

Judicial Performance and Experiences of Judicial Work: Findings from Socio-legal Research

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Abstract

Judicial performance evaluation processes and programs tend to imply an abstract, normative model of the proper judge. The focus is on the individual judicial officer, identifying how judges ought to perform their judicial work and assessing any departures from the model. However, there is considerable diversity in judging which abstract models of JPE may not anticipate. Importantly, judicial performance occurs within a context – the practical and natural settings in which every day judicial work is undertaken. This entails time constraints, workload patterns, and dependence on the activities of others, factors over which the judicial officer may

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have little control, but which in turn may affect his/her behaviour. Often, judicial performance is taken to refer to in-court work only. Judicial work also occurs outside court and outside regular court hours and so may be less visible for judicial performance evaluation. Although there is considerable variety in judicial experiences of judging, JPE only sometimes includes self-perceptions or judges' own reflections on their work. Social science and socio-legal research, including original empirical data from Australia, investigates judging in various contexts and explores judicial officers' experiences of their work. Such empirical research can widen understandings of judicial performance and evaluation.

Key words

Judicial performance evaluation; Judicial work; Australian judiciary; Judges and magistrates

Resumen

Los procesos y programas de evaluación del rendimiento judicial tienden a implicar un modelo normativo abstracto del juez competente. La atención se centra en el funcionario judicial individual, identificando cómo deben realizar su labor los jueces y determinando cualquier desviación respecto al modelo. Sin embargo, a la hora de juzgar, existe una gran diversidad que los modelos abstractos de evaluación del rendimiento judicial no pueden anticipar. Es importante destacar que el desempeño judicial se produce en un contexto – el marco práctico y natural en el que se desarrolla cada día la labor judicial. Esto conlleva falta de tiempo, patrones de carga de trabajo y dependencia de actividades desempeñadas por otros, factores sobre los que el funcionario judicial puede tener poco control, pero que, a su vez, puede afectar a su comportamiento. A menudo, se entiende por desempeño judicial únicamente el trabajo desarrollado en la sala. El trabajo judicial también se produce fuera de la sala y fuera de las horas regulares del tribunal, por lo que puede ser menos visible para la evaluación del rendimiento judicial. Aunque existe una gran variedad de experiencias judiciales a la hora de juzgar, la evaluación del rendimiento judicial sólo incluye en contadas ocasiones las percepciones o las reflexiones sobre su trabajo de los propios jueces. Las ciencias sociales y la investigación socio-jurídica, incluyendo datos empíricos originales de Australia, investigan el hecho de juzgar en diversos contextos y explora las experiencias laborales de los funcionarios judiciales. Esta investigación empírica puede contribuir a ampliar la comprensión del rendimiento y evaluación judicial.

Palabras clave

Evaluación del rendimiento judicial; trabajo judicial; magistratura australiana; jueces y magistrados

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1. Introduction

A central premise of Judicial Performance Evaluation (JPE) is that, in order to evaluate judicial performance and judicial quality, it is essential to understand judicial behaviour (Bernick and Pratto 1995). JPE research and policy focus primarily on the individual judicial officer and his or her behaviour, encompassing activities and conduct towards others, especially in the courtroom. Central sources for JPE, particularly in the United States, are the experiences, observations and assessments of court users', often called stakeholders (Brody 2000, 2008-2009, Colbran 2006). Typically evaluations are based on stakeholders' responses to surveys that 'hew closely to the ABA [American Bar Association] guidelines of 1985' (Gill *et al.* 2011, p. 734).¹ These evaluations usually come from lawyers who have appeared in front of a particular judge and sometimes from others such as litigants, witnesses, or jurors, or court staff.

However, judicial behaviour occurs in a context, which can vary along many dimensions. Drawing on empirical research, this paper addresses the different practical and natural everyday contexts in which judicial officers perform their authority, adding depth to understandings of judicial behaviour and judicial performance. First, the paper outlines different concepts of performance that are used in discussions of judicial performance and its evaluation. Second, it discusses the importance of context to judicial behaviour and performance and reports on empirical findings relating to four aspects of context: level of court and type of work; activities and inputs of others; emotional dimensions of judicial work; and personal context, especially work/family interface. The paper argues that judicial behaviour and judicial performance cannot be understood outside the dynamic and complex contexts in which judging and judicial work take place. It concludes that a critical and reflective account of judicial performance requires information from diverse sources, including judicial officers themselves, as well as attention to the context of judicial work.

2. Concepts of judicial performance

Two meta-themes in JPE processes and scholarship can be identified. First is reliance on an underpinning abstract, *normative* model of the proper judge against which the actual behaviour of individual judicial officers is evaluated. The American Bar Association criteria and other guidelines articulate an abstract or ideal model of judicial conduct and performance to be applied to all judicial officers (ABA 2005). Other sources may include statements on judicial ethics and judicial accountability by appeal courts and professional associations². The process of evaluation entails identifying deviations from the normative model and then remedying or managing them through professional development, a disciplinary process, and/or in some US states' retention elections (Kearney 1999, Brody 2000, 2008-2009, Gill *et al.* 2011, Elek *et al.* 2012).

Second is a nearly exclusive focus on the performance of the individual judicial officer. The concept of performance is used in different ways. One is the performative sense, that is how the judge performs or enacts the judicial role

¹ There are some variations. For example, Utah combines court observations with a survey (National Center for State Courts 2012, Utah State Courts 2012). Nova Scotia uses a judicial self-assessment questionnaires as well as lawyer questionnaires (Colbran 2006, p. 52); some jurisdictions incorporate judicial self-assessment exercises, including interviews with judges (Kearney 1999, Warren 2011). Note the importance of language and labelling: performance appraisal, evaluation, feedback, measurement, or reviews are all very different things. Sometimes JPE includes data about what is more properly considered performance of the court system, for example numbers of cases filed, processed, delays, numbers of judgements and so on (Spigelman 2002, Schaufli 2007). Court level data can only directly apply to individual judicial performance in an individual docket system and has little validity in a master calendar system, which is the dominant mode of case/work allocation in Australian courts (Mack, Wallace, and Roach Anleu 2013).

² See Colbran (2006) for an overview of different criteria and processes for judicial performance evaluation).

particularly in the courtroom. Here attention is on the judicial officer's outward performance, presentation of self and demeanour, and interaction with courtroom participants, especially litigants (Goffman 1956, Mack and Roach Anleu 2010). Particular facets evaluated are the judicial officer's capacity to communicate, listen and display appropriate behaviour (ABA 2005). These facets are often assessed in line with conventional expectations of judicial behaviour as detached or unemotional, as well as procedural justice norms and values, which may require more engagement (Tyler 2003, Mack and Roach Anleu 2010, 2011, Roach Anleu *et al.* 2014).

Performance can also be considered in the *operational* or functional sense. The core aspect of judicial work is decision making. Psychologists, in particular, address the cognitive mechanisms, sometimes the neuro-biology, involved in the process of judicial decision making and investigate the inward functioning of the judicial mind (Lawrence 1995, Rachlinski 1998, Guthrie *et al.* 2001, Bennett and Broe 2007). A key finding is that judicial decision making, similar to human decision making in general, relies on heuristics, including cognitive illusions, which can result in systematic errors or bias, including implicit race or gender bias, in judgement (Guthrie *et al.* 2001, Brest and Krieger 2010, Kang *et al.* 2012). The policy aim is to reduce such errors on the part of the judicial officer and therefore enhance the quality of judicial performance.³

JPE has concentrated almost exclusively on skills and capacity (especially communication), and the process of decision making, rather than the substance or legal correctness of the decisions. This emphasis on the outward behaviour of the individual judicial officer can mean that there is relatively little emphasis on judicial officers' own perspectives on their everyday work. Perhaps this is due to an implicit acceptance of a formal model of judging, where the personal, experiential dimensions of the judicial officer are excised. This formal model of judicial authority may be modified to incorporate procedural justice expectations and criteria (Mohr and Contini 2007, Rottman 2007-2008, Tyler 2007-8, Mack and Roach Anleu 2011, Elek *et al.* 2012). However, there is a growing body of socio-legal research that obtains information about decision making and styles of judging directly from judicial officers, through interviews, observation or surveys (Hunter 2005, Mackenzie 2005, Moorhead 2007, Hunter *et al.* 2008, Mack and Roach Anleu 2008, 2010, 2011). Additionally, mutual observations by judicial officers or peer reviews have been used in professional development exercises (Hiskey 2002, 2005). The 360-degree feedback process in Victoria entails peer advice and suggestions (Warren 2011). The ABA Guidelines provide that 'peer evaluations may also be beneficial' (ABA 2005, p. 15), and give examples of self-evaluations and interviews.

Neither the implicit abstract model of individual judicial behaviour nor the two concepts of performance – outward court courtroom performance and inward decision making processes – adequately recognise the importance of *context* to judicial behaviour.

3. The contexts of judicial performance

Judicial performance and judicial behaviour occur in a setting constituted by institutional requirements, organisational structures, local practices and expectations and everyday variety and unpredictability in cases, as well as broader socio-political conditions (Gibson 1980). The work of judicial officers relies on the activities and inputs of others; it is not solely a product of their own individual behaviour (Mather 1979, Eisenstein *et al.* 1988). Judicial officers will be aware of the practical contingencies of their work context and will need to manage them in various ways (Mack and Roach Anleu 2007, Fielding 2011).

³ The large volume of research on race and gender bias in sentencing outcomes also addresses concerns about systematic judicial error, but does not assess the performances of individual judges (Albonetti 1997, Steffensmeier and Demuth 2001, Snowball and Weatherburn 2007, Roach Anleu and Mack 2010).

Context is a term that is acknowledged as significant in JPE research and policy discussions, but often with little attention to the empirical content or consideration of how different contexts might influence judicial behaviour and performance and how judicial officers' 'actual working practices' can shape, and be shaped by, their work contexts (Fielding 2011, p. 113, see also Sewell 1992). Judicial officers might adopt different styles of performing their work and these styles of judging can be context dependent and situational, rather than a function of personal attributes (Smith and Blumberg 1967, Cowan *et al.* 2006, Cowan and Hitchings 2007, Hunter *et al.* 2008).

Some facets of context may not be apparent to stakeholders. One way to get a sense of the multiple constraints, tensions and pressures that judicial officers face and manage is from judicial officers themselves. Understanding the importance of context through judicial officers' perceptions and experiences of their work identifies *social* (interaction, interdependence, workgroup), as well as *individual* (behavioural or cognitive) dimensions in the performance of judicial work.

Empirical research, discussed below, reveals judicial officers' reliance on interaction and interdependence with other professional participants and investigates how judicial behaviour can vary in different situations, especially different levels of court. Such an approach avoids viewing judicial performance (in all senses) only as the outcome of individual action or behaviour abstracted from the social setting of their work. Paying insufficient attention to context can result in a mechanical, reductionist and asocial notion of judicial behaviour.

Some may be concerned that judicial self-reflections are indulgent, subjective, biased or not appropriate, where the aim of JPE is to provide objective, neutral evaluations of measurable judicial behaviour, and to evaluate departures from a formal model of judicial performance as articulated in the ABA guidelines and other normative statements. All evaluations of judicial performance are necessarily partial, and entail various degrees of subjectivity; to discount the views and experiences of the person in the judicial role is to miss information on crucial dimensions of judicial work. A critical and reflective account of judicial performance requires diverse kinds of information from diverse participants and should include perceptions of judicial officers themselves as well as contextual data.

Our empirical socio-legal research identifies key elements of the context(s), the practical and natural settings of everyday judicial work, in which judicial performance occurs. Four aspects of context to be addressed here are:

1. Level of court and type of work.
2. Activities and inputs of others.
3. Emotional dimensions of judicial work.
4. Personal context, especially work/family interface.

Empirical data on these four aspects of judicial work context are obtained from two nation-wide surveys of the entire Australian judiciary and from court observations undertaken in its magistrates/local (lower) courts. The surveys⁴ cover a range of

⁴ The two authors developed, pilot-tested and fielded the National Survey of Australian Judges to all 566 judges throughout Australia in March 2007 with a response rate of 55 per cent. The judges who responded are generally representative of the judges as a whole, in terms of gender, time on the bench and level of court and appear generally representative in terms of age, though that cannot be calculated fully, as complete date of birth data for the entire judiciary is not available. Similarly, the 2007 National Survey of Australian Magistrates was sent to all 457 state and territory magistrates throughout Australia, with a response rate of 53 percent. The respondents are generally representative of the magistracy as a whole, in terms of gender, age and time on the bench. In particular, women comprise 25 per cent of respondents to the judicial survey – at the time women constituted 24 per cent of judges – and 34 per cent of the respondents to the magistrates' survey – at the time 31 per cent of magistrates were women. The two 2007 surveys are substantially the same, with some variation in questions to reflect the different work in the different levels of court (for example, appeals or jury trials in higher but not lower courts). As there are just over 1,000 judicial officers in Australia, surveys were sent out to

topics relating to current position, career background and education, everyday work, job satisfaction and demographic information, and include closed and open-ended questions. The observational research⁵ was undertaken of the criminal list in magistrates/local courts across Australia examining aspects of the courtroom interaction. Before discussing the findings, a brief overview of the Australian court system is provided.

Australia is a federal system, with national courts and a separate court system for each state and two territories. There are approximately 160 judicial officers in Commonwealth courts, 400 state and territory judges and 450 state and territory magistrates totalling over 1,000 judicial officers, organised into over 25 different courts. In this article, the terms 'judiciary' or 'judicial officer' refer to all members of the Australian judiciary. The terms 'magistrate' and 'judge' distinguish members of the judiciary who preside in the first instance or lower state and territory courts (magistrates) from those who preside in the higher state and territory courts or Commonwealth courts (judges). Unlike the lay magistrates in England and Wales, Australian magistrates are paid judicial officers, nearly always full-time, with legal qualifications and appointed until a fixed retirement age (Mack and Roach Anleu 2006). Unlike judges in many US states, judges and magistrates in Australia are appointed, not elected, and not subject to retention elections.

3.1. Level of court and type of work

There is considerable variety in judicial work, particularly at different court levels, as disclosed by the data reported below. However this variety may not be visible or directly experienced by those undertaking evaluations (Opeskin 2013). This is especially so if the JPE is based on reports from court users or observers and focuses on courtroom activities.

each judge and magistrate rather than to a random sample. The response rates are especially robust as other researchers consider judges to be 'a "hard-to-reach" group to research' (Cowan *et al.* 2006, p. 548) or 'difficult populations' (Dobbin *et al.* 2001, p. 287). The surveys contain a mix of objective (informational) and subjective (perceptual) data: (i) factual/objective questions like date of birth, jurisdiction, previous jobs; (ii) self-reports, for example the number of hours spent on various work and non-work activities; and (iii) assessments/evaluations of work, that reflect personal experiences of work as a judicial officer, for example, whether making decisions is stressful.

⁵ The court observation research design incorporated courts from a variety of locations: each state and territory and from capital cities, suburbs, and regional centres. Twenty-seven different magistrates (or more than six per cent of all Australian magistrates) were observed conducting a general criminal list in 30 different court sessions in 20 different locations, including all capital cities, five suburban and four regional locations (Mack and Roach Anleu 2007). Male and female magistrates of varying ages and experience levels were observed in the natural setting of the courtroom. The general criminal list was chosen for observation as it is a central element in magistrates' everyday work. All jurisdictions have some version of the criminal list, which is part of the work of virtually all magistrates at some point in their career. The list is constituted mostly by proceedings relating to such offences as drink driving, theft, assault and some drug offences and includes decisions on bail, adjournments, standing matters down (to be heard later in the list), setting the matter for another procedure, such as a trial, taking guilty pleas, and sentencing. This project did not undertake observations of trials. As most defendants plead guilty, trials constitute a small proportion of cases in the magistrates court. Two researchers (in nearly all instances the two co-authors) conducted the observations across several different courts, using pre-printed templates to record similar information relating to the defendant, his/her offences, legal representation, aspects of the magistrate's interaction, and information for decisions and outcome, with space for additional comment. The templates were developed from extensive preliminary observations of court proceedings and pilot-tested in three different magistrates courts. Detailed instructions were formulated to maximise consistency between observers and to provide specific guidance on the coding of magistrates' behaviour and other activities in the courtroom (Mack and Roach Anleu 2010). The unit of data collection was the matter; each time a new matter was called the observers separately filled out a new template, regardless of whether or not the defendant was present. At the end of each day's observations, the two researchers discussed their coding and classifications for each matter and resolved any gaps or differences in their coding in order to produce a single code sheet per matter. The total number of matters observed and coded (regardless of whether the defendant was present or not) was 1,287. As it was not possible to hear or identify everything in court from observation, some information, such as defendants' demographic data and offence categories, was obtained from court records.

Questions in the two national surveys of the Australian judiciary asked respondents to report how frequently they sat in different types of jurisdiction in the past year. Response categories choices were 'always', 'often', 'sometimes', and 'never'. There are some striking differences in the patterns of work for judges and magistrates.

Criminal matters dominate the work of magistrates, compared with that of judges who undertake civil cases more frequently. About eight in ten magistrates indicate that they always or often sit in criminal and family/domestic violence jurisdictions, while around four in ten always or often sit in civil and small claims. (While some of these may be regarded as subsets of the wider civil or criminal category, they are regarded as separate or distinctive jurisdictions within the Australian lower courts.) In contrast, just over half of judges report they always or often sit in criminal, the same proportion indicating they always or often sit in civil. The dominance of criminal cases is even more striking when those who 'always' undertake this work are considered. Only seven per cent of judges always sit in the criminal jurisdiction compared with 52 per cent of magistrates. Differences are especially striking for Children's/youth matters: only 18 per cent of judges undertake this role at all, compared with 77 per cent of magistrates who do so at least sometimes.

There is also more variety in the geographic locations of magistrates' work. Many magistrates, but few judges, are required to travel on circuit. Magistrates also undertake their everyday work in courthouses in different geographical areas: the central business district (CBD) of a capital or major city, a suburb, or a regional, rural or remote town. It is rare for judges of the other courts to sit regularly outside the capital cities, except on circuit.

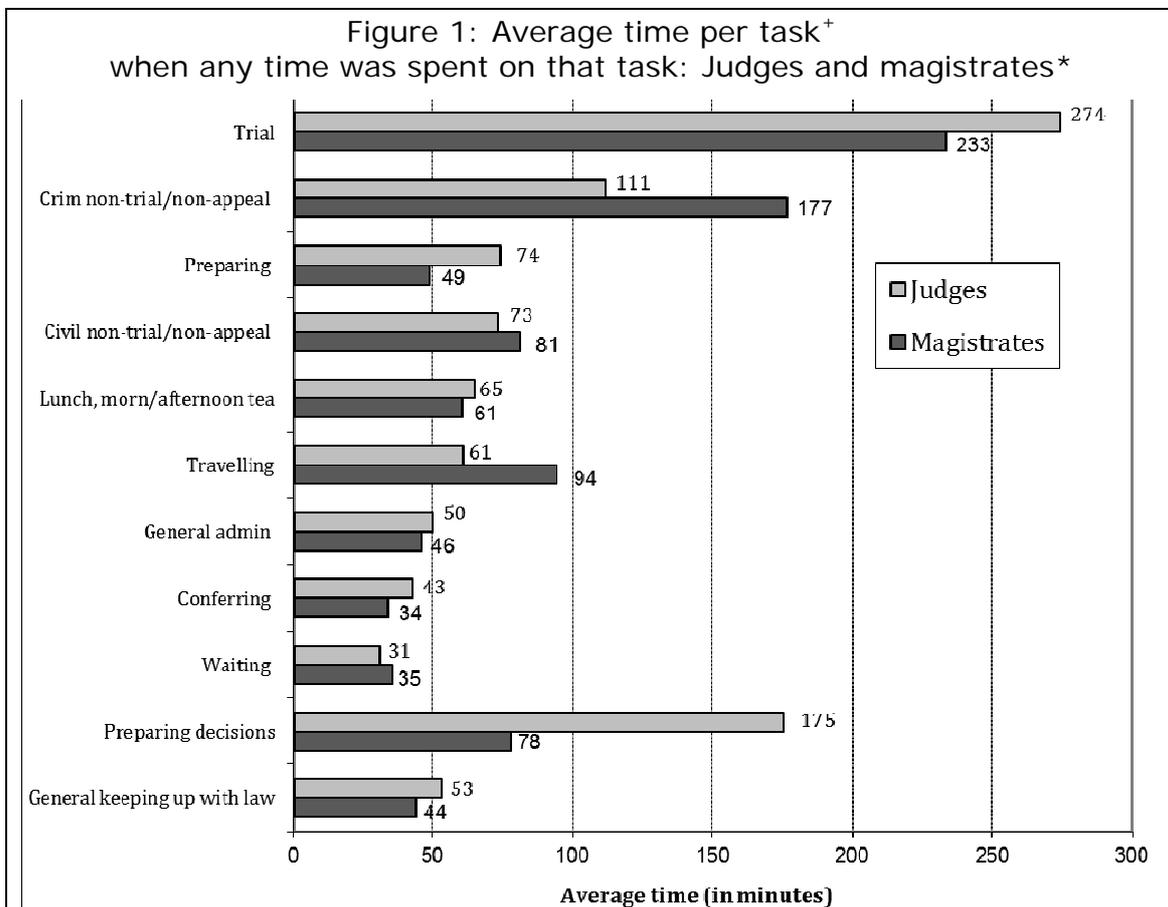
There is a greater variety of work outside the CBD courts and less scope for any specialisation. This may be a positive experience, but it creates greater demands. Magistrates must be familiar with varied aspects of law and procedure and interact with many different kinds of court users, often within a single day. One survey respondent gave a detailed description of the demands of country work:

I think there is a real difference between the stresses a magistrate faces in the city as opposed to a one magistrate country town. In the latter you are it. You have no one else to help out. You can be confronted with numerous matters that all need urgency and you have to decide on priorities amongst the urgent. The skill level of local practitioners results in more pressure on you to 'drive the show'. You can't confide in local people or what you say might get out into the public domain or the smaller gossip circles. It can be very lonely. Sometimes when you feel at your wits end you get some policy or procedural [sic] statement from the Chief Magistrate's office which seems so foreign to your own circumstances. This makes you feel alienated. You know you cannot diligently apply that practice yet you don't have the time or energy to point this out. These practice directions come from [a location] where there are [several] courts and lots more flexibility. If any magistrate there doesn't get through a list day, other magistrates will draw the work until it is finished. In the country you just sit on until it is finished. If you want to adjourn a difficult matter to consider it you know you will be struggling to find the time to do that so the pressure is on to simply finish it there & then.

A large amount of judicial work – but not all – occurs in court. The surveys asked all respondents to indicate the tasks and the time taken in each of up to three typical workdays. The tasks listed are specifically work-related and include in-court and out-of-court activities such as presiding at trial and non-trial proceedings, preparing decisions, general keeping up with the law, and lunch, morning/afternoon tea breaks. Overall a total of 1,154 typical days were described: magistrates described 535 typical days; judges described 619. Judges' days (mean=10.6 hours; median=10.7 hours) are generally about an hour longer than those of magistrates (mean=9.7 hours; median=9.5 hours), and women's work days are, on average, slightly longer than their male colleagues in their level of court.

Figure 1 describes the average time judges and magistrates report spending on various tasks. The findings reflect notable differences in the context in which work

is undertaken, the different mix of tasks and the different patterns of work organisation in the different court levels. While presiding at trial was the most time consuming activity for all in the judiciary, judges indicate considerably more time on trials than do magistrates, who spend more time on criminal non-trial/non-appeal matters such as granting adjournments, bail decisions, taking guilty pleas and sentencing. Judges spend considerably more time preparing decisions, as a result of the need for written judgements as part of their work.



+ The question in both surveys asked: 'While there may be no single typical work day, it is important to get a sense of the pattern of magistrates'/judicial work. Please indicate below the time spent (if any) on the following activities for three typical work days (days A, B, C). If all your work days are substantially similar, please only fill in column A.' The question then provided a list of potential activities: General keeping up with the law (reading cases, statutes, court rules, journal, books, etc.); Writing/preparing decisions, judgements, orders; Preparing for a case/the next day; General administrative work and correspondence; Conferring with other magistrates/judges and/or court staff/meetings; Waiting time (for legal representatives, court personnel, parties, witnesses, case assignment, etc.); Lunch, morning/afternoon tea; Presiding at trial; Hearing appeals (asked of judges only); Civil non-trial proceedings (directions hearings, pre-trial conferences, interlocutory matters, etc.); Criminal non-trial proceedings (bail, guilty pleas, sentencing, etc.); Travelling; and, Other (Please specify). Three columns were provided for respondents to estimate to the nearest quarter of an hour time spent on the tasks.

* Averages were calculated by summing the total hours spent on this activity across all days and dividing this number by only those days where time was spent on this activity, then multiplying by 60 to convert to minutes. This mode of calculating averages has been used in other research on judicial workloads (Ryan *et. al.* 1980 p. 35 Tables 2-7). Interpreting the findings must be done carefully. Every magistrate or judge does not perform each task each day for the average amount of time. Not all tasks are undertaken every day, and not all tasks take the average time every time they are undertaken. On any given day, a longer time taken for one task, such as presiding at trial, will be offset by a shorter or no time taken on another task on that day.

Another significant characteristic of the context of lower courts is the volume and rapid pace of decision making (Mileski 1971, Carlen 1976, Hunter 2005). One-quarter of all matters observed were dealt with in less than a minute; half were completed in only two minutes and twenty seconds. The average time per matter was four minutes and thirteen seconds (Mack and Roach Anleu 2007, p. 349).

One way of managing work time pressures is to undertake some work tasks outside normal business hours. Half of all judicial officers – judges and magistrates, men and women – report working outside regular work hours every day (defined in the surveys as before 9:00 am and after 5:00 pm Monday to Friday). Around a quarter do so a few times a week, and the other quarter do so once a week or less. The frequency of out of court work appears to vary for different levels of court (Table 1). Almost two-thirds of judges, whether male or female, report after hours work every day, compared with about one-third of magistrates, male or female.

Table 1: Frequency of work outside regular hours: Judges and magistrates*

Frequency of work outside regular hours [†]	Judges	Magistrates
Every day	62%	34%
A few times a week	24%	30%
About once a week	7%	9%
Few times a month	5%	15%
About once a month or less	2%	13%

Question: 'How often do you undertake judicial or non-judicial work outside regular work hours (before 9AM and after 5PM, Monday to Friday) that is necessary for, or related to, your work as a magistrate/judge?' The pre-defined response categories were: Everyday; A few times a week; About once a week; A few times a month; About once a month; A few times a year; or Never.

* Judges n=305. Magistrates n=243. Column percentages may not add up to 100% because of rounding.

† Defined in the surveys as before 9:00 am and after 5:00 pm Monday to Friday.

Recognising the impact of different court contexts and the variety in type of work and geographic location demonstrates the limitations of a single abstract model of judicial performance. This socio-legal research shows how judicial performance, in both senses, is not a solely an outcome of the judicial officer's individual attributes, but is at least partly a product of the court context.

3.2. The activities and inputs of others

Another factor shaping judicial performance is inputs from other participants (Tata 2007). A large body of socio-legal research approaches the study of courts from an organisational perspective. It examines how local practices and interrelationships between regular, key participants – especially the judge, the prosecution and the defence lawyer in criminal cases – shape the work of trial courts, the adjudicative process, and ultimately judicial performance (Mileski 1971, Eisenstein *et al.* 1988, Flemming *et al.* 1992). For example, Tata proposes 'an understanding of the

sentencing process which is not overwhelmingly focused on the judge as the decision maker, but rather as part of a sequence in a decision process, where the judge is a member (albeit the most central) of a collaborative sentencing world' (Tata 2007, p. 442).

Although the judicial officer retains authority for making the judicial decision, recognising the idea of interdependence is important for performance evaluation. Examining the capacities of and inputs from other participants in the courtroom provides important information that shapes the demands on judicial officers and ultimately their own judicial performance.

Our research finds that nearly six in ten magistrates report that their time is always or often taken up with unrepresented litigants, and only four in ten report that legal representatives are often or always well prepared (Table 2). In this regard, the context in which magistrates work is very different from that of the higher courts. Only 15 per cent of judges generally find that their time is always or often taken up explaining things to unrepresented litigants, while 57 per cent find that legal representatives are always or often well prepared. Similarly, nearly two-thirds of judges indicate that adequate support staff is always or often available while slightly more than a quarter of magistrates make this assessment.

Table 2: Judges' and magistrates' perceptions of other participants in their work*

Frequency of interaction	My time is taken up explaining things to unrepresented litigants		Legal representatives are well prepared		Adequate support staff is available	
	Judges	Magistrates	Judges	Magistrates	Judges	Magistrates
Always	1%	7%	2%	1%	20%	6%
Often	14%	51%	55%	37%	43%	21%
Sometimes	53%	38%	39%	55%	23%	29%
Rarely	31%	5%	4%	7%	12%	28%
Never	0%	0%	0%	0%	3%	15%

Question: 'Please indicate below how often the following statements apply to you and your work as a magistrate/judge'. A series of 11 statements were provided, including the three in this table. The pre-defined response categories were: Always; Often; Sometimes; Rarely; and Never.

* Judges n=306. Magistrates n=238-240. The number of respondents given as a range indicates that not all judges/magistrates who completed the survey responded to the question or to each part of it. Column percentages may not add up to 100% because of rounding.

As shown in Table 3, magistrates interact more frequently with court staff (38% always) than with other magistrates (27% always). Judges interact with court staff somewhat less frequently than magistrates do, but interact with each other more often than magistrates interact with each other.

Table 3: Judges' and magistrates' frequency of interaction with court staff and other judicial officers*

Frequency of interaction	With other court staff		With other judges/magistrates	
	Judges	Magistrates	Judges	Magistrates
Always	28%	38%	23%	27%
Often	47%	42%	51%	38%
Sometimes	22%	18%	23%	26%
Rarely	4%	2%	4%	8%
Never	0%	0%	0%	1%

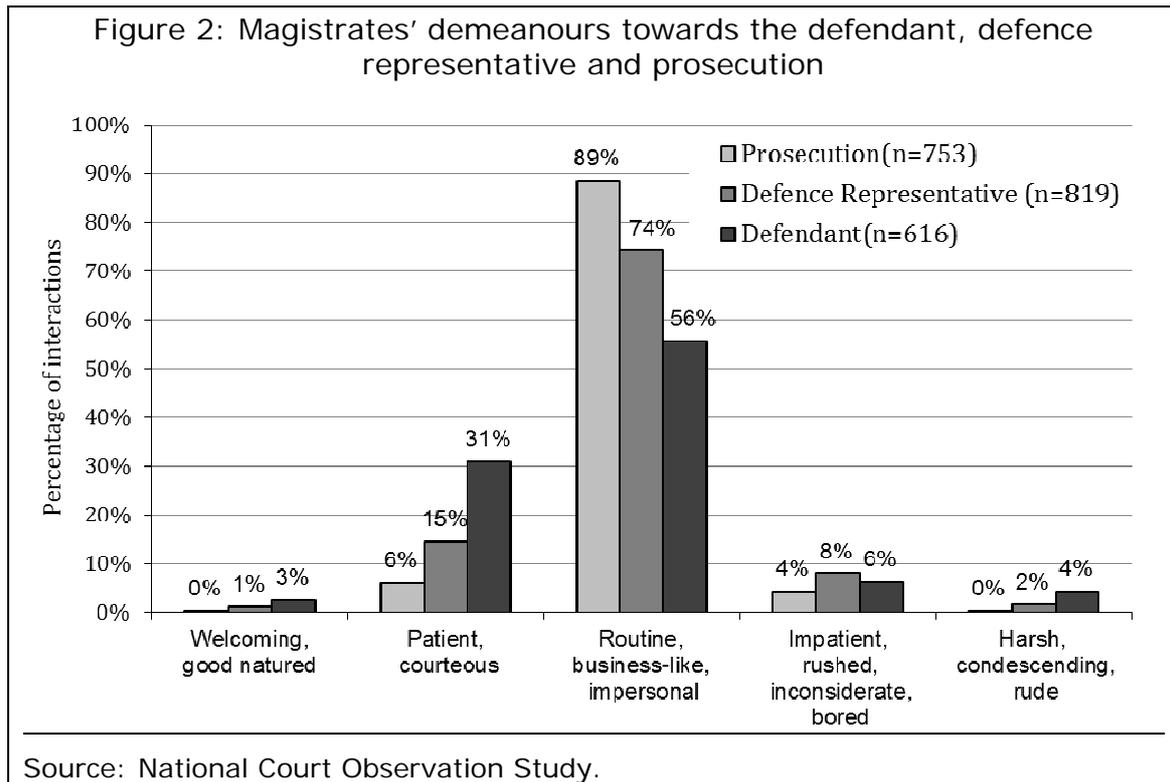
Question: 'Please indicate below how often the following statements apply to you and your work as a magistrate/judge'. A series of 11 statements were provided, including: 'I interact with other court staff', and 'I interact with other magistrates/judges', that form the basis of this table. The pre-defined response categories were: Always; Often; Sometimes; Rarely; and Never.

*Judges n=306. Magistrates n=237-239. The number of respondents given as a range indicates that not all judges/magistrates who completed the survey responded to the question or to each part of it. Column percentages may not add up to 100% because of rounding.

This may reflect the frequency magistrates sit in suburban or regional courts with a very small number of magistrates, perhaps only one. In contrast, judges in the higher courts nearly always sit in a courthouse with other judges, and may sit on appeal panels with two or more other judges.

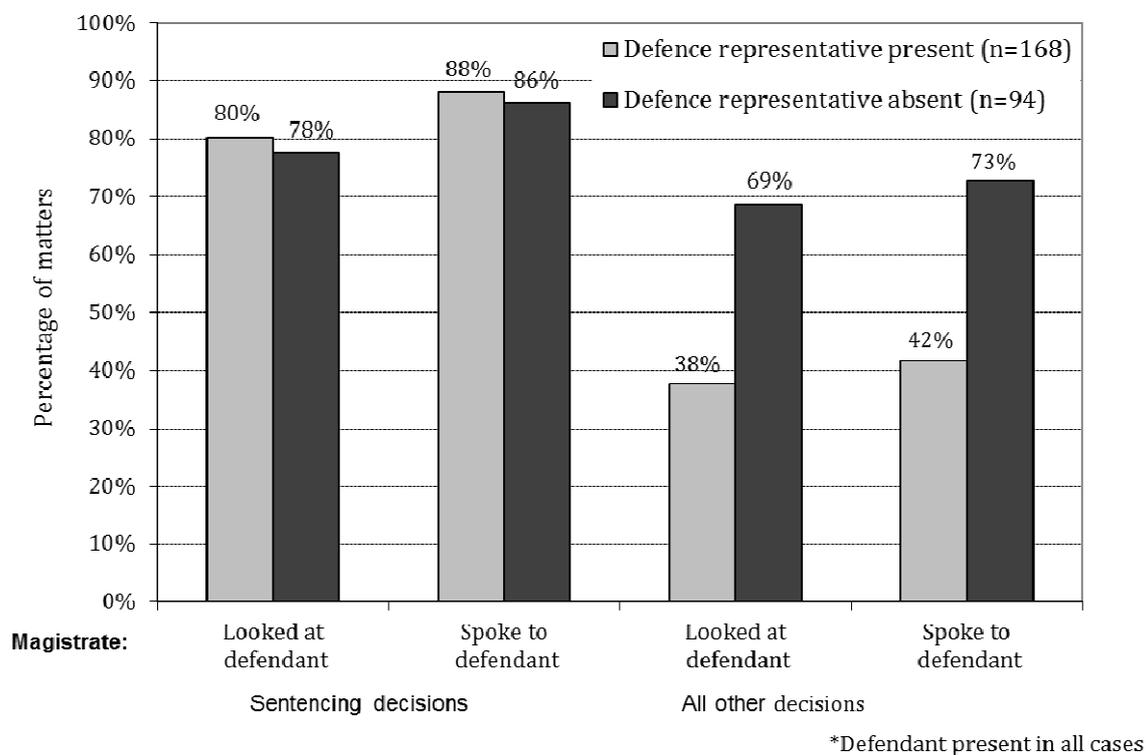
Several observational studies examine judicial officers' demeanour as a way of examining the performance of the judicial role (Ptacek 1999, Hunter 2005, Mack and Roach Anleu 2010). The display of demeanour can vary depending on the role and participation of others, both lay and professional, especially in the courtroom, and the nature of the activities or decisions being made. 'Demeanor is an achievement, a cooperative social accomplishment' (Telles 1980, p. 321). The demeanour of one person – the judicial officer – can affect the position, experience and actions of others. Judicial demeanour can reduce disruption, facilitate perceptions of procedural justice and enhance legitimacy. This is especially important for magistrates, as there are typically fewer symbols of judicial authority in lower courts, compared with higher courts in Australia. In the lower courts, wigs are not worn and gowns are rare; if gowns are worn, they are plain black and unadorned. Gavels are not used in any Australian court.

Figure 2 shows that the dominant demeanour displayed by magistrates is routine, business-like and impersonal which accords with the conventional model of judicial behaviour and performance. However, magistrates display more patience and courteousness to defendants than to the prosecution or defence representative (Mack and Roach Anleu 2010). This suggests that judicial performance varies depending on the role and situation of the participant with whom the magistrate is communicating, and an awareness of the special status of the defendant, as outside the courtroom work group and not occupying a professional role.



The kind of decision being made may also shape the performance or behaviour of the judicial officer. Whether a magistrate is delivering a sentencing or some other decision (for example, adjournment or bail) may affect their engagement with the defendant, which may in turn be affected by the presence of a legal representative. In most sentencing decisions the magistrate looked at (79%) and/or spoke (87%) directly to the defendant. In contrast, looking and speaking was observed in only about half of non-sentencing decisions (Figure 3).

Figure 3: Magistrates looking at and speaking to defendant by presence of defence representative (percentage of matters)



Source: National Court Observation Study.

Findings that sentencing decisions are delivered in distinct ways may not be surprising. The news about the sentence is of sufficient weight or import to the individual defendant and to the wider community that some level of direct engagement and more legitimacy work should occur. Direct judicial communication with the defendant, especially when sentencing, may indicate to the defendant that the magistrate regards him or her as a person worthy of direct communication, regardless of legal representation. This judicial behaviour may express values of procedural justice that could facilitate the defendant's acceptance of this news and cultivate a belief in legitimacy (Tyler 2003). Alternatively, direct looking and speaking could be a form of intimidation or lecturing, as an attempt to generate remorse or to motivate a change in future behaviour.

Another factor that may shape judicial behaviour is the presence or absence of lawyers. Legal norms imply that communication from the magistrate to the defendant would occur only through the lawyer. In a surprising finding, the presence or absence of the defence representative seems to make no difference to magistrates' direct engagement with the defendant when delivering sentencing decisions (Figure 3). Magistrates looked at and spoke to defendants directly in about four-fifths of sentencing matters, regardless of whether or not the defendant had a legal representative present.

Legal representation does appear to make some difference in non-sentencing decisions. The least frequent occasions where a magistrate looked directly at (38%) and spoke to the defendant (42%) are when the defendant is legally represented in non-sentencing matters. While the magistrate looked directly at (69%) and spoke to the defendant (73%) in a high proportion of non-sentencing matters when the defendant had no legal representative, this is still somewhat less frequent than in

sentencing decisions. These findings indicate that non-sentencing decisions are capable of greater routinisation (Emerson 1983, Heimer 2001) and can be dealt with less direct judicial attention, especially when there is no defence representative present.

These data demonstrate that taking account of the nature of the decision being communicated is important for interpreting judicial performance, as is interaction with others, especially the defendant and the defence representative.

3.3. Emotional dimensions of judicial work

Until recently questions of emotions – subjective judicial emotional experiences, emotional display, emotional performance, and emotion work – were not part of discussion about or research on the judiciary. Emotions have been cast as inherently irrational, disorderly, impulsive and personal and therefore inconsistent with the legitimate exercise of judicial/legal authority which requires impersonal, rational decision making (Maroney 2011a, 2011b). However, the process of making decisions, whether undertaken in or out of court, and interaction with other participants in the courtroom, especially the defendant, can entail emotions (Maroney 2011a; Roach Anleu and Mack 2005, 2013).

The capacity of judicial officers to manage emotions is a significant aspect of judicial performance, whether as outward display or internal process. As with other aspects of judicial work, the emotional demands are substantially shaped by context, and the extent and nature of the emotion management may not be visible to others.

A judicial officer must display a demeanour that evinces affective neutrality, emotional detachment and disinterestedness (Moorhead 2007, Bybee 2010). Justice must be dispensed in a 'mechanical, detached way' compelled by law, fact and reason and the judge should not display a demeanour that deviates from this ideal (Shaman 1996, p. 606). As noted above, judicial demeanours are dominated by an impersonal, unemotional style, but this varies somewhat in relation to different participants, just as patterns of looking at and speaking to the defendant vary according to the type of decision being communicated. Achieving such displays, which apparently recognise different professional, social and emotional demands, entails considerable emotion management.

Judicial officers' own emotional experiences of their work may not be visible to others, but they are an essential part of judicial performance (both outward display and inward functioning). The emotional content of judicial work might be characterised as stress – an individual or psychological condition – though emotions can also be practical resources for judicial officers (Polletta 2001, Ng and Kidder 2010).

The core element of judicial work is decision making. Judges and magistrates were asked whether they find 'making decisions is very stressful'. Views are divided. Approximately one-third agree/strongly agree, another third are neutral and another third report that they disagree/strongly disagree that making decisions is very stressful (Table 4).

Table 4: Judges and magistrates: Emotional dimensions of judicial work*

Emotional dimensions of judicial work	Frequency	Judges		Magistrates	
Making decisions is very stressful	Strongly agree	7%	32%	10%	38%
	Agree	25%		28%	
Difficult decisions keep me awake at night	Rarely	38%	52%	45%	62%
	Never	14%		18%	
My work is emotionally draining	Always	5%	31%	10%	47%
	Often	26%		38%	
<p>Question: 'Please indicate below how often the following statements apply to you and your work as a magistrate/judge'. A series of 11 statements were provided, including the three in this table. The pre-defined response categories were: Always; Often; Sometimes; Rarely; and Never.</p> <p>*Judges n=232-305. Magistrates n=236-240. The number of respondents given as a range indicates that not all judges/magistrates who completed the survey responded to the question or to each part of it.</p>					

In general, magistrates report finding their work more emotionally demanding than do judges. Nearly half of the magistrates surveyed find their work often or always emotionally draining while less than one-third of the judges surveyed report this level of emotional demand.

Acknowledging the emotional dimensions of judicial work does not necessarily translate into stress. Three in five magistrates indicate they rarely or never lose sleep over difficult decisions compared with a slightly smaller proportion of judges. Only around one in ten magistrates and judges report that difficult decisions always or often keep them awake at night.

As depicted in Table 5, judges and magistrates identify some emotion-related skills as essential to their everyday work (Roach Anleu and Mack 2013). Over half of magistrates and judges assess communication and being a good listener as essential, and around half consider courtesy and patience as essential qualities in their daily work. About a quarter of judges and a third of magistrates consider empathy and compassion to be essential for judicial work. Differences in the views about these skills are ones of emphasis; a large majority of judicial officers at all levels value a skill as either essential or very important. Each of these skills – including a sense of humour and cultural awareness – will, depending on the circumstances and context, require varying amounts of emotion work (Table 5).

Table 5: Emotions in everyday work: Judges and magistrates*

Valued qualities/skills (essential)	Judges	Magistrates
Communication	73%	81%
Being a good listener	53%	61%
Courtesy	53%	56%
Patience	50%	50%
Compassion	29%	38%
Empathy	25%	32%
Sense of humour	19%	27%
Cultural awareness	18%	29%
Managing emotions of court users	17%	25%
<p>Question: In your view, how important are the following qualities or skills for a magistrate/judge in the performance of daily tasks? Please mark each with a tick.' A list of 39 qualities plus an 'Other' category was provided. The pre-defined response categories were: Essential; Very Important; Important; Somewhat Important; and Not Important.</p> <p>*Judges n=303-309; Magistrates n=238-242. The number of respondents given as a range indicates that not all judges/magistrates who completed the survey responded to the question or to each part of it.</p>		

Differences between judges and magistrates are small, though larger proportions of magistrates tend to value these skills as essential, suggesting slightly more demands for emotion work in the lower courts. As reported above, higher courts more often deal with well-prepared lawyers, and have more time for reflection, more assistance from other professionals and more distance from lay participants (Abbott 1981). In lower courts there is more direct engagement with individuals, not via lawyers, though engagement is limited by the volume of cases and rapidity of decisions (Mack and Roach Anleu 2007).

Only some judges or magistrates acknowledge their role in the management of others' emotions in court. Overall, one-fifth (20%) regards managing the emotions of court users as essential in the performance of daily tasks with a third (36%) viewing it as very important. A slightly larger proportion of magistrates agree that the management of others' emotions in court is important compared with judges. This may reflect the nature of judicial work in the lower courts, with more direct engagement with court users (defendants, litigants) who do not have legal representation. It is possible that values associated with therapeutic jurisprudence and procedural justice, which require some direct engagement with these court users, are more evident among magistrates than judges (Mack and Roach Anleu 2011).

3.4. Personal / family context

As with emotions, the family or personal commitments that judicial officers simultaneously undertake are rarely considered in understanding judicial work or performance. Paralleling many other professions, questions of work/family interface and pressures of time are becoming more evident for the judiciary.

Women have made significant gains in a range of professional occupations, including the judiciary (Mack and Roach Anleu 2012, Rackley 2012, Kenney 2013, Schultz and Shaw 2013). While judicial office and judicial decision making are constituted as impersonal, disembodied and neutral, the judge is traditionally sex-typed male (Thornton 1996, 2007).

Access to sufficient time can be a source of gender inequality in many professions and occupations (Adam 1990, Epstein and Kalleberg 2001, Jacobs 2003, Jacobs and Gerson 2004, Goodin *et al.* 2005, Burchardt 2010, Misra *et al.* 2012). Women often have greater responsibility for domestic/household activities, while most men are able to rely on their wives or partners to shoulder this load, resulting in greater capacity for men to concentrate on their paid work activities (Seron and Ferris 1995, Schieman *et al.* 2009).

As discussed above, women and men judicial officers undertake similar time commitments regarding their overall work. The lengths of men's and women's work days are very similar. Women report spending more time on certain tasks, including some out-of-court work so their days are slightly longer. There is no work activity in which men spend substantially more time than women.

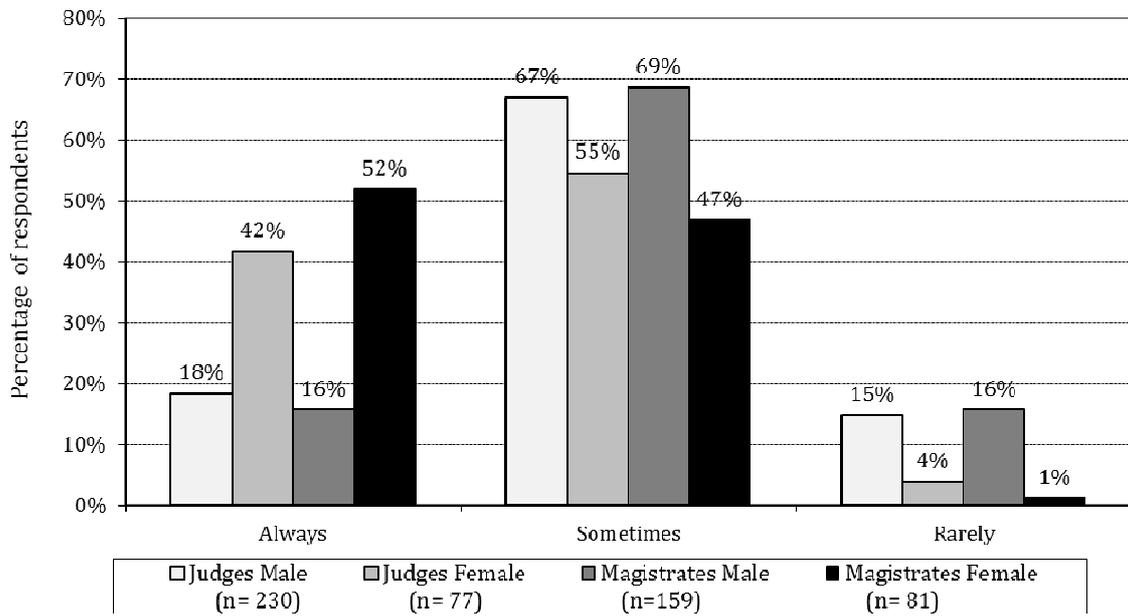
Time management, as a skill, is valued more highly by women. Among judges and magistrates seven in ten women (70%) compared with half (52%) of men rate time management as an essential or very important skill. This finding may reflect the different experiences of men and women regarding the intersection between work and non-work and any stretching of time across those two domains resulting in greater demands on women to manage time (also see Deem and Hillyard 2002, p. 137, Holmes 2002).

Different personal and family circumstances can result in differential capacity to separate work and domestic spheres, especially when judicial work occurs out side of court sitting and after regular business hours. Over nine in ten (93%) of male judicial officers are married or partnered compared with eight in ten (80%) of the women

Strikingly, but not surprisingly, of those with spouses/partners, two-thirds (65%) of the women judicial officers report that their spouse or partner's current employment status is in paid, full-time work – including self-employment – contrasting with one-fifth (20%) of their male counterparts. A larger proportion of women have no children (33% women, 14% men). Of those who have children, men generally have older children. These differences partly reflect different ages and stages in the life cycle. The average age of women judges and magistrates is 52 years (median 52) and of men 59 years (median 60).

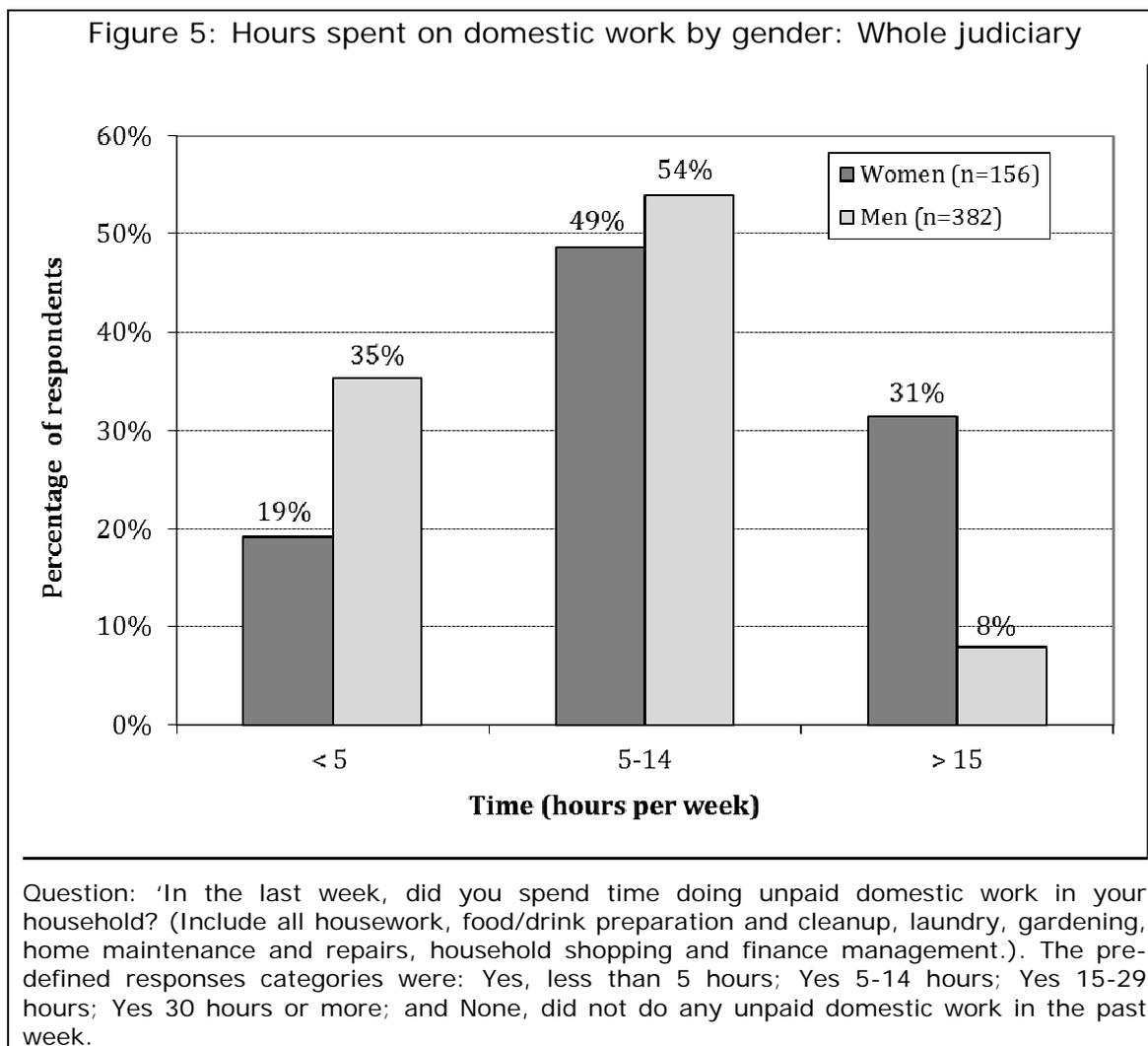
One consequence of these differences is different experiences of time pressures. Women judicial officers, especially magistrates, report feeling rushed far more often than their male colleagues (Figure 4). Half of the women magistrates report always feeling rushed compared with less than one fifth of the men. Very few women report rarely feeling rushed: only one female magistrate and only three female judges indicate this experience, whereas one in seven men report rarely feeling rushed. Gender is the strongest and most significant predictor of feeling rushed. This means that regardless of partner's employment status, level or court or age of children, women feel most rushed and men feel least rushed about their time.

Figure 4: Feeling rushed: Judges and magistrates by gender



Question: 'In general how do you feel about your time – would you say you **always** feel rushed, even to do the things you have to do, only **sometimes** feel rushed, or **rarely** feel rushed?' The pre-defined response categories were: Always feel rushed; Sometimes feel rushed; and Rarely feel rushed.

Part of feeling rushed can be attributed to the substantial domestic responsibilities that women in the judiciary retain. Respondents estimated the amount of time spent in the previous week on domestic work in their household, in response to a question giving a wide range of examples of what might be considered domestic work (Figure 5). Approximately half of women and men report spending between five and 14 hours on domestic work. A third of the women judicial officers, but less than one in ten of their male counterparts, report spending more than 15 hours per week on this unpaid work. In contrast, over one third of men report undertaking less than five hours per week on unpaid domestic work, compared with only one in five women.



The different amounts of time devoted to domestic work reported by women and men can be explained, in part, by men's wives/partners undertaking more domestic work, while women in the judiciary do not gain this assistance from their spouse or partner.

A direct way to investigate the importance of work/life tensions as a contextual factor in judicial performance is to ask whether the demands of family life interfere with their job. Only a few women and men indicate that this occurs always or often. Half of women, but only two-fifths of men, report this interference occurring sometimes. When asked the converse question of how often the demands of their job interfere with family life, around half of men and women indicate this occurs sometimes. However, almost half of women judicial officers experience their work as interfering with home life always or often, compared with only one-third of their male colleagues. These findings appear to indicate that women and men are equally successful in protecting work demands from family activities but that women may have less success or face more obstacles than men in preventing work from intruding into family time.

The following two comments encapsulate different experiences of time and the line between home and work:

As noted, my present job is much more compatible with family responsibilities + much less rushed than previously – the hours are as long, but the stress and pressure no longer apply ... [.]

This comment is from a male judge, 58 years of age, who moved from private practice as a solicitor. He suggests that it may not just be the *quantity* of hours that is significant but the *quality* of the time and the nature of the tasks to be completed within the time that distinguishes the hours as a judicial officer from the hours as a private practitioner.

For this next judge, having judgements to write has a substantial impact on her experience of time, whether at work or elsewhere.

It has had a major effect on my lifestyle in that, unless I am on holidays, any time I am not working (just about) I feel guilty – as I always have judgements outstanding. [Emphasis in original.]

4. Conclusion

Judicial performance evaluation rests on an implicit assumption of a single, ideal decontextualized judicial officer, incorporating a particular notion of impartiality and neutrality. This kind of JPE tends to focus on performance as outward display, especially in court. Evaluation typically relies on the perceptions of court users, especially lawyers. It does not incorporate judicial officers' own perceptions, experiences and reflections on their everyday work, nor does it consider key elements of judicial work context.

Empirical socio-legal research shows that judicial behaviour occurs in a context constituted by different levels and types of court, activities and inputs of others, demands for emotion work and the work-family interface. These facets of judicial work may not be visible to others and so must be understood, at least in part, through judicial officers' perceptions and experiences and as identified through independent observation and analysis. Such research identifies social as well as individual (behavioural or cognitive) dimensions in the performance of judicial work.

All evaluations of judicial performance are necessarily partial, and entail degrees of subjectivity. A critical and reflective account of judicial performance must rest on information from diverse participants, including judicial officers themselves, as well as contextual data from a range of sources. Incorporating such information into JPE processes will enable consideration of factors that might influence the behaviour of a specific judge or a category of judges which would not be revealed through more generic strategies. It will also assist in identifying opportunities where changes might improve individual or collective performance, as well as recognising where there may be little prospect of change, whether because of social, contextual or individual factors.

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