



THE LAW SOCIETY
OF NEW SOUTH WALES

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1 November 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
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By email: john.farrell@lawcouncil.au

Dear Dr Popple,

Audit of the design and implementation of the Measuring What Matters Framework

Thank you for the opportunity to contribute to the Law Council's submission to the Australian National Audit Office in response to its audit of the design and implementation of the Measuring What Matters Framework (**Framework**). The Law Society's Public Law and Human Rights Committees contributed to this submission.

Our comments are focused on the 'Access to Justice' indicator which forms part of the 'Secure' theme of the Framework.

Current metric

The 'Access to Justice' metric is intended to index Australia's performance in providing accessible and affordable civil courts and alternative dispute resolution mechanisms. In our view, this metric is too narrowly defined. We suggest that it should address the extent of legal need across the Australian community, in addition to formal avenues for the enforcement of legal rights. Consideration could be given as to whether it should be expanded to cover the following areas:

1. Legal Need

As described in the recent Public Understanding of Law survey conducted by the Victoria Law Foundation, there is a growing recognition that addressing issues of access to justice needs to move beyond a narrow focus on the 'cost and efficiency of formal legal systems' to encompass a bottom-up approach which takes into account the legal needs of a community.¹ Such an approach recognises that the justiciable problems faced by individuals do not routinely demand or result in an interaction with formal legal processes. Insight into the met and unmet legal needs of a community provides a more holistic measurement of access to justice by affording a practical understanding of the everyday prevalence of legal problems in the community, and the

¹ Victoria Law Foundation, [The public understanding of law survey \(PULS\) Volume 1: Everyday problems and legal need](#) (Report, 2023) 25.

extent to which people are equipped to recognise them as legal problems, understand and address them.

2. *Access to administrative law remedies*

As acknowledged by the Australian Government, '(a)ccess to review of government decisions is a key component of access to justice'.² Persons affected by the decision-making powers vested in government agencies and officials should be afforded the opportunity to understand and challenge the legality of such decisions and obtain access to appropriate remedies. The fact that an individual challenge based on the principles of administrative law, can sometimes act as a catalyst for changes to decision-making processes on a systemic level, is another reason why inclusion of this area is important in measuring access to justice.

3. *Access to human rights protections and remedies*

We acknowledge that measuring access to human rights protections and remedies may not be a straightforward task, particularly given the 'regional variations in anti-discrimination legislation and general human rights legislation'.³ However, in our view the task is not unachievable, given available data from various human rights commissions and other sources both at the state/territory and federal levels. We note, for example, that the Framework already looks at experiences of discrimination as part of the 'Cohesive' theme, but the metric does not currently extend to the availability of remedies.

It would be useful for the 'Access to Justice' indicator to track coverage of human rights protections across the country, the operation of any complaints processes and available remedies. The ability of different groups (e.g., children, Aboriginal and Torres Strait Islander people and other minority groups) to participate in human rights processes should also be a priority area of research.

It may be worthwhile to consider reporting on Australia's ranking in global surveys of human rights, for example the World Report of Human Rights Watch, which is published annually. As noted below in relation to the Rule of Law Index, however, we consider that inclusion of global metrics should be supplemented by data focused on the Australian context and experience.

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'.⁴ This is particularly true for vulnerable groups with 'multiple, compounding legal issues'.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:

² Attorney General's Department, [Administrative law](#) (Webpage, accessed October 2024).

³ Melissa Castan and Paula Gerber, 'Taking the Temperature of Human Rights in Australia' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2021) vol 1, 1.

⁴ National Legal Aid, [Justice on the Brink – Stronger Legal Aid for a Better Legal System](#), (Report, November 2023) 6.

⁵ *Ibid.*

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

Indicator of progress

Under the current Framework, progress is measured by reference to the World Justice Project Rule of Law Index, which is designed to score countries on adherence to the rule of law. The 2023 Statement recorded Australia's performance over time (2012–13 to 2022). We consider that it may also be worthwhile providing an indication of Australia's regional and global rankings as part of the reporting.

While we acknowledge that there is value in indicators such as the Rule of Law Index in terms of the way in which they can map trends in regional and global governance and form 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.

The Law Society supports the recommendation of Dr Warren Mundy in the Final Report of the *Independent Review of the National Legal Assistance Partnership (NLAP Final Report)* that, consistent with recommendation 25.1 of the Productivity Commission's *Access to Justice Arrangements* report⁷, the Australian Bureau of Statistics should undertake a national legal needs survey at five-yearly intervals, which would include collection of data to measure both legal need and unmet legal need.⁸

The introduction of this kind of reporting would not only allow for 'objective assessment of legal need across geographies, population cohorts and legal matter types', but 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.⁹

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,



Brett McGrath
President

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 Productivity Commission, [Access to justice arrangements](#) (Inquiry Report, December 2014).

⁸ Warren Mundy, [Independent Review of the National Legal Assistance Partnership 2020-25](#) (Report, 28 May 2024) Recommendation 1, xiii..

⁹ *Ibid.*, 35.