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National Legal Aid Submission on the Draft Evaluation Framework

National Legal Aid (NLA) acknowledges the difficult task undertaken by the Reviewers in developing an Evaluation Framework, across the four legal assistance programs and thanks the Reviewers for this opportunity to provide preliminary feedback on the Draft Evaluation Framework Discussion Paper. Our suggestions for improvement are offered as a basis for further meaningful engagement, on what is a complicated and difficult task and should not be construed as an endorsement of the Evaluation Framework itself.

1. Introduction

The Discussion Paper seeks input into the following questions:

1. To what extent do the community-wide justice outcomes reflect progress towards the long term objectives of the NPA and the Access to Justice Framework?
2. What other high level community-wide justice indicators should be monitored?
3. Do the draft performance indicators adequately and appropriately reflect the major areas on which attention should be focussed?
4. Are there any other indicators that should be considered?

The submission addresses these questions by querying the extent to which the community wide justice outcomes reflect progress against the NPA and making suggestions to improve the relevance of the indicators and consistency of the data.

In preparing our submission, it became apparent that information regarding the purpose of each indicator and how the Reviewers envision the indicator would inform decision making, would have been helpful in assessing the adequacy and appropriateness of the indicators. NLA suggests more detailed information be included in Table 2.2 'Measuring legal assistance services outcomes' to assist with submissions, prior to the end of the pilot testing, in Queensland.

2. General concerns regarding the draft framework

The Draft Evaluation Framework appears to have multiple purposes:

- Evaluating the past performance of the four program areas
- Establishing a framework for the future

NLA is concerned that the Framework is so broad it has lost focus on evaluating the progress of the Commonwealth and State and Territory parties, or progress made by Legal Aid Commissions, under clause 40, towards achieving the NPA outcomes, objectives and outputs. It is suggested that the Review be staged with learnings from the first stages informing the future stages.

NLA notes with concern that the evaluation of past performance as well as the Framework for future evaluation uses new data sets provided to the Reviewers by the Commonwealth Attorney-General's Department. It is difficult to see how this can be achieved.

2.1 Stakeholder consultation themes

The themes drawn from the stakeholder consultations have clearly had a significant influence on the evaluation questions and indicators proposed in the draft evaluation framework.

We appreciate that the Reviewers had a complex task to distil the input of a range of different stakeholders into these themes, and in general we agree that the themes seem to be a good reflection of the issues and challenges involved in evaluating legal assistance. However, the themes obscure the relative "weighting" of different service providers and service types in terms of the amount and number of services provided, and this has flown through to the framework.

For example, the first theme noted in relation to *service delivery* is that the structure and services delivered is highly disparate across service provider types, particularly across Community Legal Centres (CLCs). This is true across CLCs, but much less so across legal aid commissions, and in turn it is the commissions which deliver the vast bulk of services to clients, even though there are many more individual CLCs than commissions. Further, it is duty lawyer services and litigation services on a grant of aid that make up by far the largest part of legal assistance service delivery both in terms of numbers of services and unique clients assisted and in terms of funding. In giving an over-emphasis to the concern about disparate services, this theme skews the framework (as discussed in more detail below).

As another example, the first two themes identified in relation to *service constraints* reflect concerns about funding shortages, lack of resources and attraction and retention of staff. These are important issues and we do not dispute that they should be noted and reflected in the framework, but again they are experienced quite differently by CLCs and by the legal aid commissions which have the large majority of staff and deliver the large majority of services, and which do not in general have concerns about the retention of appropriately qualified staff, as an example. In the draft evaluation framework, these issues lead to proposed indicators regarding appropriately qualified and experienced staff and the number of pro bono and volunteer hours. In the overall context of the number of staff, hours and services

provided by the sector, these indicators would provide data that arguably is simply not material and given the implications of the sheer number of indicators proposed (see discussion below), NLA would suggest removing them.

2.2 Program logic

NLA understands the Program Logic to refer to what is currently happening.

There appear to be oversights in the Program Logic (Discussion Paper p.15) which should include references to:

- Prevention of legal problems in the high level Desired Outcomes. Prevention of problems can be targeted through legal assistance services such as information, community education, litigation that clarifies the law and policy and law reform work and also, as the *Strategic Framework for Access to Justice in the Federal Civil Justice System* recognises, from other government initiatives such as improved primary decision-making.
- Litigation and duty lawyer services in the Outputs (Discussion Paper p.15). Litigation and duty lawyer service outputs are included in the National Partnership Agreement NPA 17(c)(iii) 'Outputs' and constitute a substantial part of legal assistance service delivery as noted above, therefore must be part of the Program Logic Outputs.
- Law reform and system changes in the Outputs and prevention of problems and a more efficient justice system in the Outcomes.
- Community and stakeholder connections and non-legal service providers should be included in Legal Aid Commission 'Inputs' (Discussion Paper p.16). In relation to CLCs, it is important to understand that the commissions do not merely pass through and administer direct government funding to CLCs, in many instances they also make decisions to direct funds to CLCs to deliver services. In relation to community and stakeholder connections, it is not only CLCs that work closely with local communities and further, the legal aid commissions, by virtue of their size and footprint in the justice system, are able to work with other justice system stakeholders to secure procedural and system reforms.
- Duty lawyer services should be included in Legal Aid Commission 'Activities' (Discussion Paper p.16).

By failing to recognise litigation and duty services as outputs, the Draft Evaluation Framework devalues what is recognised by the Strategic Framework for Access to Justice in the Federal Civil Justice System as a fundamental element of access to justice and an area of significant investment by the government. As noted by the Strategic Framework:

Legal assistance continues to be a fundamental to achieving access to justice, ensuring that people can access legal advice and **representation** where they need it but cannot afford it¹.

Litigation is not only concerned with dispute resolution but also fulfils the important function of dispute prevention and creates binding precedents, so that

¹ *The Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009 p.58

parties can predict the likely outcomes in their choice whether to pursue disputes².

The draft Program Logic suggests that the activity legal representation would include court support, which is misleading because they are two totally different types of service, and should not be treated as components of a single category.

NLA also notes concerns previously expressed to representatives of the Attorney-General's Department that duty lawyer services should be expressed as a separate data category. The data collection intention under the Framework is understood to be that, litigation is legal representation and duty lawyer services will appear as legal representation where there is an appearance. If no appearance is involved then the work should be recorded as advice, with the capacity eventually to drill down in the system to where the service was provided – i.e. at court.

NLA is also concerned that 'Extended Assistance/Casework' appears for legal aid commissions under 'Activities'. 'Extended assistance' is a very recently proposed service category which has not been agreed and is not an expression that would currently be used by us to reflect our service delivery types against which data is collected. Commissions also undertake legal representation. Our consistent advice to the Attorney-General's Department has been that legal representation should not be described as 'casework', as this term means different things to different people.

NLA recommends the detail referred to above currently missing from the Program Logic be included, and that the words "extended assistance/casework" be deleted from the Program Logic.

2.3 Priority Groups

The draft Outcomes Framework captures the concept of priority groups. It is not clear how these groups have been chosen and there appear to be oversights, particularly for people in custody or detention and women and children experiencing or at risk of family violence. The definition of priority groups is relevant to the indicators for community-wide justice outcomes in the draft Evaluation Framework.

2.4 Data and data definitions, and counting rules

NLA confirms that its understanding, from Allen Consulting and the Attorney-General's Department, is that proposed data sets and data definitions have been provided to Allen Consulting by the Attorney-General's Department for inclusion into the pilot of the Framework. NLA also confirms advice at the most recent Advisory Committee meeting that Allen Consulting is aware that some data might not be capable of collection, that this will form part of the results of the pilot and that there will be an acknowledgement that adjusting systems to collect proposed data sets requires resources.

Introducing new definitions and counting rules two years into the agreement and then evaluating the 'services'/sector' progress against that new data set, when services do not have the resources or business systems to collect, capture and verify the data is vexed and problematic.

² *The Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009 p.31

We attach a letter from NLA to the Attorney-General's Department detailing concerns in relation to proposed data collection and definitions. NLA recommends that further work is required in relation to data collection and reporting in the context of the NPA Review and beyond.

2.5 Implications of the number and nature of the indicators

With 43 indicators the draft evaluation framework appears resource intensive, with the high number of indicators risking the quality and consistency of the data. NLA notes the number of 'user' and stakeholder surveys and given the complexity of the issues being discussed, recommends rationalising the surveys to address the higher priority indicators. In addition, the size and scale of legal aid operations will require a significant number of respondents (with significant cost implications) in order for the survey sample to be statistically significant.

The breadth of indicators is also an issue. For example indicator 4.1, 'Processes in place to improve the justice system in line with the access to justice principles', could encompass all legal assistance services and initiatives undertaken by a Commission. NLA recommends this indicator be narrowed and clarified to enable service providers to provide more specific and relevant information and enable consistency of responses.

The amount of data required to be collected through surveys will place a significant burden on legal assistance service providers, in terms of collection, capture and verification that is outside existing resources.

There will be no consistency in the service provider data collection unless further definitional work is undertaken and a counting methodology is specified and its use verified. NLA believes the pilot will identify a number of difficulties in the collection of data. The resources (time, training, systems adjustment) required to collect new data could and should be tested as part of the pilot.

2.6 Issues with extrapolating findings from the data based on proportions

There are a number of indicators based on proportion, which implies there are underlying targets. At best this data could establish a baseline, as there is no existing research to provide a benchmark as to what constitutes an acceptable proportion. It is not clear from the Draft Evaluation Framework whether the Reviewers have a benchmark or standard in mind, against which the performance of the sector would be assessed, outside of the targets set in the NPA.

NLA notes that for some indicators there may also be uncertainty as to what the proportion means to the delivery of legal assistance services and evidence based decision making.

2.7 Definitional uncertainty

There are a number of complex concepts that would need to be unpacked as part of any user survey. These include the concept of 'confidence' [indicator 1.4], 'right mix of services' [indicator 2.2], 'most at risk of social exclusion' [indicator 2.5], 'self-represented litigant' [indicator 2.7], 'fair' [indicator 2.8], 'appropriate quality' [indicator 2.11], 'discrete matters' [indicator 4.4], 'complex needs' [indicator 4.5], 'dedicated staff' [indicator 4.11], 'appropriately qualified and experienced staff' [indicator 4.12], and 'outsourced' [indicator 4.17]. The complexity of the 'data points' related to the

above concepts and the diverse groups whose perceptions are sought in the surveys, will cause significant challenges in analysing the data and its ultimate usefulness. Past research on legal need has shown that clients, in particular, are often unable to identify which service actually assisted them - categorising the service broadly as 'legal aid'. NLA also notes that exploring numerous complex concepts in surveys increases both the cost of the survey and the unreliability of the data.

In some places in the Discussion Paper it is suggested that there is a lack of precision/sufficient detail in relation to what is being described. If this is carried into future documents it will continue to have the capacity to cause confusion. Examples include the varying use of: 'legal assistance programs', 'legal assistance service providers' and 'legal assistance services'; and 'legal assistance system', 'justice system', 'system' and 'system wide'. The use of 'generalist'/'specialist' services is also problematic as a generalist service can house a specialist service as is the case with Legal Aid Commissions.

NLA suggests this is a factor which contributes to lack of clarity around indicators and the use to which they might be put/inferences made. NLA recommends that a glossary to the Framework (as suggested at the most recent Advisory Committee meeting by a representative of the NPA Review team) would be useful.

2.8 Difficulty in separating Commonwealth from State funded services

Experience has shown that clients and stakeholders do not distinguish between Commonwealth and State legal matters and services. Several of the indicators are based on surveying the perceptions of clients and stakeholders including the police and private profession. There is a significant risk that the survey respondents' perception of state funded service delivery will colour responses, thereby affecting the accuracy and usefulness of the data. This is particularly an issue for indicators relating to the assessment of the 'right mix of services' [indicator 2.2], 'appropriate quality' [indicator 2.11], and 'access to legal assistance' [indicator 3.1]. NLA highlights the need for pilot mechanisms to limit this risk.

3. Community wide justice objectives

3.1 Ability of community wide justice outcomes to reflect progress against NPA

The objective of the NPA is a national system focused on providing services for the socially and economically disadvantaged. There is a tension between having community wide justice outcomes based around the population (as a whole) having knowledge of basic legal rights, what constitutes a legal issue and where to get assistance, and the NPA objective of a system focused on providing services for the socially and economically disadvantaged. The Legal Assistance Services Draft Outcomes Framework diagram (Discussion paper p.18) and indicators do not make it clear it is the 'absolute figures and the gaps between those for the general population and the priority groups that are of concern', as detailed in Discussion paper p17.

NLA recommends that the model explicitly state that the priority is assistance for the socially and economically disadvantaged.

NLA acknowledges the difficulty in extrapolating community wide justice outcomes. However, some of the suggested outcomes and indicators do not reflect the potential impact of legal assistance services over and above other influences. For instance, indicator 1.5 'Proportion of Aboriginal and Torres Strait islander offenders in the criminal justice system compared with that for the total population' is a justice outcome historically influenced by bail laws, policing and underlying disadvantage rather than assistance provided by legal services.

The Australian justice system has struggled for decades with the over-representation of Aboriginal and Torres Strait Islander Peoples in the criminal justice system. Over time, it has become clear that this over-representation reflects the history of white settlement in this country and its devastating impact on Indigenous communities and the failure of other human service agencies to effectively engage with Aboriginal and Torres Strait Islander Peoples and to provide the support services they need to redress circumstances of disadvantage. NLA believes legal assistance services should not be evaluated against what essentially constitutes a failure in other (government) programs and where legal services have limited capacity to reverse generations of neglect and dislocation in Indigenous communities.

NLA notes there are a number of indicators where the potential impact by Programs over and above other influences raises questions regarding the degree Programs can be evaluated against these indicators.³

NLA also suggests indicator 1.6 'Proportion of homeless people accessing legal assistance services' will also have difficulties if used as a measure of progress against the NPA objectives. There will be significant under reporting as clients often do not self-identify and may not actually consider themselves as homeless unless 'sleeping rough'. Further it would be uncertain whether an increase in the proportion indicates more homeless people are seeking assistance or that more homeless people are experiencing legal problems.

NLA suggests indicators 1.5 and 1.6 be replaced with a process indicator that provides evidence of services in place to assist disadvantaged clients targeted by the COAG Reform Agenda.

Indicator 1.4 uses confidence as a proxy for outcome, but it is not clear that this should be done. For example, a large marketing campaign might give community members confidence about their ability to access legal assistance if needed, but the reality might be that they still find it hard in practice, or experience difficulties getting access and/or long delays when they attempt to do so. Confidence in justice system outcomes is also a distinct part of the framework, see also below.

3.2 Potential to rationalise community wide justice indicators

Existing research indicates that more affluent, educated members of the community are more likely to know their rights than disadvantaged groups⁴, particularly on a population basis. It is therefore difficult to know what indicators 1.1 'Proportion of the population surveyed who are able to identify their basic legal rights and responsibilities in key areas of law' and 1.2 'Proportion of the population surveyed who are able to identify issues as being legal issues', will actually measure. NLA suggests rationalising indicators 1.1 and 1.2, and retaining indicators 1.3 'Proportion

³ Examples include indicators 1.1, 1.2, 1.4, 1.6, 2.2, 3.1, 3.2 and 4.3.

⁴ Balmer, N, A. Buck, A. Patel, C. Denvir and P. Pleasence, Knowledge, capability and the experience of rights problems, Legal Services Research Centre March 2010.

of the population surveyed able to identify from whom they may gain legal assistance' and 1.4 'Proportion of the population who are confident to access legal assistance when needed', as more relevant to the NPA objectives of a national system of legal assistance focused on socially and economically disadvantaged people.

The forthcoming Legal Australia Wide Survey will include data relating to the sources of assistance and confidence in accessing services.

3.3 Suggested additional community wide justice objective

While acknowledging the difficulty of causality in the development of community wide justice objectives and indicators, there may be potential for an objective about 'making a difference'. The indicator could assess whether clients perceive the assistance made a difference in relation to their confidence level, level of anxiety and stress, feeling safe, ability to enjoy life, ability to carry on everyday activities, relationship with their family or financial situation⁵. Again it would provide a baseline for future years, as there is no baseline, but is a way of exploring the impact of a service.

This type of indicator is used in the LawAccess NSW customer satisfaction survey, based on the research of the Law and Justice Foundation and the Legal Services Research Centre UK. Research has shown the link between experiencing legal problems and experiencing adverse consequences including stress-related ill health with a flow on effect on physical ill-health, loss of confidence and loss of income. These consequences affect an individual's capacity for social and economic participation.

4. Performance indicators

4.1 Right Services and Right Mix of Services

Indicators 2.1 to 2.6 assess whether or not the sector is providing the "right services" or the "right mix of services" but while these are valid questions, they are also largely questions of social policy and choices, not merely cost effectiveness and efficiency. This is not recognised in the framework. We noted above that some of the indicators do not work without underlying targets. Indicators 2.3 and 2.4 are included in this category; they measure the proportion of effort and volume of services provided in relation to particular law and service types, but this only gives meaningful data if targets have been set and any such targets would be strongly informed by policy choices around priority areas for legal help and, not merely what service types are cheapest to deliver.

4.2 Self-represented litigants

Indicator 2.7 measures the proportion of self-represented litigants assisted through duty appearances. There is significant debate in Australia about the definition of a self-represented litigant and a specific definition would therefore need to be resolved before this indicator could be used. It is not clear why this indicator has been

⁵ This question has been asked in the LawAccess Client Satisfaction Surveys over a number of years with clients asked to whether the assistance - improved, made no difference, worsened or can't say in relation to each area of their life.

included as self-represented litigants are not a priority group in and of themselves just for the fact of not having legal representation, indeed that is the starting point for most clients of the sector.

4.3 Suggestions to improve the relevance of the indicator and consistency of the data

Alternative Referral indicators

NLA recommends the referrals indicators 4.7 to 4.10 be replaced with a process indicator which assesses the best practice processes in place for effective referral. These indicators would enable effective evaluation of the referral practices in place and the maturity of those processes.

NLA notes a service may be making a high number of referrals including warm referrals and be providing a poor quality service. The concentration on referrals creates a perverse incentive to refer, where the priority should be for services to provide quality information or advice and refer as appropriate. Measuring the number of referrals, proportion of 'warm' referrals, number of referrals received, and number and type of formal referral agreements, provides no information on the quality of the referrals or processes in place to reduce the referral roundabout.

The emphasis on formal referral arrangements is contrary to the experience of frontline services of 'what works'. There has been a move away from formal referral arrangements/agreements to referral mechanisms including referral information sheets, inappropriate referral notifications, training and referral networks⁶.

Process indicator for clients with complex needs

Several of the indicators are focused on delivery of services to clients with the most complex needs. NLA recommends changing indicator 2.9 'Proportion of clients/service users attending interviews, appointments and court dates' and indicator 4.4 'Average number of non-legal service providers supporting clients with complex needs' into a process indicator to assess the processes in place to support clients with complex needs. This change would enable evaluation of effectiveness, quality and coordination, while focusing on a particularly disadvantaged group.

Opportunity to rationalise similar indicators

There is an opportunity to rationalise and prioritise some of the indicators which appear to collect very similar data. For example, indicators 2.8 'Proportion of clients who perceive the legal assistance as being relevant, responsive and fair' and 2.10 'Proportion of clients who received legal assistance services and experienced a client interview that was holistic, culturally competent and respectful in its approach and resulted in early identification of the range of issues facing the client', are both focused on the client's perception of the assistance provided. If the assistance provided is perceived by the client as relevant, responsive and fair this also implies it

⁶ LawAccess moved away from formal referral agreements and arrangements over 8 years ago. Since then it has a process of seeking up-to-date information through referral information sheets, an inappropriate referral notification mechanism, training, monitoring and participation in referral networks to ensure best practice referral.

was respectful in its approach, culturally competent and resulted in early identification of problems.

NLA also recommends changing indicator 4.11 'Proportion of service provider staff dedicated to ensuring services are delivered in a culturally competent manner' to a process indicator and collapsing it into indicator 2.12 'Processes in place to ensure services are provided in a culturally competent manner'. This would overcome definitional uncertainty of what constitutes 'staff dedicated' and still enable assessment of the practices in place to ensure culturally sensitive delivery of services.

NLA notes indicators 3.1 'Proportion of respondents indicating they have confidence that the community generally and priority groups specifically, will be able to access legal assistance when needed' and 4.3 'Proportion of survey respondents... indicating they have confidence that those at risk of social exclusion and in need of legal assistance will be able to access services in a timely manner', appear to be collecting similar data in relation to confidence that the community and priority groups are able to access legal assistance when needed. NLA suggests rationalising these indicators. Noting the likelihood of very disparate views, NLA seeks clarification that the pilot will assess the usefulness of responses. However, we also point out that confidence outcomes and indicators do not necessarily provide helpful information about whether people could, in fact, do what they are confident about. Confidence indicators only tell part of a story and should be treated with caution. Indicator 3.2 'Proportion of respondents indicating they have confidence that the community generally and priority groups specifically, will be dealt with fairly when interacting with the justice system' is, like indicator 1.5 discussed above, capturing something broader than what legal assistance services alone can influence. NLA suggests removing this indicator.

5. Conclusion

NLA would welcome the opportunity to discuss the issues raised, in more detail, at your earliest opportunity.

Yours sincerely

A handwritten signature in black ink that reads "Bevan Warner". The signature is written in a cursive, flowing style.

Bevan Warner
Chair