



Law Council
OF AUSTRALIA

Office of the President

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Submitted online at: <https://www.larsubmissions.com.au/ILAP>

Dear Mr Ridgeway

Review of the Indigenous Legal Assistance Program

Thank you for the opportunity to contribute to the Review of the Indigenous Legal Assistance Program (**ILAP**). Please find attached the Law Council of Australia's submission to the review.

Please contact Mr Nathan MacDonald, Senior Policy Lawyer on (02) 6246 3721 or at nathan.macdonald@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely

Morry Bailes
President



Law Council
OF AUSTRALIA

Review of the Indigenous Legal Assistance Program (ILAP)

Cox Inall Ridgeway / Attorney-General's Department

4 October 2018

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote 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 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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 the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its Indigenous Legal Issues Committee, the Queensland Law Society and the Law Institute of Victoria in the preparation of this submission.

Context of the review

1. The Law Council is grateful for the opportunity to contribute to the review of the Indigenous Legal Assistance Program (**ILAP**). The following comments are provided in response to the matters raised in the *Review of the Indigenous Legal Assistance Program Discussion Paper (Discussion Paper)* produced by Cox Inall Ridgeway (**the Reviewer**).
2. The Law Council's submission is informed by its collaboration with the National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**), as well as the Law Council's ongoing membership of the Change the Record Coalition and Australian Legal Assistance Forum. The Law Council supports the submissions of these bodies to this review, and in particular highlights the important role of NATSILS in supporting Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and ensuring that the objectives and outcomes of the ILAP are achieved.
3. This submission is also informed by the findings of the Justice Project, a recent comprehensive national review into the state of access to justice in Australia conducted by the Law Council.¹ Focussing on 13 priority groups identified as facing significant social and economic disadvantage, including Aboriginal and Torres Strait Islander people, the Final Report identifies the access to justice issues for these groups by uncovering systemic flaws and identifying service gaps. It also highlights what is working well and provides constructive, informed recommendations for future action, building the case for new, whole-of-government justice strategies secured by appropriate funding. The Law Council directs the Reviewer to the Aboriginal and Torres Strait Islander People Chapter of the Justice Project, together with the Legal Services Chapter and the Critical Support Services Chapter.²
4. Each of the four publicly funded legal assistance services: ATSILS, Community Legal Centres (**CLCs**), Family Violence Prevention Legal Services (**FVPLS**) and Legal Aid Commissions (**LACs**) play an important, unique and complementary role in providing legal help to people across Australia.
5. ATSILS are Aboriginal and Torres Strait Islander community-based and controlled organisations that have operated across Australia since the 1970s to deliver culturally appropriate, accessible legal assistance services to Aboriginal and Torres Strait Islander people. ATSILS provide assistance such as legal information, advice and representation, referral, non-legal support and task assistance, community legal education, and early intervention and prevention activities (among many other services).
6. Since 2015, ATSILS have primarily been funded through the ILAP. The ILAP also provides funding to NATSILS to support the ongoing development and continuous improvement of the ILAP and delivery of services by ATSILS, particularly through coordination and constructive policy input.
7. The review of the ILAP provides a useful opportunity to consider the operation of the funding arrangements for ATSILS and NATSILS, but also more broadly the interaction between the ILAP and the decision-making, funding, administrative and policy settings for the legal assistance sector.

¹ Law Council of Australia, *The Justice Project: Final Report* (August 2018) <www.justiceproject.com.au>.

² Ibid.

Importance of independent funding for ATSILS

8. The Law Council emphasises that the most appropriate providers of legal services for Aboriginal and Torres Strait Islander peoples are community-controlled organisations, specifically the dedicated ATSILS (and FVPLS) which provide unique and culturally safe services.
9. The importance of ATSILS (and FVPLS) as specialised, independent, culturally safe and community-controlled organisations was highlighted throughout the Justice Project Final Report.³
10. The Justice Project found that many Aboriginal and Torres Strait Islander people may not seek legal help where services are not appropriate to the local community, or where services do not take into account matters that are important and specific to Aboriginal and Torres Strait Islander peoples.⁴ On this basis, it was found that Aboriginal and Torres Strait Islander Community Controlled Organisations (**ACCOs**) such as ATSILS (as well as FVPLS and some CLCs) are often the preferred, and most suitable, providers of legal services to Aboriginal and Torres Strait Islander people and communities.⁵
11. Similar observations are made in the *Blueprint for Change*, developed by the Change the Record Coalition,⁶ which recognises the importance of community-controlled services more broadly:

Directly affected people are best placed to identify local issues in their community and implement local solutions. Aboriginal and Torres Strait Islander community controlled organisations have the unique capacity to provide culturally appropriate services, and are able to develop localised, tailored solutions that have the support of the community.⁷

12. NATSILS recently explained the importance of the role of ATSILS in its submission to the Australian Law Reform Commission's (**ALRC**) *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*:

ATSILS were set up in line with the principle of self-determination, with an understanding of the unique impact a lack of access to culturally responsive legal assistance services has upon Aboriginal and Torres Strait Islander people and communities.

ATSILS are the preferred and in many instances the only legal aid option for Aboriginal and Torres Strait Islander peoples. ATSILS provide a unique legal service that recognises and responds to cultural factors that may influence and/or affect Aboriginal and Torres Strait Islander people.

It is important to note that Aboriginal and Torres Strait Islander people don't just need access to more legal services; they need greater access to culturally appropriate legal services. ... Cultural competency is essential for effective

³ Ibid.

⁴ Ibid, Aboriginal and Torres Strait Islander People Chapter, 29.

⁵ Ibid, Legal Services Chapter, 27.

⁶ Change the Record is a coalition of leading Aboriginal and Torres Strait Islander, human rights, legal and community organisations calling for urgent and coordinated national action to close the gap in imprisonment rates of Aboriginal and Torres Strait Islander people and cut disproportionate rates of violence experienced by Aboriginal and Torres Strait Islander people, particularly women and children. The Law Council is a member of Change the Record's Steering Committee.

⁷ Change the Record, *Blueprint for Change* (2015) 5.

*engagement, communication, delivery of services and the attainment of successful outcomes.*⁸

13. Throughout the *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report, the ALRC acknowledged the critical importance of providing services at all stages of the justice system which are culturally responsive.⁹
14. ATSILS also play an important role in covering some of the particular criminal needs of Aboriginal and Torres Strait Islander people which may not be covered by LACs. The uniquely disadvantaged status of many Aboriginal and Torres Strait Islander people requires culturally safe services to be available for legal assistance in relation to comparatively minor offences, such as street offences, even though these matters would not satisfy eligibility criteria under legal aid.¹⁰ This is particularly important as Aboriginal and Torres Strait Islander people are disproportionately imprisoned for minor crimes, contributing to this group's overrepresentation in the prison system.¹¹
15. International treaty bodies including the Committee on the Elimination of Racial Discrimination (**CERD**), the Committee on the Rights of the Child, and the Universal Periodic Review have also recognised the importance of adequate funding for independent, specialised and community-controlled Aboriginal and Torres Strait Islander services.¹² In its 2010 Concluding Observations on Australia's performance of its obligations under the CERD, the Committee called for 'an increase in funding for Aboriginal legal aid in real terms, as a reflection of its recognition of the essential role that professional and culturally appropriate Indigenous legal and interpretive services play within the criminal justice system'.¹³ Similarly, the United Nations Special Rapporteur on the Rights of Indigenous Peoples (**the Special Rapporteur**) noted that 'high quality and culturally competent legal services are critical to ensure access to justice for Aboriginal and Torres Strait Islanders and to reduce imprisonment'.¹⁴
16. On the basis of the above, the Law Council supports the position of NATSILS that ATSILS should not be administered or funded under the National Partnership Agreement and rather retain separate and independent funding under the ILAP.

⁸ National Aboriginal and Torres Strait Islander Legal Service, Submission No 109 to the Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, September 2017, 60. See also, Law Council of Australia, *The Justice Project: Final Report* (August 2018), Aboriginal and Torres Strait Islander People Chapter, 36-7.

⁹ See generally, Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018).

¹⁰ Law Council of Australia, *The Justice Project: Final Report* (August 2018), Aboriginal and Torres Strait Islander People Chapter, 36-7, citing National Aboriginal and Torres Strait Islander Legal Service, Submission No 109 to the Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, September 2017, 9.

¹¹ Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018) 268, citing Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2016* (2016) table 25.

¹² Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination – Australia, 77th Sess*, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010) 6 ('*Concluding Observations*'); Australian Child Rights Taskforce, *CRC25 Australian Progress Report* (2016) 73; Australian Human Rights Commission, *Summary of UPR Recommendations and Responses*, Recommendations 90, 93 <<https://www.humanrights.gov.au/summary-upr-recommendations-and-responses>>.

¹³ *Concluding Observations*, UN Doc CERD/C/AUS/CO/15-17, 6.

¹⁴ Victoria Tauli-Corpuz, Special Rapporteur, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, 36th sess, Agenda item 3, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 11.

Funding for ATSILS and NATSILS

17. The Law Council welcomes consideration of the effectiveness, efficiency and appropriateness of current funding arrangements in meeting the objectives and outcomes of the ILAP, and makes submissions on the following aspects of funding for legal assistance services under the ILAP: the levels of funding; certainty of funding; and the need for evidence-based funding.

Levels of funding

18. The Law Council notes that the current level of funding under the existing ILAP does not address the growing funding crisis in the legal assistance sector, resulting in significant unmet legal need. The Justice Project confirmed that the current level of funding under ILAP is clearly inadequate and is resulting in urgent and ongoing unmet need for legal assistance services for Aboriginal and Torres Strait Islander people across the criminal, family and civil law spectrum.

19. The Justice Project reported that due to funding limitations:

The majority of ATSILS' funding is directed toward casework and duty lawyer services in criminal law matters, with criminal matters making up 83 per cent of their work in 2012–2013. ... As such, this leaves 'serious gaps' in service provision in family and civil law. In Western Australia for example, four family lawyers cover all family court and child protection work in the state. ATSILS are also not resourced to meet the need of legal services in relation to child protection, which can lead to Aboriginal and Torres Strait Islander families receiving little or no legal advice or representation despite the serious consequences associated with these matters. Limited access to representation in child protection matters can and does result in the unnecessary removal of children.¹⁵

20. Even with the focus on criminal matters (noting that this is only part of the work of ATSILS), due to limited funding, ATSILS struggle to meet demand for criminal services and are forced to focus on priority clients, particularly those facing imprisonment.¹⁶
21. The Justice Project found that, in addition to needing greater resources to deliver criminal, family and civil law services, ATSILS require a greater investment to ensure that their solicitors, client services officers, and field officers can conduct outreach services such as regular visits to prisons and juvenile detention centres.¹⁷
22. The Justice Project also highlighted the impact that the funding shortfall can have on the wellbeing and capacity of lawyers, and the flow on effects that this can have for clients:

As a result of resource constraints, ATSILS are forced to offer substantially lower salaries, compared to other legal assistance providers – to lawyers who generally experience challenging working conditions and high caseloads. In consultation, remote Aboriginal legal service providers explained that junior solicitors could be dealing with extremely high caseloads which precluded their ability to ensure appropriate client outcomes. ... [The Kalgoorlie office of the Aboriginal Legal Service of Western Australia] stated that they were dealing with 'critical understaffing', while Bourke Aboriginal Legal Service explained that on some court days they are only able to have five to ten minutes with each client. Solicitors

¹⁵ Law Council of Australia, *The Justice Project: Final Report* (August 2018), Aboriginal and Torres Strait Islander People Chapter, 37.

¹⁶ *Ibid.*

¹⁷ *Ibid* 38.

explained that in these RRR areas, a lawyer with one years' experience may be dealing with up to 20 indictable matters at a time.

Aboriginal legal services face challenges regarding their ability to attract and retain staff. Constant staff turnover was also said to be a critical problem by stakeholders. Aboriginal legal services must also deal with unpredictable funding streams that may lead to redundancies or offices closing entirely. This reality undermines the effectiveness of these services and limits their ability to plan ahead.¹⁸

23. The Justice Project also highlighted the broader law and policy context against which demand for ATSILS services must be understood. This includes:

(a) Significant and increasing rates of incarceration of Aboriginal and Torres Strait Islander peoples.

The number of Aboriginal and Torres Strait Islander people in adult incarceration has increased by more than 70 per cent in the past decade.¹⁹ Despite only representing approximately 2-3 per cent of Australia's adult population,²⁰ Aboriginal and Torres Strait Islander people represent 27.4 per cent of the total adult prison population,²¹ and 34 per cent of the female prison population.²² Aboriginal and Torres Strait Islander children represent more than 50 per cent of the youth prison population.²³ Aboriginal and Torres Strait Islander people are also more likely to be imprisoned on remand²⁴ and for short periods of sentenced imprisonment.²⁵ The Justice Project also found that Aboriginal and Torres Strait Islander people are disproportionately affected by so-called 'law and order' laws and policies such as strict bail and parole requirements/conditions, mandatory sentencing, and fines, among others.²⁶

(b) Alarming rates of family and other violence experienced by Aboriginal and Torres Strait Islander people.

For example, in 2014–15, Aboriginal and Torres Strait Islander women were 32 times more likely to be hospitalised due to family violence than non-Indigenous women.²⁷ Rising numbers of charges and prosecutions as a result of efforts to address family violence drive demand for services provided by ATSILS. It was also noted in the Justice Project that as a result of stronger law and order

¹⁸ Ibid 39.

¹⁹ Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2017 (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

²⁰ Australian Bureau of Statistics, 2024.0 - Census of Population and Housing: Australia Revealed, 2016 (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0>>.

²¹ Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2017 (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

²² Ibid.

²³ Australian Institute of Health and Welfare, *Youth justice in Australia 2016–17* (2018) 8.

²⁴ Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2017 (2017)

<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>. See also, Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018) 102.

²⁵ Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018) 116-9.

²⁶ Law Council of Australia, *The Justice Project: Final Report* (August 2018), Prisoners and Detainees Chapter, 55-75; Law Council of Australia, *The Justice Project: Final Report* (August 2018), Aboriginal and Torres Strait Islander People Chapter, 49-79.

²⁷ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia 2018* cat no FDV 2 (2018) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/summary>>.

approaches to family violence, negative outcomes have arisen and additional legal assistance has been required, for victims who have charged with a criminal offence or received a family violence orders where they have responded to experiences of violence.²⁸

- (c) Increases in need for assistance with child protection.

Aboriginal and Torres Strait Islander children are overrepresented in out-of-home care.²⁹ This results in high demand for ATSILS services for family law matters. Additionally, the strong link between out-of-home care and legal problems, means that the demand for legal assistance services from young people in care is high.³⁰

24. The role of access to legal assistance and representation provided by ATSILS must be understood as an important safeguard against this broader law and policy context. The Law Council provides the following two examples:

- (a) 'Casey' – assistance provided by Aboriginal Legal Service (NSW/ACT) (**ALS NSW/ACT**):

Casey, a young Aboriginal child with an intellectual disability was represented by ALS NSW/ACT. After receiving a 12 month suspended control order and probation order for an indecent assault charge, Casey was arrested by police for possession of marijuana. This was not pursued by the police and he was released shortly after. A few weeks later, Casey breached his bail conditions by not reporting to police. The police filed a detention application to change the conditions of his bail. The Magistrate allowed the application and, if successful, would mean that Casey would receive a control order to spend in full time custody in a Juvenile Detention Centre. The ALS was successful in ensuring Casey was only issued a caution under the Children (Criminal Proceedings) Act 1987 (NSW), and was not subjected to a full time custodial sentence. The ALS brought to the court's attention the fact that the marijuana belonged to Casey's father. Furthermore, Casey's intellectual disability and the fact that he had no prior drug offences, were also relevant factors. As a result, the Magistrate dismissed the police application with a caution and allowed Casey to remain on his previous suspended control order and probation orders.³¹

- (b) 'Adam' – assistance provided by the Victorian Aboriginal Legal Service (**VALS**):

Adam is a 43 year old Aboriginal male who has a long history with substance abuse whom VALS assisted through our ReConnect program. ... Adam advised [his VALS] caseworker that he had long standing issues with drugs and alcohol and wanted to attend Wulgunggo Ngalu Learning Place. The caseworker assisted Adam to submit an application and supported him through the assessment process. Adam was able to secure a place at Wulgunggo Ngalu where he received assistance with drugs & alcohol, mental health, life skills and cultural strengthening. Adam was also assisted with his art and was supported and guided by the caseworker in how to advertise and sell his artwork to earn income. Adam was also supported to undertake cultural strengthening activities which he reported as never having done before but being needed in order to address the disconnect from family and culture he felt. After being discharged

²⁸ Law Council of Australia, *The Justice Project: Final Report* (August 2018), People who Experience Family Violence Chapter, 70-3;

²⁹ *Ibid*, Children and Young People Chapter, 50-5.

³⁰ *Ibid*, 55-7.

³¹ National Aboriginal and Torres Strait Islander Legal Services, Submission No 121 to the Law Council of Australia, *The Justice Project*, October 2017, 8.

*from Wulgunggo Adam reported, over the proceeding months, as being committed to staying out of jail and indicated an intention to support his family and undertake a TAFE course on art.*³²

25. The above provides critical context regarding demand for ATSILS services – against which their importance, including in achieving any Closing the Gap Justice Targets into the future, must be understood.
26. To meet the objectives of the ILAP and to ensure the effectiveness, efficiency and appropriateness of the ILAP, the Law Council strongly emphasises the need for increased funding.

2013 Mid-Year Economic and Fiscal Outlook ongoing savings measure

27. The 2017–2018 Federal Budget included a reversal of planned funding cuts over the following three-year period. However, it is understood that ATSILS will be subject to funding cuts of \$10 million across 2020-21 and 2021-22 due to the Commonwealth Government's 2013 ongoing savings measure. If this measure is not reversed, there will be significant ramifications including loss of staff, programs, expertise and capacity to provide services. In turn this will impact highly vulnerable Aboriginal and Torres Strait Islander people and impact upon the ability of ATSILS to deliver services that ensure Aboriginal and Torres Strait Islander people are equal before the law and have access to a fair trial.
28. The Law Council submits that this savings measure should be reconsidered, noting the significant implications on the ability for ATSILS to deliver services should the cuts proceed as intended.

State and territory funding

29. Recommendation 7.2 of the Justice Project Final Report states:

*7.2 State and territory governments should provide substantial additional funding to Aboriginal and Torres Strait Islander community-controlled legal services, over and above Commonwealth funding levels, in line with the Productivity Commission's 2014 recommendation. At the same time, the Commonwealth should increase its own contribution to these services, given the growing, critical unmet legal needs amongst Aboriginal and Torres Strait Islander peoples and the unique role of such services in meeting their needs.*³³

30. Aboriginal and Torres Strait Islander specific legal services are funded almost entirely by the Australian Government under the ILAP. This is despite the fact that state and territory laws most affect the demand for services, especially in the criminal context. This contributes to gaps in services because, as the Productivity Commission noted, 'the resource implications of state government policy changes on Indigenous specific legal services are unlikely to be fully considered or addressed [by law-makers]'.³⁴ On this basis the Productivity Commission recommended that state and territory

³² Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018) 262.

³³ Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendation 7.2.

³⁴ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014), vol 2, 806. See also Law Council of Australia, *The Justice Project: Final Report* (August 2018), Aboriginal and Torres Strait Islander People chapter, 37.

governments should contribute to the funding of ATSILS (and FVPLS) as part of any future legal assistance funding agreement with the Australian Government.³⁵

31. The Law Council emphasises that additional state and territory government contributions should not result in a reduction in Commonwealth funding. Rather, Commonwealth funding levels should also be increased, given the critical unmet need in this area.

Certainty of funding

32. The Law Council submits that funding certainty and predictability are key principles in organisational sustainability and allows legal assistance services to effectively and appropriately plan for service provision. Funding should be made by way of transparent, consistent and evidence-based mechanisms or models taking into account legal need (including unmet legal need), and barriers to access to justice.
33. In this respect, the Law Council notes recommendations 2.2 and 2.5 of the Justice Project:

2.2 Commonwealth, state and territory government funding for legal assistance services should be determined by way of a transparent and evidence-based funding model that provides adequate, predictable, sustainable and long-term funding...

2.5 To enable legal assistance services to build and maintain trust with individuals and communities who need legal help, governments should:

- *prioritise adequate, predictable, sustainable and long-term funding models for these services under Recommendation 2.2; and*
- *provide ongoing funding pathways to enable innovative pilots and community-led initiatives which have demonstrated success to flourish longer-term, with specific funding allocated for their evaluation.*³⁶

34. The Justice Project found that given the high levels of mistrust of the justice system among many marginalised people, including Aboriginal and Torres Strait Islander people, establishing and developing trust in legal actors and the legal system is imperative in increasing access to justice. It was highlighted that the key to building strong, trusted relationships is time and effort.³⁷ Maintaining ongoing or repeated work as well as consistency of staff undertaking the work was also highlighted.³⁸ These factors point to the importance of long-term, sustainable policy and funding frameworks as key enabling factors which support continuity of services and staff, and therefore trusted relationships with clients.
35. In addition, to ensure appropriate resources are provided to the legal assistance sector to meet unexpected increases in legal need, the Law Council recommends Justice Impact Tests accompany new government policy or legislation, as a means of determining the impact of any initiative or reform. The Law Council refers to the recommendations set out in the Justice Project in this regard, which calls for the introduction of a Justice Impact Test which will ensure the downstream pressures

³⁵ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014), vol 2, 808.

³⁶ Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendations 2.2, 2.5.

³⁷ *Ibid*, Legal Services Chapter, 26-29.

³⁸ *Ibid*.

caused by changes to law and policy (e.g. additional demand for legal assistance services) are identified, and accounted for, early in the policy development process.³⁹ The reliability of any Justice Impact Test would be augmented by measures adopted to better assess the social impact of new laws and policies, as at recommendation 7.4 of the Justice Project,⁴⁰ including Aboriginal Justice Impact Assessments. These would ensure that the likely impact of new measures on Aboriginal and Torres Strait Islander populations is well understood – and therefore, through the Justice Impact Test, identify the services (and level of services) that are required.

Evidence-based funding

36. The Law Council endorses an approach to funding legal assistance services that seeks to identify legal need in the community, and then sets a baseline level of services before arriving at an appropriate funding model. This approach would be more conducive to establishing a framework for the Commonwealth, States and Territories to agree on national objectives and to provide a sufficient level of funding to meet that need, shared equally between different levels of government.
37. The Law Council further considers that reviews of legal assistance service program expenditure should be accompanied by a stronger commitment to improving the ongoing evidence base regarding the Australian community's legal needs and what works in this area. Two works that have considered the legal needs of Aboriginal People are the *Legal Australia-Wide Survey* conducted by the Law and Justice Foundation of NSW (**LAW Survey**),⁴¹ and the *Indigenous Legal Needs Project (ILNP)*.⁴²
38. It is particularly concerning that the LAW survey, which remains the most comprehensive national survey available, is based on data which is now a decade old. This does not provide an adequate evidence base on which to guide future expenditure of public funds beyond 2020, and risks overlooking emerging and critical areas of need.
39. It also should be noted that while the LAW Survey was a comprehensive nation-wide survey on legal need, it was limited in its assessment of Aboriginal and Torres Strait Islander legal needs due to the methodology utilised in the survey.⁴³ The ILNP has been particularly valuable in identifying the legal needs of Aboriginal and Torres Strait Islander peoples. However, the ILNP is limited to analysing the civil and family law needs of Aboriginal and Torres Strait Islander people and did not assess criminal law needs.
40. To ensure evidence-based service delivery into the future, a new LAW Survey must be funded, as well as complementary targeted studies into the needs of difficult-to-reach communities (such as an expanded ILNP which also analyses criminal law needs).⁴⁴

³⁹ Ibid recommendation 7.3.

⁴⁰ Ibid recommendation 7.4. For further information, see the Governments and Policymakers Chapter.

⁴¹ Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (2012).

⁴² Indigenous Legal Needs Project, *Project Overview* <<https://www.jcu.edu.au/indigenous-legal-needs-project/project-overview>>.

⁴³ The LAW Survey was telephone-based, and no specialised culturally sensitive protocols were employed. Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (2012), 236.

⁴⁴ Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendation 7.8.

41. To this end the Law Council also supports the approach by NATSILS that emphasises the need for governments to undertake, in consultation with ACCOs, a national project to map the unmet legal needs of Aboriginal and Torres Strait Islander people in Australia, and to provide adequate funding for ACCOs including ATSILS and FVPLS, commensurate with these needs.

The need for funded holistic service delivery

42. The Law Council submits that the ILAP can be improved by providing for additional funding to expand critical support services for ATSILS, including to provide greater early intervention, wrap-around, prevention, rehabilitation services and therapeutic measures, often in consultation or partnership with non-legal services.⁴⁵ Critical support services are not currently supported by the ILAP funding arrangements.
43. Support to conduct such services will allow ATSILS and NATSILS to respond to the known, common pathways into, through, and out of the justice system, and into and out of disadvantage itself, for Aboriginal and Torres Strait Islander people, and ideally prevent or limit interactions with the justice system.
44. ATSILS and NATSILS are uniquely placed to provide critical support services due to their significant experience and knowledge of the underlying causes of interaction with the justice system, the strength of their relationships with communities, and established cross-sector networks.
45. The Aboriginal Legal Service of Western Australia's (**ALSWA**) 'Youth Engagement Program' provides an example of the type of holistic and collaborative service delivery that can be provided by ATSILS if funded to do so.⁴⁶ The Youth Engagement Program which commenced in May 2016, employs three Aboriginal diversion officers who work with young people who are appearing in the Perth Children's Court. Participants are usually referred to the program by their ALSWA lawyer. Support provided by the Aboriginal diversion officers includes accommodation assistance; referrals to programs (for example, drug and alcohol rehabilitation programs, educational and training programs, recreational programs); transport assistance; reminders for court and other appointments; mentoring and encouragement; and liaison and advocacy with various government and non-government agencies. The diversion officers work onsite at the Perth Children's Court as well as conducting extensive outreach services.
46. Conversely, the recent decision by the Attorney-General of Victoria to cease funding the Aboriginal and/or Torres Strait Islander Youth Legal Service (known as Balit Ngulu) demonstrates the difficulties that ATSILS can face in providing holistic services not covered under the ILAP. Balit Ngulu was established by VALS to provide assistance to a large number of Aboriginal and/or Torres Strait Islander children who could not access assistance from VALS or Djirra as a result of professional conflicts arising from the work undertaken by those agencies in related matters. Through Balit Ngulu, Aboriginal and/or Torres Strait Islander children were able to access high quality, integrated and culturally appropriate legal help. The Balit Ngulu service model of providing each child with Client Service Officers also ensured that they were supported to maintain and strengthen their connection to culture and family, while also assisted to access education, employment and leadership.

⁴⁵ Ibid recommendation 5.1. For further information, see the Critical Support Services Chapter.

⁴⁶ National Aboriginal and Torres Strait Islander Legal Services, Submission No 121 to the Law Council of Australia, *The Justice Project*, October 2017, 6.

47. The Law Council therefore submits that providing ATSILS and NATSILS with support to provide assistance in communities beyond individual case work and legal assistance is essential in order to achieve systemic change.

The need for partnership, collaboration and consultation

48. ATSILS were set up in line with the principle of self-determination. The Law Council therefore submits that the approach taken by governments in relation to the funding and administration of the sector must be founded on a commitment to genuine partnership.
49. In this regard, the Law Council highlights the important role played by the peak body, NATSILS in promoting Aboriginal and Torres Strait Islander leadership and guidance. The Law Council supports the need for the ongoing, sustainable and sufficient funding and support of NATSILS as a key element of ensuring that the objective and outcomes of the ILAP are met. Currently, while NATSILS is regularly called upon to provide detailed input into high-level policies and laws affecting Aboriginal and Torres Strait Islander populations, including through examples such as this review and the Justice Project, it lacks sufficient resources to do so optimally. NATSILS should be supported to grow and expand its size and skill, including to undertake advocacy on law reform and the legal rights, and to achieve its identified strategic planning initiatives.