

A proposal to jointly develop

**National Performance Criteria and Benchmarks for
Handling Complaints against Lawyers**

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* This paper is an only slightly amended version of the report of a scoping study undertaken at my request by Kent Maddock of Sagacity Consulting and Ted Wright, Belle Wiese Professor of Legal Ethics and Dean of the School of Law at the University of Newcastle.

1. Introduction: Common Interests

1.1 Common Goals

All of us here represent agencies that have legislative responsibilities for regulating the legal profession, and in particular each of us plays a role in systems specifically dedicated to handling complaints against lawyers. Regardless of whether the scheme of which you are a part conforms more closely to a model of ‘self regulation’, or ‘co-regulation’, or indeed is a ‘purer’ model of independent regulation than mine, our systems share features that indicate these common goals:

- (i) to deal with grievances of users of legal services or “redress consumer complaints”
- (ii) to enforce professional conduct standards
- (iii) to enhance ethical standards and behaviour in the profession generally (ie reduce incidence of dissatisfaction with the legal profession)

1.2 Common core of ideas and approaches

Although of course our systems each differ in more or less fine details, they also manifestly share a common core of ideas about processes and outcomes. Thus, in all jurisdictions there is a legislative prescription for:

- (i) To start with the rather obvious, but equally significant commonality, how complaints are to be made, and by whom they can be made (a prescription invariably contemplating mainly, although not exclusively, consumers of legal services).
- (ii) Investigating complaints, including a power for an investigating agency to take no further action or dismiss a complaint summarily.
- (iii) Resolving ‘consumer disputes’ by conciliation or mediation (in most if not all jurisdictions).
- (iv) Distinguishing between serious and less serious forms of misconduct (‘unsatisfactory professional conduct’ and ‘professional misconduct’)

- (v) Adjudicative agencies and processes for resolving allegations of serious misconduct, combined with a range of serious penalties and powers to order compensation.

Similarly, there are legislative provisions in most if not all jurisdictions empowering complaint-handling agencies to recommend improvements to the system for regulating professional behaviour. It would appear that these powers contemplate recommending changes to professional conduct rules. It would also seem that they extend to recommending, at least, that professional associations or other governmental agencies engage in professional and community education, where these are not explicitly functions of the complaint handling agency.

2. Opportunities

Our common goals and common core of ideas and approaches indicate opportunities for:

- (i) knowledge sharing
- (ii) resource sharing
- (iii) experimenting
- (iv) identifying best practices in complaint handling and, ultimately, enhancing the standards of practice and behaviour of lawyers.

Each of our systems generates or could generate potentially useful data that could help us to evaluate how well we are performing our functions, and to discover ways of improving our performance. Indeed, some of us are specifically directed by our legislation to develop performance criteria or Key Performance Indicators (KPIs) and to report against these in our annual reports.

2.1 Examples of Opportunities

Some examples of opportunities are:

- (i) for those who have a legislative requirement to develop KPIs, sharing efforts to meet the requirement (even those who don't have the requirement might still see value in participating)

- (ii) comparing KPIs to observe differences and through further analysis to learn about the effects of different approaches in different systems.

Cases in point might be:

- identifying effective education strategies for reducing complaints and improving conduct (eg ‘Client Care’ guidelines for practitioners, effective communication, ‘common pitfalls’ for practitioners)
- identifying needs to regulate specific forms of conduct and suggesting new rules (eg common conveyancing problems, costs disclosure).

3. Options

If lawyer complaint agencies decided to work together to develop a set of common KPIs, we could choose to work within either of two frameworks. One is narrower, and the other is broader. In crude terms, the narrower framework focuses on the process of complaints handling, as if this was an end in itself. The broader framework includes the complaints handling process focus, but views it as a part only of the means to an end, namely the three common goals I identified at the outset. It introduces the ideas of measuring the quality of the complaint handling system and its effects on ethical standards and behaviour in the profession.

3.1 The narrower (process) focus

The narrower option views the work of lawyer complaint handling agencies in much the same way the work of courts is viewed. A complaint is an ‘input’ in the same way a case is, and the object is to dispose of it in a timely, efficient and fair manner.

3.1.1 *Example ‘Complaint Processing’ KPIs*

Examples of such indicators would be:

- A backlog¹ measure being the number of ‘old’ complaints on hand in excess of the number allowed under the time standards.

This measure would require the adoption of a national time standard for handling complaints. The standard might read ‘90% of all complaints should be finalised within 4 months of commencement and all complaints should be finalised within 9 months.’ (Note: This is an example only. The figures are not meant even to suggest an appropriate time standard for lawyer complaint handling.)

This allows the complaint system manager to monitor backlog and draws attention to the particular cases to which attention should be given. If compared between jurisdictions using a nationally agreed time standard, it would provide one indicator of the difference in timeliness of the jurisdictions. The differences in timeliness might be due to a number of factors including different levels of resources being applied - differences in performance against KPIs only highlight differences but explaining the differences is another matter again.

In relation to the capacity of a whole system to deal with its complaint load (and comparison of this between systems), a KPI might be:

- The clearance ratio being the number of finalisations of complaints for a chosen reporting period divided by the number of receipts of complaints in the same period, multiplied by 100 (to provide a percentage).

A figure of 100% indicates that a jurisdiction is keeping up with its workload; a higher figure means that it is reducing its pending complaint load while a figure less than 100% means that complaints are accumulating.

This is a management tool for system managers to monitor and react to the capacity of their system to cope. It can be used in conjunction with the backlog measure. If significant differences in this indicator appeared consistently between jurisdictions, then one system might have something to learn from another, perhaps in terms of resource allocation but also perhaps about the ‘mechanics’ of their system.

¹ This and some of the other KPIs proposed here are developed and presented in L. Glanfield & E. Wright, Model Key Performance Indicators for NSW Courts, Justice Research Centre, Sydney. February 2000.

In relation to cost effectiveness, a powerful policy comparison tool might develop from a performance indicator such as:

- Number of full time equivalent complaints personnel employed / 1000 lawyers in the jurisdiction.

Again system managers might monitor this over time in conjunction with the previous two indicators to understand more about their own system.

In relation to accessibility, a possible KPI would be:

- Number of complaints received in a period / 1000 lawyers in the jurisdiction

Comparison of this indicator between jurisdictions might reveal that one system is more accessible than another. However there are other possible explanations to explore. For example differences between jurisdictions might mean that one system's constituency has less faith in its complaint handling system than another.

In relation to monitoring and comparing outcomes for any of the common processes numbered from (ii) to (v) in section 1.2, a KPI framework might be agreed along the following lines.

- Define categories of outcomes for each process – for example for mediation the categories might be 'settled', 'did not settle'.
- Define the performance indicator for a process as the number of each different outcome in a chosen reporting period divided by the total number dealt with in the same period, multiplied by 100.

Interest in these indicators would range from the variation of the figures for a particular process over time within one's own jurisdiction, differences between outcome figures for different processes within one's own jurisdiction and differences in these figures between jurisdictions. Questions that might arise are:

- Why is the percentage of mediations of consumer disputes that settle falling within my jurisdiction?
- Why is the prosecution success rate for serious misconduct actions consistently below 40% in my jurisdiction?

- Why is the percentage of summary dismissals significantly different between my jurisdiction and yours?

These are ‘hard’ data that should sound warnings about whether a system is providing a remedy when it should, or whether too many complaints are resulting, for example, in summary dismissal.

The focus on the use of these ‘Process focused’ KPIs would be to make the complaint handling more efficient, and no doubt inter-jurisdictional comparison of key performance measures could provide many useful insights to this end.

There are, however, I think two significant downsides to taking the narrow approach. The first is that a process focus will, almost inexorably, make micro-differences in process seem more important than they are, and lead to distracting difficulties in accommodating them within the national framework, that would consume our interest and energy. More importantly, however, we would miss out on the much greater potential offered by the broader focus, as an aid to fulfilling our statutory purposes.

3.2 The broader (goals) focus

The narrower process focus for KPIs that are applied to courts is, arguably, appropriate to them for reasons that do not apply to us. Time will not permit me to develop this point and, indeed, I can suggest that it would not advance our thinking were I to do so. It will suffice if I note without comment that quality of the judicial process and its outcomes are generally not the object of KPIs, even though fairness of process and justice of decisions are clearly ‘key’ performance areas. Further, it is not even remotely considered appropriate by any one to measure the performance of courts as enforcers of the law and guides to higher standards of behaviour, even though these are both generally acknowledged parts of their functions.

However, we have the opportunity to extend our focus to take into account both the quality of our complaint handling systems and their effects on ethical standards and behaviour in the profession. This is the broader, holistic view of complaint handling that is explicit or implicit in the legislative arrangements that apply to all of us, and in the three common goals of our jurisdictions outlined in section 1.1 above.

3.2.1 Example 'Goals' KPIs

The same performance indicators would still be useful under this approach as under the narrower focus. In fact, the narrow option would be subsumed by the broader if the broader approach were taken. The objective here would be to identify KPIs for each process and the system as a whole and to use these to understand why different performance was being achieved in different systems and functions within systems. As well measures of quality and effect on ethical standards and behaviour would be included.

As already stated process focused KPIs such as backlog measure, clearance ratio and cost effectiveness would still be used and provide valuable internal and comparative information.

In relation to the previously defined KPI about accessibility – the measure used was:

- Number of complaints received in a period / 1000 lawyers in the jurisdiction

If this KPI was significantly different in one jurisdiction from another and was being used in the broader, goals focused context, the explanations put forward under the narrow focus might still be relevant (one system is more accessible than the other or one system's constituency has less faith in its complaint handling system than the other). However, another possible explanation arising from a recognition that a complaint handling system should be attempting to affect ethical standards and behaviour in the profession is that one jurisdiction has been more successful in raising standards than another. Careful inquiry into how this has been accomplished could be profoundly valuable.

In relation to monitoring and comparing outcomes for any of the processes in section 1.2, for the narrow focus, I suggested an 'outcomes per category' KPI.

In looking at the questions that might arise on observing differences between jurisdictions, the broader, goals focused approach invites exploration of the differences in standards of the processes being measured.

So the previously posed question can become:

- Could it be that the percentage of summary dismissals in my jurisdiction is significantly different from yours because my standards of assessing ethical behaviour is different from yours?

If we were interested to measure quality we might consider a KPI around client satisfaction. It might be possible to work together to construct a common core of questions that each jurisdiction could use in participant exit surveys. Some jurisdictions have already done significant work in this area. The principles that underpin effective complaint handling systems could form the basis of this work.² This might cover the three classical components of satisfaction associated with disputes – satisfaction with procedure, satisfaction with the way I have been treated and satisfaction with the substantive outcome.

If for example, measuring client satisfaction revealed acceptable levels of satisfaction about the fairness of my agency's processes and the respect my agency accorded parties but low levels of satisfaction with the outcomes, one line of explanation would lead to policy analysis regarding the jurisdiction of my agency. Perhaps my performance in this respect is poor because my job is impossible – I don't have the powers to deal with the full range of disputes that I need to produce satisfaction.

As a final example of the broader focus, it should be possible to select areas of particular interest to all jurisdictions and to develop KPIs to allow for their investigation. For example, a common view exists that the gulf between consumer expectations and service reality is a major cause of complaint about lawyers. Indicators based, say, on Expenditure on Professional Education and Expenditure on Community Education, tracked over time and compared from jurisdiction to jurisdiction in association with other indicators such as numbers of complaints and client satisfaction, may throw light on effective strategies for addressing this issue.

4. Conclusion

There are many ways of approaching the development of performance indicators for lawyer complaint handling agencies. This paper has illustrated two; a narrow, process

² Clear and simple frameworks are suggested in *Devising a Government Complaint System – Guide to Good Practice*, State of Alaska Ombudsman. Posted November 1998 to www.state.ak.us/ombud/complsys.htm

focused perspective on complaint handling and a broader, goals focused approach that would be structured to highlight questions not only about the efficiency of the processes and the whole systems but also about its quality and its effects on ethical standards and behaviour in the profession.

The examples given here are not definitive nor are they exhaustive. They have been presented to stimulate interest and debate on the topic.

There are also a number of ways that the suggested frameworks could be put in place. One would be for a few of us who see immediate interest in specific aspects of a performance indicator framework to informally work together on areas of mutual interest and allow the framework to develop over time, as we have time. However, a project plan is attached to show how we could all be involved immediately in developing these ideas in a purposeful way, so that we all move closer, quickly, to achieving our common goals outlined in section 1.1.

ATTACHMENT

A POSSIBLE PROJECT PLAN

	Action	Responsibility	Timeframe
1.	Agreement to proceed by interested Agencies and agreement on contributing to the investment	All agencies to consider	By end Oct
2.	Engagement of consultants	Steering Committee	By end Nov
3.	Thorough review of legislation and existing performance reporting and further development of the broad framework presented to Steering Committee. Agree on the developed framework of the benchmarking	Consultants Agency leaders	By end Dec By end Jan
4.	Assess the complaint handling functions and processes of potential participants to understand the similarities of processes and functions Report on these	Consultants To Steering Committee	 By mid Feb
5.	Finalise the specifics of what will be measured (the performance indicators (including goals)) and how this will be done – the benchmarking model Obtain agreement from participating agencies	Consultants Steering Committee	 By end Feb
6.	Begin the measurement and comparison using the existing recording systems of the complaint handling functions	Consultants and the participating organisations	March and April
7.	Adjust the benchmarking model if necessary	Consultants and participating organisations	During the period
8.	Analyse results (adjusting for differences in processes and functions between agencies) Report	Consultants	Before end May
9.	Implement regime formally	Consultants and participating agencies	By 1 July '05