

Legal Review not all in the stats

The federal Attorney-General's review of Legal Assistance Services is complex and its success will rely on due consideration being given to how data is collected and analysed. **By Dr Liz Curran**

Many Victorian lawyers volunteer, work or receive aid grants for Legal Assistance Services (LAS). It is well-documented that these services work with disadvantaged people and that such work is often complex with limited resources and chronic underfunding.¹

The federal Attorney-General's Department (through Allen Consulting) is currently reviewing LAS. LAS refer to the range of services provided by Legal Aid Commissions, community legal centres (CLCs), Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS). LAS offer generalist and specialist services including telephone advice and referrals, minor assistance relating to civil, criminal and family law, legal representation, dispute resolution, counselling, community legal education, information, law reform and advocacy. The Review, which is the most significant to be undertaken of this sector, will conclude in September 2013.

The Law Council of Australia (LCA), National Legal Aid (NLA), ATSILS, the National Association of Community Legal Centres (NACLC) and the LIV, among others, have made submissions to the Review. The author, in a report for the LAACT² and a review for the Attorney-General's Department³ noted that any review must recognise the challenges and need for diversity of

programs to effectively deliver legal services to their target group – the most disadvantaged.

This article summarises some of the critical issues for the Review to consider, including the need to understand the responsiveness of different programs to different clients which is essential to ensuring quality outcomes. It aims to brief the profession as to the issues around the Review from a practitioner point of view.

Allen Consulting developed a Discussion Paper⁴ for the Review of the National Partnership Agreement (NPA) on LAS. The NPA provides the framework for federal funding of Legal Aid Commissions for the years 2010–2014. The Review states that it will examine service and overall sector progress made towards the objectives of the NPA, being the delivery of preventative, early intervention and dispute resolution services. It will also evaluate the quality, efficiency and cost-effectiveness of LAS.

The Critical Issues

Effectiveness is affected by resources, staffing and funding

Any attempt to review LAS effectiveness must recognise that a service can be impacted by the available resources and funding. In its submission to Allen Consulting the LCA stated:

"The Law Council considers that it is unreasonable to assess the effectiveness or quality of legal assistance services without acknowledging the long-term, chronic underfunding across the legal assistance sector, comprising Legal Aid Commissions (LACs), Community Legal Centres (CLCs) and Aboriginal and Torres Strait Islander Legal Services (ATSILS). Underfunding of the legal assistance sector has restricted access to justice, thereby impacting on the enforcement and protection of fundamental rights".⁵

The LCA also stated that:

"The Commonwealth and State and Territory Governments are jointly responsible for the funding of legal aid. However over the last 15 years, there has been a significant drop in the proportion of funding provided by the Commonwealth, from a share of 50 per cent in 1996–97 (equivalent to \$128 million out of a total \$264 million) to approximately 35 per cent of the total legal aid budget. In 2010–11 the Commonwealth Government contributed approximately \$200 million out of a total of \$568 million".⁶

If LAS is understaffed, has problems recruiting staff, and its staff are poorly paid, overstretched and stressed, the quality of the service can be affected. For example, ATSILS see large numbers of clients in remote locations with little time before court to take instructions and in circumstances where





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the clients have little English or have disabilities and poor capacity to comprehend. No matter how dedicated and hard working the lawyers may be, the issues of inadequate staffing, sheer demand and the shortage of time to take instructions must impact on their effectiveness.

Complexity of clients

Measuring outcomes of legal service delivery is very difficult both in terms of defining an outcome and ensuring it is realistic and within the agency's role and ability to control. The LAECT report outlined the international research in the human services and humanitarian fields and underscored the difficulties of measuring outcomes. The report developed measurements combining quantitative and qualitative tools which were designed with input from the service itself to ensure it reflected the reality and complexity of practice. These instruments⁷ enable other agencies to replicate their own evaluations in a non-burdensome and low cost way. Measuring LAS impact, outcomes and/or quality must recognise both the challenges and time-consuming nature involved in working with disadvantaged and vulnerable clients. Human services such as legal aid involve human beings rather than the production of commodities and so using simplistic measures in isolation such as number of cases handled or advice given is unrealistic. Rather than assuming that the impact of LAS is simple or easy to measure, the approach to measurement of LAS must acknowledge the difficult and unpredictable nature of service delivery when disadvantaged and vulnerable clients are involved. The concern with the Review is that even though the survey instruments used by Allen Consulting have been standardised, they do not reflect the complexity and diversity of the services/clients, and the survey questions do not sufficiently connect with the NPA objectives that they are supposed to measure. Tools need to be included which involve listening to, informing, conducting analysis with, responding to, interacting and communicating with a range of people engaged in this complicated work. As this author's methodology for the LAECT research shows, measurement is possible, but must be done

with great care to factor in diversity and complexity and incorporate approaches so that agencies can participate in the design without it being burdensome.⁸

Mowles, Stacey and Griffin⁹ provided a warning to funders noting that managerial methods have been adopted largely uncritically from the non-legal private sector. They observed that when applied to human development/services these methods have significant shortcomings. They noted dangers in substituting "more abstract and de-contextualised planning processes" which overlook the "unanticipated contextual" issues which are often treated as "noise" which needs to be "managed away" rather than the reality within which a service must operate.¹⁰

Any funding contingent on criteria which is outside the actual role, responsibility or control of LAS needs to be carefully scrutinised so that the staff, clients and service are not set up to fail. There is a real danger where unrealistic outcomes are set which are beyond the power of LAS to change, for example the effects of mental illness on a client.

Queensland Association of Independent Legal Services (QAILS), the peak body for CLCs in Queensland, noted a difficulty that it says is not reflected in the Discussion Paper by Allen Consulting:

"... our view is that most of the clients who approach community legal centres are far beyond the true early intervention or prevention end of the spectrum. By the time their problem has manifested in a legal issue, and the client is seeking legal advice, the CLC is really working at the tertiary (or at least secondary) end of the spectrum. This is where the bulk of CLC work lies".¹¹

Another complexity is that clients are not always aware of how LAS work, but know that they need help. QAILS observed:

"The reviewers must be aware that clients generally confuse legal aid offices and CLCs – clients often do not appreciate the difference between the two and will refer to them interchangeably, though it is more common in our experience for clients to refer to all free legal services as 'legal aid', rather than the other way around".¹²

The NACLC¹³ also raised concerns about the LAS section in the Discussion Paper and its depiction of different service providers as

being underdone. The NACLC noted that a table in this section is deficient in its characterisation of the different service providers and the tailored services that they provide for different client groups, for example women.

As an example, the Women's Legal Service Australia (WLSA) stated:

"An overarching concern of the Draft Framework by WLSA is that women, or at least women in domestic violence situations, have not been identified as a priority group. Although they may feature in some of the categories nominated, unless they are specifically named as a category, the review will miss crucial information about gender bias and the unique experiences of marginalised women in the justice system ...".¹⁴

Also the NACLC points out the risk of distortion in taking "stakeholder" views where those stakeholders may have a particular perspective on LAS. In ensuring the rule of law and calling authority to account in their treatment of clients (a fundamental role of LAS in a democracy) some stakeholders (which include the police and the Department of Immigration) may find LAS an unwelcome distraction. The NACLC noted:

"Given that a number of services conduct matters against police or involve police (e.g. deaths in custody) and campaign for greater accountability of police, surveying police about the rightness (or quality) of legal assistance providers' services seems problematic".¹⁵

LAS and the private profession are not always popular for upholding the rule of law. Allen Consulting needs to be mindful when surveying external players in the legal system as they may be critical of LAS as they have vested interests at stake.

Risk of cumbersome data collection

The Discussion Paper discusses indicators and proposed data points.¹⁶ Many of the suggested indicators in the Review rely on service data that either does not exist or is inconsistently gathered across the country. A key concern about the proposals around data collection is that if data is not relevant, usable, and collection entry is not time limited and capable of being used by the service to inform its operations, then it will detract from core service delivery and so remains a real risk. This author has experience of the Community Legal Service Information System (CLSIS) data collection of CLCs which is time consuming. Data collated by CLSIS service staff, despite many attempts to improve it, remains clunky and cumbersome and transaction (e.g. number of advices given) rather than quality or impact based. For example, in an office of three full-time staff, 36 per cent of staff time was spent on data collection. This is time that could be spent in direct service delivery. In

some cases, a person completing data (with a client waiting) could have to wait up to 15 minutes to access the next data page. Many rural, remote or regional LAS have only a small number of staff to service a large catchment. Time spent on inefficient and cumbersome accountability data collection impacts on service delivery. Data is critical for informing services about trends and for accountability, but those who design data collection and roll out such systems need a sense of reality and minimal burden as it can detract from service delivery.

Dangers of over-reliance on quantitative data on LAS

An understanding of each service is a critical starting point in any evaluation process. Even within one LAS program many areas of law in which clients are assisted have different policy and legislative settings and operate in ways to deliberately service specific community groups.¹⁷ The Review's methodology is largely survey based and although Allen Consulting has standardised the data, it can miss the capacity to drill down and discover the reasons behind the statistics – results that qualitative approaches can reveal, for example by interviews and focus groups. The data is open to the danger of misinterpretation. A diverse range of factors can be at play in the justice system (lack of housing, addiction etc.) and most of the submissions flag this as an issue. NLA, ATSILS, WLSA and NACLC submissions make the point that expertise and a working knowledge of how diverse client casework operates in reality is necessary to avoid misinterpretation of statistical results. NLA observed this has been downplayed or at times even ignored in the Discussion Paper. NLA stresses that agencies should be given an opportunity to explain the whys and wherefores and suggests that the Review be staged with learning from the first stages informing the future stages.¹⁸

One way of refining this is raised by QAILS:

"It is important in this type of process, particularly where the reviewers are not experts in the content of the Review, that natural justice is afforded to any organisation where a negative comment is made. This will ensure that information is not taken out of context without the opportunity to respond and to provide balance to the picture".¹⁹

It is critical that service providers and clients are given opportunities to explain why LAS can or cannot have an impact on clients' lives as these are often outside the ability of a service to control and can involve systemic problems. The NACLC submission stated:

"NACLC thinks that the Discussion Paper does not sufficiently appreciate or reflect the extent of the differences in structure,

services, service delivery methods and focus of the four providers – their respective strengths and their inter-relationship and generally complementary nature".²⁰

By involving services directly in the designing and implementation of the instruments of measurement this can be achieved. The gap between the input of LAS in the consultation phase and the lack of precision and false assumptions contained in the final survey questions underlines the disconnect.

ATSILS²¹ also noted that it is vital that consultation and survey processes are culturally competent in response to the specific location in which they are being employed. ATSILS stressed the importance of cultural competency in the conduct of the Review in relation to both ensuring that communities and clients are able to understand the survey questions and that the consultants are able to correctly interpret and understand the information they receive. ATSILS noted that in some instances written surveys may not be appropriate and verbal face to face interviews will be necessary. This underlines the danger of relying on quantitative data alone.

Another issue which concerned the author,²² and is acknowledged by Allen Consulting, is the danger in using "Client Satisfaction" terminology and surveys. The role of a lawyer is not to just do the client's bidding but to honour their undertakings as officers of the court and under the legal professional legislation and conduct rules in each of the states and territories (for example, the *Legal Profession Act* 2004²³ and the Victorian *Professional Conduct and Practice Rules* 2005²⁴ and the draft *Australian Solicitors Conduct Rules*²⁵). Many clients do not understand these (sometimes) competing duties and that a lawyer's fundamental obligation is to independently advise clients of their legal position, even if the clients are not satisfied with this advice.

Conclusion

The task facing Allen Consulting is immense. Any expectations or funding contingent on criteria beyond the actual role and responsibility, control and power of legal aid practitioners or which ignores the need for tailoring of services needs to be carefully scrutinised so that clients and LAS are not set up to fail. Civil servants and reviewers need to be mindful that trying to standardise and aggregate results or being over-obsessed with cost-effectiveness can come at the cost of driving down quality and reducing effectiveness.²⁶ It is hoped that this article will provide practitioners with sufficient background and exposure to differing views in the legal sector on the Review or the service provided. ●

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1. The Senate Legal and Constitutional Affairs Committee, "Inquiry into Access to Justice", Chapter 8. (<http://tinyurl.com/c4jforq>). See also discussion: PriceWaterhouseCoopers, 2009, *Legal Aid Funding: Current challenges and the opportunities of cooperative federalism*, December 2009 (<http://tinyurl.com/dxmb9vh>).
2. L Curran, "We can now see there's light at the end of the tunnel", *Legal Aid ACT: "Demonstrating and Ensuring Quality Service to Clients"*, Legal Aid ACT, 2012, p1-2 (<http://tinyurl.com/bqg6szm>).
3. Curran L, "A Literature Review: examining the literature on how to measure the 'successful outcomes': quality, effectiveness and efficiency of Legal Assistance Services", Attorney-General's Department, 2012 (<http://tinyurl.com/czke2wt>).
4. Allen Consulting, "The Second Draft Evaluation Framework Discussion Paper", Attorney-General's Department, September, 2012, p35 (<http://tinyurl.com/bqgb5a6>).
5. Law Council of Australia, "Review of the National Partnership Agreement on Legal Assistance Services", Draft Evaluation Framework Discussion Paper, 3 (<http://tinyurl.com/cyrxkq9>).
6. Note 5 above, 3.
7. Note 2 above, pp19-25.
8. Note 2 above, pp133-135.
9. C Mowles, R Stacey and D Griffin, "What contribution can insights from the complexity sciences make to the theory and practice of development management?", *Journal of International Development*, vol 20 (2008), 804-820 at 33-37.
10. Note 9 above, at 808.
11. QAILS Submission to the Allen's Review, August 2012, provided to the author.
12. Note 11 above, p3.
13. NACLC Submission to the Allen's Review, August 2012, provided to the author.
14. WLSA submission of 17 August 2012 (preceded the Second Allen's Discussion Paper), September 2012, p2.
15. Note 13 above, p4 and L Curran, "Making the Legal System More Responsive to Community: A Report on the Impact of Victorian Community Legal Centre (CLC) Law Reform Initiatives", La Trobe University and the Reichstein Foundation, May 2007.
16. Note 4 above, p20-23.
17. Note 2 above, p14-15.
18. National Legal Aid submission to the Allen's Review, August 2012, provided to the author, p2 (<http://tinyurl.com/cy38l7b>).
19. Note 11 above, p9.
20. Note 12 above, p4.
21. NATSIL's Feedback on the Draft Evaluation Framework Discussion Paper, Submission to the Allen's Review, August 2012, provided to the author, p2.
22. Note 11 above, p4.
23. <http://tinyurl.com/cwvmvx3r>.
24. www.lsb.vic.gov.au/documents/LSBLIVRules2005.pdf.
25. www.lawcouncil.asn.au/programs/national_profession/conduct-rules.cfm. The author notes that the Law Institute of Victoria also made a submission to Allen's Consulting on the NPA Review on 12 April 2013.
26. A Trude and J Gibbs, "Review of Quality Issues in Legal Advice: measuring and costing quality in asylum work", Lawyers Defending Human Rights, Refugee and Migrant Justice undertaken by the Information Centre About Asylum and Refugees and the Immigration Advisory Service, City University, London, March 2010 (www.icar.org.uk/9602/about-us/publications.html).