knowledge and skills as the reasons for participation. By comparison, members of the AAT identified keeping abreast of recent developments, followed by maintaining current abilities

and development of new knowledge and skills. These findings are consistent with Catlin's observations on the pre-eminence of the judicial competence factor.

ii. *Confirming identified factors influencing participation* - Analysis of empiric data confirmed many of Catlin's relationships.[131] For example:

(a) *Level of court* - This was identified by Catlin, and confirmed empirically. The survey of judicial officers disclosed some significant variations in responses between the level of court upon which respondents served giving rise to quite separate and distinct educational strategies being required for each respective court in order to respond to the differences in perception ("level of court"). The most marked differences are predictably identifiable between responses from the Supreme and the Local Courts. For example, the Supreme Court responses reflect a consistently broader intellectual pre-occupation, while the Local (and District) Courts reflect a pre-occupation with more pragmatic, practical issues.

(b) *Duration on bench* - Similarly, this was identified by Catlin, and confirmed empirically. The survey delineated significant variations in responses by reference to the duration of experience on the bench to the extent that separate layers of educational servicing have been implemented to meet the different needs of induction, updating, and replenishment ("level of application"). Thus, while each layer may focus on substantive or skills-based approaches, each is conducted at different levels of expected prior experience.

Another related variation was identified regarding the perceived purpose of education: substantive law tended to be rated more importantly by newer and less senior judicial officers, while skills and the craft of judging became consistently more important with both seniority and experience.

iii. *Identifying new underlying factors* - Empiric analysis of the New South Wales data gives rise to the need to extend recognition of underlying factors to include other factors such as *education, position* and *situation.* It is observed that each of these additional factors has a significant impact on attitudes and behaviour.

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131 Testing of Catlin's factor relating to sex was not undertaken owing to an insufficiency of sample; the other factor relating to previous history of participants in education was regarded as evident on Catlin's findings and was not reassessed empirically in New South Wales: Catlin (1981) (1982) note 84 *supra.*

(a) *Education* (or qualification) - Comparative analysis of findings of court and tribunal officers identified in many regards similar occupational tasks and attitudes, and permitted an assessment of the impact of prior formal education as a variable. The data supplied by non-legally qualified personnel calling for the supply of basic tools of the legal trade with bench books and assistance in decision-making, for example, ultimately leads to the observation that prior qualification exercises a significant underlying influence on attitudes and behaviour.

(b) *Position* (describes rank of office, nature of duties - judicial or administrative; and basis of appointment - full or part time) - Significant variations were consistently identified in the responses of Tribunal members by reference to these underlying characteristics.

(c) *Situation* (includes geographic location, and size of court/registry) - Significant variations were revealed relating to the distinctive needs of isolated or itinerant judicial officers and tribunal members. These variations consistently related to distinctive needs for formalised informational and collegial support to substitute for a lack of access to formal interaction with peers, loneliness and the absence of informal networking arrangements. This factor was visible by reference to geographic description of location and size of court or registry.

iv. *Occupational practices* - Analysis of responses provided relating to tasks and occupational practices elucidated other findings, and provided valuable input on educational needs not otherwise recognised by the respondents themselves: for example, the significance of unimpaired access to superior and appeal court decisions as a source of self-directed learning on substantive law; and, the extent to which the supply or denial of support services in different courts affects the nature of the work undertaken by the members of those respective courts (for example, magistrates spend significantly more of their non-sitting time undertaking administrative rather than legal tasks owing to a lack of secretarial support).

v. *Judicial stress* - Finally, the findings in relation to stress for judicial officers are significant in being consistent with other professionals, but singular in their causes and character.[132]

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132 J Rogers, S Freeman and the Hon P LeSage "The Occupational Stress of Judges" (1991) 36 *The Canadian Journal of Psychiatry* 5, 317-322. The authors were particularly "intrigued" by finding that aspects of judicial work itself (that is, the specific tasks and functions of judging, for example sentencing, child custody

X. CONCLUSIONS AND IMPLICATIONS FOR EDUCATORS

In summary, it is argued that the need for judicial education should be measured primarily in terms of the recognition of that need within the judiciary itself. At a philosophic level, it has been observed that while many objections have been raised by judges against the notion of continuing education, many of the objections in fact relate to the question of how educational needs should be met, rather than whether there is a need in the first instance. Increasingly a recognition among judges of the need for and the benefit of continuing education can now be observed.

This recognition opens the way to measuring the nature of that need using methodologically sound techniques. These techniques should typically combine both quantitative and qualitative research methods, and rely on sources both within and beyond the judiciary.

There is now an abundance of available data contained in the findings of various analyses which casts considerable light on the nature of that need. It has been clearly demonstrated that in certain important respects, these needs reflect characteristics which are distinctive of adults and professional learners generally and in other respects are unique to judicial officers. This data plays a critical role in the development of any educational response, provides direction on the purpose, content and style of any educational program, and has direct implications for the planning, design, promotion and conduct of judicial education.

As a consequence of the analysis undertaken, it is now possible to make the following generic observations regarding the nature of the need for continuing judicial education:

i. *Content* - There is a universally recognised need to provide judicial officers with information which keeps them up to date with substantive law and procedure. There is also a broadly acknowledged need to provide opportunities to develop particular skills of judging. Other areas of content in which education is needed include management of trials, caseloads and personnel, conduct and ethics. The need for education in the area of attitudes is less clear and more controversial and should, under such

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cases, judgments, decision making and jury trials) are perceived by respondents to be the primary source of their occupational stress (cited by 95 per cent of respondents). "Quantitative" overload stress (backlog, workload, time constraints, deadlines) were cited by 56 per cent; job-home interaction (social isolation and constraints, loneliness, lack of feedback) by 40 per cent; "qualitative" work overload concerns (lack of experience, difficulty keeping up with changes) by over one quarter. These findings were not consistent with most findings on occupational stress where workers view job factors (such as role conflict, employer/employee relationship, and career decisions) as being more stressful than the actual work they perform. This can be explained by reference to judicial functions - the burden of decision responsibility affecting lives of others, and having to do the right thing. The authors argue that additional preparation and training for the bench might alleviate this stress.

circumstances, be a matter for specific analysis on a situational basis.[133] In addition to content needs, however, empiric research and actual experience confirm and extend Catlin's argument that a range of underlying factors must be taken into account in planning to meet the educational needs of judges.

ii. *Level of application* - There are different levels of need, which should be met with a variety of different responses. Thus, instead of providing a single education program for members of the judiciary, it should most usefully be segmented into induction, updating, exchanging experience, specialist and refresher.

iii. *Manner of delivery* - There is a need to provide education in a manner which is conducive to meeting the distinctive needs of judicial officers. There is an over-arching need to operate within the constraints imposed by the doctrine of independence. There is a further need to accommodate the preferred practice of learning which exists within the judiciary. It has been previously argued that the process of selection of judges from the trial Bar brings appointees to the bench who have succeeded in highly competitive careers as advocates, and who have built upon professional learning practices which are almost invariably self-directed.

The significance of this inheritance of preferred learning practice should be recognised in the formalised domain of judicial education. In terms of its implications for program development and curriculum design, it can be argued that there is a higher than usual need to promote facilitated self-directed learning through the provision of access to educational resources (such as bench books, digests, reports and appeal decisions), and relatively less reliance on classic formalised didactic instruction in classes and seminars.

Notwithstanding, Catlin has correctly identified the subsidiary importance of group-learning processes in workshops and conferences to provide environments for collegial interaction and professional development.

These generic observations provide broad guidelines within which, in the writer's experience and observation, judicial education programs are best developed.

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133 Current examples in this domain include addressing the findings of the Royal Commission into Aboriginal Deaths in Custody to ascertain whether there is a specific need to provide education regarding judicial attitudes to Aboriginals; and, in responding to many calls coming from beyond the judiciary for education to gender bias - viz the Bollen Case in South Australia in 1992 - and, more broadly, bias towards minorities at large (on the basis of sex, race, religion and most recently ability), which is presently the subject of a reference to the Australian Law Reform Commission, and an inquiry of the Senate Standing Committee on Legal and Constitutional Affairs.

Within these guidelines, each program activity should be the subject of a specific needs appraisal.

Finally, the data from these findings serves as the benchmark of need against which educational efforts should be measured in terms, firstly, of efficiency in the attainment of defined educational objectives and, secondly, of effectiveness in meeting those needs and contributing to an enhancement of judicial performance.