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## Studying judges: the role of the Chief Justice, and other institutional actors

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### Abstract

The empirical study of judicial officers and the functioning of courts intersects with a number of judicial institutional values. Researchers will often, but not always, have legal qualifications, and most researchers of judicial officers will share a commitment to maintaining the institutional values of the Court but also have their own commitments to academic integrity and independence to maintain. In this article, we argue that the role of the Chief Justice, with its unique institutional leadership in relation to protecting and promoting judicial values, plays a number of different roles in relation to the study of judges more generally. We identify the roles of gatekeeper, provider of research, responder to research, and commissioner of research. We also identify other institutional actors that share responsibility for these roles in some instances, including the Attorney-General's Department, the Australasian Institute of Judicial Administration (AIJA) and the Australian Judicial Officers Association (AJAO). Ultimately, we argue that the status, responsibility to the court, relational position, and access to information makes it inevitable and desirable that the Chief Justice perform this role, but that researchers should engage sensitively with the Chief Justice so as to protect values that might arise in tension.

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### Key words

Head of Jurisdiction; Chief Justice; judicial organisations; attorney-general; socio-legal research

### Resumen

El estudio empírico de los funcionarios judiciales y del funcionamiento de los tribunales se cruza con una serie de valores institucionales judiciales. Los investigadores a menudo, pero no siempre, tendrán cualificaciones jurídicas, y la mayoría de los investigadores de los funcionarios judiciales compartirán el compromiso de mantener los valores institucionales del Tribunal, pero también tendrán que mantener sus propios compromisos con la integridad académica y la independencia. En este artículo, sostenemos que el papel del presidente del Tribunal Supremo, con su liderazgo institucional único en relación con la protección y promoción de los valores judiciales, desempeña una serie de funciones diferentes en relación con el estudio de los jueces en general. Identificamos las funciones de guardián, proveedor de investigación, respuesta a la investigación y comisionado de investigación. También identificamos otros actores institucionales que comparten la responsabilidad institucional de estas funciones en algunos casos, como el Departamento del Fiscal General, el Instituto de Australasia de Administración Judicial (AIJA) y la Asociación Australiana de Funcionarios Judiciales (AJAO). En última instancia, sostenemos que el estatus, la responsabilidad ante el tribunal, la posición relacional y el acceso a la información hacen que sea inevitable y deseable que el presidente del Tribunal Supremo desempeñe esta función, pero que los investigadores deben tratar con sensibilidad con el presidente del Tribunal Supremo para proteger los valores que puedan entrar en tensión.

### Palabras clave

Jefe de jurisdicción; presidente del Tribunal Supremo; organizaciones judiciales; fiscal general; investigación sociojurídica

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## 1. Introduction

This special edition has collectively interrogated the varied methodologies that can be applied to undertake empirical research about courts, as institutions and the individuals working in those institutions. It builds on a growing, but still relatively new scholarly conversation on the methodology and ethics of researching courts (eg, Wheeler 1988, Hunter *et al.* 2008, Roach Anleu and Mack 2014; and various entries relating to the courts in Cane and Kritzer 2010). As the other articles in this Special Issue have explored, empirical work can take a variety of forms that transect the quantitative, qualitative and mixed, including: surveys, interviews, focus groups, ethnographic study or jurisprudential or documentary analysis of opinions and other judicial outputs. Such work can also provide analyses of courts in a single jurisdiction, or offer comparative perspectives. Instead of examining *what* information about courts is available, and *what* methodological approaches might be applied to the data set, this paper asks different questions: *who* controls access to the data and potential data, and *which* values should inform the release, and limits, of data access. We argue that greater attention should be paid to these *who* and *which* questions, as they both impact research design and integrity, as well as having implications for the ethical conduct of research, and influencing public confidence in the judiciary by controlling the nature and extent of critique about judicial institutions. In most jurisdictions, there are no protocols guiding how to approach judicial officers to conduct research and gather data. This article therefore prompts researchers to think about how they initiate contact with courts for the purpose of gathering data, and the values-based considerations that come into play – for the courts as well as the researcher.

This article illustrates this argument through the case study of Australia, a jurisdiction with which we as judicial researchers are most familiar. In Australia, it is the head of jurisdiction (usually referred to as the Chief Justice) *who* has ultimate control over *the extent and content* of data released. Although this is a regionally specific and therefore limited example, and not all jurisdictions will share the role played by the Chief Justice in controlling judicial research, the underlying values and questions raised regarding the release of information have relevance across jurisdictional boundaries.

The role of controller of data has a number of different aspects that we explicate: the gatekeeper, the provider, the responder and the commissioner. In addition to these roles, there is also the Chief Justice as “researcher” themselves, an as yet largely under-realised role in Australia at least. Finally, and in addition to these institutionally-focussed roles, the Chief Justice might also be asked to play a role as the direct and specific *subject of* research, rather than simply as a member of the court under study. This brings with it unique challenges in relation to the management of personal versus institutional agendas, which we do not explore at length in this article.

The four institutional dimensions of the Chief Justice controller role that we focus on are descriptive: they do not themselves provide a normative frame through which to assess a Chief Justice’s performance as regards access to and provision of data. To develop a normative frame, we develop our previous work in which we have used institutional values to provide the benchmark against which other institutional roles performed by Chief Justices might be assessed (Appleby and Roberts 2021). An institutionally minded Chief Justice will elect to grant access to judicial studies scholars to undertake empirical

work in a manner which attends to these values, and not, for instance, for political or other personally motivated reasons. The use of institutional values builds on a growing conversation on the interrelationship between institutional judicial values and the promotion of the sociological legitimacy of the courts (Devlin and Dodek 2016).

As applied to the provision of data about the judiciary (both quantities and qualitative) that values' frame is clearly activated. For instance, the dissemination of data brings with it greater *transparency* for the judicial institution, an increasingly accepted judicial value. However, transparency is not necessarily an unqualified good for the institution: data must be carefully presented, interpreted and analysed in order to maintain confidence in the institution. Poor quality research threatens judicial values. As Opeskin and Appleby have written in the context of quantitative analysis: "analysis that lacks methodological rigour, or glosses over the limitations of its method (...) risk[s] bringing the judiciary unfairly into disrepute" (Opeskin and Appleby 2020, 923).

The final part of the article looks at whether there are other institutions within the Australian context more appropriate to undertake these roles, and how that shapes the role of the Chief Justice as the purveyor of data. Here, we look at jurisdictionally specific institutional actors that have different responsibilities in the judicial sphere (although similar institutions are likely to operate in other jurisdictions), including the Australasian Institute of Judicial Administration (AIJA), the Australian Judicial Officers Association (AJOA), and the Attorney-General's Department. Ultimately, we argue that the status, responsibility to the court, relational position, and access to information makes it inevitable and desirable that the Chief Justice perform this role, but that researchers should engage sensitively with the Chief Justice so as to protect values that might arise in tension. Although our case study in this paper is drawn from a single nation – Australia – and its constituent sub-national courts, utilising the values framework we have developed provides a rich prism for comparative and normative analysis across other jurisdictions, particularly, but not limited to, the common law world.

## **2. A framework for understanding the institutional and relational dimensions of the Chief Justice's role**

An individual appointed Chief Justice operates in a particular historical, political and legal context (French 2017, 322). How the individual performs that role will, undoubtedly, be affected by surrounding circumstances (eg Bennett 2001, 2016; Ayres 2003). But within that contingency, there are also consistent relationships with institutions and non-institutional actors that put pressure on the court and the Chief Justice.

In developing a normative framework for assessing the performance of a Chief Justice we have intentionally eschewed management and organisational leadership values and drawn instead on a set of judicial institutional values, as have been developed and proposed by Devlin and Dodek (2016) Their approach we contend, captures the complexity of the contemporary judicial role and institution, and avoids setting up values in "contest" with each other (as we highlight below). The values are: independence, impartiality, accountability, representativeness, transparency and efficiency. Judicial **independence** is a well-known and studied foundation of judicial

authority, and encompasses – personal/decisional independence, institutional independence and administrative/financial independence. **Impartiality** is closely associated with this value, indeed, impartiality is facilitated by the institutions and processes required for independence. Impartiality refers to the unbiased decision-making of a judicial officer, uninfluenced by personal, social, cultural, economic or institutional biases (Australian Law Reform Commission 2021). **Accountability** is another well-accepted judicial value, often pitted against independence, but ultimately both values are necessary for judicial legitimacy. Judicial accountability is achieved through many forms: appeals, open-court proceedings, provision of reasons for decisions, avenues for addressing judicial misconduct, the provision of judicial education, and supporting judicial wellbeing. Accountability is closely associated with the value of **transparency** and openness, both values which are often pursued through annual reporting, public statements and other forms of judicial engagement. **Efficiency** is a value closely associated with the achievement of justice – promoting public confidence that matters will be dealt with in a timely and cost-effective manner. Finally, there is the value of **representativeness**, that is, the diversity of the judiciary across a range of characteristics, including gender, race, class and disability. Representativeness is thus closely associated with the accountability of a court to the society it serves, and in turn is connected to the perception of the legitimacy of the judiciary in that community (eg, Ewing 2000, 721–722, Delaney 2016, 761–68).

These values have been subject to evolution, and as such the changing social, legal and political context can give emphasis to values previously not identified, or prioritised. Recognising this evolution, within this framework we have not included other possible values, such as access to justice (which we incorporate as part of **efficiency**), or judicial wellbeing (Schrever *et al.* 2019), (which we incorporate across a number of the values). However, we are alive and open to the possibility that values may develop as community expectations and judicial institutional practice change.

There is then the question of prioritisation within the values. Devlin and Dodek (2016, 12) posit that no one value “trumps” another. In our home jurisdiction of Australia, as in other constitutional democracies, however, some values are constitutionally entrenched. Constitutional entrenchment in turn imports a degree of difference and imperative, if not hierarchy, in the positionality of values. But beyond that, we argue, individual Chief Justices will prioritise different values, influenced by their own views of the role of the court in society, as well as the broader social, economic and political pressures of their tenure, and the position and legitimacy of their court at that particular time. The influence of individual approach, views and wider context is readily apparent in the many excellent judicial biographies of chief justices (Bennett 2001, 2016, Ayres 2003).

There is always a concern that judges who participate in research of the judiciary and their role might impugn the *independence* or *impartiality* of the judiciary, by association or through what they say. Data on the judiciary can reveal raw numbers, or qualitative experiences that that helps us understand the *representativeness* of the judiciary. Data on case management, and the resolution of matters, reveals at least one dimension of the *efficiency* of the court. Depending on the volume and nature of requests for data, there is also the potential that the need to respond to researcher inquiries might detract from the

efficiency of the court. Substantive research itself might also be values-associated, for example, a study might question the extent to which the value of *representativeness* is being achieved on a court, and the institutional cultural barriers to it, by examining the experience of the judges on the bench by reference to their diversity characteristics (eg, Roberts 2012a, 2012b, 2014, Thornton and Roberts 2017, Cahill-O’Callaghan and Roberts 2021). Researchers might also investigate the level of ethical and educational support provided to judges, support which in turn can raise questions associated with the values of *impartiality* and *efficiency*. Study of judicial stress and wellbeing will also intersect with a number of values, including judicial *efficiency*, *impartiality*, *representativeness* and *accountability*.

Research about judicial officers will pose other challenges to these values. Researchers will often, but not always, have legal qualifications, and most researchers of judicial officers will share a commitment to maintaining the institutional values of the Court. Indeed, most research is driven by a desire to better understand the instantiations and pressures on these values in the “real world” of the court room and chambers. That is not to say, however, that researchers will always agree with judicial officers’ interpretation of the relevant judicial values. Those undertaking research on judicial officers have their own commitments to academic integrity and independence to maintain. Tensions can arise as researchers seek to build the trust necessary to embark on data gathering with judicial officers, while also maintaining the necessary distance, and avoiding compromising their own responsibilities and independent critical analysis (see, Mulcahy and Tsalapatani 2023). The unique constitutional position of courts in many jurisdictions will also raise challenges beyond those of researching the public sector, which itself is notoriously secretive. For instance, while in some jurisdictions judicial papers are routinely deposited at state archives (eg Canada), in others the convention is for all paperwork produced in a judge’s chambers to be shredded at the retirement (or death) of the judge (eg Australia).

In our previous work, which has examined the institutional and relational position of the Chief Justice in Australia, we argue that Chief Justices have a unique responsibility to act in a way that protects and promotes judicial institutional values. Our framework moves beyond considering the Chief Justice’s role as that of an intellectual leader on the Court (see, eg, Danelski 1961, 497, Ostberg *et al.* 2004, Paterson 2013, Cornes 2013, Hunter and Rackley 2018), to their key institutional leadership role (Doyle 2009, Warren 2011).

In the next part we explore the ways in which a Chief Justice might respond to and navigate any particular tension that arises in relation to the study of judicial officers, and whether and how they protect or promote institutional values is often subject to disagreement. We do not shy away from this. In fact, we explain that this is exactly why an evaluative normative framework is needed: for these discussions, and disagreements, to take place, between judges, researchers and commentators.

### **3. The Chief Justice and the study of judicial officers**

In this part, we will look at how the Chief Justice regulates, facilitates and otherwise engages with the study of judicial officers. We posit that there are four roles for the Chief Justice, recognising that they are likely to intersect in practice. The first is as a possible *gatekeeper* for those wishing to conduct research into judicial officers (generally

academics), where the Chief Justice must make an assessment about whether research is consistent with, or might even defend or promote, institutional values. Second, there is the Chief Justice as the *provider* of raw, or possibly interpreted data, which might then inform the research of others. The third is as a *responder*, providing an *ex officio* response to research on judicial officers where it is thought appropriate and needed for the protection and promotion of institutional values. The fourth is as the active *commissioner* of research on judicial officers, where that is seen by the Chief Justice as desirable for the institutional values. There is a possible fifth role: as researcher themselves. However, in Australia, at least, this role is largely unrealised by sitting Chief Justices (Barwick 1977, Opeskin 2013, 489; contra Kiefel 2022). In order to appreciate the context of those four roles, it is necessary first to outline briefly the role of the Chief Justice in Australian courts.

Chief Justices in Australian jurisdictions (as with other judges) are appointed by the Executive, with only relatively recent moves in some jurisdictions towards appointments occurring with greater transparency in terms of criteria and process (eg Australian Capital Territory Justice and Safety Directorate 2023). Throughout Australia judges are appointed until a statutory retirement age. The Chief Justice has administrative responsibility for the operation of the court, including the allocation of specialist lists, cases and circuits, and traditionally has also had a role in receiving and dealing with complaints against judges, as well as an informal role in supporting judges in relation to education and wellbeing. In some sub-national jurisdictions, judicial commissions and judicial education bodies may also operate such as the Judicial Commission of Victoria and the New South Wales Judicial Commission. While there is increasing use of media and research officers within courts (Johnston 2019), there is no formal government judicial research office in Australia. The courts rely on the Executive for their annual funding (the Attorney-General's Department of each Australian State and Territory, and at the national level, being responsible for the administration of the courts). The Australasian Institute of Judicial Administration (AIJA) and the Australian Judicial Officers Association (AJOA) also operate alongside the Chief Justices throughout Australia, as bodies that support the judiciary including in relation to research, and education. The role of those bodies in the study of judges is explored further in the final part of this article.

### 3.1. *Gatekeeper into research*

There is no "rulebook" or established protocol for how an independent researcher should seek the necessary access to study judicial officers. University researchers will be required to comply with university ethics approval processes, but this speaks to the research-institution side of the research, not the judicial-institution side. There is no requirement (by law or convention) to request the Chief Justice's "permission" or "approval" for the researcher to contact judges in their court, or request that the Chief Justice send the information about being involved in the study onto the members of their court.

However, many researchers frequently choose to approach judges through the head of jurisdiction, although not always for permission (eg Roach Anleu and Mack 2017). Other researchers may leverage existing relationships and research being conducted through other judicial institutions (eg Appleby *et al.* 2018). But the heavy reliance on the Chief



Justice as “gatekeeper” occurs for a number of principled and pragmatic reasons. Pragmatically, the support of the Chief Justice for a research proposal means that a project is likely to get greater “buy-in” from judges in that court. We know from our own experience that some judges may seek the Chief Justice’s permission to engage in research even if that is not sought by the researcher; others will ask a researcher who approaches them directly to go through the Chief Justice. Many judges will simply not reply to an invitation to participate in a study from a researcher, but are likely to participate in a study if the Chief Justice asks them to do so directly, or has given the research their imprimatur.

At a level of principle then, seeking permission of the Chief Justice shows respect for the office of Chief Justice; it alerts that office to the work that is being done; and it allows the Chief Justice to express any institutional concerns about the research. However, it does raise concerns. It might give the Chief Justice the power to refuse involvement not just for themselves, but for other judicial officers as well. The Chief Justice’s support of research might bring informal pressure on other judges to participate in studies they were not otherwise inclined to participate in (and possibly for principled reasons). This brings about a tension in judicial values. On the one hand, there is an argument that the Chief Justice is uniquely placed to provide oversight over the nature of research that judicial officers are involved in, and to protect the collective institutional values of the court. On the other hand, the value of judicial independence includes independence of judicial officers from other judicial officers, including the Chief Justice. There is a strong constitutional argument that the Chief Justice should not perform a gatekeeper role for other judicial officers in relation to research, and that the independence of individual judges requires that they make their own decisions on these values-related matters.

There are many academic stories of studies of judicial officers abandoned, narrowed, or re-designed because of responses from Chief Justices to requests for their courts to be involved. This raises questions for the researcher that must be transparently navigated lest there be distortion of the academic integrity of the research, or the adoption, uncritically, of the Chief Justice’s interpretation of the institutional value of the research. One example of how this might be achieved, is the survey of Australian judicial officers (Appleby *et al.* 2018) that attempted to compile quantitative and qualitative data on judicial officers perceived to be the challenges facing their courts. This project was undertaken by researchers from across the University of New South Wales, the University of Adelaide and the University of Technology Sydney, and explains in its methodological section:

[T]he research team sought the approval of Heads of Jurisdiction to survey the judicial officers of their court and the survey was not distributed to the judicial officers of any court where prior approval had not been obtained (...)

The team received responses from all Australian Courts other than the Supreme Court of Victoria, the District Court of South Australia, the Magistrates Court of Queensland and the Local Court of the Northern Territory. Of those Chief Justices who responded, only the Chief Judge of the Federal Circuit Court of Australia declined the invitation for his Court to participate in the survey (306–207). Chief Justices in the courts who agreed to participate cooperated in different ways. Some granted the researchers permission to

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contact judicial officers directly. Some provided contact lists for this to occur. Some themselves distributed the survey on the behalf of the research team (306).

There is clearly a *de facto* role being played by Chief Justices as the “gatekeeper” for independent study of judicial officers in this example. The question, then, is, whether this role is appropriate, and whether the tensions that we have outlined are being navigated or ignored. The example of this survey raises questions as to whether the Chief Justices are playing a role that impinges on the ability of *other judges* in the court to engage in research that might otherwise be seen to be consistent with, or even protecting or promoting judicial values. The lack of response from a number of jurisdictions to the survey might indicate that a Chief Justice has determined that the research is inconsistent with institutional values; but it might equally indicate that the Chief Justice has simply not had the time to deal with the request (or perhaps even that the Chief Justice does not trust a particular researcher or research team). The direct refusal by the Chief Justice of the Federal Circuit Court was made without explanation, and so did not, at least expressly, signal a concern about the institutional values that might be engaged – and threatened by – the research.

There are alternative ways of approaching the Chief Justice’s “gatekeeper” role – by researchers and Chief Justices alike. These alternatives are already deployed, with individual variations, by many researchers. Researchers might approach the Chief Justice not for permission (ie as a gatekeeper), but rather to bring the research to the Chief Justice’s attention and to invite discussion about institutional values in the context of their research. This might, in appropriate circumstances, lead to a redesign of the project, if the Chief Justice raises legitimate concerns. This approach would then allow the researchers to approach individual judicial officers directly, not with the imprimatur of the Chief Justice, but with an acknowledgement that the Chief Justice is aware of the research. Such an approach balances the particular institutional role of the Chief in relation to values, while also acknowledging the potential for disagreement about institutional values, and the importance of judicial – and academic – independence.

The input of the Chief Justice can also be achieved through the appointment of advisory bodies (such as panels with oversight of the research). These both allow the Chief Justice to have awareness and raise concerns about the project, but also provide this feedback to researchers in a forum where there might be alternative views about those values, and constructive debate for the research and its design development.

### 3.2. Provider of data

Many commentators have noted that gathering raw quantitative data about courts is a laborious process. Professor Brian Opeskin (2021, 83) has noted, for instance, that data published by and about courts is haphazard, inconsistently quantified and sporadically released. There is no legal requirement for available information on the Court to be published after a set period (eg 30 years), as occurs in other public sector agencies. We would argue that the publication of key raw data – including, the demographic data about the composition of the court; extra-judicial appointments and memberships; case management and case acquittal information; and funding and budgetary information – is vital to maintain transparency in court processes, and, we would argue, is vital to the defence all of the values we promote in this paper. This is recognised internationally. For

instance, in the United States there has been a more explicit identification of the issue of reliability of data obtained independently of the court, and a concerted and coordinated push across the courts to proactively provide data and context for it, to the public and researchers by the National Center for State Courts.

In Australia, the Chief Justice is not only well placed to present much of this data, the Chief Justice is uniquely bound to ensure the data is made available in a timely fashion and on a regular basis. This is for two reasons. First, obligations of transparency, efficiency and accountability in particular require regular information flow about fundamental components of judicial institutions. Second, independence requires that that data be rigorously produced and presented by the judiciary itself, and that appropriate context is provided around that data. The old adage “lies, damn lies and statistics” means that it is in a Chief Justice’s best interest to ensure that the presentation of key data is undertaken by the institution itself, who have a unique vested interest in upholding its institutional values (although this doesn’t completely remove the possibility of the Chief Justice acting for politically or personally motivated objectives, it minimises it). Data controlled, gathered or presented by another arm of government may, we suggest (and we elaborate on below), be utilised to serve different institutional values, not necessarily those prioritised by the judiciary itself (eg Australian Government Productivity Commission 2022). These points were recognised in the Australian context by then Chief Justice Tom Bathurst in his Foreword to the 2020 New South Wales Supreme Court Annual Review, where he reflected:

[T]his Review presents an overview of the Court’s operations in 2020. This includes information about decision makers, caseload management and court operations, as well as education programs and the Court’s broader work. These facts and figures are more than mere statistics, as they help the Court to remain accountable to the public, which places its trust in the Court’s proper and just functioning. However, there is also much that can simply not be measured in words or numbers. (Bathurst 2020, 3)

Some steps have been taken on this pathway by Chief Justices in other Australian jurisdictions, although we note that not all of these were at the instigation of the Court itself, and therefore are influenced by the institutional values of different arms of government. One such example is the provision of information in the Annual Reports of Courts – which are compiled within the Court administration, but over which the Chief Justice has final responsibility. This raises questions as to whether those employed in the Court have the requisite skills to collect and interpret that data, with robustness and transparency around method, as well as the Chief Justice’s understanding of that data. Some of the data is relatively straightforward; but much requires sensitive contextualised interpretation and relies upon key assumptions as to method. Looking at the apex Australian court, for example, the High Court of Australia provides annual reports which include a report of the Chief Justice, and information about judicial decision making, sitting periods, as well as the presentation of conference by papers by the justices and the training or otherwise received. With only seven justices on the bench, the quantitative data delivery on this court is relatively straight forward, and the Chief Justice’s report tends to project the broader expression of values through which to interpret the data, such as the importance of additions of personal security for members of the Court, or the impact of the COVID-19 pandemic on court operations (Bathurst 2020, 3, Bowskill 2022, 6–13, Ferguson and Hall 2023, 10–11).

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The New South Wales Supreme Court Annual Review offers an example of a larger court. These reports include an appendix described as “Court statistics – comprehensive table of statistics”. In the New South Wales context, the reported data relates to questions of *timeliness*, specifically, the age of pending cases and listing delays. While these are important topics, they are not the only questions relevant to the timely disposition of cases. For instance, the reported data does not specifically address the extent to which a range of other factors impacted the disposition of cases (such as illness, errors, availability of counsel and other experts). With the raw disposition data alone, we argue, a key information shortfall remains.

Further absent from the data collated in the NSW Annual Review, for example, are vital statistics such as the demographic attributes of judicial officers and court staff. Some gender information can be gleaned from the first names provided in lists of court staff, but age, ethnic background, or disability will not be apparent unless expressly collected and presented. The absence of age information is particularly striking given that Australian courts impose mandatory retirement ages.

As these illustrations from Annual Reports indicate, Chief Justices, supported by their court administration, are a vital source of data on their courts, and this reflects their unique position and access to data, as well as responsibilities as spokesperson for their court. As with all third-party datasets, researchers must approach this data with appropriate caution, particularly where there is a lack of transparency as to the methodology behind its collection and interpretation. One further concern is that Chief Justices (or court administrations) are often not providing all of the data that researchers have identified as vital for promoting transparency in the courts, in aid of the other judicial values. This raises questions as to how researchers can prod the Chief Justice into providing this data which they may not be otherwise included to provide, consistent with judicial values.

### 3.3. Responder to research

Chief Justices have also assumed the role as a “responder” to published research about judicial officers and their courts, although it is not always the Chief Justice that will respond in this instance. A response from the Chief Justice has often occurred in circumstances where the Chief Justice has felt that particular research may have unfairly, or inaccurately, undermined the institutional values of the court. The Chief Justice, as the institutional head of the court, has responded not only because of the status of the office, but also because the office is able to provide further context that might have been lacking, or overlooked in the published research. This is because of the administrative responsibilities of the Chief Justice around workload allocation and oversight over the whole court, including in complaint handling, and providing mentoring and other support to judicial officers.

In Australia, the most prominent recent example of the Chief Justice as a “responder” has been in response to the public, data-reliant critique of the efficiency of the courts. In 2018, a number of criticisms were made by journalists and also in a published speech by a former Judge of Australia’s apex court, the High Court of Australia, regarding delays in the Family and Federal Circuit Courts. These criticisms were published in *The Australian* newspaper, a nationally distributed, conservative broadsheet (Heydon 2018).

The articles were critical of the delays that were evidenced through the publicly available data court data, and the damage that delay might cause both in individual cases and to the courts' institutional reputations. The *Australian Financial Review* then ran its own article ranking judicial officers in the Federal Court by reference to their efficiency in delivering judgments (Patrick 2018).

The then Chief Justice of the Federal Court, James Allsop, responded to these commentaries in two ways. First, he issued a formal response to the article in the form of a press release (Allsop 2018). In that he referred to the data that the *Australian Financial Review* relied upon to compile its "list" as flawed, and the analysis "unfair" and "simplistic" in its attack on the Court and the individual judges. He continued:

[The comments] are of no utility in providing an insight into the institutions work or services provided by a group of judges whom I know to be dedicated and extremely hard working.

According to Chief Justice Allsop, rather than an attempt to promote transparency and efficiency, the list 'appear[ed] calculated simply to embarrass individual judges.' In his opinion, therefore, efficiency might be a value that is associated with the courts and justice, but it must be tempered against judicial independence, quality of justice, and a realisation of the human dimension of the courts. It must be noted that within the Australian context, the issuing of a press release by a Chief Justice remains extremely rare.

Second, in a later speech (Allsop 2019), directed at the criticisms that were made in the articles, Chief Justice Allsop explained his concern with the data and its interpretation in more detail. Picking up his earlier concern regarding the balancing of institutional values, his speech emphasised that his concern with the critique was that the data had not been interrogated with the correct institutional values in mind. Allsop questioned the utility of measuring "efficiency" through such singular, quantitative, production-based metrics, and, rather, argued that efficiency of a court and an individual judge must be sensitively undertaken in a way that ensures judicial accountability, taking into account the other commitments and responsibilities of a judge. He argued (Allsop 2019, 376) that rather than raising questions about the efficiency of the court, the data, if correct, should raise questions as to why it was allowed to happen:

It may have been for reasons of work allocation and workload, time allocation, illness or the pressure of other work (...). The cause may be seen as my fault as head of jurisdiction.

This, we have argued elsewhere, reveals a dual-responsibility for a Chief Justice, that is, "the responsibility to support individual judges to ensure the efficient achievement of justice, while simultaneously defending them against unfair criticism" (Appleby and Roberts 2021, 97).

The role of "responder" has also emerged in other cases, where research findings have been used by the Chief Justice to undertake reform of the judiciary. For instance, following a landmark empirical study in relation to judicial stress and mental health in Victoria (Schrever *et al.* 2019), led by law and psychology researcher Carly Schrever, two successive Chief Justices in that jurisdiction (Chief Justices Marilyn Warren (2016) and

Anne Ferguson (2019)), have repeatedly drawn on that, and other research, to establish and promote a program of proactive support for judicial wellbeing.

The Chief Justice holds a unique position to respond to research on judicial officers and the court. This relates to more than just their status within the court. Rather, as we have explained above, the Chief Justice is privy to data and further context that may not have been available, or sufficiently addressed, in the research. The Chief Justice may also be able to use their institutional role and leadership to support practical reforms grounded in the research. This reinforces the key question of practice for the researcher. Should a Chief Justice be approached prior to the publication of data, and provided with an opportunity to provide further data that might not have been publicly available, or further context for the interpretation and presentation of the data? Of course, the data might not be forthcoming, but it allows the initial public presentation of this research to incorporate any input, or provide a response to criticisms, rather than for these contests to occur in the public domain, with potentially unnecessary damaging consequences for judicial values. It also provides a platform of trust between the researcher and the head of jurisdiction that makes judicial support for empirically-grounded institutional reform suggestions more likely.

#### *3.4. Commissioner of research*

Researchers may also participate in research on judges and their institutions through external work commissioned by the Court, which is generally done through the Chief Justice. In their role as leader of the court, the Chief Justice may determine that a particular subject matter requires extensive inquiry, or consolidated examination. This kind of project is different from the research a Chief Justice may direct their chamber's staff (in Australia an associate or tipstaff) to undertake for the purpose of a Chief Justice's speech at an academic conference or event, even research at a more institutionally focused event such as a State of the Judicature speech, opening of an exhibition or anniversary celebration. Rather, this form of research is commissioned by the Chief Justice for and on behalf of the court, and involves the court as an institution as a subject of the research.

Researchers from outside the court may be approached to undertake such research for a variety of reasons. For example, these commissioned projects may be perceived to be of a larger scale than the court's existing staff (associates, library and registry staff, and, in some courts, research officers) can independently undertake. The research may also require specialist expertise and involvement from academic researchers. Where the research is conducted via a team or committee, the academic researcher may also be approached in order to contribute a perspective as an outside stakeholder.

Where the project requires funding (whether to hire the academic, or funding for materials or equipment required for the research), the office of the Chief Justice provides a logical site for the research to be commissioned. As the individual accountable for spending within their court, the Chief Justice can justify, or advocate for, the budget allocation required to undertake the project.

For the researcher, the commissioned project circumvents any challenges posed by the Chief Justice as gatekeeper. As a project not only with the imprimatur of the Chief Justice, but also undertaken at the Chief Justice's direction and behest, the Chief Justice

necessarily ensures that key institutional doors at the court are made open to the researcher. In the ACT, for example, Chief Justice Helen Murrell commissioned Associate Professor Heather Roberts to serve on a committee for the design and construction of an installation in the new Supreme Court building to showcase the history of the Supreme Court. The research and drafting of content was conducted by a committee comprising the researcher, a retired justice, and the Chief Justice, with input from archival historians, public history designers and graphic designers. The work that was produced was designed to allow those visiting the court – be they lawyers, citizens and school groups – to gain insight into the court’s role and key moments in its history. The committee was provided with access to court files through court library and registry staff, as well as historical photographs and publicly available images and text. The access to court files was made possible through by the Chief Justice introducing the researchers to the key personnel in the court, and assistance was also provided by the Chief Justice’s chambers’ staff.

Commissioned research projects have the potential to implicate a number of judicial values, depending on the purpose and subject matter of the commission. The constraints of “the brief” (ie a public installation, a book, or a conference), as well as space, time, and funding necessarily focuses the research in a specific direction. For example, history and public information projects such as that mentioned above will likely prioritise independence, impartiality and accountability as core values projected to the community in an installation. The very publication of information about a court’s history reinforces the value of transparency; although it may not necessarily present information that might be less than favourable about the court’s history.

A risk of this kind of project might also occur if the Chief Justice does not consult members of the court in advance, with the result that the subsequent research may be perceived as projecting the idiosyncratic views of the Chief onto the institution as a whole. This is likely to be an issue for the court where the Chief Justice’s views are deemed to be out of step with the shared institutional vision of the court’s core values, and their priority. This might also raise the danger that the Chief Justice brings to bear the institutional pressure of their office on judicial colleagues who might not perceive the project as supporting judicial values. As we have explained above, there is not always a single judicial interpretation of these values, and what they might require in different circumstances.

Researchers invited to undertake research for a court at the request of the Chief Justice are likely to approach the prospect with enthusiasm, as the institutional gatekeeper has invited the outside researcher in. However, these invitations do also raise questions for the researcher: is the researcher being given access to all relevant data and information, and not being directed inappropriately by the Chief Justice (or other court officers) in a manner that might potentially undermine the academic rigour of the work? Is the project one that has the institutional support of the court more broadly, and if it does not, what are the potential institutional concerns that exist, and is the researcher contributing to them?

#### 4. The role of others in institutional actors in study of judicial officers

Looking at the institutional role of the Chief Justice in the study of judicial officers raises questions about the presence and capacity of other institutional bodies, and their role in relation to access, provider, responder and commissioner of research. In Australia, there are three institutional bodies in particular which have had or may be regarded as particularly adapted to these roles in Australia: Attorneys-General Departments, the Australasian Institute of Judicial Administration (AIJA); and the Australian Judicial Officers Association (the AJAO, formerly the Judicial Conference of Australia, or the JCA). The operation of these other organisations sets up the role of the Chief Justice within an ecosystem in which there is shared responsibility for interpreting, protecting and promoting judicial values, and multiple possible entry points for researchers in the design of projects.

##### *4.1. Attorney-General Departments*

As we have touched on above, the national and sub-national courts in Australia fall within the administrative responsibility of their respective Attorney-General's department, although in some jurisdictions there are separate court administration authorities that are statutorily independent from the government. The Attorney-General's department is responsible within government for legislation regarding the administration, regulation, jurisdiction and funding of the courts. In Australia, a debate has raged over the last 30 years around the responsibilities of Attorneys-General to act as a defender of the judiciary when its institutional values are attacked, including, for instance, through political motivated or unfair criticism that draws on various possible forms of data and research. This debate was started by comments in 1994 by then Shadow Attorney-General (and later Attorney-General) Daryl Williams, that he doubted the existence, or continued strength, of a convention that the Attorney-General had an independent obligation to speak in defence of the judiciary where the institution had been subjected to inappropriate political attacks that might undermine its integrity (Williams 1994, 2022) In the immediate aftermath, Williams' comments caused outcry among the Judiciary and their supporters (eg Brennan 1997). However, since that time, and as the examples we have explained above demonstrate, the Chief Justice and the courts themselves have stepped into the role of responder and defender of institutional values in a robust and effective manner. Indeed, as we argue above, the Chief Justice is perhaps better placed to defend the judiciary against unfair, and poor data-based attacks than the Attorney-General, given the unique administrative and oversight roles of the office, and the larger curial context to which they are privy.

Attorneys-General Departments, at all levels of the federation, have a role as a provider and commissioner of key data and research regarding the judiciary as an institution in their jurisdiction. The Attorney-General Department plays a particularly important role as provider of data where courts lack control over their own budget. In such circumstances it will be the Attorney-General's Department that will be ultimately responsible for the publication of appropriation and budget information for the judiciary. Such reports will provide information as required by the Government and auditing offices, and will be subject to scrutiny in estimates committees. These committees, meet regularly and are usually comprised by members of Government and



Opposition parties. The writing, and scrutiny of those reports may or may not be informed by the same prioritisation of values as those adopted by Chief Justices.

In addition to the role of provider of data, Attorneys-General Departments have also historically commissioned large research projects related to “special interest” projects in the Attorney-General/justice portfolio that study elements of judiciary process. These include such as projects directed toward sentencing guidelines, or specialist drug and alcohol courts, or youth justice diversionary measures. As a commissioner of research, Attorneys-General Departments have no guaranteed access to courts and judges, and would need to work as other researchers do with the Chief Justice to gain any necessary access, particularly where the research may raise institutional values concerns for the judiciary. Indeed, it would be constitutionally untenable – as an affront to the separation of powers and the independence of the judiciary – for the Attorney-General Department to demand access to undertake research on the courts and judges.

Data produced by, and research commissioned by, these Departments provides important glimpses into the functioning of the judiciary in the different jurisdictions across Australia. However, as foreshadowed earlier, the political nature of these departments, we suggest, renders it inappropriate as a sole or major source of data on the independent third arm of government. This is illustrated in part by the emphasis on efficiency data in many court Annual Reports. These reports mirror the Productivity Commission’s emphasis on efficiency as a key value and metric against which institutions must be measured.<sup>1</sup> Our values framework recognises the importance of efficiency as *one* key judicial value. As other values must also be weighed in evaluating the operation of judicial bodies, it is vital that courts determine, for themselves, the values and therefore the data points that will be provided for evaluation.

#### *4.2. Australian Judicial Officers Association (AJOA)*

The AJAO is a recently rebranded representative body, formerly the Judicial Conference of Australia (JCA). Its role is one of responding and advocating of behalf of its members: judicial officers across Australia. Indeed, it states its first function is “defending the judicial against unwarranted attacks”. Through its national and representative role, the AJAO is, we suggest, uniquely placed to respond to research on the judiciary. This is particularly the case in the context that the Attorney-General has largely eschewed this role, and where research has an impact beyond an individual court, or where, for whatever reason, the Chief Justice of that court is not inclined to respond, but there are institutional concerns held by the AJOA about the research. The AJOA, as a representative body, can engage in these debates drawing in the views of a range of judicial officers not simply the heads of jurisdiction.

The AJOA has also been a national hub for key research data in relation to the judiciary, particularly research related to the core judicial values such as impartiality and independence. Researchers commissioned by the AJOA have no right to engage with judges, and will need to negotiate access, potentially with Chief Justices. The AJOA, with its broad membership and reputation, is often able to assist in these discussions, or

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<sup>1</sup> As set out in the Productivity Commission’s annual *Report on Government Services*, “on the equity, effectiveness and efficiency of government services in Australia”.

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undertake to gather the data itself. For instance, in 2016-2017, the JCA (as the AJOA was then) commissioned four researchers to undertake an inquiry into the use of temporary (acting) judicial officers and the institutional challenges they represented (Appleby *et al.* 2017). Gaps in the data that was publicly available on the use of temporary judicial officers across Australia was filled by data collected by the JCA on behalf of the research team. As the final report stated, based on their initial research, the researchers developed a set of questions that the JCA then sought answers from each of the state and territory courts. The JCA was able to obtain the requested data from 19 of the 21 courts it approached. In this way, with a high but not universal success rate, the AJAO was able to collect data, working with a research team to provide a full expert analysis on the issues.

#### 4.3. *The Australian Institute for Judicial Administration (AIJA)*

The AIJA is a research and education institution for the judiciary across Australia and New Zealand. The principal objective of the AIJA is stated to include:

research into judicial administration and the development and conduct of educational programmes for judicial officers, court administrators and members of the legal profession in relation to court administration and judicial systems.<sup>2</sup>

One of the most significant contributions of the AIJA to the study of judicial officers has been as a source of data. It is the only source of regular national gender-diversity statistics in the judiciary, and its contribution in that context cannot be understated. However, until 2020, when the compiling of these statistics was outsourced to Professor Brian Opeskin (2020), the methodology behind this data was opaque, resulting in significant limitations in the data set, despite it being regularly used by judicial researchers. In 2021, the Australian Law Reform Commission (recommendation 8) recommended that these statistics be collected, and reported on annually, at least for the federal courts in Australia, by the Attorney-General.

The AIJA also plays an active role in commissioning research on judges and courts, including on topics such as judicial education, court ordered ADR and judicial workload. Like the AJOA, the AIJA has no automatic right of entry for the research that it commissions. The access of the researchers it commissions comes from its reputation as a body producing high-quality research, at a national level, on the judiciary, and the imprimatur from its Council, which comprises of the judiciary, the academy and other stakeholders, and its committees. But the AIJA has a number of characteristics that make it a unique and important institutional actor in relation to the study of judicial officers. The first is that, like the AJOA, the AIJA includes judicial voices from across courts in Australia and New Zealand, not just heads of jurisdiction. This means that there will likely be more views and perspectives on the importance of judicial research to institutional values to inform its development. Second, the fact that the AIJA is not an exclusively judicial institution, and includes practitioners and academics, means that these conversations about judicial research and institutional values can be undertaken with these other perspectives at the table.

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<sup>2</sup> See further <https://aija.org.au/>

## 5. Conclusion

While there are a range of institutional actors that play an important role in responding to judicial research, commissioning judicial research, and providing data on judicial research, the Chief Justice performs a unique, powerful and pivotal role. For both pragmatic and principled reasons, the Chief Justice often acts as a gatekeeper to studying judicial officers and courts. The Chief Justice also has a unique contextual understanding of the operation of courts and pressures on judicial officers, being privy to data and a full suite of contextual factors that other actors are not. But the unique position and power of the Chief Justice does not come without dangers for the court as an institution as well as for the integrity of research; dangers that researchers must navigate with care. In that respect, we argue that our framework provides researchers with a useful tool through which to contemplate the design of their research. This is because it situates research within the judicial values frame and requires researchers to consider the different gatekeeper, provider, responder and commissioner roles of the head of jurisdiction, as well as acknowledging the contingency of interpreting and prioritising values by different judicial officers, and judicial institutions. We argue that by emphasising the necessity, advantages, and limitations of engagement with the Chief Justice in designing and implementing research projects, our framework supports researchers to make informed decisions about research methodology and design that will support robust academic inquiry and critique of judicial institutions.

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