

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

A guide for future action

**Access to Justice Taskforce
Attorney-General's Department
September 2009**

“An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system.”

Attorney-General Robert McClelland
Foreword to the Report of the Access to
Justice Taskforce
September 2009

Why is access to justice important?

Maintenance of the rule of law is fundamental to Australia’s economy and prosperity. It enables people to plan and live their life as they choose and underpins social and economic development. The rule of law frames the relationship between state and society, founded upon an accepted set of social, political and economic norms.

Access to justice is an essential element of the rule of law and therefore of democracy. Justice institutions enable people to protect their rights against infringement by other people or

bodies in society, and allow parties to bring actions against government to limit executive power and ensure government is accountable. If people are unable to access these institutions to protect their rights, respect for the rule of law is diminished.

Barriers to justice also reinforce poverty and exclusion.¹ Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind.

Improving access to justice is therefore a key means of promoting social inclusion. Many of the issues commonly faced by people, such as family breakdown, credit and housing issues, discrimination, and exclusion from services, have a legal dimension that if not resolved can contribute to social exclusion.

¹ United Nations Development Programme’s Commission on Legal Empowerment of the Poor, ‘Making the law work for everyone’ (2008) 1, 33.

What is access to justice?

The traditional view

Access to justice has traditionally been seen as access to the courts or the availability of legal assistance, but this is a narrow view. Most disputes are resolved without recourse to formal legal institutions or dispute resolution mechanisms. Similarly, legal

assistance programs are only one part of a complex system.

Previous waves of reform to access to justice have been based around the courts as the central supplier of justice. The ‘waves’ of justice reform have been described in academic literature as follows:²

² C Parker, *Just Lawyers: regulation and access to justice*, 1999, p 31

Waves of access to justice reform

Wave 1: equal access to legal services (lawyers and legal aid) and courts.

Wave 2: correcting structural inequalities within the justice system: changing the law, court procedures and legal practice to make access to justice more meaningful. This includes streamlining the civil litigation system and ‘de-mystifying’ the law through plain language drafting and community legal education.

Wave 3: emphasis on informal justice and its importance in preventing disputes from occurring and escalating—including greater use of non-adversarial alternatives to legal justice, such as alternative dispute resolution (ADR).

Wave 4: emphasis on competition policy: implementing competition policy in order to allocate justice resources, whether formal or informal, as efficiently as possible through market institutions, such as by reforming legal profession rules to lower the cost of legal services

Justice in Society

The approach taken by the Access to Justice Taskforce moves forward from the first four waves of reform towards a broader concept of justice.

Courts are not the primary means by which people resolve their disputes.

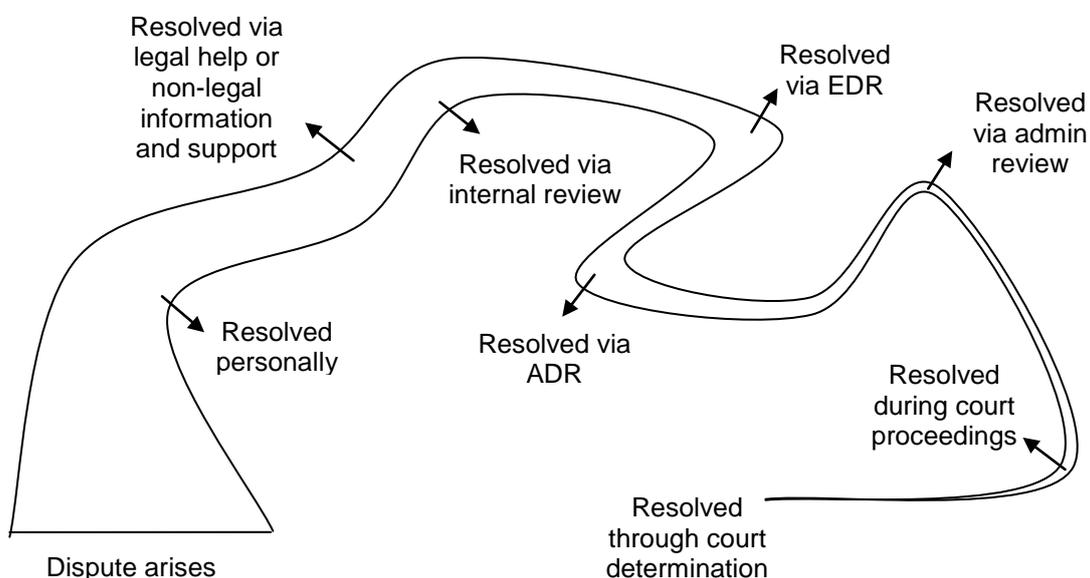
They never have been. Very few civil disputes reach formal justice mechanisms such as courts, and fewer reach final determination.

To improve the quality of dispute resolution, justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or be able to afford.

“Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.”

Marc Galanter, 'Justice in Many Rooms' in M Cappelletti (ed.), *Access to Justice and the Welfare State*, 1981, Sijthoff, Alphen aan den Rijn, 147–81 pp 161–2.

Improving access to justice requires a broad examination of how the system and its various institutions influence each other and work together to support or limit people's capacity to address legal problems and resolve disputes. Reforming one or more of the individual institutions or programs might assist current clients or users, but will not provide sustainable access to justice benefits or increase the number or profile of beneficiaries. A whole of system examination is needed.



Demand and supply

The Access to Justice Taskforce undertook a detailed examination of demand and supply in the justice system. **Demand** describes what sorts of disputes there are; their nature and number. **Supply** describes the options for resolving those disputes and the costs and effectiveness of those options.

Demand

Some of the key conclusions from the Taskforce's examination of demand were:

- Information failure is a significant issue: people do not understand legal events, what to do or where to seek assistance. People do not seek traditional legal advice, but rely on non-professional sources of advice and generally available information.
- People do not generally seek to use courts or formal justice mechanisms as a means of obtaining assistance in relation to legal issues.
- Legal events are experienced across all parts of society, although they are not experienced randomly. Some legal issues are particularly likely to arise for certain demographic groups, certain

legal issues often appear in clusters, and people who have experienced one legal event are significantly more likely to experience further events.

Supply

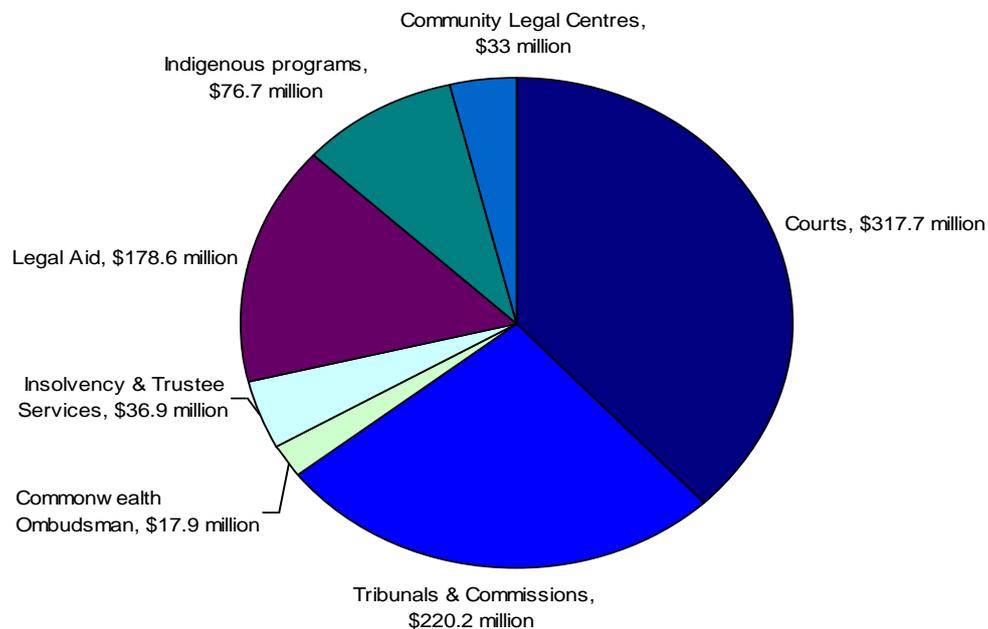
There are a vast range of mechanisms available for dispute resolution, from informal to very formal, and from low-or-no cost to very expensive.

Mechanisms include:

- information, advice and support
- internal complaint mechanisms
- external dispute resolution and ombudsmen
- administrative law remedies
- family dispute resolution services
- ADR, including mediation, negotiation and arbitration, and
- courts and tribunals.

The justice system is supported by a substantial investment of Commonwealth funds. In 2007-08, over \$1 billion in Commonwealth funding was committed to the various institutions of the Commonwealth civil justice system (see **Figure 2**).

Figure 2: Commonwealth Government investment in the justice system 2007-08



Early intervention case study – family dispute resolution (FDR) services

Since 2006, parties wishing to litigate a family dispute are required to first undertake FDR (provided by both Family Relationship Centres and Legal Aid Commissions). Early evidence strongly suggests that this arrangement has resulted in significantly more family disputes being resolved by agreement without the need for court proceedings, notably:

- FDR services provided by Legal Aid Commissions are resulting in full settlement in nearly 55 per cent of disputes, and partial settlement in a further 25.9 per cent of cases.³ Analysis of dispute resolution services provided by community and family relationship centres also indicates strong outcomes.⁴ An evaluation of legal aid FDR services by KPMG⁵ found that the benefits-cost ratio of such spending was 1.48, resulting from the avoided court costs.

³ Legal aid reporting initiative database, Legal Aid Commission data.

⁴ Federal Magistrates Court, *Annual Report 2006–07*, p 68.

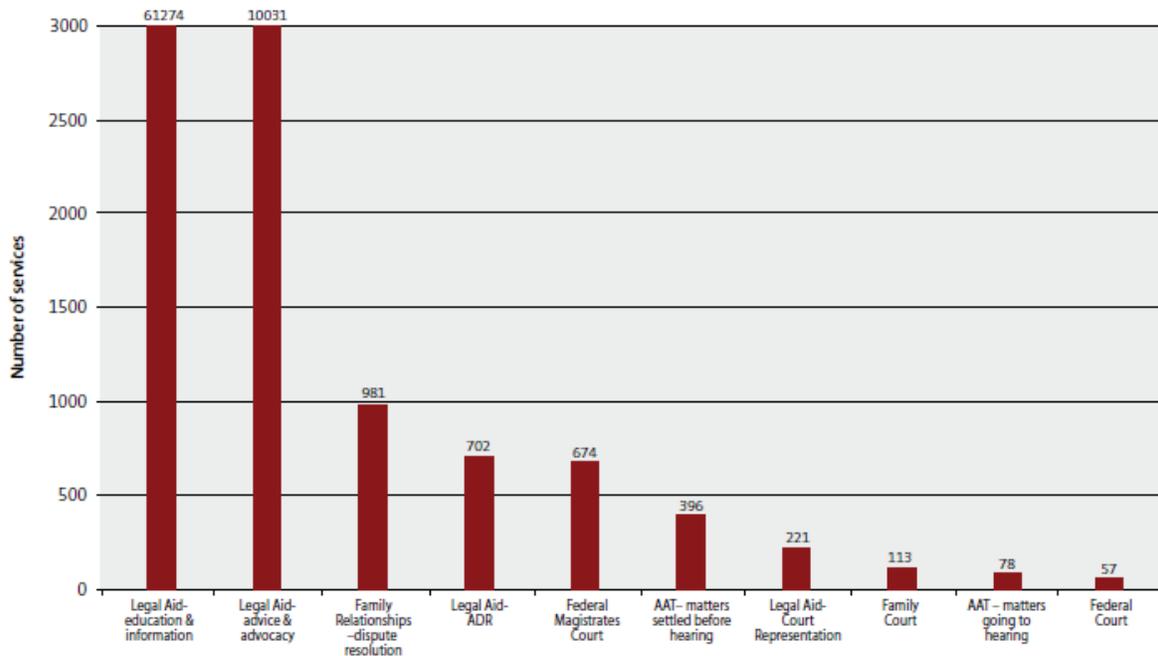
⁵ KPMG, *Family dispute resolution services in legal aid commissions: Evaluation report*, 2008, p 77.

- Total applications made for family law final orders in the Family Court and the FMC have declined by nearly 20 per cent from 2006–07 to 2007–08.⁶

In 2007–08, the cost to Government of providing FDR averaged \$1000–\$1,500 per service. By comparison, the average cost of finalising a dispute in the family court was in the order of \$9,000 per finalisation, with the average cost of a legal aid grant for litigation being \$3,837.

⁶ Family Court of Australia, *Annual Report*, 2006–2007 and 2007–08, Federal Magistrates Court, *Annual Report*, 2006–07 and 2007–08.

Figure 3: Services provided per \$1m net Commonwealth expenditure – 2007–08



The cost to Government of providing dispute resolution services varies according to the component of the justice system used and, as a general rule, increases in line with the formality and complexity of the services provided and the institutional arrangements used (see **Figure 3**).

The provision of information, advice, and counselling services by Community Legal Centres, Family Relationship Service Providers and legal aid is relatively inexpensive and can be an efficient means of avoiding or quickly resolving disputes. Formal adversarial proceedings on the other hand, such as hearings before the AAT and the Federal Court, tend to involve the greatest

costs to Government due to the significant resources involved.

In interpreting **Figure 3** it is important to bear in mind as the services shown differ substantially in their nature. While a court or tribunal process will, if finalised by adjudication, resolve a dispute, there are significant public and private costs incurred as a result of formal court processes.

Other less formal services such as the provision of legal advice and advocacy, if accessed early, are able to resolve many matters that people experience in their day to day lives and can prevent issues from escalating to more serious ones. However, such services will not necessarily resolve all matters, particularly the most complex matters.

A Strategic Framework for Access to Justice

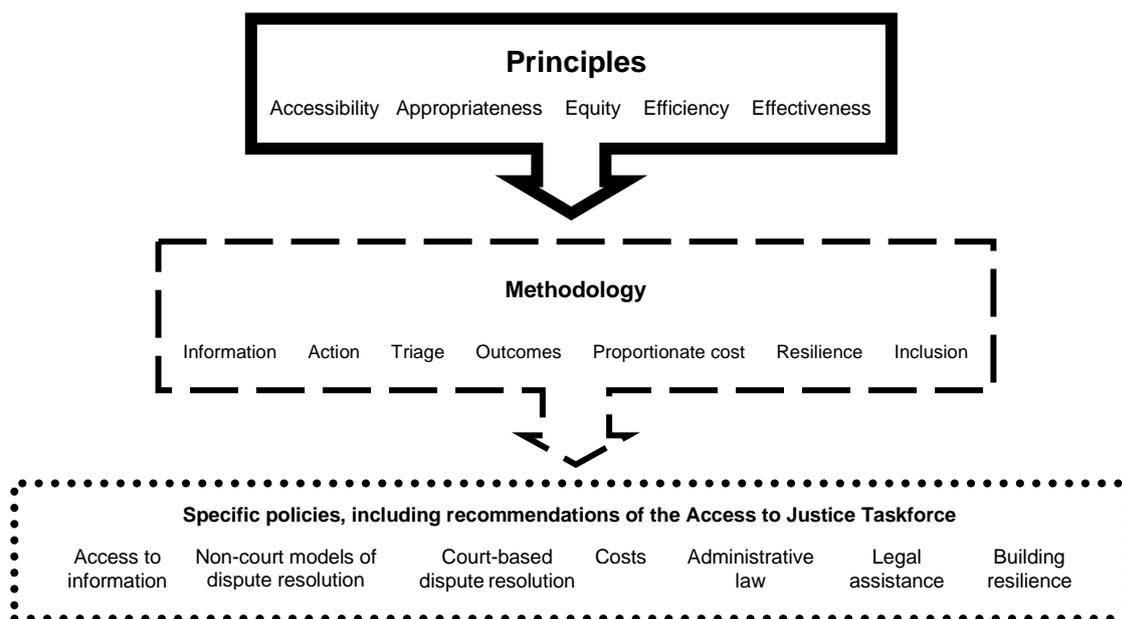
In response to these issues, the Access to Justice Taskforce proposed, and the Government agreed, that a Strategic Framework for Access to Justice should guide the consideration of future justice reforms and decisions about resourcing to ensure that the justice system is accessible and appropriate.

Policy makers should take a system wide approach to access to justice issues by applying the strategic framework to all

decisions affecting access to justice in the federal civil justice system.

Application of the strategic framework will ensure that new initiatives and reforms to the justice system best target available resources to improving access to justice. The strategic framework comprises:

- **Principles** for access to justice policy-making (objectives of the Australian justice system), and
- **Methodology** for translating the Principles in practice



The Access to Justice Principles

Accessibility

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.

Appropriateness

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.

Equity

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.

Efficiency

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.

Effectiveness

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

The Methodology is designed to assist policy-makers translate the Principles into Action. The elements of the Methodology are designed to have a reinforcing and dynamic effect. For example, better information can lead to earlier action and better outcomes. Similarly, inclusion and resilience are supported by better information and more appropriate outcomes. Better access to cost effective information and early action enables effective triage; people will be better able to achieve fair outcomes through the most appropriate means at a proportionate cost.

Information	<p>Enabling people to understand their position, the options they have and deciding what to do</p> <p>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>		
Action	<p>Intervening early to prevent legal problems from occurring and escalating</p> <p>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>		
Triage	<p>Enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system</p> <p>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>		
Outcomes	<p>Providing a pathway to fair and equitable outcomes:</p> <ul style="list-style-type: none"> • resolving disputes without going to court • when court is necessary, ensuring processes are accessible, fair, affordable and simple <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 style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> <p><u>Non court</u></p> <p>Dispute prevention Ombudsmen (including Industry Ombudsmen) Community mediation ADR</p> </td> <td style="width: 50%; vertical-align: top;"> <p><u>Court</u></p> <p>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></p> <p>Dispute prevention Ombudsmen (including Industry Ombudsmen) Community mediation ADR</p>	<p><u>Court</u></p> <p>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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Proportionate Cost	<p>Ensuring that the cost of and method of resolving disputes is proportionate to the issues</p> <p>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>		

Resilience	Building resilience in individuals, the community and the justice system 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).
Inclusion	Directing attention to the real issues that people who experience legal events have 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.

Outcome

A 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.

The way forward

The Framework is intended to guide future decisions about the federal civil justice system. It is intended to encourage development of innovative policy solutions and increase the level of integration within the various elements of the justice system.

Implementation of the Strategic Framework will involve continued consultation and coordination between Government agencies, legal assistance and other service providers, the legal profession, courts and tribunals, and users of the justice system.

Based on the conclusions from the analysis of supply and demand, and the resulting Strategic Framework for Access to Justice, the Access to Justice Taskforce made a number of recommendations for consideration by Government. These recommendations will be the subject of further consultation and consideration by Government and other stakeholders.