

Judicial Research Project

Time for Judgment Writing

Executive Summary
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INTRODUCTION

The need for judgment writing as part of judicial work will vary depending on a range of factors, particularly the level of court and the nature of the court's jurisdiction, whether trial, appellate or both, and the mix of civil and criminal matters. The overall caseload of a court, the way work is organised and allocated within a court, and the time demands of other judicial work will impact on the capacity of the judiciary to produce timely written judgments of sufficient breadth and depth. Unwarranted delay in producing judgments can be perceived as a reflection on individual judicial officers and on the efficiency of the court as a whole. Court delay raises concerns about access to justice, while methods to improve efficiency may be perceived as infringing judicial independence.

In late 2008, the Judicial Research Project of Flinders University¹ provided the Judicial Conference of Australia (JCA) with a brief report based on the 2007 National Survey of Australian Judges and the 2007 National Survey of Australian Magistrates. This further report expands on that earlier material, incorporating further analysis of survey data as well as material from the courts and a literature review. It will consider the entire judiciary as well as distinguishing the views or experiences of judges and magistrates or judges in different types of courts, where appropriate.

¹ The Magistrates Research Project and the Judicial Research Project were initially funded by a University-Industry Research Collaborative Grant in 2001 with Flinders University and the Association of Australian Magistrates (AAM) as the partners and also received financial support from the Australian Institute of Judicial Administration. From 2002 until 2005 it was funded by an Australian Research Council Linkage Project Grant (LP210306) with AAM and all Chief Magistrates and their courts as industry partners with support from Flinders University as the host institution. From 2006 the Project has been funded by an Australian Research Council Discovery Project Grant (DP 0665198) and a Linkage Project Grant (LP0669168). All phases of Project research involving human subjects have been approved by the Social and Behavioural Research Ethics Committee of Flinders University. We are grateful to Leigh Kennedy, Rae Wood, Lisa Kennedy, David Wootton, Ruth Harris, Julie Henderson, Mary McKenna, Russell Brewer, Elizabeth Edwards, Rose Polkinghorne, Wendy Reimens, Carolyn Corkindale, Lilian Jacobs, Mavis Sansom and Anne Wallace for research and administrative assistance in connection with this project.

EXECUTIVE SUMMARY

Judgment writing is one aspect of judicial work, embedded in a complex pattern of in-court and out-of-court judicial duties. Data from the 2007 National Survey of Australian Judges and the 2007 National Survey of Australian Magistrates² provide a detailed description of the working patterns and attitudes of magistrates and judges, including the time spent on judgment writing.

- Two thirds of magistrates (64%) report they work outside regular working hours at least a few days a week as do nearly nine in ten judges (86%).
- The average workday for judges is 10.1 hours; for magistrates 9.7 hours.

The tasks that take the most time, on days when they occur, are in-court work.

- Presiding at trial occurs on 60% of all typical days described by magistrates and takes, on average nearly 4 hours on those days [233 minutes]. For judges, this task occurs on 53% of typical days and takes, on average, slightly longer, about 4 ½ hours [274 minutes]³

²The two surveys were essentially identical, but conducted separately in order to maintain clarity of terminology and to recognise some differences in the nature of the work – e.g. questions about juries for the judges, not for the magistrates. The surveys were conducted as mail-back questionnaires. Participation was entirely voluntary. The research was approved by the Social and Behavioural Research Ethics Committee of Flinders University. Because of very strong concerns from the judiciary about confidentiality of the data, no tracking or identification was used on the surveys, so that the identity of those who returned the surveys and those who did not is unknown. All completed surveys are anonymous.

The 2007 National Survey of Australian Magistrates was sent to all 457 magistrates throughout Australia in late May 2007. The survey was printed as a booklet with a heavy bright orange cover to distinguish it from an earlier magistrates survey in 2002 and the judges survey. 242 surveys have been returned, giving a response rate of 52.9%. The magistrates who responded are generally representative of the magistracy as a whole, in terms of gender, age and time on the bench. There is some variation in terms of jurisdiction, with a slight overrepresentation of magistrates from New South Wales, compared with magistrates from other jurisdictions.

The National Survey of Australian Judges was sent to all 566 judges throughout Australia in March 2007. The survey was printed a booklet with a heavy bright blue cover to distinguish it from the magistrates surveys. Responses were received into June 2007; 309 surveys were returned, giving a national response rate of 54.5%. The judges who responded are generally representative of the judges as a whole, in terms of gender, time on the bench and level of court and appear generally representative in terms of age, though that cannot be calculated fully, as baseline date of birth data for the entire judiciary is not available.

The surveys included several open-ended questions which gave respondents the opportunity to comment generally about their judicial career or about other issues raised in the survey. The quotations in this report are given verbatim, as written in the survey booklets, though any information which might identify a respondent has been removed.

³ Using averages can be somewhat misleading. These average times do NOT mean that every magistrate spends 4 hours a day or each judge spends 4 ½ hours a day every day presiding at trial. These times are based on aggregating all the typical days described, in which the activity was undertaken, across all the magistrates or all judges. Not all tasks are undertaken every day, not all tasks

- Hearing appeals occurs on only 23% of all days described by judges averaging about 3 ½ hours on days when it is done. This data includes judges who do not regularly hear appeals. When only responses from the Supreme Courts and the High Court/Federal Court are considered, 33% of described days for respondents from those courts involve hearing appeals.
- The criminal list ('non-trial, non-appeal criminal proceedings') is an important part of magistrates' work, occurring on two-thirds (65%) of their typical days, averaging nearly 3 hours per day on those days (177 minutes). In contrast, only 21% of judges' days involve this work, and when it is done, takes an average of just under two hours (111 minutes).

In-court work, especially hearing appeals and civil trials, generates a need for writing or preparing decisions, judgments or orders. Most of the typical days described by judges and magistrates include some time spent 'writing/preparing decisions, judgments, orders', with judges undertaking this task on a higher proportion of their typical days and for longer times, compared with magistrates.

- For judges, 80% of the typical days described in the survey involve some time spent 'writing/preparing decisions, judgments, orders'. On these days, the time spent averages 175 minutes.
 - The judges of different courts vary in the frequency and amount of time spent on judgment writing. Respondents from the High Court and/or Federal Court⁴ and State/Territory Supreme Courts report that only 15% of their typical days involve no time spent writing/preparing decisions, while those from the Family Court, Federal Magistrates Court and County/District courts report about one quarter of such days.
- For magistrates, 'writing/preparing decisions, judgments, orders' took place on 65% of typical days, averaging 78 minutes on those days.
- Longer judgment writing hours may lead to longer overall days. While a large number of long days occur without long hours of judgment writing, a day that involves three or more hours of judgment writing is very likely to be a ten plus hour day.

take the average time every time they are undertaken, and not all judges or magistrates undertake all tasks. On any given day, a longer time taken for one task, such as presiding at trial, will be offset by a little or no time taken for another task on that day.

⁴ The response categories to the question in the National Survey of Australian Judges which asked 'In which court do you mainly sit?' are 'High Court/Federal Court', 'District/County Court (including industrial, youth, environment etc.)', 'Family Court (including WA Family Court)', 'State/Territory Supreme Court (including Court of Appeal/CCA, environment, industrial, planning etc)' and 'Federal Magistrates Court'.

These average times indicate that magistrates do spend some considerable amount of their working hours on preparation of decisions, judgments, or orders, though judges, on average, spend more time. This difference is expected, in light of judges' greater obligation to prepare written judgments after trials and appeals, contrasted with magistrates' greater in-court obligations, in which many decisions are given orally, immediately after brief oral submissions.

In response to open-ended questions asking for further/additional comments, concerns about time for judgment writing were specifically mentioned by relatively few respondents. However, it is possible that there might have been more comments in response to a direct question asking for concerns about judgment writing. The comments which were made about judgment writing appear to reflect more widely shared concerns about volume of work or lack of control over work. For some magistrates, the lack of specifically allocated time seems to be paramount. For some judges, the demands of judgment writing appear to be experienced as an ongoing obligation which is never fully discharged.

To understand the significance of these concerns about judgment writing, it is important to consider the overall attitudes of magistrates and judges to their everyday work. Magistrates and judges express considerable satisfaction with many aspects of their everyday work, especially the nature of the work itself, which they find varied and interesting. Legal values, especially impartiality and integrity, are regarded as essential qualities by all judges and magistrates; magistrates value interpersonal skills slightly more than judges, who regard legal skills more highly, perhaps reflecting the differences in their work, especially in court.

Magistrates and judges express less satisfaction with control over the amount of work, control over the manner of work, court facilities, and policies and administration. These aspects of work may have some connection with judgment writing, where that is part of the respondent's everyday work.

Findings from the surveys suggest that judicial caseloads, in volume and complexity, are experienced as increasing. The literature and public statistics do not clearly confirm the increase in volume and do not address any increase in complexity. There is relatively little consistent, publicly available data reporting the numbers of written judgements and the time from hearing to judgment. Research does indicate that the length of judgments has increased, which may in part account for an increase in perceived workload.

Judges⁵ who report the most time judgment writing, describing only typical days with at least three hours judgment writing, are more likely to sit in the High Court/Federal Court or a Supreme Court, to hear civil cases and appeals, and to value qualities associated with judgment writing as essential skills, for example diligence, legal research, intellectual skills, legal analysis and legal knowledge. This is the cohort with the lowest proportion who regard capacity to make quick decisions as essential. They have longer overall days, and a higher proportion regard the volume of cases as unrelenting and find decision making very stressful. They are the least satisfied with their hours of work.

These findings suggest that those who are spending more time on judgment writing in their work are not doing so because they choose it, but because they feel it is necessary to complete their work and would prefer to complete this work in fewer hours. Nonetheless, they report greater satisfaction with the intellectual challenge of their work compared with other judges.

The judges who report only working days with less than three hours judgment writing do more trial work and less appeal work, less civil and more criminal. They value several skills associated with judgment writing slightly less, they express more satisfaction with current hours, they are the smallest proportion kept awake by difficult decisions or who find making decisions stressful. This group is mainly composed of district/county court judges, with some supreme court judges who spend the bulk of their time presiding over criminal jury trials, where written judgments are rarely required, though preparation of sentencing remarks may require considerable reflection.

Given the link between the nature of a court's work and the need for and availability of time to write judgments, it might be expected that patterns of time allocation might be similar for courts of the same type. However, it appears from the information provided⁶ that there is no express standard or benchmark as to the amount of time that should be allocated for judgment writing which is consistent across courts generally, or across courts with similar jurisdictions. There is

⁵ Magistrates were not included in this part of the analysis, as judgment writing takes up relatively little time for most magistrates. Only 28 magistrates, out of 242 respondents, indicated one day with three or more hours judgment writing. These magistrates were all located in CBD courts and sat more often in civil. There are, of course, considerable problems with the availability of time for judgment writing for magistrates when it is needed, as indicated by the comments above, which need to be addressed.

⁶ The analysis in this section is drawn from a table provided by the JCA and from research the Judicial Research Project has conducted as part of a larger project into the Australian judiciary. The material provided by the JCA was requested by the JCA from each court for use in a presentation to the heads of jurisdictions. This request was made and the material was provided by the courts to the JCA without the involvement of the Project. As the material was not collected by the Project, it is being included in this report on a confidential basis, similar to the use of the Project's own unpublished research data. Therefore, the discussion below is couched in general terms, without reference to any specific court or individual, with the exception of the discussion of the individual docket system (IDS), which is based on publicly available sources.

also no consistent pattern in the way time is provided or the amount of time provided. There appear to be a variety of structures, including a fixed number of days per judicial officer, a fixed number of days after a trial or appeal hearing, an expectation that judgments will be written during 'gaps' created by the settlement of scheduled cases or in the judicial officer's own time, including after hours or during time otherwise designated as leave. Any or all of these can be supplemented by informal arrangements, usually by request to the head of jurisdiction or the judicial officer or senior court staff member responsible for case allocation.

Sometimes delay in producing a judgment may arise from difficulty in actually making the decision. As indicated in the survey findings, about one-third of judges agree that decision making is very stressful. In other circumstances, the decision may be made, but the judgment writing process itself is delayed, perhaps because of the press of other urgent scheduled work or inefficient work practices or a commitment by a judge to lengthy or detailed opinions.

Judicial officers at all levels need some time for judgment writing and associated out of court tasks, though the actual time needed will not necessarily be the same. Even within one court, different work allocations (eg civil or criminal, trial or appeal) will entail different judgment writing demands. The challenge is to provide a reasonable amount of time for judgment writing to those judicial officers whose work requires it, when it can be most efficiently used. This will usually entail at least some time immediately after the trial/appeal has been heard.

The research presented in this report provides independent empirical evidence about the experiences and attitudes of magistrates and judges from all courts in Australia in relation to the demands of writing and preparing judgments or orders and making decisions more generally. This question of how much time should be spent on judgment writing or how much time needs to be formally allocated in order for that amount of time to be available is one of policy, driven by the demands of a particular court, in light of its own resources, caseload and case mix, and court culture. It is also a question of the kind of judgments delivered, and the level of detail and complexity needed. While the research cannot directly answer these questions, it has identified several aspects of judgment writing which courts might wish to address:

- The informal practices of time allocation and judgment writing methods currently in use in Australian courts may no longer be appropriate. More transparent methods of managing and allocating workload may be needed. For some courts, different workload allocation methods, such as individual docket systems, may be appropriate.
- Clearer time standards may also be helpful. Few courts have express standards for when reserved judgments should be finalised, or clear practices for reporting or oversight

of outstanding judgments. There appears to be little consistent data across courts tracking time between hearing and decision and the number of written judgments delivered.

- Explicit encouragement of more efficient judgment writing practices, supported by appropriate professional development, is also a potentially useful direction. As argued by some leading judicial writers, judgments which take longer to produce or are lengthier are not necessarily of higher quality, and action can be taken by judges themselves to reduce the burdens of judgment writing. Currently, length and detail of judgment appear to be matters for independent individual judicial choice, but these issues may benefit from being addressed collectively among the judiciary within a particular court.

Courts and judicial officers experiencing caseload pressure and excessive judgment writing time demands may wish to seek more time for writing and/or more judges to write. They may also be able to develop improved workload and time allocation structures and improved judgment writing practices that will support the production of high quality judgments within a reasonable time frame.