



# Judicial education in Australia: A contemporary overview

Report prepared for the Australasian Institute of Judicial Administration

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The Australasian Institute of Judicial Administration Incorporated (“AIJA”) is an incorporated association. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

The AIJA Secretariat, which has been in operation since February 1987, is funded substantially on a composite government funding basis through the Meetings of Attorneys-General (MAG).

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Published December 2021

## Foreword

The strength of Australia's judiciary is driven by many factors, one of which is Australia's commitment to judicial education. The development of formal and informal programs over the last few decades has greatly assisted judicial officers, both at their appointment and afterwards. However, the nature of Australia's federal system necessarily creates differences between jurisdictions, complicating the ability of outsiders to understand the system of judicial education.

This report seeks to clarify the extent of judicial education in Australia, assisting lay observers to understand the nature, priorities, and range of these programs. Importantly, this study's focus on publicly available sources of information reveals that while judicial education programs are wide-ranging, the reporting of these programs could benefit from standardisation. The research also indicates that while there is a significant level of judicial education nationally, the Judicial Commission of New South Wales and the Judicial College of Victoria provide the majority of these programs.

On behalf of the AIJA, I would like to thank the authors of the study, Professor Gabrielle Appleby (UNSW Law & Justice), Jessica Kerr (UWA), Professor Suzanne Le Mire (University of Adelaide), Professor Andrew Lynch (UNSW Law & Justice), and Professor Brian Opeskin (UTS). I also acknowledge the work of their research assistants, Mr Trent Ford and Ms Anne Yang, in supporting this project.

I note that the authors have recommended further research into Australia's judicial education. The plans for future studies which may address how judicial education could be improved, and which would consider the range of judicial education that is not publicly reported, are to be commended. Such work would provide a fuller picture of Australia's success in judicial education and stimulate thinking on the next stage of its evolution.

The AIJA is proud to continue supporting research into the administration of justice, and to continue our role in judicial education.

**The Honourable Justice Jenny Blokland**

Supreme Court of the Northern Territory  
President, Australasian Institute of Judicial Administration

December 2021

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# Executive Summary

The past few decades in Australia have seen judicial education gain momentum in both provision and participation. Institutional supports and resourcing for judicial officers at all levels have become standard in all jurisdictions. This commitment reflects the acceptance within the institution that judicial education is important. Judicial education can contribute to public confidence in the judiciary by demonstrating that judicial officers are actively engaged in, and value, their professional development and that they are appropriately responsive to concerns about judicial performance. Judicial education offerings can also support judicial values, competence, and excellence and, accordingly, improve performance.

It is now timely to reflect on this progress. This report takes a step towards assessing what progress has been made in the adoption and provision of judicial education, and where there might be opportunities to enhance that in the future. The report provides therefore a scoping study and analysis of contemporary judicial education practices in Australia.

The report considers the role that judicial education can play by tracing its justifications, placing it in context as a unique form of adult and professional education. It then explains the history of its adoption and considers the – real and perceived – barriers to effective judicial education. Informed by the literature, as well as consultations with judicial officers and judicial education bodies, the report then proposes a typology for judicial education. This typology of topics for judicial education captures its diverse nature. It includes identifying legal and technical updates on substantive law, curial skills, administration, institutional challenges, society, well-being, ethics and technical developments in knowledge and public policy as topics for judicial education. Additionally, the report offers a typology aligned to the stages of a judicial career.

The report then analyses the provision of judicial education in Australia, by gathering data from the annual reports of the courts and judicial education bodies, and other public sources, over a three-year period (2015/16 to 2017/18). The data reveal that, over that period, 446 judicial education programs were offered in Australia. The state-based commissions in Victoria and New South Wales and state courts contributed 80% of the offerings, the federal courts offered 12%, and the national associations (NJCA, JCA, AIJA) delivered 8%. It appears that judicial officers in New South Wales and Victoria are particularly well-served by judicial education providers, with those in other jurisdictions having more limited options. Looking at the reported offerings, the most common subject matter was legal and technical updates on substantive law (37%) and the least common was ethics (1%).<sup>1</sup> The most common form that these sessions take are seminars (50%) and least common are online sessions (1%). Predominantly, they are offered to judicial officers at all stages in their careers (88%) and a significant percentage are delivered by judicial officers (30%).

The Report concludes with four recommendations:

1. Courts and judicial education bodies should adopt a standard taxonomy and format for the transparent reporting of judicial education offerings in their respective annual reports. Optimally, an agreed body, such as the AIJA, might assume the responsibility of collecting and disseminating that annual information in a consolidated form.
2. Judicial education providers should continue offerings that align to the judicial lifecycle and extend this beyond the orientation period, so that judicial officers have available a range of programs tailored to different stages of their careers.
3. Further research should be funded and undertaken on ways to address the judicial education needs of judicial officers working in smaller jurisdictions or regional settings, where access to judicial education programs may be limited.
4. Further research should be funded and undertaken to better understand the content and quality of judicial education offerings, the level of participation in those offerings, and whether those offerings are perceived to be meeting the needs of judicial officers, courts, and the publics they serve.

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<sup>1</sup> Noting that in each category there were offerings where insufficient information was made available to determine their nature and form.

# Part I

## Introduction – Judicial Education in Australia

Judicial education has gained increasing global recognition as a conscious, organised activity over the past fifty years.<sup>2</sup> So much is apparent from the development of aspirational policy statements, most notably the 2017 *Declaration of Judicial Training Principles* from the International Organization of Judicial Training (IOJT); increasingly institutional approaches, such as uniform standards and expectations for individual judicial officers; supporting infrastructure, ranging from umbrella organisations like the IOJT,<sup>3</sup> to many domestic legal education institutes and colleges; and developing professional expertise and academic scholarship on the topic.<sup>4</sup> In short, judicial interest in, and commitment to, education (which we use in this Report in preference to the terms ‘training’ or ‘development’) after appointment,<sup>5</sup> is evident across the legal world in a way that was not the case until recent decades. This reflects an increasing acceptance of the correlation between public confidence in the administration of justice and a judiciary that is transparently dedicated to improving the knowledge, skills and other attributes of its members.

The emergence of judicial education as a priority activity has, unsurprisingly, required the allocation of significant resources,<sup>6</sup> with one commentator describing it now as ‘big business’.<sup>7</sup> That may be something of an overstatement, but there is no denying that resources are needed not only for the development and delivery of education activities,<sup>8</sup> but also to support the time required for judicial participation as both educators and learners.<sup>9</sup> In this sense, judicial education heightens the pressure that courts may be under more generally regarding adequate levels of staffing and support. It is important that judicial officers have the capacity to engage in education and that they find the experience worthwhile. This will ensure that judicial education is of meaningful benefit to the work of the courts and to the community.

In Australia, judicial education has, in the words of one judicial officer, become ‘part of the landscape’.<sup>10</sup> Significant progress occurred between the late 1980s and early 2000s – including the establishment of the Judicial Commission of New South Wales (JCNSW) in 1986, the introduction of education programs by the Australian Institute of Judicial Administration (AIJA) from 1987, followed later by the creation of both the National Judicial College of Australia (NJCA) and the Judicial College of Victoria (JCV) in 2002.<sup>11</sup> Beyond the direct activities of these bodies, as well as those that increasingly took place internally in courts throughout Australia, the NJCA played a significant role in guiding co-ordination and expectations with respect to judicial education. In 2004, it began work on a *National Standard for Professional Development for Australian Judicial Officers* (‘National Standard’), of ‘at least five days each calendar year’,<sup>12</sup> which was endorsed by all relevant professional associations of the Australian judiciary. It also published, in 2007, a report by Christopher Roper on *A National Curriculum for Professional Development for Australian Judicial Officers* (‘National Curriculum’).<sup>13</sup>

2 Toby S Goldbach, ‘From the Court to the Classroom: Judges’ Work in International Judicial Education’ (2016) 49(3) *Cornell International Law Journal* 617, 670. This is not to suggest that in earlier times the judiciary never engaged in practices that may be described as having some educative aspect or potential. But it is widely accepted that judicial education as a deliberate, even semi-formal, activity is essentially a phenomenon of the modern era.

3 See <<http://www.iojt.org>>.

4 Duane Benton and Jennifer AL Sheldon-Sherman, ‘What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education’ [2015] (1) *Journal of Dispute Resolution* 23, 26. Although the limited scholarship on the topic is often remarked upon.

5 This Report is almost exclusively concerned with post-appointment education, given this has been the focus of the Australian experience, although in Part V we do include within the possible typologies of judicial education ‘pre-appointment education’ programs, which are increasingly offered in other common law jurisdictions.

6 Benton and Sheldon-Sherman, above n 4, 23.

7 S I Strong, ‘Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?’ [2015] (1) *Journal of Dispute Resolution* 1, 2.

8 Including as funding to support judicial education in the developing world.

9 It is interesting to note that, notwithstanding the devotion of considerable time and resources to judicial education, the literature remains surprisingly limited. Strong describes the 1960s and 70s as the ‘high point for scholarly interest in judicial education’ in the US: Strong, above n 7, 6. In Australia, there appears to have been a flurry of interest in the 1980s and 90s, but remarkably little since, despite the fact that there is a lively literature about the judiciary.

10 Respondent to survey quoted in Gabrielle Appleby et al, ‘Contemporary Challenges Facing the Australian Judiciary’ (2019) 42(2) *Melbourne University Law Review* 299, 334.

11 See Robert French, ‘Judicial Education – A Global Phenomenon’ (Speech delivered at The International Organisation for Judicial Training, 26 October 2009, Sydney), 5-9.

12 National Judicial College of Australia, *National Standard for Professional Development for Australian Judicial Officers* (‘National Standard’).

13 Christopher Roper, *A Curriculum for Professional Development for Australian Judicial Officers* (Report prepared for National Judicial College of Australia, 2007) (‘A Curriculum’).

As explained by the author of the NJCA's report setting out the National Curriculum, this was intended to be:

... a document to which all of the Australian bodies providing professional development for judicial officers might refer to help them set priorities, identify areas that could be covered but are not currently covered, and avoid duplication of effort.<sup>14</sup>

In late 2019, the NJCA adopted a document titled *Attaining Elements of Judicial Excellence: A Guide for the NJCA ('Elements of Judicial Excellence')* and placed this on its website under the link to the 'National Curriculum & Standards'.<sup>15</sup> The shift indicated by this document's title is significant. The earlier National Curriculum, which is no longer accessible on the NJCA's website, was, as the quote above makes clear, 'a framework to support the development of a comprehensive and integrated range of programs of professional development, provided from different sources'.<sup>16</sup> That is not an explicit purpose of the *Elements of Judicial Excellence*.

Yet, the considerations that were the catalyst for the National Curriculum remain relevant. While the aspiration of providing 'an "operational plan" to systematically guide the delivery of programs'<sup>17</sup> is perhaps too ambitious to be realised given the range of actors in judicial education and the variance amongst them as to resources, it seems worthwhile to reach a better understanding of what we mean when we refer to 'judicial education in Australia' in terms of *what* and *how much* is provided, and *by whom*.

The aim of this Report, then, is to provide a scoping study of judicial education in Australia. It offers a snapshot of the current landscape of judicial education as it is disclosed publicly by the courts and judicial education bodies in Australia. It does so by examining their published annual reports, supplemented by other publicly available sources of information. These indicate what priorities are revealed by the offerings of judicial education providers, who is devising and delivering the programs, how diverse are the delivery modes, whether there are programs targeted to the needs of judicial officers at different career stages and, importantly, whether there are gaps or jurisdictional inequalities in the provision of education that might be a cause for concern and invite a remedial response.

Our interest in these questions arises from an earlier exercise in which we surveyed judicial officers about those matters they believed were a 'contemporary challenge' for the Australian judiciary.<sup>18</sup> Of thirteen topics they were asked to consider, it was revealing that education was amongst the six that a clear majority of respondents to the 2016 survey 'agreed' or 'strongly agreed' was a challenge. The comments submitted by judicial officers in that survey highlighted their concerns about the quality and effectiveness of judicial education, including disparities between jurisdictions – both horizontally across the states and territories and vertically within court hierarchies. This study is a first response to those findings, illuminating current practice as to the formal provision and availability of judicial education, so as to provide the foundation for an informed discussion about the nature and direction of judicial education in Australia.

It is important to be express about what this phase of the research is *not* addressing. First, it is not an exercise in measuring *participation* in judicial education by the judiciary or the extent to which the *National Standard* is met or exceeded. With over a decade since Christopher Roper's report on that topic for the NJCA,<sup>19</sup> such a study is well overdue, but our focus is on the *provision* not the receipt of judicial education. Second, the question of *how* judicial education might be delivered differently in the future is intended as the next phase of this project, drawing not only on what is presented here but on comparative models from other jurisdictions, most relevantly federal countries. This also includes the matter of content. This Report does not attempt to use the data presented to provide a 'needs-based' analysis of judicial education in Australia, which is not possible without a much deeper engagement with the judiciary on that question, recognising the reality of quite marked jurisdictional differences within court systems. Such an inquiry would assess the empirical *demand* for judicial education in Australia, whereas this study is necessarily confined to assessing *supply*. Additionally, this report makes no judgement about the quality of judicial education offerings. While this is a matter worthy of further study, evaluations of the quality of a learning experience are complex.<sup>20</sup> The methodology employed in this study is not conducive to any conclusions on this front. Finally, the methodology adopted draws on publicly available sources and, primarily, published annual reports.<sup>21</sup> While analysis of these data provides a novel contribution to our understanding of judicial education, it does not capture all judicial education offered in Australia. For example, it is highly likely that internal sessions are

14 Ibid 4, see also 61-62.

15 See <<https://njca.com.au/resources/national-curriculum-standards/>>.

16 Roper, *A Curriculum*, above n 13, 61.

17 Ibid.

18 Appleby et al, above n 10.

19 Christopher Roper, *Review of the National Standard for Professional Development for Australian Judicial Officers* (December 2010) ('*Review of the National Standard*').

20 Jill Blackmore, 'Academic pedagogies, quality logics and performative universities: evaluating teaching and what students want' (2009) 34(8) *Higher Education Review* 857, 869-70.

21 Further information about the methodology and its strengths and limitations is set out in Part VI below.

offered within courts but not captured in the annual reports. The extent of the gap between actual and reported offerings is presently a matter of conjecture, and one worthy of investigation in future research on this topic.

The structure of this Report is as follows. Part II examines the justifications for, and distinctive features of, judicial education, both on their own terms and in the context of adult education and professional development. Part III discusses factors that have challenged the establishment and delivery of judicial education in Australia. Although some of these concerns have diminished or mutated over time, they remain relevant as a means of understanding the ways in which judicial education is provided, supported, and experienced today. In Parts IV and V, the Report catalogues typologies through which the breadth of current judicial education initiatives may be appreciated and evaluated, firstly by subject matter and then by audience. Part VI, after explaining the methodology employed and its necessary limitations, reports on an empirical analysis of judicial education programs delivered in Australia over the three-year period 2015/16 to 2017/18. This is intended to bring a clearer understanding of what contemporary judicial education actually looks like, having regard to the typologies explained earlier in the Report. Part VII offers a discussion of key findings in conclusion.

## Part II

# Justifications for Judicial Education and Implications for Design and Delivery

This Part commences with a discussion of the justifications for judicial education, drawing on the broader literature about adult education and continuing professional development. This reveals some synchronicity between the justifications for adult education and those asserted in favour of judicial education, but also some key distinctions. The individual and institutional justifications for judicial education fall within an overarching theme of supporting public confidence in the judiciary and the administration of justice. Between the two types of justifications, it is possible to observe some overlap. For example, the development of collegiality might have a benefit for individual judges in creating a more supportive workplace, but also institutional advantages that flow from a workplace culture of greater deliberation and opportunities for collaboration. The principles and theory of adult and professional education also assist in identifying several features of judicial education that are recognised to present particular challenges in design and delivery.

Judicial education can contribute to public confidence in two ways. First, judicial officers and the institution can assert and demonstrate that they, like members of other professions, are actively engaged in, and value, their professional development and that they are appropriately responsive to concerns about judicial performance. Second, judicial education offerings can support judicial values, competence and excellence and, accordingly, improve actual performance.<sup>26</sup> While the specifics of judicial education remain unlikely to garner much public attention, particularly given the continuing reluctance of courts to expose their internal processes to external scrutiny, a judiciary that manifests excellence is likely to enhance public confidence in the system of justice and its administration.

### Justifications Pertaining to the Individual

Adult education is valued because it helps individuals to reach their full potential as a person.<sup>22</sup> This is also the context within which professional education operates: both in the form of satisfying the initial requirements for entry into a profession, and then sustaining and developing one's membership of that profession. Houle, Cyphert and Boggs suggest that the fundamental characteristic of the profession itself – the possession of a 'specialized body of knowledge and skills' – requires both this initial and continuing education.<sup>23</sup> Initial education provides the baseline knowledge and skills that allows accreditation into a profession. Continuing education enables professionals to 'master an expanding base of theoretical knowledge, increase their skills and problem solving capacities and in general build on their professional experiences'.<sup>24</sup> Knox and McLeish add that continuing professional development can also enhance career development.<sup>25</sup> From an institutional perspective, Armytage argues that continuing professional education provides an 'institutional response to public criticism of the professions and an important way of managing personal and systemic change'.<sup>26</sup> In some professions, participation in continuing education is required for ongoing re-accreditation.<sup>27</sup>

While there is some common ground here between professional education generally and judicial education, differences arise in the context of professional accreditation and career development. In most common law countries, including Australia, with no 'accreditation' requirements for judicial officers beyond minimalistic qualifications, motivations for judicial officers to participate in judicial education offerings must rest on other foundations. These include their desire for individual development and collegial engagement, a willingness to support institutional goals, and reputational motivations – to be perceived by peers and the public as competent and responsive judicial officers. While this is a more limited range of motivations, this is not to suggest they are not powerful. As noted by the Australian Law Reform Commission:

Much of the impetus to secure judicial education has come from judges and magistrates themselves ... in response to the changing roles and responsibilities of judges and decision-makers, and the increased public demands, expectations and scrutiny of the justice system.<sup>28</sup>

22 C Hartley Grattan, *In Quest of Knowledge: The History of Adult Education* (Association Press, 1955) 11.

23 Cyril O Houle, Frederick Cyphert and David Boggs, 'Education for the Professions' (1987) 26(2) *Theory into Practice* 87, 87.

24 *Ibid.*

25 A B Knox and J A B McLeish, 'Continuing Education of the Professional' in Colin J Titmus (ed), *Lifelong Education for Adults: An International Handbook* (Pergamon Press, 1989) 374.

26 Livingston Armytage, 'Judicial Education on Equality' (1995) 58(2) *Modern Law Review* 160, 161 ('Judicial Education').

27 See, eg, CPD requirements for lawyers.

28 Australian Law Reform Commission, *Managing Justice: Review of the Federal Civil Justice System*, 2000, Report 89, para 2.150 ('*Managing Justice*').

In common law countries, judicial education initially encountered some resistance due to the view that judicial selection according to merit as a legal professional was sufficient to ensure judicial competency.<sup>29</sup> This presented, and, as we explain in Part V in describing the different typologies of judicial education during phases of a judicial career, still presents, particular challenges for the idea of pre-appointment education, but also for education on appointment and to a lesser degree continuing post-appointment education.

As recognition grew that accomplishment as a senior legal practitioner did not necessarily map instantly onto competence on the bench, judicial education became a way to support that transition, and so emerged the idea of initial induction/orientation-style education. As one Chief Justice recognised, '[w]hen lawyers don black robes to become judges, they do not magically acquire all the knowledge, experience, and skills necessary to become excellent judges'.<sup>30</sup> So it was concern around induction and transition that led to the early interest in judicial education, particularly in the United States. Strong notes, '[c]oncerns about judicial preparedness led to major reforms in the 1960s and 1970s, when the United States became the first common law country to adopt a system of judicial education'.<sup>31</sup>

In Australia, formal judicial education became a matter for interest and reform in the 1980s and 90s,<sup>32</sup> driven in part by the creation of the JCNSW as a response to judicial misconduct after the controversy that embroiled High Court Justice Lionel Murphy.<sup>33</sup> Thus, as we explain in Part III, the focus in Australia was not exclusively or even primarily on judicial preparedness, but on the continuing education of members of the bench on wider topics, including cultural awareness training.

Against this background, the first justification for educational offerings for the judiciary is to support the development of skills, including direct curial skills and those in judicial administration and ethics.<sup>34</sup> This justification is relevant to the transition of new judges into the judicial role as well as supporting their ongoing competence.

The second justification for judicial education rests on a desire for the currency of knowledge in relation to legal and technical updates on substantive law.<sup>35</sup> While judicial officers have the benefit of hearing arguments from all sides, as part of the adversarial system, it is still important that, as the law changes through legislative reform or developments in the common law, the judiciary is informed about those changes. While judicial officers may be expected to have strengths in self-directed learning, the efficiency and collegiality offered by sessions attended by multiple judges, on legal developments that are relevant to their jurisdiction, makes these sessions standard fare for continuing judicial education.<sup>36</sup> This is connected to maintaining and demonstrating the overall competency of the judiciary, which is discussed below as an institutional justification for judicial education.

There is evidence that judicial officers regularly draw on their fellow judges for support.<sup>37</sup> Indeed, this is a critical way that ethical advice is provided to individual judges.<sup>38</sup> It is also plausible that the experience of judging may be isolating.<sup>39</sup> Enabling formal and informal interaction between members of the bench can build collegiality and provides an additional justification for judicial education.

29 See, eg, Lord Hailsham, *Hamlyn Revisited: The British Legal System Today* (Stevens and Sons, 1983) 50-51, quoted in Armytage, 'Judicial Education', above n 26, 162. See also Part III below.

30 Mary R Russell, 'Toward a New Paradigm of Judicial Education' [2015] (1) *Journal of Dispute Resolution* 79, 79. See also W Martin, 'Future Directions in Judicial Education' (2011) 10 *The Judicial Review* 277, 279.

31 Strong, above n 7, 2.

32 Australian Law Reform Commission, *Managing Justice*, above n 28, para 3.74.

33 Kate Lumley, 'From Controversy to Credibility: 20 Years of the Judicial Commission of New South Wales' (Judicial Commission of New South Wales, 2008) 2.

34 See further categorisation of the different skills in Part IV of this Report.

35 Again, see further categorisation in Part IV of this Report.

36 See, eg, <<https://www.judicialcollege.vic.edu.au/programs-and-events/evidence-law-essentials-procedural-considerations>>.

37 Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (Australasian Institute of Judicial Administration, 2012) 53.

38 Gabrielle Appleby and Suzanne Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (2019) 47(3) *Federal Law Review* 335.

39 Isaiah Zimmerman, 'Isolation in the Judicial Career' (2000) 36 *Court Review* 1, 1; Gabrielle Appleby and Andrew Lynch, 'The Judge, the Judiciary and the Court: The Individual, the Collective and the Institution' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 1.

## Justifications Pertaining to the Institution

Adult education can be seen as delivering benefits beyond the individual to institutions and society generally. Similarly, the potential for judicial education to be of value to the judiciary as an institution, and to the community it serves, provides additional justifications for investment in judicial education. Richard Devlin and Adam Dodek position judicial education not as ‘nice to have’, but as ‘a vitally important form of regulation because it is designed to ensure that judges are competent, thereby enhancing public confidence’.<sup>40</sup> Regulation, in this analysis, is a ‘dynamic exercise in collective problem-solving’<sup>41</sup> with the ‘problem’ being how best to support the judiciary. The regulatory aspects of judicial education are particularly obvious in the accountability and ‘agent of change’ justifications explored below. However, as discussed in the next Part, concern about the potential for judicial education to operate as *regulation* underpinned much disquiet about its introduction. The crafting and delivery of judicial education must walk a line that supports the judiciary without constraining the independent thought of judicial officers, or, indeed, creating a perception that this could occur.

Four connected institutional justifications for judicial education can be identified: competence, accountability, efficiency, and education as an ‘agent for change’. Each is considered below.

The first institutional justification, and one that connects a number of the others, is competence. Competence is a ‘fuzzy concept’,<sup>42</sup> say Françoise Delamare Le Deist and Jonathan Winterton who have argued that a holistic typology includes cognitive, social and functional competence because, to be effective at work, a person must have ‘underlying knowledge, functional skills and appropriate social behaviour’.<sup>43</sup> In the judicial context, in 1991, the National Association of State Judicial Educators in the United States considered competence at the institutional level. It highlighted the goal of judicial education as ‘to enhance the performance of the judicial system as a whole by continuously improving the personal and professional competence of all persons performing judicial branch functions’.<sup>44</sup> This interest in competence as an institutional justification for judicial education also aligns with the aims of professional education,<sup>45</sup> and is ranked highly by judicial officers surveyed about their reasons for engaging with judicial education.<sup>46</sup>

The second institutional justification is accountability. In essence, the argument here is that the judiciary is accountable for the competency of its members. Thoughtfully designed and supported post-appointment education is a way to demonstrate that the judiciary takes that responsibility seriously. As Armytage argues, judicial education ‘offers an appropriate means of providing accountability without violating independence’.<sup>47</sup> Naturally, this form of accountability does not operate in a vacuum; rather it coexists with other well-established accountability mechanisms including the open court principle, the giving of reasons for decision, and the appeal process.<sup>48</sup>

The third institutional justification is efficiency. Efficiency, again, is connected to competence, in that a highly competent judiciary across a range of skills and knowledge sets will lead to a more efficient judiciary. Efficiency of the court system is seen as critical for a range of societal goods, from economic prosperity to human rights.<sup>49</sup> In his overview of the literature, Stefan Voigt notes that judicial efficiency is determined by a wide variety of actors, from litigants to members of the legal profession to court staff and can be evaluated by both the speed and the quality of an outcome.<sup>50</sup> In respect to the judicial actor, he notes that education likely plays a role.<sup>51</sup> Similarly, Maria Dakolias concludes that reforms to improve court productivity ‘can include information technology, training, new case processing designs and cultural changes’.<sup>52</sup> Amongst the typologies of judicial education set out in Part IV, legal and technical updates on substantive law, curial and administrative skills and technical developments in knowledge and public policy seem particularly relevant to judicial efficiency.

40 Richard Devlin, ‘Regulating Judges: Challenges, Controversies and Choices’ in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 19. See also, Adam Dodek and Richard Devlin, ‘Fighting Words: Regulating Judges in Canada’ in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 87.

41 Julia Black, Martin Lodge and Mark Thatcher (eds), *Regulatory Innovation: A Comparative Analysis*, quoted by Devlin, above n 40, 3.

42 Françoise Delamare Le Deist and Jonathan Winterton, ‘What Is Competence?’ (2005) 8(1) *Human Resource Development International* 27, 29.

43 Ibid 39–40.

44 National Association of State Judicial Educators, *Principles and Standards of Judicial Branch Education* (2011) 4, available at <<https://nasje.org/wp-content/uploads/2011/05/principles.pdf>>.

45 Livingston Armytage, ‘Policy Development in Continuing Judicial Education: An Assessment of Some Approaches Taken in N.S.W., U.S.A., U.K., and Canada’ (1993) 11(1) *Journal of Professional Legal Education* 51, 60 (‘Policy Development’).

46 Dennis W Catlin, ‘An Empirical Study of Judges’ Reasons for Participating in Continuing Professional Education’ (1982) 7(2) *Justice System Journal* 236, 253.

47 Armytage, ‘Judicial Education’, above n 26, 161.

48 Gabrielle Appleby and Suzanne Le Mire, ‘Judicial Conduct: Crafting a System that Enhances Institutional Integrity’ (2014) 38(1) *Melbourne University Law Review* 1, 38.

49 Maria Dakolias, ‘Court Performance Around the World: A Comparative Perspective’, (1999) 2 *Yale Human Rights and Development Law Journal* 87, 137.

50 Stefan Voigt, ‘Determinants of judicial efficiency: a survey’ (2016) 42 *European Journal of Law and Economics* 183, 186.

51 Ibid 189. See also Council of Europe, *European judicial systems: Efficiency and Quality of Justice* (2014) 485 (calling for increased judicial training to enhance judicial efficiency in Europe).

52 Dakolias, above n 49, 87.

Beyond these three conventional justifications, more ambitiously, judicial education can be seen as an ‘agent for change’. Globally, programs funded by various non-government organisations are made available to the judiciary in post-conflict or developing countries as a way to promote ideals related to the rule of law.<sup>53</sup> As we explore in Part III, in Australia, the idea that judicial education is needed to initiate broad change of this kind has previously raised concern about attempted external influences through the vehicle of judicial education. That being said, judicial education is legitimately viewed as supporting established judicial values, such as the rule of law, impartiality and ethics.<sup>54</sup>

Even in Australia, judicial education can also be seen as supporting social change more specifically through enhancing judicial knowledge and skills in relation to vulnerable parties, social structural inequalities, and inclusive and contemporary attitudes: what we refer to as education on ‘Society’ in Part IV, including social context, cultural sensitivity and bias training.<sup>55</sup> We return to this in Part III, below, in our discussion of judicial independence.

This brief survey of the justifications for judicial education reveals multiple and overlapping justifications, operating at the individual and institutional levels. It is evident that there is a ‘variety of goals – to be concerned with both individual judges *and* society, to be both minimalist *and* aspirational, and to be both liberal *and* vocational’.<sup>56</sup> It is against this complex background that judicial education is designed and delivered. It is critical that the judicial education curriculum be considered and evaluated for its ability to deliver on these potentially divergent goals.

### Challenges for Judicial Education as Adult Education

Reviewing the effectiveness of judicial education programs, Claxton argues that the ‘field of judging and the field of adult education need to find a common ground, one in which each learns from the other’.<sup>57</sup> Like adult education generally, judicial education has as its essential characteristics that ‘the activities be purposefully educational, that they be engaged in by adults and that at the time the adults also be engaged in their ordinary routine’.<sup>58</sup> Adult education provides a rich vein of theory and practice that can usefully inform an evaluation of existing judicial education, and contribute to the identification of its key challenges.

The history of adult education is venerable, preceding the creation of formal schooling for children.<sup>59</sup> Kidd and Titmus cite Xenophon’s *Cryopeadia*, written about 370 BC, as an example of the formal education of adults. Plato’s *Republic*, published in 375 BC, also formalised ‘high-level adult education’<sup>60</sup> by:

[performing] the function of a living teacher who makes his students think, who knows which ones should be led further, and who makes them exercise the same faculties and virtues in studying his words as they would have to use in studying nature independently.<sup>61</sup>

The rich history of adult education indicates that it tends to be responsive to societal change. It is driven ‘by faiths, by revolutions, by migration, by inventions, and renaissances, by nationalist ardour, by international organizations and now by the demands of high technology’, gaining momentum in times of change, such as the Industrial Revolution or the Reformation.<sup>62</sup> It is certainly possible to see some of these elements emerge when considering continuing professional education and, specifically, judicial education. This underlines the potential for judicial education to be utilised as a specific and timely intervention to address a gap or change. It also suggests that the curriculum should be regularly reviewed for its continued relevance.

Theories of adult education recognise that adult learning is distinct from that for children.<sup>63</sup> There are a variety of reasons why adult learners are different. In Titmus’s phrase, the adult learner is ‘physically, psychologically and socially different enough to require distinctive approaches to instruction’.<sup>64</sup> These differences are variously asserted to be the experience and knowledge of adults, their ‘practical experience of the process for acquiring skills and knowledge’,<sup>65</sup> their motivations for participating, their busy lives and extensive commitments and their

53 Geeta Oberoi, ‘Globalisation of the Judicial Education Discourse’ (2012) 38(3) *Commonwealth Law Bulletin* 393, 395.

54 Kathleen E Mahoney, ‘The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice’ (1996) 32(4) *Williamette Law Review* 785, 788.

55 Armytage, ‘Judicial Education’, above n 26, 164.

56 Armytage ‘Policy Development’, above n 45, 54.

57 Charles S Claxton, ‘Characteristics of Effective Judicial Education Programs’ (1992) 76(1) *Judicature* 11, 11.

58 Grattan, above n 22, 3.

59 J R Kidd and Colin J Titmus, ‘Introduction’ in Colin J Titmus (ed) *Lifelong Education for Adults: An International Handbook* (Pergamon Press, 1989) xxiv.

60 Grattan, above n 22, 38.

61 Allan Bloom, ‘Preface’ in Allan Bloom, *Plato’s Republic: Translated with Notes and an Interpretive Essay* (Basic Books, 2<sup>nd</sup> ed, 1968) xxi.

62 Kidd and Titmus, above n 59, xxiv-xxv.

63 Malcolm S Knowles, Elwood F Holton III and Richard A Swanson, *The Adult Learner: The Definitive Classic in Adult Education and Human Resource Development* (3<sup>rd</sup> ed, Elsevier, 2005) 35-36.

64 Kidd and Titmus, above n 59, xxxii.

65 John Daines, Carolyn Daines and Brian Graham, *Adult Learning Adult Teaching* (3<sup>rd</sup> ed, Ashley Drake Publishing, 2002) 1.

agency as voluntary participants. A key challenge for adult educators and judicial educators alike is therefore how to engage this group of learners.

However, it is also clear that judicial officers can be meaningfully distinguished from other adult learners. The institutional imperative of judicial officers' independence, as discussed in Part III (including from their educators, but also their colleagues and even their head of jurisdiction); their high socio-economic status; their role as impartial adjudicators; the solitary nature of judicial life for many; and their pre-existing high level of professional education and long experience in the law all need to be considered when judicial education is designed.

In the rest of this Part, we consider three key challenges that judicial education faces as a form of, albeit unique, adult education: ensuring engagement, questions around assessment and attendance, and coherence within the curriculum.

### (i) Ensuring Engagement

In adult education, the previous experience of the participant can provide significant advantages. For example, it can mean that the educational experience can be pitched at an advanced level. It can also provide opportunities to draw on the experience of the learners and share insights and experiences that are relevant to the group as a whole. However, it may also mean that learners, as working professionals in their sector, come to such programs with scepticism of the value of a formal learning experience. In his masterful tome on the history of adult education, C Hartley Grattan notes in reference to ancient Greek civilisation, 'scepticism about the quality of education currently offered has a very long tradition'.<sup>66</sup>

Additionally, it may be difficult for adult education to be effective. The 'Einstellung effect' refers to the tendency for individuals to remain faithful to previous approaches to problem-solving even when presented with better options.<sup>67</sup> According to one judge, this tendency is amplified with highly capable judges.

One of the challenges in judicial education is that as people get more experienced, they're more reluctant to change the way that they do things. It is just a human tendency that isn't limited to judges in particular. However, if you have high-achieving people who are used to getting gold stars – and that is who the federal judiciary is – once they reach a place where they are comfortable with the way they do things, it is very hard to inspire change.<sup>68</sup>

The challenge of designing effective educational offerings in professional contexts is significant. One way this is often addressed is by responding to local needs. Another is to draw on those within the relevant profession to assume the role of educators.

Local relevancy can address learner scepticism by ensuring the offering can be readily seen as useful to the participant. It can provide education that is relevant in a timely way and capitalise on immediate motivations of learners. However, it can also lead to a piecemeal approach, where the educational curriculum lacks balance, is possibly too reactive, and is not comprehensive. In the judicial education context, local relevancy might drive an approach that is highly focused on education about substantive law at the expense of other possible needs.<sup>69</sup> Similarly, a high weighting given to jurisdictional needs would be consistent with the adult education principles that educational offerings should be student-centred and tailored to the experience of the participants, but would also reduce the extent to which jurisdictions share resources and leverage the strengths and experiences of other jurisdictions.

Another way to enhance engagement is by selecting judicial officers as educators. In adult education practice, this has the advantage of drawing on those who are familiar with the role of the judicial officer and who, therefore, can deliver an offering that is aligned to the needs and experience of the participants. It also ensures the presenters have credibility and reflects the idea that 'adults should have a direct say in the how, when, where and what of their own learning'.<sup>70</sup> Finally, it alleviates concerns about judicial independence that might come to the fore if the educational offering was sponsored,<sup>71</sup> driven by sectoral interests<sup>72</sup> or influenced by government.<sup>73</sup>

<sup>66</sup> Grattan, above n 22, 30.

<sup>67</sup> The term is derived from the German word for 'set': Tom Vanderbilt, *Beginners: The Curious Power of Lifelong Learning* (Atlantic Books, 2021) 30.

<sup>68</sup> Jeremy Fogel and S I Strong, 'Judicial Education, Dispute Resolution and the Life of a Judge: A Conversation with Judge Jeremy Fogel, Director of the Federal Judicial Center' [2016] (2) *Journal of Dispute Resolution* 259, 268.

<sup>69</sup> The data indicate offerings are weighted towards substantive law: see Figure 1A below.

<sup>70</sup> Kidd and Titmus, above n 59, xxxiii.

<sup>71</sup> Bruce A Green, 'May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions of Judicial Ethics and Policy' (2002) 29(3) *Fordham Urban Law Journal* 941, 1000; see also Diane E Cowdrey, 'Educating into the Future: Creating an Effective System of Judicial Education' (2010) 51 *South Texas Law Review* 885, 890 (speculating that grant funding may influence judicial education programs in ways that suit the granting body).

<sup>72</sup> It may be this possibility that Sir Anthony Mason was referring to when he referenced 'apprehensions' judicial education could amount to 'indoctrination': Sir Anthony Mason, 'The State of the Judicature' (1994) 68 *Australian Law Journal* 125, 132-3.

<sup>73</sup> See concerns about government interference discussed in Part III below.

At the same time, this approach can itself raise concerns. The judicial officer as educator approach is likely excellent where the offering is focused on sharing existing experiences or strengths, but less so where the aim of the offering is to address an area where the skills and knowledge are not held within the judiciary, most obviously when the aim is for the educational offering to be an 'agent of change'. It also may mean that the teaching method selected is one with which the judicial officer is familiar or comfortable, rather than because it is the most effective to support learning. One solution to address this is to create a partnership between judicial and external educators that leverages the strengths of both.<sup>74</sup> A genuine partnership may combine the benefits of educational and subject matter expertise, temper resistance to change within the judiciary and also avoid a situation where the appeal of the new overtakes a genuine search for efficacy.<sup>75</sup>

### **(ii) Assessed or Attended; Mandatory or Voluntary?**

In his article on continuing legal education, Gold criticised its lack of assessment: 'It is odd, I think, that only in continuing (legal) education do we equate education with attendance, that is to say, attendance with results'.<sup>76</sup> Writing in 1986, Gold attributed this gap to the fact that continuing education for lawyers was just developing and that the profession is distrustful of bureaucracy.<sup>77</sup> Notwithstanding this, he expressed hope that over time, '[w]ritten tests, practice simulations, self-assessments, on-the-job certifications and peer reviews will be blended artfully with the learning activities to ensure competence, enhance performance and provide for special needs'.<sup>78</sup> While this might yet develop in the context of continuing legal education (although there is little sign of it several decades later), as we explore in Part III where we consider the importance of judicial independence in judicial education design, implementing testing or even mandatory attendance would be controversial in the context of judicial education.

### **(iii) Maintaining Coherence within the Curriculum**

In common with adult education generally, the introduction and design of judicial education programs tend to respond to 'a perceived practical need' at a given time, rather than a 'coherent theory and principle'.<sup>79</sup> This was reflected in the Australian Law Reform Commission's Discussion Paper on the federal civil justice system, where judicial education was described as 'patchy'.<sup>80</sup> As noted in the Introduction, the NJCA's development of a National Curriculum was an attempt to address this issue. But it needs to be recognised that coherence is not the only objective, or perhaps even the most critical. The desire, acknowledged earlier, to align curriculum with local needs may result in stronger levels of judicial engagement, even though it simultaneously inhibits the adoption of a coherent and well-crafted curriculum.

Continuing legal education has attempted to respond to the complex goals of continuing professional development (CPD) by mandating certain elements be present within the yearly plan for individual practitioners. For example, in South Australia, legal practitioners must complete 10 hours per year of CPD with at least one hour of 'practical legal ethics', one hour of 'practice management or business skills' and one hour of 'professional skills'.<sup>81</sup> Similarly, compliance encourages practitioners to engage with a variety of teaching methods and limits their ability to gain sufficient hours purely through self-directed activity.<sup>82</sup>

The prospect that judicial education curricula in Australia may tend to lack cohesion and comprehensiveness makes the typologies in Parts IV and V and the empirical data in Part VI particularly useful. It is only by developing an understanding of existing curricula that we can assess the areas of success and the gaps. Prior to turning to those, however, it is worth exploring the barriers to judicial education, which may have continued relevance and, consequently, impact both contemporary offerings and normative thinking about the future of judicial education.

<sup>74</sup> Goldbach, above n 2.

<sup>75</sup> Cowdrey, above n 71, 887.

<sup>76</sup> Neil Gold, 'Beyond Competence: The Case for Mandatory Continuing Learnings in Law' (1986) 4(1) *Journal of Professional Legal Education* 17, 20.

<sup>77</sup> *Ibid* 20-21.

<sup>78</sup> *Ibid* 25.

<sup>79</sup> Colin J Titmus (ed), *Lifelong Education for Adults: An International Handbook* (Pergamon Press, 1989) 3.

<sup>80</sup> Australian Law Reform Commission, *Discussion Paper, Review of the Federal Civil Justice System (DP 62)* (1999) para 3.77.

<sup>81</sup> [https://www.lawsocietysa.asn.au/Public/Lawyers/Professional\\_Development/Mandatory\\_CPD.aspx](https://www.lawsocietysa.asn.au/Public/Lawyers/Professional_Development/Mandatory_CPD.aspx).

<sup>82</sup> *Ibid*.

## Part III

# 'Barriers' to Judicial Education

In 1999, Chief Justice Murray Gleeson declared:

Judicial education is no longer seen as requiring justification. We are past the stage of arguing about whether there should be formal arrangements for orientation and instruction of newly appointed judges and magistrates, and for their continuing education.<sup>83</sup>

It might be correct that the notion of educating judges 'no longer arouses passions',<sup>84</sup> but it is also true that conceptual and practical barriers persist as challenges to the project of judicial education. Of these, the issue of judicial officers having the available time to participate in educational opportunities is the most significant – a consequence of the resourcing of the courts and their institutional capacity to relieve judicial officers of their core duties of hearing cases and writing judgments.

However, this Part commences with a consideration of judicial independence, not because this continues to be voiced as a ground for resisting the activity of judicial education *per se*, but because the principle has determined the autonomous character of judicial education. This influences the question of resourcing so that courts can support judges having the necessary time. Additionally, the foundational nature of independence is necessarily connected to the discussion on the voluntary nature of participation of judicial education, also considered later in this Part.

But judicial independence remains important in further respects. As discussed below, it provides an important limitation on assessment as a feature of judicial education, in distinction to other forms of adult education and professional development considered in Part II. Independence also continues to exert an influence on the focus and content of judicial education and a wariness of anything that might be said to border on 'ideological' instruction. This does not appear to have inhibited the breadth of topics with which judicial education is concerned, but rather produced a more careful and deliberate invocation of judicial independence itself as a robust justification for them receiving attention. In short, while no longer strictly a 'barrier' to resisting the introduction of judicial education, judicial independence remains foundational to understanding other issues and debates in the delivery of judicial education.

As considered in this Part, concerns about the purpose and value of judicial education take different forms: they might create difficulties on the supply side, relating to funding, resourcing or design; the demand side, relating to the take-up and engagement of the judiciary; or be external to judicial education programs themselves, pertaining to the foundational values, such as independence and federalism, that intersect with the design and provision of judicial education. These considerations continue to influence the contemporary arrangements considered in this Report.

### Judicial Independence

When reviewing Australian literature on judicial education in the 1980s and 90s, the dominant theme is the danger its embrace might pose to judicial independence. As a blanket objection, Justice John Basten later characterised this as 'an unsophisticated view from a simpler age'.<sup>85</sup> In its most basic form, the fear was that the political arms of government might dictate to the judiciary the things that it was required to know and that this would risk at least a public perception that the courts were under the control of government, if not actually embolden government to assume and extend the possible applications of such a hierarchy.<sup>86</sup> That danger was essentially averted by the models of judicial education adopted, which left determination of the curricula in judicial hands, and individual participation voluntary.<sup>87</sup>

Beyond government control, the more subtle threat was from attempts at 'indoctrination' of the judiciary,<sup>88</sup> or what Chief Justice Murray Gleeson later described as 'inappropriate proselytisation' as a result of 'pressure

83 Murray Gleeson, 'The Future of Judicial Education' (1999) 11 *Judicial Officers Bulletin* 1,1.

84 Judicial respondent to survey quoted in Appleby et al, above n 10, 334.

85 John Basten, 'Judicial education on 'gender awareness' in Australia' (2015) 22 *International Journal of the Legal Profession* 151, 159.

86 Justice JA Dowsett, 'Judicial Education' (Conference Paper, Judicial Conference of Australia Colloquium, 6-8 November 1998) 2.

87 National Judicial College of Australia, *Annual Report 2002–2003* 3; Ivan Potas, 'The Judicial Commission of NSW: Treading a Fine Line between Judicial Independence and Judicial Accountability' (2000) 18 *Law in Context* 102, 117. For critique, see Strong, above n 7, 12-17.

88 Chief Justice Anthony Mason quoted in Armytage, 'Judicial Education', above n 26, 163 (text accompanying n 15); John Doyle, 'How Do Judges Keep Up to Date?' (Speech, LawAsia Downunder, 21-22 March 2005) 3.

from some sections of the community for programmes to cultivate in judges attitudes reflecting the prevailing enthusiasm of the day'.<sup>89</sup> Gleeson CJ's comments highlight that the gathering momentum for judicial education over the 1990s owed much to media attention and public concern over an 'out of touch' judiciary, as revealed in instances of gender bias and cultural insensitivity.<sup>90</sup> However, the comments also highlight the inherently controversial nature of the 'agent of change' justification for judicial education, as introduced in Part II.

There is no denying that exposure of the judiciary to more inclusive and contemporary attitudes was strongly advocated as a central objective of judicial education, and has, in time, become a commonly accepted feature of curricula.<sup>91</sup> The fear of being beholden to 'special interest groups'<sup>92</sup> was allayed by ensuring the relevant issues were addressed through a 'broader educational framework of promoting equality before the law within a pluralistic society'.<sup>93</sup> While this overcame disquiet about education on gender awareness as a threat to judicial independence, it is instructive that members of the judiciary remain vigilant against 'ideology' or 'political direction' that may be presented as 'education'.<sup>94</sup> This may manifest as an aversion to particular topics or, perhaps more likely, the selection of those who might present or speak on certain topics.

The catalyst of potential bias in legal doctrine, procedure, and institutions appears to have been instrumental in arriving at an expansive understanding of judicial education, rather than one that is narrowly doctrinal in focus. As we remark in Part IV, the range of content that may be the subject of judicial education is now characterised by its diversity. When Chief Justice John Doyle, the inaugural Chair of the Council of NJCA outlined the NJCA's offerings of what he preferred to call judicial 'professional development', he was unapologetic about the 'considerable emphasis' on programs that he labelled as "'social awareness" programs'.<sup>95</sup> These included coverage of indigenous, gender and disability issues but also anything 'aimed at ensuring that as far as possible judicial officers understand the people and situations that come before them'.<sup>96</sup>

The inclusion of these topics in judicial education have come to be seen as *supporting*, and not detracting, from the principle of judicial independence. The IOJT has endorsed education on 'social context, values and ethics' as necessary to ensure 'an independent unbiased mindset for individual judges' as part of the principle of judicial independence.<sup>97</sup>

There is a further dimension to the early judicial independence concerns that should be noted as of continued relevance. This was a fear that education was either an admission of deficiencies in the method of selecting individuals for judicial appointment,<sup>98</sup> or, more sinisterly, might have the potential to operate as a 'back door' for a 'government wishing to give credentials to a class of candidates from outside the practising profession' – and lacking the requisite values of independence.<sup>99</sup> While time has shown these specific anxieties to be lacking foundation, both point to matters of enduring significance.

The first is that, unsurprisingly, there *is* a link between education and performance in that the point of the former is to maintain, if not raise, the quality of the latter.<sup>100</sup> The provision of judicial education reflects that the appointment of persons with requisite qualities for judicial work is not the end of the matter, and cannot alone be relied upon to ensure a judiciary that remains high-performing over potentially long periods of judicial service during which considerable legal, social and scientific change may occur.<sup>101</sup> Of course, as discussed in Part II, the importance of regular professional development opportunities after recruitment has become accepted generally across many workplace environments, including in the legal profession from which judicial officers are recruited.

89 Murray Gleeson, 'Judicial selection and training: Two sides of the one coin' (2003) 77 *Australian Law Journal* 591, 596.

90 See Kate Lumley, 'Without fear or favour, affection or ill-will: addressing gender bias in NSW judicial education' (2014) 12 *The Judicial Review* 63, 70-72. There was sufficient concern over the first of these issues to prompt a Senate inquiry: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (1994), while more generally, see *Access to Justice Advisory Committee: An Action Plan* (Canberra: Commonwealth of Australia, 1994), Action 2.4.

91 The role of judicial leadership is significant in this regard, notably that of Western Australia's Chief Justice David Malcolm and initiatives he launched in his state after attendance in 1990 at a conference on *Equality and the Administration of Justice: Race, Gender and Class*: see Lumley, above n 90, 70; David Malcolm, 'Women and the Law – Proposed Judicial Education Programme on Gender Equality and Task Force on Gender Bias in Western Australia' (1993) 1 *Australian Feminist Law Journal* 139, 139; David Malcolm, 'The fair trial and equality of justice in child sexual abuse cases' (1994) 1(2) *Journal of Sexual Aggression* 95, 96. Chief Justice Malcolm particularly championed the work on bias in the law by Canadian academic, Professor Kathleen Mahoney. Mahoney subsequently reflected on judicial education as a response: Kathleen E Mahoney, 'The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice' (1996) 32(4) *Willamette Law Review* 785.

92 Dowsett, above n 86, 5.

93 Armytage, 'Judicial Education', above n 26, 182. See also Lumley, above n 90, 75.

94 Basten, above n 85.

95 Doyle, above n 88, 4.

96 *Ibid* 5.

97 International Organization for Judicial Training, *Declaration on Judicial Training Principles*, adopted 8 November 2017, art 1: 'Judicial training is essential to ensure high standards of competence and performance. Judicial training is fundamental to judicial independence, the rule of law, and the protection of the rights of all people.'

98 Justice Gordon Samuels, 'Judicial Competency: How it can be Maintained' (1980) 54 *Australian Law Journal* 581, 585.

99 Dowsett, above n 86.

100 James Allsop, 'Continuing judicial education: the Australian experience' (2012) 10 *The Judicial Review* 439, 444: 'Given that the grounds for removal of a judicial officer are for proved misbehaviour or incapacity, the necessary aims of judicial education must be to promote the highest standards of behaviour befitting judicial office and to foster judicial capacity.'

101 Strong, above n 7, 9-10.

Second, and likewise, there is a relationship between diversifying the selection of individuals for judicial appointment, to be more inclusive of different professional experiences, and the role to be played by judicial education. However, the executive arm has not embraced this potential to achieve much transformation of the bench through appointments from a broader pool. To some, this may be a source of disappointment, but it simply reflects the nature of judicial education in each jurisdiction (going to content, depth and timing of offerings) and, ultimately, that it is the preserve of the judicial arm itself. When curricula are determined by judges and participation is at the discretion of individual judges, judicial education does not strongly lend itself to being harnessed to an agenda that the executive arm may have concerning appointments.

That is not to say that education would not acquire a particular significance in respect of a more diverse judiciary. This connection was highlighted by Chief Justice Gleeson, when he argued that any move to increase appointments to the bench of people with professional experience outside of the bar would only 'mak[e] the need for appropriate systems of judicial education more obvious and more urgent'.<sup>102</sup> While still respecting the independence of the judiciary, education would require more substantial resourcing by government to address the necessity of 'certain basic skills' which, if not acquired by prior experience, must be taught.<sup>103</sup> Gleeson was direct in stating that a commitment to greater diversity of professional background would require government to be prepared to wear a cost that has traditionally been obviated by the practice of appointing judges from the private bar.<sup>104</sup>

Lastly, although not discernible in earlier exchanges about the risks posed by education to judicial independence, it seems worth acknowledging what more recent debates about intra-judicial influence may mean for this topic. In 2012, a High Court judge warned of 'the enemy within' appellate courts, through which a judge's individual independence might be compromised by the way in which 'excessively dominant judicial personalities' approached engagement in the court's deliberative processes.<sup>105</sup> That prompted several responses, all of which rejected the claim that judicial officers were vulnerable to being overborne by such 'personalities'.<sup>106</sup> Nevertheless, the prominent discussion of intra-judicial independence in the last few years cannot be simply ignored.

Although judicial education is not directly linked to a specific decisional question or process, it is a structured activity through which judges may be exposed to positions, presumably sometimes held with great forthrightness, of their peers – whether alongside them as audience members or as judge educators. A unique dimension to these occasions may be the bringing together of judicial officers from across the court hierarchy – so that views expressed by senior members assume a particularly strong significance for others. That this may be on matters that are not purely doctrinal, but at the intersection of law and policy (for example, legislative requirements for mandatory sentencing) or indeed complex social questions that may arise in the courts, only increases the potential for certain views to receive a powerful imprimatur in judicial education fora that may permeate the legal system in unseen ways.

Additionally, when considering intra-judicial independence, we might note the role that a head of jurisdiction plays in organising education and development opportunities for the judges of her or his court, or at least supporting their attendance at externally provided events. While participation is voluntary, as discussed separately below, the influence of the head of jurisdiction over what form of education the judges of the court have access to, or simply *most easily* have access to, seems relevant and real.

Care needs to be taken in acknowledging both these intra-judicial aspects of education. While it is fair to presume both exist in practice, it may not be correct to even refer to them as risks to judicial independence. To the extent they may be said to be so, they may simply be risks worth taking. As we explored in Part II, interaction and engagement are understandable objectives of effective educational design, and additionally the justification of judicial education that looks to its beneficial collegial opportunities must surely outweigh any danger in the possible effect of 'excessively dominant judicial personalities'. Likewise, for education to be relevant to those receiving it, input and steering by a head of jurisdiction seems more valuable than concerning. In short, while it is important to recognise these dimensions to the discussion following the recent judicial attention devoted to intra-judicial independence, these do not seem to be a prime source of anxiety or danger.

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102 Gleeson, above n 89, 597.

103 Ibid 594.

104 Ibid 593-596.

105 JD Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205, 215.

106 For an overview of this debate, see Andrew Lynch, 'Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia – Contemporary Challenges, Future Directions* (Federation Press, 2016) 156.

In summary, earlier alarm that judicial education posed a danger to the independence of the judicial arm has not been borne out by Australian experience over the last 30 years. However, solicitude for judicial independence unsurprisingly remains highly relevant. Consistent with international principles of best practice, this concern has determined and maintained the nature of judicial education in Australia as one in which 'institutes of judicial training share the independence of the judiciary'.<sup>107</sup> It is from this foundation that the critical contemporary challenges to the provision of judicial education, notably resourcing, must be approached and to which this report now turns.

## Resources

The issue of resources is critical to the implementation of judicial education. It includes both the funding of education activities and the staff necessary to support them, as well as generally supporting the courts to enable judicial participation in those activities as part of individual workloads.<sup>108</sup> Commonwealth, state, and territory governments fund judicial education within their own court systems and collectively through the funding of the National Judicial College of Australia. Accordingly, the latter is a national resource, one which is looked at, and in fact relied, upon by the courts of most jurisdictions as the central means through which formal judicial education is provided. However, budgetary constraints determine the opportunities and educational resources possible, and this displays jurisdictional differences.

Limitations on resourcing must be appreciated as an unavoidable cost of the independence of judicial education, as Gleeson recognised when he said that '[o]btaining financial support from governments for bodies that are independent of government control, or even influence, is not easy'.<sup>109</sup> It may require more than general advocacy of the value of judicial education and instead translate into the identification of priority areas that respond to stakeholder concerns. There are three factors in play affecting the content of judicial education offerings – while what judicial officers *want* and what they might be said to *need* are both obviously important, obtaining extra resourcing may come down to what government is *willing to fund*. Although independence is assured by a consistent model of judiciary-led education, it is not surprising that government will seek to use resourcing to drive initiatives which accord with the priorities that it has identified for the judiciary. Indeed, as has been described, general government backing for judicial education grew from its ability to supply a means of responding to the concerns of the early 1990s over deficient gender and cultural awareness.<sup>110</sup>

As the concept of judicial education has broadened to embrace a range of typologies, the management of a financially sustainable program by any single provider has arguably become more difficult. The challenge of choice in allocating limited resources needs to be acknowledged, especially when one considers the varying needs of different judicial audiences, the views of court leaders as to what is of most value for their judges, and that voluntary participation necessitates the offering of programs that are designed to attract engagement. Quality is also a powerful consideration since, as noted in Part II, judges 'tend to be impatient with, and dismissive of, that which does not live up to their expectations'.<sup>111</sup> This may go not simply to the amount of resources available, but their application. One respondent to the authors' 2016 survey said:

While there is a large investment in judicial education in NSW, I doubt the efficiency with which judicial education is delivered and the usefulness of much of what is delivered. The main problems are (a) judges and magistrates are not well-trained in delivery of adult education and (b) the approach taken is largely "one size fits all". Thus, much of the effort is either ill-directed or of very limited use to the recipients. Like much CPD in the legal profession generally. (Male, 20-24 years' service, NSW, Magistrates/Local).<sup>112</sup>

While the issues of resourcing and quality can be considered in respect of specific jurisdictions or providers, an overarching question also exists: given the full extent of what may constitute judicial education activities, and the number of providers operating within and across different jurisdictions, how efficient is the current approach to allocating resources and is it ensuring good value for the money made available by government?

107 Gleeson, above n 89, 595.

108 *Declaration on Judicial Training Principles*, above n 97, arts 4 and 6.

109 Gleeson, above n 89, 595.

110 French, above n 11, 6.

111 Basten, above n 85, 160.

112 Appleby et al, above n 10, 336.

Resourcing the courts sufficiently to support *participation* in judicial education appears a more acute issue than that of funding providers, the activities themselves and any associated travel and accommodation needs. As article 6 of the *Declaration of Judicial Training Principles* says:

The state must ensure that the infrastructure is in place to permit judges to attend judicial training seminars throughout their time on the bench. In practical terms, this means appointing enough judges to give each judge time to undertake training.<sup>113</sup>

There is a corresponding call upon judicial leadership by the IOJT Declaration to ‘support and encourage judges by giving them sufficient time away from their sitting schedule to attend judicial training events and to participate as faculty at those events’.<sup>114</sup> But the onus on government in article 6 must obviously operate as a pre-condition for heads of jurisdiction to have capacity to release judges for education opportunities as part of their workload.

In Australia, the Council of Chief Justices, the Council of Chief Judges, the Council of Chief Magistrates, and other judicial representative and education bodies, all endorsed the NCJA’s *National Standard* which said that ‘each judicial officer should be able to spend at least five days’ per annum participating in professional development activities.<sup>115</sup> In reviewing the impact of this development in 2010, Roper highlighted a number of contextual issues. In a pithy affirmation of the point made above, one senior judge commented to Roper that ‘governments have never owned the Standard and feel little obligation to make available resources to enable it to be met’.<sup>116</sup>

The data Roper collected revealed that a majority (68%) of the judicial officers who participated in his survey did in fact meet or exceed the five-day standard in the preceding year.<sup>117</sup> Indeed, almost a quarter of judicial officers managed to complete 10 days or more of education activities – though it is possible this suggests that those with a particularly positive attitude or experience to judicial education were more likely to be amongst the survey respondents (who comprised 21% of over a thousand judicial officers contacted).<sup>118</sup> When viewed over a three year period, the number meeting the standard overall was slightly lower, but still a majority (57%).<sup>119</sup> Yet, on both measures, it is still unsatisfactory that close to a third of the survey respondents did not meet the standard. Roper highlighted the disparity of resourcing and opportunity to explain differences in these results when broken down by jurisdiction, concluding that the higher rates of participation in New South Wales and Victoria ‘reflects the fact that in both these States judicial education is well funded and there is an institution devoted to judicial education’.<sup>120</sup> The lack of dedicated institutional support in other states was a clear point of contrast, but it was the federal judicial officers who were those with the highest proportion not meeting the standard. Roper’s comment on the resourcing in New South Wales and Victoria resonates strongly with our data collected for this Report and discussed later in Part VI.

The comments gathered by Roper, and by the authors of this Report through their own survey of judicial officers in 2016,<sup>121</sup> suggest that judicial education is held hostage by the resourcing of the courts generally. As one judge responded to Roper, ‘[a]dditional funding and the appointment of additional judicial officers is needed to ensure that attendance at judicial education programs does not add to court delays and backlogs’.<sup>122</sup> The head of one court made clear the trade-off that was required under existing resourcing levels in her or his court:

The consequential delays in hearing of matters and in delivery of judgments militate against releasing judicial officers for five days each year in addition to annual leave, long leave and judgment writing time.<sup>123</sup>

Comments received by these authors included the following, noting the lower court level:

Very little time made available for continuing education (Male, 5-9 years’ service, WA, District/County/Federal Circuit).

Funding of education is inadequate. (Male, 0-4 years’ service, WA, District/County/Federal Circuit).

<sup>113</sup> *Declaration on Judicial Training Principles*, above n 97, art 6.

<sup>114</sup> *Ibid.*

<sup>115</sup> Roper, *Review of the National Standard*, above n 19, 1: ‘This standard need not be met in each year but can be met on the basis of professional development activities engaged in over a period of three years.’

<sup>116</sup> *Ibid* 7.

<sup>117</sup> *Ibid* 9.

<sup>118</sup> *Ibid* 5.

<sup>119</sup> *Ibid* 12.

<sup>120</sup> *Ibid* 13.

<sup>121</sup> Appleby et al, above n 10.

<sup>122</sup> Roper, *Review of the National Standard*, above n 19 17.

<sup>123</sup> *Ibid* 19.

Judicial Education with respect to magistrates is very poorly resourced. (Female, 10-14 years' service, WA, Magistrates/Local).<sup>124</sup>

Attempts by judicial officers, supported by their head of jurisdiction, to nominate days for professional development in advance, can run against the needs of the court in managing trials, especially with juries, of considerable duration and that may run over time.<sup>125</sup> Even when not sitting, judges may feel that the need for judgment writing is a more urgent call upon their time. There is also the issue that days when the judicial officer is free to commit to professional development may not coincide with optimal or 'truly educational' activities, which one respondent to the authors' 2016 survey said was especially an issue in jurisdictions where education is 'ad hoc' due to the lack of a Judicial College.<sup>126</sup>

As made clear in the introduction, this Report does not seek to replicate and update Roper's work from 2010 by measuring the amount of judicial education that is undertaken relative to the *National Standard*, although that would be a timely and worthwhile exercise. Quite aside from the effect that the passage of the years may have had upon judicial attitudes and work pressures that might affect participation in judicial education, the rapid and widespread embrace of digital platforms before, and then accentuated by, the COVID-19 pandemic from March 2020 means that we are now operating in a markedly different context, one that enjoys a greater ease in the delivery of educational opportunities that was simply unthinkable in the first decade of the century.

Resourcing was a critical consideration to Roper's 2010 study and would equally be significant to any future attempt to assess satisfaction of the *National Standard*. But it is important to appreciate that resourcing is also relevant to this study, despite this study not being concerned with individual participation in judicial education activities. Instead, resourcing is a lens through which to contemplate the provision of judicial education, and whether it might be under-resourced yet at the same time possibly over-supplied? This inevitably requires acknowledgment of the role played by federalism.

### Federalism and Distance

The division of the Australian judiciary across a federal system may be dealt with relatively briefly as a standalone consideration. But it is important to give express attention to it when considering the way judicial education has developed and what this means for the cost and effectiveness of its contemporary operation. When we talk of surveying the 'landscape' of judicial education, the scene before us is instantly recognisable as federal in nature.

One way in which the significance of federalism has been apparent is through the openness or otherwise of discrete professional cultures in the states and territories – recalling especially the strides made in Western Australia at the instigation of Chief Justice David Malcolm in the 1990s.<sup>127</sup> In other jurisdictions, the absence of a champion may have delayed developments, or perhaps their uptake by judicial officers once made available. However, this unevenness is frequently a feature in a federal system. On balance, one might assess it as affording valuable opportunities for experimentation and development, pursuant to the theory of 'laboratory federalism',<sup>128</sup> which have supported rather than hobbled the emergence of judicial education. In this light, Chief Justice Malcolm provides an example of his own experience of judicial education (at an international conference) instigating professional development opportunities for colleagues within his own jurisdiction, and then further influencing educational priorities in other parts of the federation.<sup>129</sup>

In his analysis of survey results on participation in judicial education when arranged by jurisdiction, Roper rightly suggested that it may be too simplistic to look only at jurisdictions horizontally by geography. Engagement with professional development in respect of individual courts, considered vertically within jurisdictional hierarchies, may differ markedly, affected by factors including leadership and culture of the relevant institution, but also workload and resourcing. There is no guarantee that these will be consistently experienced by judicial officers within a jurisdiction understood as a geographical and political area. Indeed, the evidence suggests otherwise.<sup>130</sup>

When considering the availability of opportunity and resourcing, the difference between the more populous states and others is stark. Recognition of the institutional support available from the JCNSW and the JCV appears in the responses to surveys on judicial education, both from those inside those jurisdictions and those

<sup>124</sup> Appleby et al, above n 10, 335.

<sup>125</sup> Roper, *Review of the National Standard*, above n 19, 20.

<sup>126</sup> Appleby et al, above n 10, 335.

<sup>127</sup> Above n 9.

<sup>128</sup> See further explanation in Gabrielle Appleby and Brendan Lim, 'Democratic Experimentalism' in Rosalind Dixon (ed), *Constitutional Values* (Hart Publishing, 2018) 221.

<sup>129</sup> For another example of the epiphany effect of attending an international conference on judicial education, see Martin, above n 30, 278.

<sup>130</sup> Appleby, et al, above n 10, 335-36; Roper, *Review of the National Standard*, above n 19, 18.

elsewhere looking in and feeling the lack of an equivalent body for them to access.<sup>131</sup> As one respondent said simply: 'I think education is done better in those jurisdictions with a Judicial College'.<sup>132</sup> Although that comment is expressed as a qualitative remark, it is worth noting that it is not the role of this study to assess the quality of judicial education by provider, but simply to measure the scale of that activity by different institutional providers. Results in respect of the state-based education providers will be discussed in Part VI below.

Before concluding this section, it must be said that the point made earlier about the impact of the COVID-19 pandemic on society's embrace of digital communication, including to facilitate education and professional development, must prompt a fresh appraisal about the possibilities for judicial education. Access to education activities has traditionally been more limited for judicial officers working in regional, rural and remote Australia than for those working in metropolitan areas. The same may also have been true to an extent in smaller jurisdictions due to the reduced availability of a local pool of relevant instructors or where greater travel times and cost act as deterrents to participation in educational opportunities offered elsewhere. The ubiquity of online synchronous and interactive communications platforms presents the potential for a great levelling of education across the Australian judiciary, overcoming the tyranny of distance. This is an area ripe for future study as we move beyond the apogee of the COVID-19 pandemic.

### Voluntary Participation

Lastly, we return to the idea of voluntary participation, which was introduced as a general feature of adult education in Part II. The solicitude for judicial independence that so strongly marked early debates on the introduction of education programs for judicial officers remains manifest in the voluntary nature of those programs to this day.<sup>133</sup> As already acknowledged, this has significant consequences for the design of judicial education offerings, with providers seeking to attract judges to their programs and also the support of their heads of jurisdiction to facilitate attendance. That cannot itself be a bad thing, for to be valuable judicial education *should* be relevant to judicial needs. But as those needs have come to be understood as being of greater breadth, the stretching of resources to ensure a diversity of education offerings to a discriminating audience has become a significant issue.

The data presented by Roper in 2010 revealed that just 3% of respondents had participated in no days of professional development in the preceding year. This figure was not separately examined but was assumed to be explained by the same reasons that accounted for the additional 29% of respondents who admitted not meeting the national standard. Presumably, there is overlap, but antipathy, dissatisfaction or lack of effective opportunity may also explain a complete lack of engagement. Of course, participation in Roper's survey was itself voluntary, and it may be that the judicial officers who have opted out of judicial education are underrepresented.<sup>134</sup>

The Association of Australian Magistrates submitted to Roper that making judicial education compulsory might have the benefit 'that governments would be more likely to commit funding to professional development'.<sup>135</sup> It is not so surprising to see this position taken by the magistracy – the pressures of work and limited resourcing significantly challenge participation in professional development from judicial officers at the lower court levels. Complaints include having to self-fund basic resources to keep up to date, such as textbooks, in addition to using personal leave to attend conferences.<sup>136</sup> The voluntary nature of judicial education, so central to assuring the independence of the judiciary, can be used as a crutch for the deficiency of resourcing by placing an onus on individuals to self-fund their professional development.

Finally, there is the question of purpose and effectiveness that inevitably arises from voluntary participation. As one respondent put it to the authors: 'The real problem has always been there, and that is, the small number of people who would most benefit from such programmes do not attend!'.<sup>137</sup> Accordingly, one might ask what all the effort is for since the capacity for judicial education to fulfil its function, perhaps where this is most needed, is stymied. Justice Basten considered this in respect of the importance of gender awareness training:

<sup>131</sup> Roper, *Review of the National Standard*, above n 19, 13. Chief Justice Martin discussed the resourcing of both state-based organisations at n 30, 281.

<sup>132</sup> Appleby, et al, above n 10, 335 (Female, 0-4 years' service, Qld, District/County/Federal Circuit).

<sup>133</sup> Doyle, n 88, 9.

<sup>134</sup> There is a case for an exercise that gathers qualitative data from those who avoid judicial education, as a group distinct from those who aim to participate to the national standard but are thwarted from doing so.

<sup>135</sup> Roper, *Review of the National Standard*, above n 19, 29.

<sup>136</sup> See comments from judicial respondents to surveys quoted at Appleby, et al, above n 10, 335; *ibid* 18.

<sup>137</sup> Quoted in Appleby, et al, above n 10, 336.

the more senior one is professionally, the more likely one is to resist the suggestion that one has unconscious prejudices, unarticulated and unexamined values, and limited understanding of how one reaches one's own decisions and makes one's own judgments. Yet this is the area into which judicial education must delve if there is to be any serious attempt to improve levels of general awareness.<sup>138</sup>

Justice Basten does not urge compulsion as the solution and indeed there are strong views that this may not be the most effective way to promote and achieve meaningful change, at least in respect of an issue such as reducing unconscious bias.<sup>139</sup>

Although Chief Justice Doyle remarked in 2005 that it 'may be a matter for debate' whether voluntary participation should continue to be seen as necessary for judicial independence, this seems unlikely to change, whether as a general proposition or in respect of specific forms of education.<sup>140</sup> But it is certainly relevant to keep the voluntary nature of judicial participation in professional development firmly at the forefront of any consideration of how education is made available and how that might be enhanced.

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138 Basten, above n 85, 160.

139 Lumley, above n 90, 73.

140 Doyle, above n 88, 9.

## Part IV

# Typology of Topics for Judicial Education

In Parts IV and V, we turn from a conceptual consideration of the justifications for judicial education, challenges of design of judicial education as a unique form of adult education, and the institutional barriers that have shaped, and in some instances continue to shape, that design, to propose a typology to understand the provision of judicial education in Australia today. This exercise enables the empirical review of publicly available materials that is presented in Part VI of the Report.

Taxonomies of topics that might be the subject of judicial education have been attempted around the world. The principal purpose and use of such taxonomies appear to be for heads of jurisdiction and education services providers to understand the broad educational needs of the judiciary, the specific content of which may then be tailored to particular courts (by level or specialisation) and updated as technology, science, or social expectations change. This allows the mapping of a curriculum of appropriate generality and specificity so as to achieve the ultimate goal of judicial education: to assist the judiciary in performing their institutional task in a way that promotes public confidence in the administration of justice. It also provides a tool to understand the evolving demand for different subjects within the judiciary and analyse the extent to which judges are undertaking structured or cohort-based education across the breadth of a proposed curriculum or are self-directing to particular areas.

The typology we have adopted for the purpose of the empirical survey in this Report has been taken from a combination of sources, most obviously the work performed in the development of the NJCA National Curriculum. This is supplemented by conversations that we have conducted across Australia with the NCJA, the AIJA, the Judicial Conference of Australia (JCA, renamed the Australian Judicial Officers Association in 2021), the JCNSW, and the JCV, as well as individual members of the state and federal judiciaries who gave generously of their time, most especially those who attended a 2019 roundtable facilitated by President Chris Maxwell of the Victorian Court of Appeal.

As we have already explored, the justifications for education are closely mapped onto an understanding of the judicial role, and it is therefore unsurprising that the topics for judicial education map onto the functions and required competencies of a judge. There are many attempts to articulate these functions and competencies. For instance, writing in 2009, then Chief Justice of the High Court, Robert French, said that there were five key competencies that a judge must exhibit.<sup>141</sup> First, the judge must understand her or his role in its constitutional setting, the relationship of the judiciary to other branches of government, and its place in the judicial hierarchy. Second, the judge must know the relevant law, and keep herself or himself abreast of developments in it. Third, a judge must have highly developed fact-finding skills, that is, understanding of relevance, weight, sciences, ‘reasonableness’ type standards, and wider contextual issues, such as cultural norms, that are relevant to the fact-finding function. Fourth, a judge must have knowledge of matters that are relevant to judicial process, including litigation management to avoid cost, delay, and other stresses, procedural fairness and bias, the importance and practice of judicial independence, high level communication skills. Finally, the judge must have a strong understanding of her or his ethical obligations.

As acknowledged earlier, in 2019, the NJCA published the *Elements of Judicial Excellence* statement, containing a set of nine elements that ‘describe the knowledge, skills and qualities of judicial officers’ that facilitate judicial excellence.<sup>142</sup> Although not explicitly framed as relevant to a judicial education curriculum, we can see close similarities between these competencies and the areas which are and might be targeted by judicial education. These nine elements are grouped under three headings:

<sup>141</sup> French, above n 11, 1-4.

<sup>142</sup> *Attaining Elements of Judicial Excellence: A Guide for the NJCA* (November 2019), available at <<https://njca.com.au/wp-content/uploads/2020/01/Attaining-Judicial-Excellence.pdf>>.

### Members of the Court and the General Community

1. *Ethics and Integrity*: Australian judicial officers understand the ethical challenges they face and are aware of ways to maintain the actual and perceived integrity of the judiciary.
2. *Engagement*: Australian judicial officers actively engage in advancing the work of their courts. This is achieved through supporting their colleagues and their court as an institution, and by educating the community about the court's purpose, values and commitment to continuous improvement.
3. *Wellbeing*: Australian judicial officers can use self-care practices and wellbeing programs to manage stress and maintain their physical and psychological health to ensure they remain fit, motivated and effective in their working lives.

### Informed and Impartial Decision-makers

4. *Knowledge of the Law and the Justice System*: Australian judicial officers are experts in the law and the justice system.
5. *Critical Thinking*: Australian judicial officers use analytical and problem-solving skills effectively to make decisions that are timely, free of bias, and based on a critical assessment of evidence and arguments properly presented.
6. *Self-Knowledge and Self-Control*: Australian judicial officers understand how their personal perspective, values, preferences, mental states and thinking habits can affect their decisions and perceptions of fairness.

### Managers of the Court Process and Judicial Administrators

7. *Managing the Case and Court Process*: Australian judicial officers are skilled in effective caseload management and control of courtroom hearings to minimise delay in processing and finalising cases.
8. *Building Respect and Understanding*: Australian judicial officers interact effectively with those who work in or appear before the court to facilitate fair and just case outcomes. They listen attentively to others and communicate clearly to ensure that parties understand the issues in dispute, court processes and the court's decisions.
9. *Facilitating Resolution*: Australian judicial officers endeavour to build consensus to facilitate better case preparation and, where feasible, to reach a resolution acceptable to parties through compromise and agreement on all or some of the issues in dispute.

Unsurprisingly, given the different justifications that have emerged for judicial education, the modern articulation of judicial competencies is more expansive than simply focussing on the substantive law that informs judicial decision-making, or even the skills required to manage a courtroom.<sup>143</sup> Rather, as explained in Parts II and III, these competencies now include themes that reflect a deepening as well as changing understanding of the judicial role and its connections to contemporary values.

It is not within the scope of this Report to provide a full comparative review of the taxonomies of judicial education subjects that are the basis for curriculum development across the world. Such a review was undertaken in Roper's 2007 report to the National Judicial College.<sup>144</sup> That report considered various aspects of the curricula across England and Wales, Scotland, Canada, New Zealand, California, Nevada and Missouri, as well as that in place in New South Wales through the JCNSW. Based on this comparative analysis, it proposed a national curriculum for Australian judges. That Curriculum proposed eight modules that were grouped around the following subjects:

#### 1. Maintaining their knowledge and mastery of the law

At the very centre of a judicial officer's work is the need to know and apply the law, both substantive and procedural. This includes the interpretation of statutes and the application of the laws of evidence.

Professional development activities can help judicial officers to keep up to date with changes and developments in the law and to refresh and deepen their knowledge and understanding of it.

<sup>143</sup> Referring to this shift in judicial education, John McGinness, 'Judicial Education in Australia' (2009) 17 *Australian Law Librarian* 150, 151.

<sup>144</sup> Roper, *A Curriculum*, above n 13.

## **2. Managing efficiently the cases before them, the court room and their own work**

Judicial officers have a management role in three situations. They need to manage the cases before the court over which they preside, the court room itself, and their other work outside the courtroom.

Judicial officers not only preside over trials and decide cases. For some, an aspect of their management of cases is the encouragement of the resolution of disputes between the parties by alternative means. Judicial officers influence dispute resolution in various ways and, in doing so, exercise a specific role.

## **3. Making decisions and giving reasons for decision, both written and oral**

Judicial officers make decisions in all aspects of their work. Decisions are made in and out of court. At the core of a judicial officer's work is the making of decisions and the exercise of judgement.

Usually a judicial officer must give reasons for the decision. Professional development activities should help judicial officers to deliver oral judgments and write well-composed judgments. A part of the judicial role is also to give directions to juries. Although this does not involve the judicial officer in making a decision, it requires the judicial officer to give the jury the guidance necessary to make a correct decision.

The judicial role also involves the sentencing of offenders. In this aspect judicial officers must make decisions in order to sentence correctly.

## **4. Applying appropriate standards of judicial conduct**

Judicial officers, whilst performing their role and in their private lives, encounter situations which require them to consider how they should conduct themselves and which may involve ethical issues raising questions in regard to appropriate judicial conduct.

## **5. Understanding the relationship between the judiciary and society and changes in society**

The judicial system performs a central role in society. Whilst judicial officers act independently they are conscious of the social contexts of the matters that come before them. Professional development activities which deal with social context issues alert judicial officers to the diversity within the community which is reflected in matters before the courts.

Although professional development programs will sometimes specifically deal with social context issues, usually these issues will be dealt with pervasively in programs dealing with other topics.

## **6. Keeping abreast of developments in knowledge and issues of public policy that impact on the law**

There are many developments in knowledge in various aspects of life which impact on the law and the work of the courts. There are also various public policy issues which arise and can be of relevance to judicial officers as they perform their judicial role.

Examples of developments in knowledge include –

- genetics and human engineering
- the environment
- artificial intelligence.

Examples of public policy issues include –

- human rights issues arising out of responses to perceived threats of terrorism.
- the relationship between the three arms of government.

## 7. Using information and other technology, in and outside the courtroom, to assist with judicial work

Information technology is a pervasive feature of the work of the courts. The court room itself may well have technology in it which is used during cases in various ways. The case itself may be conducted using information technology, for example in regard to documents which are in evidence. The judicial officer may, as well, use information technology whilst on the bench or in chambers, eg. to write judgments. Various forms of information technology, such as email, the web and the use of intranets, are part of judicial life.

Other forms of technology, such as audio-visual recordings, are also to be found in the courtroom, and judicial officers need to be familiar, in general terms, with what those technologies can do and their limitations.

## 8. Maintaining their health and well-being

Judicial officers perform their work under considerable pressure. They need to maintain their physical and mental health. Doing so helps them perform their role more efficiently and effectively.

Consideration of the 2007 National Curriculum in light of the NJCA's more recent *Elements of Judicial Excellence* demonstrates that the requisite competencies of the judicial role are not wholly static, but capable of evolution, even in a comparatively short time frame. This also suggests that no single statement is definitive, and that any typology should be tailored to the purposes of the discussion. Accordingly, we propose a **typology of topics for judicial education** to assist us in achieving the specific objective of this Report: to gain an understanding of judicial education across Australia as it is currently provided, including the breadth and supply of subjects from particular providers and within jurisdictions.

To create clear and inclusive categories that will allow the most efficient and accurate mapping of the content of judicial education programs in practice, the typology presented here differs in some ways from the National Curriculum. In particular:

- We have combined management and decision-making skills into one, which we refer to as 'Curial skills'. It is not intended that any of the content of the National Curriculum will be lost in this change.
- We have not included technology as a stand-alone topic, but, rather, it is viewed as incorporated across the topics. For instance, the impact of technology on judicial review will be caught within substantive legal and technical updates. The use of technology in the court room during discovery will be caught within 'Curial skills'. The digital systems required for judges to manage personnel will be caught within 'Administration'.
- We have divided the topic on knowledge and issues of public policy into 'Institutional challenges', specifically relating to the institutional position of the courts and judiciary, and other 'Technical developments in knowledge and public policy'.

The typology that we have adopted is as follows:

- 1. Legal and technical updates on substantive law:** includes updates on recent cases, and legislative reform, across both legal subject areas (eg, criminal law) as well as procedurally focused subject areas (eg, evidence).
- 2. Curial skills:** includes education on the many skills that are required for the performance of the core judicial role, hearing and deciding cases. It includes case management, judgment writing, ex tempore, managing juries and other participants in court proceedings, digitisation of court processes and using technology in the court, and judicial officers' responsibilities with respect to alternative dispute resolution of issues that have come before them.
- 3. Administration:** includes subjects such as personnel management (including harassment and bullying), office management (including use of relevant databases and other systems) and public and media interactions.
- 4. Institutional challenges:** includes education on the institutional role of the judiciary and its constitutional relationship with the executive and legislature, the judicial organisational structure and court hierarchy, and recurring issues like access to courts.

- 5. Society:** includes social context, cultural sensitivity and bias education. Social context education includes education on topics that contextually inform the practice of the judicial role, such as the modern operation of correctional services facilities. Cultural sensitivity education addresses expanding judicial officers' understanding of different cultural frames. In particular, in Australia it incorporates education on the culture and practice of Aboriginal and Torres Strait Islander peoples that can inform judicial officers' understanding of First Nations issues in cases that come before them. It also includes education relating to the culture and practice of the many and varied ethnicities of the Australian population, including but not limited to language and translation. It extends to education around particular issues that manifest for people based on their age, gender, religion or sexual orientation. Bias training is closely related to this and includes education on unconscious bias that might manifest in relation to race, ethnicity, age, gender, religion, or sexual orientation.
- 6. Well-being:** focussed on judicial well-being and mental health.
- 7. Ethics:** includes education on ethics with a focus on the responsibilities of individual judges to ensure they are making decisions in their professional and personal life that maintain the integrity of the judicial institution.
- 8. Technical developments in knowledge and public policy:** includes education on non-legal substantive topics that contextually inform the practice of the judicial role but fall outside the category of social context education. Examples include developing technologies, financial literacy, neuroscience and regulation.

## Part V

# Typology of Periods in Judicial Education

In addition to substantive typologies of judicial education by topic, there is now a well-established temporal delineation of judicial education in Australian jurisdictions, to the extent that there are expectations (albeit still in the context of voluntary participation) that judges will undertake an induction or orientation program when they are first appointed to the bench, followed by ongoing, regular judicial education throughout their tenure. The national standard is set at five days a year of continuing judicial education.<sup>145</sup> In addition, there is a standard that 'on appointment a judicial officer should be offered, by the court to which he or she is appointed, an orientation program'. And 'within 18 months of appointment, a judicial officer should have the opportunity to attend a national orientation program'.<sup>146</sup> Other common law jurisdictions have pitched their judicial education more specifically to different and additional stages of the progression through a judicial career. For instance, there is now in England and Wales a Pre-Application Judicial Education program for lawyers, and in Canada there are programs designed specifically for judges approaching retirement.

When developing the National Curriculum, Roper opted against a typology that would include division based on the stage of judicial career. He stated:

A difficulty with such a model is that, whilst it is clear all judicial officers have a stage where they are newly appointed, after that their careers can differ in many ways. The mid and late stages of judicial officers' work can be quite different from each other, depending on the court in which the judicial officer serves, the work done by that court, and perhaps the status of the judicial officer, eg. some will become heads of jurisdiction or assume administrative roles.<sup>147</sup>

Of course, the progression of judicial careers will differ and is context dependent. However, we nonetheless see value in creating a typology of different periods of judicial education. This is not to say that all judges will progress through each period, or that they will do so at the same tempo. But it does allow us to understand the paths that might be taken, and therefore the judicial needs in terms of tailored educational programs. It also encourages evaluation of when offerings are the most useful, and thus have greatest potential for engagement. With that in mind, we consider the typology of periods of judicial education not as an *alternative* to the typology of topics, but, rather, as an intersecting matrix: to understand the types of topics offered during these different periods.

Drawing from the practice of Australia and other similar common law jurisdictions, together with conversations undertaken with judicial officers across the country, we accordingly propose a **typology for understanding different periods of judicial education** that a judicial officer might progress through. These periods may overlap, and not all will be relevant to any individual judicial officer.

1. **Pre-appointment education:** These are programs that are undertaken by legal practitioners and academics who are seeking judicial appointment in the future. These are run by official judicial education institutions, and they have utility in assisting people, particularly those from underrepresented groups, to feel confident and prepared to apply for judicial appointment. They focus on the role and skills required of a judge, including curial skills, decision-making, ethics, resilience, equality, and diversity. Such education can also help individuals to make a better-informed decision about whether judicial appointment is right for them. An example of such a program is to be found in the United Kingdom, the Pre-Application Judicial Education Programme has been running since April 2019, as an initiative of the Judicial Diversity Forum.
2. **On appointment:** Induction / orientation / onboarding program and mentoring. This will usually include an intensive, initial multi-day program that is highly recommended, although not compulsory, to be attended, ideally, before the judicial officer commences their work on the bench (although in practice it more often occurs sometime in their first few months, and sometimes longer). Induction/ orientation programs generally include a broad scope of topics, presented in an introductory fashion with a focus on delivery by judicial colleagues.

<sup>145</sup> *National Standard*, above n12; see also the review of that standard: Roper, *Review of the National Standard*, above n 19.

<sup>146</sup> *Ibid.*

<sup>147</sup> Roper, *A Curriculum*, above n 13, 64.

- 3. Mid-career judicial officers:** The NCJA's *National Standard* recommends five days of ongoing judicial professional development each year, to be undertaken on topics from across the breadth of the curriculum.
- 4. Gatekeeper:** This refers to programs that might be developed as prerequisites for judicial officers wishing to exercise new areas of jurisdiction, or assigned to specialised areas of jurisdiction, such as commercial or mental health lists, or presiding over drug courts or courts designed for Indigenous defendants. The intention of such programs would be to provide judges with specific expertise and judge-craft skills required to exercise specialised areas of jurisdiction.
- 5. Appellate:** These are programs designed for judicial officers appointed to an appellate role, whether as their initial judicial appointment, or subsequently during their judicial term. They focus on the unique dimensions of this role, for instance, management of appellate court rooms, appellate judgment writing, management of multi-member courts.
- 6. Leadership:** Programs designed for judicial officers appointed as head of jurisdiction, or to senior judicial administrative roles within a court. In Canada, for instance, a seminar has been designed for Chiefs, to provide a forum for understanding the knowledge and skills required to lead a court in the 21st century.<sup>148</sup>
- 7. Preparation for retirement:** Programs undertaken by judicial officers nearing the end of their tenure, focused on passing back corporate knowledge to the bench, preparing the individual for future judicial or non-judicial roles they may undertake post-retirement from their tenured judicial service, and the ethical responsibilities of retired judicial officers. Examples of such programs include the Canadian National Judicial Institute, which has offered retirement planning sessions,<sup>149</sup> and the New Zealand Te Kura Kaiwhakawā (Te Kura), Institute of Judicial Studies, indicates that its curriculum includes retirement planning as part of its health and wellbeing stream.<sup>150</sup>

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148 See further reference in Roper, *A Curriculum*, above n 13, 87.

149 Ibid 88.

150 See further [https://www.ijs.govt.nz/recent\\_developments/default.asp](https://www.ijs.govt.nz/recent_developments/default.asp).

## Part VI

# Current Practice in Judicial Education in Australia

In this Part, we present the results of our empirical investigation of judicial education programs and analyse them by reference to the typologies identified in Parts IV and V. This work has been undertaken on the basis that any rational consideration of the future of judicial education in Australia should be grounded in an understanding of current practices. This will allow for successes to be recognised and built upon, and for challenges to be identified and remedied.

### Data Sources, Scope, and Limitations

Judicial officers may engage in continuing education in many ways, including self-guided reading as autodidacts, attendance at general conferences hosted by academic or professional institutions, and through programs offered specifically to judges and magistrates for the purpose of their educational development. Given the obvious challenges of attempting to map out the former judicial education activities, this Report is concerned *solely* with the last of these, as reported in annual reports and other public sources discussed below. In adopting this focus, we draw no conclusions about the comparative merits of certain judicial education activities over others.

There is currently no single, comprehensive record of formal, dedicated judicial education programs in Australia. Accordingly, the data used for this analysis were obtained from disparate sources, all of which are publicly available. These comprised (a) the annual reports published by individual courts in accordance with their statutory reporting obligations or long-established practices; (b) the annual reports published by institutions with recognised judicial education functions, namely, the JCNSW, JCV, NJCA, JCA, and AIJA; and (c) on rare occasions, websites of relevant bodies as a supplementary source where other published information was ambiguous or incomplete. From these sources, we identified events as ‘judicial education programs’ according to their labelling, description, or context. The different forms that ‘programs’ may take are identified and reported on in the section below on ‘mode of delivery’.

The scope of the data was limited geographically, jurisdictionally, and temporally. *Geographically*, we captured only judicial education programs provided in Australia. We recognise that Australian judicial officers occasionally engage in such programs abroad, whether in person or online, but this has necessarily fallen outside the scope of this study, given the methods of data collection. *Jurisdictionally*, we included the federal courts (High Court, Federal Court, Family Court, and Federal Circuit Court),<sup>151</sup> and the generalist state and territory courts (Supreme, District/County, and Magistrates/Local), summing to 25 courts nationally. We did not capture data from specialised Australian courts such as land and environment courts, children’s courts, drug courts, or the Family Court of Western Australia. *Temporally*, we chose a collection period of three years, which was considered sufficient to capture current judicial education practices, while keeping within the resource constraints of the project. Most of the annual reports that we used as primary data sources were arranged by financial year, but some organisations report by calendar year.<sup>152</sup> In the latter case, we allocated judicial education programs to the relevant financial year, and our analysis accordingly reflects data for the three financial years 2015/16, 2016/17, and 2017/18.<sup>153</sup> This was as current as could be achieved given the publication schedules of some of the documentary sources.

<sup>151</sup> In 2021, the Family Court and Federal Circuit Court were merged into a single court, but this does not affect the period under examination: see *Federal Circuit and Family Court of Australia Act 2021* (Cth).

<sup>152</sup> The annual reports of courts in New South Wales, South Australia, and Western Australia are arranged by calendar year.

<sup>153</sup> For courts reporting in calendar years, where judicial education program dates were not stated, we assigned the program to the first half of the calendar year (e.g., a program listed in ‘2018’ was assigned to January-June 2018, and thus to the 2017-18 financial year).

As in all empirical studies, the results must be assessed in light of limitations of the data collected. Four limitations are worth noting, although in our opinion they do not compromise the integrity of the results because their scale is likely to be minor. First, of the 25 courts included, some did not publish annual reports for the relevant period.<sup>154</sup> Second, some annual court reports contained no information on judicial education programs. It is unclear whether this stemmed from the absence of such programs or a failure to report on existing programs. Without making an assumption as to which of these alternatives applies, it is simplest to state that if there are unreported programs then as a matter of methodology they fall outside the scope of our empirical assessment. This would include informal programs offered within a court but not captured in annual reports. Third, the data are only as accurate as the information published in the stated sources. And finally, as there is no standard format for reporting, there was substantial variability in the scope and depth of information provided, such that it was not possible to extract identical data across every domain of interest. We made inferences from the published information where it appeared clearly reasonable to do so, but otherwise we have reported only on the information as published. On occasion, the difficulty of information accuracy was mitigated by triangulating data that appeared in more than one source.

### Overview of the Data

Over the three-year period, 446 judicial education programs were provided across Australia—an average of around 150 each year. The breakdown of these programs can be viewed in different ways (Table 1). Of the total number of programs, the states and territories provided 80% (n=358) through their courts and state-based judicial colleges and commissions. The federal courts delivered 12% (n=54), and the national associations (NJCA, JCA, AIJA) delivered the balance (8%, n=34). These figures are based on the principal provider and may thus not fully reflect the contribution of specific providers in joint programs.

As explained in Part III, when looking at judicial education nationally, NSW and Victoria stand apart from other jurisdictions as being very actively engaged in the provision of judicial education, which is consistent with the findings of the Roper report over a decade ago.<sup>155</sup> Some 160 programs were delivered in NSW and 132 in Victoria over the three-year period. The majority of these were provided by their state-based colleges or commissions—in NSW, 94 by the JCNSW (59% of that state's programs), and in Victoria, 93 by the JCV (70% of that state's programs). The remaining programs in NSW and Victoria were delivered by individual courts across all levels of their court hierarchies, with 27 in the Supreme Courts, 30 in the District/County Courts, and 48 in the Magistrates/Local Courts. In contrast, the direct provision of judicial education in the other states and territories was sparse. In the 15 state and territory courts outside NSW and Victoria, only 66 programs were delivered over three years—an average of 1.5 programs per court per year. Half of the programs offered outside NSW and Victoria (n=33) were delivered in a single court (District Court of Western Australia) but it is not known whether that is an artefact of better reporting, although potentially also a consequence of distance from national judicial education offerings, or the result of other factors. The lower number of programs provided by the courts outside NSW and Victoria may reflect reliance upon the offerings of the NJCA as a national judicial education provider, funded by contributions from all Australian governments for this purpose.

Within the federal judiciary, the lion's share of judicial education programs was delivered in the Federal Court (n=43), with a small number being delivered by the Family Court (n=6) and Federal Circuit Court (n=5). Of all surveyed courts for which data were available, only the High Court reported no judicial education programs. The national associations accounted for 8% (n=34) of all programs, with the NJCA being the largest of these (n=23), followed by the AIJA (n=9) and the JCA (n=2).

The sections that follow report on five variables that emerged from the literature, data, and consultations as being of special interest, namely, subject matter, mode of delivery, audience, deliverers, and providers. We also sought to collect information on the duration of programs, their timing (in or out of regular working hours), and funding sources. However, the data sources did not reveal sufficient information on these latter topics, making further analysis unachievable in this study.

154 Of the 75 annual court reports potentially available (25 courts over three years), this affected only seven reports—the Supreme Court of Western Australia in 2018, and the Supreme Court and Local Court of the Northern Territory in all three years.

155 Roper, *Review of the National Standard*, above n 19, 13.

Table 1: Judicial Education Programs by Jurisdiction, 2015/16 to 2017/18

<b>States and Territories</b>						
	Supreme	District/ County	Magistrates/ Local	College/ Commission	<b>Total</b>	<b>Percentage</b>
NSW	17	18	31	94	<b>160</b>	<b>36%</b>
VIC	10	12	17	93	<b>132</b>	<b>30%</b>
QLD	0	0	8	--	<b>8</b>	<b>2%</b>
SA	4	n.a.	1	--	<b>5</b>	<b>1%</b>
WA	4	33	1	--	<b>38</b>	<b>9%</b>
TAS	2	--	7	--	<b>9</b>	<b>2%</b>
NT	n.a.	--	n.a.	--	<b>0</b>	<b>2%</b>
ACT	2	--	4	--	<b>6</b>	<b>1%</b>
Sub-total	39	63	69	187	<b>358</b>	<b>80%</b>
<b>Commonwealth</b>						
	High Court	Federal Court	Family Court	Federal Circuit Court		
Federal Courts	0	43	6	5	<b>54</b>	<b>12%</b>
<b>National Associations</b>						
NJCA	--	--	--	--	<b>23</b>	<b>5%</b>
JCA	--	--	--	--	<b>2</b>	<b>0%</b>
AIJA	--	--	--	--	<b>9</b>	<b>2%</b>
TOTAL					<b>446</b>	<b>100%</b>

**Notes:** n.a. = no annual report available; -- = not relevant

## Data by Categories of Inquiry

### (i) Subject Matter of Programs

As discussed in Part IV above, judicial education spans a broad range of subject matters. There we set out a typology with eight substantial topics. For the purposes of the current empirical study, we have added the further categories of 'multiple' (where multiple subjects were covered with none clearly predominating), and 'unknown' (where the published information was insufficient to identify a category of subject matter). The distribution of programs by subject matter is shown in Figure 1. The most frequent subject was 'substantive law' (37%), which far outranked the next most frequent of 'society' (18%) and 'curial skills' (13%). Surprisingly, 'ethics' accounted for just 1% of programs. It may be that these matters are dealt with elsewhere, for example through conversations with trusted colleagues or heads of jurisdiction.<sup>156</sup>

Figure 1 aggregates all judicial education programs over the three-year period (n=446), but a different picture emerges when the data are stratified in different ways. One useful comparison is between the programs delivered directly by courts (n=225) and those delivered by *all* state and national judicial education institutions grouped together (i.e., NJCA, JCA, AIJA, JCNSW, and JCV) (n=221). The institutions placed *greater* emphasis on 'society' (22% versus 13%) and 'curial skills' (18% versus 8%) than did the courts, and *lesser* emphasis on 'substantive law' (31% versus 44%), as shown in Figure 1A.

Another useful comparison is between programs offered at different levels of the court hierarchy. In the state and territory courts (outside the state-based colleges and commissions), 43% of programs in lower courts (Magistrates/Local) and 67% of programs in intermediate courts (District/County) addressed 'substantive

<sup>156</sup> See further discussion of informal practices of ethical support in Appleby and Le Mire, above n 38.

law', but only 13% in Supreme Courts fell in that category. The position was reversed in relation to education about 'society' where such programs accounted for 10% in lower courts, 11% in intermediate courts, and 33% in Supreme Courts. Similarly, Supreme Courts devoted more programs to 'technical' matters such as finance, science, and probability (10%) than did the other courts (2-3%). These figures suggest that judicial officers in different courts have differently perceived educational needs, which may reflect the suggestions and guidance given by their heads of jurisdiction. For example, lower courts need to be constantly apprised of decisions on substantive law given by appellate courts that sit above them, thus fuelling demand for education on those matters. In contrast, they may perceive a lesser need for general education about society, given their daily exposure to a large and diverse range of litigants, including litigants in person.

Figure 1: Subject Matter of Programs, 2015/16 to 2017/18 (n=446)

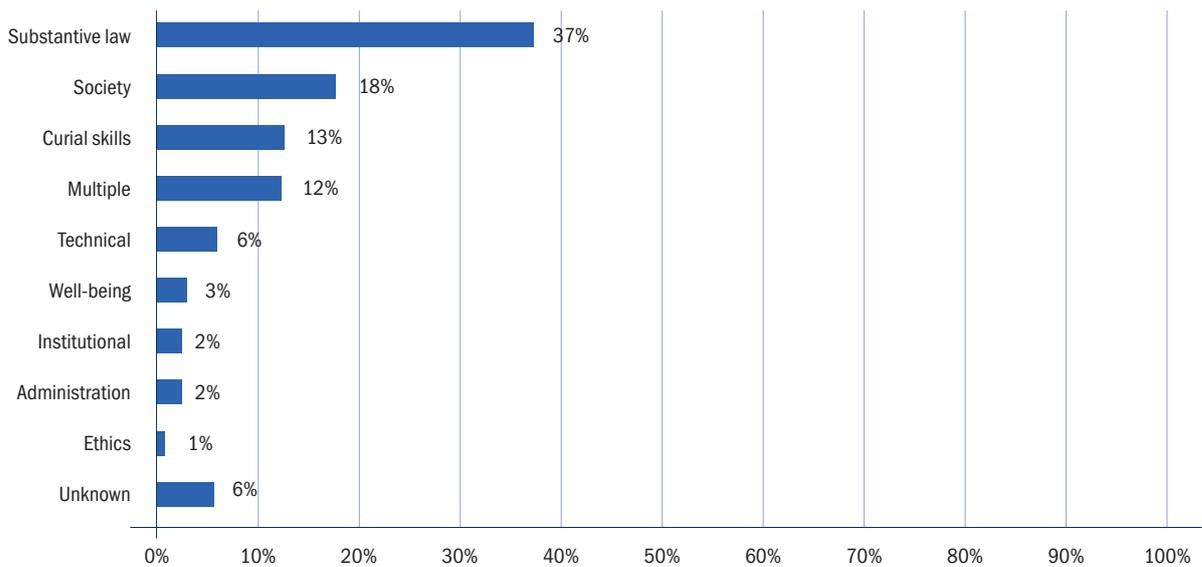
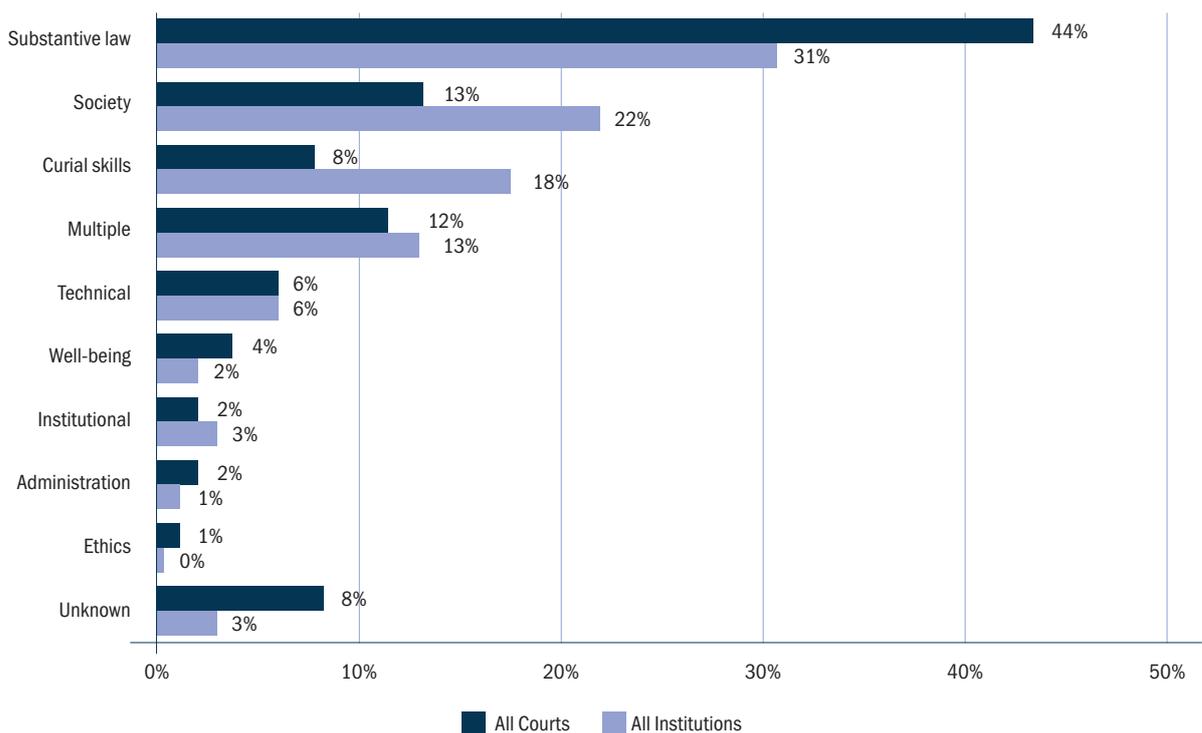


Figure 1A: Subject Matter of Programs by Type of Institution, 2015/16 to 2017/18 (n=446)

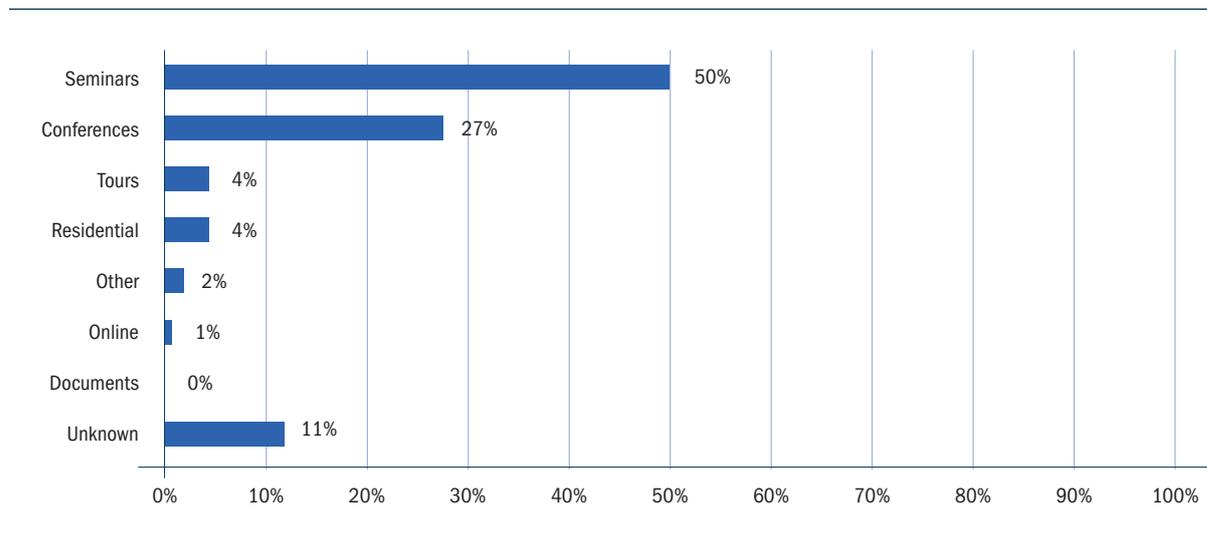


## (ii) Mode of Delivery

Judicial education can be delivered in different ways, ranging from flexible programs delivered through online modules and audio-visual materials, to intensive residential programs. The choice of mode has implications for cost, accessibility, flexibility, and effectiveness. We classified the programs into six specific modes, plus 'other' and 'unknown'. The categories used here were largely dictated by the particulars available in the data sources, but these are not necessarily the categories of greatest consequence. For example, the effectiveness of judicial education may depend on whether programs are didactic or experiential/interactive, but the data sources did not reveal such granular information. The distribution of programs by mode of delivery is shown in Figure 2. The most frequent mode was 'seminars' (50%), and although their duration is not known, the descriptions in the annual reports (e.g., 'lunchtime seminar', 'twilight seminar') suggest events of around 1-2 hours. The next ranked mode (but only half as frequent) was 'conferences' (27%). Their popularity reflects long-standing conferences in the judicial calendar, held annually or biennially, with jurisdictional or national coverage. Examples include the Supreme and Federal Court Judges Conference and the JCA's annual colloquium. 'Tours' and 'residential' programs each accounted for 4% of all programs. There was a near total absence of 'online' programs (there was a solitary offering in the Federal Circuit Court), but the drive to greater online capability necessitated by the COVID-19 pandemic may change this in the future.

Some differences were observed in the mode of delivery when comparing the institutions (NJCA, JCA, AIJA, JCNSW, and JCV) with the courts. The institutions had fewer conferences (19% versus 36%) but more residential programs (7% versus 2%). There were also observed differences in mode when comparing the 171 programs delivered at different levels of the state and territory court hierarchies. 'Tours' were confined almost exclusively to Supreme Courts (15% of their programs versus 0% in intermediate courts and 1% in lower courts), while 'residential' programs were found exclusively in Magistrates/Local Courts (6% versus 0% in other courts). Moreover, for Supreme Court programs the dominant mode was 'seminars' (54%) and then 'conferences' (23%), but for intermediate and lower courts this was reversed, with conferences dominating, followed by seminars. Whether this reflects work patterns at different levels requires further investigation—for example, busy and geographically dispersed magistrates may find it disruptive to attend seminars day-to-day, and hence court administrators may prefer that magistrates attend block programs offered through conferences.

Figure 2: Mode of Delivery of Programs, 2015/16 to 2017/18 (n=446)



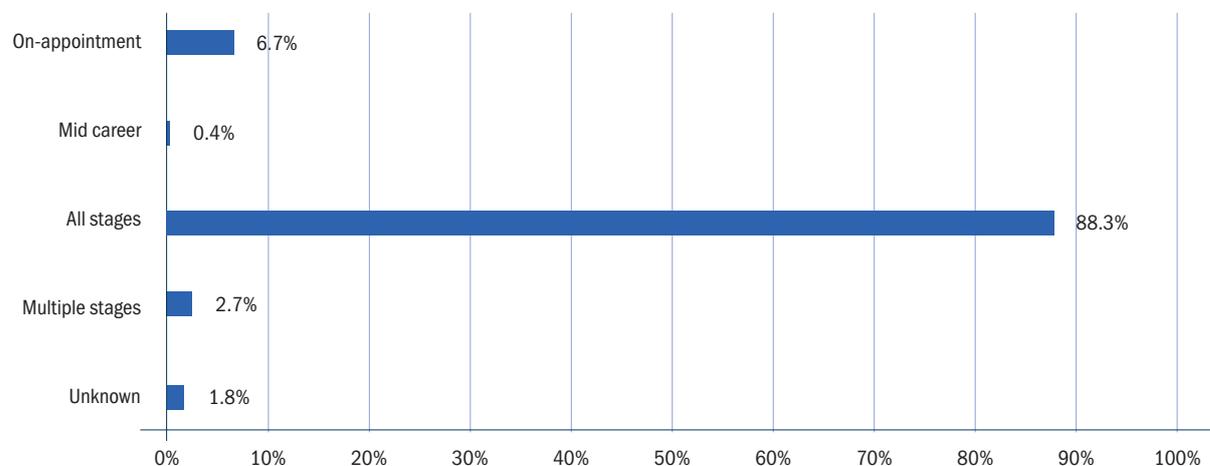
## (iii) Audience and Career Stage

As explained in Part V, judicial education programs can be designed for disparate audiences, from judicial officers at the commencement of their tenure, to those approaching retirement. Reflecting these stages in judicial career, we considered whether programs were expressly directed to specific participants. The typology proposed in Part V classifies the programs into seven categories: pre-appointment, on-appointment, mid-career, gatekeeper, appellate, leadership, and pre-retirement. For the data collection we added 'all' (where there was no differentiation), 'multiple' (where more than one, but not all, stages were targeted), and 'unknown'. The distribution of programs by intended audience is shown in Figure 3, featuring only the five categories for which we identified any relevant programs in the three-year period. It can readily be seen that the vast majority of programs

were not overtly directed at particular career stages—the ‘all’ category accounted for 88% of all programs, and the next most frequent (‘on appointment’) only 7%. This may reflect genuine openness about audience composition or a failure to record the intended audience in published sources to which we had recourse.

Of the 30 on-appointment programs, 17 (57%) were provided by the judicial education institutions and 13 (43%) by the courts (but only in federal courts and in the courts of NSW, Victoria, and Tasmania). Documentary sources rarely stated whether there was cross-jurisdictional attendance at on-appointment programs, but it is assumed that the institutional programs were open to all (e.g., the NCJA’s National Magistrates Orientation Program) whereas the court-based ones were not. Overwhelmingly, the court-based on-appointment programs were conducted in Magistrates/Local Courts. Consequently, although on-appointment programs accounted for 7% of all Australian programs, in the lower tier of the state and territory courts, they accounted for nearly double that (13%). Notably absent in the annual reports were programs specifically tailored to pre-appointment, gatekeeper, appellate, leadership, and pre-retirement education.

Figure 3: Audience of Programs, 2015/16 to 2017/18 (n=446)



#### (iv) Deliverers

As discussed in Part II, judges and magistrates are perceived to have a high degree of knowledge and skill in their discipline, leading to the question, ‘who is suitable to provide them with judicial education?’. The answer is contingent on the type of education they are to receive, thus inviting different responses if the intention is to boost their knowledge of a recent High Court decision or the cultural context of sentencing Indigenous offenders. The identity of the program deliverer will naturally follow the subject of the program itself to ensure it is suitable to its educational aims and focus. In that sense, Figure 4 below may be seen as related to Figures 1 and 1A above.

We classified program deliverers into four substantive categories: ‘judicial officers’, other ‘legal experts’ (including academics), ‘non-legal experts’ (including academics), and ‘adult educators’, and added the categories of ‘multiple’, ‘other’, and ‘unknown’. The category of ‘adult educators’ requires some explanation: it refers to education professionals who are focussed on program design and delivery rather than on substantive content, and who thus do not profess expertise in the content of specific programs. This contrasts with other legal and non-legal expert deliverers.

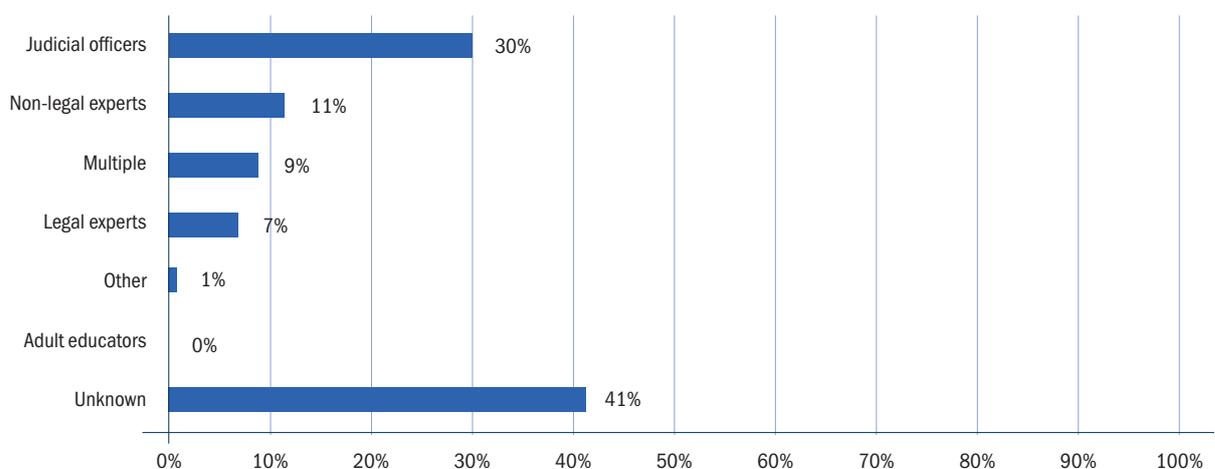
The distribution of programs by deliverer is shown in Figure 4. It should be noted that the deliverer was unknown in 41% (n=185) of programs, which invites caution in interpreting the results. For programs for which this information was available, the largest category of deliverer was judicial officers (30%), followed by non-legal experts (11%), multiple deliverers (9%), and legal experts (7%). This suggests that judicial officers look to their own as primary suppliers of judicial education, but that there is still demand for non-legal experts in supplementing those programs. The causes of this phenomenon are a matter of conjecture. Judge-led education is consistent with the judiciary’s ongoing concern to protect judicial independence, but it has also been reported that in-house choices may be a product of funding limitations, especially in lower courts.<sup>157</sup>

<sup>157</sup> Appleby et al, above n 10, 335-336.

However, the saving may come at a price because judicial officers are not well trained in the delivery of adult education, which may impact on program effectiveness.<sup>158</sup> Not one adult educator was reported to have delivered a judicial education program in the period under study.

Once again, there were significant differences between the programs delivered by courts and institutions. The courts showed less diversity in their deliverers, with judicial officers accounting for 36%, non-legal experts 9%, and legal experts 4% (47% were unknown). In the institutions (state and national), judicial officers accounted for 25%, non-legal experts 14%, and legal experts 10% (36% were unknown). There were also differences by court hierarchy. Of the 171 programs delivered directly by state and territory courts, the Supreme Courts were the most diverse, with a plurality of programs delivered by non-legal experts (31%), followed by judicial officers (26%), multiple deliverers (10%), and legal experts (5%). The other courts placed greater reliance on judicial officers, accounting for 65% of deliverers in District/County courts and 38% in Magistrates/Local Courts.

Figure 4: Program Deliverers, 2015/16 to 2017/18 (n=446)



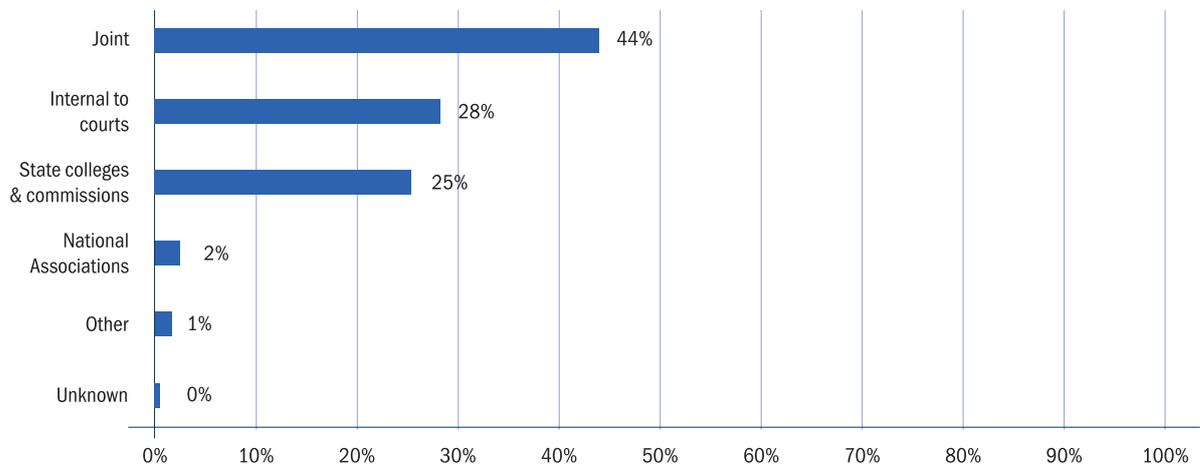
### (v) Providers

The final variable we investigated took an institutional perspective to ask, ‘who are the providers of judicial education programs?’, bearing in mind the limitation of the current study to programs offered specifically to judges and magistrates for the purpose of their educational development. This focusses not on those who present or deliver the programs (as in the preceding section) but instead on the entities that administer them. Aspects of this question have already been addressed above when comparing other variables (subject matter, mode, audience, and deliverers) across different types of service provider. We classified program providers into three substantive categories—internal to the courts; state judicial colleges and commissions (comprising the JCNSW and the JCV); and national associations (comprising the NJCA, JCA, and AIJA)—and added the categories of ‘joint’, ‘other’, and ‘unknown’. The distribution of programs by provider is shown in Figure 5. The largest proportion of programs (44%, n=195) was provided jointly by two or more of the groups just mentioned, followed by internal provision by courts (28%), the state colleges and commissions (25%), and the national associations (2%).

Disaggregating the category of ‘joint’ provision (n=195), 63% (n=123) of joint programs occurred in NSW, 25% (n=48) in Victoria, and 5% each in the national institutions (n=10) and federal courts (n=9). In NSW, joint provision was overwhelmingly between the JCNSW and the courts (115 of 123 joint programs), and in Victoria it was overwhelmingly between the JCV and the courts (40 of 48 joint programs). These arrangements suggest a high degree of co-operation between providers in jurisdictions with state-based colleges or commissions. However, the optimal distribution of programs between alternative providers in other contexts is a matter of debate, raising questions about national uniformity, specialisation, funding, and accountability.

<sup>158</sup> Ibid.

Figure 5: Providers of Programs, 2015/16 to 2017/18 (n=446)



### Conclusions from Empirical Analysis

Four general observations can be drawn from the empirical analysis, within the limits of the data available for this study.

First, a deeper understanding of judicial education practices in Australia would be possible if courts and other bodies published more complete, detailed, and timely reports of judicial education programs within their purview. It would be especially valuable to have further data on the duration, timing, and funding of such programs. Moreover, a common reporting framework would assist in the rigorous analysis of programs and in evaluating the adequacy of the five-day national standard set by the NJCA in 2006. Such a reform addresses the need for accountability and transparency in the judicial role, including around judicial education. In so far as judicial education programming is made more visible to court users and the public, it can foster public confidence in the judiciary by highlighting the investment made in maintaining and enhancing judicial knowledge and skills.

Second, there is arguably a two-tier system of judicial education in Australia, with 75% (n=335) of all programs being provided in just two states (NSW and Victoria), plus the Federal Court. If an absence of reporting indicates an absence of programs, courts in the remaining jurisdictions (which do not yet have the support of locally based judicial colleges or commissions) offer a very limited judicial education curriculum (17%, n=77). This suggests that reliance is being placed on the national associations or cross-jurisdictional attendance to meet their courts' needs, or that those needs are simply not being met. Further reporting on judicial participation in the activities of national associations would illuminate this issue – for now, we suggest that this is the most likely explanation of what is occurring across these other jurisdictions. This is consistent with our earlier empirical survey of Australian judges and magistrates, which reported disparate availability of judicial education programs by jurisdiction, with states having a judicial college or commission being in an advantageous position.<sup>159</sup>

Third, the provision of judicial education varies between levels of the court hierarchy, with lower and intermediate courts having a larger number of programs, with different content, than those further up the hierarchy. The observed rejection of a 'one size fits all' approach appears eminently sensible and is consistent with the literature suggesting that judicial education should be relevant and tailored to the needs of the learner.

Finally, there are notable differences between the programs offered through the judicial education institutions (NCJA, JCA, AIJA, JCNSW, JCV) and the courts. In the institutional offerings, this can be seen in *subject matter* (greater coverage of social context and curial skills), *mode* (more residential programs), *audience* (more on appointment programs), and *deliverers* (slightly greater diversity).

<sup>159</sup> Ibid 333-337.

## Part VII

# Conclusion and Recommendations

The objective of this Report was to provide an overview of the contemporary provision of judicial education in Australia. The justifications for judicial education claim that it can contribute to the quality of judicial work and also to public confidence in the judicial system.

This Report draws on the annual reports of courts and judicial education bodies to provide foundational information as to the provision of judicial education, against which to consider whether such claims are being fully realised. Broadly, the results prompt further inquiries into the need for greater transparency about judicial education programs, the value and possibility of a more synthesised approach to judicial education across the Australian federation, and whether there needs to be greater breadth in the identification of topics as part of overall curriculum design, with the needs of disparate audiences firmly in mind.

More specifically, the assessment and understanding of the current state of judicial education is hampered by the limited publicly available data. While there are considerable (though likely not comprehensive) data available, there is no agreed standard or format for reporting. Similarly, no taxonomy has been adopted that could enhance understanding of what is being offered and to whom it is targeted. This impedes assessment, comparability of offerings and any moves towards a more cooperative approach between providers.

**Recommendation One: Courts and judicial education bodies should adopt a standard taxonomy and format for the transparent reporting of judicial education offerings in their respective annual reports. Optimally, an agreed body, such as the AIJA, might assume the responsibility of collecting and disseminating that annual information in a consolidated form.**

Our findings reveal that the ‘patchiness’ reported to the Australian Law Reform Commission in 1999 remains an apt description.<sup>160</sup> This is particularly the case in two areas. First, while there is clear recognition in current offerings of the need for on-appointment education, there seems to be limited education aligned to the various stages of the judicial career. There is no recognition of the potential of pre-appointment education, as has been developed in the United Kingdom in conjunction with reform generally of judicial appointments in that jurisdiction. But nor is there much recognition of specialised mid-career and later career focussed education. This may flow from the fact that judicial education is predominantly a state and jurisdiction-based activity. As such, offering education that serves judicial officers within a jurisdiction across all stages of their careers may seem to be an efficient use of resources. At the same time, the limited adoption of stage-aligned education seems to miss an opportunity to provide timely education for particular cohorts gathered cross-jurisdictionally.

**Recommendation Two: Judicial education providers should continue offerings that align to the judicial lifecycle and extend this beyond the orientation period, so that judicial officers have available a range of programs tailored to different stages of their careers.**

Second, there is a large difference in opportunity for judicial officers to engage with education in NSW and Victoria, where more institutionalised resourcing has been dedicated to judicial education, when compared with the rest of the federation. It seems unlikely, and possibly unnecessary, to hope that ‘laboratory federalism’, which has seen the development of judicial education institutions in these jurisdictions, will usher in the creation of equivalent bodies in states and territories that do not presently have them. This is because the support from governments for the NJCA is designed to address the need for judicial officers to access professional development, while avoiding the cost and impracticality of providing these directly through a commission or college in smaller states and territories.

Further, to talk only of the different opportunities that are available across different states and territories is likely to miss a critical spatial issue in a country the size of Australia. Judicial officers outside the capital cities are likely to have had more limited opportunities to access judicial education – both because of what is available locally for them to attend with convenience and the cost in terms of time and funds that must be met for them to travel to events conducted elsewhere. The experience of judicial officers regarding judicial education thus mirrors the experience of the individuals who appear before them, for whom location in regional, rural, or remote Australia is a critical determinant of access to justice.<sup>161</sup> Online offerings hold the potential to radically alter this state of

<sup>160</sup> Australian Law Reform Commission, above n 80, para 3.77.

<sup>161</sup> Law Council of Australia, *The Justice Project: Final Report* (Law Council of Australia, 2018).

affairs and we are now at a critical juncture in this regard given the significant skills development initiated by the COVID-19 pandemic. Judicial enthusiasm for online learning has previously been muted, with many preferring to experience the social and collegial benefits of programs delivered face to face. That is understandable for the many judges concentrated in capital cities for whom the choice is a real one. But for those working in the regions, the preferences of their urban colleagues may have limited the use of technology to overcome the significant barriers posed by distance. It will be interesting to see the extent to which that disadvantage is overcome in future by a greater appetite for online learning.

**Recommendation Three: Further research should be funded and undertaken on ways to address the judicial education needs of judicial officers working in smaller jurisdictions or regional settings, where access to judicial education programs may be limited.**

The highlighting of unevenness in the delivery of judicial education across Australia does not answer other questions that are more directly connected to the justifications for its existence. Are there different implications for enhancing judicial performance, which flow from the varying availability of judicial education across jurisdictions? What are the levels and diversity of judicial participation in different education programs? What might the answer to that question tell us, in turn, about the quality of the programs being offered and whether they are proving effective in meeting their objectives? Where educational offerings are limited or perceived as lacking in other ways, are judicial officers engaging in self-directed learning or collegial conversations to bridge the gap? Further research is required to answer these questions.

**Recommendation Four: Further research should be funded and undertaken to better understand the content and quality of judicial education offerings, the level of participation in those offerings, and whether those offerings are perceived to be meeting the needs of judicial officers, courts, and the publics they serve.**

Our findings also reveal an ongoing conservatism in the design and provision of judicial education in Australia that may reflect the barriers to its introduction, and, in particular, the continuing prevalence of concerns about institutional independence. This is reflected in the focus on the delivery of substantive law-based programs and the corresponding reliance on judges as educators, as well as 'on-appointment' education rather than mid- to later career programs; and the continuing voluntary nature of judicial education. There appears to be some appetite for shift in some of these areas, but adherence to the conventional position in relation to others. The extent to which further movement can be made – for instance in relation to the expansion of the topics and periods of the focus of judicial education, and the use of non-judicial educators – is worth further exploration by the judiciary.

Finally, since its institutionalisation in the late 1980s, Australia has seen a relative explosion in external judicial education providers, and an uptake of internal programs. Yet to gaze upon the 'judicial education landscape' in 2021 is to take in an environment where resourcing remains contentious; where there is overlap of offerings in some areas, with others possibly under-serviced. In 2009, former Chief Justice Robert French acknowledged the relevant challenge and the imbalance of multiple actors in the provision of judicial education. With his keen sensibility for the possibilities of federalism, French was unsurprised by this complexity, but did not suggest that it be simply accepted as the way things must be:

It is in a sense regrettable that in a country with a population of just over 21 million people and a relatively small body of judicial officers who form part of a national integrated judicial system, there is a diversity of bodies delivering judicial education programs. However, this is an aspect of a larger phenomenon of institutional diversity with which Australians are well familiar. It is an incident, although not a necessary incident, of federation. Accepting that reality, there is a need for the coordination of the provision of judicial education in Australia so that the best use can be made of available financial and human resources and they can be targeted to the areas of greatest need.<sup>162</sup>

The prospect of a more streamlined, co-ordinated approach – which remains sensitive to the ever-present need for some localised curriculum adapted to the court level and jurisdiction – beckons.

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<sup>162</sup> French, above n 11, 9.

## Acknowledgments

The authors gratefully acknowledge the research assistance of Mr Trent Ford and Ms Anne Yang in the preparation of this Report. We also express our appreciation to the many judicial officers and staff at judicial education providers who have met with and spoken to us on this topic over several years. Those conversations have been invaluable.

We thank Justice Murray Aldridge, Justice Judy Hughes and Justice Susan Kenny for their comments and suggestions on this project in their capacity as the members of the Advisory Council appointed by the AIJA to guide our work.

The authors alone are responsible for any errors and views expressed in this Report.

Lastly, we thank the AIJA for the funding which has supported, and so made possible, this research.