

From Evaluation to Improvement: A Chief Justice's Perspective

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Warren, M., 2014. From Evaluation to Improvement: A Chief Justice's Perspective. *Oñati Socio-legal Series* [online], 4 (5), 953-973. Available from: <http://ssrn.com/abstract=2536304>



Abstract

At the Supreme Court of Victoria, Australia, concepts of judicial performance and evaluation are relatively new. Responding to modern expectations for increased judicial accountability for their performance, Victorian judges have engaged a number of court-led evaluation and measurement tools aimed at improving judicial performance both inside and outside the courtroom. These include the Court Craft judicial education programme, the Report on Government Services performance indicators and the International Framework for Court Excellence. This article discusses how the Supreme Court of Victoria obtained judicial acceptance of the value of these tools in the Australian constitutional and institutional context. It highlights programme design aspects, including the importance of judicial involvement in programme development.

Key words

Judicial evaluation; judicial independence; Court Craft; International Framework for Court Excellence; Supreme Court of Victoria

Resumen

En la Corte Suprema de Victoria, Australia, los conceptos de rendimiento y evaluación judicial son relativamente nuevos. En respuesta a las expectativas

Article resulting from the paper presented at the workshop *Evaluating Judicial Performance* held in the International Institute for the Sociology of Law, Oñati, Spain, 9-10 May 2013, and coordinated by Francesco Contini (National Research Council of Italy), Jennifer Elek (National Center for State Courts), Kathy Mack (Flinders University), Sharyn Roach Anleu (Flinders University) and David Rottman (National Center for State Courts).

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modernas de una mayor responsabilidad judicial por el desempeño de sus funciones, los jueces de Victoria han integrado un número de herramientas de evaluación y medición dirigidas a mejorar el desempeño judicial, tanto dentro como fuera de la sala. Estas herramientas incluyen el programa de educación judicial Court Craft, los indicadores de rendimiento del Informe sobre Servicios del Gobierno y el Sistema Internacional para la Excelencia de los Tribunales. Este artículo analiza cómo obtuvo la Corte Suprema de Victoria la aceptación judicial del valor de estas herramientas, en el contexto constitucional e institucional de Australia. Se destacan aspectos como el diseño del programa, incluyendo la importancia de la intervención judicial en el desarrollo del programa.

Palabras clave

Evaluación judicial; independencia judicial; Court Craft; Sistema Internacional para la Excelencia de los Tribunales; Corte Suprema de Victoria

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1. Introduction

In 2001, the then Chief Justice of the Supreme Court of New South Wales, Chief Justice Spigelman, made the following observation:

Perhaps the foremost challenge for judicial administration today is to ensure that contemporary expectations of accountability and efficiency remain consistent with the imperatives of judicial independence and the maintenance of the quality of justice. Accountability for the administrative functions of courts is, in principle, distinct. Some activities fall clearly into one or another category but there is a significant area of overlap between the two (Spigelman 2001, p. 1).

These remarks allude to the increasing public demand in Australia over the last few decades for both judges individually, and the Judiciary as an institution, to be accountable for both the efficiency and quality of the justice they deliver (Gleeson 1995). They also highlight that judicial accountability for administrative activities is a relatively new and somewhat confronting concept for the Australian Judiciary. Accountability or evaluation for individual performance of judicial tasks is therefore an extremely controversial area and is one that is presently approached with caution in Australian jurisdictions.

The reluctance to embrace judicial performance evaluation stems from the potential threats to the standing of the Judiciary posed by externally-imposed, economically-driven models of performance evaluation in the Australian constitutional context. Whilst these risks must be acknowledged, there are significant benefits to be gained by courts that engage in broad-based, court-led performance evaluation programmes, particularly in terms of public confidence, judicial independence, and personal professional development.

The Supreme Court of Victoria has adopted three court-led evaluation or measurement tools that have addressed cultural and philosophical resistance to new methods of judicial accountability and contributed to improvements in judicial performance both inside and outside the courtroom. These are the Court Craft programme, the Report on Government Services (ROGS) performance indicators on courts administration, and the International Framework for Court Excellence (IFCE). The Court Craft programme has assisted judges with their in-court performance skills. ROGS data and IFCE implementation have heightened judicial awareness of the need for improved case management outside of the courtroom and improved judicial input into case management reform processes. The success of these tools lies in striking the correct nexus between judicial accountability and judicial independence.

2. The Australian constitutional and institutional context

The tensions surrounding judicial accountability for performance are based on the nature of the separation of powers and the associated concept of judicial independence established under Australia's constitutional structure (French 2009). In Australia, the powers of the Commonwealth are divided among three branches of government: the Parliament, the Executive, and the Judiciary (Blackshield and Williams 2006). Under this model, the Judiciary is independent from the governmental branches. The risks and benefits of, and the barriers to, implementing judicial evaluation programmes in Australia are necessarily informed by the limitations imposed by this constitutional context (Warren 2004).

Sir Owen Dixon described Australia's separation of powers doctrine in the *Boilermakers* case of 1956.¹ Dixon wrote:

If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed

¹ *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

according to the same plan, you would still feel the strength of the logical inferences from Chapters I, II and III and the form and content of ss.1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement. Section 1 positively vests the legislative power of the Commonwealth in the Parliament of the Commonwealth. Then s.61 in exactly the same form, vests the executive power of the Commonwealth in the Crown. They are the counterparts of s.71 which in the same way vests the judicial power of the Commonwealth in this Court, the federal courts the Parliament may create and the State Courts it may invest with federal jurisdiction. This cannot all be treated as meaningless and of no legal consequence. (*R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, p. 275).

The independence of the Judiciary from the other two arms of government is supported by section 72 of the Constitution which protects the tenure and remuneration of federal judges. Judges have secure tenure until they are 70 and their remuneration may not be decreased during their term of office (Blackshield and Williams 2006).

These two principles, separation of powers and judicial independence, make the courts a distinct branch of government and one of the three pillars of Australia's democracy.

There are two important aspects of judicial independence. The first aspect is the decisional independence of individual judges. This is known as internal independence. The second is the independence of courts as institutions. The internal independence of the Victorian Judiciary is enshrined in the legislation establishing the governance structure of the Supreme Court. Section 28 of the *Supreme Court Act 1986* (Vic) establishes a Judges Council, consisting of all judges of the Court, which has the authority to collectively make decisions regarding court administration. The Chief Justice is identified as the head of the Judiciary, but is only the "first amongst equals".

The function of the judicial branch, as opposed to the Legislature and the Executive, is to apply and uphold the rule of law in an objective and independent manner (Keyzer 2010). Under the Constitution, judges, unlike officers of the Executive and Legislature, are appointed, not elected. Judges therefore do not exercise their authority through political legitimacy. Rather, the legitimacy of the judicial branch is based on public confidence that judges are discharging the judicial function in a manner which is independent from outside influence (Gleeson 1995).

This constitutional context has strong implications for the development of judicial performance evaluation programmes in Australia. There is strong judicial resistance to evaluation programmes that have the potential to undermine the public's confidence in the independence of the Judiciary. In particular, external government-led performance evaluation programmes which are not adequately adapted to the needs of the Judiciary pose a potential threat to the constitutional standing of the Judiciary.

3. The risks posed by judicial performance evaluation

3.1. The standing of the Judiciary is undermined

In the last thirty years, management reform has been implemented across Australian government administration so as to improve the responsiveness and accountability of government (Keating and Weller 2001). The new approach has focused on the measurement of performance and results based on gauges of efficiency, effectiveness, and quality of service (Keating and Weller 2001).

Under the reforms, the executive government in Australia has imposed traditionally private-sector methods of performance management, such as accruals and programme-based and output budgeting, on public sector organisations (Drummond 2001). Government agencies now prepare their budgets, manage their operations, and prepare their financial reports on a basis similar to that used by

business, including costing of relevant outcomes and outputs (Drummond 2001). A system of performance benchmarking has also been established through the Productivity Commission's Report on Government Services (Mulgan and Uhr 2001). A politically important purpose of programme-budgeting is the imposition of political directions. As political scientists and public administration commentators would have it:

[Programme-based budgeting systems] impose greater political direction over policy options with major financial implications. The greater emphasis on corporate goals and strategic planning at the agency level has primarily been intended to facilitate the managerial control of secretaries [of government departments] and senior management and so to increase the 'internal' accountability within their agencies (Mulgan and Uhr 2001, p. 166).

Under this system, public organisations have been transformed into commercial operations that must meet the executive government's policy and efficiency targets in order to justify the level of public funding they receive. The objective is to replicate the competition, incentives, and sanctions of a market system to increase the output and efficiencies of government agencies. The quest for efficiencies measurable in monetary terms has overriding importance under this model (Drummond 2001).

As the executive government, through departments of treasury and finance, controls the provision of financial resources for the courts, State and Federal governments in Australia have asked that courts adopt some aspects of this performance measurement framework to ensure that the public receive "value for money" from court services (Drummond 2001).

In the 1990s Victoria shifted to mega-departments and the courts found themselves as a mere business unit alongside areas such as gaming, emergency services, corrections and police. The title of 'justice' was appropriated to cover all sorts of non-court functions, indeed, anything remotely connected to social control, culminating in a department of justice. Under this system, departmental officers make the ultimate decisions, not the courts, about the provision of resources to the courts and the Supreme Court's total budget forms part of the overall Department of Justice budget. The Supreme Court of Victoria, will however, become administratively independent from the Department of Justice as of July 2014.

In 1983, the then Chief Justice of the Supreme Court of South Australia, Chief Justice King, observed the potential threats to judicial independence that stem from the Executive's control of the purse strings (King 1984). Chief Justice King said:

The effective functioning of the judiciary depends in large measure upon the financial and material resources made available to it ... the dependence of the judiciary on outside sources for the wherewithal to perform its function must always pose some threat to the independent and impartial administration of justice. Those who control the purse strings will always have some capacity to influence the actions of those who are dependent upon the contents of the purse (King 1984, p. 341-342).

Through the vehicle of the purse a government can, in effect, control or constrain the Judiciary by requiring the courts to conform to budget processes.

Under the current system of output and programme-based budgeting this means the courts are required, together with other government departments, to provide information against Treasury output performance targets for each appropriation bill² that is put before Parliament. This includes a description of the goods and services that will be provided by the courts in comparison with previous years. By addressing each output measure, the courts make a case regarding their prudent financial management and its reforms to improve efficiency. This process has the

² An appropriation bill is a bill, or motion, that authorizes government spending.

potential to undermine the standing and functionality of the Judiciary in a number of ways.

First, the Judiciary is placed in the constitutionally undesirable position of having to compete for funding on an equal footing with the political priorities of public administrators. In the case of Victoria, the Supreme Court is also required to compete with the priorities of other business units within the Department of Justice for an allocation of part of the Department of Justice budget. Not only are the courts reduced to a standing similar to that of a government department, the reliance on government-imposed performance measures ensures that political and economic criteria dominate funding appropriation decisions. The more fundamental consideration of the value of the Judiciary in a democratic society is not taken into account in determining funding levels for the courts. The risk for the courts therefore in embracing the Executive's performance measures is that they will receive inadequate funding to perform their constitutional role (French 2009).

The allocation of the Victorian Department of Justice contingency funding is illustrative of this point. The Victorian Department of Justice has a very large budget. Included in its budget is a component for contingency. If the courts need funding for their buildings or to meet an unexpected contingency, the courts must appeal to the Department of Justice to accommodate the financial need. If an unexpected phenomenon arises in litigation, such as the prosecution of the various killings during the Victorian gangland era³, the Supreme Court must make a business case to the Department of Justice.

A further demonstration of the dangers of government-imposed and controlled performance frameworks is the Victorian Parliamentary Public Accounts and Estimates Committee Outcomes Report for 2010-11. The Report recited that the results for the Department of Justice's performance measure 'Quality of Court Registry Services' had consistently been above 95 per cent but that for 2010-11 the figure had declined to 85 per cent. The Public Accounts and Estimates Committee approached the Department of Justice for information about the "sudden and significant decline in service quality." (Warren 2012, p. 13). The Department responded by saying that the 85 per cent figure was merely an estimate and that the actual result was confirmed at 95 per cent.

The performance of court registries should not be the concern of a government department. This is particularly the case given the special constitutional role afforded to Supreme Courts in the Australian context. Sometimes, state parliaments have endeavoured to constrain the powers of Supreme Courts and their capacity to intervene in government action. In a line of cases⁴ in the last few years the High Court of Australia has made it clear that the State Supreme Courts have a special constitutional role. The High Court has held that legislation that would compromise the integrity of a Supreme Court will be struck down as invalid.⁵ In this context, it is questionable for government departments to be able to interfere in and constrain the function of courts through the provision of services and resourcing.

The adherence of the Judiciary to output measures set by the executive government might convey the message to the public that the Judiciary is managing public funds inefficiently (Drummond 2001). It could be inferred that judges are not to be trusted with finances and need to be supervised and controlled. Such a perception would be damaging to the constitutional standing of the Judiciary. The further risk is that once courts accept that they are answerable to the executive government, demands for more answerability to government will emerge and it will

³ The Victorian gangland era was a period from the late 1990s to early 2000s of retributive murders of over 30 of Melbourne's underworld figures.

⁴ See *Kable v DPP (NSW)* (1996) 189 CLR 1; *South Australia v Totani* (2010) 242 CLR 1; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; and *Wainohu v New South Wales* (2011) 243 CLR 181.

⁵ See *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45.

become increasingly difficult for the courts to maintain judicial independence (Drummond 2001).

3.2. *The Courts as a dispute resolution service*

Economically-driven performance measurement frameworks impose a model designed to improve the efficiency and effectiveness of private sector service delivery onto the Judiciary (French 2009). However, as a fundamental democratic institution, the Judiciary has different objectives and processes to commercial enterprises, which are focused on increasing productivity and reducing the bottom line (French 2009). The constitutional function of the Judiciary is to uphold the rule of law. The authority of the Judiciary to discharge this function is based on public confidence that judges apply the law in a consistent, objective, impartial, and open manner. In order to be convinced of the probity of the actions of judges, the public must be able to observe and understand the judicial process (Doyle 1999). Judges are therefore obliged to ensure public access to the work of the courts by adhering to the principles of open justice (Doyle 1999). Chief Justice Spigelman highlighted the differences between private sector service delivery and the judicial function:

[J]udges are bound, in carrying out their functions, to work within an inherently inefficient process: they must conduct their activities in public, publish reasons for their decision and observe the other principles of open justice, practices entirely foreign to the way profit-driven business organisations function. Courts cannot sensibly be made subject to performance measures and other management controls used in the private sector that is free of those necessarily inefficient operational constraints (Spigelman 2001).

It is these core features of open justice which distinguish the judicial function from the performance of legislative, executive, and private commercial functions. The link between the inherently inefficient processes of open justice and the institutional legitimacy of the Judiciary means that notions of efficiency relevant to market activities are inappropriate when applied to judicial administration (Drummond 2001). The risk for the Judiciary in adopting performance frameworks that measure performance in purely economic terms is that the courts might come to be seen as mere dispensers of dispute resolution services (French 2009). The Judiciary is a fundamental democratic institution and therefore cannot, and should not, be subject to financial incentives to improve its performance (Drummond 2001).

One way of comprehending the value and significance of courts to our democratic structure is to reflect on the types of cases to go through the courts. In criminal cases the State, represented by the prosecuting authority, brings a citizen before the court. It is a matter of *the State v. the Citizen*. There are a number of important, fundamental principles applied in the Australian criminal justice system. A person is entitled to a fair trial, a fair hearing, and is innocent until proved guilty beyond reasonable doubt. Whilst Victoria now has a Charter of Human Rights,⁶ these principles are ancient rights that can be traced back to the origins of our democratic society, the development of the rule of law, and our civilisation as we know it.

Sometimes it is forgotten in the running commentaries about our political structures and society that the courts play an important part in maintaining peace and harmony within Australian society. Professor Hazel Genn in the 2008 Hamlyn Lectures spoke about the role of civil justice as a public good. It facilitates peaceful dispute resolution between citizens thereby avoiding citizens resorting to confrontation and violence as may occur in less civilised societies. There is a collective benefit in the rule of law. It supports the tranquillity of the State through ensuring social order, cohesion and significantly, restraint on the Executive.

⁶ Charter of Human Rights and Responsibilities Act 2006 (Vic).

Most disputes in society are not resolved in courts. Of the civil cases litigated in the courts, less than five per cent ultimately go before a judge (Warren 2012). These days civil litigation is largely resolved through alternative dispute resolution, such as mediation and arbitration, or settlement between the parties. However, it is the fact of a civil justice system symbolised by the courts that enables parties to enforce their rights. It is also the power of the courts that brings reluctant parties to the negotiating table. We relegate the courts to the role of mere service providers at our peril.

Traditionally, it has been the long-established principles of open justice that have provided the basis for judicial accountability and improvements in judicial performance (Gleeson 1995). As a general rule, people who know their decisions are open to constant public review and scrutiny are more likely to make reasonable decisions (Gleeson 1995). The requirement that judicial decisions are held to appellate review also promotes good decision-making and the acceptability of the outcome of the judicial process (Gleeson 1995). On one view, the existence of these traditional methods of judicial performance evaluation might render it unnecessary to impose modern economic-based performance measurement frameworks onto the courts. However, the principles of open justice provide accountability for judicial functions only. By embracing broad-based performance evaluation programmes that are developed by and for the Judiciary, judges can improve both administrative and judicial performance. The Judiciary also stands to gain a number of other benefits in terms of public confidence, judicial independence, and personal professional development. These benefits are discussed in the following section.

4. The benefits of court-led performance evaluation

4.1. Public benefits: maintains public confidence in the Judiciary

Until quite recently, the Australian Judiciary focused solely on accountability for judicial functions through the processes of open justice. Judges decided cases according to the law and to the extent that the resources provided by the executive government enabled them to do so (Gleeson 1995). If financial resources were not adequate, then that was not the fault of the Judiciary. Justice Nicholson warned against this tendency to leave the administrative aspects of court management to the executive government:

The quality of independence given to the judicial branch is unique in the political spectrum and in turn requires of the branch that it be accountable in the sense that it performs its functions efficiently. A judicial branch which is (for example) years behind in disposal of its caseload may be independent but it has no political relevance. The quality of independence ceases to matter to citizens if they cannot have it applied in prompt resolution of their disputes. The principle of judicial independence requires of the judicial branch that it be efficient in the dispatch of its business for without efficiency the preservation of public confidence necessary to the existence of the principle will not occur. Public confidence is diminished by delay in the administration of justice (Nicholson 1993, p. 424).

Open justice alone is no longer enough to maintain public confidence in the Australian judicial system. The Australian community now demands transparency in court administration and in particular accountability for money spent and actions taken. The Australian Survey of Social Attitudes conducted in 2007 highlighted a general dissatisfaction with the delays and inefficiencies in court processes, including the length and cost of cases (Schulz 2010). The survey linked these perceived administrative inefficiencies to a decline in public confidence in the courts (Schulz 2010). Results from a Supreme Court of Victoria User Survey conducted in 2012 also indicated a level of frustration with court delays. The primary response to this change in public expectation has been the general acceptance amongst judges

of the inevitability of a more pro-active role for the Judiciary in case management and in the internal management of courts (French 2009).

The evidence of a decline in public confidence in the Judiciary points to the need for more community education and communication to explain how judges and the courts work. The Australian experience has valued the use of the media as the main, and often sole, conduit for information about the justice system for the general public (Schulz 2010). However, media reporting is often selective in its focus on the dramatic and sensational issues debated in courts (Schulz 2010). Some major news outlets focus exclusively on crime and sentencing and frequently criticise the courts for imposing lenient sentences. Positive improvements to the quality and administrative efficiency of the justice system, such as the modernisation of courts, the growth of the paperless court, and case management reforms are rarely reported (Gleeson 1995). Consistently negative reporting regarding the court system has impacted on levels of public confidence in the Judiciary. It also fails to provide the administrative accountability that the Australian public demands of the Judiciary.

The rise of new media and technologies, particularly social media, and the related decentralisation of the press into a variety of new online forums, has also presented challenges. This shift challenges the traditional relationship between the courts and the media; specialist court reporters have made way for "citizen journalists" who tweet and text directly from the courtroom (Warren 2013). Information posted online is often immediate and not subject to sufficient editorial scrutiny; it is also highly interactive and permanently available to anyone with access to the Internet. As a result the courts are now facing more public scrutiny than ever before and have had to adapt to ensure continued open justice and accountability in this technological age (Warren 2013).

There is growing awareness that the courts should engage with the public directly to communicate the achievements in court administration and thereby improve public confidence in the judicial system; technology and social media provide an excellent opportunity for courts to do so (Warren 2013). Performance evaluation reporting can form an important part of the efforts of the Judiciary to explain the work of the courts more expansively. The Supreme Court of Victoria publishes data against key performance measures on its website⁷ to ensure the Court is fully accountable to the Victorian community. The website reports provide the public with concrete evidence of reductions in court delays and case backlogs. They illustrate that the Court has a clear and responsive case management reform system to improve the efficiency of the justice system. This not only counters negative media reporting of the Judiciary but also offers the public a more scientific, economic, and tangible method of keeping check on the Judiciary than that allowed by the jurisprudential analysis of judicial performance on appeal.

The Supreme Court of Victoria User Surveys, conducted as part of the court's implementation of the International Framework for Court Excellence (IFCE) also improved public understanding of the court system by including information and questions about court processes such as listings and procedures. The information about how and why courts operate in a certain way enhanced community confidence in the thoroughness of the judicial process.

4.2. Political and constitutional benefits: protection of judicial independence

Performance evaluation reporting also facilitates better communication between the courts and the Executive. Quantitative performance data and outcomes have enabled the courts to outline their administrative needs and achievements in the economic rationalist terms of efficiency that resonate with government budget and accountability processes. The Supreme Court of Victoria's globally accepted IFCE

⁷ Website: <http://www.supremecourt.vic.gov.au/>

performance measures, described in depth later in this article, are easily aligned with the government's budget paper performance measures. In a recent climate of government funding cuts, the Supreme Court of Victoria's ability to point to a track record of prudent and transparent financial management and a pro-active approach to case management reform assisted the Court in avoiding drastic reductions in government funding. It has also provided an evidence base for successful funding bids for information technology and case management reforms.

A proactive approach by courts in demonstrating their administrative efficiency and accountability also decreases the risk of interference by the executive government in court administration. The ability of courts to assert their administrative independence is particularly important as judicial officers continue to be involved in aspects of court administration creating the risk of judges becoming party to efficiency audits conducted by government external review bodies. The Auditor-General and Ombudsman⁸ have traditionally conducted audits or enquiries of court administrative activities involving administration staff. Tensions may arise as these bodies seek to audit processes that are not merely administrative, but that also form part of the judicial function. A quasi-judicial function that Auditors-General have sought to consider is case listing practices. In the Victorian jurisdiction, case listing is not a purely administrative matter. Judges are heavily involved in listing practices. It is constitutionally inappropriate that members of the Judiciary charged with finalising case lists are made subject to review by government bodies that might also be litigants in the court system. Yet rather than rebuffing audits, if the courts illustrate that they are managing public funds responsibly and are improving the efficiency of court processes, then government external review agencies are less likely to seek to review quasi-judicial functions. In this way, performance evaluation frameworks, when developed by and for the Judiciary, can help protect judicial independence, rather than hinder it.

4.3. Judge-centric benefits: professional development

As mentioned above, the judicial position requires the application of the law, justly and from an independent, impartial, and objective position. Judges are therefore essentially lone decision-makers, working in a system that is based on the law of precedent. These systemic factors combine to inhibit the flow and nature of information and feedback that judges receive from others. A judge's position within the legal system means that if they receive any feedback at all, it is most likely to be filtered or not necessarily candid. In other contexts, this phenomenon is known as "CEO disease," where those higher up an organisational structure suffer from the effects of not receiving views distinct from their own (Taylor 2006). Australian judges are also generally appointed to the bench after long careers as barristers. The type of judicial "career path" in Australia means judges receive little training in preparation for the judicial role beyond the technical expertise on how to run a trial or appeal and how to apply applicable laws to a set of facts. These skills are the result of accumulated legal experience, rather than formal judicial training. In an age where judges from specialist areas are asked to sit in new areas, this may be difficult. Furthermore, some governments wish to diversify judicial appointments. Thus, individuals are appointed from backgrounds, for example, where there is no accumulated legal experience, and training is essential. Judicial evaluation programmes tailored to the unique needs and position of judges can therefore provide an important opportunity for judges to develop skills specific to their role and identify areas for improvement.

⁸ The Auditor General and the Ombudsman are independent officers of the Parliament. The Auditor General investigates the management of resources within the public sector and the Ombudsman investigates decisions and actions of government bodies.

5. Supreme Court of Victoria performance evaluation tools

The Supreme Court of Victoria has embraced a number of court-led evaluation and measurement tools aimed at improving judicial performance both inside and outside the courtroom. These include the Court Craft judicial education programme, refinement of the Report on Government Services performance indicators, and the International Framework for Court Excellence. Each initiative presents unique opportunities and challenges and is subject to ongoing review and improvement.

5.1. *Judicial education: Court craft*

The Supreme Court of Victoria participated in a programme through the Judicial College of Victoria to address the shortfall in judicial professional evaluation and training. The Judicial College of Victoria is an educational organisation which was established a decade ago to meet the educational and continued professional development needs of Victorian judicial officers. The result was the Court Craft programme (Warren 2011).

There are two key elements of the Court Craft programme. The first is the 360-degree feedback survey. The second is the Communication in the Courtroom workshop. The latter component addresses the development of judicial communication skills based on the needs identified through the survey. This component provides the most illuminating feedback.

For the communication workshop, judges go into an interactive simulated "courtroom" environment with four or five other judicial colleagues of mixed jurisdiction. Two professional actors who have been trained to train others in public performance are engaged to assist. Two of the judges will appear as counsel and the individual judge presiding over the moot court situation will be filmed. There will then be commentary about the interactive listening capacity of the individual judge. There will be comments made for example that the judge is only speaking to the counsel at the bar table and forgetting about the people down in the back row. The actors will teach participants about voice projection, body language and the non-verbal messages that we convey to litigants and counsel. It is highly interactive.

The 360-degree feedback part of the programme requires judges to nominate "raters", mostly from their peer group, who would review their "in-court" and general work performance, including their verbal communication skills, non-verbal communication, listening and interpersonal skills. The peer group consists of fellow judges, immediate personal staff, counsel who regularly appear before them, lawyers who instruct in cases and administrators with whom they interact. The raters are selected at random by the Judicial College after the judge concerned has nominated a pool of raters to choose from. It is entirely voluntary and is not an appraisal process.

Raters are asked to consider and rank propositions in categories of behaviour randomly arranged, for example:

- *Verbal communication skills*: "Ensures that what they are saying is understood"
- *Nonverbal communication*: "Pays attention and shows understanding when listening"
- *Dealing with people*: "Treats others with respect and courtesy"
- *Organisation and planning*: "Appears to be well prepared"
- *Self*: "Effectively manages the stresses and demands of the role"
- *Environment*: "Shows enthusiasm for and commitment to the role"

5.1.1. Challenges

The programme was not only innovative, but also, for the Judiciary in Victoria, extremely challenging. As mentioned above, the consequence of the emphasis on internal and institutional independence is that traditionally in Victoria, judges received little feedback about how they performed on an individual level. The hierarchical legal culture meant that judges were unlikely to be told, especially by counsel who appear before them, that they are not projecting their voice sufficiently or that they are being terse with counsel. Many judges were reluctant to participate.

The key to success of this programme was for heads of jurisdiction to say: "I will put my hand up and I will engage in the programme. I will be the test case". Broader judicial input into the programme was also vital; the Judicial College developed the survey in consultation with a judicial working group.

Strict confidentiality of the identity of raters and of survey results is another key aspect of the programme's success. It was felt that publication of results regarding a judge's communication skills for example had the potential to attract criticism of the Judiciary and therefore undermine public confidence in the Judiciary as an institution. To ensure confidentiality, raters take the survey online. The data and responses are then transferred to a psychologist who in turn debriefs the judicial officer.

The survey model, which garners positive and constructive feedback from multiple, anonymous sources, was also found to be the most suitable for the Judiciary. A single-source "top-down" appraisal model would be unacceptable given the emphasis on internal judicial independence. Judges must not be in danger of feeling coerced to decide a case one way or another for fear of reprisal through performance evaluation conducted by a higher ranking judge or by a government official. A top-down model also would not address the barriers to feedback imposed by the hierarchical legal system culture. The 360-degree feedback model allows open and honest communication between judicial officers and raters in a non-threatening environment, while persevering judges' internal independence.

To further safeguard judicial independence, the programme does not evaluate a judge's expertise, decisions or productivity. Rather it is based on desirable judicial behaviours, style, and approach.

5.1.2. Improvement

The insights gained during the Court Craft programme are supported by ongoing opportunities for professional development through the Judicial College, such as leadership training and programmes for longer-serving judges.

The implementation of the Court Craft programme has been a delicate yet highly successful process. In the seven consecutive years since the pilot, more than 70 Victorian judicial officers across the jurisdictions have participated, and many more have supported the programme by providing feedback to their judicial colleagues.

For individual judicial officers, it is of enormous benefit in improving their performance. Of the colleagues who participated, some have adopted techniques from the programme. One colleague now has a note that he puts on his bench saying "be quiet" because he found as a result of the 360-degree review that he was interrupting counsel too much and asking too many questions - something most others were too polite to tell him.

The programme also has the potential to impact on wider organisational issues such as judicial workplace culture, wellbeing and work satisfaction. It is through these tools that the Victorian Judiciary is maintaining its connection with the community by being responsive to changing expectations of judicial performance and accountability in the modern age.

Seven years on, the Supreme Court is now in the process of evaluating and reviewing the programme itself. Key questions to be addressed include: how to engage with those judicial officers who will not take the time to participate; how to best convey to those who, for whatever reason, do not embrace the idea of feedback, as to what a positive, constructive and affirming process it can be; and for those who have taken part, how to revisit or continue the experience, particularly in terms of ongoing professional development.

There will always be judges who are reticent to this concept. They may feel vulnerable or that it is inappropriate for lawyers who work before judges to critique them. However, many of these concerns can be alleviated by explaining the sensitive and careful way the process is managed. Over time, adjustments could be made such as the head of jurisdiction identifying raters from a list of nominees of the individual judge. In time, confidence in the process will grow.

5.2. Measuring performance: Report on Government Services (ROGS) data

Australia's Productivity Commission produces an annual publication called the Report on Government Services (ROGS), which provides economic data regarding the efficiency of areas of the public service (SCRGSP 2013). The chapter on courts administration reports and compares data for each of Australia's jurisdictions on the following performance indicators: fees paid by litigants,⁹ backlogs,¹⁰ staff,¹¹ attendances at court, clearance rates,¹² and costs per finalisation.¹³

5.2.1. Challenges

As a government-led set of performance indicators focused on quantitative data, there was concern they may operate to devalue qualitative aspects of judicial activities which are incapable of precise measurement (Gething 2013). This focus on efficiency at the expense of the quality¹⁴ of the judicial process could lead the public to draw inaccurate conclusions about judicial performance. For example, with regards to the attendance indicator, which measures the number of times parties are required to appear in court to finalise a matter, an increase in number of attendances per matter supposedly indicates inefficiency or ineffectiveness. This is simplistic and misleading in the context of increased intensive case management by judges in common law jurisdictions. Whilst intensive case management is likely to increase the number of attendances, it is also likely to increase the quality of the outcome for the litigants by encouraging early case settlement. The attendance indicator could also be distorted across different case types, as some cases are necessarily more complex than others. This difference in workload is not easily reflected in economic data.

⁹ This indicator is defined as the average court fees paid per lodgement. It is derived by dividing the total court fees collected by the number of lodgements in a year.

¹⁰ 'Backlog' is an effectiveness indicator and is defined as a measure of the age of a court's pending caseload against nominated time standards. The number of cases in the nominated age category is expressed as a percentage of the total pending caseload. The 2013 ROGS acknowledges that results can be affected by the complexity and distribution of cases. Diversion programmes can also impact on this indicator.

¹¹ The ROGS measures 'judicial officers per finalisation' and 'full-time equivalent staff per 100 finalisations' as an indicator of efficiency. They are calculated by dividing the number of staff or judicial officers by the total number of finalisations and multiplying this by 100.

¹² Clearance is measured by dividing the number of finalisations by the number of lodgements in the same period.

¹³ This efficiency indicator is measured by dividing total recurrent expenditure (gross and net) within each court for the financial year by the total number of finalisations by the same period. The 2013 ROGS acknowledges that some cases are more resource intensive than others and this is not reflected in the data.

¹⁴ Indicators on quality for courts have not yet been identified by the Productivity Commission. The 2013 ROGS acknowledges that as the perceptions of court users about the quality of the services delivered by courts may be strongly influenced by the outcomes of judicial decisions, isolating data or perceptions of the quality of court administration may be difficult.

It was necessary to review the performance indicators to make them more relevant and accurate. It was hoped this would encourage judges to use the data as a basis for improvements in judicial case management.

5.2.2. The Australian Institute of Judicial Administration (AIJA) ROGS working group report

To this end the Australian Institute of Judicial Administration (AIJA) ROGS Working Group was established in 2009, consisting of judicial officers and court administrators from Australian jurisdictions, to review the utility and effectiveness of the ROGS performance indicators. The Working Group published a report in October 2010, which recommended:

- The number of performance indicators be kept to a minimum to reduce complexity and inaccuracy of reporting;
- Selecting a more balanced set of indicators to minimise dysfunctional impacts such as inappropriate focus on timely disposition at the expense of a quality judgment;
- The performance indicators focus on promoting core success factors such as the timely disposition of cases, a low level of pending cases and outstanding judgments, and reasonable cost and resource allocation per matter;
- Further research be conducted on categorising case types to adequately take account of different workloads and complexity between case types; and
- The "attendance" indicator be removed as intensive case management is more likely to distort the number of attendances in favour of early case settlement or greater quality of outcome¹⁵.

In response to the Working Group's recommendations regarding a more balanced set of indicators, the Productivity Commission introduced the following new performance measures in the 2013 ROGS: "gross expenditure per finalisation", "net expenditure per finalisation", "judicial officers per finalisation", and "full-time equivalent staff per judicial officer employed". These better complement the clearance rate and backlog indicators already in place.

As an experiment, a table of homicide case type data for 2011-12 was also introduced, showing the number of lodgements, number of finalisations, clearance rates, backlogs and the attendance indicator. The Courts are now working on finalising homicide related data and developing a methodology for reporting by other case types.

The Courts are also looking to introduce indicators detailing "matters finalised by trial" and "matters using court time" to provide more useful information on resource intensive cases.

The judge-led improvements to the performance indicators helped to allay some concerns about government interference into the work of the Judiciary. It is now generally accepted that the economic data contained in ROGS are a more useful means of illustrating the Judiciary's ability to manage the courts independently and to assure the community that public resources are being used efficiently (French 2009). Judges are also satisfied that ROGS data will not be directed at individual judges or their reasoning in a particular case. Rather the performance indicators measure the performance of the Judiciary as a collective.

5.2.3. Improvement

Merely calculating and reporting the data would not have produced dramatic improvement in judicial performance. The Court collects its own data on the ROGS

¹⁵ This recommendation proved controversial and "attendance" remains as a ROGS performance indicator. Lower courts in Australia, who generally do not use intensive case management, argued that the attendance indicator could be a useful measure of the increase in their case workload over time.

indicators and feeds the data into the Productivity Commission's report. An internal Supreme Court group made up of judges and administrators also analyses the data on a monthly basis and uses it to make recommendations for reform to the Court's management groups and Judges Council.¹⁶ Data is provided for each division of the court: commercial and equity, common law, criminal, and the Court of Appeal. This has encouraged heads of divisions, judges, and caseload managers to use the data themselves and feel a sense of ownership and responsibility.¹⁷

The main judicial response to the improved data has been the acceptance of a greater role for the Judiciary in case management. Judges are now concerned to ensure the efficiency and effectiveness of court proceedings in a manner which was not contemplated a few decades ago (French 2009).

For example, the Supreme Court passed the criminal appeal reforms, which increased the case management of those appeals. In the first year of the reforms, the number of pending criminal appeals and applications measured by the backlog indicator reduced from 600 to 253 (Supreme Court of Victoria 2012).¹⁸

5.3. *The International Framework for Court Excellence (IFCE)*

In 2007 an International Consortium for Court Excellence was established upon the initiative of the Singapore Judiciary. It initially included the United States National Center for State Courts, the United States Federal Judicial Centre, the Australasian Institute for Judicial Administration, and the Singapore Subordinate Courts. The Consortium developed a global framework for court excellence, which is a universally applicable quality system for courts. The holistic nature of the framework provides much better value than most other management tools that usually focus on a limited range of issues directed at particular aspects of court activity.

Seven areas of measurement are identified in the framework:

1. Court management and leadership;
2. Court policies;
3. Human material and financial resources;
4. Court proceedings;
5. Client needs and satisfaction;
6. Affordable and accessible court services; and
7. Public trust and confidence.

5.3.1. Challenges

There was initial scepticism amongst some judges to the bureaucratic or managerial language and concepts of the framework. To change these perceptions, the Supreme Court started by building awareness and acceptance of the framework amongst judges through a small judicial committee to champion the benefits of the framework. Key messages included:

- IFCE was developed by courts specifically for courts and the values of the court system;
- IFCE is not an externally imposed model and the focus is on internal evaluation and improvement of courts;

¹⁶ The Judges Council, consisting of all judges of the Supreme Court, make decisions collectively. The Judges Council delegates responsibility to a number of committees who report back to Council.

¹⁷ For example, the Family Court of Australia has developed "judicial one-pagers" which confidentially capture each judge's statistics on disposals, reserved judgments and days in court.

¹⁸ Updated figures continue this trend: view up-to-date performance statistics on the Supreme Court of Victoria website (Supreme Court of Victoria 2014).

- Implementation increases judicial independence as it demonstrates the Court's self-management capability to government and minimises dependence on government; and
- IFCE does not have any bearing upon the judicial decision-making process associated with cases; but it does have a bearing upon the administrative operational process that supports the judicial decision-making process.

5.3.2. The organisational self-assessment

The cultural transition towards IFCE implementation could not have succeeded without the maximum involvement of judges and staff. The Court's first step towards implementation of the framework was therefore to ask judges and administrative staff to complete an organisational self-assessment. The self-assessment asked participants to respond to 29 statements regarding the court's performance against all seven areas of the framework. Responses indicated perceptions against a six point scale ranging from "none" to "excellent". The assessment achieved an overall response rate of 35 per cent across the court. Experience dictates that this was in fact an excellent response level for a first survey. Over time the response rate will increase. The response rate from judges was the highest of any demographic group in the Court with 48 per cent (26 out of 54) providing feedback to the self-assessment. Again, this was an excellent response level to an exercise that had never been previously attempted. The Judiciary is often innately sceptical of what may be viewed as management or corporate techniques. The presentation of the results of the survey were well received. A higher response level is anticipated next time. Furthermore, judges necessarily prioritise their workload. If a time-consuming survey return competes with a pressing judgment, the latter will win out most times.

Respondents and judges in particular regarded the "court proceedings" area as the standout best performance area for the Court. The performance areas of public trust and accountability, as well as affordability and accessibility of court delivery were also viewed as strong areas of the Court's operations. The greatest opportunities for improvement were identified within the court leadership, management and planning areas of the framework. Judges in particular were highly critical of the Court's performance regarding the quality of case registration and management systems. Judges were also highly critical that the Court did not have a visionary statement. The intriguing, indeed heartening feature of the survey was that the responses of judges and staff were largely parallel. This is important for identifying institutional as distinct from individual performance.

Despite initial scepticism, judges appreciated the opportunity to participate in the process. Having contributed to the self-assessment, some judges became very interested in the results and the follow-up action required. Judicial buy-in to the process through the confidential self-assessment model formed the basis of significant performance improvements.

5.3.3. Improvement

The self-assessment focused judge's attention on improving the leadership, policy and planning aspects of court operations. Judges drafted a Supreme Court Strategic Statement which clearly defined the Court's long-term goal to be an "outstanding superior court" through IFCE implementation. The statement sets out the attributes the Court should apply in pursuing this goal and is designed to offer internal guidance to judges and staff regarding the values the Court stands for. The Council of Judges endorsed the statement. The Strategy is based on the seven areas of court excellence in the IFCE framework and outlines plans for reform under each heading. For example, under the "court proceedings" area of the framework, the Supreme Court Strategy planned to carry out criminal law reforms, case management reforms of civil appeals, a commercial court review and create an emblematic library. These reforms are designed to facilitate the Court's transition

from a "court-centric" culture to an outwardly looking "service-centric" organisation that provides efficient and effective justice for the Victorian community.

Systematic changes have already been made to improve the case management of criminal and civil appeals and simplify jury directions. A key aspect of the appeals reform included a universal leave to appeal requirement and allowing more leave applications to be dealt with on the papers. The Commercial Court is currently undertaking a review to better integrate the case management skills of Associate Judges¹⁹ and are developing a separate Commercial Court registry to improve case allocation. Significant improvements in case management have already been made, with the backlog of cases in the Supreme Court decreasing by 25 per cent over the past two years. The Supreme Court has also maintained a consistently high average case clearance rate of 108 per cent for the last three years.²⁰

The Supreme Court also put in place a very comprehensive and inclusive approach to planning. Key documents were the Supreme Court Strategy, the Business Plan and the Policy Framework. The Strategy forms the pivotal document that drives the business planning process and implementation of improvements necessary for a court of excellence. It took two years, 10 judges, and more than 50 staff. The Strategy sets out key activities in order to achieve improvements under each of the seven areas of excellence. For example, under the "public trust and confidence" area, the strategy outlines improvement plans such as criminal law reform, a commercial court review and a library review. The Executive Committee of the Court reviews progress against the activities on a monthly basis and makes recommendations for action to the Judges Council. The inclusive nature of the planning process helped to create a sense of ownership for the Strategy and the Business Plan throughout the Court. The clear identification of strategic priorities and an internal governance structure through which to analyse performance data and recommend and implement reforms have been key improvements instigated by the self-assessment.

Conclusion

This paper has identified the following success factors for judicial evaluation and measurement tools in the Australian constitutional context:

- Programmes must be built from the ground up in each jurisdiction to adequately take account of the constitutional, social and institutional context;
- Judicial participation in developing and implementing evaluation and measurement tools is vital if they are to result in relevant and long-term improvement in judicial performance;
- Evaluation and measurement tools must adequately safeguard the internal and institutional independence of the Judiciary; this means, at a minimum, the individual judge's reasoning in particular cases cannot be the subject of review (other than appellate review);
- Judge's may embrace a range of evaluation and measurement tools that contribute to broad-ranging improvements both to in-court performance skills and case management outside the courtroom;
- Assessment of judicial performance is complex and sophisticated; it is necessarily quite distinct from managerial or economically driven and weighted assessments; and

¹⁹ Associate Judges hear and determine issues arising before and after trial in civil cases.

²⁰ Statistics such as these about court performance are publically available on the Supreme Court of Victoria's website.

- If creative and innovative measures to assess judicial performance are developed the Judiciary will engage and positively respond to the opportunity.

Afterword

Since this paper was delivered, the Victorian Parliament passed the *Court Services Victoria Act 2014* (Vic) which transferred the court administration services and resources previously provided by the Department of Justice to a new independent, court-run administrative structure called Court Services Victoria (CSV). The new courts governance system is intended to strengthen judicial independence by vesting administration of Victoria's courts in the courts themselves and by bringing the staff and resources supporting the Judiciary directly within the control of the Judiciary, rather than the Executive.²¹

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²¹ For more information on the historic reforms see the Parliament of Victoria (2013, p. 4212-4215), speeches by the Chief Justice and Attorney-General (Court Services Victoria 2014), the Court Services Victoria Act 2014, and the Court Services Victoria Bill 2013.

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