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Dear Ms Roger,

Re: Draft report of the Review of the National Partnership Agreement on Legal Assistance Services (NPA Review)

Thank you for your email of the 31 March 2014 to NLA's representatives on the NPA Review Advisory Committee attaching the draft report of the NPA Review and three accompanying working papers which underpin the findings and opportunities presented in the draft report.

Your email invites participation by NLA in consultation feedback on the draft report, and advises that the working papers which underpin the report are final and are provided for information only. It notes both that any feedback provided will be important to delivery of a robust report, and that ACIL Allen Consulting would be grateful for any feedback on any matters of fact that impact the accuracy of the draft report. It advises that following finalisation of the draft report, there will be further opportunity for sector consultation in the context of the (anticipated) draft Productivity Commission (Inquiry into Access to Justice Arrangements) report and the further work of the Attorney-General's Department (AGD) to progress the way forward for legal assistance from 1 July 2015.

Also as foreshadowed by your email, the AGD has released a copy of the draft report direct to NLA confirming any feedback on the draft report should be provided to you through Advisory Committee representatives with the working papers being final, and stating that the purpose of feedback should be to assist ACIL Allen Consulting to finalise their report and focus on matters of fact that impact on the accuracy of the draft report. The AGD's advice also noted that there will be opportunities to discuss the NPA review's findings and suggested reform options with the department at a later date.

Whilst we understand that the working papers are final (although remaining confidential at this stage) and do not form part of the current consultations, we have concerns that some aspects of the working papers should be better contextualised, and that they contain some errors and omissions which should be addressed. This would help avoid the potential for any misunderstanding by those not so familiar with the legal assistance service sector. This is particularly the case in relation to the history and development of current and draft legal assistance data sets, the extent of the testing of the framework and data sets, and the potential applicability to Australia of innovations in legal assistance service delivery in other countries.

In accordance with the invitation to comment on the draft report and the advice received that the working papers are final, NLA's comments below focus on the draft report. Thank you for the opportunity to provide these comments.

Comments on Draft Report

The draft report is generally well-written. We appreciate the extent of the research behind it. We request that the following matters are addressed:

Preface

p.iii ... "A series of working papers detail the analysis that has informed this report. ...

Prior to finalising the Review report on legal assistance services, key stakeholders are being consulted through the governance bodies for the Review whose membership includes the national bodies representing the providers of legal assistance services. This approach recognises the wider consultation undertaken in the earlier stages of the Review and the focus of this consultation. Consultation feedback will be taken into consideration in any refinements to the report prior to submission of the final report to the Australian Government Attorney-General's Department".

To ensure that there is no room for misunderstanding we request that the preface clarifies that legal assistance service providers were not consulted about the content of the working papers and are not to be taken to have endorsed their accuracy. The preface should also state that the draft report does not necessarily reflect the views of the legal assistance service providers.

Executive Summary

Given the general importance of executive summaries, it would assist if the Executive Summary recognised at its outset¹ that Australia's legal assistance service delivery is efficient, effective and innovative by international comparison, that the benefits of the mixed model of service delivery are internationally recognised, and that the origins, nature, purpose, focus and extent of service delivery by the legal

¹ And as is suggested elsewhere in the report, eg p.4 Chapter 1

assistance service providers are different, as are the local conditions and legal needs across the country.

Further amendments to the Executive Summary flow from the following comments on the individual chapters of the substantive report.

Chapter 1

Introduction

We suggest that it would be of assistance to those not so familiar with the legal assistance sector and service delivery, and could help avoid the potential for misunderstanding, if the content of Chapter 1 could further distinguish between the legal assistance service providers (independent organisations), and the Commonwealth's legal assistance funding program(s) which supports the provision of efficient and effective services by providing some funding to the legal assistance service provider organisations to help provide the services.

Chapter 2

Key Review findings and implications

Key findings

Targeting disadvantaged groups

p.7 "The current level of legal assistance however is insufficient to meet demand for certain types of services (such as legal representation services) and legal problems (related to civil law matters) and also affected the level of support able to be provided to people with more complex, or linked non-legal problems".

This paragraph could be construed to mean that the current level of legal assistance is sufficient to meet legal problems not "related to civil law matters" which is not the case. It would be accurate to say "The current level of legal assistance however is insufficient to meet demand for services and different legal problems, particularly those related to civil law matters, and also affected the level of support able to be provided to people with more complex, or linked non-legal problems."

Whilst an economical use of language we have some hesitation about the use of the expression "targeting disadvantaged groups". Perhaps consideration could be given to changing this language here and elsewhere appearing in the report to reflect assistance for disadvantaged groups?

Is the legal assistance sector providing the right services to support achievement of the NPA objectives?

p.14 "The Review found that strategic and operational planning to support achievement of NPA objectives was not performed by all service providers, and was relatively immature in a number of ATSILS, community legal centres, and FVPLS. However, examples of very mature processes were reported by some organisations

of each legal assistance service type, indicating opportunities to share good practice between service providers of the same type.”

It is unclear whether the services referred to were not performing strategic and operational planning pursuant to their separate agreements with the Commonwealth which the NPA expresses “are consistent with the objectives of this agreement [the NPA]”. Whilst stated elsewhere in the draft report², it is suggested that it would be appropriate if the statement here were contextualised by noting that these services are not parties to the NPA or funded pursuant to it.

Chapter 3

Short to medium term improvements

Key points

Meeting the legal needs of disadvantaged Australians

p.21 “Greater coordination of services for clients with complex needs and multiple/frequent legal problems through case management has potential to improve individual outcomes, as well as reduce service costs. These services should not necessarily be provided by legal assistance service providers. Establishment of mechanisms to ensure appointment of a legal case manager and/or liaison with an external case manager would improve service coordination”.

Please see comments in relation to “case management” below.

3.1 Meeting the legal needs of disadvantaged Australians

Deciding who receives what types of services (client centred service delivery)

Improvement option (a) – Increased clarity about who should receive which types of services

p.22 “As an example, currently there are no limitations on access to some services such as the provision of information and advice”.

This example might be taken to mean that there are no limits placed on the provision of all legal information and advice by service providers. This is not the case, for example many face to face legal advice services are subject to the provision of a health care card. It would be more accurate if the draft report stated “As an example, currently there are not limitations on access to some information and advice services.”

Improvement option (b) - More intensive management of people with complex needs experiencing multiple/frequent legal problems

p.26 “The Review found that relatively few legal assistance services have processes and practices in place to provide for more intensive case management of individuals with complex needs. It is not assumed that a case manager would necessarily come

² For example p.17

from the legal assistance service provider, however establishment and utilisation of such a process by legal assistance services, with specific responsibility for coordination of legal services with the case manager, is likely to contribute to better management of people with complex needs experiencing multiple/frequent legal problems. ...

Improvement option (b) – areas for action

p.26 Establishment of processes within legal assistance services to case manage clients with complex needs and/or co-ordinate legal services with an external case manager.”

NLA is highly supportive of co-ordinated service delivery across legal and non-legal service providers.

NLA is however concerned that the draft report as currently worded could give rise to the mistaken impression that there is a particular model of “case management” which could be readily adopted, which would be likely to add significant benefit, and which would be cost effective.

“Case management” is likely to mean different things to different people. For example, a distinction is commonly understood to exist between “case management” where someone oversees and co-ordinates all activities, and facilitated referrals³ by a provider to other service providers which enable the ongoing exchange of relevant information between service providers for the person’s benefit and with the person’s authority.

The institution of “case management” per se across a range of providers runs the risk of adding a comparatively/unproductive layer of service delivery in a climate of limited funds. Depending on what is entailed and without an appropriate understanding of others roles and responsibilities it could also have the potential to be detrimental to outcomes for the client and lead to conflict between providers.

It is suggested that there will not be one model of co-ordinated service delivery but many and that a good local system of legal and non-legal referrals and a focus on local training to understand the role, availability, and identification of involvement of other service providers will in many cases be a beneficial and cost effective approach.

Accordingly, NLA suggests that it would be appropriate for the draft report to suggest “investigation by legal assistance service providers of potential processes for the management of the different issues faced by people experiencing multiple/frequent legal problems”.

³ There are also different levels of facilitation

Both here and elsewhere appearing, we suggest that it would be preferable for the report to refer to management/co-ordination (depending on context) of issues or needs rather than “management of people”.

Providing integrated, coordinated legal and related support services

Improvement option (c) - Further development of collaboration with Family Relationships Centres (FRCs)

p.27 “It could also assist in working with FRCs in building cultural competencies and augmenting their capacity to manage the more complex clients, especially those with a history of family violence. This arrangement would extend the resources available to the clients of legal assistance services, provide an appropriate non-legal service setting for a proportion of clients, an efficient approach to resource allocation and reduce service overlap.”

We have some concern that an inference might be incorrectly drawn from the words “non-legal setting” that family dispute resolution should not of necessity be operating in a legal context, and that where legal assistance service providers provide family dispute resolution, that they do so in a particularly legal setting.

The reference to “service overlap” could also give rise to some inaccurate understandings about the role of family dispute resolution in legal aid commissions, which whilst providing a FDR service to the client and former partner, also fulfil a grants management function in relation to aid for litigation services, and so, at least in this regard, are distinct from the services provided by the FRCs.

It would therefore be helpful if the words “provide an appropriate non-legal service setting for a proportion of clients” were deleted and substituted with the words “and provide an efficient approach to resource allocation.” or, alternatively, for this section of the draft report to be better contextualised.

It is suggested that the draft report would more appropriately refer, here and elsewhere appearing, to the management of complex issues rather than “complex clients”.

Improvement option (d) - Streamlining of front line interfaces and triage arrangements

p.28 “...There is scope to consolidate the multiplicity of websites and telephone services aimed at providing front line services along the lines of the Law Access NSW service. This type of service is well placed to provide triage services for legal assistance within the relevant state or territory.”

Whilst LawAccess is considered to work well in NSW, legal aid commissions have extensive state-based front line service delivery interfaces.

The recall of those surveyed by the *Legal Australia-Wide Survey: Legal Need in Australia* (LAW Survey) of legal assistance services was highest for legal aid commissions⁴. It is suggested that these findings, which are relevant to streamlining access to service delivery, should be referenced in the draft report.

Chapter 4

Significant reform opportunities

4.2 Coordinated system governance, planning and funding to support client centred services

NLA supports co-ordinated planning and delivery of legal assistance services.

Policy and priority setting

p.36 “A Legal Assistance Advisory Standing Committee (LAASC) comprised of senior officials from Commonwealth, state and territory governments with the option for inclusion of client representation, would provide advice to the existing senior officials committee (NJ CEOs Group) reporting to the Ministerial forum; the Standing Council on Law and Justice. Working groups convened on an as required basis would provide technical advice to the standing committee on a range of matters to build the evidence base for policy decisions and effective policy implementation. The working groups would draw on a range of experts from government, non-government, sector and system representative bodies and academia.

A key role of LAASC would be to develop a national legal assistance service strategic plan. ...”

This text suggests that legal assistance service providers are not to be involved in strategic planning relating to the sector and its clients on either a national or state/territory level.

Related to the text above is the “Legal Assistance Service System Governance” diagram (Figure 4.1 p.35). This diagram does not depict representatives of the NPA legal assistance service providers involved at the “policy and priority setting point” except to the extent that they might be joined on an ad hoc basis in one of the working groups which might be convened. It is a significant concern that the expertise of the legal assistance service provider organisations, whilst included at the “system planning” point, does not appear to have been recognised as the main source of information and input. This expertise is fundamentally relevant to the policy and priority setting for legal assistance services, and is necessarily involved in national and/or state or territory level strategic planning for legal assistance service delivery.

⁴ p.137

POTENTIAL FUNDING ALLOCATION APPROACHES

p.38 “Analysis of current funding arrangements undertaken as part of the Review (see *working paper two*, chapter 8) found that there are opportunities, in line with current direction in public sector management, to move towards output based targets and/or funding. An important element of the proposed output based funding approach is inclusion of additional loadings or weightings for certain population groups and/or locations. This would ensure appropriate incentives for targeting service delivery to eligible groups and support a client centred approach by covering the costs of managing clients with complex, multiple needs (including case management)...

A pre-requisite to successful implementation of output based funding is robust data about service costs, including any additional costs involved in servicing particular client groups. Such data do not presently exist so that introduction of output based funding is a long term option, which needs to be accompanied by improvements in information about service costs.”

Box 4.2

“OVERVIEW OF ARRANGEMENTS FOR SERVICE PROVIDER SELECTION, FUNDING AND REPORTING

1. State and territory performance targets to meet the policies and service priorities set out in the strategic plan set by the LAASC.
2. Regional targets to support the state and territory performance targets set by state/territory planning forums.
3. Regional planning forums take a collaborative approach to determining which service provider organisations are best placed to provide services to meet specified targets. Provision for intervention of state/territory planning forums in decision making where collaborative agreement is not reached.
4. Specification of which service providers are responsible for which services made through regional and state/territory plans and reviewed/approved by the LAASC.
5. Funding provided to service provider organisations through an agreement between the Commonwealth, state planning forum and service provider organisation.
6. Performance against service targets compiled by state/territory planning forum, and submitted to the LAASC through a government report on state/territory performance.

Delivery of particular types of services would not necessarily be restricted to service providers operating under current legal assistance service programs. For example, an organisation currently delivering services under the Community Legal Services Program could branch into services previously provided by a legal aid commission or an FVPLS. Importantly, funding service delivery on the basis of an efficient price would provide incentives for the delivery of efficient services and encourage the allocation of legal assistance resources to their highest value use.

This structure also has potential to encourage greater involvement from the private profession. However, it should be noted that decisions about which organisations provide services would also take into account pre-existing factors, such as reputation or relationships with the community, which may better place some organisations to deliver certain services.

In areas where a serious shortage of service providers is present (i.e. thin markets) legal aid commissions could act (and would need to be funded appropriately) as a fall back 'service provider of last resort'. Meeting this requirement might occur in collaboration with other service providers such as ATSILS, depending on the location.

Decisions about which service providers would deliver what services in particular areas would take place at the state/regional system planning level. This would encourage collaboration and cooperation in meeting service targets and encourage system efficiencies. However, if collaborative agreement could not be reached provision could also be introduced for decisions to be made by state/territory planning forums based on a competitive assessment.

State/territory legal assistance service plans would include specification about which service providers will deliver the services needed to meet state/territory targets, which would be reviewed and approved by the LAASC. Once approved, individual funding agreements would be made between the Commonwealth, state planning forums (ie state funding bodies) and service provider organisations, providing for output based and/or block funding to provide the agreed services."

We note the content of Box 4.2, paragraph 5 and the paragraph on p. 41 "... Once approved, individual funding agreements would be made between the Commonwealth, state planning forums (i.e. state funding bodies) and service provider organisations, providing for output based and/or block funding to provide the agreed services."

We understand that the intention is for multiple agreements between the Commonwealth, the State/Territory, and the individual legal service provider. If this is the intention, to clarify matters we suggest that the reference to the "state planning forum (/s)" should be deleted and the "State or Territory" specified instead. The current reference to "state planning forum/s" has the capacity to cause confusion with the "state and territory legal assistance planning forums"⁵ which we understand it is proposed be comprised by representatives of legal and non-legal services providers, the Commonwealth Attorney-General's Department and representatives of the States and Territories.

⁵ "Legal Assistance Service System Governance" diagram p.35

From the text on page 40 following Box 4.2, it could be mistakenly inferred that:

- The nature, purpose, and capacities of the legal assistance service provider organisations currently providing legal assistance services are the same or at least very similar and that the service provision offered by each is readily capable of comparison and interchangeable for that of the other.

This is not the case.

- Service delivery is not already funded on the basis of efficiency.

Whilst a number of services at a fixed unit price is not the current basis for funding, and we understand that unit costs for some services were not available from some service providers, the data that is available about unit costs, the fees paid by legal aid services to private practitioners on grants of aid, the extensive contribution by volunteers, and existing research and experience from Australia and overseas all indicate that legal assistance service delivery in Australia is efficient and that the mixed model of legal assistance service delivery is the best.

- The structure proposed will increase service delivery by private practitioners.

If common eligibility tests are to be applied and the most efficient price of service delivery and administration is to be achieved then the current system of grants of aid and occasionally and in particular circumstances, payments for duty and advice services, through legal aid commissions or ATSILS needs to continue. This system also provides some capacity to control quality through contractual (panel etc) conditions⁶ and to manage issues of conflict. Significantly increased fee rates are likely to enhance the involvement of some private practitioners in some locations, but in many of the locations where the real challenges exist there are simply no private practitioners.

- Legal aid commissions are a “fall back ‘service provider of last resort’ ”.

Whilst the context of this phrase in the draft report is service provision in a “thin market”, we would prefer that legal aid commissions (and other legal assistance service providers) were not described in this way. Negative and ill-founded perceptions of the quality of legal assistance services are an issue that legal assistance service providers have to regularly contend with. It is unhelpful to staff morale and to minimising the perception of disadvantage if

⁶ Refer, for example, *AIFS Independent Children’s Lawyers Study May 2013*, and the work of the National ICL Stakeholder Group

people believe they are receiving a second rate service but have to take it because there is nothing else.

In addition to the above points the text suggests the encouragement of collaboration and co-operation between existing legal service providers, but then also raises the question of competitive assessment by state/territory planning forums. Such a suggestion is potentially threatening to existing and effective co-operative relationships between service providers, established over years by the service providers themselves.

Given the potential for the text referred to be misconstrued, and that it appears to add little, if anything, to the “system planning” elsewhere described in Chapter 4 we respectfully suggest that it could be deleted without any impact upon the findings or areas for action suggested by the draft report.

4.3 Outcome measures and performance indicators

p.41 “A consistent set of agreed national indicators for legal assistance services would better reflect the contribution of all parts of the Commonwealth and state/territory funded legal assistance services. National indicators would also reinforce service priorities and guide allocation of resources. These would replace the performance monitoring arrangements currently in place for each program.

The required data and frequency of data collection, covering who receives services and how much it costs to provide these services, should be informed by the findings of the Review and the refined set of indicators and data points (see working paper one, addendum)...

...Data should support accountability requirements to governments and the public, tracking of performance, understanding the costs of service delivery and inform good practice. This will require improved definition around specified groups of disadvantaged Australians, determination of average unit costs for service categories and systematic input from employees, clients, non-legal service providers and the wider justice system”.

Outcome measures and performance indicators – key action areas

p.42 “Establish a set of national, agreed performance indicators applicable across the legal assistance services, drawing on the evaluation framework developed and refined as part of the Review. These indicators would be populated by periodic or ongoing qualitative and quantitative data collection and address areas of focus including whether the sector is providing the right services to meet the needs of the most disadvantaged Australians, and providing services effectively, efficiently, and in a co-ordinated and sustainable manner.”

NLA is fully supportive of data collection which supports accountability for funding received and informs planning for service delivery, and is cost effective.

Particularly in the context of the suggestion of output based funding, although we note output based funding is expressed to be a long term option, we are concerned that the text of the draft report could give rise to a misunderstanding that developing a data set capable of yielding comparable data across legal assistance service providers, which is underpinned by systems and processes to enable collection and recording of that data is a readily achievable aim.

The work of the National Legal Assistance Data Collection Working Group (NLADCWG) has not been completed. At this date, the NLADCWG does not have an agreed draft data set with settled definitions, and has not begun to develop a set of counting rules (with the "count of 1" being a major issue), which could be properly tested. As ACIL Allen Consulting are aware (letter from NLA dated 29/5/13 attaching other correspondence), the issues involved are significant, and will require substantial resourcing if they are to be appropriately addressed.

We request that the draft report be amended so as to provide an appropriate understanding of some of the issues which will need to be tackled in relation to data collection, recording, reporting, and any potential for comparisons across legal assistance service providers.

4.4 Increasing participation of the private profession

p.42 "If there is sufficient funding made available to the private profession in regional and remote areas they are more likely to provide services where they currently do not. The service delivery structure outlined in section 4.2 could help facilitate this, by providing funding at an efficient price and flexibility for different providers to enter the legal services market."

Please refer to our comments under 4.2 above.

Conclusion

Thank you for the opportunity to provide these comments.

Please do not hesitate to be in touch with us if you require further information or wish to discuss any of the matters raised.

Yours sincerely,



George Turnbull
Chair