

JUDICIARY AND KPI – WHERE IS THE BALANCE?

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Statistics on a court's performance in disposal of various types of matters are kept in the course of the administration of a modern court. These statistics may be used to draw conclusions about trends in the court's workload, compare the performance of similar courts or to base requests to the Executive for additional resources. It may be theoretically possible to produce statistics on an individual judge's performance, but that leads to the question whether it is feasible and proper to keep statistics on an individual judge's performance and, if so, the purposes for which they could be used.

In discussing the role of key performance indicators and statistics in monitoring the work of the court, this paper will consider the interplay of two principles: judicial independence and integrity of judicial performance. Independence of the judiciary underpins the rule of law. Diligence in the discharge of judicial duties assists in maintaining the independence of the judiciary. The paper will also discuss the negative aspects of keeping statistics on the performance of an individual judge and the role of collegial responsibility for the overall performance of the court.

Some definitions to begin with

In broad terms, **judicial independence** refers to the constitutional and practical independence of the judiciary from other arms of Government and external influences. Article 3 of the *Beijing Statement of Principles of the Independence of the*

*Judiciary in the LawAsia Region*¹ is an apt description:

“3. Independence of the Judiciary requires that;

- a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
- b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.”

The concept of judicial independence encompasses the court as a whole, but is also a term that applies to the role of the individual judge.

The term **key performance indicator** or **KPI** is a management term for a measure of performance, such as volume of sales in the retail sales context. An example of a standard definition is:²

“KPIs represent a set of measures focusing on those aspects of organizational performance that are the most critical for the current and future success of the organization.”

What KPIs are currently used for Australian courts?

The Report on Government Services (RoGS) that is published each year in Australia has a section on court administration that focuses on data on the processing of criminal and civil cases. The Federal, State and Territory Governments have agreed objectives for court administration that are reflected in the choice of performance indicator framework. The objectives set out in the 2011 Report³ are:

- (a) to be open and accessible;

¹ The *Beijing Statement* was released following the 6th Biennial Conference of Chief Justices of Asia and Pacific, held in Beijing in 1995 and is accessible at the LawAsia website <http://lawasia.asn.au/beijing-statement.htm> viewed 26 September 2011.

² Parmenter D, *Key performance indicators: developing, implementing, and using winning KPIs* (John Wiley & Sons, New Jersey: 2nd ed, 2007) p 4.

³ Report on Government Services 2011 at 7.22 accessible at <http://www.pc.gov.au/gsp/reports/rogs/2011> viewed 26 September 2011.

- (b) to process matters in an expeditious and timely manner;
- (c) to provide due process and equal protection before the law;
- (d) to be independent yet publicly accountable for performance.

The current focus of the court administration data is on the disposal of cases, such as the numbers of cases disposed of during the reporting period and the time taken for disposing of them. The RoGS figures allow the relevant government to compare the performance of its courts against the performance of the courts of other States and Territories. There are nationally agreed counting rules. There are discrepancies incorporated into the figures because of such matters as variations between the States and Territories as to the division of work between tiers of courts and tribunals, diversion programs that affect disposal of cases and differences in geography and demography. Despite those discrepancies, trends can be discerned as the figures have been continually refined and improved over the years. There is a working group that is currently investigating how performance indicators might be made more relevant and informative.

The characteristics of court administration performance that are notionally the subject of the performance indicators are described as equity, effectiveness and efficiency, but the Report acknowledges that effectiveness of court administration is currently measured by reference to access to the court rather than the quality of court administration performance. The Report makes it clear that quality is an indicator of governments' achievement against the objective of providing due process or access to

judicial determination of cases and is not concerned with the outcomes of judicial decisions.⁴

Among the performance indicators used are backlog indicator and clearance indicator. The backlog indicator⁵ measures the age of a court's pending caseload against nominated time standards and the number of cases in the nominated age standard is then expressed as a percentage of the total pending caseload. For the purpose of evaluating the data, national standards have been set. For many courts the standard is that no more than 10 per cent of lodgments pending completion are to be more than 12 months old and no lodgments pending completion are to be more than 24 months old.

The clearance indicator⁶ is measured by calculating the number of cases finalised in the reporting period as a percentage of the number of lodgments in the same period. The clearance indicator therefore shows whether the volume of case finalisations has matched the number of case lodgments during the reporting period or whether a court's pending caseload would have increased or decreased over that period.

It is accepted that the use of performance indicators for court administration services as part of the accountability of government for expenditure of public funds does not erode judicial independence.⁷

⁴ Report on Government Services 2011 at 7.26.

⁵ Report on Government Services 2011 at 7.27.

⁶ Report on Government Services 2011 at 7.37.

⁷ French CJ, *The Judiciary in An Age of Global Interdependence* (Paper delivered at International Association for Court Administration Conference, 15 March 2011, Bogor, Indonesia) accessible at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj15mar11.pdf>. viewed 28 September 2011.

A number of organisations concerned with fostering efficient court administration have cooperated to develop the International Framework for Court Excellence which is “a framework of values, concepts and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver.”⁸ Two courts in Australia which have implemented programs to apply the International Framework for Court Excellence are the Magistrates’ Court of Victoria and the Land and Environment Court of New South Wales.

Are KPIs for Australian courts relevant to judges in performing their role?

The reality that measurements of a court’s overall performance are published in annual statistics such as RoGS or in the court’s annual report is not lost on the judges of the court. The art of the judicial role or the skill of judicial decision making cannot be measured quantitatively.⁹ Although the finalisation of a case may follow as a result of a trial or judgment, the disposal of the case in that way is part only of the court process. The timeliness of the disposal of the case may be affected by many factors apart from the role played by the judge, such as availability of witnesses, availability of court resources such as court reporting or technology assistance, or work pressures on the lawyers in the case.

One response of judges to the existence of statistics such as the RoGS figures is the development of protocols on the usual period of time for which a judgment will be reserved before it is given. For the Supreme Court of Queensland the judges’

⁸ International Framework for Court Excellence at p 4 accessible at <http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf> viewed 29 September 2011.

⁹ Spigelman JJ, *Measuring Court Performance* (2006) 16 JJA 69, 70.

protocol for reserved judgments provides that a judgment should generally be delivered within three months after the conclusion of the hearing, except in exceptional cases. The protocol also provides that where a judge experiences difficulty in meeting that timeframe, the judge should advise the Senior Judge Administrator, so that arrangements can be made, such as adjusting the judge's calendar to give time out of court, in order to facilitate the finalisation of the judgment. The commitment of judges collegiately to such a protocol brings with it a recognition that there must be judgment writing time made available for the judge.

Another example of a judicial response to the existence of statistics on the overall performance of a court is judicial supervision of listing practices to make the most effective use of available judge time for trials and hearings.

Diligence in the discharge of judicial duties is one of the guiding principles for appropriate judicial behaviour in Australia,¹⁰ as that supports the objective of maintaining the independence of the judiciary. The positive judicial response to the existence of KPIs that measure the overall performance of a court recognises the public expectation that an independent judiciary will apply diligence in the discharge of judicial duties.

Why there are no official published statistics kept on the performance of individual judges

In the Australian context, there is no court sanctioned publication that applies any sort of KPI to an individual judge's performance. Occasionally a newspaper might

¹⁰ Council of Chief Justices of Australia, *Guide to Judicial Conduct* (AIJA, 2nd ed, 2007) p 7.

publish an ad hoc article about successful (or unsuccessful) appeals from identified judicial officers in specific matters, such as sentencing for a particular type of offence.

There are a number of reasons why any idea for keeping statistics on an individual judge's performance is flawed. The following is not an exhaustive list. First, and most importantly, judges do not choose the cases they hear. That ensures impartiality and is essential for maintaining independence of the judiciary. Second, there is no consistency in the degree of difficulty of cases. (In fact, with the prevalence of alternative dispute resolution processes, it is the cases that are marginal or with difficult issues of fact or law that tend to proceed.) Third, the dynamics of the trial may be affected by the preparation (or lack of preparation) of the lawyers or deficiencies in evidence which may be addressed on an appeal. Fourth, the time that it takes for a judge to deliver a reserved judgment may be affected by the caseload carried by the judge.

Statistics such as number of appeals or numbers of successful appeals or numbers of unsuccessful appeals for a particular judge will usually be meaningless. In civil cases, the step of filing an appeal may be taken by the unsuccessful party to use as a negotiating tool. The more cases that a judge is able to complete may mean a potentially larger number of appeals. As Chief Justice Spigelman explained:¹¹

“Appeals are allowed for a wide range of reasons which have nothing to do with the quality of the decision. Appeals are dismissed in a wide range of cases, often in the exercise of an appellate discretion, which do not constitute any kind of endorsement.”

Where is the balance?

¹¹ Spigelman JJ, *Measuring Court Performance* (2006) 16 JJA 69, 76.

Courts in Australia have accepted and adapted to the annual publication of RoGS figures. There are clearly benefits for the maintenance of, or improvement in, the efficiency of a court in keeping statistics on the overall performance of the court, particularly for comparison purposes with courts of a like jurisdiction and for discerning trends in the overall disposal of a court's cases. These statistics focus on the entire court process, rather than the performance of the judges or any particular judge. The existence of those statistics has contributed to collegial responsibility for the overall performance of the court.

It is essential for the continued independence of the judiciary that statistics are not kept and published on the performance of an individual judge. The public should be able to rely on the diligence of an individual judge in the discharge of his or her duties to assist in maintaining the public confidence in the judiciary and the independence of the judiciary.

Justice Debra Mullins