Strategic Framework for Access to Justice in the Federal Civil Justice System

Response by the Faculty of Law and the ANZSOG Institute for Governance University of Canberra

Overall response

The Faculty of Law and the ANZSOG Institute for Governance strongly commend the Commonwealth's Strategic Framework for Access to Justice in the Federal Civil Justice System. Articulation of a principle-based strategic framework for access by individuals, small enterprises, nongovernment organisations and other entities to justice is strongly commended as a positive and forward-looking response to issues identified by governance and justice studies specialists, government reviews and litigants over the past decade.

The following comments on the *Strategic Framework* report and guide for future action draw on input from the Faculty of Law and the ANZSOG Institute for Governance. They initially consider the overall approach in that *Framework* before responding to specific issues.

A framework for action

The challenge facing the Attorney-General's Department and other participants in the justice system is to move beyond statements of aspiration to produce tangible outcomes that substantively address those issues.

Aspects of the *Strategic Framework* report are unexceptional: they can and should be implemented. The effectiveness of action in implementing that framework will be dependent on how the Commonwealth addresses difficult questions regarding program development/review, commitment of funds, prioritisation and relationships with other stakeholders.

Action Plans are a very good idea, provided that they are not aspirational, are embedded, are negotiated in whole of government approaches and are consistent with other strategies. An Action Plan that prepared by Dr Fleming for the Attorney-General's Department as part of a proposed National Indigenous Justice Strategy in 2006 might provide a useful model.

The report's emphasis on empirical bases for action is laudable. It is however important to embed data collection and data appraisal in governance structures rather than collect information that is unlinked to decision-making. It is also important to recognise commercial and institutional realities, in particular pressures on small and mid-range legal practices (key actors in the justice system in rural and remote Australia) and on providers of legal education.

Underpinning the Framework

The *Strategic Framework* guide for future action is predicated on system management and institutions. Consistent with the Government's exploration of a Bill or Charter of Human Rights, with international agreements and with current initiatives such revised Freedom of Information law it is important to recognise the role of human rights as a foundation for the justice system.

A fundamental question about underpinning of the *Framework* is where is the place for fair and effective access to justice as an incident of citizenship? Could this be incorporated in the model? Access to justice over the past 40 years has increasingly been absorbed into human rights discourses, and defended and located by reference to human rights instruments. The *Framework* refers to the 'access to justice' model of the Florence Access to Justice Project (Cappelletti & Garth). It is good that policy-making is informed by and demonstrating links with access to justice scholarship. However, Cappelletti & Garth conceive of 'justice' and 'access to justice' in a different way to the *Framework*. Their conception is about access to justice as a modern social right rather than about efficiency and effectiveness.[1]

The architecture of justice

Consumer interests in relation to justice services are best served by a simple, dynamic and readily-understandable judicial system. The policy outlined in the framework paper has the potential for significant benefits for judicial service consumers but carries significant systemic risk because of the underlying fragmentary nature of the Commonwealth justice system.

As the *Strategic Framework* report notes, civil justice in Australia is fundamentally affected by the federal system and by 'fragmentation' within the Commonwealth's jurisdiction. It consists of a (statutory) subset of law, being those dealing with matters the responsibility of the Commonwealth parliament. This fragmentary jurisdiction is split across a number of different administrative structures, complaint handling bodies, tribunals and courts. This situation is exacerbated by the need to provide jurisdictional coverage both in main cities and more remote locations. Many of these problems have in the past been ameliorated by local state and territory courts dealing with Commonwealth legal matters (retaining an essential unity for judicial service consumers).[2] However, from the latter half of last century, there has been a trend to create separate specialist Commonwealth fora to deal with particular classes of matters.[3]

The report does not explore the basic architecture of the existing federal system. Had this occurred, other options may have become available. One controversial possibility may be the collapse of the federal jurisdictions into existing state/territory courts, with the capacity of the Commonwealth Government (as in Canada) to appoint federal judges into those state/territory courts. Less controversial may have been integration of Commonwealth courts and tribunals either into a single federal court or a similar action in relation to the underlying registries supporting the existing federal structures. These options, considered respectable in most other Western Democracies, are not specifically considered, perhaps because of the broad policy level at which the report is targeted. However, the report is cognizant of the underlying problem, and emphasizes the need for efficient early targeting of dispute resolution options.

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[1] Some of the implications for justice and legal institutions are discussed in H.W. Arthurs & R. Kreklewich, 'Law, Legal Institutions, and the Legal Profession in the New Economy', (1996) 34 *Osgoode Hall Law Journal* 1 and D. Fleming, 'Legal Aid and human Rights', (2007) International Legal Aid Group Conference, Antwerp.

[2] It remains the case that most Commonwealth criminal prosecutions, and with commercial and civil litigation continuing to be dealt with in state/territory courts.

[3] One example of this change was creation of the Family Court at the Commonwealth level and the transfer of family matters over a number of decades from state and territory Supreme and Magistrate Courts to the Family Court. Although many family law matters are concerned with matters that can be effectively resolved entirely within the Family Court, disputes often risk the need for both state/territory and federal court involvement (eg when the settlement involves the sale of property, the law governing the sale takes place under the ordinary state/territory law dealing with property).

The report makes certain assumptions about the ways in which citizens behave within the justice system. Not least is the claim that the majority of civil legal events do not result in a formal legal decision and by implication greater emphasis therefore needs to be paid to access to justice through informal mechanisms of dispute resolution. This is just one of several behavioural claims which require further empirical investigation.[4] Is the evidence base underpinning this claim sound? What factors prompt resort to non-legal determination? For instance, does limited access to legal aid lead to 'innocent' citizens resolving legal events through informal mechanisms of dispute resolution because they can't afford to win? Will greater dependence on informal mechanisms of dispute resolution extend or limit inequalities? Secondary research demonstrates quite clearly that organised interest groups and affluent citizens tend to benefit most from complex justice systems as they have the financial and knowledge resources to negotiate the system. What sources of justice information do citizens from low income groups rely upon? Are they increasingly prisoners of 'Wikipedia-Justice'; captives of low grade information and advice due to the absence of intelligent public information filters?

In sum, how can the Justice Taskforce be sure that the critical behavioural assumptions in the *Strategic Framework* report are sound? The absence of a strong evidence base suggests the need for more rigorous research to test these assumptions to avoid the emergence of profound implementation gaps in the delivery process. Moreover, careful piloting will also be necessary to avoid unintended consequences of action which widens the very social inequalities that the framework seeks to bridge.

Engagement and governance

The report recognises the need for civic education to ensure that citizens are empowered through knowledge to take up their rights of citizenship and exercise them effectively within the justice system. That recognition is applauded. However, it is also suggested that the Integrity Agencies with responsibility for monitoring access to justice issues should themselves play a greater role in this area.

In theory, Integrity Agencies should play three roles in safeguarding the legitimacy of the system of government and upholding the rule of law: a moral role as the guardian of the 'Good Society'; a prudential role with regard to monitoring, reporting, and evaluating risks to the system; and, an educative role both upwards to the political class and outwards to the citizenry. Integrity Agencies in Australia are not meeting educative obligations. This is reflected in the ignorance that most Australian citizens have about the important role that they play in safeguarding the quality of democratic life. In considering the *Framework* it is therefore suggested that Integrity Agencies are deployed within civic education programs to both provide the basis for active citizenship in Justice Administration and to raise their public profile as guardians of a 'Good Society'.

Achieving cultural change

The report proposes a wide range of changes to the federal justice system, designed to improve the resolution of disputes presently dealt with by federal courts, tribunals and other complaint handling bodies. Underlying these changes is a significant change in the federal dispute handling culture – every element of the justice system should actively work to resolve disputes.

[4] To run the counterfactual; it may be that the threat of legal determination prompts recourse to informal mechanisms of dispute resolution and once the deterrent is removed new forms of game playing will emerge, i.e. citizens will not feel compelled to engage in informal resolution processes.

An example of the new Commonwealth approach is the "no wrong number, no wrong door" approach, discussed below. The differing elements of the existing system should be able to make quality referrals to an appropriate dispute resolution mechanism.

In the main, the *Framework* adapts proven reform techniques to existing justice programs, consistent with Commonwealth responsibility for funding a wide range of programs and federal courts and tribunals. Most of the recommendations are neither contentious nor unique and have therefore not been critiqued on an item by item basis in the following pages of this submission.[5]

Acknowledging the inherent maleness of law and its institutions

There are opportunities within the *Framework* and plans for its implementation to acknowledge the power assumptions that structure and influence the operation of the legal system. Our 'public' institutions continue to be dominated by males and there are gender differences in personality traits and roles. It is evident that law may in fact not reflect women's experiences—instead seeing and treating women 'the way men see and treat women',[6] which has been described as irrational, illogical, emotional and erratic.[7] A male-style of cognition seems to permeate the 'voice' of the law with its emphasis upon abstract rules instead of connectedness. In this way, Dr Patricia Easteal argues that the law has been described aptly as speaking 'to men while it alienates and excludes women'[8] and produces systemic disadvantages to women and members of other minority groups.

Service Delivery

Access to justice and especially the delivery of legal aid services cannot be divorced from the health of the legal profession. Whilst the mega and medium sized solicitors' firms generally earn high incomes the majority of solicitors' firms are small. Reports by the Law Council of Australia and other bodies have indicated that over the past 30 years profitability in these firms has steadily declined. They are already experiencing difficulty in recruiting and retaining new entrants, not only in rural and regional areas, and levels of expertise vary considerably (partly as a result of insufficient funds to invest in training and information technology).[9]

In enhancing access to justice policy-makers will accordingly implement a realistic approach regarding the composition of labour markets for legal work and will probably need to be involved in measures to protect/ensure the financial viability of some categories of law firms (if a sufficient spread of points of access is to be maintained).

Consideration needs to be given to further liberalisation of the reservations of legal work. As in the health care sector there is considerable potential to diversity supply, that is, to consider the

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[5] The paper acknowledges the contribution of earlier reform efforts and studies, including the UK Woolf reforms and the Australian Law Reform Commission *Managing Justice* report. However, unlike some of those earlier reforms, the *Strategic Framework* report does not attempt a detailed analysis of civil process, and instead concentrates on establishing a broader conceptual framework.

[6] Catharine MacKinnon, 1983, 'Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence,' 8 *Signs* p 685.

[7] Ngaire Naffine, 1995, 'Sexing the Subject of Law,' in M. Thornton (ed), *Public and Private: Feminist Legal Debates*, Melbourne: Oxford University Press, pp 18-39.

[8] Margaret Davies, 1994, *Asking the Law Question*, The Law Book Company, Sydney, p 191.

[9] Law Council of Australia and Law Institute of Victoria, (2009) *Report into the Rural, Regional and Remote Areas Lawyers Survey, September 2009*

delivery of some legal services, with the aid of information technology, by non-law-qualified service providers

Measures to retain and build supplier capacity in markets for legal aid (and access to justice) work should continue to have priority

Measures to increase the availability of 'frontloaded' legal aid (i.e. access to legal advice and minor assistance) are commended, provided that –

- one, demand is properly scoped and researched,
- two, access is truly accessible to target groups, and
- three, expansion of these services does not come at the price of reducing the availability of legal representation in family law and crime.

It should be noted that in an international context Australia provides a low level of legal representation in legal aid, and eligibility for legal representation is severely restricted.

Data Requirements

Recommendation **5.1** concerns data collection.

It is encouraging to see recognition of the need for "consistent and strong evidence bases to make future decisions" and of long-standing concerns regarding the justice system data collection framework. Work by the Productivity Commission and the COAG working group over the past decade in harmonisation of data collection between federal and state/territory courts is strongly endorsed. The results of that work have been patchy and there is still a real lack of information about basic issues for justice administration, for example about how many litigants are self-represented and at what stages of justice process.

The proposed solution – an "external body with standing responsibility or a one-off reference" – poses concerns and might indeed exacerbate the problem. Such a body would need to be constituted in such a way as to have the authority to actually compel some changes. That is what is really missing at the moment. Discussion by stakeholders at ACAG and COAG meetings has recurrently resulted in agreement that something needs to be done. However, the political and institutional realties mean that a lot of what subsequently happens in response to that agreement involves tinkering at the edges (for example, the raft of qualifications introduced into the Productivity Commission's court statistics in recent years to point out why they are not really compatible - mainly in response to complaints from the judiciary) whereas that expenditure of resources might be much better expended trying to make the statistics compatible in the first place.

Recommendation **5.1** concerns introduction of an 'overarching data collection template' for the federal courts and other entities.

Development and review of such a template is commended as a useful first step in establishing a standard that state/territory governments might be persuaded to adopt, either through ACAG or some other process (perhaps the new body to be formed as a result of Recommendation 5.3, discussed below).

Recommendation **5.2** concerns data collection to enable evaluation of changes.

A recurrent comment within the legal community is that initiatives in courts and tribunals are sometimes not evaluated or evaluated transparently. Lack of data collection is often used as the excuse for inadequate evaluation. Adoption of proper evaluation methodologies in relation to other public sector initiatives is axiomatic. 'Independence of the judiciary' does not prevent the same principle being applied to courts. It is accordingly suggested that a pre-condition of funding for any new federal court or tribunal initiative be that satisfactory data collection – to enable a proper evaluation – be factored into the process.

Recommendation **5.3** concerns a review of the interrelationship between the Commonwealth and state/territory justice systems.

A review of Commonwealth and State responsibilities in the administration of justice is probably long overdue. It is however important to avoid production of an interesting and well-researched report that languishes on a physical or electronic bookshelf. A mechanism for avoiding that report is to task the proposed review panel (or an existing body such as the Australian Law Reform Commission) with concrete issues.

Information about the Law

Recommendations **6.1** and **6.2** concern information about the law, with the rubric 'no wrong number no wrong door' replacing the 'one stop shop' ethos of a decade ago. Recommendation **6.8** concerns use of information technology.

The plethora of different sources of basic legal information (online and hard copy) and the lack of co-ordination between them has been a well-recognised problem for quite a while. Associated with this is another problem - that is making the information actually accessible – which is not the same thing as putting it on website. People need to know that there is a website, readily identify where that site is located and readily navigate the site to find (and make sense of) the information that they need. They also need to be able to understand the terminology used on the website, which may not be immediately intelligible and thus may provide a barrier to justice. Simply going online (resulting in the user-unfriendly 'brochureware' found on many government sites) on an agency by agency basis or by providing whole of government portals is not enough.

For example, a number of courts have 'Guides for Self-Represented Litigant.' To benefit from this you have to be a litigant who understands that the name the court calls you by is 'the self-represented litigant'. That is not immediately obvious to most people who don't have a lawyer acting for them and who, for example need to know which court the matter is in and that the court has a website. Those people encounter difficulties when they rely on Google for information: they discover a lot of leads without much sense of how to sort through them to make sense of the information that applies in the relevant jurisdiction.

It is highly desirable that consideration of access to legal information take place in conjunction with broader strategic consideration of access to government information online. That consideration should be informed by a critical and empirically-based appraisal of the accessibility of government sites (and government-funded online legal resources) and of agency practice in online provision of statutory and interpretative information (eg guidelines and procedure manuals).

Recommendation **6.3** concerns consolidation of information on a common referral database.

The Commonwealth could usefully (and without major cost) take the lead by creating such a common referral database (or funding a project such as AustLII to create it), thereby meeting a national need and proving a model for the states and territories.

Just as important for enhanced access to justice and greater administrative efficiency would be more research on *how* people use online legal information. Australian and overseas empirical research indicates that use is mainly to supplement other sources of advice. In implementing the Strategic Framework a building block should be authoritative empirical research addressing questions such as what do users look for, how do they search and how do they apply the information gained? How could we leverage that to improve the information and make it more accessible?

Recommendation **6.9** concerns Commonwealth legislation.

The existing Commonwealth statute book over a long period of time has become characterised by a huge amount of material, which in the view of some observers increasingly defies organization and is difficult to comprehend. The report's recommendations for improvement of the statute book (essentially a voluntary review process) do not match review initiatives adopted in other federal states, particularly those that have addressed similar systemic problems in US state legislation. Failure to address this aspect of access to justice at the Commonwealth level, and by extension at the state/territory levels, is a serious risk.

Alternative Dispute Resolution

Recommendation **7.1** concerns industry ombudsman or dispute resolution mechanisms.

Use of industry bodies such as the Telecommunications Industry Ombudsman and the Australian Banking & Financial Services Ombudsman is a fundamental aspect of industry co-regulation schemes. The report notes questions about significant imbalances in power/resources and it would be appropriate to explore the effectiveness of existing industry schemes prior to any large-scale devolution of justice responsibilities to the private sector.

Recommendations **7.4** through **7.6** concern use of alternative dispute mechanisms (ADR) by Commonwealth government agencies and nongovernment bodies.

The report embodies tensions in the use of ADR, emphasising the need to match dispute resolution techniques to the specific interests of parties in order to avoid costly and ineffective techniques but encouraging widespread use of ADR without a critical examination of costs and benefits of those mechanisms.

There is no doubt that use of high transaction ADR techniques may offer significant cost and time advantages over other more traditional mechanisms. However, the uncritical application of ADR techniques to all cases carries significant risks. The use of ADR in some case categories may be far more expensive and time-wasteful than traditional mechanisms. In other circumstances, although ADR techniques may lead to the resolution of disputes, there effectiveness will be no higher than those cases where the technique was not used. Caution in mandating use of ADR is therefore desirable.

The Courts

Recommendation **8.10** includes consideration of amendments regarding action by representative and advocacy groups under Commonwealth human rights statutes.

That recommendation is endorsed, consistent with preceding comments in thus submission regarding human rights as a foundation of the Australian justice system.

Recommendation **8.12** concerns vexatious litigants' legislation.

From the perspective of access to justice a corollary for consideration is introduction of Commonwealth statutory protection of representative and advocacy groups in relation to strategic litigation against public participation (i.e. SLAPP suits).

Administrative Law

Recommendations **10.1** through **10.4** concern development and implementation of a Charter of Good Administration.

Development of such a Charter to articulate expectations regarding policymaking and administrative practice is commended. The Government's statements regarding changes to the Freedom of Information Act, along with community feedback regarding those changes and independent statements over the past decade about administrative practice from bodies such as the Commonwealth Ombudsman suggest that there is a need to go beyond an aspirational charter. Obligations regarding transparency should be enshrined in legislation and, as importantly, should be actively policed so that in practice they are not ignored by senior or junior officials. Consideration might be given to increasing penalties in the Archives Act regarding record management and encouraging more active enforcement under that Act.

Recommendations **10.6** and **10.7** concern systemic change following the identification of suboptimal practice, thereby ensuring that agencies move towards best practice. The experience of particular agencies suggests that this is particularly important. Priority should accordingly be given by the Australian National Audit Office to identification of systemic failures, highlighting instances where agencies are not 'learning' and are thereby inhibiting access to justice.

Building Resilience

Recommendation **12.2** concerns access to clinical legal education opportunities and to pro bono work opportunities.

There is increasing recognition within law faculties of the significance of clinical legal education and exploration of innovative techniques for delivering clinical legal teaching, a particular emphasis at the University of Canberra. Support should be given for pro bono legal clinics that are associated with that teaching, i.e. under the auspices of the university as part of work integrated learning rather than as independent community and indigenous legal aid organizations. A model for auspicing is provided by the clinic at Monash University.[10] Its adoption by other universities has been inhibited by lack of resources. Auspicing is consistent with the national education strategy that seeks to bridge gaps between the community and education sector. It also represents an efficient use of resources.

[10] http://www.law.monash.edu.au/legal/

Recommendation **12.5** concerns ongoing work with state/territory governments to encourage development by Australian primary and secondary schools of strategies for wellbeing, including conflict resolution.

Consistent with comments at the beginning of this submission regarding the underpinnings of the civil justice system it would be appropriate in developing those strategies to emphasise human rights as a foundation of citizenship and social interaction. In essence, justice is more than readily identifiable and affordable mechanisms for the resolution of disputes.

Please do not hesitate to contact us if you have any queries or we can otherwise be of assistance.

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