

Process and content of continuing learning for judicial officers

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This paper concentrates on continuing learning by judicial officers after their appointment and any induction, which are the subject of other papers given at this session. Most of the content of this paper is based on material contained in Livingston Armytage's invaluable *Educating Judges: Towards a New Model of Continuing Judicial Learning*,¹ which was written while the author was Education Director of the Judicial Commission of NSW, and draws on that Commission's resources. I do not necessarily agree with all the conclusions, but this book contains a wealth of material and references.

This paper assumes that judicial officers have been appointed on the basis of their knowledge, not only of law, practice and procedure, but that they also have a basic understanding of how to carry out their functions in and out of the courtroom or hearing room. The latter assumption may not always be justified, because many judicial officers, on appointment are exposed to, and need to understand, an area of practice with which, experienced though they are, they are totally unfamiliar. However, for the purposes of this paper I assume that all judicial officers have that basic level of competence and knowledge.

My background may help to explain my perspective. I was appointed to the bench after a career, not at the Bar, but in legal education and law reform. For most of the 15 years before my appointment, I had held a position of dean of a law faculty or equivalent. These days a dean is as much a manager as a teacher or scholar, and faces a daily task of allocating and managing scarce resources and dealing with interpersonal relationships. So my comments reflect the experience of someone who has been both a professional educator and a manager of a medium-size enterprise. These perspectives, I think, are unusual for a judicial officer. However, they have enabled me to develop some insights into both how adults learn and what makes an organisation efficient, in the sense that it is able to perform, as well as resources allow, its proper functions.

Why?

The AIJA was established because a number of people, including a significant number of judicial officers, saw a need to provide resources which would, among other things, enable courts and tribunals to perform their functions better. In NSW, since the mid-1980s, the Judicial Commission has provided significant resources for training and support for judicial officers. It has also conducted "needs analyses" of judicial officers in the State.² In the UK there is a Judicial Studies Board,³ and in the United States and Canada long-established institutions that include training of judicial officers among their functions.⁴ All these developments recognise that judicial officers need support and training. This fact was not

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¹ 1996, Kluwer Law International, The Hague/Boston/London.

² L. Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning*, Ch 4, esp. 85 ff.

³ Martin Partington, "Training The Judiciary in England and Wales: The Work of the Judicial Studies Board" [1994] *Civil Justice Quarterly* 319.

⁴ Armytage, Ch 1.

admitted for many years, but it seems now to be accepted.⁵ Education for judicial officers is seen as enhancing judicial independence and accountability, and not as inconsistent with it.⁶

Professional competence

While there has been much discussion about what constitutes “professional competence”,⁷ I assume for the purpose of this paper that, for judicial officers, it is a mixture of skill (or “art”) and knowledge, including the following:

- Legal knowledge
- Courtroom technique
- Management technique
- New awareness
- Technology

Legal knowledge

Legal knowledge is a prime requirement of judicial officers. Like any professional, a competent judicial officer will wish to be up to date with developments, if not in the vast area of the law as a whole, at least with the most recent legislation and cases affecting the jurisdiction in which he or she works. Judicial officers will have acquired a good deal of legal knowledge well before their appointment. However, on appointment, they may move to a new area in which they need to learn a great deal quickly. In addition, legislative changes also require judicial officers to come to terms rapidly with significant quantities of material, for example, the *Evidence Act* 1995 and the recent changes in the law and procedure in NSW governing appeals from magistrates to higher courts.

Courtroom technique

⁵ H Gregorcuk, “The Desirability of Judicial Education in Australia” (1996) 14 *Journal of Professional Legal Education*, 77; M Kirby, “Modes of Appointment and Training of Judges - A Common Law Perspective” (no date), paper delivered to ICJ Seminar, Belfast, Northern Ireland, *Legal Institutions in Transition*, esp at 21-23.

⁶ RD Nicholson “Judicial Independence and Accountability: Can they co-exist?” (1993) 67 ALJ 404.

⁷ For a working definition of appropriate competency standards, see A Gonczi et al, *Establishing Competency-based Standards in the Professions*, National Office of Overseas Skills Recognition, Commonwealth Department of Employment, Education and Training, Research Paper No 1, AGPS, Canberra, 1990, 9. The standards mentioned in this publication are not specific to any profession. The following definition is taken from the 'Executive Summary':

2. A competent professional can be defined as a person who has the attributes necessary for job performance at the appropriate standard. This definition focuses on three elements: attributes, performance, and standards. Attributes such as knowledge, skills and attitudes, in combination, underlie competence... Thus a competency-based standard is a level of achievement required for some area of professional practice..."

See also L Heywood et al, *A Guide to Development of Competency Standards for Professions*, National Office of Overseas Skills Recognition, Commonwealth Department of Employment, Education and Training, Research Paper No 7, AGPS, Canberra, 1992. On competency and skills more generally, see N Gold, K Mackie and W Twining, *Learning Lawyers' Skills*, London, Butterworths, 1989 and N Gold, “Towards Training for Competence” (1993) 1 *Journal of Professional Legal Education* 1.

Many judicial officers have to learn new skills in order to deal with developments in procedure, for example, taking evidence from children by video link and from witnesses in foreign countries by teleconference link. These skills are not difficult, and the need for them is rather obvious.

There are other communication skills where, it seems, some judges at least need to develop new understanding, for example of the difficulties in communication faced by litigants who are immigrants or who have disabilities, and of ways in which those difficulties may be overcome. Some practitioners are knowledgeable about these matters and can take a lead in introducing new techniques, but in many cases practitioners also lack this understanding, and it is appropriate for judicial officers to take a lead.

Management technique

There is now a great deal of literature on case management technique. All judicial officers will need to be able to deal with one or more forms of case management, as there would be very few courts or tribunals that now do not employ these. The systems vary from court to court, but it is reasonable to expect that each court will make its judicial officers familiar with the particular system it uses, and that induction programs for judicial officers will introduce some basic concepts of case management. It is probably more important for the registrars and their staff who manage the filing of documents to understand these principles more fully, but all judicial officers must have some basic understanding of the operation of the system used in the jurisdiction in which he or she works, and the reasons why case management, and the particular variant are used. In some courts, such as the Federal Court of Australia, judicial officers are allocated a “docket” of cases and are expected to manage them and this seems to be a growing trend. Judicial officers may be required to take on responsibility for special lists or regional courts. If so, they may need much more awareness of the theory and practice of case management.⁸ All judicial officers need the foundation of this understanding.

New awareness

Cultural and gender awareness are both subjects about which, in a real sense, there was no awareness 30 years ago. It is now accepted that it is no longer acceptable for judicial officers to be insensitive to issues that may arise out of, or involving, gender or cultural differences.⁹ Though there has been some resistance by judicial officers to some programs designed to increase awareness of gender and cultural differences and their impacts on the operation of the legal system, education in these matters is now considered appropriate for judicial officers in a multicultural society.

Technology

⁸ There is a substantial literature on case management, particularly in the *Journal of Judicial Administration*. However, my guess is that very few judicial officers have more than a passing knowledge of this literature.

⁹ Eg H Meadows “Increasing Judicial Awareness” (1995) 69 *Law Institute Journal* 1092; S. Brown, “Discrimination Awareness in the Family Court” (1998) 12 *Australian Family Lawyer* 12; more generally see K Mahoney and S Martin, *Equality and Judicial Neutrality*, Toronto, Carswell, 1987.

These days judicial officers need to be familiar with modern information technology. It is rarer for barristers and solicitors to be able to survive in practice today without basic computer skills, as these are required not only for information retrieval and word processing, but also, in many cases for such matters as keeping a diary. E-mail has become a vital means of communication, even within court systems. Some judicial officers may be able to rely on associates to deal with e-mail and conduct research using the vast array of legal information that is now available electronically. Relevant statistical material (e.g. sentencing statistics) is available, often only in electronic form. Many courts are moving towards electronic document lodgment and electronic real-time transcripts.

Efficiency

Whether or not judicial officers think “efficiency” is a concept that should be applied to the judicial process, others - principally Treasury officials and politicians - do,¹⁰ and most judicial officers would, I suspect, find their work both easier and more satisfying if frustrating inefficiencies were removed. Case management is but one way in which bureaucrats and their political overlords expect courts and tribunals to show greater signs of efficiency. Restrictions on jury trial, such as those currently proposed in England and Wales, are another. The prevailing ideology of economic rationalism and outcome-measurement are such that if the courts do not take measures to be more efficient, they will find that their resources are reduced, or more ominously, that rules and procedures designed to protect the rights of litigants and the interests of justice will be removed by the political process.

It is always possible for courts to be more efficient without sacrificing the interests of justice. For this purpose, I take “efficiency” to mean the effective use of the resources available. This does not mean that judicial officers (including tribunal members) should be given a “darg” or quota of cases to be dealt with in a given time, for that would ignore the significant differences between individual cases. What it means is that time is not wasted, and that no unnecessary process is undertaken.

In a system so bound by tradition as the common law, there are clearly instances in which time is wasted and things are done that are not necessary, and sometimes not desirable. Judicial officers become aware of these. By their very nature, judicial officers are not political activists, and cannot venture to suggest change unless they are able to produce a solution which eliminates the inefficiencies without sacrificing the interests of justice. Case management systems are designed for this purpose, and sometimes achieve it. Good skills of communication between the bench and the advocates may achieve as much. In either case, and in the case of other ways of working more efficiently, judicial officers may need to learn about new technology, new techniques (for example, of finding out why the inefficiencies arise), or what others faced with similar problems have done.

Feedback on judicial performance: the reflective judge: oxymoron or tautology?

¹⁰ Babette Smith, “Victorian Courts in the Dock” *Australian Financial Review*, 18 June 199, 31.

A distinguishing characteristic of a “professional;” is that, ideally, such a person has developed the capacity for independent learning. Donald Schoen, who was not an educational theorist, but an urban planner and teacher of that subject, has introduced the concept of the “reflective practitioner”, a concept which now figures in the thinking of good professional educators.¹¹ This concept (like most good theories) is, as John Cleese would say, “a statement of the bleeding obvious”. A good professional is a person who has acquired significant knowledge and skill (or “art”) relevant to a particular area, and who has developed the technique of learning continuously from his or her experience, and thus is able to solve problems which arise in complex, messy situations. This learning technique involves incorporation, into the process of reflection, of relevant knowledge of which the professional has become aware, whether by professional practice, reading, professional discussions, or casual conversations. It is possible to be reflective on one’s own, but constructive feedback **from someone else** helps greatly.

Judicial officers are almost unique in the paucity of feedback they receive on their professional performance. Virtually all they receive are notices of appeal from their decision, and then, if a litigant has the resources and will to pursue the appeal, in the long run, a copy of the decisions of the appeal court. That feedback is sporadic and haphazard, and when received it is directed, quite properly, not so much to improving the performance of the judicial officer, as to getting the right result for the litigants. It corrects legal reasoning, probably the aspect of judicial work in respect of which judicial officers require least feedback. While the system of appeal is significant in making judicial officers accountable, it is singularly ill-fitted to provide constructive feedback to judicial officers. Most other professionals have means of receiving feedback, either formally, through performance appraisals, re-accreditation procedures, or through other formal or informal types of peer review.

Many widely-used types of performance appraisal are, or might be seen to be, inconsistent with traditional notions of judicial independence. The peer review common at the Bar is very informal: barristers whose performance is inadequate learn to see deficiencies when they cease receiving briefs or their colleagues in chambers drop hints. It is, however, something. Judicial officers are not subject to any market pressures and relatively little peer pressure. Because, for the most part, they operate as individual decision-makers, their peers do not observe them operating in a professional capacity, and are not in a position to provide feedback.

Personally, lack of this type of feedback has been one of the most difficult things for me to adapt to on the bench. As I do not come from a traditional professional background at the Bar, I am perhaps more than usually keen to ascertain whether or not I am performing my judicial functions effectively and efficiently. This evaluation is not readily measured without clear criteria for performance. It would not be acceptable for most judicial officers to be subject to the type of performance criteria used for this type of evaluation in other professions or vocations, because these would clearly interfere with the function of the judicial officer in deciding cases according to law. It is my view, nevertheless, that any professional person needs to understand how effective he or she is in performing his or her professional function. Like any competent professional, the judicial officer on his or her own will formulate some criteria for professional self-evaluation, but may need some assistance in formulating these criteria and also in determining whether he or she has met those criteria.

¹¹ DA Schoen, *The Reflective Practitioner*, New York, Basic Books, 1983; *Educating the Reflective Practitioner*, San Francisco, Jossey-Bass, 1987.

What?

Keeping up to date - new developments

The needs surveys of judicial officers rate highly the need to “keep abreast” of developments, especially legislation and appellate court decisions. This can be done in several ways.

New technology

Where new technology becomes available (for example, on-line access to sentencing statistics or comparable verdicts in civil cases, voice-recognition software that enables dictation direct to disk), some judicial officers are keen to learn how to use the technology.

Management?

Most judicial officers have no formal training in management when they are appointed and few have any experience of management of anything other than a one-person practice. Those who are placed in charge of a court, region, or special list, may need to learn management skills appropriate to their task.

Current awareness/social change

I have already mentioned the perceived need for judicial officers to become aware of the consequences of differences in gender and culture. However, other areas of social change may be appropriate subjects for judicial sentencing options. Information may become available about, for example, the effectiveness and appropriateness of various sentencing options in relation to different types of offender. Experts in particular areas such as mental illness, developmental problems, or disabilities may be able to provide useful information to judicial officers who encounter the need to deal with accused people or witnesses (and, it must be said, colleagues) who are afflicted with such problems.

How?

Characteristics of judicial officers as learners

The first important characteristic of judicial officers as learners is that they are exceptionally busy people. The very techniques that have made courts more efficient have done so by ensuring that available judicial officers are actually sitting as much as possible. Time for individual learning is much easier to find than time when several judicial officers are available at the same time.

Armytage,¹² who is familiar with the educational research on how people learn, has indicated that, because of the way they are appointed, and their own perceptions of the need to maintain independence, judicial officers have particular characteristics as learners. The differences from other highly educated adult learners may not be so great, however.

¹²

The achievements required of judicial officers before they are appointed mean that they will all have had a fairly intensive tertiary level education, and will then have made the transition from the passive learning which was, at least until recently, the norm in most Australian Universities, to the role of independent, self-motivated and self directed, active adult learner which characterises professionals.

This process may be changing, as most Australian universities now see their role differently. Previously, they (and the professions for which they provided training) often saw their role as inculcating defined bodies of skill and knowledge into students who, immediately prior to entering university, had already been the recipients of discrete bodies of knowledge in the course of their secondary education. Now they see that role as primarily equipping students for lifelong learning by developing their capacity for critical reflection and independent learning.¹³

When faced with the prospect of “education”, most adult learners, however, still tend to think of the learning experience as that which was typical of universities when they were students. They may not be aware that the agenda of some universities (sometimes overt, sometimes hidden) and the inevitable effect of a professional life is to bring about the transformation from passive to active knowledge acquisition. Many are simply not aware that, as conscientious professionals, they are already engaged in continuing education.

Some formal learning activities, such as “continuing professional education” seminars, lecture series, and addresses at workshops, conferences and professional associations can be important sources of new information and new skills. I have, over the years, noticed an attitude among legal professionals that they do not need any formal continuing education. They resent both the idea that they need it, and especially the notion that continuing education should be mandatory.¹⁴

For most professional people, however, formal activities are a minor part of continuing professional education. Most of their learning occurs when they read professional literature, research individual specific problems, and discuss their work with peers informally.

Armytage, after reviewing the literature, concludes that continuing judicial education should be a “voluntary, independent and judge-led process”¹⁵ and that it should “facilitate individualized learning which is self-directed and critically reflective, and accommodate the distinctive styles in which judges prefer to learn and practice.”¹⁶ This is probably another statement of the bleeding obvious. It is also a statement of what most judicial officers actually **do**, and what, in the contemporary jargon, constitutes “best practice”, even though the judicial officers may not recognise it as continuing education. If the process by which judges in fact learn is labelled (possibly re-labelled) “continuing judicial education”, it will both dispel suggestions that judicial officers are neither accountable nor professional in their approach, and also remove some of the fears of judicial officers either that they do not need continuing education or that any formal program of continuing education will interfere in some way with their judicial independence.

¹³ PC Candy et al., *Developing Lifelong Learners Through Undergraduate Education*, AGPS, Canberra, 1994.

¹⁴ J W Nelson, *A Study of the Continuing Legal Education Needs of Beginning Solicitor*, Sydney, Centre for Legal Education..

¹⁵ p. 151.

¹⁶ p. 152.

Appropriate vehicles for continuing learning

Once there is some certainty about the nature and characteristics of judicial officers as learners, some thought can be given to the methods that can be used to help judicial officers learn. Most of them are familiar. Some require group activities, but many do not.

Conferences and courses

Formal conferences and courses are regarded very highly by most judicial officers, if the NSW Judicial Commission user surveys reported by Armytage are any indication. They provide not only information and insight on knowledge and skills, but also a degree of collegial contact at a number of levels for people engaged in what is generally a fairly solitary professional life. Academics often report that the most valuable part of conferences is not the formal presentations, but the informal exchange of ideas and information that takes place over meals, coffee or stronger drinks. My experience is that this is equally true of meetings of judicial officers.

The problem about formal conferences or courses is that they need presenters who are interesting and acceptable. Judicial officers, by and large, feel that they deserve presenters who are acknowledged experts in their fields. In some areas - especially practical areas of law such as criminal law, torts and defamation - in general, to the judicial officers who arrange conference programs, only other judicial officers or leading academics appear acceptable as presenters - a point to which I shall return. Often these people, though highly skilled and knowledgeable in their areas, either know little about how people learn, or appreciate that presentation of a conference paper for best effect requires skills different from those of a jury advocate or a university lecturer of the 60s. There are, of course, exceptions.

Justice David Levine's presentation to the last NSW District Court Judges' conference on defamation law and practice, for example, was a model conference presentation: a solid paper containing detailed information, a presentation using appropriate audio-visual teaching aids (slides, overheads, art work, film and video clips). It was a classic performance which both inspired and informed, and offered a learning experience far beyond most formal educational institutions.

Other examples do not necessarily involve judges. Academics are not necessarily "academic" in their approach, and some practitioners may be able to make presentations that do not focus on the narrowly practical (when that is not appropriate). The presentations by Professors Young and Chesterman on their research on juries at the 1999 National District and County Court Judges' Conference are excellent examples. Reflective and critical judges will soon realise that while judicial officers have, collectively, a vast repository of relevant knowledge and experience, they do not have a monopoly. Recently the Judicial Commission of NSW presented a seminar on identifying witnesses who tell lies. Many judges say they develop skills in this area through experience, and no doubt they do. However, in this case the presenter was a psychologist who had made a special study. It may have been my inexperience that convinced me of the value of the presentation, but I noticed some very experienced judicial officers who seemed to gain a lot from the seminar.

Where the learning opportunity is presented formally, care must be taken not only in the selection of the presenter, but also to ensure that that presenter, no matter how well informed, does not alienate the audience through inappropriate means of presentation.

This point is linked to the points made earlier about the rather negative attitude of some professional people to the very notion of formal continuing education activities. Their conception is the narrow, formalistic concept of the “teacher-centred” learning which used to be typical of universities and secondary schools. They do not appreciate fully that formal continuing professional education is most successful, both from the perspective of the individuals and of the professional group collectively, when each participant contributes, and does not merely “soak” up information.

Educational studies establish that in many circumstances independent learners - a class that includes most adults - learn best when they are actively involved in the learning experience. Students in educational institutions invariably report that they **learn** more where they are actively involved, such as in problem-solving and group discussions. Clinical programs are remarkably successful in enabling students to learn, not only in the sense of gaining knowledge, but also in terms of developing attitudes and skills. Such learning experiences may be resource-intensive (ie costly), and they are certainly not the best way of conveying information. They are, however, important in developing “deep” as opposed to “shallow” learning.¹⁷

The experience of many educators is that groups of professionals, especially judicial officers, are often reticent to engage in learning activities that differ from the traditional lectures, seminars and workshop discussions. Judicial officers are not as often resorted to by those who address gatherings of, say, judicial officers. However, once initial resistance is overcome, the value of these experiences is appreciated. Many participants at this conference may have experienced the session offered at the national Judicial Orientation Course, where the conference organisers tell the group that they are to assume that they have just landed at an airport in a foreign country, and that the next speaker is a government official. The leader of the discussion then addresses the group only in Bosnian, and distributes a form printed in that language. The members of the group are then taken through the form and the leader indicates (speaking only Bosnian until the exercise is completed) that they should fill it in. Most participants assume it is an immigration form and are quite shocked when they discover what they have actually agreed to in the form! The purpose of the exercise, of course, is to illustrate the difficulty that those who do not speak English have in filling in forms and dealing with officials in this country. No lecture could convey this so vividly.

Another advantage of learning environments that are participatory is that they maximise the use of the knowledge and experience of all members of the group, not just those of the “lecturer”. Groups of judicial officers bring together a vast wealth of individual experience and knowledge which more often than not will enhance any contribution that can be made by an “imported” presenter.

Independent learning packages

While formal situations may provide an appropriate environment for some learning by judicial officers, most of that learning will necessarily be individual, self-directed learning by the judicial officers acting independently. The question then becomes ‘how can individual, self-directed learning by judicial officers be encouraged?’

¹⁷ The distinction between “deep” and “shallow” learning has become important in understanding how and why people learn, and in selection of appropriate teaching methods. The subject is explored comprehensively in M Le Brun and R Johnstone, *The Quiet Revolution*, Sydney, LBC, 1994, especially at pp. 60-61.

Newsletter (“Judicial Officers Bulletin”, circulars)

The provision of information can assist judicial officers considerably. They are necessarily busy, and in many courts they are often on circuit without access to libraries and other resources. Some courthouses in NSW, for example, are not connected to the court computer network and also have telephone systems which make it impossible to dial up from chambers. Digests and summaries of recent legislation and decisions can be extremely useful. The Judicial Commission of NSW produces the *Judicial Officers Bulletin* each month. It is invaluable to a judge on criminal circuit.

E-mail and the Internet

The Internet and e-mail are potentially significant means of continuing judicial education. There are still some obstacles - physical obstacles such as the need for access in all courthouses and chambers, something that should soon be achieved - and a greater obstacle, which is the need for judicial officers to become computer literate.

What is required now?

What is now required is an acknowledgment by judicial officers that, if they are competent professionals, they are already engaged to some extent in continuing judicial education, and then to bring them into contact with the resources they need to make this education effective, systematic and continuing.

Needs analysis

Judicial officers need to identify and state clearly what they require to continue their learning. As, I hope, this paper has shown, many judicial officers are not familiar with much educational jargon and tend to be deterred by it. They are likely to be individual, self-reliant and self-directed learners. If they can be assisted to identify their learning pattern and the resources they need, they may make their lives easier by being more efficient and effective in their learning. There may be ways in which they can save time and increase the content of what they learn. To identify these needs and techniques probably requires more than a survey. It probably requires individual educators, working from a platform such as the AIJA or a Judicial Commission, to work with judicial officers.

Resource people

The AIJA and the NSW Judicial Commission have demonstrated that there are people who can provide at least some of the resources that judicial officers need for continuing learning. Desirable and qualified “judicial educators” may be difficult to find, as they will need to be aware of the likely characteristics of judicial officers as learners and to their approaches to learning. They must also be sensitive to judicial officers’ particular wants and attitudes and knowledgeable about the resources available to judicial officers.

Judicial officers themselves, particularly heads of jurisdiction and Chairs of Education Committees, may find that they become the initial resource people, especially in identifying the needs that judicial officers working with them may have. Institutions like the AIJA and

the NSW Judicial Commission may help, but there are few skilled educators with the requisite knowledge, and little prospect that funds will be available to employ more, other than on a consulting basis. Perhaps the best assistance they can offer is in training a few judicial officers in each jurisdiction to be the resource people for that jurisdiction.

Many judicial officers are already identifying their own learning needs, and engaging in their own continuing professional education, so the additional task may not be too onerous.