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Judicial Education on Equality

Gender equality in the courts - Leadership and the role of education

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Introduction

Over the past two decades, judiciaries in many countries have been criticised for the failure to reflect social values in their treatment of diversity and, in particular, gender. In essence, the courts have been criticised for being out of touch and embedding gender bias.

This paper was originally published as an article in *The Modern Law Review* in 1995. At that time, it argued that continuing education had an important emerging role in supporting the courts to reflect changing social attitudes and values, and it examined the educational considerations in performing this role effectively.

Since then, it is argued that some progressive courts have recognised an imperative to recaste their roles as formative social institutions, embracing new paradigms, notably as “managers of justice”, to become more accountable and improve service delivery. As a part of this ongoing transformation, these courts are grappling with the need not just to reflect social values of diversity and gender equality but to assume a leadership role in promoting and protecting them.

In this dynamic context, the techniques of judicial education in supporting the courts to assume and exercise their leadership role are all the more important today.

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This article argues that judicial education, while new to the common law tradition, is becoming integral to the standing of the judiciary and offers an appropriate means of providing accountability without violating independence. The 1990s mark a period of intense change for judiciaries operating in many western countries. This change is heralded by widespread complaints of 'gender bias' and cultural insensitivity. These complaints in Britain and Australia have mirrored those in the United States and Canada a decade earlier and have led to a number of prominent inquiries. These inquiries have in turn led to the unprecedented introduction of judicial education on gender and ethnic awareness.

There are a number of reasons for these developments. In the first instance, they are due to the changing roles of women in western society and to the increasing recognition of plurality in communities. Less directly, the issue of equality is emblematic of the need for the judiciary, as a formative social institution, to lead or at least to reflect this shift in prevailing social values. Third, and perhaps most significant at a systemic level, they underscore a need for the judiciary to provide and demonstrate social accountability.

This article explores the role being cast on continuing education to contribute solutions to problems of inequality before the law. Premised on Australian experience, the article focuses discussion on an examination of the technical issues involved in educating judges. The article explores new ground in the application of educational theory to the practice of judging and identifies distinctive characteristics of judges as learners. It then proposes a number of educational principles and guidelines to accommodate these characteristics with a view to developing an effective educational response.

To the extent that complaints of inequality encapsulate an underpinning demand for judicial accountability, it is argued that continuing education is acquiring a significant role for the judiciary at two levels: first, as a means to enhance equality of treatment before the law; and second, to illuminate an appropriate means to provide accountability. For these reasons, the judiciary has an emerging interest in developing its continuing education.

Accountability, independence and education

Accountability is a complex and problematic issue for the judiciary.[1] For judges operating within the Westminster system of government, the question is not whether there should be judicial accountability, but how judicial accountability should be balanced with judicial independence.[2] As Lord Hailsham has put it:

> The problem is how to reconcile the divergent and to some extent inconsistent requirements of public accountability, judicial independence and efficiency in the administration of justice.[3]

The development of judicial education generally, and gender and racial awareness specifically, is best understood within the broader context of the professional-isation of the judiciary. Professionalisation describes the evolving relationship between the judiciary and society; what is unique about this process for the judiciary is that it must find a means of enhancing competence while balancing the competing precepts of independence and accountability. Since the 1960s, public criticism of the professions generally has become increasingly vocal throughout the western world. Houle describes this criticism as relating to inadequate service systems to care for the needy, and to what he describes as excessive self-interest, incompetence and malevolence.[4] The professions have been criticised by their own members (both within and between branches of the profession), by consumers (the revolt of the client, citizen and special interest group advocates), by the mass media and by government.[5] This criticism has imposed pressures on all professions to carry out their duties at the highest possible

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The views expressed in this paper are those of the author and do not necessarily reflect any official views of the Judicial Commission of New South Wales. It should be noted that the argument is made with particular reference to gender and ethnicity.

1 For example, see the work of Justice McGarvie (then Justice of the Supreme Court of Victoria; now Governor of Victoria): McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) J Judicial Administration 1, 33; 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) J Judicial Administration 1,236-277; and Nicholson, 'Judicial Independence and Judicial Organisation: A Judicial Conference for Australia?' (1993) J Judicial Administration 2, 143-161.

2 Shetreet, *Judges on Trial - A Study of the Appointment and Accountability of the English Judiciary* (Oxford: North-Holland Publishing, 1976); see also Shetreet, 'The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986' (1987) 10 U New South Wales LJ 4, 7.

3 Lord Hailsham, 'Democracy and Judicial Independence' (1979) 28 U New Brunswick LJ 7, 8.

4 Houle, *Continuing Learning in the Professions* (San Francisco: Jossey-Bass, 1980) pp 14, 271.

5 *ibid* 273. Such criticism is antithetical to the preservation of the professional entity and ultimately threatens to lead the government to regulatory intervention to protect the public interest.

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standards of competence. Houle postulates that it is within this context that the concept of systematised continuing professional education evolved.[6]

This criticism - bringing with it threats of governmental regulation and intrusion into their privileged

domain - has led the professions to take steps to consolidate their identity in order to maintain their continuing existence. This process, which included a panoply of increasingly formalised requirements relating to entry standards, codes of conduct and rules of membership, included the linking of professional performance with continuing education. Continuing education became seen increasingly to be a means for professions to improve performance, disarm criticism and thereby to resist pressures to impose external standards on the professions. Thus, the incorporation of education services became an integral part of this institutional response to public criticism of the professions, and an important means of managing both personal and systemic change.

The formative role of the judiciary in society, and the traditional metamorphosis of judges from legal practitioners, tends to obscure direct comparisons being made between the judiciary and other professions. It is, however, argued that the process of professionalisation provides important insights on the judiciary and the changing nature of its role: first, it marks the transference of responsibility for competence and performance from the individual to the group which reflects the ongoing evolution of the judiciary as a social institution within society; and second, at a time when accountability is being demanded of all social entities, it is noteworthy that the judiciary is beginning to see itself in this context primarily as a profession rather than as an arm of government or a body of public servants [7]

The problem of criticism of the judiciary is described in these terms of professionalisation by the present Chief Justice of Australia, Sir Anthony Mason:

> The defence of existing professional structures and professional practices on the basis that they contribute to the just and efficient disposition of litigation is likely to be greeted with a degree of robust scepticism unless the soundness of that basis is clearly demonstrated... The plain fact is that, in contemporary society, people are not prepared to accept at face value what professional people tell them.[8]

Initially, the suggestion of introducing continuing judicial education was anathema to a properly appointed judiciary within the common law approach. In Britain, for example, opposition was expressed by Lord Hailsham who attacked what he described as the 'ignorant clamour' in support for the findings of the Bridge Report[9] that judges should be made to undergo specialised training:

> I also regard with a degree of indifference verging on contempt the criticism of judges that demands for them a type of training which renders them more like assessors or expert witnesses than judges of fact and law.. . The judge's function is to listen intelligently and patiently to evidence and argument ... to evaluate the reliability and relevance of oral testimony .. . and finally to reach a conclusion based on an accurate knowledge of law and practice ... The capacity of being a judge is acquired in the course of practising the law.[10]

In Australia, Justice Samuels argued that there was no need for judicial education on the grounds that judicial appointment based on merit should obviate any such need:

> The best way of maintaining judicial competency is to appoint reasonably competent judges, who already know enough to embark on their task with tolerable efficiency. If it is recognized that a large proportion of new appointees cannot perform competently without prior instruction, then the system of selection has failed and basic training is little more than a means of propping it up. [11]

In the past decade, a consensus among judges has begun to emerge in Australia, as it has in the United States, Canada and to an increasing extent England, which recognises the benefits of continuing education.[12] The value of judicial education was finally endorsed in 1993 by the Chief Justice of Australia, marking its formal recognition at the highest echelon of the Australian judiciary. In commenting on participation in judicial education, Sir Anthony Mason noted:

> I do not think judicial education should be confined to the discussion of legal principles, judicial activities and court administration. Judicial education should extend to aspects of the interaction between law and society ... The need for judicial independence is no argument against the desirability of judges becoming better informed.[13]

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6 *ibid* 279.

7 This perception sheds light on the deeper question, 'What is the judiciary?' Within the extended framework of the Westminster system's separation of powers doctrine, it gives rise to a potential conundrum: how can an arm of government see itself modelled as a (private) professional entity without some inherent contradiction? The effects of this contradiction lie at the foundations of the conflict between judicial independence and accountability which remain so problematical for the judiciary in Australia, as elsewhere. It remains to be seen whether this emerging self-perception is ultimately found to be appropriate or adequate.

8 Mason, 'The Independence of the Bench, the Independence of the Bar and the Bar's Role in the Judicial System' (1993) 10 Australian B Rev 1 - 10, 1.

9 Bridge Report: the Working Party on Judicial Studies and Information, chaired by Lord Justice Bridge (1978); cited in Judicial Studies Board, *Report for 1983 - 1987* (London: HMSO, 1988).

10 Lord Hailsham, *Hamyln Revisited: The British Legal System Today* (London: Stevens & Sons, 1983) pp 50 - 51.

11 Samuels (Justice of Appeal, Supreme Court of New South Wales), 'Judicial Competency: How it can be Maintained' (1980) 54 Australian LJ 581 - 587, 585.

12 The English experience is most recently outlined by Partington, 'Training the Judiciary in England and Wales: the Work of the Judicial Studies Board' (1994) CJQ 319 - 336.

13 Mason, 'The State of the Judicature' (1994) 68 Australian LI 125 - 134, 133.

Most recently, the Chief Justice has provided leadership in the introduction of orientation training for new appointees to judicial office, including justices of superior courts of record:

> [In the past] new judges were expected somehow to acquire almost overnight the requisite knowledge of how to be a judge. Perhaps it was thought that judicial know-how was absorbed by a process of osmosis... One of the myths of our legal culture was that a barrister by dint of his or her long experience as an advocate in the courts was fully equipped to conduct a trial in any jurisdiction.[14]

This leadership has extended to continuing education in areas such as gender awareness and aboriginal culture, subject to the following general caution:

> We must take good care to ensure that under the guise of judicial education, judges are not subject to indoctrination or attempts by interest groups and pressure groups to influence judicial decision-making in favour of such a group ... I don't think that you need to send judges to classes in order to educate them about the community in which they live.[15]

The key to reconciling the educational dilemma of indoctrination versus independence is provided by Justice Nicholson, who relates the need to provide increased accountability to the issue of continuing judicial education:

> Judicial education is now an accepted part of judicial life in many countries ... Judicial independence requires that the judicial branch is accountable for its competency and the proposition is now accepted as beyond debate.[16]

This recognition of the relationship between judicial education and independence is critical to the process of professionalisation of the judiciary, having regard to the fundamental doctrinal importance of independence. Justice Nicholson is not alone in identifying this relationship. Indeed, in Canada, the consolidation of judicial independence is formally acknowledged at a policy level as a rationale for continuing education.[17]

Education as an agent of change

A notable feature of the response to problems of gender and race inequality in the judiciary has been the consistency with which proponents of change have charged continuing judicial education with a remedial role. Education, even within the judicial environment, has long been recognised as an agent of change.

Claxton and Murrell, for example, see the principal goal for judicial education as being to promote change through development. They argue that continuing education equips the judiciary individually and institutionally to cope with the problems and challenges confronting the courts. From this perspective, education is seen as an agent of change which is promoted through effective learning.[18] This ability to change is of unique significance to judging, owing to the unique characteristics of judging in our society: judges are important public officials charged to resolve disputes and apply complex laws; yet, clearly, judges cannot possess all the technical knowledge needed to decide all cases. Increasingly, the courts serve as a major formative institution in society to uphold standards and to provide the value system which was previously provided at home and through the moral teaching of the church. Claxton and Murrell cite women and race as two visible examples of the need for change confronting courts in the United States in the 1980s, which epitomised the courts' ability to respond to change. They argue that while judges come from a relatively homogeneous group - middle class, white, males - clients of the justice system increasingly comprise people with differing life experiences:

> Judicial education has an important role to play in helping the courts respond to these issues. However, simply training judges in courtroom procedures or updating them on recent court decisions is not enough ... (judicial education) must focus not only on helping judges to master content but also on helping them develop the more generalised abilities they need in order to meet the complex demands placed on them.[19]

The need for change

Over the past decade, the need for change has been documented in numerous task force investigations throughout the United States. More recently, in Australia a number of investigations are currently assessing the need for judicial education on gender and ethnic awareness. Put simply, the existence of need can operate at two levels: actual, empirically measurable need, and perceived need.

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14 Mason, opening address (as yet unreported), inaugural national judicial orientation programme, 3 October 1994, Sydney.

15 Mason, extract of interview from 'The Law Report,' ABC Radio; reported in *Australian Financial Review*, 19 May 1994.

16 Nicholson (Justice of the Supreme Court of Western Australia), 'Judicial Independence and Accountability: Can They Co-exist?' (1993) 67 Australian LI 404 - 426, 425.

17 National Judicial Centre, *1991 - 92 Annual Report*, Ottawa, p 4. The policy of the Canadian National Judicial Centre includes: 'To foster a high standard of judicial performance through programmes that stimulate continuing professional and personal growth; to engender a high level of social awareness, ethical sensitivity and pride in excellence, within an independent judiciary; thereby improving the administration of justice.'

18 Claxton and Murrell, *Education for Development: Principles and Practices in Judicial Education* (1992) JERITT Monograph 3, Michigan State University, pp 1 - 5: Claxton and Murrell argue that education is for development, development embodies change, thus education is an agent of change.

19 *ibid* 3 - 4.

While a number of these investigations are ongoing, it remains a matter of debate in Australia whether these inquiries will establish the existence of 'actual' gender bias and ethnic inequality within the judiciary. It is, however, already open to the judiciary to recognise the existence of a perceived need for judicial education in relation to gender bias and ethnic inequality. This need is generally perceived in the community, whether correctly or otherwise.[20] Equally, once it is recognised at a doctrinal level that justice must not only be done but must also be seen to be done, it is argued that the credibility of the judiciary is impaired if it is not seen to be concerned with redressing these perceived problems.[21]

It is within this context that the earlier comments of Chief Justice Mason and Justice Nicholson, among others, attain their significance. These expressions recognise that continuing education can provide an appropriate means by which the judiciary can visibly redress problems of inequality, both actual and perceived. Thereby, continuing education provides a means of restoring judicial credibility without violating its independence and, in this sense, judicial education also provides an appropriate means of social accountability. Following leads established in the United States and Canada, the Australian judiciary has in the past two years gone some distance in recognising and responding to these needs.[22]

A plethora of inquiries

Instrumental in this process, the media has played a leading role in bringing a number of cases to the critical attention of the Australian public. Three rape trials, in particular, have been highlighted.[23] Media coverage of these cases has generated considerable public criticism of judicial attitudes to women and to the issue of equality of treatment before the law generally.[24] This coverage has precipitated a number of governmental inquiries, in the process prompting the wry observation that the media had given the judiciary 'rougher than usual handling' in its reporting of the issue.[25]

In 1992, the *Report and Findings of the Royal Commission into Aboriginal Deaths in Custody* were released. These findings related to the treatment of Aborigines within the Australian justice system. The Commission found that Aborigines suffered a range of disadvantages in the social, employment, education, health and justice systems. In respect of the latter, it recommended that judicial officers and others working in the justice system should be educated in Aboriginal tradition and custom.[26]

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20 Anecdotally, this is a matter of general comment and personal observation.

21 It is arguably for this reason that the Australian Institute of Judicial Administration took the unusual step of issuing press statements to publicly announce its sponsorship of Australian judges attending training in Canada on gender equality in 1992.

22 Armytage, 'Continuing Judicial Education: the Education Program of the Judicial Commission of New South Wales' (1993) 3 J Judicial Administration 1, 28 - 46; and 'The Need for Continuing Judicial Education' (1993) 16 U New South Wales U 536 - 584. See also Sallmann, 'Comparative Judicial Education in a Nutshell: A Cursory Exposition' (1993) 2 1 Judicial Administration 245 - 255. The Judicial Commission of New South Wales was the first to respond in 1992, by working with the Local Court of New South Wales to develop and conduct a sequenced five-day programme of judicial education on equality, specifically focusing on Aboriginality, gender and ethnicity. The Australian Institute of Judicial Administration has also accepted grants from the federal government to develop national programmes on Aborigines and the law, conducting a pilot programme in Western Australia; and on gender equality, organising a faculty development workshop in Vancouver, Canada for judges from around Australia. In 1994, Chief Justice Malcolm of Western Australia added his voice to that of Chief Justice Mason in formally recognising the existence of gender bias within the justice system of that state. In the same year, the Family Court of Australia conducted a gender equality programme for its judges and staff. See in particular Graycar, 'Gendered Assumptions in Family Law' (unpublished conference paper), *Gender Awareness Seminar* (1994) Family Court of Australia.

23 *R* v *Johns* - in this heavily quoted rape-in-marriage case, Justice Bollen ruled: 'There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of *rougher than usual handling*. It may be, in the end, that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing the mind and consenting. You will bear that in mind when considering the totality of the evidence about each act of intercourse.' On appeal, this ruling was held to be wrong in law, partly in as much as it suggested to the jury that any agreement produced by 'rougher than usual handling' might nevertheless constitute valid consent (Supreme Court of South Australia, 26 August 1992, unreported) pp 12 - 13.

R v *Stanbrook* - in this case, O'Bryan I ruled: 'The aggravated rape was most serious, but having regard to the unusual circumstance that the victim was not traumatised by the event, indeed was probably comatose at the time, a sentence significantly less than the maximum is deemed appropriate.' (Supreme Court of Victoria, 10 November 1992, unreported) pp 27 - 28.

R v *Davie* - in this case, Bland J ruled: 'And often, despite the criticism that has been directed at judges lately about violence and women, men acting violently to women during sexual intercourse, it does happen to the common experience of those who have been in

the law as long as I have, anyway, that "No" often subsequently means "Yes".' (Morwell County Court, 15 April 1993, unreported) pp 34 - 35.

24 The media also gave prominent coverage to the work of Canadian Professor Kathleen Mahoney during her several visits to Australia since 1992. Professor Mahoney, an advocate of gender equality, gavenumerous presentations to courts, universities and government, and galvanised attention both within and beyond the judiciary to the need for change. See, for example, Mahoney, 'Gender Bias in Judicial Decisions' (1993) 1 *The Judicial Review* 197 - 217; and Mahoney and Martin, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987). Within the domain of feminist jurisprudence, there is an emerging literature relating specifically to the judiciary and to the need for judicial education. Many of the inquiries which follow recognise and build on the emerging feminist jurisprudence relating specifically to the judiciary. See, for example, Graycar and Morgan, *The Hidden Gender of Law* (Sydney: Federation, 1990); Hecht-Schafran, 'Overwhelming Evidence: Reports on Gender Bias in the Courts' (1990) 26 *Trial* 28; Hecht-Schafran, 'Issues and Models for Judicial Education about Gender Bias in the Courts' (1989) 26 *Court Review* 3; Wilder, 'Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts' (1989)26 *Court Review* 3; Wikler, *Identifying and Correcting Judicial Gender Bias,* in Mahoney and Martin, *op cit.*

25 Senator Amanda Vanstone, Deputy Chair of Committee, Standing Committee on Legal and Constitutional Affairs, Senate, Parliament of Australia, at the public launch of its report in May 1994.

26 Recommendation 96, *Report of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: Parliament of Australia, 1991).

The Standing Committee on Legal and Constitutional Affairs of the Australian Senate has recently published a report on *Gender Bias and the Judiciary* in mid-1994. This report concluded that an impersonal, systemic, problem of gender bias did exist which is wider than a handful of isolated cases.[27] But, to the extent that an impression has been created that the media comments cited above as evidence of 'gender bias' are in some way typical of overt prejudice on the part of the judiciary as a whole, it found that this was a false impression and the publicity that the comments themselves have attracted has been exaggerated.[28]

Next, the Chief Justice of Western Australia released a report on *Gender Bias.* In this report, Chief Justice Malcolm accepted that gender bias does exist in the law and the administration of justice.[29] The report makes broad ranging recommendations to eliminate gender bias in the law and the administration of justice. These recommendations relate to the courts, women as victims, protection of Aboriginal women, law reform, police,
punishment of women, appointment of judges and judicial education. A number of these recommendations propose that this continuing education should be mandatory.[30]

The Australian government more recently released a report on *Access to Justice:*
An Action Plan. Known as the Sackville Report, this report upheld three central objectives for reforming the justice system: equality of access to legal services, national equity and equality before the law regardless of race, ethnic origins, gender or disability. It stated that all Australians should be entitled to equality before the law.[31] The report proposed a range of recommendations affecting government, the profession, judiciary, police, law reform and community education. In relation to judicial education, specifically, it proposed:

> Government should continue to provide resources and other support, whether to a new judicial education centre, to the Australian Institute of Judicial Administration or to the courts themselves as appropriate, for the development and provision of continuing education programs for the judiciary and relevant court staff, concerning awareness on gender and cultural issues. These should include training programs for court officers and the judiciary in the use of interpreters ... (and),
>
> The Commonwealth should explore, in conjunction with the States, the possibility of establishing an independent national judicial education centre. The primary function of the centre should be to provide courses and other educative material for judges, magistrates, members of dispute resolution tribunals and any other person performing judicial or quasi-judicial functions.[32]

Finally, the Australian Law Reform Commission is now undertaking a reference on *Equality Before the Law.* The Commission's terms of reference require it to examine and report on gender bias in the legal system, whether the courts are affected by gender bias and what role judicial education should play to redress the situation.[33]

It must be observed that the findings of these reports, combining with some measure of public endorsement of media coverage, have been instrumental in the judiciary in Australia, as elsewhere, undergoing a period of intense self-reflection. Prominent as an outcome of this process has been recognition of the need for judge-led education on equality. In the light of this recognition, it is necessary to assess the application of educational theory to the practice of judging in order to discern the role being given to judicial education.

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27 *Gender Bias and the Judiciary* (Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, May 1994), finding 4.52. This report found, *inter alia,* that the vast majority of judges undertake their task conscientiously and well, and with no suggestion of any wilful bias (4.48); that a number of inappropriate and perhaps thoughtless comments had been made by some judges, which demonstrated a failure to express an understanding in terms clearly comprehensible to lay people (4.49); and that 'a small number of male magistrates, a small number of male judges and a significant minority of male barristers have made statements which demonstrate bias against women'(4.50).

28 *ibid* finding 5.1. Consequently, the focus for effective reform should be on gender bias in the legal system itself, including reform of

the judicial selection process (5.5), judicial education (5.85). increased accountability (5.119), and reform of substantive law and procedure (5.135). Specifically, in relation to judicial education (5.85 - 5.118), the Committee supported the concept of voluntary continuing professional development and education for judges and magistrates developed under the aegis of the courts concerned (5.116/7). The Committee found that 'gender issues represent not so much a personal problem for judges, but a systemic problem within the law.' The Committee recommended a number of responses which included judicial education, which it considered should be voluntary (5.85).

29 *Report of Chief Justice's Taskforce on Gender Bias* (Perth, Western Australia, June 1994).

30 In relation to judicial education, the report makes extensive recommendations including that judges and magistrates upon appointment be immediately provided with educational materials in relation to their functions, including materials relating to the avoidance of gender bias (recommendation 36); that programmes of continuing judicial education established on gender issues (r 37), domestic violence (r 38), the female victim's perspective in sexual assault cases (err 39 and 71), and on the Aboriginal female perspective in courtroom situations (r 40); that the judiciary receive ongoing and compulsory education to ensure that notions of presentation do not unwittingly discriminate against women who are applicants for restraining orders for domestic violence (r 87); and that judicial officers have compulsory training to ensure an understanding of the nature and danger of private violence (r 98):*Report of Chief Justice's Taskforce on Gender Bias.*

31 *Access to Justice Advisory Committee: An Action Plan* (Canberra: Commonwealth of Australia, 1994) p 4, known as 'the Sackville report' after its author (subsequently appointed Justice of the Federal Court of Australia).

32 *ibid* Actions 2.4 and 15.4.

33 *Australian Law Reform Commission Reference on Equality before the Law* (Discussion Paper 54, July 1993) - Issues: 7.22 - 7.25. Part 1 of the Commission's report on women and violence was released mid-year. In December 1994, the Commission released Part 2 of its report noting that there had been considerable activity in the area of gender awareness education' (8.68), and for this reason made no recommendations.

Application of educational theory

The educational strategies which underpin any approach to educating judges on equality should rest on foundations of adult learning theory. These foundations must, however, be specifically designed to support the distinctive requirements of judges who exhibit characteristics, styles and practices as learners which are distinctive, and which have direct and important implications for educators.

Cross has observed that there is a notable lack of theory in adult education. This she attributes to the market orientation of practitioners concerned with delivering services to clients, and to the multidisciplinary nature of adult education which she considers to cause confusion and a lack of academic coherence.[34] Notwithstanding, there is an emerging literature of adult learning as a specific domain of education.

Generally speaking, adult learning is characterised by being autonomous, self-directed, building on personal experience and the immediacy of application in problem solving.[35] In this sense, it is argued that judges epitomise adult learners. Participation in continuing education is usually a purposive activity: to prepare for a new job or improve present job abilities, and rewards such as improved employment and remuneration tend to dominate the choices of learning.[36]

Judges as adults - how adults learn

Education is a formalised process by which people learn. Pivotal to the development of any education process is the need to provide the means for effective learning. Theorists have sought to understand and explain the learning process, and their investigations have focused upon the individual components of the learning act and the delineation of various types of learning. Explanations of how learning takes place have been assessed through various theoretical and clinical means.

Within this understanding, it is argued that any paradigm of adult education should be seen primarily as a process of facilitation based on self-directed learning, where the educator is cast in the role of facilitator in a process centred on the learner, rather than as an authoritarian model of teaching where the educator directs a learning process which focuses on the subject.

The application of this learning theory - specifically, humanistic and developmental explanations of learning - provides a range of useful insights to the process of judicial learning. Generally speaking, it is argued that humanist theory appears relevant to learning self-understanding; behaviourism is useful in teaching practical skills; and developmental theory has much to offer to goals of teaching ego, intellectual or moral development.[37] In broad terms, it is argued that these theoretical explanations provide the most appropriate foundations for any model of judicial education on equality.

Developmental theory

Developmental theory offers particular insights to educators. Developmental theorists see the various stages and phases of human development as an inevitable unfolding of predetermined patterns, and relate phases of the life-cycle with the developmental stages of growth and maturity.[38] Havighurst, for example, identified developmental tasks for the three periods of adulthood: *early adulthood, middle age* and *late maturity.*[39] Knox views adult development and learning in terms of change events: leaving home, marriage, children, retirement; interspersed with death, health and new jobs.[40]

For developmentalists, the educator is cast in the role of helping the individual advance to the next level of cognitive development, through designing educational experiences which will challenge the learner to reach for growth-enhancing cognitive experiences.[41]

Developmental theory provides some useful explanations for the existence of particular phenomena pertaining to learning by reference to the stage of career at which the learner may be found, such as judicial orientation on appointment to the bench.

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34 Cross, *Adults as Learners* (San Francisco: Jossey-Bass, 1981) pp 109 - 111. To remedy this situation, Cross developed two theories or conceptual frameworks on adult motivation for learning and on teaching to facilitate learning in adults.

35 Knowles, *The Modern Practice of Adult Education: From Pedagogy to Andragogy* (Chicago: Follett, 1980) pp 43 - 44.

36 Johnstone and Rivera, *Volunteers for Learning* (Chicago: Aldine, 1965) p 3. Cross observes that nothing in the myriad of surveys since has changed that general conclusion: Cross, *op cit* 91 and 93 - 94.

37 Cross, *op cit* n 34, pp 233 - 234.

38 See, for example, Darkenwald and Merriam, *Adult Education: Foundations of Practice* (New York: Harper & Row, 1982) p 88; and Cross, *op cit* n 34, p 168.

39 Havighurst, *Human Development and Education* (New York: Longmans Green & Co, 1953); and Havighurst, *Development Tasks and Education* (New York: McKay, 3rd ed, 1972) p 2.

40 Knox, *Adult Development and Learning: A Handbook on Individual Growth and Competence in the Adult Years for Education and the Helping Professions* (San Francisco: Jossey-Bass, 1977) pp 514, 537; see also Knox, 'Interests and Adult Education' (1968) 1 J Learning Disability 2, cited in Knowles (1980), *op cit* 92: and Cross, *op cit* 171.

Humanism

Another useful explanation of the learning process is provided by humanism. The humanistic approach to learning emphasises that a person's perceptions grow out of experience, and stresses the individual's responsibility for becoming what one wants to become.[42]

The research of Tough supports the humanistic approach that there is a natural tendency for people to learn and that learning will flourish if encouraging environments are provided.[43] This approach has been highly influential in underpinning many approaches to continuing education. The humanistic explanation has been adopted by Maslow in constructing his theory of human motivation based on a hierarchy of needs.[44] This hierarchy, in turn, has been relied upon by many subsequent theorists, including Knowles. Darkenwald and Mirriam argue that Knowles' philosophy of andragogy (adult learning) is based on a humanistic developmentalist orientation, that of 'man in his wholeness' and the adult as a self-directed learner.[45] This approach is also supported by Cervero and Brookfield, who argue that effective facilitation of learning is the goal towards which all continuing professional educators should strive.[46]

The implication of humanism for the educator is to cast the educator in the role of facilitator rather than as the agent to direct the learning process. Humanism conceives the education process being centred on the learner rather than the subject in order to give freedom to pursue self-directed development - when, how and where he or she wants. It will be argued shortly that this explanation of the learning process is appropriate to the learning practices of judges and can be useful in developing a model of continuing judicial education.

Cognitive psychology

The cognitive concept of learning provides an important new perspective to finding an answer to the question 'how do adults learn.' Cognitive psychology focuses on the acquisition of knowledge and knowledge structures rather than on behaviour. Cognition is the process of registering, storing and retrieving information, and manipulating that information to solve problems.[47] The cognitive model of the learner is 'based on the premise that learning is an active, constructive and goal-orientated process that is dependent upon the mental activities of the learner.'[48]

Proponents of a cognitive psychological explanation of learning seek to understand mental processes, thinking, concept formation and the acquisition of knowledge. A major long-term objective of education, according to cognitivists, is the learner's acquisition of clear, stable and organised bodies of knowledge.[49]

A key assumption to cognitive theory is that learning is cumulative in nature and rests on prior experience. Thus, in this model of education, the educator must take into account the prior level of knowledge because understanding and interpretation of the information presented depends on the availability of appropriate schemata:
adults - and particularly professionals - must, according to Shuell, be able to test, evaluate and modify understanding and experience. Thus, a major goal of this form of instruction is to teach learners how to derive schemata that will be useful for their practice. Shuell concludes:

> without taking away from the important role played by the teacher, it is helpful to remember that what the student does is actually more important in determining what is learned than what the teacher does.[50]

Experiential learning

The work of Kolb is valuable in any study of adult learning for the manner in which he integrates the application of cognitive psychology with human developmental theory.[51] It is argued that this work comprises two practical elements which are universally relevant to adult learners and has specific application to judges.

The first element of Kolb's work emphasises the essential role of experience. It sees learning as being a continuous process grounded in experience and places greater importance on the process rather than its outcome.[52] In this process, learning rather than teaching becomes the dominant concern. For Kolb, 'learning is the process whereby knowledge is created through the transformation of experience.[53]

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41 Cross, *op cit* n 34, pp 230 - 231.
42 See, for example, Cross, *op cit* n 34, p 228.
43 Tough, W72y *Adults Learn: A Study of the Major Reasons for Beginning and Continuing a Learning Project* (1968) Monographs in Adult Education (No 3). Toronto: Ontario Institute for Studies in Education, cited in Cross, *op cit* 50.
44 Maslow, *Motivation and Personality* (New York: Harper & Row, 1954).
45 Darkenwald and Merriam, *op cit* n 78.
46 Cervero, *Effective Continuing Education for Professionals* (San Francisco: Jossey-Bass, 1988) p 57; and Brookfield, *Understanding and Facilitating Adult Learning* (San Francisco: Jossey-Bass, 1986) p 283.
47 Darkenwald and Merriam, *op cit* ns 102, 107.
48 Shuell, 'Cognitive Conceptions of Learning' (1986) 56 Rev Educational Research 411 - 436, 415, cited in Cervero, *op cit* n 40.
49 Darkenwald and Merriam, *op cit* 102 - 104.
50 Shuell, *op cit* 429.
51 Kolb builds on the foundations of human development theory which recognises three broad stages of human maturation. These are *acquisition* (birth to adolescence: acquisition of basic learning abilities and cognitive structures). *specialisation* (extends through formal education and career training and early adult work experiences: person achieves a sense of identity, frequently reflected through work) and *integration* (pursuit of personal/social fulfilment, often marked by a mid-life crisis: the challenge comes to shape one's own experience rather than accepting them as they happen); Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (New York: Prentice Hall, 1984) pp 142 - 145.
52 *ibid 26 - 27.*
53 *ibid* 38.

The first element of the learning process occurs in a four-step process, which Kolb describes as a 'learning style inventory.' This inventory consists of a four-element cycle consisting of concrete personal experience, observations and reflection on that experience, abstract concepts and generalisation, and application in new situations.[54]

The second element rests on the premise that learners have preferred orientations to learning permitting classification into the above types. The learning style inventory provides illuminating insights for the design of integrated instructional strategies to promote effective learning. This classification of preferred learning styles can also provide a useful basis for facilitated learning equipping educators to design instructional programmes which integrate each of the four major learning styles for group learning situations or, potentially more usefully, to design *individualised* learning programmes tailored to meet both the particular styles and needs of individual judges.[55]

Behaviourism

Behaviourism is an antithesis to the cognitive approach in searching for an explanation of the learning process. The behaviourist approach, which is sometimes referred to in discussions by practitioners as a 'competency-based' approach to education, lies at the foundation for one of the largest and most visible segments of adult education, namely occupational training in the workplace.[56] This approach is generally based on applying learned experiences for the attainment of functional outcomes and is frequently applied in skills training where the learning task is broken into segments where there is what Cross describes as 'a correct response,' which is rewarded.[57]

Implicit in this approach to the learning process is a model of education developed by Tyler which was designed as a means of defining good practice and providing a conceptual structure to assist educators.[58] This model comprises five elements for identifying needs, defining objectives (preferably in behaviourist terms), identifying learning experiences to meet those objectives, organising learning experiences into a plan with scope and sequence, and evaluating programme outcomes in terms of attainment of behaviours specified.

The Tylerian model of education has been highly influential in forming the basis for much subsequent work.[59] Brookfield, however, argues that it distorts reality.[60] More importantly, he argues that it is antithetical to effective learning. Brookfield argues that learning entails fundamental change in learners and leads them to redefine and reinterpret their personal, social and occupational worlds, in the process exploring affective, cognitive and psychomotor domains that they had not previously perceived as relevant.[61]

For judges, however, it is argued that behaviourism is limited in its application to definable tasks, such as learning to undertake electronic legal research in preparing judgments or perhaps trial-diary management. In focusing on behavioural outcomes, it fails to provide any assistance in training judges in the responsibilities and tasks which are primarily cognitive, interpretive or judgmental. To some large extent, the quest to become 'a good judge' depends on qualities involving complex, multifaceted mental processes, attitudes and values which cannot be readily instilled or measured in the manner envisaged by behaviourism.

Facilitated learning

A corollary of adults being autonomous learners is the shift from the classic pedagogical model of didactic teaching to a process of self-directed learning.

Learners, as much as facilitators, have been socialised into a view of education as an authoritarian-based transmission of information, skills and attitudes from teacher to student. Yet, Brookfield argues, to give in to this temptation is to reaffirm precisely those patterns of dependency that prevent adults from becoming empowered, self-directed learners [62]

Brookfield observes that talk of the role of the teacher is unfashionable and distasteful to some educators of adults who are at pains to stress the democratic and student-centred nature of their practice: 'Facilitators do not direct; rather, they assist adults to attain a state of self-actualisation or

to become fully functioning persons.[63]

Developing in adults a sense of their personal power and self-worth is seen by Brookfield as a fundamental purpose of all education and training efforts.[64] Only if such a sense of individual empowerment is realised will adults possess the

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54 *ibid;* also Kolb and Fry, 'Towards an Applied Theory of Experiential Learning' in Cooper (ed), *Theories of Group Processes* (New York: Wiley, 1975).

55 For example, Kolb's learning cycle/inventory can operate at the following instructional levels: by 'doing' through undertaking exercises; by 'reflecting' through processing experience in group discussion; by 'observing' through listening to lectures or reading; or by 'applying' through developing and testing theories into practice.

56 See Cross, *op cit* n 34, p 233. The application of behaviourist theory usually has the following characteristics: the education objectives must be clearly stated; learning tasks must be analytically designed in relation to desired end behaviours; content broken into small easily-mastered steps, encouraging self-instruction and response from learner; materials provide immediate feedback to enable self-pacing; subject and activities adhere to set sequence and process conducive to mastery; completion of each step ('correct response') provide own reward; responsibility for ensuring learning takes place must rest with materials themselves as a learning instrument rather than instructor.

57 Cross, *op cit* n 34, pp 232 - 233.

58 Tyler, *Basic Principles of Curriculum and Instruction* (Chicago: University of Chicago Press, 1949).

59 Regarding the enduring influence of the Tylerian model, see Houle, *op cit* n 4, p226; and Brookfield, *op cit* p 204.

60 *ibid* 213 - 214.

61 *ibid* 214.

62 *ibid* 296.

63 *ibid* 123 - 124.

64 *ibid* 283.

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emotional strength to challenge behaviours, values and beliefs accepted uncritically by the majority. Effective facilitation requires a philosophy of practice, and is present when adults come to understand that the belief systems, value frameworks and moral codes informing their conduct are culturally constructed. Thus, he argues that effective facilitation means that learners will be challenged to examine their previously held values, beliefs and behaviours, and will be confronted with those which they may not wish to consider.[65] In this sense, the mission of continuing education is to engage learners in the continuous critical analysis of received assumptions, common sense knowledge and conventional behaviours:

> Central to [the process of adult education] is a continual scrutiny by all involved of the conditions that have shaped their private and public worlds, combined as a continual attempt to reconstruct those worlds. This praxis of continual reflection and action might be accurately viewed as a process of lifelong learning.[66]

As such, it is argued that facilitated learning provides a cogent philosophic outlook of empowering the adult learner within any formalised approach to education. This is highly compatible with the preferred self-directed learning practices of judges and, perhaps more importantly, the doctrinal imperative to preserve judicial independence within the education process.

Facilitated learning provides a philosophically compelling approach to judicial education and postulates a dual answer to the nature - nurture debate: first, it asserts that good judges can be educated and not just born; second, it highlights that learning rather than teaching is the most important element in that education process.

Within this understanding of the process of adult learning, the observations of Cross are endorsed:

> It does make sense to argue that, generally speaking, humanist theory appears relevant to learning self-understanding; behaviourism seems useful in teaching practical skills; and developmental theory has much to offer to goals of teaching ego, intellectual or moral development.[67]

It follows that any paradigm of formalised judicial education should be seen, primarily, as a process of facilitation based on self-directed learning rather than an authoritarian model of teaching.

Judges as professionals

Judges, as professionals, possess certain characteristics as learners which should be acknowledged in the development of any programme of equality education. Most influential of any understanding of this learning process is the work of Schon.

Schon's model of professional knowledge

Schon's explanation of professional learning offers insights on the essence of professional expertise which distinguishes exemplary professional performance from occupational competency. Schon focuses study on the domain which exists beyond competence. This work has particular relevance for any programme of professional education which operates within a judicial selection process based on merit. It is argued that merit selection imports a range of professional competencies into the judiciary, using either explicit criteria as in the American model or by inference as in the British approach.[68] These competencies define the threshold upon which any programme of continuing education is based. Given these pre-existing professional competencies, Schon's work addresses the higher-order skills of professional practice and orientates the education process to the continual aspiration of excellence rather than to the attainment of competence.

Schon has developed a model of professional knowledge which consists of two elements: the first identifies the essence of professional competence in a concept which he defines as 'artistry,' and the second examines the ways in which highly successful professionals have accomplished their artistry. Schon uses the term professional artistry to refer to the kinds of competence practitioners display in unique, uncertain and conflicting situations of practice:

> Artistry is the competence by which practitioners actually handle indeterminate zones of practice ... Artistry is an exercise of intelligence, a kind of knowing, though different in crucial respects from our standard model of professional knowledge .. . In the terrain of professional practice, applied science and research-based technique occupy a critically important though limited terrain, bounded on several sides by artistry. There is an art of problem framing, an art of implementation and an art of improvisation - all necessary to mediate the use in practice of applied science and technique ... Most situations of professional practice are, however, characterised by uniqueness, uncertainty and value-conflict; (mastery of knowledge, or past actual experience) is unlikely to solve such problems; the

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65 *ibid* 286.
66 *ibid* 293 - 294; and see 287.
67 Cross, *op cit* n 34, pp 233 - 234.
68 The American approach tends to be relatively formalised, identifying and defining three principle criteria for selection comprising *integrity, temperament* and *professional competence.* Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law and breadth of experience: ABA, *Standing Committee on Federal Judiciary - What it is and how it works* (Chicago: American Bar Association, 1991) p 7; the English approach, on the other hand, is less formal. See, for example, Lord Hailsham (1985) 28 *Law Society Gazette* 2335; see also *Judicial Appointments - The Lord Chancellor's Policies and Procedures* (London: Lord Chancellor's Department, 1986), and Megarry, 'Seventy-five Years On - Is the Judiciary What it Was?' (1984) *The Edward Bramley Lecture* 13.

> ability to resolve these situations is the essence of professional artistry.[69]

Integral to Schon's concept of professional artistry is his theory of how it is attained. In describing the learning process, Schon identifies two models of professional learning. The first, knowing-in-action, is like learning to ride a bike. Once an adult has learned how to do something, he or she can execute a smooth sequence of activity, recognition, decision and adjustment without having to 'think about it.' It encompasses a common body of explicit, more or less systematically organised professional knowledge, values, preferences and norms.[70] The second form of learning, which he describes as reflection-in-action, on the other hand, is the process of learning new ways of using competences which are already possessed.[71] It is the process through which practitioners sometimes make new sense of uncertain, unique or conflicting situations of practice, where students construct and test new categories of understanding, strategies of action and ways of framing problems.[72] This approach to learning focuses not simply on the process rather than the outcome, but also on the problem-setting rather than the problem-solving aspect of this process.

Cervero endorses this approach to learning, which he specifically applies to the professions[73]:

> Two forms of knowledge must be fostered through continuing professional education. First, the focus must be on ... practical knowledge and what cognitive psychologists call procedural knowledge and know-how ... [that] repertoire of examples, metaphors, images, practical principles, scenarios or rules of thumb that have been developed primarily through prior experience ... The second form of knowing that must be fostered consists of processes by which professionals use their practical knowledge to construct an understanding of current situations of practice ... variously called reflection-in-action, intuition or problem-finding.[74]

Cervero's observations draw attention to the important distinction in two divergent models of education based respectively on the delivery of declarative knowledge *(knowing what)* and procedural knowledge *(knowing how).*

Self-managed professional development

Smutz and Queeney translate the notion of facilitation in adult education specifically to professional learning. While recognising the importance of facilitation in adult education and the need for adults to assume self-responsibility for their own learning, they observe:

> [I]t is evident that professionals require guidance and assistance in structuring their continuing professional education so that it will, in fact, benefit their practice.[75]

The nature of this guidance and assistance is described in the concept of 'self-managed' professional development. Smutz and Queeney see the process of preparing the individual, providing learning resources and building a supportive infrastructure as being the key ingredients to facilitate the adoption of systematic, self-managed professional development.[76]

This conceptual approach integrates two potentially contradictory educational needs, being the need for structured assistance and the need for self-direction, and is compatible with what is known of judges as learners.

Judges as learners

Judges as learners are distinctive. In particular, the learning characteristics, needs, practices, preferences and constraints of judges can be distinguished from adult learners generally. These distinctive features arise from the process and criteria of judicial appointment, and the nature of tenure; judges' preferred learning styles and practices; doctrinal constraints, the formative nature of the judicial role and the environment surrounding judicial office; and judges' needs and reasons for participating in continuing education.

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69 Schon, *Educating the Reflective Practitioner* (San Francisco: Jossey-Bass, 1987) p 13; and Schon, *The Reflective Practitioner* (New York: Basic Books, 1983) pp 138, 169, 198.

70 *ibid* 33 (1987).

71 *ibid* 14,26 - 31. Reflection-in-action is distinguished from two more elementary forms of knowledge, being firstly, facts, rules and procedures (what he describes a technical training) and secondly, the forms of inquiry by which competent practitioners reason their way in problematic instances to clear connections between general knowledge and particular cases (what he describes as 'learning to thinking like' a lawyer).

72 *ibid* 39.

73 Cervero (1988), *op cit* 44 - 46.

74 Cervero, Azzaretto and Tallman, *Visions for the Future of Continuing Professional Education* (Georgia: University of Georgia, 1990) p 178. In seeking to develop either kind of knowing in an educational context, Cervero argues that the key is to provide methods which build on experience, such as case studies, by which learners can uncover and develop their practical knowledge.

75 Smutz and Queeney, 'Professionals as Learners: A Strategy for Maximizing Professional Growth' in Cervero, Azzaretto and Tallman, *op cit* 183 - 205, 186.

76 *ibid* 204 - 205.

Judicial appointment and tenure

The process of merit selection determines appointment to judicial office and establishes a particular threshold of pre-existing competencies in legal knowledge and skills. Consequently, it is generally valid to claim that judges as learners possess extraordinarily high levels of pre-existing professional competence. In addition, Catlin has demonstrated that the distinctive nature of judicial tenure, specifically its security and lack of promotional opportunity, affect individual judges' motivation to learn and place them in a different position to other professionals who operate in working environments lacking these features.[77]

Preferred learning styles and practices

There is evidence emerging to suggest that judges as a profession exhibit preferred learning styles and utilise preferred learning practices developed over the course of their careers.

While there is little empirical data available on how judges learn, it is argued from the author's own clinical experience and observation that judges tend to be autonomous, entirely self-directed and exhibit an intensely short-term problem orientation in their preferred learning practices.[78] The research of Herrmann lends credence to this hypothesis, providing empirical evidence that the preferred learning styles of judges and lawyers tend to be 'left brained,' that is: logical, analytical, problem-solving, controlled, conservative and organisational.[79]

Cervero applies and extends Schon's concept of professional artistry to educating judges. Cervero argues that judges, like all professionals, rely on a repertoire of practical, non-abstract knowledge or know-how as the basis of their expertise. Judicial problem-solving, however, involves a special form of artistry in that these problems are always ill-structured, solutions are inconclusive and important features of the problem become apparent only as the situation unfolds. Cervero argues that expert judges bring to bear their own implicit theories on situations - personal perspectives and values developed from prior experience - and this influences how they look at the particular case before them.[80] It follows, according to Cervero, that the challenge for the judicial educator is to be able to integrate knowledge acquired from judicial practice with principles and theories to facilitate the best application of judgment.[81]

While it may be premature to discern support for this hypothesis, the clinical experience and observation of the author in educating judges suggests that Schon's approach to professional learning is compatible with judges' continuing learning practices and should, as a result, form an active element in any process of continuing judicial education.

Doctrinal constraints

Reference has already been made to the imperative to preserve judicial independence within any Westminster system of government. The doctrinal significance of this precept has been seen to be highly influential in any judicial approach to the notion of continuing education. It follows that educators should make efforts to ensure that judges recognise the independence and integrity of the process, in order to appease any

concerns of possible indoctrination.

Equally, the formative nature of the judicial role can create a discomfort for some judges participating in continuing learning under conditions which could possibly be seen to erode the authority of their role. Both considerations contribute to the need for an independent, discrete process of education.

Judges' reasons for participating in continuing education

Catlin has identified significant differences between judges and other professionals in their motivations and perceived needs for continuing education. He found that appointment to judicial office and the environment surrounding judicial tenure

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77 Catlin, 'An Empirical Study of Judges' Reasons for Participation in Continuing Professional Education' (1982) 7 *Justice System Journal* 2, 236 - 256; see discussion below.

78 It is argued that Kolb's *Learning Style Inventory* is routinely modified in practice by the imposition of predictable models of learning which are reinforced by work practices formed throughout a successful career as an advocate at the trial bar. In this hypothesis, it is argued that professional work practices impose particular patterns of learning on those who subsequently attain judicial office: throughout careers where briefs are frequently delivered at 4 pm presenting unique problems requiring personal and immediate research in the application of law to particular facts, the planning of a conceptual approach and the delivery of compelling argument within a highly competitive environment by 10 am the following morning.

79 Herrmann, *The Creative Brain* (Lake Lure, North Carolina: Ned Herrmann/Brain Books, 1989); see also Phillips, *Orchestrating Learning for Judges' Preferred Learning Styles* (unpublished conference paper, 1992), National Association of States Judicial Educators (NASJE) Annual Conference, Charleston, South Carolina. See 'judges' brain dominance profile' produced from empirical testing and supplied to the writer; application of the 'Myers-Briggs Type Indicator' to lawyer types (July 1993) American Bar Ass 174 - 78. Claxton and Murrell, *op cit*, address a chapter on 'Learning Styles of Judges'; however, this work is an application of Kolb's general work on experiential learning and lacks any grounding in empirical data distinctive to judicial learning; see also the comparison of left-mode and right-mode characteristics in Kolb, *op cit* 49, 141. If these various observations of the characteristics of lawyers and judges are valid, this raises the vexed question whether the practice of law creates these characteristics in practitioners or whether persons with these characteristics are attracted to practice in the law. Detailed exploration of this issue, and its full implications for educators, remains a matter for further research.

80 Cervero and Conner, *Educating Judicial Educators: Two Perspectives* (Georgia: University of Georgia: Judicial Education Adult Education Project [JEAEP], 1992) pp 1.1 - 1.17, 1.2.

81 *ibid* 1.5.

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created educational needs distinct from other professionals.[82]

These distinctive features related in particular to the motivational factors in continuing learning where personal benefits, professional advancement and job security were ranked significantly lower by judges than by other professionals such as physicians and veterinarians.[83] This is consistent with judges perceiving themselves as public officials, now behaving differently from professionals in the private sector.[84] Catlin observes that 'the difference appears most dramatic when the reward system is examined.[85] Judges may participate to develop new skills in order to be more competent, but not to increase their income; thus, the development of competence, in the case of the judge, must be a reward itself. The lack of importance of job security, professional advancement and personal benefits have 'serious implications' for purposes of planning education programmes; comparison between groups suggests that for judges the concept of judicial competence is a factor much broader than professional service; in addition, judges operate in an environment where there is a lack of any distinctly identifiable patient or client relationship.[86]

These elements are distinguishing features which have significant implications for educators in terms of both the content and the process of any programme of continuing judicial education. They also significantly affect the application of educational theory to judges. Principal among these is the need to recognise the intrinsically aspirational nature of continuing judicial education which determines the mission of judicial education as extending beyond the conventional domain of technical competence.

In view of these distinctive features, there is a need for educators to develop a specific model of judicial education which extends the foundations of adult and professional education, and goes beyond training for functional competencies, to pursue professional artistry and promote active self-analysis and critical reflection.

Policy issues

Prescription or choice?

In Australia, there is as yet no mandatory continuing judicial education.[87] Indeed, formalised structured continuing judicial education is minimal in any state other than New South Wales, where education is voluntary.

The voluntary character of judicial education is of fundamental importance, for a number of reasons. First, prescription is anathema to any programme of continuing professional education, where it is recognised in humanistic terms that motivation is essential for meaningful learning; it is all the more anomalous for any programme of judicial education whose mission extends beyond the domain of basic competence to

promote professional artistry.

Notwithstanding the existence of overwhelming educational and doctrinal arguments against prescription in continuing education, it is, however, noted that most judicial education in the United States is mandatory.[88] This situation defies explanation, until the provision of a visible means of accountability is recognised as being central to the process of judicial professionalisation: in effect, it is argued that mandatory judicial education has much more to do with demonstrating a concern for the pursuit of competence rather than implementing an effective means of attaining it.

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82 Catlin, *The Relationship between Selected Characteristics of Judges and their Reasons for Participating in Continuing Professional Education*, unpublished doctoral dissertation (Michigan: Michigan State University, 1981) p 125; see also Catlin, An Empiric Study of Judges' Reasons for Participation in CPE' (1982) 7 *Justice System Journal* 2, 236 - 256. Catlin's research has revealed that judges' reasons for participation are complex and multidimensional. Three underlying factors emerged from analysis of judges' reasons for participation which, in order of importance, were *judicial competence, collegial interaction* and *professional perspective.* Catlin found that significant relationships exist between these participation factors and judges' characteristics including their sex, years since qualifying, tenure on current bench and court level currently served. Thus, Catlin concludes that it is wrong to assume that participation is primarily a function of programme content in formulating curricula and designing programmes.

83 Compare the empirical findings of Catlin with those of Cervero relating specifically to physicians and veterinarians, respectively: Cervero, 'A Factor Analytic Study of Physicians' Reasons for Participation in Continuing Education' (1981) 56 1 Medical Education 29 - 35.

84 Catlin (1981), *op cit* n 82, p 125.

85 *ibid.*

86 *ibid* 126.

87 in New South Wales, the voluntary nature of judicial education has been the subject of favourable comments by the Attorney General. See Hannaford, 'Voluntary Continuing Judicial Education' (1993) 5 *Judicial Officers Bulletin* 43 - 47: 'I am, therefore, sensitive to the need for voluntary judicial education ... The current public debate on the vexed issue of judicial education has, unfortunately, been conducted in ignorance of the extensive education programmes already available.'

88 Seventy per cent of all state-based programmes of judicial education in the United States are mandatory: Hudzik, *Issues and Trends in Judicial Education* (Lansing, Michigan: Michigan State University, Judicial Education Reference, information and Technology Transfer Project [JERITT], 1993) p 127.

Facilitating 'judge-led' learning

For judges in New South Wales, as perhaps elsewhere, the voluntary, independent character of continuing education is of considerable importance. The need for judicial education to *be judge-led* has become something of a mantra.[89] This catch cry of judicial education can mean a variety of things: it can highlight the importance of judges owning their own education programme and playing a decisive role in policy making; it can mean that any programme of continuing education should preserve judicial independence from any risk of indoctrination; it can mean judges should make up the faculty as being the only appropriate reservoir of expertise and experience to fuel the delivery process; and it can also be used to express the view that judges should be the masters of their own learning - that education should not be formalised or even organised for them - as they are experienced and indeed successful in meeting whatever needs may exist in a self-directed fashion.

Whatever *judge-led* may ultimately mean, it is symptomatic of a view that professionals generally and judges in particular see themselves as the best arbiter of their learning needs and how to meet them and, within this self-image, see any notion of external prescription as anathema.[90]

A model approach to continuing judicial learning

Catlin's model of judicial education

Catlin has introduced a model of judicial education which applies educational theory to judicial learning and provides a foundation for a distinctive paradigm of continuing judicial education.[91] Using seven objectives of judicial education, Catlin links technical competence with what he describes as *judicial authenticity*, which as a concept offers some similar connotations to Schon's notion of artistry. These objectives he describes as mastering theoretical knowledge, developing problem-solving capacity, developing collegiate identity, relating to allied professionals, conceptualising the judicial mission, maintaining an ethical practice and self-enhancement.[92]

Catlin's model is built in turn on seven characteristics of the judicial profession that must be acquired on becoming a judge. These characteristics include a transition which may be traumatic and unprepared; integration with a larger judicial body; isolation of practice; unique decision-making obligation; absence of financial incentive to participation in learning; changing judicial roles; and extreme heterogeneity of new judges in age and experience.[93]

Guidelines for educating judges

Any model of formalised continuing judicial education should be based on foundations of adult learning, build on Catlin's work and reflect the distinctive characteristics of judges as learners.

It has already been argued that humanist theory, behaviourism and developmental theory each provide useful explanations of the process of adult learning. Within this understanding of the process of adult learning, it has been argued that any paradigm of formalised adult education should be seen primarily as a process of facilitation based on self-directed learning rather than on an r authoritarian model of teaching.

It has also already been argued that judicial learning is a distinctive process in educational terms and that, consequently, the mission of continuing judicial education should extend beyond conventional notions of technical competence to embrace professional excellence or artistry. The essence of judicial practice exists beyond the domain of behavioural explanations of competence and eludes a satisfactory explanation within the behaviourist approach. Whether described in terms of judicial artistry (as defined by Schon),[94] authenticity (as defined by Catlin)[95] or simply expertise, the

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89 This position is shared by the British judiciary, to the point where it is described as a 'cardinal principle.' See Judicial Studies Board, *Report for 1983 - 87* (London: HMSO, 1988) p 30.

90 This imperative for *judge-led* education should not be confused with the need for expert assistance to facilitate meaningful learning along the lines drawn by Brookfield, and Claxton and Murrell, *op cit,* discussed above.

91 The initial endeavour of developing a model of education for judges as learners has been undertaken by Catlin who has devised a model of judicial education which identifies its three major goals as being *new judge transition* (induction into new responsibilities and preparation for change), *continuing education* (refresher, maintenance and modernisation) and *career development.* Catlin, 'Model of Judicial Education,' *The Who and What of Judicial Education* (East Lansing: Michigan Judicial Institute, 1988) pp 5 - 9. This approach is consistent with Houle's view of the role of professional education following selection and certification of competence: Houle proposes a three-layered educational model comprising: (1) the academic stage, (2) the professional stage comprising both institutional and in-training, (3) continuing education or training: Houle (1980), *op cit* 34, 106. Similar approaches have been applied to legal education in England and Wales in the 'Ormrod Report,' *Report of the Committee on Legal Education* (London: Her Majesty's Stationery Office, 1971); and was endorsed in the 'Pearce Report' on legal education in Australia: Pearce, Campbell and Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra: Australian Government Printer, 1987). However, it is at odds with the two-tiered approach adopted in the NASJE Standards of induction and continuing education: NASJE, *Principles and Standards of Continuing Judicial Education* (National Association of States Judicial Educators INASJEI, 1991). Standards 3.1 and 3.2, respectively.

92 Catlin (1988), *op cit* Figure 6, p 15.

93 *ibid.*

94 Schon (1987), *op cit* n 13; see discussion above.

95 Catlin (1988), *op cit* Figure 6, p 15; see discussion above.

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essence of judging is a highly complex intellectual, problem-solving process which resists procedural description or predictable outcomes (as discerned by Cervero and Conner).[96] In place of behaviourism, it is argued that experiential learning, based on an application of the principles of cognitive psychology, provides a more useful explanation of how judges actually learn (that is, through critical reflection and reinterpretation of experience applied to specific problems) and how educators can facilitate that learning.

Underpinning educational principles

Taking into account the above considerations, this model should comprise three precepts of judicial education:

Voluntary, Judge-led Process - There is a doctrinal imperative for a voluntary, independent education process.[97] The credibility of any education process for judges is also critically dependent on the ability of any education provider to preserve judicial independence from any risk of indoctrination, whether actual or apparent.

Procedural Knowledge - Judicial education should explore the domain which extends beyond the realm of professional competence. In simple terms, this involves developing the professional artistry of judges. A study of the literature of educational philosophy reveals the need for the practice of judicial education to promote the development of judicial skills, disposition and attitudes, *in addition to* the cognitive acquisition of information.

Facilitated, Jndividualised Learning - To be effective, any formalised process of judicial education should facilitate individualised learning which is self-directed, reflective and promotes the capacity for rigorous self-critique. In this sense, the purpose of education relating to judicial disposition, attitudes and values is to promote a continuous critical analysis of received assumptions, common sense

knowledge and conventional behaviour. This process should accommodate the distinctive styles in which judges prefer to learn and practice. Judicial education should be seen in humanistic terms as a process which builds on the preferred learning styles and practices of judges through facilitating self-education. Consequently, there is also a need for the development of instructional strategies which promote self-managed learning and are facilitative rather than didactic in technique. Finally, the instructional design of judicial education should focus on individualised learning strategies: while instructional design and delivery based on group learning does offer a valuable opportunity for the exchange of experience for judges, who otherwise practice in isolation, the educational adequacy of group learning for judges is limited.

In this sense, it has already been suggested that there are two answers to the classic *nature/nurture* debate as it applies to educating judges: first, good judges are made rather than ordained by fate; second, however, they make themselves through learning rather than being taught.[98]

The educational response

Judicial education is new to the common law tradition, having commenced in the United States in the mid-1960s, and in Britain, Canada and Australia a decade later. In the intervening twenty years, the momentum has gathered pace in Australia with the establishment of the Australian Institute of Judicial Administration and the Judicial Commission of New South Wales. These bodies have recently collaborated in the development of a five-day residential judicial orientation programme for new judges and magistrates throughout Australia to assist in their transition to the bench.

In New South Wales, the Judicial Commission conducts an extensive programme of continuing education for judicial officers in the state's six courts. During 1993/94, this consisted of judicial officers participating in more than 1000 days of judicial education, together with a further *325* days of computer training, a notional average of about five days of continuing education for each judicial officer annually. In addition, the Commission publishes and updates five bench books for judicial officers in all courts in different aspects of judicial practice, a monthly digest of topical articles, recent cases and legislative developments, and a journal of researched papers of enduring juristic value.

This education programme builds on and extends Catlin's three-level model of judicial education to operate at five levels: orientation of new appointees; updating recent change; exchanging experience and providing a forum for problem-solving; providing refreshers; and special interest. The content of the programme includes law, practice and procedure; skills; disposition, such as attitudes and values, ethics and conduct; management and administration; and interdisciplinary issues.

Equality education: some programme examples

In planning judicial education in New South Wales relating to equality before the law, consideration has been directed towards two overseas approaches, variously described as the 'Canadian' and the 'United States' models. The Canadian model, which has been developed by the Western Judicial Education Centre, focuses on gender and racial bias, with an extensive series of papers, materials and exercises which explore aspects of the problem from substantive perspectives using a variety of adult learning techniques.[99] The American model, which has been developed by the National Council of Juvenile and Family Court

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96 Cervero and Conner, *op cit* 1.5; see discussion above.

97 Voluntariness is also important for effective learning in humanistic terms, involving considerations of recognition of need, perception of benefit and motivation.

98 See discussion of facilitated learning above.

99 Campbell, *Judicial Education Program on Gender Equality* (Vancouver: Western Judicial Education Centre, undated).

Judges, takes an alternative approach by focusing on the role of attitudes and values in judicial decision making, supported by examples relating to a range of disability types.[100]

The New South Wales Judicial Commission has and continues to develop a number of educational programmes in this area. In particular, these programmes have been developed for the Supreme Court, Land & Environment Court, and the Local Courts of New South Wales. Additionally, the Standing Advisory Committee on Judicial Education is presently investigating the development of an inter-curial programme for all judicial officers throughout New South Wales. Finally, the national judicial orientation programme included two major equality workshops on gender and ethnic diversity.

Each programme varies depending on the nature of the need and the context within which the response is to be provided: to this point, the Commission has integrated aspects of both the American and Canadian approaches in developing these programmes. With the benefit of experience gathered over the past three years in developing a range of different programmes in this area, it has been found that the most effective learning occurs when educational theory is applied to judging in the following way:

(a) Issues such as gender equality are treated within a broader educational framework of promoting equality before the law within a pluralistic society. Within this context, gender, for example, is integrated with a range of issues relating to diversity arising from Aboriginality, ethnicity or disability wherever appropriate.

(b) The education process is court-led, independent, non-doctrinaire, voluntary and designed for all members of the court, rather than

selected members or only those who express an interest.

(c) The objectives of the education process are to provide information and promote awareness of problems and solutions; to develop and integrate practical judicial skills (for example, in courtroom communication, assessment of credit, decision making and sentencing); and to promote analysis and critical self-reflection of disposition, attitudes and values.

(d) The programme development process involves the court's education committee overseeing a special-purpose committee of experts selected to identify learning needs and to develop educational solutions, to select presenters, and to develop instructional and facilitation skills.

(e) Faculty is selected from the judiciary, academia, the legal profession on occasion, law reformers, criminologists, educators and other experts.

(I) The programme is designed in multiple, sequenced segments to consolidate learning and to integrate principle with the practice of judging.

(g) The instructional design of courseware and delivery techniques are workshop-based to facilitate active, participatory, self-directed learning by judicial officers applying a broad range of adult learning principles.

Since 1992, the Commission has developed various judicial education programmes on equality, involving a number of structured sessions relating to Aborigines and the law, gender equality and ethnicity in the courtroom. For members of the Local Courts, for example, this programme has been structured to consist of five days during the past three years integrated within the courts' overall programme. Different elements of this programme were planned with the courts' education committees working with project committees of nationally-acknowledged academics and educators, Aborigines, feminists, representatives of ethnic resource services and groups, legal practitioners, and other experts. Elements of this programme have included a series of information-giving presentations,[101] panel discussions and participatory small-group workshops with discussion using facilitators, videos, problem-solving case studies, role-reversal exercises and a variety of other instructional modules designed to raise awareness, promote critical self-
reflection and consider the ramifications for each participant in terms of stimulating change at a personal and court level. Sessions have included:

Women and the issue of gender equality

- Gender bias and the judiciary
- Law reform perspectives on women's access to justice
- Is gender bias a problem for the courts?
- Gender neutrality and plain language
- Stereotyping
- Domestic violence

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100 Maples and Zimmerman, *The Crucial Nature of Values and Attitudes in Judicial Decision-making* (Reno: National Council of Juvenile and Family Court Judges, 1991).

101 Addresses were provided by Justice Mary Gaudron of the High Court of Australia ('Equality before the law, with particular reference to Aborigines'); Royal Commissioner Elliott Johnston QC; with Aboriginal perspectives from Mr John Williams-Mozley of the Attorney-General's Department and the Aboriginal Legal Service; and a paper from the New South Wales Police Service.

Aborigines and the law

- Equality before the law, with particular reference to Aborigines
- Findings of the Royal Commission into Aboriginal deaths in custody
- Aboriginal law enforcement issues and perspectives
- Modern Aboriginal Society and Customs
- An Aboriginal view of the Criminal Justice System
- Discrimination in contemporary Australian society
- Being Aborigine - a role-reversal
- Aboriginal English in the courtroom - a linguist's view
- Stereotyping
- Cultural perceptions, behaviour and values
- Aborigines and the law after Mabo
- Meeting tribal elders

Ethnic awareness in the courtroom

- Pluralism in Australian society
- Cultural perceptions, behaviour and values
- Stereotyping
- Using interpreters
- Is there equality in your courtroom?
- Naming systems

Judicial skills and disposition

- Judicial Attitudes and Values in Decision-Making
- Sentencing principles and practice - exercises
- Sentencing alternatives
- Courtroom communication

Educational evaluation

Evaluation is essential to judicial education. Most directly, evaluation measures the quality of the learning process for the individual judge. Of greater systemic significance, however, evaluation measures the impact of continuing education on judicial performance and provides the means to demonstrate the judiciary's concern for the development of competence. Thus, educational evaluation integrates the pursuit of competence and, in the evidence of success in that endeavour, a means of social accountability.

The nature of the evaluation process varies depending on which purpose is being met: external accountability, for example, to funding bodies such as the federal government, generally requires greater reliance on objective outcomes, while internal accountability is more concerned with the qualitative learning process. The classic formulation of evaluation criteria was made by Kirkpatrick, who organised four foci for evaluation - reaction, learning, behaviour and results.[102] Commentators generally agree that evaluation of behaviour and results has greater value: Cervero, for example, describes assessing the impact of application of learning as 'the holy grail' of evaluators.[103] Equally, however, this is the most difficult to undertake. While this form of evaluation is 'often difficult if not impossible' to undertake, Hudzik argues that:

> Ultimately, evaluation ought to concern itself with the question of outcome and impact: have conditions changed, and does the change represent an improvement or a deterioration of performance when set against our objectives?[104]

Practical as well as doctrinal difficulties frequently lead to an expedient reliance on inferential measur ements of the quality of the education process rather than its outcomes, with the result that qualitative assessments are frequently used to provide quantitative measurements. Attainment of educational objectives relating to enhancing judicial competence may be very difficult to discern, owing to the difficulty of selecting appropriate performance indicators for an essentially intellectual quality and the reluctance of judges to subscribe to the process of being assessed through any means other than the formal appeals process.

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102 Kirkpatrick, *Evaluating Training Programs* (Madison, Wisconsin: American Society of Training and Development, 1975). *Kirkpatrick's hierarchy*, which is widely adopted as a balanced and practical approach, emphasises four levels of evaluation: reaction, learning, performance (transference of behaviour) and organisational/community impact (results). This model is useful in devaluing participant and organisational perceptions to focus on outcome and results.

103 Cervero (1988), *op cit* 143.

104 Hudzik, *Judicial Education Needs Assessment and Project Evaluation* (Lansing, Michigan: Michigan State University; Judicial Education Reference, Information and Technical Transfer Project [JERITT], 1991) p 37.

Brookfield notes that difficulties of assessment are exacerbated and become 'somewhat tortuous' when dealing with a host of highly interpretive, essentially intellectual, frequently discretionary political, social, moral and ethical questions which frequently arise.[105] In the present context, these difficulties are compounded by impediments associated with the doctrine of independence which render a range of conventional measuring techniques inappropriate with judges.

Additionally, a number of other constraints exist to limit the rigour and utility of most evaluative efforts in practice: the most obvious include limitations on resources such as cost, time and expertise. However, constraints will also frequently include qualified institutional support, goal ambiguity and fear of results. Technical constraints such as complexity, research design problems, lack of data and limited experience and expertise also play influential roles in confining the scope of the evaluation and the methodologies employed.[106] Hudzik observes: 'in sum, the usual level of evaluation undertaken systematically by the various organisations is minimal.'[107] Most courts do not usually even *attempt* to measure learning or knowledge gain, to determine if participants change their behaviour on the job and if the changes improve their performance.[108] This is clearly illustrated by the Judicial Studies Board, the body charged with educating and training judges in Britain. The Board reports that 'the efficacy of judicial studies cannot be measured directly.'[109] Thus, 'the Board cannot take hold of a judge and make him better. It would be unrealistic and impertinent to try.'[110]

Yet, notwithstanding these doctrinal and practical difficulties, it is in the interests of judges and judicial educators to be able to demonstrate the value of their endeavours.

A range of methodologies or techniques are available for possible application in judicial education. These include experiment, correlation, surveys, client assessment, systematic expert judgment, clinical case studies and observation.[111] In any given situation, these measurements may be limited in their validity, reliability and utility. Consequently, the utility of findings is usually best assured through the triangulation of methodologies: for example, the combination of interviews, client surveys, observation and expert judgment is generally likely to test hypotheses and tentative conclusions to reach a consensus on the efficacy of any assessment findings.

In New South Wales, all judicial educational programme activities are subject to formalised needs assessment and evaluation processes

as a matter of course. Adapting a combination of classic Tylerian and Kirkpatrick models, needs are identified using compound methodologies including interviews (both within and beyond the judiciary), observations, surveys and analysis of courts' management data. Educational objectives are then defined to meet these needs. All programmes are subjected to both formative and summative assessment focusing primarily on participant reaction, together with appraisal by instructors, education staff and education committee. Because it is recognised that satisfaction need not correlate with effective learning, this measure may be overridden by the expert appraisal of the education committee in final assessment for purposes of future planning.[112] Finally, the needs assessment cycle is renewed on completion of the educational programme to ascertain the extent to which previously diagnosed needs have been met, and what needs and action continues to be required. Usually, this involves going back to user representatives after an appropriate period of time for their reassessment of the impact of education on judicial performance and improvements in the quality of justice.

Conclusion

While it is still too early to evaluate present equality education endeavours, now is the time to establish a meaningful evaluation framework. In relation to equality education specifically, consideration should be given to integrating the methodologies adopted in establishing need to provide the means to evaluate outcome. In addition to undertaking process-based evaluation of the efficiency of the education delivery, endeavours should also be made to assess what improvements can be discerned in terms of the judicial behaviour and performance previously assessed as deficient, at either an individual or systemic level.

In relation to perceived needs, it has been argued that the need for equality education is, at least in part, emblematic of a public demand for judicial accountability (particularly relating to gender and racial equality). In this instance, it is of greater importance that the judiciary can be seen to respond, rather than that its response has any particularly measurable outcome. Evaluation of any judicial response to such need is met primarily through the evidence of judges' participation in continuing education.

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105 Brookfield, *op cit* 275.
106 Hudzik (1991), *op cit* 44 - 47.
107 Hudzik, *The Continuing Education of Judges and Court Personnel* (Lansing, Michigan: The Judicial Education Network, 1989) p 13.
108 Hudzik and Wakeley, 'Evaluating Court Training Programs' (1981) 64 *Judicature* 8, 369 - 375, 371.
109 *Report of the Judicial Studies Board 1983 - 87* (London: HMSO, 1988) p 4.
110 *ibid* 21.
111 Soc. for example, Anderson and Ball, *The Profession and Practice of Program Evaluation* (San Francisco: Jossey-Bass, 1978).
112 See findings of the 'Dr Fox Effect': Williams and Ware, 'Validity of Student Ratings under Different Incentive Conditions: A Further Study of the Dr Fox Effect' (1976) 14 J Educational Psychology 449 - 457, cited in Houle, *op cit* 245 - 246.

In relation to actual empirically measurable needs, it has already been seen that a number of difficulties confront more detailed evaluation. Specifically, where need has been determined at least in part by media agitation - *ad hoc,* fragmentary and unscientific as it maybe - it is extremely difficult to find any reliable gauges of change for the purposes of methodologically sound evaluation.[113] Equally, to the extent that the methodology of initial needs assessment may be limited in its reliability and validity, this will present corresponding difficulties in undertaking meaningful measurements of change arising from the education provided.

Resolving issues of methodology lie beyond the domain of this article. They must, however, be resolved in order to ensure and demonstrate the value of any educational endeavour. Ultimately, there can be no substitute for rigorous analysis of data relating to court decisions as forming a significant component of any needs I assessment/evaluation methodology. Until need is assessed at this level, it will remain difficult to evaluate change in judicial performance in any objectively meaningful way.

Development of an effective educational response to complaints of unequal treatment on the part of the judiciary provides the means to enhance not only the quality of justice, but also the standing and accountability of the judiciary. While the introduction of any formalised process of continuing judicial education marks departure with common law tradition, this development warrants scrutiny and encouragement.

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113 The media in Australia has recently reported a number of cases indicative of judicial awareness of gender and racial awareness and, perhaps, of changing attitudes on the bench. This coverage, however, cannot be accepted as methodologically sound evidence of changed behaviour or performance resulting from educational intervention. In a decision of the NSW Supreme Court, prominent coverage was given in the media to the conviction of the murderer of a prostitute, Ms Jasmin Lodge. The judge was reported in detail for stating that the life of a prostitute was worth no less and no more than any other person: *R* v *Beltrame,* Supreme Court of NSW, May 1994 (unreported). Similarly, the same court recently restated the law of provocation for the purposes of a battered-wife syndrome killing. Here the court recognised that loss of self-control need not have occurred immediately before the act causing death, modifying the traditional view of provocation as a doctrine founded in the era of chivalry when men's blood boiled: *R* v *Chhay*, Court of Criminal Appeal, [Supreme Court of NSW, 4 March 1994 (unreported).