



Law Council
OF AUSTRALIA

Office of the President

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Australian National Audit Office
38 Sydney Avenue
FORREST ACT 2603

By email: ag1@anao.gov.au

Dear Australian National Audit Office

Design and implementation of the Measuring What Matters Framework

The Law Council welcomes the opportunity to contribute to the Australian National Audit Office audit of the effectiveness of the design and implementation of the Measuring What Matters Framework (the **Framework**). Our feedback is limited to the following aspects of the Framework:

- the access to justice category under the Framework's 'secure' theme;
- the trust in government, public service and key institutions categories within the Framework's 'cohesive' theme; and
- the Aboriginal and Torres Strait Islander languages spoken category under the Framework's 'cohesive' theme.

This submission is informed by contributions from the Law Society of New South Wales, the Law Society of South Australia, the Law Society of Western Australia, the Queensland Law Society, and the Administrative Law Committee of the Law Council's Federal Dispute Resolution Section.

Access to justice

The Framework's 'access to justice' metric is intended to measure Australia's performance in providing accessible and affordable civil courts and alternative dispute resolution mechanisms. In our view, this metric is far too narrowly defined. We suggest that it should address the extent of legal need across the Australian community beyond civil remedies, in addition to formal avenues for the enforcement of legal rights.

Reliance on Rule of Law Index

The current metric used to measure access to justice is the World Justice Project's *Rule of Law Index*, which assesses a country's performance in providing accessible and affordable civil courts and alternative dispute resolution mechanisms.

In Australia, the *Rule of Law* indicator is relied upon as demonstrating relatively stable scores between 2013 and 2022 of 0.6 (out of 1) for access and affordability of civil courts, and 0.8 (out of 1) for alternative dispute resolution mechanisms.

While the existing metric allows for a useful assessment of the accessibility of Australia's civil justice systems as compared with other countries and forms the basis for comparative analysis and debate, we do not consider that this indicator should be relied upon exclusively for the purposes of measuring access to justice within the Framework. In our view, there are more

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au

PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612

Law Council of Australia Limited ABN 85 005 260 622

www.lawcouncil.au

meaningful ways to assess access to justice in Australia which should be adopted by the Framework, beyond the current focus on civil justice.

In its 2014 report *Access to Justice Arrangements*,¹ the Productivity Commission made recommendations concerning ‘the best way to improve access to the justice system and equity of representation including, but not limited to, the funding of legal assistance services’ in light of the costs of accessing justice services and securing legal representation, and the impact of these costs on access to, and quality of justice. Recommendation 25.1 was that a legal need survey be conducted by the Australian Bureau of Statistics (**ABS**) at regular intervals.

In a recent review of the National Legal Assistance Partnership (**NLAP**),² the Reviewer, Dr Warren Mundy, pointed out that Recommendation 25.1 made by the Productivity Commission had not been implemented. Mr Mundy also recommended that a legal needs survey be conducted at five-year intervals. He noted that, without such a survey, governments cannot be certain what legal need exists, let alone what their funding is achieving, or even trying to achieve.³

The Law Council is highly supportive of a substantive legal needs survey as recommended, and submits that data from such a survey would be well-placed to inform the Framework’s metrics on access to justice.

However, given that multiple facets of each aspect of ‘access to justice’ are complex and subject to difficulties of measurement and in some cases impossibilities, a detailed yet nuanced approach is necessary. A legal needs survey would logically form part of this process, but so also might interviewing panels of experts and garnering their views on how Australia is performing against a whole suite of criteria, including what changes to the systems have resulted in benefits or detriments, what changes might result in improvements in areas of access to justice including affordability, and the availability of dispute resolution mechanisms other than courts.

The introduction of this kind of reporting would not only allow for a more comprehensive assessment of legal need across geographies, population cohorts and legal matter types, but would also contribute to a more nuanced understanding of access to justice in Australia than can be gleaned from global tools such as the *Rule of Law Index*.⁴

Access to effective legal representation and advice, including in criminal defence matters

It is similarly important that the ‘Access to Justice’ metric takes account of access to legal representation in both civil and criminal defence matters. The 2023 *Justice on the Brink* report commissioned by National Legal Aid noted that, without legal advice, many people ‘may be unable to pursue their claims and exercise their rights’.⁵

In the Australian Law Reform Commission’s 2019 report, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, the inextricable link between access to legal representation in criminal matters and access to justice was highlighted in the following way:

Access to legal representation and advice is one of the cornerstones of addressing the disproportionate rates of Aboriginal and Torres Strait Islander incarceration. In the absence of legal representation and advice, a defendant may be incarcerated for a

¹ Productivity Commission *Access to Justice Arrangements* Report No 72, (5 September 2014).

² Dr Warren Mundy, *Independent Review of the National Legal Assistance Partnership* (March 2024), 97.

³ *Ibid*, 44.

⁴ Mundy, 35.

⁵ National Legal Aid, *Justice on the Brink – Stronger Legal Aid for a Better Legal System*, (Report, November 2023) 6.

*range of reasons, including sentencing following an inappropriate guilty plea, a lack of awareness of available defences or pleas in mitigation.*⁶

Due to the narrow focus on civil courts and alternative dispute resolution, the current metrics used to measure access to justice within the Framework do not have sufficient regard to the availability of legal representation, especially in the criminal law jurisdiction. Until this is rectified, the access to justice category remains significantly limited in its utility and does not represent a meaningful measurement.

Trust in government, public services, and key institutions

The following sub-themes are included within the Framework's 'cohesive' theme:

- 'Trust in key institutions', which contains metrics relating to trust in the healthcare system and trust in police, informed by the ABS *General Social Survey*;
- 'Trust in Australian public services' which contains metrics relating to the proportion of people who trust in Australian public services, informed by *Trust in Australian public services: 2023 Annual Report*; and
- 'Trust in national government' which contains metrics relating to the proportion of the population that express confidence in the national government, informed by the OECD's *Trust in Government Report* and *Survey on Drivers of Trust in Public Institutions*.

Whichever index is used by the Framework to 'score' public trust in government and institutions, it is almost universally accepted that a decline has occurred and is probably continuing. The context goes beyond the relationship of citizens with government and includes increasing concern as to misinformation and disinformation and as to inadequacy of the teaching of civic duties and responsibilities, critical thinking, media literacy and the history of legal and other institutions.

Specifically in relation to trust in the court system, in 2020 the Australian Law Reform Commission conducted a survey which indicated that trust in Australian courts had actually increased over the past 10 years.⁷ By contrast, in 2024 the Chief Justice of the Supreme Court of NSW, writing about 'truth decay' in the context of courts, referred to a more recent Resolve Monitor Survey finding that only 30 percent of Australian had faith in the country's courts and judicial system.⁸

A significant aspect of that context of declining trust is a decline in the functioning of institutional arrangements that should protect and promote trust in government by securing its accountability. Since the late 1970s, the federal system for administrative justice has included the Federal Court of Australia with procedures designed to facilitate judicial review; the Administrative Appeals Tribunal with jurisdiction to review administrative decisions on the merits review; an Ombudsman to investigate complaints about government actions; statutory duties to give reasons for decisions; later freedom of information legislation; and the Administrative Review Council (**ARC**) to monitor the operation of the system. Similar systems have developed, more slowly, at state and territory levels (save for the ARC). From the establishment in 1988 of the Independent Commission Against Corruption (**ICAC**) in NSW, anti-corruption bodies were established. Federally, this step was taken only in 2022, with the establishment of the National Anti-corruption Commission (**NACC**).

⁶ Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018),

⁷ Australian Law Reform Commission, "Without Fear or Favour: Judicial Impartiality and the Law on Bias" (December 2021, Final Report, No 138) 146.

⁸ Chief Justice Andrew Bell, 2024 Acton Lecture Truth, the Courts and Truth Decay <<https://supremecourt.nsw.gov.au/about-us/speeches.html>>.

However institutional failure has been dramatic, and often the consequence of deliberate governmental intervention. The only available metric of the loss of trust here is the findings of reports by royal commissions, anti-corruption tribunals, parliamentary committees. Notable examples are the Senate Committee report on appointment of AAT members on a non-merits and political basis.⁹ The AAT was replaced in 2024 by the Administrative Review Tribunal (**ART**) with new members appointed following a merits-based selection process. Decisions to make no appointment to the office of Freedom of Information Commissioner and to reduce funding of the Office of Australian Information Commissioner, persisted for many years. More recently the functioning of statutory offices and funding have been restored. However, there remains a significant backlog in determining Information Commissioner reviews. For eleven years the ARC remained non-functional due to de-funding, until its reinstatement in 2024 by the legislation establishing the ART. Evidence of a loss of trust is found in the reports and recommendations which for many years sought reversal of the attrition of these institutional arrangements for achieving accountability.

Further, the findings of the Robodebt Royal Commission recorded a lack of integrity in the Australian Public Service.¹⁰ Its exposure of unlawful and unjust policy making reinforced the loss of trust in federal public administration. Another inquiry revealed secret multiple appointments of a Prime Minister to additional ministries in breach of parliamentary and political convention and principles of ministerial responsibility.¹¹ Parliamentary committees and anti-corruption bodies have exposed unlawful conduct and breaches of public trust at the highest levels of government.¹²

These reports and inquiries are evidence of loss of trust in government and institutions. A metric for measuring loss of trust needs to draw on such evidence which is more reliable than any social survey. It should also take account of measures adopted which are intended to address concerns of the nature expressed above, such as the Government's response to the Royal Commission into the Robodebt scheme.¹³ Without reliance on such material, the Framework is ill-designed to measuring administrative justice and trust in systems.

In light of the above concerns across both the Framework's 'access to justice' category and those categories relating to trust in government, public services, and key institutions, we submit that 'justice and accountability' should be a standalone wellbeing theme. To capture this area of wellbeing requires re-thinking and proper coverage of themes at the broadest level, through to the sub-themes, indicators and metrics.

Aboriginal and Torres Strait Islander languages spoken

The Law Council agrees that the 'Aboriginal and Torres Strait Islander languages spoken' metric is an important inclusion in the Framework as a means of working towards a sustained increase in the number and strength of Aboriginal and Torres Strait Islander languages being spoken.

We have, however, received feedback that the measure may need to assess not just the number of people speaking these languages, but also the resources available for interpreting and translating, especially when interacting with legal systems. This is because the availability

⁹ Legal and Constitutional Affairs References Committee *The Performance and Integrity of Australia's Administrative Review System Interim Report* (March 2022); *The Performance and Integrity of Australia's Administrative Review System Final Report* (30 June 2022).

¹⁰ Royal Commission into the Robodebt Scheme *Report* (Commonwealth, 2023)

¹¹ The Hon Virginia Bell AC *Report of the Inquiry into the Appointment of the Former Prime Minister to Administer Multiple Departments* (Commonwealth, 25 November 2022).

¹² Australian National Audit Office *Award of Funding under the Community Sport Infrastructure Program* (915 January 2020); Auditor-General *Administration of the Community Health and Hospitals Program Department of Health and Aged Care Auditor-General Report No 31* (Commonwealth 2023).

¹³ Australian Government, *Government Response, Royal Commission into the Robodebt Scheme*, (Commonwealth 2023).

of translators has an inherent link to encouraging the use of Aboriginal and Torres Strait Islander languages and plays an important role in supporting the sustainability of these languages into the future.

The abovementioned 2024 independent review of the NLAP noted that language issues impact many Aboriginal and Torres Strait Islander peoples encountering the legal system, and that access to interpreter services ensures Aboriginal and Torres Strait Islander peoples receive equitable and timely access to justice, make informed decisions within legal processes, and can effectively engage with the justice system when need arises.¹⁴

Regrettably, this independent review has found that interpreter services for Aboriginal and Torres Strait Islander peoples are chronically underfunded, with Recommendation 13 stating:

*The Reviewer considers that access to interpreter services is essential for Aboriginal and Torres Strait Islander Australians to have proper access to justice and that funding is currently inadequate. The Commonwealth together with the relevant jurisdictional governments and service providers should determine an adequate level of interpreter funding for legal assistance purposes as soon as practicable.*¹⁵

The Law Council considers that the Framework's approach to the 'Aboriginal and Torres Strait Islander languages spoken' metric should include some consideration of the availability of interpreting services. While the Law Council's focus is on the availability of interpreting services within the legal sector, the Framework should consider access to interpreters more generally as a key component of preserving and strengthening the use of Aboriginal and Torres Strait Islander languages.

Contact

I am sending a copy of this letter to the Treasury Secretary, Dr Steven Kennedy PSM, for his interest and awareness.

If you wish to discuss these matters further, I invite you to contact Mr Nathan MacDonald, Deputy General Manager of Policy at nathan.macdonald@lawcouncil.au.

Yours sincerely



Greg McIntyre SC
President

¹⁴ Dr Warren Mundy, *Independent Review of the National Legal Assistance Partnership* (March 2024), 97.

¹⁵ *Ibid*, 98.