



## Symposium Paper

### Building an Evidence Base for the Civil Justice System

Law reform bodies have, over many years, commented on the lack of comprehensive and consistent data to inform civil justice policy and program reforms.

Existing data collection and reporting are complex and differs significantly across organisations and service types. Differences in how various services and actions are defined make it difficult to gain a comprehensive picture of service delivery. Major issues include:

- gaps in data
- inconsistent descriptions of services, and
- inconsistent demographic data.

The 2009 Report of the Access to Justice Taskforce commented that data collection in relation to the civil justice system remains an issue. The Report said:

*Statistics are inconsistently collected and reported and significant gaps remain. Data is necessary not only to the institution to identify and act on problem issues, but also to inform analysis and understanding (undertaken by agencies, academics, the public) regarding the performance of the justice system generally.<sup>1</sup>*

At the same time the National Alternative Dispute Resolution Advisory Council (NADRAC) released its report, *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction*. Chapter 6 of that report drew attention to the lack of data collection, particularly comparable data collection, about ADR services and the justice system more generally. NADRAC noted that at a systemic level there is little data from which conclusions can be drawn about:

- the use of and the demand for ADR
- the profile of ADR practitioners and organisations
- the appropriateness of different forms of ADR for different disputes, or
- the effectiveness of different processes.

NADRAC went on to recommend, amongst other things, that the Attorney-General implement initiatives to address the significant and longstanding lack of comparable data, evaluation and research about ADR in the federal civil justice system and to ensure that future ADR policy is built on a strong evidence base.<sup>2</sup>

<sup>1</sup> Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System – Report by the Access to Justice Taskforce*, September 2009 at p. 72

<sup>2</sup> NADRAC, *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction*, September 2009, Rec 6.4

The lack of an evidence base to inform decisions about the civil justice system appears not to be unique to Australia. In the UK, Professor Hazel Genn, pointed out that:

*There has been an historic lack of basic factual information about the characteristics of litigated cases in the civil courts. Although courts in England and Wales collect a considerable quantity of information for administration purposes, this database information generally misses vital descriptive elements such as case type, value and outcome.*<sup>3</sup>

Professor Genn suggested that in order to properly understand the processes that one is seeking to improve, and to assess the extent to which modifications may have achieved their objectives, it is necessary to be able to answer some simple questions. These include:

- Who sues in the civil courts, about what kinds of disputes, and in relation to what sums of money?
- What is the outcome of cases commenced in the courts? What proportion settle, go to trial, lapse or are withdrawn? What sums are awarded?
- How long, on average, do cases take to conclude and are there differences depending on the type of case?
- How much does it cost the parties to litigate civil claims and are there differences depending on the type of case?<sup>4</sup>

To these questions, a myriad of others can be added relating to the experiences of, and outcomes for, people who use services outside the courts to help them to address issues and resolve disputes.

An even broader question could be asked about whether most people who have legal issues and disputes are using the services designed to assist them or are addressing their needs in other ways. And, if the latter, what impact that is having on those people, their families and communities.

The Access to Justice Taskforce put the data needs this way:

- who uses the justice system, and who does not
- what types of disputes they use it for
- what kind of assistance they seek and what they find
- the quality of outcomes
  - what kind of results they get (how do they resolve their dispute, how long does it take, how effective it is)
- how much it costs
  - including better information on the actual costs (public and private)
  - the costs of particular pathways and mechanisms for resolving disputes, and
  - how satisfied they are with the outcome.<sup>5</sup>

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<sup>3</sup> H Genn, *Solving Civil Justice Problems: What might be best?*, Paper, Scottish Consumer Council Seminar on Civil Justice, 2005.

<sup>4</sup> Cited in NADRAC, *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction*, September 2009, p.83

<sup>5</sup> Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System – Report by the Access to Justice Taskforce*, September 2009 at p. 72

## **What is the Department doing?**

In response to these concerns, the Attorney-General's Department has started considering what might be involved in developing a sound evidence base to better support civil justice policy and reforms. The proposed project received support at the Federal Civil Justice System Roundtable in November last year. As a result the Department decided to take forward a project to develop, over time:

- a robust evidence base that will enable us to answer important questions about what the civil justice system delivers to the people who use it, its value to the Australian community and the extent to which it meets broad public policy objectives
- reliable information about people's needs and expectations, why and how they choose and move between services, what influence those choices and decisions, what happens to them along the way, the extent to which their needs and expectations are met and the outcomes they get.
- approaches to analysing information that is gathered to enable us to understand how changes to one part of the system may influence other parts of the system so that better judgements can be made about the system-wide impacts of policy and service delivery changes.

In late 2010 the Department engaged a consultant, Elizabeth Shearer of Managing Justice to provide some advice on issues that would be involved in a project to build an evidence base for the civil justice system. Ms Shearer brought to this work experience that had developed whilst undertaking a similar project for the Department in relation to a broad scoping paper aiming to address the gaps in current data collection and reporting requirements in the legal assistance sector. It sought to identify what data may need to be collected and what arrangements might be necessary to improve data collection in the sector.

A reference group of data and research experts has been established comprising: Professor Alan Hayes, Director, Australian Institute of Family Studies, Dr Andrew Bickerdike, CEO, Relationships Australia Victoria, Professor Tania Sourdin, Director, The Australian Centre for Court and Justice System Innovation, Fiona Dowsley, Director, Australian Bureau of Statistics' National Centre for Crime and Justice Statistics, Elizabeth Shearer, Principal, Managing Justice, Geoff Mulherin, Director, Law and Justice Foundation of NSW, Dr Steven McEachern, Deputy Director, Australian Social Science Data Archive and Professor Camille Cameron, Associate Dean, University of Melbourne.

It was recognised that if the project was to be successful it would need the support and commitment of all, or at least key, stakeholders in the civil justice system. The project will be a long term one which will require stakeholders to engage with it and commit some resources, if only in terms of time, to achieve its objectives.

## **What can we get out of it – why should I care?**

Organisations in the civil justice system are already collecting good data about their services and the people who use them. That data helps to demonstrate that organisations are meeting their service objectives and provides information about the potential for service delivery improvements. In addition, a variety of evaluation and research is already undertaken by

service providers, government, students and academics into particular services and the outcomes that they deliver. This is all very important work and needs to continue.

The aim of this project is to work towards shared information about the civil justice system as a whole. Organisations may wonder what advantages this will deliver for them and why they should engage with it.

A shared system-wide evidence base that comprises consistent data about the people who use the system and the services delivered to them will enable us to see:

- whether the civil justice system as a whole is achieving its objectives and what it is delivering to the Australian community
- how different organisations and services contribute to that
- how people connect with and what patterns emerge as they move through the system
- where there are gaps, pressure points, emerging trends and opportunities
- where there are opportunities for better coordination
- where potential exists for development of more complementary services
- where there is potential for innovation, and
- how changes in one area are likely to impact elsewhere.

Such an evidence base will enable us to build stronger cases for funding for civil justice services both new and existing. It will assist in establishing clearer links with other key government priorities such as closing the gap on Indigenous disadvantage, social inclusion, homelessness, regional development, and multiculturalism. That should also increase the likelihood of attracting funding under other government agendas.

### **What are the challenges?**

There are four significant challenges for the project:

- first, reaching agreement in a diverse system comprising a range of different professional interests is likely to be difficult
- second, many organisations already have significant investments in electronic and other data collection systems that would be costly to change
- third, engaging private service providers such as lawyers and commercial arbitrators or mediators and state/territory bodies will be challenging, and
- resourcing – initially the project will require an ongoing commitment of time by personnel able to contribute to progressing it. As the project develops there may be requirements for IT or other systems to be developed for reporting and recording of agreed data terms and metrics. If necessary a case for resourcing may be able to be made.

### **What will be involved?**

Development of an evidence base for the civil justice system will require a long term commitment from government and other stakeholders. It will necessarily be an iterative process spanning many years. It will involve working through a range of conceptual and

practical difficulties.<sup>6</sup> The example of the work done by governments in conjunction with the Australian Bureau of Statistics to build an evidence base for the criminal justice system over the last two decades or so illustrates the complexity of the task, but also the value of the endeavour, with the range of detailed evidence now available about the criminal justice system across Australia. An evidence base will support research and evaluation in the sector and improve our knowledge about our achievements.

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<sup>6</sup> The World Bank, *Performance Measures Topic Brief*, viewed at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,contentMDK:20756997~menuPK:1990189~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html>.



## Workshop 1: What are the objectives for the civil justice system?

*Facilitator: Louise Glanville, First Assistant Secretary, Access to Justice Division*

The first question that needs to be answered in order to build a better data base for the civil justice system is ‘what information do we want?’ Information that demonstrates that one service, one program or one organisation is performing efficiently and effectively is useful. However, it will not help to make the case for the essential importance of a well functioning civil justice system to the welfare of the Australian community. To do that we need to be clear about what Australians are looking for in the civil justice system (objectives) and what it is delivering to them whether as individuals, small businesses, volunteer organisations or large trading corporations (achievements). As a first step we need to identify appropriate objectives for the civil justice system.

It is sometimes suggested that a better way forward would simply be to compile a list of all the questions we have about the operation of the system. That is ‘what is it we don’t know and would like to know?’ The problem with that approach is that it may result in a virtually endless list of questions, which differ according to the perspective and interests of the persons or organisations who are asking the question. It may include questions about the whole system from a broad public policy point of view and very specific questions about the performance of an aspect of a service from a particular provider’s point of view. It would not be feasible to collect sufficient data to answer all of those questions.

In the alternative, it is sometimes suggested that most, if not all, of the information that we want is already collected by different stakeholder organisations. From this perspective all we need to do is conduct an audit of what is already collected and collate the resulting data into a searchable database. While this would provide access to a large amount of useful and interesting data there are three issues with the approach. First, the database would include data provided by different organisations about the people who use their services and aspects of their services that is not capable of comparison. Second, it would not add to our knowledge about how and why people choose and move between services, and how those pathways may influence outcomes or people’s satisfaction with them. Finally, the included data would be more likely to represent a supply side view – ie the interest of service providers in measuring their performance – as opposed to a consumer or demand based perspective – eg what different services may be beneficial.

After considering these options the Department concluded that the first step must be to carefully define what information we really should have about the civil justice system. This can be done by asking ‘what are the objectives of the civil justice system and how can we measure whether we are achieving them or not?’ The Department tested this conclusion with a number of experts in data collection, evaluation and research in a series of consultations late last year. The approach was strongly supported by virtually everyone that we spoke to. Once established early this year, the Department’s reference group of experts also confirmed this to be the correct approach.

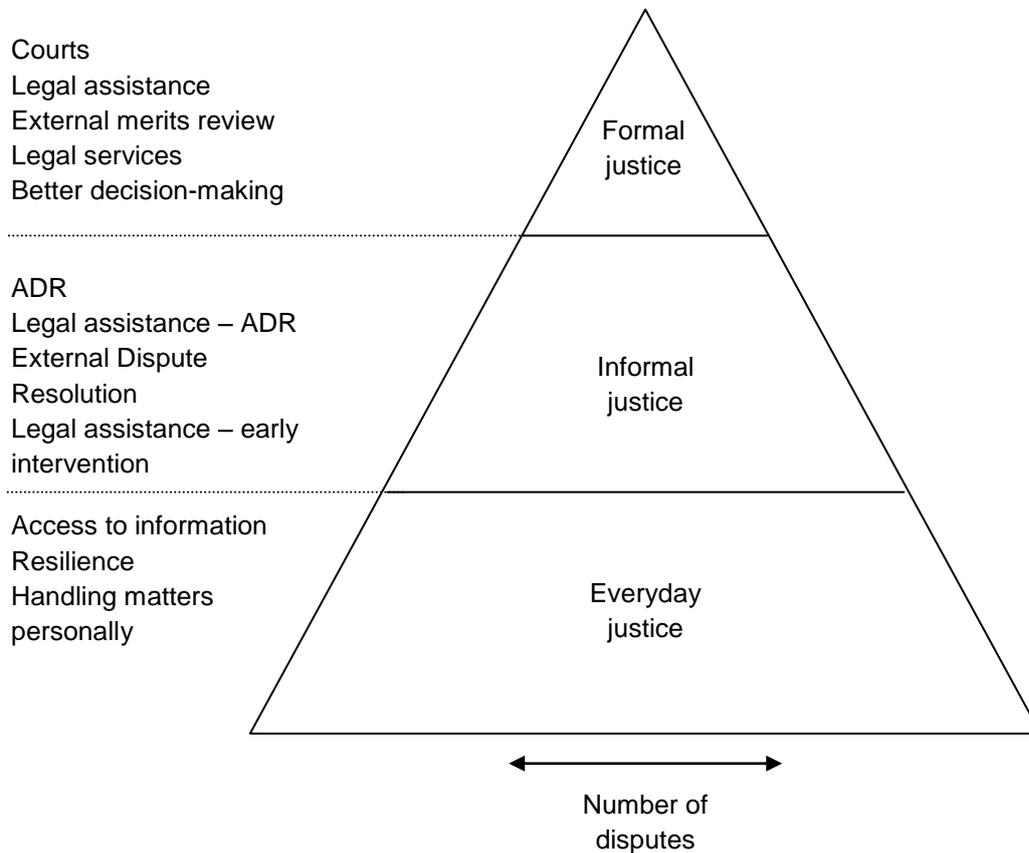
### **What do we mean by the civil justice system?**

As the Strategic Framework for Access to Justice made clear the civil justice system is not just the formal justice system of courts and tribunals, and not just the various ways of

resolving disputes that are called “alternative dispute resolution”. It also encompasses the way people solve problems and resolve disputes in their everyday lives.<sup>7</sup>

The following figure taken from the Access to Justice Report<sup>8</sup> demonstrates this approach to the civil justice system:

**Figure 5.4: The relationship between justice types and the number of disputes resolved**



### Possible Framework

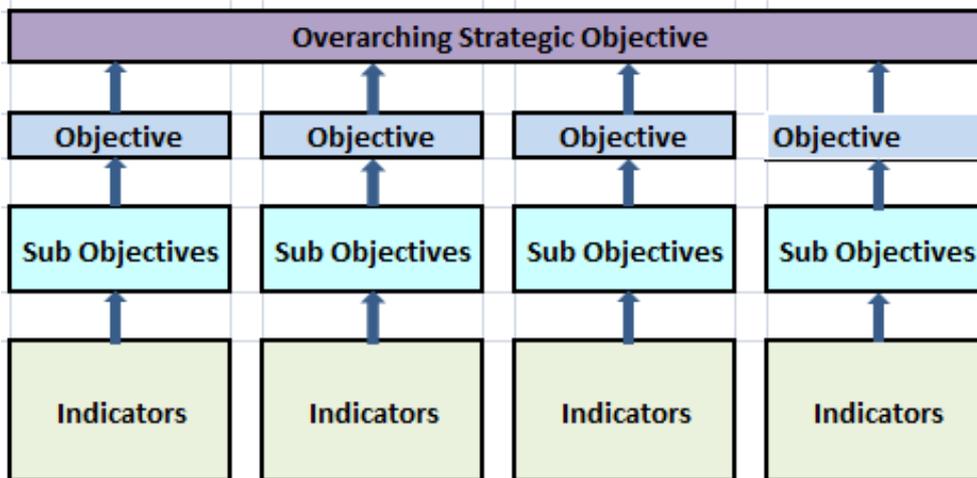
The terms of reference issued to Elizabeth Shearer of Managing Justice on 14 October 2010 asked her, among other things, to:

*Set out the key public policy objectives for the civil justice system identified in the Strategic Framework for Access to Justice in the Federal Civil Justice System (particularly the Access to Justice Principles) and other relevant policy documents including the Social Inclusion Agenda, Australia’s Human Rights Framework, the National Indigenous Law and Justice Framework, the National Partnership Agreement on Legal Assistance Services, the National Plan to Reduce Violence Against Women, the National Framework for Protecting Australia’s Children, the National Partnership Agreement on Homelessness and the National Disability Agreement.*

<sup>7</sup> Attorney-General’s Department, A Strategic Framework for Access to Justice in the Federal Civil Justice System – Report by the Access to Justice Taskforce, September 2009 at p.4.

<sup>8</sup> Attorney-General’s Department, A Strategic Framework for Access to Justice in the Federal Civil Justice System – Report by the Access to Justice Taskforce, September 2009 at p68

In her report Elizabeth Shearer proposed the following model for the development of appropriate objectives:



*An overarching strategic objective* for the civil justice system would help to provide high level goal a mission statement for the civil justice system which could have meaning both for stakeholders within the system and for the Australian community more broadly.

*A small number of key objectives* (say 5-10) would identify key goals for the system.

*Sub-objectives* would help to translate the key objectives into particular contexts, for example, within particular institutions and services.

*Indicators* for each sub-objective would enable measurement of outcomes.

### **Is there an overarching objective for the Civil Justice System?**

The question of whether there is an overarching public policy objective for the civil justice system has received limited consideration. Regard can be given to the mission outlined for the Attorney-General's Department:

*achieving a just and secure society.*

In pursuing that mission for the civil justice system, the Department works towards achieving the following outcome:

*An equitable and accessible system of federal civil justice.*

While justice, equity and accessibility are the focus of these, it has been argued that at the highest strategic level, the federal civil justice system is an important component of stability, security, and economic prosperity. This is encapsulated in the highest level objective for the civil justice system contained in the Productivity Commission's report on government services. This is:

*The civil justice system sustains and fosters social stability and economic growth.*<sup>9</sup>

<sup>9</sup> SCRGSP (Steering Committee for the Review of Government Service Provision) 2010, *Report on Government Services 2010*, Productivity Commission, Canberra, at p. C.2.

The objectives of several Commonwealth Government initiatives including Australia’s Human Rights Framework, Ahead of the Game: Blueprint for Reform, the National Indigenous Law and Justice Framework and the National Disability Agreement may also inform the development of objectives for the civil justice system. The objectives of these initiatives include an emphasis on early resolution, improved information, and better connected services and can be seen to parallel the Strategic Framework for Access to Justice. As a result, the performance of the justice system will contribute to the achievement of these other Government initiatives.

## Objectives

The Strategic Framework for Access to Justice identifies five principles to guide future policy and program decisions about the civil justice system. It also sets out a methodology for translating those principles into practice. Both are set out below.

### The Access to Justice Principles

<b>Principle</b>	<b>Description</b>
<i>Accessibility</i>	Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.
<i>Appropriateness</i>	The justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level.  Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.
<i>Equity</i>	The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.
<i>Efficiency</i>	The justice system should deliver fair outcomes in the most efficient way possible. Greatest efficiency can often be achieved without resort to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating.  The costs of formal dispute resolution and legal assistance mechanisms – to Government and to the user – should be proportionate to the issues in dispute.
<i>Effectiveness</i>	The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis.  All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes and maintaining and supporting the rule of law.

## The Access to Justice Methodology

<p><b>Information</b></p>	<p><b>Enabling people to understand their position, the options they have and deciding what to do</b>          Provision of information about the law or legal rights, including Government services and benefits is a central means of influencing access to justice. The three most commonly reported barriers to obtaining help with legal issues are difficulty getting through on the phone, delay in getting a response and difficulty in getting an appointment. Many experience ‘referral fatigue’, dropping out after an incorrect referral. An effective information strategy needs to ensure not only that the information is available, but that people can reach that information when they need it.</p>		
<p><b>Action</b></p>	<p><b>Intervening early to prevent legal problems from occurring and escalating</b>          Early intervention will prevent legal problems from occurring and escalating. In many situations, early action can resolve a matter or identify the best course of action. However, if a person does nothing, which often happens when there is not enough assistance available, or it is not clear to a person where to turn to for help, it can be much harder and more costly to rectify the problem. Failure to address legal problems has been shown to lead to entrenched disadvantage.</p>		
<p><b>Triage</b></p>	<p><b>Enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system</b>          All elements of the justice system need to have an inbuilt capacity to direct people to the most appropriate form of resolution. Without a triage capacity people’s attempts to approach the justice system may be unsuccessful and they may be rejected; or the pathway through the justice system may not be the most appropriate pathway, being determined by how they first made contact with the system (or how the system made contact with them).</p>		
<p><b>Outcomes</b></p>	<p><b>Providing a pathway to fair and equitable outcomes:</b></p> <ul style="list-style-type: none"> <li>• resolving disputes without going to court</li> <li>• when court is necessary, ensuring processes are accessible, fair, affordable and simple</li> </ul> <p>A good justice system should provide a pathway to fair and equitable outcomes. Where possible, the justice system should focus on resolving disputes without going to court. Where court is necessary, the Framework can ensure the courts are accessible, fair, affordable and simple. The traditional adversarial system is no longer relevant or sustainable for most disputes.</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p><u>Non court</u>            Dispute prevention            Ombudsmen (including Industry Ombudsmen)            Community mediation            ADR</p> </td> <td style="width: 50%; vertical-align: top;"> <p><u>Court</u>            Culture change – focus on resolving the dispute            Better and earlier identification of the real issues            Active case management            Greater use of ADR</p> </td> </tr> </table>	<p><u>Non court</u>            Dispute prevention            Ombudsmen (including Industry Ombudsmen)            Community mediation            ADR</p>	<p><u>Court</u>            Culture change – focus on resolving the dispute            Better and earlier identification of the real issues            Active case management            Greater use of ADR</p>
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<p><b>Proportionate Cost</b></p>	<p><b>Ensuring that the cost of and method of resolving disputes is proportionate to the issues</b>          Cost can be a significant barrier to justice. The cost to disputants and the cost to Government of resolving disputes should be proportionate to the issue in dispute.</p> <p>Adequate information about costs is essential in assessing proportionality. The provision of greater information regarding the costs of the justice system allows better identification of the most appropriate pathway to dispute resolution and, in particular, whether litigation is the most appropriate course.</p> <p>Case management of litigation will help to ensure that costs incurred are directed to resolving the dispute, and limit costs from collateral actions.</p>		
<p><b>Resilience</b></p>	<p><b>Building resilience in individuals, the community and the justice system</b>          The focus is on helping to build resilience in individuals, the community and the justice system by reinforcing access to information and supporting the cultural changes necessary to ensure improvements in access to justice are continuing. This includes equipping people with the basic skills necessary to resolve their own issues (including by accessing appropriate information and support services).</p>		
<p><b>Inclusion</b></p>	<p><b>Directing attention to the real issues that people who experience legal events have</b>          Legal issues are often symptomatic of broader problems in people’s lives. The justice system needs to have the capacity to direct attention to the real issues that people might be facing, and what they need to do to address them. This may include a referral to support services outside of the justice system.</p>		

## **Objectives for the civil justice system?**

### *Strategic Framework for Access to Justice*

The Strategic Framework for Access to Justice indicates that a civil justice system based upon the Access to Justice Framework:

- promotes access to appropriate mechanisms for the early resolution of problems and disputes
- establishes a triage function, enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system
- provides capacity for resources to be best directed to reflect where and how people access the justice system
- promotes social inclusion by targeting the resolution and identification of broader issues which may be the cause of specific legal problems
- promotes fair outcomes
- empowers individuals to resolve disputes between themselves when appropriate, without recourse to the institutions of the justice system
- allocates resources more efficiently, including through ongoing evaluation, and
- enables every individual to have improved access to effective resolution opportunities, irrespective of how they make contact with the system.

These outcomes may also be cast as objectives.

### **Shearer report**

In her report to the Department, Elizabeth Shearer proposed the following objectives for the civil justice system:

1. People solve their problems before they become disputes
2. People resolve disputes at the earliest opportunity
3. People resolve their disputes at a reasonable cost
4. People are equal before the law
5. People have equitable access to the federal civil justice system
6. People benefit from a system of federal civil justice that contributes to the well-being of those who use the system and the community.

## **NADRAC's National Principles for Resolving Disputes**

NADRAC's National Principles for Resolving Disputes<sup>10</sup> are also relevant to a consideration of appropriate objectives for civil justice system.

- 1. People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.*
- 2. Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.*
- 3. People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.*
- 4. People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.*
- 5. People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.*
- 6. Effective, affordable and professional ADR services that meet acceptable standards should be readily available to people as a means of resolving their disputes.*
- 7. Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.*

### **Sub-Objectives and Indicators**

Work to develop sub-objectives and indicators, if thought appropriate, would need to await final agreement on the high level key objectives for the system. This work could be progressed as part of the next steps for the project.

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<sup>10</sup> National Alternative Dispute Resolution Advisory Council 'National Principles for Resolving Disputes and Supporting Guide. Report to the Attorney-General (April 2011)



## **Workshop 2: An evidence base for the civil justice system - what would it take?**

*Facilitator: Katherine Jones, First Assistant Secretary, Social Inclusion Division*

If we are to embark on a project to build an evidence base for the civil justice system, we need to carefully consider what would be involved, what government and other stakeholders in the system might need to do or contribute and what benefits and challenges would be faced.

A workshop panel has been established to discuss these issues. The Panel comprises:

- Roger Wilkins, Secretary, Attorney-General's Department,
- Warwick Soden, Chief Executive Officer, Federal Court of Australia,
- Bevan Warner, Managing Director, Victoria Legal Aid and
- Fiona Dowsley, Director, National Centre for Crime and Justice Statistics, Australian Bureau of Statistics.

### **What do we know about how people use the system and what gaps might there be?**

As discussed in the introduction to this paper we have very little information about the civil justice system and what it delivers to the Australian community, how effectively services are delivered, what pathways between services people take, the outcomes that they get or their satisfaction with the outcomes. That is the long experience of law reform bodies and researchers. It is also the experience of the Attorney-General's Department. When asked by the Attorney-General, other government agencies or senior departmental management to find data or research to support a proposed new civil justice initiative or reform, departmental officers are very often either unable to do so or unable to find sufficiently compelling evidence.

Is this experience shared by other stakeholders in the civil justice system?

### **What benefits would there be from collecting data according to agreed system-wide objectives?**

Workshop 1 involved a discussion of the need to define system-wide objectives as a first step to building a strong evidence base for the civil justice system and what those objectives should be.

Taking into account the objectives discussed in Workshop 1, what benefits could be gained from collecting data to help us measure the extent to which those objectives are being achieved?

## **What challenges would it present and how can we overcome this?**

As the introduction to this symposium paper indicated there are likely to be some significant challenges to overcome if we are to succeed in building a sound evidence base for the civil justice system. Challenges identified there are:

- reaching agreement in a diverse system comprising a range of different professional interests is likely to be difficult
- many organisations already have significant investments in electronic and other data collection systems that would be costly to change
- engaging private service providers such as lawyers and commercial arbitrators or mediators and state/territory bodies will be challenging, and
- there are presently no targeted resources for the project (beyond the staff resources the Department is committing) and none can reasonably be expected in the current budgetary environment (although a case for additional resources may be made as financial circumstances improve if a clear need for it is identified as the project is progressed.)

What other challenges might there be? How could they be overcome?

It should be remembered that the development of an evidence base will be a long-term, iterative process. It is important that the project proceeds from stage to stage as work is completed to the satisfaction of stakeholders. Care should be taken not to try and achieve too much too quickly. The sounder the foundation work is, the stronger the resulting evidence base will be.

## Workshop 3: Pathways through the civil justice system

*Facilitators: Matt Minogue, First Assistant Secretary, Civil Law Division  
Professor Alan Hayes, Director, Australian Institute of Family Studies  
Professor Tania Sourdin, Director, Australian Centre for Court and Justice  
System Innovation*

The Strategic Framework for Access to Justice in the Federal Civil Justice System report noted research that indicates that a large number of people do not seek information from legal sources for their legal problems.<sup>11</sup> The idea of a path to justice encompasses many things, from doing nothing to seeking advice from a doctor to making an appointment with a lawyer to pursuing a court determination.

Viewing the system from the perspective of a person (natural or corporate) making their way through the system to resolve their issue, the key stages they might encounter are:

- Information, education and referral services that build the capacity of people to solve problems and resolve disputes
- Counselling and support services that address the non-legal dimensions of problems that may also have a legal dimension
- Facilitative dispute resolution services – where an independent third person assist people to resolve disputes (eg mediation and conciliation)
- Professional advice and representation, including legal services ranging from early intervention services like advice through to complex services like representation in a court hearing, and
- Private determination of complaints and disputes through bodies such as industry ombudsman or services such as arbitration
- Administrative decisions by government agencies and merits review tribunals, and
- Adjudication by a court.

These services are provided by a vast array of organisations including publicly funded services, community agencies, Commonwealth and State and Territory departments, private firms, courts and tribunals. From the perspective of the individual, a pathway can be complex and confusing.

The concept of a person's path to justice is useful as it facilitates a broad examination of how the system functions as a whole to support or limit people's capacity to address legal problems and resolve disputes.<sup>12</sup>

A better evidence base about an individual's pathway through the justice system will provide reliable information about people's needs and expectations, why and how they choose and move between services, what influences those choices and decisions, what happens to them along the way, the extent to which their needs and expectations are met and the outcomes they get. By mapping an individual's pathway, it will be possible to see where intersections and connections are occurring, and how, over the longer term, changes in one area may impact on other services or programs to improve access to justice for the community. For

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<sup>11</sup> *Strategic Framework*, p21.

<sup>12</sup> *Ibid*, p.5.

example, how does the provision of family law advice through the legal assistance sector impact on the time, length, cost and effectiveness of court proceedings. If we were able to change the policy or delivery of services in one respect would that lead to better outcomes in another? For what types of civil matters would ADR be more suitable prior to commencing litigation as opposed to court ordered – or not at all; or what types of matters best respond to judicial case management, or indeed the timing of such intervention.

Service providers may also be better placed to anticipate events that will drive demand for their service by seeing where connections exist. For example, the impact of the Global Financial Crisis may be expected to increase a person's likelihood of accessing financial assistance or a debt recovery agency, or involvement in bankruptcy or insolvency proceedings. But the mapping of an individual's pathways may also identify an increased likelihood of appearing in the Family Court for domestic violence issues or the Social Security Appeals Tribunal (SSAT) for a child support review issue. An holistic approach to building an evidence base for the civil justice system would enable comparison of data and trends in one area with outcomes in others. Awareness of such linkages could assist in understanding how changes or interventions in one pathway could impact (positively or negatively) in other seemingly unrelated areas. This will help plan resourcing and future programs by governments, services and institutions.

A key challenge to the mapping of an individual's pathway through the civil justice system is the diversity of the system and achieving consistency in terminology to be able to see the connections and intersections. Mapping the pathways to justice for different matter types is an ongoing body of work that will need to be undertaken in conjunction with members of the civil justice system. Some work in this area has been done in the family law jurisdiction and could stand as an example of how this work may be taken forward.

It is also acknowledged that a large number of disputes are resolved outside of formal legal institutions and services and are never reported. Consideration will need to be given to how information may be sourced about what people are deriving from the system and why they did or did not seek assistance with their issue to determine whether particular reforms or steps may take someone down a different path. Snapshot surveys or add-ons to current longitudinal studies may provide valuable insights into those issues that are currently unreported.

### **Consistent terminology**

In order to obtain useful information about people's pathways it will be necessary to adopt some consistent descriptors for demographic and service information.

This requires common:

- service definitions
- definitions of legal problems
- demographic criteria for service users, and
- manner of describing resolution.

It is acknowledged that this requirement should not create an undue burden for service providers.

## Workshop 4: Where to from here?

This workshop provides an opportunity to consider what steps should be taken to progress the project to build an evidence base for the civil justice system.

### Development of data principles

Would it be useful to develop a set of principles to underpin data collection in the civil justice system? As an example, the Shearer Report<sup>13</sup> suggested the following principles:

1. *Comprehensiveness* – The data gathered should be comprehensive, allowing assessment of performance against all objectives
2. *Consistency* – Data should be gathered in a manner that is consistent, allowing comparison across different service types, service providers and pathways to justice
3. *Economy and simplicity* – The simplest and least expensive data collection methods should be used
4. *Data is capable of aggregation and disaggregation* – Data should be gathered in a way that is capable of aggregation and disaggregation
5. *Relevance* – Data gathered should be relevant to the agencies and individuals providing it as well as to government objectives
6. *Timeliness* – Data should be gathered frequently enough and released soon enough after gathering to retain relevance for decision makers.

### Objectives and indicators

What needs to be done to take forward the discussions in Workshop 1 and settle agreed civil justice system objectives and indicators?

What timeframe would be appropriate?

### Consistent descriptors for data collection purposes

What steps should be pursued to start developing consistent demographic and service descriptors to allow comparison of users and of services, linkages to other government priorities and systemic analysis of outcomes?

### Engagement of stakeholders

What strategies could or should be adopted to engage the civil justice sector, other relevant government agencies, users of the civil justice system, and the public?

What key messages should be communicated about the project?

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<sup>13</sup> Based on Productivity Commission's "timeliness" principle, *Productivity Commission Report on Government Services 2010* at p. 1.10.

## **Audit of existing data collections**

What would be involved in conducting an audit of organisation's existing data collections to:

1. determine to what extent existing data meets the sector's needs for measuring performance of the system in relation to the identified objectives, and
2. develop a repository of information about existing data that can be shared by government, services providers, researchers and the public.

Would this be a useful endeavour?

What sort of timeframe may be required and what challenges should be anticipated?

## **Stakeholder Working Group**

The Department is considering establishing a Working Group of key stakeholder representatives to take forward the issues raised above. Would that be useful? Are there any considerations that the Department should take into account in this regard?

What relationship should that Working Group have with the Department's Reference Group of data/research experts?

## **Framework Document**

Would it be useful to develop a civil justice data collection, evaluation and research framework document to provide guidance for the sector on matters such as agreed data collection principles, civil justice system objectives, indicators, consistent terminology etc?

Would such a document need to be supported by more formal agreements such as memoranda of understanding/agreed protocols?

Could the Working Group proposed above usefully have a role in developing such a framework document or any related documentation?

## **Other considerations**

How should the Department/Stakeholder Working Group consult with the sector? What ongoing role might the participants at the Symposium play in that?

What other issues should the Department consider in taking forward this Project to build an evidence base for the civil justice system?