



Law Council
OF AUSTRALIA

Independent Review of the National Legal Assistance Partnership

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful for the assistance of the following Constituent Bodies in the preparation of this submission:

- Law Society of New South Wales
- Law Society Northern Territory
- Law Society of South Australia
- New South Wales Bar Association
- Queensland Law Society

The Law Council also thanks its Access to Justice Committee; Rural, Regional and Remote Committee; and Young Lawyers Committee for their contributions.

Executive summary

1. The Law Council welcomes the opportunity to contribute to the Review of the National Legal Assistance Partnership 2020–25 (**NLAP**). The following comments are in response to the matters raised in the Issues Paper dated August 2023.
2. Each of the three legal assistance services funded under the NLAP—Legal Aid Commissions (**LACs**), Community Legal Centres (**CLCs**) and Aboriginal and Torres Strait Islander Legal Services (**ATSILS**)—play an important, unique and complementary role in providing legal help to people and communities across Australia. Family Violence Prevention Legal Services (**FVPLSs**), which are not currently funded through the NLAP framework, also play a critical role.
3. While recognising the profound impact these subsectors have on promoting access to justice to Australians and supporting those experiencing disadvantage, the Law Council’s submission emphasises the role of the private legal profession: solicitors and barristers have a key function in the delivery of publicly-funded legal services, most notably with respect to supporting complex legal problems that require representation and advocacy. The success of the publicly funded system’s delivery depends, to no small extent, on the continued commitment and efforts of the private profession—which occurs in addition to its substantial pro bono efforts. However, it must be viable for them to continue this work.
4. The Law Council makes the following recommendations for consideration by the Independent Reviewer:
 - Consequent upon this Review, an appropriately resourced legal needs analysis should be developed and implemented to better understand the legal needs of Australians including priority groups experiencing disadvantage, legal issues, location and access at a population level. Such an analysis must provide for national and targeted surveys on legal need, and the extent to which it is met or unmet. A current, reliable national analysis is needed to drive evidence-based responses.
 - Justice Impact Tests (alternatively, Legal Assistance Impact Tests) should accompany all new government proposals as a means of identifying the downstream impacts of a policy initiative or reform measure, and ensuring that any increased legal need can be resourced and met.
 - To ensure that the established objectives agreed under the NLAP can be progressed, a significant and ongoing increase in the funding of the entire legal assistance sector is required. This funding should include:
 - increased federal funding for Legal Aid Commissions across criminal, civil and family law matters, restoring the Commonwealth share of funding to 50 per cent; and
 - additional, ongoing and evidence-based resourcing for CLCs and ATSILS—and, outside of the NLAP, FVPLSs.
 - Legal aid rates made available to the private legal profession should have far greater regard to existing scales of costs, and, wherever possible, align with these benchmarks. Legal aid rates should be designed with the objective of ensuring sustainable participation by the profession in the delivery of access to justice to Australians in need.

- Impact assessments should be undertaken when there are significant changes to the way in which the private legal profession is expected to engage with Legal Aid Commissions when undertaking legal aid work.
- Consideration should be given to the establishment of a Higher Education Loan Program (**HELP**) debt relief scheme for legal practitioners who reside and work in eligible rural, regional and remote (**RRR**) areas, to incentivise the recruitment and retention of qualified lawyers in underserviced areas. The objectives of the legal needs analysis proposed above should include identifying RRR areas most in need.
- **ATSILS** must be adequately resourced as a matter of priority, so as to support sufficient legal and therapeutic staffing levels, their advocacy functions, and the provision of culturally safe models of care to vulnerable members of the community.
- Extensive consultation and co-design should occur with National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) and individual **ATSILS** in relation to whether the former Indigenous Legal Assistance Program (or a similar standalone funding stream) should be developed.

Introductory comments

5. Legal problems are a common occurrence in society, and most Australians will experience several interactions with the legal system throughout their lifetime. Effective and efficient access to justice in these circumstances will often necessitate the assistance of a legal adviser or representative, as many people struggle to navigate Australia’s complex laws and justice system on their own. People experiencing disadvantage are often more vulnerable to legal problems and frequently have greater and more complex legal needs than the general population. However, unmet legal need commonly spirals into more complex and serious legal problems—for example, unaddressed civil matters can lead to family law or criminal law matters over time.
6. Despite having vastly disproportionate interactions with the justice system, Australians experiencing disadvantage are often the least able to respond effectively.
7. In 2017–18, the Law Council undertook a comprehensive national review into the state of access to justice in Australia (the **Justice Project**).¹ Focussing on 13 priority groups identified as facing significant social and economic disadvantage, the final report of the Justice Project shone a light on justice issues for these groups by uncovering systemic flaws and identifying service gaps. It also highlighted what was working well.
8. The constructive, informed recommendations in the final report of the Justice Project provided a roadmap for future action, building the case for new, whole-of-government justice strategies secured by appropriate funding. In particular, the Law Council refers the Independent Reviewer to the Justice Project chapter on ‘Legal Services’, which primarily focuses on the central role of publicly-funded legal assistance services in meeting the legal needs of people experiencing disadvantage.² This chapter identified a range of factors which were necessary considerations in designing and resourcing effective service delivery—from trauma-informed practice to specialised services.
9. The Justice Project summarised the impact of under-investment in the justice system and the personal, community, social and economic costs when people cannot access justice.³ These include, for example:
 - (a) people being incarcerated;
 - (b) an inability to resolve mounting debts, fines or payments, resulting in poverty and/or eviction and homelessness;
 - (c) people remaining at risk of harm or exploitation—such as family violence, or for older people or people with disability, the risk of abuse or exploitation by relatives or carers;
 - (d) missed opportunities to exercise an individual’s rights under the law, including to address workplace exploitation or discrimination, to obtain their legal entitlements, or to seek redress as a victim of crime;

¹ Law Council of Australia, [The Justice Project: Final Report](#) (August 2018).

² Law Council of Australia, [The Justice Project: Final Report \(Legal Services Chapter\)](#), August 2018).

³ Law Council of Australia, [The Justice Project: Final Report \(Introduction and Overview\)](#), August 2018) 18.

- (e) families being split when children are unnecessarily removed from their parents;
 - (f) people being returned to their countries of origin to face persecution, torture or death; and
 - (g) problems escalating from civil or family matters to criminal matters.⁴
10. These scenarios have broader cost implications across the Australian economy—such as to health, housing, social services and welfare, child protection, families, corrections, policing and justice portfolios. They also entrench disadvantage and intergenerational cycles of poverty, violence and harm—with opportunity costs to all Australians given the loss of healthy, productive and vibrant communities.⁵
 11. For many Australians, the no-cost or minimal-cost services provided by government-funded legal assistance providers are often the first and most fundamental sources of support to address legal issues. Access to these services is especially important in the current economic circumstances, noting the preventative role that they play in avoiding harm—whether through job loss or family breakdown—to individuals and families.⁶
 12. While legal assistance services are not a ‘cure-all’, the benefit of investment in the legal assistance sector in minimising the multitude of costs to government associated with failure to adequately access justice has been consistently recognised in Australian and overseas research.⁷ Most recently, the 2023 report, *The benefits of providing access to justice*, commissioned by National Legal Aid (NLA), found that, for every \$1 invested in legal aid services by the Commonwealth Government, an equivalent benefit of \$2.25 was delivered.⁸

Legal need

13. It is well recognised that there are high levels of unmet legal need in Australia, and that the legal system is regarded as inaccessible to many. However, collecting data on this issue has proved difficult and has only occurred sporadically in recent decades.
14. The Victorian Law Foundation has recently released *Everyday Problems and Legal Need*, volume 1 of its Public Understanding of Law Survey (PULS).⁹ Although focused on Victoria, the PULS is the first major legal needs survey in Australia since the Legal Australia-wide survey (LAW Survey) released by the Law and Justice Foundation of New South Wales in 2012.¹⁰ The PULS provides valuable insight into the prevalence of legal need across Australia.

⁴ Ibid.

⁵ Ibid 18-19.

⁶ In the context of highlighting the value of legal assistance, the Law Council has been grateful to receive a draft of the submission of the Kaldor Centre Data Lab, which publishes and analyses data around Australia’s refugee status determination decisions. The Kaldor Data Lab’s submission provides insight into the benefits of legal representation in this field of law. In the Law Council’s view, these insights are indicative of the value of legal representation more broadly.

⁷ See, eg, Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 30-31; International Bar Association and World Bank Group, [A Tool for Justice: A Cost Benefit Analysis of Legal Aid](#) (2019) 19.

⁸ PwC (for National Legal Aid), [The benefits of providing access to justice](#) (Report, January 2023).

⁹ Victorian Law Foundation, [Public Understanding of Law Survey: Everyday Problems and Legal Need](#) (volume 1, 30 August 2023).

¹⁰ Law and Justice Foundation of New South Wales, *Legal Australia-wide survey* (2012).

15. 42 per cent of respondents to the PULS reported having experienced one or more 'justiciable problems' over the previous two-year period.¹¹ The most common problems concerned consumer transactions, housing, fines, employment and family law.¹²
16. Consistent with previous findings, some vulnerable persons such as those reporting high levels of mental distress, Aboriginal and Torres Strait Islander people and single parents reported problems more frequently.¹³ 53 per cent of those who had faced problems reported multiple problems demonstrating that experience of one legal problem can lead to and/or reinforce further problems.¹⁴ Also consistent with previous findings, 'the association between justiciable problems and disadvantage becomes even more apparent when looking at multiple problem experience'.¹⁵
17. In relation to unmet legal need, the PULS survey found that:

*37% of problems reported through the PULS did not give rise to a legal need. If the narrow definition of expert help (legal services only) is used, 57% of problems involved an unmet legal need, with the remaining 6% involving a legal need that was met ... If the broad definition of expert help is used, 49% of problems involved an unmet legal need, with the remaining 14% involving a legal need that was met ... Where a legal need existed, using a narrow definition, 90% went unmet, and using a broad definition 78% went unmet.*¹⁶

18. The level of need going unmet can also be demonstrated by the number of persons being turned away from legal assistance services. In the final report of the Justice Project, the Law Council summarised data on the number of potential clients being turned away from legal assistance sector services as follows:

As identified by the Productivity Commission, while around 14 per cent of Australians live below the poverty line, just eight per cent of all Australian households qualify for legal aid. Meanwhile, in 2015–2016, CLCs had to turn away nearly 170 000 people, a substantial increase upon 2014–15, when nearly 160 000 people were turned away. A recent Australian Council of Social Service survey of community services found that 72 per cent of CLCs reported being unable to meet demand, and only four per cent could fully meet demand. Unmet demand for their services was higher than any other category of community service surveyed, including accommodation, counselling and family support/child protection services.

ATSILSs and NVPLSs are experiencing extremely high levels of unmet legal need for criminal, family and civil law services. While ATSILSs have had to prioritise criminal matters, despite evidence of the need amongst Aboriginal and Torres Strait Islander for civil assistance, they struggle to meet existing demand. Against a rising tide of Aboriginal and Torres Strait Islander incarceration, this should be of enormous concern. Meanwhile, some FVPLSs estimate turning away 30 to 40 per cent of Aboriginal and Torres Strait Islander women who seek assistance for

¹¹ Victorian Law Foundation, [Public Understanding of Law Survey: Everyday Problems and Legal Need](#) (volume 1, 30 August 2023) 45.

¹² Ibid.

¹³ Ibid 14, 47.

¹⁴ Ibid, 15, 75-76.

¹⁵ Ibid 48.

¹⁶ Ibid 20.

family violence matters. High levels of need for such matters, which intersect with other areas of legal need such as homelessness, child protection and credit issues in Aboriginal and Torres Strait communities, reinforces the urgency of these concerns, which were reflected across multiple consultation locations.¹⁷

19. The Law Council understands that the level of ‘turn aways’ and, therefore, unmet legal need, has only increased since the release of the Justice Project. The frontline service providers and their peak bodies may have more recent data on the number of people being turned away from their services.
20. However, it is important to recognise that legal assistance service data, including in relation to potential clients turned away, is only captured when clients successfully identify a problem as a legal problem, seek help, and engage with a legal assistance service. Surveys such as the LAW Survey and the PULS, and pre-targeted research, such as that conducted by Chris Cunneen and Melanie Schwartz into the civil and family law needs of First Nations persons,¹⁸ have previously provided a strong understanding of the extent of legal need in Australia, the extent to which it is met and the consequences of unmet legal need.
21. Such research is critical in ensuring that there is a comprehensive picture of Australians’ current legal needs, which is fundamental to future reform. Consequent upon this Review, an appropriately resourced legal needs analysis should be developed and implemented to better understand the legal needs of Australians, including people experiencing disadvantage. This should address priority groups, legal issues, location and access at a population level. Such an analysis must provide for national and targeted surveys on legal need.
22. Addressing this justice gap was a major—and often the highest—priority of many submitters to the Law Council’s Justice Project, and must remain a key focus for the funding of the legal assistance sector. However, this can only occur effectively where there is a greater identification and appreciation for where these justice gaps exist.

Recommendation

- **Consequent upon this Review, an appropriately resourced legal needs analysis should be developed and implemented to better understand the legal needs of Australians including priority groups experiencing disadvantage, legal issues, location and access at a population level.**

Legal assistance impact tests

23. The Law Council considers it particularly important in determining additional funding for the legal assistance sector that resources are provided to meet unexpected, and therefore unbudgeted, increases in legal need as a result of new policy initiatives or legislation.
24. Additional strains on the legal assistance sector are rarely sufficiently factored into policy and law reform processes, including the Regulatory Impact Assessment process. The Law Council continues to recommend that Justice Impact Tests—with

¹⁷ Law Council of Australia, *The Justice Project: Final Report* ([Legal Services Chapter](#), August 2018) 7.

¹⁸ See, eg, Chris Cunneen and Melanie Schwartz, *The family and civil law needs of Aboriginal people in NSW* (Final Report, 2008).

a particular emphasis on the downstream effects on access to, demand for, and resourcing of the legal assistance sector—accompany new government proposals as a means of determining the impact of any initiative or reform and ensuring that any increased legal need can be met.¹⁹

25. There can be little doubt that, since Governments are the single most likely cause of increases in unmet legal need, it behoves them to adequately assess and fund the legal assistance needs created, at the time the need is created. In the Law Council's view, this responsibility must be shared across government.
26. Should this not be accepted, alternatives include publicly agreed checklists, to be addressed as part of the policy and law reform process, which will nevertheless direct portfolio agencies to carefully consider and weigh up impacts on the justice system and prompt central agency inquiry into these matters.

Recommendation

- **Justice Impact Tests (alternatively, Legal Assistance Impact Tests) should accompany all new government proposals as a means of determining the downstream impacts of an initiative or reform, and ensuring that any increased legal need can be met.**

Funding quantum

27. The current funding model under the NLAP is not providing sufficient funding to ensure that Australia provides its people—through the legal assistance sector—with an adequate safety net in times of legal need. The sector is under extreme pressure and, consequently, many of the most marginalised people in Australia are missing out on timely and effective help, increasing their risk and vulnerability. Under-resourcing places pressure on those who are the least empowered to act—and the consequences can be significant for both the individuals affected and the wider community.
28. In analysing the NLAP's predecessor, the National Partnership Agreement on Legal Services, the Law Council found:

One key deficiency of the current NPA is that it simply binds state governments to spending Commonwealth funding in certain ways, based on a Commonwealth funding offer which seemingly lacks an evidence base or rationale. It does not seek to quantify or address unmet legal need in a transparent manner, including through joint funding commitments. As noted by the Productivity Commission, currently, 'the total quantum of funds allocated is not sufficient to achieve governments' stated priorities'. It further suggested that 'the global funding envelope provided to legal assistance providers by Australian governments should be broadly related to the costs associated with meeting [identified] priorities.' Similarly, NATSILS has emphasised the need for governments to develop, in consultation with Aboriginal community-controlled organisations ('ACCOs'), a national plan to map the unmet legal needs of Aboriginal and Torres Strait Islander people in

¹⁹ See Law Council of Australia, [Justice Impact Assessments](#) (Policy Statement, September 2013); Law Council of Australia, [The Justice Project: Final Report – Governments and Policymakers](#) (August 2018) 14-26.

Australia, and to provide adequate funding for ACCOs commensurate with these needs.²⁰

29. The Law Council considers that similar issues have been perpetuated under the NLAP, and that the ability of the NLAP to meet its objectives, as agreed by the Australian, state and territory governments, remains hamstrung by the quantum of funding provided under the agreement.
30. The inadequate level of funding provided under the NLAP has created a number of specific issues, each of which is contributing to the level of unmet legal need as discussed above. These issues include:
 - (a) The legal aid means tests are set at levels for which most Australian households—even those experiencing significant disadvantage—will not be eligible. In its submission to the Commonwealth Treasury as part of the 2023–24 Pre-Budget process, NLA indicated that only approximately 5 per cent of Australian households would meet the criteria of legal aid income and assets tests, down from 8 per cent at the time of the Productivity Commission’s inquiry.
 - (b) Important services cannot be provided. For example, the Law Council is aware that, at various times throughout 2023, several ATSILS have been forced to freeze vital services due to unsustainable staff workloads and inability to attract and retain staff in RRR areas.
 - (c) Limitations on the quality of service that can be provided. Emblematic of this issue is the level of service that court-based duty lawyers are able to provide. In many cases, duty lawyers will be only able to spend 10 to 15 minutes with a client before representing them in court. While this service-type is very important in ensuring that individuals before a court have representation, the demands on the service mean that clients may not in all cases receive optimal support or advice. In 2017, an independent evaluation of Victoria’s summary crime system illustrated the futility of inadequately relying on such services against a rising tide of needs and broader service cutbacks.²¹
 - (d) Limitations on the provision of holistic services. The complexity of many legal areas of practice has increased significantly. So has the impact of disadvantage on the type of service response that is needed to address intersecting complexity. This requires trauma-informed and holistic service provision which is inherently more expensive than the provision solely of legal advice, and therefore difficult to maintain under an unduly restrictive funding arrangement. However, it would be a false economy to resource services that are not trauma-informed and do not respond to clients’ needs effectively.
 - (e) Significant impacts on the ability for legal assistance services to attract and retain quality staff, as well as external assistance from the private profession. In addition to the strain felt by those in the legal assistance sector, high staff turnover, high levels of pressure, and over-burdensome workloads can impact the level of service provided to clients. This results in less-than-optimal outcomes, which may create additional legal need moving forward.

²⁰ Ibid 10.

²¹ Hugh M McDonald et al, ‘In summary: Evaluation of the appropriateness and sustainability of Victoria Legal Aid’s Summary Crime Program’ (Report, Law and Justice Foundation of New South Wales, June 2017)

31. The Law Council considers current Commonwealth funding levels under the NLAP to be approximately half of the level required to adequately meet demand on the sector.
32. In the final report of the Justice Project, the Law Council estimated that the Commonwealth funding shortfall was at least \$310 million.²² This figure comprised:
 - (a) the Productivity Commission's estimate that the Commonwealth should provide additional funding of around \$120 million per annum for civil legal assistance services;²³ and
 - (b) PricewaterhouseCoopers' (**PwC**'s) estimate in advice commissioned by the Law Council that, to return the Commonwealth's share of LAC funding to at least 50 per cent, the Commonwealth would need to provide an additional \$190 million per annum.²⁴
33. The Law Council acknowledges that the PwC figures are focused on LAC funding only and do not include the amounts required to address urgent unmet needs for CLCs and ATSILS—and, outside of the NLAP, FVPLSs. As such, the Justice Project recommendation should be viewed as a minimum estimate only. The Law Council considers that this shortfall is now more than \$500 million (even factoring in the additional money provided under the NLAP and other initiatives).
34. The need for significant additional funding to address civil law issues remains essential. Despite the prevalence of legal need related to civil law issues (see paragraph [15] above), civil law matters only account for 4 per cent of grants for representation by LACs.²⁵ Given that the Productivity Commission's recommendation was made in 2014, and was suggested merely as an interim funding solution to 'address the more pressing gaps' in civil legal assistance services, the Law Council suggests that this figure is now likely to be a significant underestimate.
35. Further, the Law Council has recently re-engaged PwC to update its estimate of the level of additional funding required each year to return the Commonwealth to a 50 per cent share of legal aid funding with the states and territories (see Table A1 in **Appendix A**).²⁶ The projected level of additional funding required in this regard in the current financial year is \$369.6 million.²⁷ This figure is almost double the figure initially included in the Law Council's estimation in 2018.
36. In its 2023–24 Pre-Budget Submission, NLA identified that an increase in baseline funding of \$382 million per annum for LACs by 2025 is required.²⁸ This would include \$168.3 million in immediate investment to continue funding to a number of important current programs and expand the number of services that LACs are able to provide (with particular focus on family law access for women and children escaping domestic and family violence).²⁹ It is important to note that the above requests from NLA would only seek to address the funding shortfall for LACs.

²² Ibid 11 (rec 2.1).

²³ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 741, rec 21.4.

²⁴ PwC, *Update to Projected Real Funding of Legal Aid Commissions* (Advice from PwC to the Law Council of Australia, January 2018).

²⁵ PwC (for National Legal Aid), *The benefits of providing access to justice* (Report, January 2023) 4.

²⁶ PwC, *Update to Projected Real Funding of Legal Aid Commissions* (Advice from PwC to the Law Council of Australia, October 2023).

²⁷ Ibid.

²⁸ National Legal Aid, Submission to the Treasury, *2023-24 Pre-Budget Submission* (13 December 2022) 2.

²⁹ Ibid.

37. In its advocacy prior to the 2023–24 Budget, NATSILS identified that a \$250 million emergency support package was required to prevent the freezing of frontline services in RRR locations and address a ‘workload crisis’ risking the physical and mental health of staff and therefore clients.³⁰
38. In the previous year, prior to the 2022–23 Budget, Community Legal Centres Australia recommended additional investment of \$80 million per year, for 10 years, from the Commonwealth Government to boost core funding for CLCs across Australia to meet the needs of local communities.³¹

Returning to a 50–50 share of LAC funding

39. At the request of the Law Council, PwC has tracked changes in real per capita funding of LACs by the Commonwealth over time (see Table A2 in **Appendix A**). The Commonwealth’s contribution to funding of LACs on a real per capita basis has reduced dramatically since 1997.³² In 1996–97, Commonwealth grants to LACs were approximately \$13.95 per capita and state/territory grants were approximately \$7.98 per capita. In the 2023–24 financial year, it is estimated that Commonwealth grants will be approximately \$11.03 (falling year on year over the next four years) while state/territory grants will be approximately \$24.27 per capita.³³
40. Prior to 1996–97, the Federal Government’s funding contributions to LACs accounted for 55 per cent of total funding, with the remaining 45 per cent covered by State grants and interest from public purpose funds. In 2016–17, Federal Government grants make up approximately 28 per cent of LAC funding.³⁴
41. At page 20 of the Issues Paper it is noted:

The requirement that Commonwealth funding be only used for Commonwealth law matters applies only to LACs. Similar restrictions are not present for CLCs or ATSILSs. The Review understands that the principle of ‘Commonwealth money for Commonwealth matters’ was introduced in the 1990s to address a concern at the time that the states and territories may be cost shifting onto the Commonwealth. The Review is interested in views whether this approach remains necessary and/or legally required and what the impacts are on service providers and service provision of this requirement.
42. The Law Council does not support the ‘Commonwealth money for Commonwealth matters’ approach to funding of LACs under the NLAP. The Law Council considers that the suggestion that there is any natural ‘Commonwealth-State divide’ in responsibility for legal assistance services is directly contradicted by the Commonwealth’s acceptance of funding responsibility in areas such as public health and education.
43. Similar to state/territory-run public health and education systems, which draw significantly on Commonwealth funding, the provision of legal assistance (including in respect of state/territory criminal laws) is fundamental to civil society in the Commonwealth of Australia. This is demonstrated by the fact that the Australian

³⁰ National Aboriginal and Torres Strait Islander Legal Services, *Emergency funding needed to prevent imminent service freezes: Aboriginal and Torres Strait Islander Legal Services* ([Media Release](#), 17 April 2023).

³¹ Community Legal Centres Australia, Submission to the Treasury, *2022-23 Pre-Budget Submission* (2022) 2.

³² PwC, *Update to Projected Real Funding of Legal Aid Commissions* (Advice from PwC to the Law Council of Australia, October 2023).

³³ *Ibid.*

³⁴ *Ibid.*

Government (and Parliament) often directs a national focus toward issues that generally fall under state/territory laws, such as domestic violence, drug offences and serious organised crime.

44. Moreover, the 'Commonwealth money for Commonwealth matters' approach to funding (even if it were ever efficacious) has now long since ceased to be relevant. The interaction between legal issues arising out of relationship breakdown, family violence, child protection and the criminal law is now such that any notion that one level of government has a greater role than another is misconceived.
45. The perpetrator of family violence may commit a Commonwealth and State crime with the one activity at the same time, cause a need for children to be protected, call upon the family law system to evaluate the utility of the perpetrator maintaining a relationship with those children, and give rise to a need to have the financial relationship with the survivor determined.
46. In the Law Council's view, the Commonwealth, as the primary revenue raiser in the federation, bears equal responsibility for this system. This equal responsibility should be reflected in the share of funding provided to LACs, in addition to others in the legal assistance sector, which would also more accurately reflect the 'partnership' to which the NLAP refers.
47. The Law Council considers that future legal assistance funding models should be based around certain parameters, including:
 - a transparent, evidence-based approach to legal assistance service funding, including through improving the existing evidence base (such as periodic legal needs surveys of the general population and targeted priority groups);
 - agreed priority groups who should receive legal assistance, based on the best existing evidence;
 - agreed priority areas of unmet legal need across the criminal, civil and family law spectrum, based on the best existing evidence;
 - commissioning independent actuarial work that assesses the funding required to meet the shortfall in unmet legal need; and
 - mutual government commitments to identifying and addressing unmet legal need with respect to the identified priority groups and areas of law.³⁵

Recommendation

- **To ensure that the established objectives agreed under the NLAP can be progressed, a significant and ongoing increase in the funding of the entire legal assistance sector is required. This funding should include:**
 - **increased federal funding for Legal Aid Commissions across criminal, civil and family law matters, restoring the Commonwealth share of funding to 50 per cent; and**
 - **additional, ongoing and evidence-based resourcing for CLCs and ATSILS—and, outside of the NLAP, FVPLSs.**

³⁵ Law Council of Australia, *The Justice Project: Final Report* ([Legal Services Chapter](#), August 2018) 11 (rec 2.2).

The role of the private legal profession

48. A particular focus of the Law Council's submission to this review is the impact that the current approach to funding and restrictions under the NLAP is having on the ability of LACs to engage members to undertake legal aid work.
49. The private legal profession is critical to the delivery of legal assistance services under the NLAP—particularly legal aid services. The Australian legal aid system operates under a 'mixed model' of service delivery. Under this model, rather than relying solely on in-house lawyers, LACs brief out matters to members of the private profession at reduced rates—often significantly below practitioners' usual private rates. This allows LACs to draw on both in-house expertise and the experience and acumen of the private profession. Nationally, LACs are heavily reliant on the private profession for delivery of services. According to NLA, in the 2022–23 financial year, approximately 75 per cent of legal aid approved matters were assigned to private practitioners.³⁶
50. The importance of publicly funded legal representation cannot be underestimated. At present, inadequate, inequitable and inconsistent Commonwealth funding of legal services is operating as a significant disincentive for experienced and appropriately qualified legal practitioners to accept legal aid work. This, in turn, is reducing the quality of legal services provided to the nation's most disadvantaged, vulnerable and marginalised people.

Remuneration for legal aid work

51. In 2014, the Productivity Commission found that the mixed model of legal assistance service provision was successful, but that its sustainability was in question.³⁷ It found that financial incentives would be required to attract private practitioners to perform essential legal assistance work, particularly in RRR areas.³⁸ The Law Council, in the Final Report of its Justice Project, identified similar concerns about the sustainability of the mixed model.³⁹
52. Almost a decade on from the Productivity Commission's report, financial incentives for private practitioners to undertake legal aid work have, in fact, reduced significantly. As a general observation, fees paid by LACs to private practitioners have fallen below what is fair and reasonable, and practitioners for the most part cannot sustain an effective and viable legal aid practice. As a result, the number of practitioners willing to do this work is reducing significantly. The Law Council understands that there has been a particular reduction in the number of practitioners willing to take on legal aid work in family law matters and that, in certain locations, these services have simply become unavailable as a result. This poses real risks to families' and children's wellbeing and safety.
53. NLA notes that private practitioners are particularly essential in delivering legal aid services in regional and remote areas of Australia—however, the fees provided to undertake these matters have been limited and not kept pace with increased costs or increases to CPI.⁴⁰

³⁶ National Legal Aid, *National Legal Aid Statistics (Report—Practitioner Type, 2022-23)*.

³⁷ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 703.

³⁸ *Ibid.*

³⁹ Law Council of Australia, *The Justice Project: Final Report (Legal Services Chapter, August 2018)* 12-13.

⁴⁰ National Legal Aid, Submission to the Treasury, *2023-24 Pre-Budget Submission* (13 December 2022) 6-7.

54. In its submission to the Commonwealth Treasury as part of the 2023–24 Pre-Budget process, NLA stated:

This is impacting on the legal aid supply model with all Legal Aid Commissions experiencing a significant decline in the number of private family law practitioners willing to undertake legal aid work due to the low level of fees. In Victoria, the number of firms undertaking legal aided family law work has reduced by more than 50% in nine years. This loss of private practitioners has accelerated in recent years, for example, in Queensland there has been a 32% reduction in available family law private practitioners since June 2021.⁴¹

Disparity with private rates

55. The fees charged by private lawyers for the delivery of services to non-legally aided clients is determined by the market, which values those services. Government itself, as a significant consumer of legal services for its own purposes, acknowledges this value and pays market-driven fees.
56. The gap between fees charged by the legal profession on a private basis and those allocated when a matter is publicly funded continues to widen. In recent times, this has been particularly evident with the onset of higher than usual inflation. It is noted that wage increases are often tied, or at least linked, to increases to the rate of inflation in recognition of the impact of that figure on a person's income in real terms. The fact that, despite inflation, fees paid to private practitioners conducting publicly funded legal work have, for an extended period, not increased, or have only minimally increased, operates as a disincentive to experienced practitioners who may be considering taking on such work.
57. Feedback provided to the Law Council from the private profession engaged in legal aid funded work has highlighted the extreme divergence in funding when compared to remuneration expected from a fee-paying client in a similar matter. While it is not expected that legal aid payments to the private profession should match privately agreed rates, these indicate just how significant the shortfall between the two is.
58. While it is not expected that legal aid payments to the private profession should match privately agreed rates, data provided to the Law Council suggests that, across a range of family law property and parenting disputes, payments received from legal aid commissions are consistently between 25 and 30 percent of what would otherwise have been costed had the same matter be taken on privately.
59. Feedback from the private profession also noted that the relatively low rates paid for legal aid matters are exacerbated when consideration is given to the private work that is forsaken in order to take on these matters.

Disparity with other government-funded legal services

60. Beyond the disparity between legal aid rates and private rates that private practitioners may receive, it is important to acknowledge that a disparity also exists in the rates paid to private practitioners when taking on a legal aid matter as opposed to the rates received when briefed by a Commonwealth agency—often on opposite sides of the same matter. In this regard, the New South Wales Bar Association has provided two tables setting out a comparison between various

⁴¹ Ibid.

forms of funding where counsel appear in Commonwealth publicly funded matters (see **Appendix B**).⁴²

61. The Law Council sees no justification for Government, on the one hand, paying market-driven fees to private lawyers who (for example) prosecute citizens on its behalf, but on the other hand, paying a mere fraction of the same fee to the lawyers it funds to act for those citizens.
62. Of particular concern is the disparity between the funding of Legal Aid matters as compared to Attorney-General's Department rates, especially when counsel briefed by each organisation are involved in the same proceedings. This has the perverse outcome that those funded pursuant to a grant of Legal Aid are often confronted by Commonwealth agencies that brief out at the much higher rates with greater allowances for preparation (and often uncapped). In the Law Council's view, it is difficult to justify parties to the same litigation funded, ostensibly, from the same source, being remunerated differently. Such disparity is antithetical to the principle of 'equality of arms' as part of the right to a fair trial and a fair hearing.
63. Moreover, increased funding of legal aid matters means better processes and communications in an adversarial legal system. This would likely lead to a corresponding decrease in cost and expenditure from government agencies, such as prosecutor services, because there is higher-quality representation which serves to narrow the issues in dispute and resolve matters more efficiently.

Reference to courts' scales of costs

64. Clearly, rates paid to the private legal profession are constrained by the quantum of funding provided to LACs under the NLAP. The Law Council expects that, through an increase in core funding, these rates should substantially increase to a level that better reflects the value of legal services, and will go some way to attracting and retaining practitioners willing to undertake legal aid work.
65. The Law Council is supportive of greater transparency and certainty with respect to rates paid to private legal practitioners undertaking publicly funded matters. In doing so, it considers there is merit in referencing legal aid rates to scales of costs arrangements that exist within Commonwealth, State and Territory courts. While these scales of costs will typically fall short of what is the market rate for legal services, they provide benchmarks that are subjected to regular review, and adjusted according to external factors.
66. For example, the Commonwealth's Joint Costs Advisory Committee undertakes an annual review of legal practitioners' costs in each of the federal courts, and forms recommendations for adjustments to the scale of costs based on a formula that has regard to Australian Bureau of Statistics wage data and the consumer price index. The Law Council contributes to this process each year.⁴³
67. The Law Council is of the view that legal aid rates made available to the private legal profession should have greater regard to these scales of costs and, wherever possible, align with those benchmarks. To this end, the Law Council suggests regard should be had to the scale of costs set out by the Federal Circuit and Family Court

⁴² While these tables only refer to counsel in New South Wales, they provide an instructive example of the disparity affecting both barristers and solicitors throughout Australia.

⁴³ See, eg, Law Council of Australia, Submission to the Joint Costs Advisory Committee, [2022 Inquiry into Legal Practitioners' Scales of Costs](#) (22 August 2022).

of Australia.⁴⁴ As noted above, this will no doubt require a significant boost to the core funding of the legal assistance sector under the NLAP.

Recommendation

- **Legal aid rates made available to the private legal profession should have far greater regard to existing scales of costs and, wherever possible, align with these benchmarks. Legal aid rates should be designed with the objective of ensuring sustainable participation by the profession in the delivery of access to justice to Australians in need.**

Administrative costs

68. As set out above, the Law Council's membership has emphasised the inadequacy of funding for private legal professions undertaking legal aid when compared with the market value of their professional services. However, several contributors have also pointed to the administrative costs involved in taking on and delivering legal aid services which are largely ignored by the existing funding arrangements, and have been identified as a disincentive for taking on additional matters.
69. While it is acknowledged that there is a need for appropriate oversight, quality control and accounting for grants of assistance, new reporting and administrative requirements must have regard to the administrative toll such measures will have on the profession, especially where additional obligations are not matched with additional funding support.
70. A similar observation relates to procedural and process changes within courts and tribunals, noting that such shifts may place a disproportionate burden on practitioners undertaking legal aid services.
71. Noting the above remarks with respect to the need for a Justice Impact Test—or a narrower Legal Assistance Impact Test—to accompany new government initiatives, the Law Council is of the view that similar considerations should be undertaken when there are significant changes to the way in which the private legal profession is asked to engage with legal aid commissions. This will ensure that administrative obligations do not unduly add to inefficiencies or increased compliance costs.

Recommendation

- **Impact assessments should be undertaken when there are significant changes to the way in which the private legal profession is expected to engage with Legal Aid Commissions when undertaking legal aid work.**

Labour market

72. The Law Council notes that there are significant workforce supply and remuneration challenges which impact on the provision of legal assistance services in all regions, including metropolitan (in particular outer metropolitan) areas. This is evident in the disparity of remuneration and employment conditions for various segments of the legal assistance sector.

⁴⁴ See, <<https://www.fcftca.gov.au/fl/pubs/legal-costs>>.

73. As a direct result of the level of remuneration to private law firms for legally aided casework (combined with the increased overheads of undertaking such work, including the cost of administering grants themselves) sufficiently attractive remuneration cannot be offered to prospective lawyers by private law firms.
74. As noted in the Issues Paper, it is evident that the wage rates in the sector are still far too low, and this makes recruiting and retaining skilled staff challenging. This has a direct impact on the provision of legal assistance services.
75. The Law Council is also concerned that staffing levels are not sufficient to facilitate working environments that appropriately support the safety and wellbeing of practitioners who engage with traumatic material on a regular (if not daily) basis, or to ensure that practitioners are able and equipped to provide a satisfactory level of service delivery.
76. In addition to increased funding to support remuneration that more closely aligns with the broader market, longer funding cycles and more advanced notice of additional funding will support better recruitment and human resources practices and will assist particularly with planning and staff retention. The Law Council strongly supports calls from the legal assistance sector towards extended funding cycles to enhance financial certainty and security for services within the legal assistance sector, and their vital staff.

Service delivery in regional, rural and remote locations

77. A particular challenge of legal assistance service delivery in regional, rural and remote locations stems from the difficulty in attracting and retaining lawyers in these areas. Currently, lawyers working for different arms of the legal assistance providers experience disparity in remuneration, employment conditions and workload. Whilst this is also a problem in metropolitan areas, the severity of the impact is heightened in RRR locations.
78. Feedback provided by the Law Council's Young Lawyers Committee (**YLC**) particularly highlights the unique challenges in attracting and retaining staff in RRR areas. The YLC advises that there is a perception among law graduates and early career lawyers that working in an RRR area will result in a lower salary, fewer networking and mentorship opportunities, and reduced opportunities for advancement. The perception also extends to the idea that training 'on the ground' will be advantageous, but there is no training to support a junior lawyer to relocate to an RRR area. These perceptions disincentivise many early career lawyers from pursuing roles in RRR areas, even if they are passionate about promoting access to justice.
79. Early career lawyers also hold concerns that their experience working in the legal assistance sector in an RRR area may not be valued, or regarded as highly, by city employers, which could limit their future career prospects. This is despite many early career lawyers, more often than not, having more altruistic reasons for career selection.
80. This also results in a self-perpetuating cycle, where legal assistance providers in RRR areas cannot attract or retain suitable staff and develop a negative reputation due to their under-resourcing, further dissuading other lawyers from working there.
81. Given the above concerns, consideration as to better incentivising practitioners (particularly early-career practitioners) to work in the legal assistance sector in RRR

locations, is required. In this regard, the Law Council is investigating the potential viability of a HELP Debt Relief Scheme. While this may fall outside of the terms of reference for the Review, the Law Council provides the below information for consideration by the Reviewer, and would be pleased to provide further information as the Review progresses, if required.

82. The Law Council's RRR Committee points out that one added value to being able to offer appropriate remuneration to prospective employee lawyers will be the significant expansion of the availability of legal services to towns and locations that presently are not served at all. This will be achieved by firms using their existing infrastructure to support branch offices (the occupancy costs of which are invariably low) staffed by the increased number of recruits. Indeed, the Government could be confident that the number of casework files and the number of newly recruited lawyers to undertake them will be directly proportionate to the increased investment.
83. This can be referenced to the unmet legal need in these communities which is reflected in the research to which this submission has referred.

HELP Debt Relief Scheme

84. A key priority area identified in the Law Council's *RRR Lawyers and Communities National Strategic Plan* was the development of policy options to promote the recruitment, retention and succession of legal practitioners in RRR areas.⁴⁵ The Law Council's Policy Division, with the assistance of its Rural, Regional and Remote Committee, has subsequently examined a variety of policy models which could assist in incentivising legal practitioners to relocate to, and stay in, RRR areas with the most legal need, and increase access to justice for individuals living in these communities.
85. The Law Council recognises the significant role that financial incentives can play in facilitating the recruitment and retention of professionals in RRR areas, particularly for the legal assistance sector. This is consistent with recent findings from the Regional Australia Institute that two in five urban workers would be convinced to move to an RRR area if a financial incentive was involved.⁴⁶
86. Given this, the Law Council and its RRR Committee are currently considering the development of a Commonwealth Higher Education Loan Program (HELP) debt reduction and indexation relief scheme for legal practitioners who work in an eligible RRR area for a specific period.
87. This proposed scheme remains subject to approval by the Law Council's Directors, and therefore does not yet constitute a settled Law Council policy. Nonetheless, this scheme would likely be broadly equivalent to the *HELP for Rural Doctors and Nurse Practitioners* scheme,⁴⁷ established under the *Higher Education Support Act 2003* (Cth) and administered by the Commonwealth Department of Education.
88. Under the existing *HELP for Rural Doctors and Nurse Practitioners Scheme*, individuals must meet the eligibility criteria and complete the required amount of work in an eligible rural, remote or very remote location to partially or fully reduce

⁴⁵ Law Council of Australia, [Rural, Regional and Remote Lawyers and Communities National Strategic Plan](#) (13 November 2020) 15-17.

⁴⁶ Regional Australia Institute, [Nearly half of all urban workers would move to regional Australia for a better salary](#) (Media Release, 4 July 2023).

⁴⁷ Department of Health and Aged Care, [HELP for Rural Doctors and Nurse Practitioners](#) (Web Page, September 2023).

their outstanding HELP debt.⁴⁸ The required amount of time for an individual to eliminate their debt will vary, depending on how remote the location is, and how many years of study were undertaken. This existing scheme also allows for the waiver of indexation—which is based on the Consumer Price Index over a two-year period—on an eligible participant’s outstanding HELP debt for the period they live and complete eligible work in an RRR area.⁴⁹

89. Beyond incentivising legal practitioners to relocate to an eligible RRR area, a key benefit of such proposal is that it is unlikely to require significant new Commonwealth expenditure. Rather, this scheme would be primarily funded by the forgiveness of monies already expended by the Commonwealth in the form of such debts. In some cases, these debts will not be fully recouped regardless, due to, for example, individuals leaving the workforce before their debt is entirely repaid, or the cancellation of a person’s debt upon their death. Notably, the former Department of Education, Skills and Employment forecast in its Annual Report 2021–22 that 11.82 per cent of existing HELP debt is not expected to be repaid.⁵⁰
90. The Law Council acknowledges that such debt relief scheme may be of particular interest to early career lawyers, who are typically more mobile and will have the largest HELP debts. However, as HELP debts are currently taking law graduates approximately a decade to pay off,⁵¹ more experienced practitioners—such as those with six to 10 years of post-admission experience—are likely to also have an interest in taking advantage of a HELP debt relief scheme to eliminate their remaining debt. This may be of particular interest if practitioners have been out of the workforce for a period, such as due to parental leave. Therefore, such a scheme will, importantly, facilitate the supervision and mentorship of junior practitioners in RRR areas, and will also assist with succession arrangements for legal practices in these locations.

Recommendation

- **Consideration should be given to the establishment of a HELP debt relief scheme for legal practitioners who reside and work in eligible RRR areas, to incentivise the recruitment and retention of qualified lawyers in underserved areas.**

Funding Aboriginal and Torres Strait Islander Legal Services

91. In the context of appropriately funding ATSILS, the Law Council considers that the approach to NLAP funding arrangements should be consistent with what is required under the **National Agreement** to Close the Gap.
92. Key principles in respect of moving beyond a ‘consultation’ approach and towards shared decision-making and genuine partnership are set out in the National Agreement, and are directly relevant to how governments approach legal assistance funding for ATSILSs. In particular, the transformation required by the priority reform areas are relevant to the national approach to funding the legal assistance partnership.
93. By way of general example, members of the legal profession have expressed concern that the recent approach taken to justice reinvestment funding at the

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Department of Education, [Skills and Employment, Annual Report 2021-22](#) (October 2022) 57.

⁵¹ Department of Education, [2019-19 HELP report data extract](#) (Web Page, August 2021).

Commonwealth level will proceed on a time-limited grant basis. The Law Council commends the Australian Government on the approach taken in respect of community readiness support and the establishment of the National Justice Reinvestment Unit, as recommended by the Australian Law Reform Commission in its Pathways to Justice Report.

94. However, grant processes are onerous and resource-intensive, and the time-limited nature of grant funding is a significant barrier to long-term planning and sustainable programming. The grant-based funding approach may ultimately undermine the success of, in this case, the other features of the justice reinvestment model, which is based on supporting local strengths (and which may not extend to familiarity with the grants application process).
95. The Law Council suggests that the transformation required by the National Agreement requires ambition and imagination from governments, and a willingness to re-examine all aspects of its approach to the matters that affect Indigenous peoples. This extends to the models applied to the design and delivery of legal assistance services.
96. On matters affecting Aboriginal and Torres Strait Islander people, the Law Council endeavours to support and amplify the views of First Nations people.
97. A critical issue in the effective provision of legal services to Aboriginal and Torres Strait Islander people continues to be the issue of salary parity within the legal assistance sector, particularly when compared to salaries in Legal Aid Commissions. Without this foundational lever in place, ATSILS are unable to properly recruit and retain staff, including in relation to backfilling roles. For example, in May 2023, the Aboriginal Legal Service (NSW/ACT) (**ALS**) was forced to freeze services to 13 Local Courts, the effect of which is that the ALS was unable to act for Aboriginal and Torres Strait Islander people facing new criminal charges in those Local Courts from 15 May 2023. This policy setting is resulting in poor outcomes across the legal assistance sector, adding extra burden to other legal assistance providers and, from the perspective of managing conflicts, undermining the existence of a viable market for legal assistance.
98. The Law Council understands that, for the ALS, the persistent and inadequate levels of funding at state and Commonwealth level denies the ability of the ALS to thrive, and to embed the culturally safe and appropriate model of care it considers necessary to establish, to truly be in a position to address the social and civil determinants of incarceration. Ideally, ALS offices across NSW should be staffed with Aboriginal field workers, and staff members who can assist with disability, care, family and other civil matters (including fines, housing and education-related legal issues). In many cases, dealing with one legal problem will be little more than a temporary solution to what are likely complex and inter-related circumstances of disadvantage.
99. In addition to adequate legal staffing, the ALS should be resourced such that its legal services are provided as part of a network of therapeutic services, including mental health, drug and alcohol rehabilitation, and the supports needed as part of, for example, prisoner throughcare, including employment support services. We note that, while it is pleasing that in NSW a number of Indigenous-specific court and tribunal lists have been established to improve the access and quality of justice for Indigenous people, neither the ALS nor other Aboriginal community-controlled services have received commensurate resourcing to provide additional services to support these initiatives. The Law Council is concerned that this lack of adequate

resourcing may, in effect, set these initiatives up to fail and reduce political appetite in the future to engage again with similar approaches.

100. Further, ATSILS should be adequately funded to support an advocacy function—as should all providers in the legal assistance sector. The Law Council considers that efficiencies are gained by ensuring a mechanism for systemic and policy issues that arise in practice to be identified, articulated and effectively communicated back to governments. This would ultimately exert downward pressure on funding requirements in the future.

Recommendation

- **ATSILS must be adequately resourced as a matter of priority, so as to support sufficient legal and therapeutic staffing levels, its advocacy functions, and the provision of culturally safe models of care to vulnerable members of the community.**

Inclusion in the NLAP

101. We understand that, while some benefits have accrued to ATSILS under the NLAP funding model (including greater visibility over funding for the entire legal assistance sector and improved engagement with governments), the gaps identified in the Review of the Indigenous Legal Assistance Program have not, as a whole, been addressed by the NLAP model. This includes gaps that affect the ability of ATSILS to deliver more holistic (legal and therapeutic) services, as well as legal services that address the range of legal need.
102. In the Law Council’s view, consideration is required for a funding model that clearly sets out the obligations of the Commonwealth and states, and which sufficiently and sustainably allows ATSILS, together with other Aboriginal community-controlled organisations, to provide legal and therapeutic services that address the social, civil and legal determinants of persistently poor outcomes in the care and criminal justice jurisdictions.
103. Subject to extensive consultation and co-design with NATSILS and individual ATSILS, consideration could be given to redeveloping the former Indigenous Legal Assistance Program (ILAP) which provided direct grants from the Commonwealth to the ATSILS to deliver frontline legal assistance and related services to Aboriginal and Torres Strait Islander clients. It is critical that such consideration be driven by Aboriginal and Torres Strait Islander Legal Services (consistent with the goal of self-determination as defined under the NLAP and the Closing the Gap Framework) and bearing in mind the importance of specialised, culturally-appropriate legal assistance services for First Nations people.

Recommendation

- **Extensive consultation and co-design should occur with NATSILS and individual ATSILS in relation to whether the former Indigenous Legal Assistance Program (or a similar standalone funding stream) should be developed.**

Additional comments

Wraparound services

104. It is important to recognise that Australians who experience intersectional disadvantage often require additional casework assistance or wraparound services. Each part of the legal assistance sector must be funded to increase the ratio of this assistance able to be provided to those receiving discrete services based on how intersectional disadvantage impacts their legal capacity to address their legal need.
105. Specifically, CLCs and ATSILS need to receive increased funding for casework services in the areas where they are the known providers of specialist, multi-disciplinary, services and where they are the providers of complementary services to Legal Aid Commissions and private practitioners. The demarcation between generalist and specialist CLCs can make meeting this need challenging: there is an assumption that specialist centres will service all the legal needs of a particular priority client group, yet the terms of the funding agreement can be so specific as to preclude that possibility.
106. There is a need for more investment in legal resources co-developed (with communities, key stakeholders and persons with lived experience) to assist specific cohorts who don't have access to the resources they need. For example, there is a need for culturally appropriate legal resources, resources translated into language, and resources for people who live with disability.
107. In relation to the issue of limiting Commonwealth funding for Commonwealth matters, it must be noted that the legal needs of many clients relate to both State and Commonwealth areas of law and often includes areas of law where there is a choice of jurisdiction. Similarly, some CLCs engage in holistic and multi-disciplinary service delivery which is often done in partnership. These partnerships are expensive and are usually not funded: their costs are absorbed by the CLC. Lack of funding for partnerships is problematic as access to justice issues are more appropriately addressed through case work and partnerships.

Advocacy

108. The legal assistance sector has unique knowledge and valuable experience about the impact of the law on vulnerable client groups. It is vital that this knowledge and experience is used to inform the legislative branch of government when making laws, and the executive arm of government when formulating policy and administering those laws. CLCs are well recognised for their important role in law and policy reform work.
109. However, there is a lack of funding to support this work, and most CLC lawyers undertake this work in addition to full caseloads. In the disability space, this is particularly concerning as there are indications that the Federal Government is moving away from funding systemic advocacy for people with disability, towards an

exclusive focus on individual advocacy. Systemic advocacy can lead to better laws and policies that reduce the need for individual legal services.

110. The law Council is highly supportive of the NLAP and future funding models recognising the important role that the legal assistance sector, especially through its various peak bodies, plays in advocacy and law reform.

Appendix A— Projected Real Funding of Legal Aid Commissions

Table A1: Level of Nominal Commonwealth Funding Required for 50% Share of Total Funding (\$million)⁵²

Financial Year	Commonwealth Input Grants	State Input Grants	Level of additional funding required
2017–18	231.4	473.3	242
2018–19	241.4	494.6	253.2
2019–20	267.4	509.2	241.8
2020–21	294.3	586.3	292
2021–22	267.7	610.5	342.8
2022–23	328.3	654.6	326.3
2023–24	307.9	677.5	369.6
2024–25	311.9	697.9	386
2025–26	319.6	715.3	395.7
2026–27	327.6	733.2	405.6
2027–28	335.8	751.5	415.7

Table A2: Real Per Capita Funding of Legal Aid Commissions by Source (\$2023)⁵³

Year	Commonwealth Grants	State Grants	Special Trust and Statutory Interest	Self-generated
1996–97	\$13.95	\$7.98	\$2.49	\$4.28
1997–98	\$11.57	\$8.66	\$2.65	\$3.13
1998–99	\$11.40	\$9.00	\$2.81	\$2.26
1999–00	\$10.38	\$10.39	\$2.90	\$3.18
2000–01	\$10.29	\$10.33	\$3.16	\$2.15
2001–02	\$10.53	\$11.68	\$2.99	\$1.91
2002–03	\$10.59	\$11.77	\$3.50	\$1.85
2003–04	\$10.72	\$12.90	\$4.54	\$2.16
2004–05	\$11.62	\$13.08	\$4.40	\$2.24
2005–06	\$11.33	\$13.44	\$4.83	\$2.25
2006–07	\$11.05	\$13.87	\$6.22	\$2.68
2007–08	\$12.35	\$13.65	\$7.13	\$2.39
2008–09	\$11.32	\$14.38	\$7.41	\$2.00
2009–10	\$11.73	\$14.44	\$6.66	\$1.93
2010–11	\$12.08	\$15.48	\$6.05	\$1.90

⁵² PwC, *Update to Projected Real Funding of Legal Aid Commissions* (Advice from PwC to the Law Council of Australia, October 2023).

⁵³ *Ibid.*

Year	Commonwealth Grants	State Grants	Special Trust and Statutory Interest	Self-generated
2011–12	\$12.08	\$16.36	\$5.38	\$2.21
2012–13	\$11.89	\$16.87	\$5.09	\$1.83
2013–14	\$11.94	\$15.93	\$4.62	\$1.74
2014–15	\$11.10	\$16.26	\$4.24	\$1.53
2015–16	\$10.95	\$17.61	\$4.18	\$1.42
2016–17	\$11.06	\$19.81	\$3.30	\$1.66
2017–18	\$10.97	\$22.44	\$3.11	\$1.34
2018–19	\$11.10	\$22.74	\$3.36	\$1.36
2019–20	\$12.19	\$23.20	\$3.37	\$1.35
2020–21	\$12.90	\$25.69	\$1.29	\$1.40
2021–22	\$10.93	\$24.94	\$1.62	\$0.83
2022–23	\$12.38	\$24.68	\$2.56	\$1.68
2023–24	\$11.03	\$24.27	\$2.52	\$1.66
2024–25	\$10.69	\$23.91	\$2.48	\$1.63
2025–26	\$10.53	\$23.57	\$2.44	\$1.61
2026–27	\$10.38	\$23.24	\$2.41	\$1.58
2027–28	\$10.24	\$22.92	\$2.38	\$1.56

Notes:

Source: National Legal Aid, Australian Bureau of Statistics, Reserve Bank of Australia, Commonwealth Treasury, National Partnership Agreement on Legal Assistance Services

1. Data up to 2022–23 (actual and budgeted) are sourced from National Legal Aid income and expense budgeted forecasts.
2. 2019–20 to 2024–25 estimates of Commonwealth funding are sourced from the National Partnership Agreement on Legal Assistance Services and Commonwealth Budget papers. Beyond the life of the National Partnership (i.e. 2024–25 Commonwealth funding is assumed to grow in line with inflation forecasts.
3. ‘Special Trust and Statutory Interest’ and ‘Self-generated’ income sources are considered state sources of funding.

Appendix B— Comparison of counsel rates in publicly funded Commonwealth matters

The following tables have been compiled by the New South Wales Bar Association.

Table B1: Criminal law matters—Daily fees for preparation and appearance at trial/hearing (District and/or Supreme Court) excl. GST unless shown

Experience Level	Legal Aid—Cth Matters	Legal Aid—State Matters	Prosecution CDPP	Prosecution NSW DPP
Junior counsel—District Court 0–3 years	\$987	\$1284	\$800–1100 (GST incl.) by negotiation	\$1250 (GST incl.)
Junior counsel—District Court 3 years +	\$987	\$1284	\$1100–2200 (GST incl.) by negotiation	\$1250 (GST incl.)
Junior counsel—Supreme Court 0–3 years	\$1140	\$1482	\$800–1100 (GST incl.) by negotiation	\$1250 (GST incl.)
Junior counsel—Supreme Court 3 years +	\$1140	\$1482	\$1100–2200 (GST incl.) by negotiation	\$1250 (GST incl.)
Junior counsel—Complex criminal case ⁵⁴	\$1150	\$1496	NA	NA
Senior Counsel—District Court	\$1440	\$1872	\$2200–4400 (GST incl.) by negotiation	\$1440 (GST incl.)
Senior Counsel—Supreme Court	\$1860	\$2148	\$2200–4400 (GST incl.) by negotiation	\$1860 (GST incl.)

⁵⁴ Legal Aid NSW's policy includes a definition of matters that will be considered 'complex panel matters' and which are generally only able to be briefed to members of the Legal Aid Complex Criminal Law Panel. It includes Supreme Court trials and lengthy criminal trials.

Table B2: Examples of rates in other law types—Daily fees for preparation and appearance at trial/hearing (GST excl. unless shown)

Matter type	Legal Aid—Civil and Administrative Law	Legal Aid—Family Law	Attorney General Department Rates
AAT hearing	Preparation \$150 p/hr Appearance \$1125		
Judicial Review—AAT matter	Preparation \$150 p/hr—max 5 hrs Appearance \$225 p/hr—max 5hrs p/day		
Family Court matter		Preparation \$150 p/hr—max 3 hrs Appearance: 1st day \$1200; subsequent days \$965	
Independent children’s lawyer		Preparation \$150 p/hr—max 2 hrs Appearance: 1st day \$1200; subsequent days \$965	
Family Law—Full Court appeal		All inclusive fee \$2160	
Civil matter	Preparation \$150 p/hr capped allowance Appearance \$225 p/hr—max 5hrs p/day		Preparation \$283.33 p/hr (GST incl.) no cap Appearance \$1700 p/day (GST incl.) may be negotiated higher
Migration review	Preparation \$150 p/hr capped allowance of 5 hrs but can be negotiated higher Appearance \$225 p/hr—max 5hrs p/day		Preparation \$255 p/hr (GST incl.) 4 hrs but can be negotiated higher Appearance \$1530 p/day (GST incl.)