

Federal Court deserves a fair hearing

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The Federal Court's operational target is to complete 85 per cent of cases within 18 months of commencement. Over the past five years the court has consistently outperformed, achieving a rate of 93.3 per cent.

The court's latest annual report indicates that 82 per cent of appeals were delivered within three months, and 79 per cent of judgments at first instance were delivered within three months of the date of being reserved.

These positive results do not remove the imperative for improvement. But they do provide important context for [reports written last week by The Australian Financial Review journalist Aaron Patrick](#), which [used data compiled by a private company to rank Federal Court judges](#) under the metrics of "average days to write judgment", "average words per day", and "average paragraphs a day".

The problem with such data scrapes is not the act of judging judges per se. Judges are no strangers to scrutiny. Australia's justice system is built on the pillars of accountability and transparency, and the principle of open justice has long been reflected through our open courts where anyone can watch justice being done.

The issue with seeking to gauge a court's performance by statistics is that [quantitative data alone cannot provide a meaningful measure](#) of either judicial productivity or the justness of litigants' outcomes without due consideration of qualitative factors.

By stripping out qualitative measures, the analysis left behind raw numbers that are, as Federal Court Chief Justice James Allsop AO said, "misleading and grossly unfair". Such analysis takes no account of the nature, complexity or duration of cases heard. It does not factor in time spent sitting on appeal cases or the number of cases settled without trial. It fails to consider the assistance the court has received from parties. It does not allow for the number of witnesses and documents tendered in evidence.

Publicly tarnished

Fundamentally, such analysis does not paint a full or fair picture of the quality of work performed by judges or the quality of justice delivered to litigants in an overworked and under-resourced federal court system.

Judges should not be publicly tarnished by such analysis, but unfortunately it is becoming more common. The reputations of Family Court judges were inappropriately impugned earlier this year on the basis of statistics that similarly did not take into account critical qualitative factors, including the complexity of specialist family law matters.



This year has seen a misguided reliance by policymakers on statistics to seek to justify court reform without due regard for qualitative facts, case complexities or resourcing. This includes the proposal currently before the Parliament to restructure the federal courts by merging the specialist Family Court into the overstretched Federal Circuit Court and removing family law appellate jurisdiction to the already clogged Federal Court.

As the former Chief Justice of NSW James Spigelman AC QC has noted, the most important aspects of the work of the courts are those that defy easy conversion into numbers: fairness, accessibility, openness, impartiality, legitimacy, participation, honesty and rationality.

Numbers alone are an inaccurate measure of a justice system and an incomplete mandate for reform.

Legitimate concerns

There are legitimate concerns about the speed of justice in Australia. However, in order to secure just, affordable and timely outcomes for litigants, the source of the problem must be properly identified and addressed.

The federal courts are each experiencing delays and unsustainable judicial workloads caused in no small part by systemic underfunding and under-resourcing, including cuts to legal aid.

Before any restructure, there is a stark need for a review into the resources given to all federal courts and their practices to ascertain what the courts require to ensure litigants are not further disadvantaged by delays. Such a review was a key recommendation by the Law Council's landmark review into access to justice, The Justice Project.

Where legitimate concerns do arise in relation to federal judicial performance, there should be an independent body to provide oversight and to fairly and impartially investigate allegations.

An independent, appropriately calibrated Federal Judicial Commission would promote transparency and accountability of all judges, and has already received the support of the Judicial Conference of Australia. This would provide a fair mechanism to hear complaints from the public, and a fair process for judges who are the subject of allegations which might otherwise be aired in the media.

No one is above the law, and no court or judge should be immune from scrutiny. But everyone deserves a fair hearing.

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