

EVALUATING JUDICIAL PERFORMANCE FOR CASELOAD ALLOCATION

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Since 2000, the Magistrates Research Project and the Judicial Research Project of Flinders University, led by Sharyn Roach Anleu and Kathy Mack, have undertaken extensive empirical research into many aspects of the Australian judiciary. The research has used interviews, surveys and observation studies to investigate the attitudes of magistrates and judges towards their work, their experiences of their everyday work and how matters are handled in court.[§] The Magistrates Research Project was funded initially by a University–Industry Research Collaborative Grant in 2001 with Flinders University and the Association of Australian Magistrates (‘AAM’) as the partners, and received financial support from the Australasian Institute of Judicial Administration (‘AIJA’). From 2002 until 2005, it was funded by an Australian Research Council (‘ARC’) Linkage Project Grant with AAM and all Chief Magistrates and their courts as industry partners and with support from Flinders University as the host institution. From 2006, the Judicial Research Project has been funded by an ARC Discovery Grant. The Workload Allocation Study has been funded by an ARC Linkage Project Grant 2006–2009 with the Magistrates’ Courts of Victoria, South Australia and the Northern Territory as well as the AIJA as collaborating organisations. From 2010, additional funding has been supplied by ARC. All phases of these research projects involving human subjects have been approved by the Social and Behavioural Research Ethics Committee of Flinders University. We are grateful to Russell Brewer, Carolyn Corkindale, Colleen deLaine, Elizabeth Edwards, Katrina Hartman, Ruth Harris, Julie Henderson, John Horrocks, Lilian Jacobs, Leigh Kennedy, Lisa Kennedy, Mary McKenna, Rose Polkinghorne, Wendy Reimens, Mavis Sansom, Chia-Lung Tai, Jordan Tutton, Carla Welsh, Rae Wood, and David Wootton for research and administrative assistance in connection with this project.

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§ See details at <http://www.flinders.edu.au/law/judicialresearch>.

ABSTRACT

This article examines the principles and processes governing the allocation of work to judicial officers in Australian courts. It investigates the extent to which implicit evaluation of judicial performance occurs as part of the workload allocation process. This allocation is influenced primarily by the need to dispose of the court's business efficiently as well as by a desire to provide a fair distribution of work. Although Australian courts traditionally value generalist judges who can deal with all types of cases that come before them, efficiency (and fairness) may require recognising and utilising particular knowledge and skills of each judicial officer. As a result, assessments of the performance of individual judicial officers necessarily form part of the allocation process. These assessments are often made by senior judicial officers or experienced court staff responsible for the caseload allocation process. They are generally made informally, relying on secondary sources of information, but may also be informed by direct knowledge of the judicial officer's experiences or preferences in relation to type or amount of work. While important for the flexibility of court operations, these informal evaluations can lead to some inefficiencies and unfairness.

I INTRODUCTION

Most discussion of judicial performance evaluation occurs in the context of official evaluation programs conducted by the court itself, and/or in association with judicial education bodies, or the local legal profession, primarily in the United States and in Europe.¹ These programs have a range of purposes including improving the performance of individual judicial officers and the judiciary as a whole, informing judicial retention processes (especially elections), contributing to professional development programs and enabling assignment of judges to appropriate roles within their courts.²

- 1 David C Brody, 'The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust' (2008) 86 *Denver University Law Review* 115; Stephen Colbran, 'A Comparative Analysis of Judicial Performance Evaluation Programmes' (2006) 4 *Journal of Commonwealth Law and Legal Education* 35; Francesco Contini and Richard Mohr, *Judicial Evaluation: Traditions, Innovations and Proposals for Measuring the Quality of Court Performance* (VDM Publishing, 2008); Rebecca Kourlis, 'Judicial Performance Evaluation' (2010) 56 *Wayne Law Review* 765; Rebecca Love Kourlis and Jordan M Singer, 'Using Judicial Performance Evaluations to Promote Judicial Accountability' (2007) 90 *Judicature* 200; Sharyn Roach Anleu and Kathy Mack, 'Judicial Performance and Experiences of Judicial Work: Findings from Socio-Legal Research' (2014) *Oñati Socio-Legal Series* 1015.
- 2 Jennifer K Elek, David B Rottman and Brian L Cutler, 'Judicial Performance Evaluation in the States: A Re-examination' (2014) 98 *Judicature* 12.

In Australian courts,³ explicit or formal judicial evaluation for any purpose is rare, and academic or professional discussion is limited.⁴ Individual judicial performance is a matter for professional development or internal court governance, and is limited by constitutional guarantees of judicial independence.⁵ There has been some limited peer review of judicial performance in Australia, either independently organised among groups of judicial officers,⁶ or through structured 360 degree feedback programs run in association with judicial education bodies.⁷ These programs are voluntary and focussed primarily on individual professional development and judicial self-improvement.⁸

In contrast to these structured programs, this article explores the evaluation of judicial performance that occurs in a less formal way, as part of the caseload allocation process in Australian courts. Drawing on an extensive body of original empirical research, it outlines ways that the need for efficient disposition of caseload drives the allocation process. Identifying judicial officers who can dispose of caseload in a timely fashion, or who have particular knowledge and skills that can assist in achieving efficient case resolution, is a key component of the caseload allocation process. Fairness in allocating work to the judiciary is also an important goal, which may complement, or create tension with, the need for efficiency.

- 3 Each Australian state and territory has a first instance lower court usually called a magistrates court (except in New South Wales where it is called the Local Court) and a supreme court, which hears appeals and the most serious criminal and civil matters. The five most populous states have an intermediate trial court (named the district or county court), which hears criminal jury trials and civil matters usually without juries. Unlike the lay magistrates of England and Wales, Australian magistrates are paid judicial officers, nearly always full time, with legal qualifications, and appointed until a fixed retirement age: Sharyn Roach Anleu and Kathy Mack, 'The Professionalization of Australian Magistrates: Autonomy, Credentials and Prestige' (2008) 44 *Journal of Sociology* 185. For more detail regarding Australian courts and the judiciary see H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012); James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004).
- 4 Stephen Colbran, 'Judicial Performance Evaluation: Accountability Without Compliance' (2002) 76 *Australian Law Journal* 235; Garry Hiskey, 'Mutual Observation, Reflection and Discussion and Professional Development for Magistrates' (2002) 12 *Journal of Judicial Administration* 39; G F Hiskey, 'Mutual Observation, Reflection and Discussion and Professional Development for Magistrates: Further Developments' (2005) 15 *Journal of Judicial Administration* 107; Kathy Mack and Sharyn Roach Anleu, 'The Administrative Authority of Chief Judicial Officers in Australia' (2004) 8(1) *Newcastle Law Review* 1; Chief Justice Marilyn Warren, 'Enhancing our Self-perception: 360-degree Feedback for Judicial Officers' (2011) 21 *Journal of Judicial Administration* 3.
- 5 Hiskey, 'Mutual Observation, Reflection and Discussion and Professional Development for Magistrates' above n 4; H P Lee, 'Appointment, Discipline and Removal of Judges in Australia' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 27; Mack and Roach Anleu, 'The Administrative Authority of Chief Judicial Officers in Australia', above n 4; Warren, above n 4.
- 6 Hiskey 'Mutual Observation, Reflection and Discussion and Professional Development for Magistrates', above n 4; Hiskey, 'Mutual Observation, Reflection and Discussion and Professional Development for Magistrates: Further Developments', above n 4.
- 7 Warren, above n 4.
- 8 Chief Justice Diana Bryant, 'Court Excellence and the Perfect Storm' (Speech delivered at the International Association for Court Administration 7th International Conference, Sydney, 24–26 September 2014); Law Reform Commission of Western Australia, *Complaints Against Judiciary*, Project No 102 (2012).

Evaluation of judicial performance, then, is an inevitable and integral part of the allocation process. However, this evaluation is driven by the practical needs of work allocation, as distinct from judicial performance evaluation programs intended to provide feedback for judicial professional development or to generate an improvement in judicial performance.

This article will first identify those aspects of judicial performance regarded as important to work allocation and second, analyse how those making the allocations determine whether judicial officers manifest the performance or qualities needed. The findings suggest that these assessments may serve the immediate practical needs of caseload allocation reasonably well. However, they are often implicit rather than explicit. They are made through processes and by applying criteria that are not systematically developed, articulated and applied, and are not generally known, even to the judicial officers involved. As a result of the lack of openly available information, important goals of more structured forms of judicial evaluation, most notably judicial self-improvement, are not met. Other important considerations for court administration, such as developing a wider range of expertise within the judiciary and having a more flexible judicial workforce, may also be undermined by evaluations that are implicit and not effectively or appropriately communicated.

The article draws on original empirical data developed nationally over several years through the Magistrates Research Project and Judicial Research Project. This extensive investigation was necessary, as there is ‘very little academic or professional attention ... paid in the Commonwealth to the issue of how cases are allocated to judges’.⁹ The system in England has been described as ‘opaque ... [b]ecause so few people understand in detail how it works’.¹⁰ This article addresses significant gaps in the literature about judicial performance evaluation, especially in Australia, and in relation to judicial workload allocation.

II RESEARCH METHOD AND DATA SOURCES

The aim of this study is to understand the institutional requirements and practical tasks involved in allocating cases to courts and judicial officers. Extensive initial consultations were undertaken in 2007 to identify key issues relevant to workload

9 Petra Butler, ‘The Assignment of Cases to Judges’ (2003) 1 *New Zealand Journal of Public and International Law* 83, 84.

10 Kate Malleon, ‘Safeguarding Judicial Impartiality’ (2002) 22 *Legal Studies* 53, 68. Earlier research by Lovegrove appears to have escaped the attention of the few subsequent writers on this issue: Austin Lovegrove, ‘The Listing of Criminal Cases in the Crown Court as an Administrative Discretion’ [1984] *Criminal Law Review* 738; Butler, above n 9; Enid Campbell, ‘Suspension of Judges from Office’ (1999) 18 *Australian Bar Review* 63; Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (Australasian Institute of Judicial Administration, 2012). As with judicial performance evaluation, there is considerably more attention to case allocation in the USA and in Europe: see, eg, Victor E Flango and Brian J Ostrom, ‘Assessing the Need for Judges and Court Support Staff’ (Research Report No R-182, National Center for State Courts, 1996); Philip M Langbroek and Marco Fabri (eds), *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries* (Intersentia, 2007).

allocation, and to identify individual judicial officers and court staff with responsibility for workload allocation, in a variety of court sizes and locations. Building on these consultations, in-depth interviews with court staff and judicial officers involved in workload allocation were undertaken in four magistrates courts, two intermediate courts and three higher courts, in five Australian jurisdictions in 2008, 2009 and 2012.¹¹ These included courts of varying sizes, in terms of numbers of judicial officers, with CBD, suburban and remote/regional courts. Including the pilot interview, a total of 22 interviews involving 26 interviewees are included in the data.¹² These courts and interviewees were selected to enable in-depth investigation and comparison of key issues across different jurisdictions throughout Australia, rather than quantitative statistical representation.

To identify practices and attitudes across the courts, interviews were structured around key issues relevant to allocation. Interview questions covered background information about the court context, the process and method of workload allocation, and principles, values or goals informing workload allocation. Interview questions were open-ended, allowing interviewees to discuss a full range of issues from their own perspective and in their own words, based on their experience and knowledge.¹³

All interviews were audio-recorded and fully transcribed by Project staff to ensure confidentiality. Transcripts were read several times to identify emerging themes, sub-themes and patterns and to disentangle differences between courts in their approaches to workload allocation.¹⁴

Following preparation of a draft report, further consultations were undertaken in 2010, and a summary of the draft report was distributed to all magistrates in three courts, as part of presentation and response sessions. These occasions enabled important feedback on the draft findings.

Before examining judicial performance evaluation as a component of caseload allocation, it is helpful to briefly describe the process of caseload allocation as

- 11 Participation by courts and individuals was voluntary. All stages of the research were approved by the Social and Behavioural Research Ethics Committee of Flinders University.
- 12 Each interview was conducted by two of the authors, usually Anne Wallace and Sharyn Roach Anleu. Five were conducted by Anne Wallace and Kathy Mack, and three were conducted by Sharyn Roach Anleu and Kathy Mack.
- 13 In addition to the interview data, other information about work allocation practices and processes was obtained from telephone conversations, meetings and written material provided by the courts, including rosters and statistical data on caseloads and cases processed. For more detail about the interviews and data analysis, see Mack, Wallace and Roach Anleu, *Judicial Workload*, above n 10.
- 14 Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage, 2nd ed, 1998).

it occurs in Australian courts,¹⁵ and to outline the roles played by both judicial officers¹⁶ and court staff.

III THE CASELOAD ALLOCATION PROCESS

The usual method of allocating caseload in most Australian state and territory courts relies on a master calendaring system in which cases are allocated to a particular list,¹⁷ depending on case type and the stage reached in the process from initiation to disposition. Generally, individual judicial officers are separately allocated to a list, rather than being allocated to specific cases from the beginning.¹⁸ For example, on a particular day or week, a judge may be allocated to the criminal arraignment list, or to a directions hearings list of civil matters.

Court staff play a significant role in the caseload allocation process.¹⁹ They may allocate cases to particular courtrooms or lists, assign judicial officers to those courtrooms or lists and, in some circumstances, directly allocate cases to judicial officers.²⁰ While operating broadly under the direction of senior judicial officers with caseload allocation responsibility (in this article referred to as ‘Allocating Judicial Officers’ or ‘AJO’), they are required to exercise considerable skill and judgment in carrying out these processes, and in balancing key principles and values that underlie them.

15 Australia has separate court systems in each state and territory along with a federal court system that operates nationwide. States generally have three levels of courts, ranging from high volume first instance courts of general jurisdiction (generally referred to as magistrates courts), to intermediate trial courts that deal with more serious cases. Supreme courts function as the court of appeal from both lower levels of the hierarchy, as well as dealing with the most serious cases. Specialist courts, such as youth courts, also exist in each state and territory. The federal courts have largely specialised jurisdictions, and the High Court is the final court of appeal for the state and federal jurisdictions.

16 A term that includes both judges (in higher and intermediate courts) and magistrates (in local or magistrates courts).

17 The alternative is an individual docket or personal diary system, in which each new matter is allocated directly to an individual judicial officer by a routine, non-discretionary or automatic process. That judicial officer then has responsibility for dealing with the case until it is finalised. Neither the head of jurisdiction, nor court staff, allocate particular cases to individual judicial officers apart from the prescribed system. This system is rarely used in Australian state and territory courts, though is common in federal courts: Mack, Wallace and Roach Anleu, *Judicial Workload*, above n 10, 103–4; Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court’s Individual Docket System* (Law and Justice Foundation of New South Wales, 2002). It will not be discussed in this article, nor will allocation to appeal panels.

18 There are exceptional situations in which cases may be allocated directly to an individual judicial officer at an early stage, such as matters that are especially urgent, raise particular security concerns, or are more complex or lengthy. For more detailed description and discussion of master calendaring system, see Ernest C Friesen, Edward C Gallas and NESTA M Gallas, *Managing the Courts* (Bobbs-Merrill, 1971) 184–7; David C Steelman, John A Goerdts and James E McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (National Center for State Courts, 3rd ed, 2004).

19 Anne Wallace, Kathy Mack and Sharyn Roach Anleu, ‘Work Allocation in Australian Courts: Court Staff and the Judiciary’ (2014) 36 *Sydney Law Review* 669.

20 Ibid 676–8, 687–91.

Court staff participate in, and often initiate, consultations in relation to caseload allocation, both with the individual judicial officers concerned and with AJOs. In some courts, it will be the AJO or head of jurisdiction who allocates individual judicial officers to particular lists or case types. In other courts, the court officer with caseload allocation responsibilities (in this article referred to as the 'Allocating Court Officer' or 'ACO') will be responsible for selecting the judicial officer for the particular lists from a pool of available judges or magistrates provided by the AJO.

The data suggests that, in carrying out their caseload allocations, both ACOs and AJOs make frequent assessments of the performance of individual judicial officers. Knowledge or information drawn from these assessments is used very frequently (daily or even several times a day) as circumstances demand allocation decisions to be made. The need for these evaluations derives principally from the pressure to dispose of the court's business efficiently, comprising a range of aspects of judicial performance, as discussed in more detail below. Another important factor in the allocation process is the need to ensure a fair distribution of workload, and this also requires assessment of judicial performance.²¹

IV ALLOCATING FOR EFFICIENCY

This research finds that judicial officers and court staff with responsibility for caseload allocation regularly make judgements about the capacities of the judicial officers to whom they allocate caseload. Efficiency is a key consideration, especially for court staff, though it is generally conceived of as encompassing different aspects of performance including timeliness,²² especially the capacities to get through the list on the day and to resolve matters, as well as the application of specialist knowledge and skills.

A Timeliness

A key consideration for court staff involved in the allocation process is to enable cases to be listed, heard and finalised in a timely fashion. Minimising delay in all phases of case processing is particularly important for the parties in a case, such as defendants in criminal cases who may be waiting in custody, civil litigants, victims of crime or witnesses. Statutory time limits may apply to pre-

21 Some writers have identified these assessments, whether made by judicial officers or court staff, as a form of administrative discretion: Campbell, above n 10; Lovegrove, above n 10. Nonetheless, as Campbell comments: '[s]ome leeway for exercise of managerial discretion in assignment of cases among the judges of a court must be allowed': at 78.

22 Australian Centre for Justice Innovation, 'The Timeliness Project: Background Report' (Background Report, Monash University, October 2013) <<http://www.law.monash.edu.au/centres/acji/projects/timeliness/timeliness-report-acji-monash-may13-2014.pdf>>.

trial detention or require certain types of cases to be dealt with in specific time periods.²³

A concern for timeliness is also driven, in part, by workload measures established as part of institutional accountability requirements, whether imposed by the court itself or by a department of the executive government that resources the court.²⁴ The following comments illustrate these concerns, primarily in relation to finalising cases, the first from an ACO and the second from an AJO:²⁵

We've got very particular statistics — every case that is initiated and dealt with and finalised, it's all kept; statistics are kept in town and they're presented to us very regularly. I can have access to the statistics at any time I want through ... a part of our email system's got a bulletin board they call it that has all the statistics on it, so at any given time I can find out how many cases we've done this month, this financial year, I can compare it to other courts, and at the end of every month, explain why. I have to provide a report on how many cases we've done for that month and it's always compared to what the state average is and if I fall behind the state average I have to. ... There's targets that we have to meet, for example, 85% of cases should be dealt with within six months so if I'm falling behind that target I have to explain why. So, all my listing decisions are made with the targets in the back of my mind, knowing that I have to meet those. (W18, ACO)

[T]he court staff are 'stat' driven. They need the stats up, they want the work pushed through. ... We dispose of the cases which is the end result, what the [government department is] looking for, and the CEO of the court is looking for, for disposal numbers. (W20, AJO)

The second quote hints at the way the pressure experienced by court staff to meet these statistical performance targets can create demands on judicial officers. These expectations can be experienced as inconsistent or in conflict with the need to have sufficient time to deal fairly and effectively with the cases brought before the court.²⁶ Tensions around timeliness involve demands of long case lists each

23 For example, legislation in all Australian states and territories requires that unless a person who is arrested and charged with an offence is bailed by police, they must be brought before a court within 24 hours after being taken into custody: *Bail Act 1977*(Vic) s 4(1)(a); *Bail Act 1980* (Qld) s 7(2)(b), or as soon as reasonably practicable after being charged: *Bail Act 2013* (NSW) s 46(1); *Bail Act 1982* (WA) s 6(4); *Criminal Law (Detention and Interrogation Act) 1995* (Tas) s 4(1); *Police Administration Act* (NT) s 137(1), or as soon as reasonably practicable but, in any event, not later than 4 pm on the next working day following the day of arrest: *Bail Act 1985* (SA) s 13(3), or as soon as practicable after the person has been taken into custody and, in any case, within 48 hours after having been taken into custody: *Bail Act 1992* (ACT) s 17.

24 For a more detailed discussion see Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Report on Government Services: Courts* (2015) 7.1; Mack, Wallace and Roach Anleu, *Judicial Workload*, above n 10, ch 9.

25 The W number designation is a code to indicate which interviewee is being quoted. Where direct quotations are used, they are verbatim, except where identifying information has been deleted. Some quotes have been shortened so that the excerpt used focuses on the specific point being made. This is indicated by square brackets or ellipses. As these were oral interviews, the verbatim quote may contain some infelicities of language; these have not been corrected.

26 Kathy Mack and Sharyn Roach Anleu, "'Getting Through the List": Judgecraft and Legitimacy in the Lower Courts' (2007) 16 *Social and Legal Studies* 341.

day, creating pressure to get through all cases listed rapidly on the day, as well as expectations that listed cases will be finalised promptly.

B Getting through the List

A range of factors within and outside the courts can increase the volume of cases in a court on any given day, and the resulting time pressures to hear those matters on the day set. Internal factors may include the unavailability of one or more judicial officers, perhaps due to other cases running longer than anticipated. External factors may include new legislation or different policing practices. The following quote from a court official illustrates this:

We certainly have had a lot of problems in [court location] where court was finishing, you know, at 6:30, 7 o'clock, every night of the week. We, it's just not good for, like the core hours of the court would be something like 9:00 'til 4:30 or 9:00 'til 5:00, so if you've got magistrates that are working longer hours than what they should be and on a consistent basis, that's when you know you've got some problems. (W3)

Interviewees in several jurisdictions report that their courts had established guidelines to limit the number of matters that can be listed on an individual day in particular types of lists. In practice, it appeared that the demands of the work mean that they are often exceeded.

All the registries — there is a practice direction ... [number] matters. So there is much emphasis on maintaining that [number] per list. (W7, ACO)

We are supposed to only have [number] matters the most in each court ... in the general courts. There are days we go over but if that does go over we have to explain why. (W11, ACO)

Given these pressures on listing and completing cases allocated on the day scheduled, the capacity of a judicial officer to manage a large number of listed cases is highly valued. This is particularly the case in the high volume lists in magistrates courts as this AJO explains:

Now I know, for example, that it'll be a reasonable mention list because [name], [is] reasonably quick and thorough ... (W20, AJO)

So if you get a big list of 100 or 90 or 80 you're simply not going to put that person [slower magistrate] in that list because to do so would be detrimental to him, or her, and ultimately to the delivery of the service, the justice service, to serve the people that are appearing before the court. (W20, AJO)

Judicial officers with a capacity for quickly working through a list of cases are deployed to manage particular stages of the workload in higher courts, such as managing pre-trial matters in particular lists, as the following quotation from an AJO in a higher court illustrates:

Oh well the list, yes, the list judges are judges who have a talent for moving large amounts of work quickly, efficiently and getting things done and so the ponderous judge is not the judge that — the list judges that we have here are all, can I say this, they're guns. They can actually move, we sit them at 9 o'clock in the morning, they sit until 10 o'clock and they are hard at it. They do 30 cases in an hour, that are in the list system, and then they will be the reserve list judge as well so then at 10:30am they then pick up the reserves, which as I say can be anything up to 6 or 7 trials, 4 pleas and say 5 or 6 appeals and they will again churn those in an effort to try and see if they can be sorted out. (W21(a), AJO)²⁷

The same AJO also indicates that a judicial officer with similar skills might be used strategically to deal with backlogs, though such deliberate selection is unusual:

We try and send super-efficient judges on circuit where we've got serious backlogs. So that's the only time where we'll consciously think "no not this one, but rather that one". (W21(a), AJO)

C Promoting Case Resolution

Although timeliness can be equated with speed in getting through a long case list on the day, both AJOs and ACOs recognise the limitations of speed alone as a criterion to be applied in matching judicial officers to particular tasks. Speed in getting through a list may not always be conducive to achieving the most efficient outcome in terms of generating finalisations, as the following remark from an AJO suggests:

It's clear that there are some [judicial officers] that might take a different view and could go into a list and quickly go through that list, but that doesn't mean that they have necessarily tried to resolve matters that really could have been resolved. (W7, AJO)

The next comment also indicates the importance of those allocating work having an awareness of the attitudes of legal practitioners, and how they are likely to respond to the approaches of the judicial officers in that court:

I've got a particular magistrate who's very, very quick but none of the barristers like appearing before him because he's so strict and, if I put them before him, they will move heaven and earth to think of a reason to adjourn their case to avoid being in front of him, and so I've gained nothing by putting my huge big list in front of [name], because so much of it's been adjourned, ... I don't think there's a point in me putting a case before a certain magistrate where it's going to be an adjournment application that he'll grant because that means I'm not meeting my ... target, so I'd think

27 This quote is from a group interview involving four interviewees. Accordingly, quotes from this interview are designated as W21(a)-(d), to indicate specific individual interviewees.

very carefully before I'd put a magistrate in that situation for my sake ... (W18, ACO)

A more interventionist judicial officer might be deployed in a particular list to encourage resolution of contested matters:

For example, why I was asked to do the special contest mention today was that potentially there's a two-day contest that will ride on its resolution you see, and from that perspective if it resolves and I'm more likely to be a bit more interventionist, and push people to talk about issues. (W20, AJO)

We set just basically new matters in court [x], if they can't resolve you've got the [conference] in six weeks, well in theory that's great. Works wonders. But in reality that just doesn't work because people want adjournments for different reasons, and things like that. And we've got a magistrate, like Mr ... [name], who will work through those and he'll get a lot of pleas out. He's fantastic in ... resolving a lot of matters, yes. He'll bring matters forward — he uses his own initiative. (W11, ACO)

Deploying a judicial officer who is perceived as having a more lenient attitude towards sentencing might also achieve early resolutions:²⁸

From my point of view as a manager, how do you mix your tough magistrates and lenient magistrates — because if I chuck the lenient magistrates into [type of] conference lists there is a high chance the stuff will settle because strategic lawyers will say 'well, ... if we take our chances on a trial and never know who we'll get' — if they think they are likely to be found guilty, they'll take the plea before the soft one. (PW, AJO)²⁹

Even on the day of trial, a judicial officer who is regarded as lenient can be effective in generating a swifter outcome:

The magistrate who's slow, the barristers love appearing before [name] because he's lenient, so it's more tempting to put my cases in front of him, so there's lots of things to take into account ... I know if I put a contest in front of him the barristers might think 'oh, well, he's so lenient, we'll plead guilty and get it over with that way' and that frees up that magistrate for the rest of the day, so I have to think about those things as well and be a bit strategic about what I do with those magistrates. (W18, ACO)

In these circumstances, achieving a timesaving outcome will depend on the perceptions of legal practitioners about the strength of their client's case and about the sentencing proclivities of the judicial officer. This requires considerable local

28 There was no suggestion, in any of our interviews or observations, that a specific case or class of cases were allocated to a judicial officer in order to achieve a particular substantive outcome for a particular defendant or class of defendants. This contrasts with the findings of Lovegrove, whose research in the English Crown Court disclosed a pattern of case allocation to ensure 'that the outcome of the case will accord with the view of a just outcome held by the person responsible for the listing decision' including to 'ensure the maximum likelihood of conviction for defendants with serious criminal records': Lovegrove, above n 10, 742.

29 PW refers to a quotation from the pilot interview.

knowledge on the part of legal practitioners and those doing the work allocation within the court.

V SPECIALIST KNOWLEDGE AND SKILLS

Until recently Australian courts have tended to conceive of judicial officers as generalists, who have the capacity to deal with any type of caseload that comes before their court.³⁰ This approach is consistent with the principles of judicial impartiality and neutral caseload allocation,³¹ which should underpin all legitimate systems of judicial work allocation, and are based on the assumption that the identity of the individual judicial officer is immaterial to the outcome of the case. It also ensures that those responsible for the court's administration have a flexible judicial workforce that can be deployed to meet varying levels of demand for different case types, as well as providing judicial officers with a variety in their work, which they may value.³² This goal is explained by an ACO who is concerned to ensure that judicial officers who specialise do not lose or diminish their capacity to undertake all types of caseload dealt with by the court:

You've also got to remember that they, too, have to eventually go through the other courts too, and they won't want to be sitting in the general court all the time, they need a bit of variety also. (W11, ACO)

A trend to specialisation in the legal profession and specialisation in case types in Australian courts has resulted in a move towards increasing the application of specialist judicial knowledge and expertise to the subject matter of the case.³³ Within the general caseload, there are also a variety of tasks and roles performed by judicial officers that may benefit from particular skills and expertise. These include, for example, managing the intake list, managing pre-trial hearings, conducting trials, hearing pleas and sentencing, and appellate work.

Careful selection of a judicial officer to deal with particular case types, or a particular task or role, can impact significantly on the way with which caseload

30 Michael Lavarch, 'Judicial Appointments: Procedure and Criteria' (Discussion Paper, Attorney-General's Department (Cth), September 1993) 5; Law Council of Australia, 'Process of Judicial Appointments' (Policy Statement, 20 September 2008) 3; Mack, Wallace and Roach Anleu, *Judicial Workload*, above n 10, 137–43; Kathy Mack, Sharyn Roach Anleu and Anne Wallace, 'Caseload Allocation and Special Judicial Skills: Finding the "Right Judge"?' (2012) 4(3) *International Journal for Court Administration* 68, 68.

31 Butler, above n 9, 86–7; Lovegrove, above n 10, 747; Mack, Wallace and Roach Anleu, *Judicial Workload*, above n 10, 155–7; Sage, Wright and Morris, above n 17, 58; David C Steelman and James R James, 'Assuring Randomness and Security in the Individual-Calendar Assignment of Cases to Judges in the Cuyahoga County Court (OH) Court of Common Pleas' (Technical Assistance Report, National Center for State Courts, 13 April 1988); Mack, Roach Anleu and Wallace, 'Caseload Allocation and Special Judicial Skills', above n 30, 68. For a fuller discussion of the principle of neutral case allocation in relation to work allocation, see Wallace, Mack and Roach Anleu, 'Work Allocation in Australian Courts', above n 19, 687–9.

32 Butler, above n 9; Langbroek and Fabri, above n 10, 22; Mack, Wallace and Roach Anleu, *Judicial Workload*, above n 10, 155–7, 171–2; Steelman and James, above n 31; Mack, Roach Anleu and Wallace, 'Caseload Allocation and Special Judicial Skills', above n 30, 71.

33 Mack, Roach Anleu and Wallace, 'Caseload Allocation and Special Judicial Skills', above n 30, 69–70.

is dealt. In the quest for efficiency, it is important to match specialist knowledge or expertise to caseload in specialist lists, as the following explanations from two AJOs indicate:

So, whilst I start with this philosophy of everybody being equal and having equal access to the various courts, ... underpinning all of that is if you use your, or deploy your, appropriate resources to the areas where they have an expertise, so you match their skills to the case. ... [Y]ou then look at your specialisation and you match your resources to your caseload, you've always got to do that, because at the end of the day we think that we've got to dispose of the cases. (W17, AJO)

So you create special lists, you create special expertise. ... The specialist lists I'm quite thoughtful about who I put in there. ... I don't put people in there who can't deal sympathetically and sensitively with people who are suffering from mental health issues. The Drug Court — ... [a]gain, there's some people I wouldn't put in there — in a fit. ... I think that family violence should be dealt with in a way that limits the damage to the women, so I don't put people in there who deal with them inappropriately. (PW, AJO)

The examples above also illustrate the ways that specialist knowledge and particular skills or abilities can be closely linked. Certain kinds of courts demand both expertise in the subject matter of the cases as well as the personal qualities to deal effectively with the specific needs or demands of the people who will be appearing in these courts.

Even within generalist lists, deploying specialist knowledge can also be a way to assist the efficient disposition of caseload, as well as improving substantive outcomes:

I do see a case and think 'oh that'd be, you know, Judge X is more suited to that case, his experience is better suited'. (W19, ACO)

If we had two trials going ahead, one to civil and one to criminal, and I've got one magistrate who is a very experienced civil lawyer and one who's a very experienced criminal lawyer, I know how I am going to allocate that — a civil lawyer to do the civil case who knows a lot about civil work, and the criminal lawyer to do the criminal case who knows a lot about crim work. (W7, AJO)

AJOs and ACOs explain the rationale for this approach, in general terms:

I think there are horses for courses — it's nonsense to suggest that every judicial officer is good at every type of work — we know they're not — it's a lie, to say that they are good at all types of work. ... People have particular skills and I try and utilise their skills. (PW, AJO)

So I have the amount of cases [region]-wide that I have to set down and I just have to divide them between the magistrates as best I can, taking into account their particular strengths and weaknesses. (W18, ACO)

If they were good at it [a type of court], you'd try and give it to them fairly regularly because it's in your own interests. ... [N]ormally we would try and list to their strength. (W15, ACO)

Conversely, judicial officers who are perceived as lacking the expertise or skills to deal effectively with certain types of cases or tasks might find themselves deployed elsewhere. The first comment below suggests that recognising potential weaknesses is important for the wellbeing of the judicial officer as well as for those appearing in court.

Some people have particular weaknesses and [I] try and make sure that their weakness are put in a place where they will not hurt people or themselves. (PW, AJO)

The next comment suggests that it is also important for those involved in work allocation to ensure that judicial officers are allocated work in which they are interested:

I have to share work around, but I'll do my best to make sure people sitting in that court are interested in doing that sort of work. ... Then I do my best to make sure that people sitting in that court don't act in a way to cause people to come rushing through my door. So I do try and put people in the court who are compatible with it. (PW, AJO)

Of course, interest in a certain type of work is not necessarily a guarantee of suitability, and the person undertaking the allocation may need to exercise considerable tact,³⁴ as the same interviewee goes on to explain:

Occasionally I get a volunteer for a listing which I know that will come to grief — the court's grief. I normally try and find something else they want to do that clashes with that — and give them that. So they don't get that work — it's not apparent or obvious anyway — that I'm avoiding giving them that work. (PW, AJO)

The care with which this situation is managed by this AJO has important positive outcomes,³⁵ though it may limit the ability of the judicial officer in question to improve and develop the necessary expertise or skills to undertake work that is of particular interest. Similarly, in the examples below, allocating a judicial officer with appropriate expertise to a particular list may improve the quality of the court's work and/or its efficiency, but does not give other judicial officers the opportunity to acquire the abilities needed. In the long term, it will also limit the flexibility of the court to allocate cases to a wider range of judicial officers:

You don't give building disputes to people who don't have any ability to manipulate complex technical information, complicated accounting and all that, because it will just go forever, and they'll never be able to take control at all and at the end of it they'll muck it up because they just didn't understand it — it will get on top of them. (PW, AJO)

34 Wallace, Mack and Roach Anleu, 'Work Allocation in Australian Courts', above n 19, 692.

35 Ibid.

You understand that he might be better in a committal instead of a contest mention or he's a little bit slow for the mention court so you only put him in the mention court when it's not a very big list, so there's a number of different things that you take into account when you're allocating. (W15, ACO)

However, one AJO was sceptical of the extent to which differences in skills and abilities could be factored into workload allocation:

I think in an ideal world, an ideal court, a very good [head of jurisdiction or AJO] can recognise the strengths of their different staff. Some magistrates are very good at putting through large numbers of matters, others don't deal with bulk very well but deal much better with technical legal arguments, others will deal better with, say, unrepresented defendants, whatever; I mean in an ideal situation it would be lovely to be able to you know put certain matters between certain magistrates — match your cases to your magistrates, I suppose, but I don't think it's ever going to happen. To a limited extent I think it happens in here that cases go certain ways depending on the capacity of the magistrate but it's not really an easy one to do. (W5, AJO)

Such concerns may reflect a more limited capacity to factor differential skills and expertise into caseload allocation in smaller courts, as this AJO, and another, explain:

Specialisation is difficult, it can happen to a degree ... but at the end of the day we need to do what the court needs to do to run. ... [S]ometimes the needs of the court are that well if those few magistrates are on leave or are on circuit, then magistrates who perhaps don't usually do [particular type of work] or don't do it as much will need to do it ... (W1, AJO)

If you go to a [regional or country court] what are you going to do, you're stuck with the whole lot. So you've got to be able to do it all. But I think generally with people in town, [they] think, why not leave people in the area that they feel most comfortable with and have the most knowledge of. (W5, AJO)

In courts that have the capacity for more specialised allocation, the value attached to particular skills and expertise may vary according to the nature of the caseload. In higher courts, ability to manage jury trials is highly valued, as an ACO indicates:

There are judges who are better equipped to ... because of their experience, better equipped to deal with juries. So you do try and make sure that they have the jury and not the judge who has never had any experience of juries. I mean you might say, well you've got to get the experience and that is something we do, look at, but, yeah, I mean we've got some very strong judges who have been great with juries as barristers and therefore we will make sure that if there's a jury that judge, if he or she is available, can do it. (W19, ACO)

This comment also recognises the potential risks for future court administration, as well as for the professional development of the judicial officer, in limiting opportunities to those who already possess the necessary qualities.

Implicit evaluation for workload allocation can recognise qualities beyond specialist expertise or skills that promote efficiency. The ability to deal effectively with particular types of litigants is sometimes a factor in allocation, particularly in magistrates courts that have a high percentage of unrepresented litigants.³⁶ Two ACOs advert to this when discussing why a particular judicial officer might be selected:

It might be because it's a difficult litigant in person. I'm often aware of that. (W19, ACO)

Yes, Mr [name]. He ... is ... very good with the clients, he's very thorough, he explains himself extremely well to the clients in court, but saying that he doesn't, go on and on and on — he gets to the point. (W11, ACO)

An AJO agrees:

If you've got a vexatious or a querulous litigant there are some people who you would choose over others, all other things being equal ... and you do every day. (W21(b), AJO)

Attitudes to certain types of litigants might also be a factor in work allocation:

Well, I think it's fairly important if [a judicial officer says] 'look I really have a certain attitude to these women that make [domestic violence] complaints I think they're really doing it for family court reasons and I'm not too sympathetic', well I wouldn't let that person loose on a restraining order application. (W7, AJO)

Yes, for example, [a] magistrate that's known to be very strict, ... we've got Crimes Family Violence that sits four days a week, very vulnerable, mainly women, as you can imagine — I wouldn't let him loose on the women, ... on the Monday, the Monday's the day when all the weekend bashing come in — I wouldn't let him loose on them because he's, he just hasn't got the right attitude. (W18, ACO)

36 Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 *Social and Legal Studies* 405, 406. Although, it should be noted that there is actually little information available about self-represented litigants in Australia: Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented: Litigants: The Dark Side' (2014) 24 *Journal of Judicial Administration* 61, 67–9. See also Rosemary Hunter et al, *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (Law and Justice Foundation of New South Wales, 2002). In Mack, Wallace and Roach Anleu, *Judicial Workload*, above n 10, 24–5, a higher proportion of magistrates reported that their time was taken up explaining things to unrepresented litigants compared to judges. See also Sharyn Roach Anleu and Kathy Mack, 'Performing Authority: Communicating Judicial Decisions in Lower Criminal Courts' (2015) 51 *Journal of Sociology* 1052, 1059, 1063–4, where it was found that magistrates may need to perform their duties differently in the presence of unrepresented litigants.

Efficiency is not conceived of only in terms of rapid case processing. AJOs and ACOs also displayed an awareness of the value of other qualities, such as thoroughness:

I really don't think it's fair to judge a magistrate by how many cases they do on a given day, whether it be on the bench or in chambers, because one could be doing a much more thorough job than the other, so how do you measure that? (W18, ACO)

Just because someone's faster doesn't mean that they're better. From the court's perspective that's what they would want, to use the term 'fast bowlers' because it gets through the work but that doesn't necessarily mean that your delivery of service, of justice, is any better or any worse than the slow person. Some people are more methodical, it's that balance. ... [S]o, if the choice arises where, and the circumstances permit, a person who is more methodical might have less exposure to the busy courts. (W20, AJO)

An ACO also made the point that a particular judicial officer's skills and abilities could impact on other aspects of the way that court workload was managed, such as the degree of support that might be required from court staff:

The [ACO] has also got to be aware of the impact on the registry as well, so say if you have a new magistrate start and all of a sudden you give him a civil list, and the civil jurisdiction can be quite complicated, if they've not done civil before — the impact, you know the [ACO] would sort of think the files that are going to come out might be difficult for court staff to interpret, so we make sure perhaps that we've got experienced people dealing with those files when they come out. (W4, ACO)

By being aware of the relatively limited capacities of this newly appointed judicial officer, and providing the additional support needed, this ACO creates an opportunity for the judicial officer to develop the necessary expertise, while also ensuring that the overall efficiency of the court process is maintained.

VI FAIRNESS — DISTRIBUTING THE COURT'S WORK EQUITABLY

The need to ensure an even distribution of work among the judicial officers in a particular court emerged as another core principle underlying the caseload allocation process. Achieving fairness also requires those allocating work to make comparative evaluations or assessments of judicial performance, as one ACO explains:

If I have a particular magistrate that will do this much work but this magistrate will only do this much work, so how do I divide it up so that it's fair. So that's something that I have to take into account each time that the magistrates that move a lot of work get a bit resentful of magistrates that are slower because they know that they get more work than the slow

magistrate, so you have to take that into account as well and not try and, not take advantage of their work ethic. (W18, ACO)

This ACO recognises that evaluation of some judicial officers as fast or slow, and the resulting allocation can result in perceived unfairness. Judicial officers and court staff with workload allocation responsibilities were concerned to ensure that judicial officers perceive their workloads to be fair in terms of volume and case type, complexity, size (or duration), and the demands of out of court work (such as judgement-writing in higher courts, and travelling for circuit courts). The following explanation from an AJO typifies these concerns:

I think equity of effort is a major concern for judges. I think if you listen to judges talking in the corridors they are conscious of who's doing more and who's doing less particularly if they are under pressure, so if you have a heavy listing regime and the judges are constantly being asked to pick up another one and another one, they often look around to see who's not picking them up and they know more about it [the law list] than I do because they read it every morning to see who's doing what so you do try and have the fire hose move evenly across the lot of them so equity is important for us. (W21(a), AJO)

The comment above identifies a concern that can arise within the judiciary if allocation is regarded as unfair in some respect. Although not expressly stated, it appears that the expectation that judicial officers ought to be willing to pick up additional work arises from the imperative to 'get through the list', that is, to ensure that cases listed for a certain day are actually dealt with by a judicial officer. This potential tension between fairness and efficiency in work allocation is explicitly recognised in the next comment:

you've always got to balance fairness and time out of court against what your targets are. Um, and you've really got to meet your targets, so you need to list as efficiently as you can but as fairly as you can as well. (W15, AJO)

Evaluating relative strengths and preferences of judicial officers and factoring these into allocation can assist with maintaining fairness as well as efficiency. A magistrate with particular expertise in the subject matter of a specialist list, or with skills in managing a large intake list, might be more comfortable with an allocation that included more of that type of caseload, and less likely to complain about not being allocated other types of caseload.

VII ASSESSING PERFORMANCE

While interviewees were candid about the ways that the capacities of individual judicial officers might be factored into the caseload allocation process, the basis for judgments about those abilities was more obscure. None of the courts studied in this research have a formal process for assessing individual judicial performance, whether in terms of knowledge or particular skills and qualities that

might be strategically deployed. In practice, the task of making these assessments is left to the judicial officers and court staff responsible for caseload allocation. In effect, these judicial officers and court staff assume a responsibility for evaluating the performance of judicial officers in their court. In doing so, they draw on a variety of sources of information.

A Sources of Information for Assessing Judicial Performance

Information about the professional background of a judicial appointee will provide an indication of expertise and skills that may be relied on by AJOs and ACOs. This is particularly so when allocating to specialisations. One ACO expresses this, saying:

We generally — when they first start, we generally know if they come from a civil background or a criminal background, so you would try and list to that. (W15, ACO)

An AJO comments:

Sometimes it's easy, we've got key magistrates here who have an industrial background, so they specialise in the industrial division of the court; um, we've got a [worker's compensation], a couple of [worker's compensation] experts so they have specialised in that area. They're choosy. (W17, AJO)

Further information might be obtained via conversations with individual judicial officers about their skills, areas of interest or preference:

I guess it's talking to them [eg the judicial officer/s concerned]. (W15, ACO)

I have discussions with them and ask them what sort of things do they like doing, what do they really not like doing when they first come here. ... [A]nd get a feel for what they like to do. (W18, ACO)

People, magistrates will indicate, you know, where they're comfortable working. (W17, AJO)

Completion of specific training (sometimes required for judicial officers to sit in certain specialist lists and divisions, such as a drug court) can also provide information to those making allocations about likely capacity.³⁷

Quantifiable measures, such as the numbers of cases disposed of, were a frequent source of information for making assessments about judicial performance, as the following quotes illustrate:

Whether people are quick or slow, you'll see it by how much work they get through. If a magistrate is given a list of 65 or 70 mention matters, and will need assistance if by lunchtime there's still 40 there, you know that their

37 Mack, Roach Anleu and Wallace, 'Caseload Allocation and Special Judicial Skills', above n 30, 72–3.

capacity's going to be 20/25 in the morning and 20/25 in the afternoon. (W20, AJO)

I guess it's ... looking at their performance in court, ... [s]ee how quickly they move through their work. ... [T]heir times, their efficiency. (W15, ACO)

None of the jurisdictions that participated in this research had established benchmarks for timeliness of individual judicial performance, whether in terms of getting through the list on the day, frequency of adjournments or rate of disposing of or finalising cases. One ACO commented:

and who's slow and fast, I just know that from working with them, I don't know that from stats because the stats aren't divided up into a particular magistrate. (W18, ACO)

Beyond these kinds of information, the qualities and skills which make a judicial officer suitable or unsuitable for certain types of cases or tasks are assessed primarily through the views of others in and outside the courts, gathered informally. Feedback from members of the legal profession is an important source of information for evaluating the performance of judicial officers within their court, as one AJO explains:

Talking to people and talking to practitioners ... just because you come on the bench it doesn't mean that you then sever all ties with people. And you get a sense of what do people think about your court, you don't necessarily ring you up and say 'Did you like that result?' — you don't, but in conversation I will see them at functions or wherever. ... So it's, it's discussion, it's discussion with people, discussion with clerks, the clerk in the court, will feed the information back to the [ACO], so it's talk. (W20, AJO)

Court staff and judicial officers with workload allocation roles also tend to rely on feedback from other court users and other court staff, as these remarks illustrate:

Lots of feedback ... when you're working in the courts you hear what they have to say about magistrates ... so you basically take it in. (W2, ACO)

Without spying on everyone, and I don't — you just sort of hear — people make comments. I know within the court here I've got a pretty good handle on the practices of the magistrates even though I've never been to see them in court. I really don't know how I know — I don't ask for information — you just pick up comments and remarks. The clerks know. If I wanted to know I could find out — I would just go and ask the clerks. (PW, AJO)

Feedback from clerks and from barristers and things like that. (W15, ACO)

It's a pretty small industry, most people know something about the magistrates and, if you don't, there's plenty of people that will tell you. (W18, ACO)

AJOs might also rely on feedback from other judicial officers as illustrated by the following outline of feedback provided to one AJO by a country judicial officer concerning their temporary replacement:

The [country judicial officer] who [replacement judicial officer] relieved has been on the ‘phone to me saying he’ll probably need another [judicial officer] to go and help him there because there was just an extraordinary amount of cases adjourned. The [replacement judicial officer] has a reputation as, of being a judicial bully. ... [S]o, he was adjourning some cases because he didn’t want to deal with them, or, bit too difficult (inaudible) the legal profession are avoiding him, they’re likely to get adjournments if they’re looking for a therapeutic outcome or to drug and alcohol treatment, or whatever, they would avoid him, and a lot of the local practitioners I suspect bearing in mind his reputation, would simply seek to avoid him because of the perception that they might, their client might get an unduly harsh sentence. (W17, AJO)

Those comments illustrate a tendency to rely only on informal and often passive feedback. In the absence of any formalised process for seeking information on the work of judicial officers, those responsible for workload allocation tend to take account of whatever information makes its way to them, rarely actively or systematically seeking it out.

B Assessment Process

The process by which information about judicial performance is itself evaluated, assessed and incorporated into workload allocation was not defined by any interviewee and sometimes was expressed in terms of instinct or intuition, drawn from experience:

You know, you get a gut feel for it, too, whether they’re going to be good in that court or there’s another area which they would be better in. (W15, ACO)

Those responsible draw on their experience as judicial officers themselves. An AJO comments:

How do I know they’re no good at it? I’ve been doing this job a long time and I know most of my colleagues pretty well — just from socially, conferences. (PW, AJO)

The assessment of judicial performance is also heavily reliant on the memory of those making the assessments, as this quote from an ACO reflects:

And you do remember when you’re here a long time, you do remember who’s done what and who’s good at what and things like that. (W2, ACO)

Another ACO agrees that direct experience is important but feels that the necessary insight can be acquired fairly rapidly:

You just have to work with them for a couple of weeks and you get a real feel, and ... it’s just a matter of watching them for a couple of weeks and you soon get it sorted out ... (W18, ACO)

In some courts, ACOs might rely to a greater extent on the AJO for this information. One comments, when asked whether they had knowledge of individual judicial officers’ strengths and weaknesses:

Not necessarily, no. That's something that is communicated between the [judicial officers] and [AJO] really. (W4, ACO)

In some courts it might be more of a consultative process, as another ACO indicated:

Yes, yes, [AJO] directs me more but I may have you know a couple of suggestions. (W11, ACO)

One AJO summarises:

It's usually ... an informal process. ... As a management group and through the registrars we'll get to know where, what areas they're particularly good at. ... [I]t's generally a matter of observation and then matching the skills and developing the skills of magistrates to the requirements. (W17, AJO)

VIII LIMITS OF IMPLICIT JUDICIAL PERFORMANCE EVALUATION IN WORKLOAD ALLOCATION

Most of the ACOs interviewed in this research had been in that role, or in other roles in the court, for some time. This enables them to have a wide understanding of the demands of different types of judicial work, and to acquire information about judicial performance over a considerable time and from a range of sources. However, some courts experience difficulties in filling these types of positions with experienced staff.³⁸ Performance assessments made by less experienced staff might be more problematic. Staff whose own roles were insecure might perhaps be inclined to give greater regard to the timeliness imperative, at the expense of other considerations. Newer staff appointees could also be at a disadvantage where they lack assumed local knowledge, as one ACO explained:

Well, there probably should be a more formal process but I think the assumption has generally been because people know because it's a small profession. The difficulty for me is that I come from interstate ... so I don't know, I didn't know the profession here, particularly the profession — I didn't know the [judicial officers] in the [particular court]. So I've just gathered it over time. And so that's why I say I think in some ways a more explicit statement of people's expertise would have been of assistance. (W13, ACO)

Another important feature of this implicit evaluation process is that the judicial officers who are the subject of these assessments are generally not consulted or involved in the evaluations made of their performance. Assessments of performance that take place as part of the allocation process follow no explicitly set process and are not recorded. Chief Judicial Officers or AJOs hold discussions with judicial officers about their skills and preferred areas of work, and AJOs would be prepared to explain allocation decisions to individual judicial officers who questioned them. Beyond this, there is no regular mechanism in the courts

38 Wallace, Mack and Roach Anleu, 'Work Allocation in Australian Courts', above n 19, 686.

to enable judicial officers to seek or receive feedback on their performance and to respond to those assessments.

A further issue that emerges from this data is that assessments of judicial performance in the context of caseload allocation are made without reference to any established or clearly articulated benchmarks, either qualitative or quantitative. This again raises issues about the transparency of the process, and perceptions of fairness, as between allocations of individual judicial officers. If there is no established benchmark, for example, as to the number of matters which might be reasonably disposed of in an intake list, an individual judicial officer might be rightly concerned if they are criticised, explicitly or implicitly, for being ‘slow’ in dealing with such a list. Such benchmarks might also address the difficult issue of achieving an appropriate balance between timeliness and other qualities, something that emerged as a source of tension within some of the courts studied.

The informal nature of this current process for reviewing judicial performance for caseload allocation runs the risk that other potential sources of knowledge and information that might produce a more informed assessment are overlooked. This risk was referred to by an AJO in the following terms:

If they don’t say [give an explicit indication of their attitude] and I don’t know that but then you hear ‘did you hear what [name] did in court’, ‘No, what did he do?’ and they said on the grapevine, but how do you find out about that? (W7, AJO)

Such a process of assessing judicial performance may exclude or discount important information and may not incorporate all relevant considerations. Limited sources of information might reflect bias, either intentionally, or as a product of stereotypical attitudes held by the informant. This may lead to inconsistency in the way that allocations are made, and unfairness to individual judicial officers. Ironically, it may also result in less efficient use of the court’s scarce judicial resources, undermining the primary goal of evaluating judicial performance for the purpose of workload allocation.

The sources of information about judicial performance, the process of assessment and the uses made of that information in the Australian workload allocation process contrast strongly with more structured judicial performance evaluation processes, such as the voluntary peer review programs which have taken place in Australia,³⁹ or the elaborate survey based evaluations in the USA.⁴⁰ These structured processes obtain information systematically and from multiple sources to provide a more rounded perspective on the judicial officer’s performance.

39 Hiskey, ‘Mutual Observation, Reflection and Discussion and Professional Development for Magistrates’, above n 4, 50; Hiskey, ‘Mutual Observation, Reflection and Discussion and Professional Development for Magistrates: Further Developments’, above n 4, 107; Warren, above n 4, 4–6.

40 See American Bar Association, *Judicial Performance Resources* <http://www.americanbar.org/groups/judicial/conferences/lawyers_conference/resources/judicial_performance_resources.html>; Kourlis and Singer, above n 1, 204–5; National Centre for State Courts, *Judicial Performance Evaluation: Resource Guide* <<http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Performance-Evaluation/Resource-Guide.aspx>>; Francesco Contini, Sharyn Roach Anleu and David Rottman, ‘Evaluating Judicial Performance (Special Issue)’ (2014) 4 *Oñati Socio-Legal Series* <<http://opo.iisj.net/index.php/osls/issue/view/36>>.

Useful feedback is provided to the judicial officers, who will often have the opportunity, through appropriate professional development programs, to use that assessment to enhance their skills.

IX CONCLUSION

Judicial officers and court staff with allocation responsibilities regularly make assessments of the performance of the judicial officers in their courts as part of allocating workload. These assessments are designed to promote efficient case processing along a range of dimensions including timeliness, appropriate deployment of judicial resources in response to differing case types and tasks, and fairness. Assessments relate to judicial knowledge, expertise, and skills that might be deployed to manage the caseload.

To some extent these assessments are informed by the individual judicial officer's past work experience, acquired skills or capacity and expressions of preference. However, they also rely to a significant extent on information obtained in an unsystematic way that comes to those making the allocations from a variety of sources within and outside the court. There is an absence of clearly defined standards for the skills and expertise needed and criteria against which judicial performance is assessed, as well as no, or very limited, opportunity for judicial officers to receive useful feedback on their work and to improve their own individual performance as well as that of the court overall. The informal nature of the process by which these assessments of performance are made enables relatively rapid judgments about deploying resources flexibly in busy, high-volume courts. In some circumstances it may be serving the courts well, and there would be risks in formalising such a process. However, the weaknesses in the current process leave it open to criticism as to whether appropriate judgements are being made on the best sources of information. There is potential for misjudgements to occur, and for judicial officers to experience inequities and imbalances in the way that caseload is allocated. The establishment of clearly articulated benchmarks together with a more transparent process for assessing performance enabling feedback and improvement would mitigate these concerns.