



Law Council  
OF AUSTRALIA

# 2020-21 Pre-Budget Submission

**The Treasury**

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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 2019 Executive as at 14 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member
- Executive Member, Vacant

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

## Acknowledgement

The Law Council is grateful contributions of the following organisations, Law Council Sections and Law Council Advisory Committees in the preparation of this submission:

- Law Society of New South Wales;
- Law Institute of Victoria;
- Law Society of South Australia;
- Family Law Section;
- Access to Justice Committee;
- National Human Rights Committee;
- Indigenous Legal Issues Committee; and
- Charities and Not-for-profits Committee of the Legal Practice Section;
- Australian Environmental and Planning Law Group of the Legal Practice Section.

## Executive Summary

1. The Law Council is grateful for the opportunity to provide this submission to the Treasury for consideration in preparing the 2020-21 Federal Budget.
2. The Law Council's submission to the Pre-Budget process is largely focussed on the need for increased funding for the legal assistance sector and adequate resourcing for federal courts and tribunals.
3. Key recommendations from the Law Council contained in this submission are as follows:
  - The Australian Government should invest significant additional resources in Legal Aid Commissions (**LACs**), Community Legal Centres (**CLCs**), Aboriginal and Torres Strait Islander Legal Services (**ATSILS**), and Family Violence Prevention Legal Services (**FVPLS**) to address critical civil and criminal legal assistance service gaps. This should include, at a minimum, \$390 million per annum comprising:
    - at least \$120 million per annum for civil legal assistance services; and
    - at least \$270 million per annum for other services provided by LACs, restoring the share of Commonwealth funding of such services to 50 per cent.
  - The funding of ATSILS should continue to be delivered through an adequately resourced, standalone and specific purpose funding program which is administered by the Commonwealth.
  - Funding for Justice Impact Tests should be provided at the Commonwealth level to facilitate the smoother development of laws and policies which have downstream impacts on the justice system.
  - Additional funding should be provided to LACs to increase their National Disability Insurance Scheme (**NDIS**) appeal work in response to increased demand.
  - Additional funding should be provided to legal service providers, including through increased allocation of legal aid funding to civil matters, to address demand for services in relation to Centrelink's Online Compliance Program.
  - The Australian Government should provide additional resources to the federal courts, in particular the Family Court of Australia (**Family Court**) and the Federal Circuit Court of Australia (**Federal Circuit Court**), including additional Judges, Registrars and other staff in order to efficiently deal with the considerable increase in workload. This should be supported with additional funding for legal assistance services for those people with cases moving through these systems.
  - The Australian Government should make additional targeted resources available to the Administrative Appeals Tribunal (**AAT**) to better enable it to meet its performance measures and efficiently deal with the increase in workload.
  - The Australian Government should ensure the availability and adequate resourcing of Indigenous Liaison Officers in Family Court registries where they

are required, particularly in the Northern Territory, Far North Queensland and Western Australia with a progressive roll-out in other states and territories and metropolitan registry areas.

- The Australian Government, working with state and territory governments, should commission a full review of the resourcing needs of the federal courts and tribunals. Alongside this review, the Australian government should facilitate an open public discussion about the economic, social and civic importance of meeting the resourcing needs of courts and tribunals.
  - The Australian Government should adopt and adequately resource a judicial appointment process that promotes greater transparency and accountability of judicial appointments.
  - The Australian Government should establish and adequately resource a National Justice Interpreter Scheme and a National Aboriginal and Torres Strait Islander Interpreter Service.
  - The Australian Government, peak legal assistance bodies and legal professional bodies should cooperate to develop rural, regional and remote (**RRR**) access to justice strategies to ensure an appropriate and tailored mix of services, publicly funded and private, in areas of critical need.
  - The Australian Government should invest in technology and new models of service delivery, particularly in RRR areas, so that these initiatives can achieve their intended purpose of increasing the reach of federal courts and tribunals to regional areas and improving equitable access to the justice system.
  - The Australian Government should establish and adequately resource a Federal Judicial Commission to provide a fair mechanism to hear complaints against the judiciary and provide a fair process for judges who are the subject of allegations which might otherwise be aired in the media.
  - The Australian Government should provide adequate funding for the reinstatement of the Administrative Review Council (**ARC**).
4. The Law Council also suggests that the Australian Government provide additional funding to agencies including the Office of the Australian Information Commissioner (**OAIC**), Australian Competition and Consumer Commission (**ACCC**), Australian Human Rights Commission (**AHRC**), Australian Charities and Not-for-profits Commission (**ACNC**) and Australian Financial Security Authority (**AFSA**) to ensure that these agencies are adequately funded to undertake their essential functions.

## Introduction

6. This submission has been informed to a significant degree by the findings and recommendations of the Law Council's 2017-18 review into the state of access to justice in Australia, *The Justice Project*.<sup>1</sup> Through the Justice Project, the Law Council sought to shine a light on the justice issues experienced by 13 priority groups identified as facing significant social and economic disadvantage by uncovering systemic flaws and identifying service gaps.<sup>2</sup>
7. The Justice Project's Final Report comprises 22 chapters and 59 recommendations. These recommendations provide a roadmap for future action, building the case for new, whole-of-government justice strategies secured by appropriate funding. While the Final Report contains several recommendations involving minimal or no cost, it also includes several others which call for, in some cases, quite significant government expenditure (at both the state/territory and federal levels).
8. In making the recommendations in this submission, the Law Council acknowledges that the Final Report of the Justice Project provides only a framework for a long-term approach to justice in Australia and that governments will, and must, determine their policy and funding priorities while weighing up the merits of expenditure across a variety of portfolios.
9. What is clear from the Justice Project is that the cost of legal assistance is a frequent and formidable barrier for many Australians in all walks of life, from older to rural Australians to people with disability, and particularly people with complex and intersectional disadvantage, and accessing the justice system is often obstructed by undue delays and poorly resourced courts and tribunals. It is with particular focus on addressing these serious issues that the Law Council provides the following submissions as part of the 2020-2021 Pre-Budget process.

## Increased funding for the legal assistance sector

10. Legal problems are a common occurrence in society and most Australians will experience several legal problems throughout their lifetime. Many everyday problems have critical legal dimensions which often go unaddressed.
11. However, experience of legal problems is not spread evenly among the Australian population. People experiencing disadvantage are often more vulnerable to legal problems and frequently have greater, and more complex legal needs than the general population. They are disproportionately represented in the justice system – despite often being the least able to respond effectively (both in terms of finances and capability).
12. The recent or ongoing Royal Commissions into the Protection and Detention of Children in the Northern Territory,<sup>3</sup> Misconduct in the Banking, Superannuation and

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<sup>1</sup> Law Council of Australia, *The Justice Project: Final Report* (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>.

<sup>2</sup> The priority groups identified in the Justice Project are people with a disability, people experiencing economic disadvantage, LGBTQI+ people, prisoners and detainees, Aboriginal and Torres Strait Islander people, people who experience family violence, people who have been trafficked and exploited, recent arrivals to Australia, children and young people, rural, regional and remote (RRR) Australians, asylum seekers, older persons and people who are homeless.

<sup>3</sup> *Royal Commission into the Detention and Protection of Children in the Northern Territory* (Final Report, 17 November 2017).

Financial Services Industry,<sup>4</sup> Aged Care Quality and Safety,<sup>5</sup> and Violence, Abuse, Neglect and Exploitation of People with Disability<sup>6</sup> have unearthed how frequently serious legal issues can be experienced by multiple groups in Australia, and how significant the impact of these issues can be on their lives – whether they fall prey to predatory lenders, or individuals or organisations who neglect, abuse or exploit the people in their care.

13. Key elements of Australian democracy including equality before the law, access to justice and the rule of law are dependent on all members of the community being able to access legal assistance when necessary to uphold their rights. A consistent theme identified by the Law Council throughout the Justice Project was that the cost of legal assistance is a frequent and formidable barrier for people with complex and intersectional disadvantage.<sup>7</sup> For a great number of Australians, no-cost or minimal cost services are critical in addressing legal needs and government-funded legal assistance services are often the first and most fundamental port of call. Against an ongoing backdrop of costly and intensive Royal Commissions, these services should be considered to form a key safeguard in protecting the rights of vulnerable Australians, and a preventative policy tool going forward.
14. Each of the four publicly funded legal assistance services – LACs, CLCs, ATSILS and FVPLS– play an important, unique and complementary role in providing legal help to people across Australia. While the private legal profession also plays a critical role in ensuring access to justice, including through its substantial pro bono contribution, governments must ultimately bear responsibility for ensuring an appropriate service safety net. As the principal revenue raiser in the federation, the Australian Government has a responsibility to ensure adequate access to these services. This is particularly the case with regard to civil and family law issues. As outlined below, legal assistance funding to address these issues is particularly scarce and requires urgent attention by the Australian Government.

### **Why provide adequate funding to the legal assistance sector?**

15. There are substantial hidden costs for individuals, communities and governments across many portfolios that result from failing to adequately fund the legal assistance sector. The upfront cost of investment in key services which are necessary to ensure access to justice – particularly legal assistance, but also other critical areas such as courts and tribunals, interpreters, intervention and prevention programs, and so on - should be viewed in the wider context of their potential to reduce other community costs, many of which are likely to exceed the expenditure required to adequately fund legal assistance services.
16. The International Bar Association and the World Bank Group's 2019 report surveyed 50 cost and benefit studies of past and proposed legal aid programs covering civil and common law jurisdictions in both developed and developing countries and in large and small jurisdictions.<sup>8</sup> This report found that these cost and benefit analyses suggest that the economic benefits of legal aid investment outweigh the costs, and

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<sup>4</sup> *Royal Commission into the Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019).

<sup>5</sup> *Royal Commission into Aged Care Quality and Safety* (Interim Report, 31 October 2019).

<sup>6</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Web page) <<https://disability.royalcommission.gov.au/Pages/default.aspx>>.

<sup>7</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018) 6.

<sup>8</sup> International Bar Association and World Bank Group, *A Tool for Justice: A Cost Benefit Analysis of Legal Aid* (2019) 2.



that support for legal aid programs can bring significant budgetary savings to the government.<sup>9</sup>

17. The report further identified that legal aid can bring cost savings to the justice system and can deliver substantial savings to the government by reducing expenditure on other public services or by avoiding or limiting the use of state resources. For example, in the United Kingdom:
  - (a) for every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34;
  - (b) for every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98;
  - (c) for every £1 of legal aid expenditure on advice relating to social welfare entitlements, the state saves £8.80; and
  - (d) for every £1 of legal aid expenditure on employment advice, the state saves £7.13.<sup>10</sup>
18. In Scotland, every £1 spent on legal aid in housing cases saw a return of around £11 and every £1 spent on legal aid in criminal or family cases saw a return of around £5.<sup>11</sup>
19. The business case for adequately funding legal assistance services in Australia is well known. In 2014, the Productivity Commission recognised the net public benefits to the community of legal expenditure and the ‘false economy’ of not doing so, given that the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection.<sup>12</sup>
20. The Productivity Commission reported that the legal aid income tests are below many established measures of relative poverty. The long-term under-resourcing of LACs has led to a situation where around 14 per cent of Australians live below the poverty line, but just eight per cent of all Australian households qualify for legal aid.<sup>13</sup> The Productivity Commission found that there is overwhelming qualitative evidence that narrowing the gap would be socially and economically justified.<sup>14</sup> It cited former Chief Justice Gleeson’s remarks that:

*The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly, or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.*<sup>15</sup>

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid 19.

<sup>11</sup> Ibid.

<sup>12</sup> Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 30-1 (‘Access to Justice Arrangements’).

<sup>13</sup> Ibid 719, 1020-2.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid 30-1, citing The Hon Murray Gleeson AC QC, *State of Judicature* (Speech, Australian Legal Convention, 10 October 1999).

21. A recurring theme, throughout the Final Report of the Justice Project, is the costs (personal, community, social and economic) that arise and/or grow when people cannot access justice. These include, for example:
- (a) unresolved problems escalating from civil, to family, to criminal matters;
  - (b) family violence victims being evicted for reasons which are not their fault, such as damage to the rental home by the perpetrator;
  - (c) an inability to resolve mounting debts, fines or payments, resulting in poverty and/or eviction and homelessness, as well as deteriorating mental and physical health, and in some jurisdictions, imprisonment;
  - (d) an inability to access a person's entitlements, such as unpaid wages, income support or a pension, resulting in destitution;
  - (e) an inability to seek redress as a victim of crime, to address workplace exploitation or discrimination;
  - (f) people remaining at risk of harm, violence and exploitation – such as family violence victims, elder abuse victims, people with disability who are abused by carers, and people who are trafficked or subject to forced marriages;
  - (g) families being split when children are unnecessarily removed from their parents;
  - (h) a greater likelihood of incarceration, including in circumstances in which charges and arrest were unwarranted; and
  - (i) a greater likelihood of people being returned to their countries of origin to face persecution, torture or death.<sup>16</sup>
22. These scenarios clearly have broader cost implications – such as to health, housing, social services and welfare, child protection, families, corrections, policing and justice portfolios. They also entrench individuals' disadvantage, and the likelihood of this occurring as part of an intergenerational cycle of poverty, violence and harm – with opportunity and economic costs to all Australians given the loss of healthy, productive and vibrant communities.<sup>17</sup>
23. In 2013, Allen Consulting Group agreed that the early resolution of legal issues can benefit the wider community by increasing the justice system's efficiency and reducing litigation and other economic costs that flow through to society.<sup>18</sup> It also stated that:

*The outcomes of even minor legal problems can have potentially significant consequences (e.g. bankruptcy) and costs for individuals (e.g. adverse health outcomes from stress). These can in turn result in further costs borne by society (e.g. healthcare costs). Appropriate access to legal assistance services can prevent or reduce the escalation of such adverse consequences.*

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<sup>16</sup> Law Council of Australia, *The Justice Project: Final Report – Introduction and Overview* (August 2018) 18.

<sup>17</sup> *Ibid.*

<sup>18</sup> The Allen Consulting Group, Attorney-General's Department, *Review of the National Partnership Agreement on Legal Assistance Services Working Paper Three: Market Analysis* (2013) 23.

*Although such negative externalities are difficult to describe and quantify, there is evidence to suggest that government intervention in legal assistance can lead to a reduction in negative externalities.<sup>19</sup>*

24. The Organisation for Economic Co-operation and Development (**OECD**) similarly recognised the ‘intrinsic links between access to justice, poverty reduction and inclusive growth’.<sup>20</sup> A 2016 OECD background paper states that:

*...individual consequences can in turn translate into greater spending on public programs such as social and health services, income supports, disability plans, employment insurance, and other services. The failure to resolve legal problems can contribute to a ‘cycle of decline’...in which one problem leads to another with escalating individual and social costs. Inability to resolve legal problems and limited access to justice may diminish access to economic opportunity, reinforce the poverty trap, and undermine human potential, which could affect growth.<sup>21</sup>*

25. While legal assistance services are not a ‘cure-all’ for all of these issues, the importance of these services in minimising the multitude of costs associated with failure to adequately access justice has been consistently recognised in Australian and overseas research.<sup>22</sup>

### What level of additional Commonwealth funding is required?

26. In the 2019-20 Budget the Australian Government announced that it will be changing the way in which the legal assistance sector is funded by establishing a National Single Mechanism for Commonwealth Legal Assistance Funding (**Single Mechanism**), and replacing the National Partnership Agreement on Legal Assistance Services (**NPA**) through which LACs and CLCs are currently funded, and the Indigenous Legal Assistance Program (**ILAP**) through which ATSILS are funded. A new funding agreement for the Single Mechanism, the National Legal Assistance Partnership (**NLAP**) is, at the time of writing, subject to ongoing negotiations between the Australian Government, state and territory governments and the sector. FVPLSs continue to be funded outside the Single Mechanism through the Indigenous Advancement Strategy (**IAS**) administered by the National Indigenous Australians Agency.

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<sup>19</sup> Ibid 26-7.

<sup>20</sup> Organisation for Economic Co-operation and Development and Open Society Foundation, ‘Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All’ (Issues Brief, 2016) 3.

<sup>21</sup> Organisation for Economic Co-operation and Development and Open Society Foundations, ‘Understanding Effective Access to Justice’ (Workshop Background Paper, Organisation for Economic Co-operation and Development and Open Society Foundations, 2016) 12 <<http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf>>.

<sup>22</sup> While the global justice evidence base is not well resourced, international studies also support findings that unresolved legal problems have social, economic and health consequences. See, eg, Pascoe Pleasence et al, ‘Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems’ in Pascoe Pleasence, Alexy Buck and Nigel J Balmer (eds), *Transforming Lives: Law and Social Process* (The Stationary Office, 2007) 67; Graham Cookson and Freda Mold, *The Business Case for Social Welfare Advice Services - An Evidence Review: Lay Summary* (University of Surrey, July 2014) 1 <<https://www.lowcommission.org.uk/dyn/1405934416347/LowCommissionPullout.pdf>>; Citizens Advice Bureau, ‘Towards a Business Case for Legal Aid’ (Paper presented at the Legal Services Research Centre’s Eighth International Research Conference, July 2010) 2 <[https://www.accessjusticeactiongroup.co.uk/wp-content/uploads/2011/07/towards\\_a\\_business\\_case\\_for\\_legal\\_aid.pdf](https://www.accessjusticeactiongroup.co.uk/wp-content/uploads/2011/07/towards_a_business_case_for_legal_aid.pdf)>; Laura K Abel and Susan Vignola, ‘Economic and Other Benefits Associated with the Provision of Civil Legal Aid’ (2010) 9 *Seattle Journal for Social Justice* 1, 139-67.

27. The NPA and ILAP were each the subject of an independent review during 2018.<sup>23</sup> However, the level of funding provided through these agreements was largely excluded from the terms of reference of the reviews.
28. The strain on the legal assistance sector to address unmet legal need given restricted funding was noted by the NPA Review. It was acknowledged in the Final Report that the consistent narrative among stakeholders was that 'growing demand for legal assistance services coupled with the increasing costs of delivery are placing significant external pressure on the sector' and that this 'compromises the achievement of the NPA's aspirations as services' resources are focused on striving to meet demand while facing increasing costs, rather than focussing on the aspirations of the NPA'.<sup>24</sup> Unmet legal need was also identified in the review of ILAP, where it was pointed out that submissions 'consistently articulated the view that there is an insufficient level of funding provided for legal assistance services to Aboriginal and Torres Strait Islander peoples through the ILAP and other sources to meet the current level of legal need'.<sup>25</sup>
29. In the 2019-20 Budget, the Australian Government announced that it will increase overall funding of the legal assistance sector by approximately \$20 million (indexed) from 1 July 2020.<sup>26</sup> As part of this, the Australian Government provided funding certainty to the sector and reversed scheduled cuts to the funding of ATSILS. Additional funding was also provided for discrete areas of legal assistance, such as for:
  - (a) the provision of legal assistance services supporting the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability;
  - (b) Elder Abuse Service Trials across 12 frontline services designed to support older people who are victims of abuse;
  - (c) the Fair Work Commission Workplace Advice Service; and
  - (d) throughcare services in the Northern Territory.
30. Additionally, in the Mid-Year Economic and Fiscal Outlook (**MYEFO**) 2019-20 released in December 2019, the Australian Government announced that it would provide \$15.3 million in additional funding to the legal assistance sector.<sup>27</sup> This additional funding is contingent on it being matched by the states and territories.
31. While these measures are welcome and desperately needed, they fail to address chronic underfunding of the sector by the Australian Government.
32. In August 2018, the Law Council estimated in the Justice Project that the Commonwealth funding shortfall is at least \$310 million. This figure comprised:

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<sup>23</sup> Urbis, *Review of the National Partnership agreement on Legal Assistance Services 2015-2020* (December 2018); Cox, Inall, Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP) 2015-2020* (February 2019).

<sup>24</sup> Urbis, *Review of the National Partnership agreement on Legal Assistance Services 2015-2020* (December 2018), 54.

<sup>25</sup> Cox, Inall, Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP) 2015-2020* (February 2019), 39.

<sup>26</sup> Australian Government, *Mid-Year Economic and Fiscal Outlook 2019-20* (December 2019) 198 <[https://budget.gov.au/2019-20/content/myefo/download/MYEFO\\_2019-20.pdf](https://budget.gov.au/2019-20/content/myefo/download/MYEFO_2019-20.pdf)>.

<sup>27</sup> Ibid.

- (a) the Productivity Commission's estimate that the Commonwealth should provide additional funding of around \$120 million per annum for civil legal assistance services; and
  - (b) PricewaterhouseCoopers' (**PwC**) estimate that to return the Commonwealth's share of LAC funding to at least 50 per cent, the Commonwealth should provide \$190 million per annum.<sup>28</sup>
33. The Law Council estimates that this shortfall is now at least \$390 million. Updated estimates from PwC indicate that for the Commonwealth to return to a 50 per cent share of total funding for LACs, the level of additional funding required has increased from \$190 million per annum to \$270 million per annum.
  34. The Law Council has repeatedly called for the Commonwealth's share of LAC funding to return to at least 50 per cent, allowing for a more equitable split with the states and territories. This reflects the Law Council's longstanding concerns that since 1997, the Commonwealth has dramatically reduced its spending on LAC funding from around 55 per cent of the contribution at that time, to only 33 per cent in 2017-18.<sup>29</sup>
  35. Funding of LACs has failed to keep pace with population growth or inflation. The most recent analysis from PwC also demonstrates that the Australian Government's per capita share of total government LAC funding in real terms is at its lowest level in more than 20 years, and that this share is declining.<sup>30</sup>
  36. Given that the Productivity Commission's recommendation was made in 2014, the Law Council suggests that the estimated total annual cost of the measures of \$200 million is likely to be now a significant underestimate. Further, the Productivity Commission's recommendation was merely for an interim funding injection to 'address the most pressing needs'.<sup>31</sup> Future funding levels should then be determined with reference to a more comprehensive assessment of legal need.<sup>32</sup>
  37. The Law Council has been informed by some legal sector services that they will remain under significant financial strain under anticipated NLAP distributions. This could require a reduction of staffing levels at these services and therefore a significant decrease in frontline services provided. This has the potential to lead to a failure in adequately meeting what is needed to support many vulnerable members of the community. The Law Council considers that if the objectives and desired outcomes of the NLAP are to be achieved, unavoidably, significant additional funding will be required.
  38. While the Law Council understands that no part of the sector will be 'worse off' under the NLAP and that base funding has been quarantined, there is a concern that the grouping of all of these services together under the Single Mechanism could create increased competition and tension in the sector.

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<sup>28</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018) 11 recommendation 2.1.

<sup>29</sup> The Commonwealth's contribution to funding of LACs has reduced dramatically since 1997, from around \$11.79 per capita in 1996-1997 to around \$9.26 per capita in 2017-2018 (in real terms, adjusted for inflation and population increases): Advice from PricewaterhouseCoopers to the Law Council of Australia, June 2019.

<sup>30</sup> *Ibid.*

<sup>31</sup> Productivity Commission, *Access to Justice Arrangements* 703.

<sup>32</sup> *Ibid* 739.

**Recommendation:**

- **The Australian Government should invest significant additional resources in Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services to address critical civil and criminal legal assistance service gaps. This should include, at a minimum, \$390 million per annum comprising:**
  - **at least \$120 million per annum for civil legal assistance services; and**
  - **at least \$270 million per annum for other services provided by Legal Aid Commissions, restoring the share of Commonwealth funding of such services to 50 per cent.**

**Aboriginal and Torres Strait Islander Legal Services**

39. The Justice Project confirmed that the level of funding provided to ATSILS under the current funding agreement, the ILAP, is 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.
40. While ATSILS have had to prioritise criminal matters, despite evidence of the need among Aboriginal and Torres Strait Islander people for civil assistance, they have struggled to meet existing demand.<sup>33</sup> 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, reinforce the urgency of these concerns.
41. 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.
42. 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 explained that in these RRR areas, a lawyer with one year’s experience may be dealing with up to 20 indictable matters at a time.*

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<sup>33</sup> National Aboriginal and Torres Strait Islander Legal Services, Submission No 121 to Law Council of Australia, *The Justice Project* (October 2017).

*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.<sup>34</sup>*

43. The Law Council notes that the levels of funding under the proposed NLAP do not address the growing funding crisis in this part of the sector.
44. The Law Council continues to strongly support the position of the National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) that funding for ATSILS should not be administered under the NLAP and should instead retain separate and independent funding under an agreement with the Australian Government. The Law Council remains extremely concerned that the decision to remove separate and independent funding of ATSILS, in contravention of the recent independent review of ILAP, undermines the steps taken to improve the over-representation of Aboriginal and Torres Strait Islander people in all facets of the justice system at a time when governments are moving towards justice Closing the Gap targets to address this issue nationally. The Law Council is concerned that this proposed change will see a reduction in governance and community-control over the strategic direction and cultural priorities of their legal services.
45. The Law Council acknowledges that the Australian Government has sought to address these concerns by quarantining the funding of current ATSILS for at least the length of the NLAP, subject to certain exceptions. However, the Law Council has concerns with the certainty provided under the proposed quarantine provisions, and is of the view that the funding of ATSILS should continue to be delivered through a standalone, specific purpose funding program.

**Recommendation:**

- **The funding of ATSILS should continue to be delivered through an adequately resourced, standalone and specific purpose funding program which is administered by the Commonwealth.**

**Justice Impact Tests**

46. 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.
47. The Law Council refers to the recommendations set out in the Justice Project in this regard, which call for the introduction of a Justice Impact Test which will ensure the downstream pressures 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.<sup>35</sup> The Justice Project identified numerous examples of how new laws and policies – for example, in the family violence, immigration, elder abuse and social security contexts, had resulted in sudden spikes in demand across the legal assistance sector and the courts and tribunals. However, services were

<sup>34</sup> Law Council of Australia, *The Justice Project: Final Report – Part 1: Aboriginal and Torres Strait Islander People* (August 2018) 39.

<sup>35</sup> Law Council of Australia, *The Justice Project: Final Report – Recommendations and Group Priorities* (August 2018) 13 recommendation 7.3.

frequently not funded to address these additional demands, with many vulnerable individuals often paying the price. The examples below suggest that these unaddressed pressures continue to accumulate and that a systemic policy solution is needed.

**Recommendation:**

- **Funding for Justice Impact Tests should be provided at the Commonwealth level to facilitate the smoother development of laws and policies which have downstream impacts on the justice system.**

**Legal assistance for people with disability – National Disability Insurance Scheme**

48. The Law Council recommends that additional funding be provided to LACs to increase NDIS appeal work. The NDIS offers an appeals process by which applicants can contest and ask for a review of NDIS decisions. The two most commonly reviewed decisions through this process are decisions that are not in favour of an applicant's eligibility for NDIS, and decisions about the level of funding made available to approved participants of the NDIS.
49. The appeals process for NDIS decisions is as follows: an internal merits review is conducted, followed by an appeal to the AAT and lastly, the matter is held for judicial review in the Federal Court.
50. To date, limited funding has been made available to LACs under their 'novel and complex' matters funding stream. However, the Law Council understands that current funding is not sufficient to manage the influx of applicants seeking review as the NDIS roll-out nears completion.<sup>36</sup> Furthermore, as the AAT is a 'no costs' jurisdiction, applicants who are already experiencing financial hardship are unable to seek support from plaintiff firms which offer representation or support on a 'no win, no fee' basis, as there is no ability to recover costs if the appeal is successful.
51. With the above factors in mind, the Law Council notes there is a high probability of an increase in applicants seeking review in the AAT and Federal Court of Australia (**Federal Court**) acting in a self-represented capacity. The Law Council believes this is an inappropriate outcome, with further consideration given to the fact that the NDIS is always represented by private law firms and plaintiffs themselves are often already members of a vulnerable part of the community.

**Recommendation:**

- **The Australian Government should provide additional funding to Legal Aid Commissions to increase their National Disability Insurance Scheme appeal work in response to increased demand.**

**Legal assistance for people impacted by Centrelink's Compliance Program**

52. The Law Council submits that additional funding for the legal assistance sector is required to support those impacted by Centrelink's Online Compliance Program. This includes provision of resources necessary to respond to pressures placed on the legal assistance sector and the courts and tribunals, as set out below. It may also include

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<sup>36</sup> Applications to the NDIS Division of the AAT increased by 50 per cent from 2017-18 (802 applications) to 2018-19 (1206 applications): Administrative Appeals Tribunal, *Annual Report 2018-19* (Report, 2019) 29.



restitution following the finding of the Federal Court in November 2019 regarding the illegality of the method of income averaging,<sup>37</sup> a key component of the Program which is now discontinued.<sup>38</sup> The Law Council notes that further consideration of the associated issues by the Federal Court remains pending, and this may further affect the necessary allocation of resources.<sup>39</sup>

53. The Law Council has previously raised the issue of the pressure that the Program has placed on individuals, the legal assistance sector and the courts and tribunals.<sup>40</sup> Many legal assistance services have reported increased demands on limited available resources since the commencement of the Online Compliance System. For example, Victoria Legal Aid has reported that it had 'experienced an obvious increase in demand since the initiative was implemented'.<sup>41</sup> Further, it reported that inaccuracies in the system place a significant burden on lawyers, tribunals and courts to address and rectify mistakes made by Centrelink or the Online Compliance System, when these should in fact have been corrected at the systemic level once initially identified.<sup>42</sup> Victoria Legal Aid has, since that time, continued to experience ongoing demand for legal assistance in responding to Online Compliance System debt notices.<sup>43</sup>
54. CLCs and LACs across Australia have limited resources for meeting the demands for assistance with Centrelink debts. This results in many members of our community who are already marginalised and vulnerable, being left in a position where they are unable to access legal advice or secure representation in a timely manner. Less than three per cent of legal aid grants are made for civil matters nationally,<sup>44</sup> while CLCs reported turning away over 112,700 people in 2016-17.<sup>45</sup> The Law Council notes experiences such as that of the Welfare Rights Centre, which reported in 2017 having to turn away 20 to 30 per cent of people seeking assistance for related issues,<sup>46</sup> and which it understands is not an isolated occurrence. Additionally, significant resources are required of legal services to deal with individual cases, which often involve attempting to ascertain pay, locate payslips and contact previous employers on behalf of clients.

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<sup>37</sup> Order of Davies J in *Amato v Commonwealth* (Federal Court of Australia, VID611/2019, 27 November 2019).

<sup>38</sup> See Paul Karp, 'Robodebt: Government Abandons Key Part of Debt Recovery Scheme in Major Overhaul', *The Guardian* (online), 19 November 2019 <<https://www.theguardian.com/australia-news/2019/nov/19/robodebt-government-abandons-key-part-of-debt-recovery-scheme-in-major-overhaul>>.

<sup>39</sup> *Katherine Prygodicz & Ors v Commonwealth of Australia* VID1252/2019.

<sup>40</sup> Law Council of Australia, Submission to the Senate Standing Committee on Community Affairs, *Centrelink's Compliance Program* (31 October 2019) 27-32.

<sup>41</sup> Victoria Legal Aid, Submission No 111 to the Senate Standing Committee on Community Affairs Senate, *Inquiry into the Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (6 April 2017) 7-8

<sup>42</sup> *Ibid* 30.

<sup>43</sup> 'Centrelink Accused of Chasing Debts That Don't Exist', *ABC 7:30 Report* (27 June 2019) <<https://www.abc.net.au/7.30/centrelink-accused-of-chasing-debts-that-dont-exist/11259084>>, citing Rowan McRae, Executive Director, Victoria Legal Aid.

<sup>44</sup> National Legal Aid, *Legal Aid Commission Services 2015 to 2017 – Attachment A*.

<sup>45</sup> National Association of Community Legal Centres, *National Census of Community Legal Centres, 2017 National Report* (Report, October 2018) 14 [2.8]. The Law Council notes that the actual number of turnaways by CLCs is likely higher than 112,700 as only 62 of the 124 CLCs surveyed responded to this question in the 2017 Census. The number of turnaways has previously been reported as high as 169,513 in the 2016 Census (in that Census, 109 CLCs out of the 129 surveyed responded to this question).

<sup>46</sup> Law Council of Australia, *The Justice Project: Final Report – Part 1: People Experiencing Economic Disadvantage* (Final Report, August 2018) 43, citing Christopher Knaus, 'Legal Aid Services Join Up to Deal with High Volume of Centrelink Debt Cases', *The Guardian* (online), 1 April 2017.

**Recommendation:**

- **The Law Council recommends that additional funding be provided to legal service providers, including through increased allocation of legal aid funding to civil matters, to address demand for services in relation to Centrelink’s Online Compliance Program.**

**Legal assistance for asylum seekers**

55. In addition to highlighting the need to properly resource federal courts and tribunals which are grappling with critical pressures (discussed below), the Law Council remains particularly concerned that following severe funding cuts in 2014, only a small number of asylum seekers in Australia have access to government-funded legal assistance. This means that the community’s costs of providing such assistance are shifted to increased burdens on courts and tribunals. However, early legal assistance can help to prevent unmeritorious claims.<sup>47</sup> To achieve more efficient, sustainable and fair outcomes, and reduce downstream pressures on courts and tribunals, full the Immigration Advice and Application Assistance Scheme funding for all asylum seekers in need should be reinstated.

## Increased resourcing for federal courts and tribunals

### **Current inadequacy of funding**

56. The federal courts and tribunals have been chronically under-funded and under-resourced for a substantial period of time. The Law Council considers it clear that increased funding is required, in particular for the Family Court and the Federal Circuit Court.
57. The Law Council acknowledges the allocation in the 2019-20 MYEFO of \$13.5 million over three years from 2019-20 to the Federal Court to pilot a screening and triage program for matters being considered by family law courts.<sup>48</sup> However, beyond this and the allocation of \$35 million over the forward estimates to support the expansion of the jurisdiction of the Federal Court to include corporate crime, the 2019-20 Federal Budget’s nominal funding increases of the federal courts and AAT was insufficient to address the chronic underfunding and under-resourcing.
58. The Law Council’s Justice Project noted that insufficient funding, coupled with an increasing demand for services, hinders the capacity of courts and tribunals to resolve matters swiftly and fairly. The various indicators detailed below demonstrate that, due to critical under-resourcing, the federal courts and tribunals are under immense and chronic pressure and are struggling to meet demand.<sup>49</sup>

### **Increases in workloads and delays**

59. There are currently long delays in commencing and finalising matters in the federal courts and tribunals. As the Justice Project noted, delays in commencing and finalising matters in a court or tribunal are a critical indicator of under-resourcing.<sup>50</sup>

<sup>47</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Asylum Seekers* (August 2018) 3, 23-4.

<sup>48</sup> Australian Government, *Mid-Year Economic and Fiscal Outlook 2019-20* (December 2019) 199

<[https://budget.gov.au/2019-20/content/myefo/download/MYEFO\\_2019-20.pdf](https://budget.gov.au/2019-20/content/myefo/download/MYEFO_2019-20.pdf)>.

<sup>49</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 4.

<sup>50</sup> *Ibid.*

60. The Productivity Commission states that measuring a court's performance relative to national benchmarks 'indicates effective management of caseloads and timeliness of court services.'<sup>51</sup> For the Federal Circuit Court, the national benchmark is 'no more than 10 per cent of lodgements pending completion are to be more than 6 months old' and 'no lodgements pending completion are to be more than 12 months old'.<sup>52</sup> For the Federal Court and the Family Court, the national benchmark is 'no more than 10 per cent of lodgements pending completion are to be more than 12 months old' and 'no lodgements pending completion are to be more than 24 months old'.<sup>53</sup>
61. At June 2019, in the Federal Court's original jurisdiction, 19 per cent of the matters had been pending conclusion for over a year and 13 per cent for over two years.<sup>54</sup> In the Family Court, 38 per cent of cases pending conclusion were more than 12 months old, exceeding its own target of 25 per cent.<sup>55</sup>
62. In the Federal Circuit Court, 38 per cent of final order applications were not disposed of within 12 months, exceeding its own target of 10 per cent.<sup>56</sup> Family law continues to constitute the largest portion of the overall workload of the Federal Circuit Court, representing 89 per cent of all family law work at the federal level.<sup>57</sup> It has been noted that Federal Circuit Court judges:

*in most cases, carry a judicial docket ranging anywhere between 300 and 500 matters. The daily, weekly and monthly pressures on our judges to hear matters in court and deliver judgments in a timely and expeditious manner are relentless. The Court is continuously facing scrutiny from a number of sources in relation to its workload, and it is an ongoing challenge for the Court to balance its increasing workload with the timely finalisation and delivery of reserved judgments.*<sup>58</sup>

63. The AAT's *2018-19 Annual Report* stated that in the year under review, 66 per cent of applications were finalised within 12 months of lodgement, below the target of 75 per cent. The comparable figures in 2017-18 and 2016-17 were 77 per cent and 82 per cent.<sup>59</sup> The *2018-19 Annual Report* further stated that 'timeliness declined in the Migration and Refugee Division due to the workload pressures and caseload management strategies targeting older cases'.<sup>60</sup>
64. As discussed in the Justice Project, the number of matters before the federal courts and tribunals has increased.<sup>61</sup> The workload of the Family Court has steadily increased each year since 2011-12.<sup>62</sup> Filings in the Federal Court have increased by 13 per cent since 2014.<sup>63</sup> Notably, the Law Council made the point in its Pre-Budget submission for 2019-20 that the number of migration appeals and related actions filed

<sup>51</sup> Productivity Commission, *Report on Government Services 2019, Part C Chapter 7: Courts* (2019) 7.14-5 Box 7.4 ('*Report on Government Services 2019: Courts*').

<sup>52</sup> Productivity Commission, *Report on Government Services 2019: Courts*, 7.14-5 Box 7.4.

<sup>53</sup> *Ibid.*

<sup>54</sup> Federal Court of Australia, *Annual Report 2018-19* (Report, 2019) pt 3, 26.

<sup>55</sup> Family Court of Australia, *Annual Report 2018-19* (Report, 2019) 16.

<sup>56</sup> Federal Circuit Court of Australia, *Annual Report 2018-19* (Report, 2019) 27.

<sup>57</sup> This has increased from 87 per cent in 2017-18: Federal Circuit Court of Australia, *Annual Report 2018-19* (Report, 2019) 30.

<sup>58</sup> Federal Circuit Court of Australia, *Annual Report 2018-19* (Report, 2019) 3.

<sup>59</sup> Administrative Appeals Tribunal, *Annual Report 2018-19* (Report, 2019) 21.

<sup>60</sup> Administrative Appeals Tribunal, '2018-19 At A Glance' (Web page, October 2019) 3

<<https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2018-19-annual-report/2018-19-at-a-glance>>.

<sup>61</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 13.

<sup>62</sup> Productivity Commission, *Report on Government Services 2019: Courts*, Table 7A.2; Family Court of Australia, *Annual Report 2018-19* (Report, 2019) 17.

<sup>63</sup> Federal Court of Australia, *Annual Report 2018-19* (Report, 2019) pt 3, 24.

in 2017-18 had increased by over 30 per cent, from 764 in 2016-17 to 1019 for 2017-18.<sup>64</sup> This has increased by a further 11 per cent in 2018-19.<sup>65</sup> Filings in the Federal Circuit Court have increased by 38 per cent since 2014.<sup>66</sup> The Law Council understands that at the Sydney Registry of the Federal Circuit Court, the callover lists of most Judges are already full to mid-2020.

65. In 2018-19 the AAT has received the highest ever number of lodgements in a single year.<sup>67</sup> While this has only increased by three per cent since 2017-18, it is 46 per cent more than were lodged in 2015-16. The Migration and Refugee Division remains the division with largest volume of applications lodged, which has doubled since 2015-16 to more than 36,000 in both 2017-18 and 2018-19.<sup>68</sup> The Social Services and Child Support Division received the second highest number of lodgements, which increased by 24 per cent compared to 2017-18.<sup>69</sup> The AAT finalised more than 44,000 cases in the reporting year, 11 per cent more than in 2017-18, with finalisations in the Migration and Refugee Division increasing by 16 per cent.<sup>70</sup>
66. However, the number of cases that the AAT has on hand has increased by 30 per cent since June 2018. The AAT noted that:

*While we were able to increase the number of applications finalised in 2018-19 with the appointment of more members and the application of improved case management strategies, we remain constrained in our ability to respond to the scale of the increased demand for our services. This requires additional member, staff and financial resources as well as legislative and technology changes that will assist us to operate more effectively and efficiently.<sup>71</sup>*

*... the AAT's ability to finalise applications is primarily dependent on the resources, particularly the number of members, available to deal with our caseload. The number of reviews completed reflects what we were able to achieve with our members and staff during the reporting year.<sup>72</sup>*

67. While the workload of the courts and tribunals has increased, there has been an insufficient corresponding increase in resources. This has placed pressure on the ability for courts and tribunals to process and resolve matters in a timely manner.
68. The Honourable Ian Callinan AC, in his review of the operation of the *Tribunals Amalgamation Act 2015 (Cth)* (**Callinan Review**), found that the AAT's Migration and Refugee Division is the Division that is most in need of further funding.<sup>73</sup> The review found that:

*... there is a real and pressing need for further Members and resources in this Division. Whilst there is such a deficit in it, reviews to be made will multiply, deserving applicants will continue to live in uncertainty, and*

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<sup>64</sup> Federal Court of Australia, *Annual Report 2017-18* (Report, 2018) 31.

<sup>65</sup> Federal Court of Australia, *Annual Report 2018-19* (Report, 2019) pt 3, 29.

<sup>66</sup> *Ibid* 24.

<sup>67</sup> Administrative Appeals Tribunal, *Annual Report 2018-19* (Report, 2019) 2, 25.

<sup>68</sup> *Ibid* 2, 33.

<sup>69</sup> *Ibid* 2, 30.

<sup>70</sup> *Ibid* 2.

<sup>71</sup> *Ibid* 24.

<sup>72</sup> *Ibid* 21.

<sup>73</sup> Ian David Francis Callinan AC QC, *Review: Section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019) 22 [1.35].

*dishonest or ineligible applicants will be able to remain within the country.*<sup>74</sup>

### Delays in judicial appointments

69. The Justice Project identified that delay in judicial appointments, particularly in RRR areas, can cause significant court backlog and subsequent delays.<sup>75</sup> The Law Council submits that adequately resourcing the federal courts and tribunals involves the prompt filling of judicial vacancies and appointing sufficient numbers of judges and members to hear matters expeditiously, including additional Judges, Registrars and other staff in order to efficiently deal with the considerable increase in the Federal Circuit Court's migration workload. This should be supported with additional funding for legal assistance services for those people with cases moving through this system.<sup>76</sup>
70. The Law Council welcomed the several judicial appointments made to the Family Court, Federal Court and Federal Circuit Court during 2019.<sup>77</sup> Delays in appointing judges to positions that become vacant in the federal courts can have an ongoing impact on the operation of those courts. A delay of even as little as two months can have a significant impact, particularly in registries that already face substantial delays. The Family Court's *Annual Report 2018-19* noted that the capacity to finalise some of the pending applications older than 12 months was impacted by judicial vacancies in 2018-19, particularly in the Melbourne and Sydney registries.<sup>78</sup>
71. The Law Council also welcomed efforts to increase the resources of the AAT through 34 additional appointments in 2019. Currently, the AAT has the highest number of members since amalgamation.<sup>79</sup> The AAT has noted the positive direct impact that this membership increase has had on the outcomes it was able to deliver in 2018-19:

*... the number of applications finalised was above the number we expected to complete, reflecting the appointment of additional members during the year and measures put in place to improve our effectiveness and efficiency.*<sup>80</sup>

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<sup>74</sup> Ibid 23.

<sup>75</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018)13-4.

<sup>76</sup> Law Council of Australia, Submission to the Treasury, *2018-19 Pre-Budget Submission* (31 January 2018) 14.

<sup>77</sup> Law Council of Australia, 'Additional Federal Court Appointments Welcome to Manage Increased Caseload, Extended Jurisdiction' (Media Release, 5 April 2019) <<https://www.lawcouncil.asn.au/media/media-releases/additional-federal-court-appointments-welcome-to-manage-increased-caseload-extended-jurisdiction>>; Law Council of Australia, 'Law Council Backs Appointment of Townsville Judge Following Long Vacancy' (Media Release, 22 March 2019) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-backs-appointment-of-townsville-judge-following-long-vacancy>>; Law Council of Australia, 'Law Council Welcomes Five New Court Appointments' (Media Release, 25 February 2019) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-welcomes-five-new-court-appointments>>; Law Council of Australia, 'Law Council Applauds Family Court Appointments' (Media Release, 12 February 2019) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-applauds-family-court-appointments>>.

<sup>78</sup> Family Court of Australia, *Annual Report 2018-19* (Report, 2019) 22.

<sup>79</sup> Administrative Appeals Tribunal, *Annual Report 2018-19* (Report, 2019) 3.

<sup>80</sup> Ibid 21.

## Family Court of Australia and Federal Circuit Court of Australia

72. There has been chronic underfunding of the family law system over several decades and a failure to make timely appointments of judicial officers when retirements occurred, resulting in a backlog of cases and long delays.
73. Proper resourcing of the family law system and timely appointments are needed to help solve the problem. The structural changes as proposed by the Federal Circuit and Family Court of Australia Bill 2019 (**Merger Bill**) will not, in the view of the Law Council, result in substantial efficiencies, reduction in delays or increased deliverables for the community, nor will it reduce complexity or legal costs in the family law system. The merger proposal will abolish a stand-alone, specialist family court as we know it and will fail to address the risk of victims of family violence falling through the cracks.
74. There is an urgent need to increase resourcing of the Family Court and the Federal Circuit Court. The funding and resourcing of Australia's family law courts is a matter of national importance that needs to be addressed by the Australian Government. Family law impacts a broad range of Australians, not just court users. The social, economic and emotional costs of having a system that is chronically under-funded and under-resourced are immense.<sup>81</sup>
75. During 2018 and 2019, the Law Council has made a number of submissions which have identified chronic underfunding of the family law system as a major problem in terms of access to justice for Australians. The Law Council highlighted this in its submissions during 2018 in relation to the previous iteration of the Merger Bill,<sup>82</sup> as well as in its Pre-Budget submissions for the 2018-19 federal budget and 2019-20 federal budget.<sup>83</sup>
76. The Australian Law Reform Commission (**ALRC**) found in its *Review of the Family Law System* that at a systemic level, the current family law system suffers from a deficiency in funding:
- There is a chronic lack of funding for the appointment and proper training of judicial resources (including judges, judicial registrars – none of whom are currently employed within the courts, and registrars), court-based social services professionals (including Family Consultants and Indigenous Liaison Officers), and legal aid services (including Independent Children's Lawyers).<sup>84</sup>*
77. These factors have all contributed to the creation of crippling judicial workloads, necessarily impacting upon quality and timely access to justice for Australians in the family law system. As more Australians will have contact with the family law system than perhaps any other part of our justice system, there is a need for urgent injection of resources to ease the burden on Judges, court staff and litigants. This would ensure

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<sup>81</sup> Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (23 November 2018) 18, citing Law Society of New South Wales, Submission to the Law Council of Australia, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (November 2019).

<sup>82</sup> Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (23 November 2018).

<sup>83</sup> Law Council of Australia, Submission to the Treasury, *2019-20 Pre-Budget Submission* (12 February 2019); Law Council of Australia, Submission to the Treasury, *2018-19 Pre-Budget Submission* (31 January 2019).

<sup>84</sup> Australian Law Reform Commission, *Review of the Family Law System* (Final Report 135, 27 September 2019) 32.

the ongoing work undertaken by the courts and their administrative support are able to operate at optimal levels.<sup>85</sup>

78. The Law Council notes that any court system, whether it be in family law (as it exists now or in the future) and in any other jurisdiction, can only properly serve a community if it is properly funded and resourced. Without that backing from government, it is impossible for its goals to be achieved.
79. The Law Council commends the Australian Government for commencing the process of considering and implementing the recommendations arising from ALRC's *Review of the Family Law System*.<sup>86</sup>
80. The Law Council also commends the Australian Government's current focus on the ability of the federal courts to provide the community with accessible services for the resolution of family disputes. The Law Council understands the need to give careful consideration to the ALRC recommendations in light of supporting evidence. Further, the Law Council notes that the Australian Parliament has appointed a Joint Select Committee on Australia's Family Law System, which will report on 7 October 2020.

#### **Recommendations:**

- **The Australian Government should provide additional resources to the federal courts, in particular the Family Court of Australia and the Federal Circuit Court of Australia, including additional Judges, Registrars and other staff in order to efficiently deal with the considerable increase in workload. This should be supported with additional funding for legal assistance services for those people with cases moving through these systems.**
- **The Australian Government should make additional targeted resources available to the Administrative Appeals Tribunal to better enable it to meet its performance measures and efficiently deal with the increase in its workload.**

#### **Specialist lists and Indigenous Liaison Officers in the Family Court**

81. The ALRC's *Pathways to Justice Report* recommended that specialist Aboriginal and Torres Strait Islander sentencing courts should be established, which have individualised case management, wrap-around services and are culturally competent, safe and appropriate, with relevant Indigenous organisations playing a central role in the design, implementation and evaluation of specialist Indigenous sentencing courts.<sup>87</sup>
82. Although those recommendations reference states and territories, the Commonwealth has Indigenous affairs responsibilities which should translate to, among other things, the provision of funding for specialist Indigenous lists in courts and tribunals. The Law Council is supportive of measures to introduce or maintain specialist Indigenous lists across relevant Australian courts and tribunals.

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<sup>85</sup> Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (23 November 2018) 43.

<sup>86</sup> Australian Law Reform Commission, *Review of the Family Law System* (Final Report 135, 27 September 2019).

<sup>87</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Final Report 133, 27 March 2018) 328.

83. The ALRC recommended in its *Review of the Family Law System* that the Australian Government ensure the availability of Indigenous Liaison Officers in court registries where they are required.<sup>88</sup> The ALRC considers that the Australian Government should provide sufficient funding to restore the program through which Indigenous Liaison Officers were engaged in each registry of the Family Court as appropriate to the needs of that registry. This is consistent with Recommendation 6 of the Family Law Council's 2012 Report *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*.<sup>89</sup>
84. The Law Council supports this recommendation and recommends that the allocation of immediate funding to re-employ Indigenous Liaison Officers in the Northern Territory, Far North Queensland and Western Australia with a progressive roll out in other states and territories and metropolitan registry areas.

**Recommendation:**

- **The Australian Government should ensure the availability and adequate resourcing of Indigenous Liaison Officers in Family Court registries where they are required, particularly in the Northern Territory, Far North Queensland and Western Australia with a progressive roll out in other states and territories and metropolitan registry areas.**

## What level of Commonwealth funding is required?

### National inquiry into resourcing the federal courts and tribunals

85. It is incumbent on the Commonwealth to ensure unreasonable delays in federal courts and tribunals are minimised by providing sufficient resources and sustainable funding. The Justice Project highlighted the fact that there has not been a full-scale review and assessment of the resourcing needs of courts and tribunals in recent years and there is an immediate need for a full and publicly available review of the resourcing needs of the judicial system to ensure funding is allocated accordingly.<sup>90</sup>
86. In 2014 and 2015 respectively, the Government commissioned KPMG and Ernst & Young to conduct internal reviews on the performance of federal courts, the costs and savings of potential reform options, and structural and funding issues. The KPMG report called for a considerable increase in court resources while the Ernst & Young report identified several reform areas that it suggested could result in efficiency savings.<sup>91</sup>
87. Most recently, in 2018 the Government commissioned PwC to review the efficiency of the operation of the federal courts in relation to family law, a report that has formed the basis of the Government's proposed structural reforms to the Family and Federal Circuit Courts.<sup>92</sup> However, the future funding needs or expenditure allocation of the

<sup>88</sup> Australian Law Reform Commission, *Review of the Family Law System* (Final Report 135, 27 September 2019) 378.

<sup>89</sup> Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012) <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>>.

<sup>90</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2019) 19 recommendation 4.1.

<sup>91</sup> See Attorney-General's Department, 'Structural Reform of the Federal Courts' (Web Page) <<https://www.ag.gov.au/LegalSystem/Courts/Pages/Structural-reform-of-the-federal-courts.aspx>>.

<sup>92</sup> PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts* (Final Report, April 2018) <<https://www.ag.gov.au/LegalSystem/Courts/Documents/pwc-report.pdf>>.



courts was deemed to lie outside the scope of the report and therefore the efficacy of the courts was examined against the existing levels of funding and judicial appointments.<sup>93</sup>

88. While these reports have now been released publicly, the delay in their publication and lack of transparency during their production are concerns that were raised in the Justice Project.<sup>94</sup> The Law Council submits that there is a need for greater transparency in matters that involve calls for increased funding or propose significant structural reforms, with future reports requiring prompt release to enable enlightened policy discussions in this area.
89. Echoing the recommendation of the Justice Project, it is of critical importance that the Australian Government, working with state and territory governments, commission a full review of the resourcing needs of the federal courts and tribunals. Alongside this review, the Australian government should facilitate an open public discussion about the economic, social and civic importance of meeting the resourcing needs of courts and tribunals.

**Recommendation:**

- **The Australian Government, working with state and territory governments, should commission a full review of the resourcing needs of the federal courts and tribunals. Alongside this review, the Australian government should facilitate an open public discussion about the economic, social and civic importance of meeting the resourcing needs of courts and tribunals.**

### Judicial Appointments Process

90. The Australian Government should adopt and adequately resource a judicial appointment process that promotes greater transparency and accountability of judicial appointments.
91. In September 2008, the Law Council issued a policy statement titled *The Process of Judicial Appointments* in which it supports the view that judicial appointment should be a function of Executive Government and supports the establishment of a formal Judicial Appointment Protocol which outlines the judicial appointments process in the federal courts.<sup>95</sup>
92. The Law Council supports reforms that would see judicial appointments to the Federal Court, Family Court and Federal Circuit Court and the AAT publicly advertised, with an independent panel to provide a shortlist of potential appointees to the Attorney-General. The Law Council welcomes the fact that the protocol developed in March 2019 between the Attorney-General and the President of the AAT relating to the ongoing appointment needs of the AAT requires the President to seek expressions of interest by public advertisement.<sup>96</sup>
93. The importance of merits-based appointment in the AAT was noted in the Callinan Review where it was recommended that:

*further appointments, re-appointments or renewals of appointment to the Membership of the AAT should be of lawyers, admitted or qualified for*

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<sup>93</sup> Ibid.

<sup>94</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 19.

<sup>95</sup> Law Council of Australia, *Policy Statement: The Process of Judicial Appointments* (September 2008).

<sup>96</sup> *Protocol on Appointments to the Administrative Appeals Tribunal* (2019).

admission to a Supreme Court of a State or Territory or the High Court of Australia, and on the basis of merit.<sup>97</sup>

**Recommendation:**

- **The Australian Government should adopt and adequately resource a judicial appointment process that promotes greater transparency and accountability of judicial appointments.**

**National Justice Interpreter Scheme**

94. During the Justice Project, stakeholders expressed concern about the critical shortages of appropriately trained and culturally sensitive interpreters in the justice system.<sup>98</sup> This was overwhelmingly brought up as a key priority, particularly in the context of recent arrivals to Australia, people who are seeking asylum, Aboriginal and Torres Strait Islander peoples and in RRR areas.<sup>99</sup> For example, Townsville Community Legal Service explained in Justice Project consultations that there are very few interpreters (in all languages and AUSLAN) available in Townsville in the Federal Court and Federal Circuit Court.<sup>100</sup>
95. Integral to the federal jurisdiction is access to high quality interpreting, particularly due to the large number of migration matters involving individuals from culturally and linguistically diverse (**CALD**) backgrounds. Currently, there is little data available on the provision of interpreting services in the federal courts.<sup>101</sup>
96. In 2017, the Judicial Council on Cultural Diversity (**JCCD**) released the *Recommended National Standards for Working with Interpreters in Courts and Tribunals*. The standards are comprehensive regarding interpreters within courts and tribunals, and are a guide to best practice in the judicial system.<sup>102</sup> The standards are a tool for the courts to use, in assessing whether and when to engage an interpreter, how to engage one and what to expect from them, and it also prescribes a set of standards for interpreters.<sup>103</sup> Noting that there are often shortages of interpreters for particular languages, the standards include both minimum standards and optimal standards that can be implemented where there is a larger pool of qualified interpreters.<sup>104</sup> While these standards provide an excellent guide for the courts, it is necessary to ensure interpreter services and courts are adequately funded to enable its implementation.

<sup>97</sup> Ian David Francis Callinan AC QC, *Review: Section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019) 9 [1.8].

<sup>98</sup> Law Council of Australia, *The Justice Project: Final Report – Part 1: Recent Arrivals to Australia* (August 2018) 19-20.

<sup>99</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Critical Support Services* (August 2018) 47.

<sup>100</sup> Law Council of Australia, *The Justice Project: Final Report - Part 1: Recent Arrivals to Australia* (August 2018) 21, citing consultation with Townsville Community Legal Service in Townsville on 29 August 2017.

<sup>101</sup> Law Council of Australia, *Submission to the Treasury, 2019-20 Pre-Budget Submission* (12 February 2019) [98].

<sup>102</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Critical Support Services* (August 2018) 47, citing Jenna Gray, National Accreditation Authority for Translators and Interpreters, 'Judicial Council completes Recommended Standards for Interpreters Working in Court Settings' (Media Release, 31 October 2017) <<https://www.naati.com.au/news-events/news-events-container/updates/jccd-recommended-national-standards/>>.

<sup>103</sup> Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2017) iv <<http://jccd.org.au/wp-content/uploads/2018/02/JCCD-Interpreter-Standards.pdf>>.

<sup>104</sup> *Ibid.*

97. The Productivity Commission and the JCCD have identified an urgent need for funding for Aboriginal interpreter services, and for training and professional development to be provided to existing Aboriginal language interpreters.<sup>105</sup> This point was consistently raised in submissions to the Justice Project. For example, Kingsford Legal Centre has recommended that all levels of government should work with peak Aboriginal and Torres Strait Islander organisations to ‘establish and fund high quality, culturally appropriate and accessible interpreter services within the justice system’.<sup>106</sup>
98. Recommendation 22.3 of the Productivity Commission’s 2014 report *Access to Justice Arrangements*, that a National Aboriginal and Torres Strait Islander Interpreter Service be developed and funded, remains outstanding. Specifically, the Productivity Commission recommended that:
- That the Northern Territory Aboriginal Interpreter Service as a platform for a National Aboriginal and Torres Strait Islander Interpreter Service be funded by ongoing contributions from the Australian, State and Territory Governments. While this service is being developed governments should focus their initial efforts on improving the availability of Aboriginal and Torres Strait Islander interpreter services in high need areas, such as in courts and disputes in rural and remote communities.*<sup>107</sup>
99. The National Accreditation Authority for Translators and Interpreters (**NAATI**) receives funding for the Indigenous Interpreting Project through the Australian Government’s Indigenous Advancement Strategy.<sup>108</sup> The Law Council recognises that the Australian Government announced \$1.6 million in funding in June 2017 to the project.<sup>109</sup> However, the Law Council reiterates the point raised in its Pre-Budget submission for 2019-20 that NAATI is not an employer of translators or interpreters, but rather it focuses on issuing accreditations for practitioners aiming to work as translators or interpreters.<sup>110</sup>
100. The Law Council reiterates its recommendation from the Justice Project that the Australian Government should implement a National Justice Interpreter Scheme, which ensures that:
- (a) professional, appropriate and skilled interpreters are readily available and free to people from culturally and linguistically diverse backgrounds who cannot afford them, including Aboriginal and Torres Strait Islander peoples, recent arrivals, asylum seekers, and people who are trafficked and exploited, at all levels of the justice system, including legal assistance services;

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<sup>105</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Critical Support Services* (August 2018) 48, citing Productivity Commission, *Access to Justice Arrangements*, 780; Judicial Council on Cultural Diversity, *Cultural Diversity within the Judicial Context: Existing Court Resources* (2016) 6.

<sup>106</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Critical Support Services* (August 2018) 48, citing Kingsford Legal Centre, Submission No 93 to the Law Council of Australia, *Response to the Justice Project Issues Paper on Aboriginal and Torres Strait Islander People* (4 October 2017).

<sup>107</sup> Productivity Commission, *Access to Justice Arrangements*, 66 recommendation 22.3.

<sup>108</sup> National Accreditation Authority for Translators and Interpreters, ‘Indigenous Interpreting Project (IIP)’ (Web page) <<https://www.naati.com.au/development/indigenous-interpreting-project-iip/>>.

<sup>109</sup> Indigenous Affairs, Department of Prime Minister and Cabinet, ‘Minister Scullion: Additional \$1.6m for Indigenous Language Interpreters’ (Media Release, 16 June 2017) <<http://www.indigenous.gov.au/news-and-media/announcements/minister-scullion-additional-16m-indigenous-language-interpreters>>.

<sup>110</sup> Law Council of Australia, Submission to the Treasury, *2019-20 Pre-Budget Submission* (12 February 2019) 28 [102], citing NSW Bar Association, Submission No 88 to the Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander People* (2017) 41-2.

- (b) interpreter services and courts are funded to enable the full implementation of the JCCD's *Recommended National Standards for Working with Interpreters in Courts and Tribunals*; and
- (c) the Productivity Commission's Recommendation 22.3 from its *Access to Justice Arrangements Report* regarding the development of a National Aboriginal and Torres Strait Islander Interpreter Service is implemented.

**Recommendation:**

- **The Australian Government should establish and adequately resource a National Justice Interpreter Scheme and a National Aboriginal and Torres Strait Islander Interpreter Service.**

## Access to justice in regional, rural and remote (RRR) areas

### Legal assistance in RRR areas

101. In 2014, the Productivity Commission recorded ongoing concerns being raised by RRR stakeholders, including regarding considerable levels of unmet need in certain remote communities.<sup>111</sup> The Justice Project also highlighted the significant and ongoing concerns regarding the levels of unmet legal need in RRR communities.<sup>112</sup> Justice Project stakeholders emphasised that many RRR residents experience financial barriers in accessing legal assistance.<sup>113</sup> It highlighted that strict legal aid grant eligibility rules can mean that Australians in RRR areas, such as those in the farming industry and small business owners, may be 'asset rich, financially poor', and thus cannot access legal aid despite not being able to afford a lawyer.<sup>114</sup>
102. In its submission to the Justice Project, Community Legal Centres NSW considered that:

*Because many RRR Australians can be identified as 'asset rich, financially poor' individuals, they are often unqualified to accept pro bono legal assistance from initiatives due to the value of the property they might own, even if they do not have the finances to pay for private legal assistance'.<sup>115</sup>*

103. As noted above, there is currently very little public legal assistance funding dedicated to support civil law matters. In this regard, less than three per cent of means-tested legal aid grants for legal representation and dispute resolution nationally were for civil

<sup>111</sup> Productivity Commission, *Access to Justice Arrangements*, 98, citing Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements* (13 November 2013) and Central Australian Aboriginal Legal Aid Service Inc, Submission No 89 to Productivity Commission, *Access to Justice Arrangements* (11 November 2013).

<sup>112</sup> Law Council of Australia, *The Justice Project: Final Report – Part 1: Rural, Regional and Remote (RRR) Australia* (August 2018) 4.

<sup>113</sup> Ibid 16, citing Legal Aid Queensland at The Justice Project consultation on 29 August 2017 in Townsville. See also Community Legal Centres NSW, Submission No 106 to the Law Council of Australia, *The Justice Project* (9 October 2017).

<sup>114</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018) 14; Law Council of Australia, *The Justice Project: Final Report – Part 1: Rural, Regional and Remote (RRR) Australians* (August 2018) 16, citing Legal Aid Queensland at The Justice Project consultation on 29 August 2017 in Townsville. See also Community Legal Centres NSW, Submission No 106 to the Law Council of Australia, *The Justice Project* (9 October 2017).

<sup>115</sup> Community Legal Centres NSW, Submission No 106 to the Law Council of Australia, *The Justice Project* (9 October 2017).

law matters in 2016-17, compared to 65.4 per cent for criminal law matters and 32.3 per cent for family law matters.<sup>116</sup>

104. The Law Council views with concern the fact that when intensive levels of legal assistance are required for civil law matters, it is unlikely that this support will come from a legal aid grant, placing significant pressure on the community legal assistance sector and pro bono legal services. The difficulty in obtaining legal aid grants for civil law matters places a burden on the broader community legal sector. In particular, chronically under-funded and under-resourced CLCs are left to address the void of legal assistance services for civil law matters.
105. Among the top five legal problems dealt with by CLCs is credit and debt issues.<sup>117</sup> It is estimated that around 240,000 financially disadvantaged people per annum experience these kinds of issues and therefore need access to free legal information and advice.<sup>118</sup> The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Services Royal Commission**) highlighted the consumer and financial services issues facing RRR Australians. The Interim Report found that frequent reference was made to the difficulty that farmers have in obtaining access to banking services and to appropriate support.<sup>119</sup> The imbalance between claimants and financial service entities is particularly pronounced in the expert legal representation engaged by financial institutions throughout the course of a dispute, compared with that typically engaged by individuals and small businesses.<sup>120</sup>
106. The Productivity Commission found that thin markets, especially in rural and remote areas, provided an important rationale for publicly-funded legal assistance services and recommended an additional \$200 million per year for civil legal assistance services alone.<sup>121</sup> It further found that the sustainability of the successful mixed model of legal assistance provision (using in-house and private lawyers) was in question, and that financial incentives were required to attract private practitioners to perform essential legal assistance work, particularly in RRR areas.<sup>122</sup>
107. Several other significant inquiries have recognised unmet legal need and broader access to justice issues amongst RRR communities.<sup>123</sup> The Justice Project further noted the significant and ongoing concerns regarding shortages of both RRR private

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<sup>116</sup> National Legal Aid, *Legal Aid Commission Services 2015 to 2017 – Attachment A*.

<sup>117</sup> National Association of Community Legal Centres and Financial Counselling Australia, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (26 October 2018) 11.

<sup>118</sup> Ibid 6. Of the 1.2 million individuals with credit debt legal problems, 20 per cent, or 240,000 are likely to be in the lowest income quintile, and all these people are likely to need at least some legal information to help them resolve the issue: Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia Access to Justice and Legal Needs' (2012) 7 *Law and Justice Foundation*, 60. See also G Renouf and P Porteous, *Consumer Credit Legal Services in Australia* (Unpublished Report to Australian Security and Investment Commission, Document 18 on ASIC FOI Disclosure Log 2011-2017, 2011) <<https://asic.gov.au/about-asic/freedom-of-information-foi/foidisclosure-log/freedom-of-information-asic-disclosure-log-archive-2011-2017>>.

<sup>119</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, February 2019) vol 1 237.

<sup>120</sup> Ibid 488-9.

<sup>121</sup> Productivity Commission, *Access to Justice Arrangements*, 666, 703.

<sup>122</sup> Ibid 703.

<sup>123</sup> Richard Coverdale, Centre for Rural Regional Law and Justice, *Postcode Justice – Rural and Regional Disadvantage in the Administration of the Law in Victoria* (2011) 21-2, citing Legal and Constitutional Affairs References Committee, Parliament of Australia, *Access to Justice* (2009) recommendations 1, 3, 6; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (Final Report, 8 June 2004) 41, 78; Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) 6, 43, 139.

and public legal practitioners.<sup>124</sup> The Justice Project found that common themes were raised during consultations about the state of legal assistance in RRR areas, including:

- (a) general shortages of lawyers in RRR areas;
- (b) scarce and over-stretched legal assistance services in RRR area;
- (c) insufficient loading for legal assistance services to deliver effectively to RRR areas;
- (d) insufficient private practitioners;
- (e) conflict of interest issues;
- (f) lack of specialist services; and
- (g) recruitment and retention issues.

108. A lack of legal assistance services and other dispute resolution services can result in inaction and an escalation of matters:

*...the inevitable consequence is that legal problems remain undetected, communities remain uninformed about fundamental legal issues, and so more serious legal problems which are more costly both socially and economically, arise later on.*<sup>125</sup>

109. Other impacts of a paucity of lawyers in RRR areas are that there is likely to be a greater proportion of individuals who are unrepresented in court. Commentators to the Justice Project expressed concerns about self-representation among RRR Australians. While data on self-represented litigants is limited, it was noted in the Justice Project that in RRR areas with a scarcity of lawyers, 'it can be expected that a greater proportion of [individuals] will be unrepresented in court'.<sup>126</sup> For example, the Townsville Community Legal Service had observed that people were more likely to self-represent, but less able to do so due to the increasing complexity of the legal system.<sup>127</sup>

110. Concerns of RRR legal services in regard to individuals self-representing in family law matters were also raised during the Justice Project. In its submission to the Justice Project, the Hume Riverina Community Legal Service commented that local gaps in pro bono family law representation leave clients self-representing to their own detriment, as 'clients may choose to self-represent but the process is complicated and not a viable option for many people'.<sup>128</sup> Aboriginal Family Law Services in Kalgoorlie commented that where services could not help people with family and child protection matters, 'people don't want to go and represent themselves at a hearing. They won't pursue it'.<sup>129</sup>

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<sup>124</sup> Law Council of Australia, *The Justice Project: Final Report – Part 1: Rural, Regional and Remote (RRR) Australia* (August 2018) 4.

<sup>125</sup> *Ibid* 39.

<sup>126</sup> *Ibid* 40, citing Centre for Rural Regional Law and Justice and National Rural Law, Submission No 4 to Department of Justice and Regulation (Victoria), *Access to Justice Review*, 10.

<sup>127</sup> *Ibid* 40-1, citing consultation with Townsville Community Legal Service in Townsville on 29 August 2018.

<sup>128</sup> *Ibid*, citing Hume Riverina Community Legal Service, Submission No 122 to the Law Council of Australia, *A Submission to the Law Council of Australia by Hume Riverina Community Legal Service as part of the Justice Project in Response to the RRR Australians Consultation Paper* (13 October 2017).

<sup>129</sup> *Ibid*, citing consultation with Aboriginal Family Law Services in Kalgoorlie on 8 September 2017.

111. The Law Council supports the proposals of Financial Counselling Australia and the National Association of Community Legal Centres' (now Community Legal Centres Australia) in their submission to the Financial Services Royal Commission for additional resourcing to create a properly funded network of community financial counselling and community legal services.<sup>130</sup> This needs to be complemented by adequately funded state and territory civil law legal assistance services.
112. The Law Council recommends that governments, peak legal assistance and legal professional bodies should cooperate to develop RRR access to justice strategies to ensure an appropriate and tailored mix of services, publicly funded and private, in areas of critical need. These strategies should be planned and tailored to meet regional circumstances, and may include rural placement, mentoring and incentive schemes, resourcing additional legal services, increasing legal aid rates, and strengthening practitioner referral networks (including to facilitate pro bono assistance).<sup>131</sup>
113. In this context, the Law Council notes the following investment proposals and strategies that may be effective in overcoming a scarcity of RRR lawyers, including local recruitment and retention issues:
- (a) financial incentives to plug critical gaps, such as HECS debt relief, free housing, monetary allowances or other financial incentives for relocation and remaining in RRR areas;
  - (b) training locals to become lawyers, including the employment of local paralegals which could encourage staff to commence law degrees;
  - (c) tailoring any targeted incentives schemes at more experienced lawyers, as well as/instead of juniors, who may be less likely to settle into communities longer term, such as concessions for Fringe Benefit Tax liabilities on employer payments of employee benefits which apply to both new legal practitioners and experienced practitioners looking for a career change;
  - (d) expanding/maintaining RRR circuit courts, noting that these offer important opportunities to RRR solicitors who are build their careers;
  - (e) ensuring a stronger flow of government legal work to local RRR firms, as it was observed that this had declined and local lawyers were missing out, with flow-on effects for communities; and
  - (f) incentivising industry and education providers to increase the number of opportunities for placements in RRR areas for law students and graduates.
114. It is also observed that compared with the services offered by other sectors, there has been relatively little emphasis on ensuring that RRR communities can receive legal services.<sup>132</sup> In this context, it is noteworthy that in 2017, the Australian Government announced that hundreds of new junior doctors would experience work as a general practitioner in RRR Australia, under the second round of the Rural Junior Doctor Training Innovation Fund. This fund, providing up to \$18.6 million, was intended to

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<sup>130</sup> National Association of Community Legal Centres and Financial Counselling Australia, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (26 October 2018).

<sup>131</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018) 64.

<sup>132</sup> *Ibid* 63.

address the medical workforce shortage in rural Australia and improve the health outcomes of people living in those areas.<sup>133</sup>

## Federal courts in RRR areas

115. The Justice Project highlighted that additional funding and resources are required to maintain and, where required, expand RRR circuit courts, having regard to their important function in upholding the rule of law and fostering community engagement through a tangible local presence.<sup>134</sup>
116. The Justice Project noted that a decline in local court circuit services in RRR communities has been observed, which significantly exacerbates distance, transport and cost barriers for residents. Submissions to the Justice Project provided examples of the difficulties faced by individuals in RRR Australia in accessing the federal courts. For example:

*In one Western NSW CLC example, the client, a middle-aged man with a workplace incurred injury required help with an employment law general protections matter. The first Federal Circuit Court mention was listed in Sydney, around eight hours away by car. However, the client was unable to drive, and it would have been 'almost impossible' to attend the mention without assistance. Fortunately, the lawyer was in Sydney for other reasons and appeared for the client. Subsequent efforts to arrange for the client to attend the mediation by telephone were not agreed by the other side. While, ultimately, pro bono legal assistance in Sydney was secured, this was a stark example of the difficulties which can be faced by RRR clients in attending city hearings.*<sup>135</sup>

117. The Federal Circuit Court's Circuit Program for 2018-19 was similar to 2017-18.<sup>136</sup> It sat in 30 rural and regional locations on 150 occasions as, with the length of these circuits varying from single days to whole weeks.<sup>137</sup> In addition to those 150 occasions, the Federal Circuit Court reports that there was a significant judicial presence in the Dandenong and Wollongong registries where there is a near full-time judicial presence.<sup>138</sup> As was in 2017-18, 20 per cent of the Federal Circuit Court's family law workload in 2018-19 was undertaken on circuit.<sup>139</sup>
118. Comparing the Federal Circuit Court's Circuit Program in 2018-19 to the time it spent on circuit in 2012-13, when it had almost 45 per cent less general federal law matters and 4 per cent less family law matters,<sup>140</sup> approximately the same amount of days per year is spent on circuit in regional areas.<sup>141</sup>

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<sup>133</sup> Ibid, citing David Gillespie, 'More Training for Junior Doctors in Regional and Rural Australia' (Media Release, 27 October 2017).

<sup>134</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 73.

<sup>135</sup> Ibid.

<sup>136</sup> Federal Circuit Court of Australia, *Annual Report 2017-18* (Report, 2018) 76.

<sup>137</sup> Ibid.

<sup>138</sup> Federal Circuit Court of Australia, *Annual Report 2018-19* (Report, 2019) 76.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid 27; Federal Circuit Court of Australia, *Annual Report 2012-13* (Report, 2013) 40, 46.

<sup>141</sup> In 2012, the Federal Circuit Court sat in 28 regional and rural locations and spent approximately 730 days on circuit: KPMG, *Review of the Performance and Funding of the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia* (Report, 2014). Based on current information, the amount of days spent on circuit is unknown. However, if on each of the 150 occasions in 2018-19 the Federal Circuit



119. In certain contexts, the delay in having their matter heard effectively means that their case is already lost.<sup>142</sup> Victoria Legal Aid's office in Mildura told the Justice Project of the consequences for clients with little means of waiting for child protection matters to be heard locally:

*There is certainly a disadvantage for RRR clients in court. In one current example, there's a three month wait for child protection matters, compared to three weeks in Melbourne. The family is really disadvantaged. The mother in this case has lost, because at that time the new status quo is set and the baby has been put in care... It's seven hours on a bus to get to Melbourne. The child protection jurisdiction won't fund our clients to get there.*<sup>143</sup>

120. It is well recognised that technology has the capacity to generate significant time and cost savings for courts and tribunals, as well as for those using the court and tribunal system.<sup>144</sup> In the Federal Circuit Court's *Annual Report 2017-18*, it noted that:

*Federal Circuit Court judges conduct some procedural and urgent hearings by video-link and telephone link in between circuits. The technology provides litigants with greater access to the Court and assists in maximising the value of time spent at the circuit locations. eFiling provides litigants and legal practitioners with greater access to the Court by enabling them to file documents from rural and regional locations as opposed to attending registry locations or using standard post.*<sup>145</sup>

121. As per the Justice Project, it has been found that the appropriate use of technology can improve access to justice for people living in regional, rural and remote areas by reducing travel time, inconvenience and costs.<sup>146</sup> However, consultations and submissions to the Justice Project revealed that there are disadvantages that come with the advantages of the use of technology in the federal court system. One example provided by Regional Alliance West to the Justice Project was that appearing by telephone and video link is less than ideal as reception and connections can be unstable, and time lags can create difficulties with participants inadvertently talking over one another, all of which can exacerbate the stress of the court process itself, particularly for vulnerable individuals such as survivors of family violence.<sup>147</sup>

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Court sat for a week, that would amount to a total of 745 days on circuit: Federal Circuit Court of Australia, *Annual Report 2018-19* (Report, 2019) 76.

<sup>142</sup> Law Council of Australia, *The Justice Project: Final Report – Part 1: Rural, Regional and Remote (RRR) Australians* (August 2018) 45, citing Community Legal Centres NSW, Submission No 106 to the Law Council of Australia, *Law Council of Australia's Justice Project* (9 October 2017).

<sup>143</sup> Ibid, citing consultation with Victoria Legal Aid in Mildura on 26 September 2017.

<sup>144</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 76, citing Productivity Commission, *Access to Justice Arrangements*, 19.

<sup>145</sup> Federal Circuit Court of Australia, *Annual Report 2017-18* (Report, 2018) 76.

<sup>146</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 77, citing Anne Wallace, "'Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia' (2008) 19 *Journal of Law, Information and Science* 1; Bridget Harris, Lucinda Jordan and Lydia, 'Courting Justice Beyond the Cityscape: Access to Justice and the Rural, Regional and Remote Magistrates' Courts' (2014) 23(3) *Journal of Judicial Administration* 158; Justice Project Consultation with Queensland Legal Aid in Townsville on 29 August 2017.

<sup>147</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 78, citing Regional Alliance West, Submission No 94 to the Law Council of Australia, *Submission by Regional Alliance West Inc. to the Law Council of Australia Justice Project* (2017).

122. The Justice Project revealed that Audio Visual Link (**AVL**) can also be problematic for asylum seekers:

*AVL has been criticised as depersonalising the claimant, hindering the credibility of the case, and undermining due process. One comprehensive statistical analysis of immigration decisions in the US found that asylum applicants who had in-person hearings were granted asylum at double the rate of those who had video-conference hearings.*<sup>148</sup>

123. The Justice Project concluded that the while online procedures do have efficiency advantages, it needs to be balanced with local, face to face services and proceedings.<sup>149</sup> For example, since 2016 all divorce applications are filed in the Federal Circuit Court via an electronic divorce file.<sup>150</sup> The Hume Riverina Community Legal Service submitted to the Justice Project that courts should 'reconsider online only applications', such as divorce applications. It argued that online only applications create 'barriers for elderly people, people with literacy issues and those living in rural areas with a lack of internet coverage'.<sup>151</sup>
124. The Productivity Commission considered 'that greater investment in technology is warranted given the potential benefits. A lack of resources appears to be the main barrier to the uptake of technology'.<sup>152</sup> The effectiveness of technology also relies on the existence of reliable infrastructure to support online processes and proceedings, compatible technology between parties, and a willingness and capacity of court users, lawyers and judicial officers to use technology.<sup>153</sup>
125. In its *Annual Report 2018-19*, the Federal Circuit Court again acknowledged that reliance on the states for facilities while on circuit, such as courtrooms, hours of access and access to technology and resources including video-link pose a number of challenges for the Court.<sup>154</sup> The Law Council submits that the Government must invest in technology and new models of service delivery, particularly in RRR areas, so that these initiatives can achieve their intended purpose of increasing the reach of federal courts and tribunals to regional areas and improving equitable access to the justice system.<sup>155</sup>

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<sup>148</sup> Ibid 79, citing Susan Banki and Ilan Katz, *Resolving Immigration Status, Part 1: Review of the International Literature* (University of New South Wales Social Policy Research Centre, 2009) 35, 39.

<sup>149</sup> Ibid 80.

<sup>150</sup> Federal Circuit Court of Australia, *Annual Report 2017-18* (Report, 2018) 20.

<sup>151</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 80, citing Hume Riverina Community Legal Service, Submission No 122 to the Law Council of Australia, *A Submission to the Law Council of Australia by Hume Riverina Community Legal Service as part of the Justice Project in Response to the RRR Australians Consultation Paper* (13 October 2017).

<sup>152</sup> Productivity Commission, *Access to Justice Arrangements*, 20.

<sup>153</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 80.

<sup>154</sup> Federal Circuit Court of Australia, *Annual Report 2018-19* (Report, 2019) 76; Federal Circuit Court of Australia, *Annual Report 2017-18* (Report, 2018) 76.

<sup>155</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2: Courts and Tribunals* (August 2018) 80.

**Recommendations:**

- **The Australian Government, peak legal assistance bodies and legal professional bodies should cooperate to develop rural, regional and remote access to justice strategies to ensure an appropriate and tailored mix of services, publicly funded and private, in areas of critical need.**
- **The Australian Government should invest in technology and new models of service delivery, particularly in RRR areas, so that these initiatives can achieve their intended purpose of increasing the reach of federal courts and tribunals to regional areas and improving equitable access to the justice system.**

## Establishment of a Federal Judicial Commission

126. The Law Council acknowledges and welcomes that the 2019-20 Federal Budget provided \$104.5 million over four years from 2019-20 (including \$10 million in capital funding over four years from 2019-20) to establish a Commonwealth Integrity Commission (**CIC**). The 2019-20 Federal Budget also provided for:
- (a) \$2.2 million in 2019-20 (including \$0.8 million in capital funding) for the Australian Commission for Law Enforcement Integrity to commence its reconstitution as the law enforcement integrity division of the CIC with a significantly expanded jurisdiction and to engage an Integrity Commissioner designate prior to the commencement date of the CIC;
  - (b) \$4.9 million over four years from 2019-20 for the Attorney-General's Department to support the CIC and to provide legal services assistance; and
  - (c) \$1.0 million over three years from 2020-21 for the Office of the Commonwealth Ombudsman to oversee operations of the CIC.
127. The Attorney-General's 2018 Discussion Paper, which outlined a proposed model of the CIC, suggested that consideration will be given as to whether the public sector division of the CIC could be given jurisdiction over members of the federal judiciary.<sup>156</sup>
128. The Law Council considers that the oversight of federal judicial officers should not fall within the responsibility of the CIC. The Law Council recommends that a separate Federal Judicial Commission be established apart from a CIC to address judicial misconduct, including corrupt conduct, misuse of judicial authority and any abuse of power by members of the deferral judiciary. Such a Commission should be established by a separate Act of Parliament and could possibly be based on the model of the independent Judicial Commission in New South Wales (**NSW**).
129. The independent Judicial Commission in NSW is established pursuant to section 5 of *Judicial Officers Act 1986* (NSW) which can, *inter alia*, conduct an investigation into any complaint made by members of the public or otherwise into the conduct of any NSW judicial officer. If the complaint is found to be substantiated, a report is prepared which is sent to Parliament to consider or the matter can be referred to the appropriate agency, such as law enforcement.
130. In relation to members of the federal judiciary, it is noted that there is already legislation in place to address 'judicial misbehaviour' under the *Judicial Misbehaviour*

<sup>156</sup> Attorney General's Department, Parliament of Australia, *A Commonwealth Integrity Commission - Proposed Reforms* (Paper, 2018) 5.

and *Incapacity (Parliamentary Commissions) Act 2012* (Cth), which provides for a commission to be established pursuant to section 9 of that Act by the Houses of Parliament to:

... investigate, and to report to them on, alleged misbehaviour or incapacity of a Commonwealth judicial officer, so they can be well-informed to consider whether to pray for his or her removal under paragraph 72(ii) of the Constitution.<sup>157</sup>

131. This may be a more appropriate legislative basis to establish a commission of inquiry in relation to any allegation of judicial misconduct, including corrupt conduct.
132. The Law Council considers that to subject the judiciary to the regulation of the proposed CIC could be open to constitutional challenge as it has the potential to infringe the separation of powers established in the Constitution, which vests judicial power only in the judiciary as per section 71 of the Constitution.<sup>158</sup> Furthermore section 72(ii) of the Constitution provides that it is for the two Houses of Parliament to investigate and decide whether a judicial officer has engaged in misbehaviour and to then remove that officer if appropriate.
133. A further issue is that there may be the need for judicial review of decisions made by the CIC. It is essential to the protection of the rule of law that there be a strong and independent judiciary, separate from, rather than subject to, review by the executive arm of government. This separation of judicial from executive power is of central significance in protecting the rights of all citizens from arbitrary, unlawful interference with their rights and must not be diluted by classifying the judiciary into the same category as other staff of the public service employed in the executive arm of government under the *Public Service Act 1999* (Cth), which the judiciary are not (although it does apply to their staff).
134. An independent, appropriately calibrated Federal Judicial Commission would promote transparency and accountability of all judges and has already received the support of the Judicial Conference of Australia. The Law Council suggests that this would provide a fair mechanism to hear complaints from the public, and a fair process for judges who are the subject of allegations.

**Recommendation:**

- **The Australian Government should establish and adequately resource a Federal Judicial Commission to provide a fair mechanism to hear complaints against the judiciary and provide a fair process for judges who are the subject of allegations which might otherwise be aired in the media.**

## Funding for statutory and government bodies

### Administrative Review Council

135. The Law Council supports the recommendation in the Callinan Review that the ARC should be reinstated and constituted in accordance with Part V of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**).

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<sup>157</sup> *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 3.

<sup>158</sup> Judicial power is vest in the members of the judiciary as set out in the *Australian Constitution* ch III.

136. The operation of the ARC commenced in 1976 but was terminated in 2015, when its functions were consolidated into the Attorney-General's Department.<sup>159</sup> The Callinan Review found that this 'transfer' of function is:

*contrary to the intention and spirit of [the AAT Act] that any section of any department of government might have a role of overseeing or inquiring into the work of the AAT, that is the reviewer of decisions made by officials of many other departments of government.*<sup>160</sup>

137. The Callinan Review stated that the work done by the ARC during its 40 years of operation was useful to the purpose of 'ensuring that our system of administrative review is as effective and significant in its protection of the citizen as it can be'.<sup>161</sup>
138. The Law Council recommends that the Australian Government provide adequate funding for the reinstatement of the ARC.

**Recommendation:**

- **The Australian Government should provide adequate funding for the reinstatement of the Administrative Review Council.**

## Office of the Australian Information Commissioner

139. The OAIC remains under-resourced. The Law Council notes that the 2019-20 Federal Budget provided OAIC with \$25 million over three years. This budgetary allocation was solely for the privacy regulation function of OAIC, specifically to facilitate timely responses to privacy complaints and support strengthened enforcement action in relation to social media and other online platforms that breach privacy regulations.<sup>162</sup>
140. The Australian Information Commissioner and Privacy Commissioner (**Information and Privacy Commissioner**) has identified that this funding has assisted in increasing the capacity of OAIC to implement the strengthened enforcement mechanisms that the Australian Government has committed to introduce into the *Privacy Act 1988* (Cth) (**Privacy Act**),<sup>163</sup> as well as in the development of a new privacy regime for social media and online platforms.<sup>164</sup>
141. The Information and Privacy Commissioner also identified that OAIC requires increased resources to meet the increased number of requests for Information Commissioner review of Freedom of Information (**FOI**) requests. In October 2019, OIAC's annual report identified that the number of FOI requests made to Australian government agencies and Ministers increased by 13 per cent.<sup>165</sup> The number of applications for Information Commissioner review of FOI decisions made to OIAC

<sup>159</sup> Ian David Francis Callinan AC QC, *Review: Section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019) 19 [1.27]. See Senator Mathias Cormann, Minister for Finance, Parliament of Australia, 'Smaller Government – Transforming the Public Sector' (Media Release, 11 May 2015) <<https://webarchive.nla.gov.au/awa/20190808004220/https://www.financeminister.gov.au/media-release/2015/05/11/smaller-government-%E2%80%93-transforming-public-sector>>.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid, quoting Robert Ellicott QC (First meeting of the Administrative Review Council, 15 December 1976).

<sup>162</sup> Australian Government, *Budget Measures 2019-20* (Budget Paper No 2, Part 1) 53.

<sup>163</sup> Commonwealth, *Parliamentary Debates*, Senate, 22 October 2019, 72 (Ms Angelene Falk) 79.

<sup>164</sup> Ibid 72-3.

<sup>165</sup> Office of the Australian Information Commissioner, *Annual Report 2018-19* (Report, 2019) 92.

grew last year by 16 per cent and over the past four years the number has risen by more than 80 per cent.<sup>166</sup>

142. The Information and Privacy Commissioner noted at Senate Estimates in October 2019 that:

*the substantial and sustained increase in IC review applications over recent years has widened the gap between incoming work and finalisations, and has resulted in increased delays and backlogs. In order to meet the timeliness objective of the FOI Act and provide faster outcomes for the community, additional resources are required, and the IOC continue to work with government in relation to our resourcing needs.*<sup>167</sup>

143. Specifically, the Information and Privacy Commissioner noted that OAIC's funding budget allows for 19 case officers to work on requests for Information Commissioner review of FOI requests however it is estimated that at an additional nine full-time staff members are required in the OIAC office to perform the role of Information Commissioner review of FOI requests in order to meet the increased number of requests for review.<sup>168</sup>

144. In addition, the Australian Competition and Consumers Commission's *Digital Platforms Inquiry* recommended additional functions for OAIC which would require additional funding from the Australian Government.<sup>169</sup> Recommendation 16 relates to strengthening protections in the Privacy Act, involving the:

- (a) updating of the 'personal formation' definition;
- (b) strengthening of notification requirements;
- (c) strengthening of consent requirements and pro-consumer defaults;
- (d) enabling of erasure of personal information;
- (e) introduction of direct rights of action for individuals; and
- (f) introduction of higher penalties for breach of the Privacy Act.<sup>170</sup>

145. Recommendations also call for:

- (a) a broader reform of Australian privacy law (Recommendation 17);<sup>171</sup>
- (b) OAIC developing, in consultation with industry stakeholders, an enforceable code of practice to enable proactive and targeted regulation of digital platforms' data practices (Recommendation 18);<sup>172</sup> and

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<sup>166</sup> Ibid 77.

<sup>167</sup> Commonwealth, *Parliamentary Debates*, Senate, 22 October 2019, 72 (Ms Angelene Falk).

<sup>168</sup> Ibid 81-2.

<sup>169</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 29 <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>>.

<sup>170</sup> Ibid 34-5, 456.

<sup>171</sup> Ibid 36, 476.

<sup>172</sup> Ibid 36-7, 481.

- (c) the introduction of a statutory cause of action for serious invasions of privacy (Recommendation 19).<sup>173</sup>

146. In its response to the ACCC's *Digital Platforms Inquiry*, the Australian Government has announced that it supports in-principle Recommendations 16(a)-(c) and (e) and that the Social Media Privacy Reforms announced in March 2019 will also seek input on the amendments proposed in those recommendations.<sup>174</sup> Further, in seeking to implement Recommendations 16(d), 17 and 19, the Australian Government has committed to a review of the Privacy Act to ensure it empowers consumers, protects their data, and best serves the Australian economy, to span over two years.<sup>175</sup>
147. The Law Council supports these recommendations of the ACCC and recommends that the Australian Government ensure that OAIC is adequately resourced to undertake its expanded functions in implementation of these recommendations and its strengthened enforcement abilities, as well as to effectively perform the functions with which it is already charged, particularly in regards to the review of FOI requests and the operation of the mandatory Notifiable Data Breaches Scheme.
148. Under-resourcing of the OAIC increases the risk of undesirable performance compromises that may adversely affect good regulation, including delay and further pressure for the OAIC to use discretion to decide against acceptance, investigation or determination of complaints. As privacy and information law gathers increasing public attention, it is essential that Australia has a properly resourced independent agency to provide adequate oversight.

## Australian Competition and Consumer Commission

149. The Law Council recommends that the current level of funding for the ACCC should be increased to enable the ACCC to more effectively carry out its current investigative and regulatory functions, particularly in relation to consumer law-related investigations, support and dispute resolution.
150. In addition, the ACCC's *Digital Platforms Inquiry* recommended additional functions for the ACCC which would require additional funding from the Australian Government.<sup>176</sup> It was recommended that a specialist digital platforms branch be established within the ACCC to build on and develop expertise in digital markets and use of algorithms,<sup>177</sup> which would then be tasked to undertake an inquiry into the competition for the supply to ad tech services and online advertising services by advertising and media agencies.<sup>178</sup> It also recommends that the designated digital platforms each implement a code of conduct to govern their relationships with news media businesses.<sup>179</sup>
151. In its response to the ACCC's *Digital Platforms Inquiry*, the Australian Government has announced that it will ask the ACCC to work with the relevant parties to develop and implement a voluntary code to address these concern and provide to the

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<sup>173</sup> Ibid 37, 493.

<sup>174</sup> Australian Government, *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (12 December 2019) 6.

<sup>175</sup> Ibid.

<sup>176</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 29 <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>>.

<sup>177</sup> Ibid 31, 142 recommendation 4.

<sup>178</sup> Ibid 157, recommendation 5.

<sup>179</sup> Ibid 257 recommendation 7.

Australian Government a progress on code negotiations in May 2020, with codes to be finalised no later than November 2020.<sup>180</sup>

152. Further, the Australia Government has committed to funding the establishment of a Digital Platforms Branch within the ACCC to monitor and biannually report on digital platforms, take enforcement action as necessary, and conduct inquiries as directed by the Treasurer, starting with an inquiry into competition for the supply of ad tech services and the supply of online advertising by advertising and media agencies.<sup>181</sup>
153. The Law Council supports these announcements. While noting that the Australian Government has announced that in the 2019–20 Mid-Year Economic and Fiscal Outlook it is committing \$27 million over four years for a Digital Platforms Branch within the ACCC, the Law Council recommends that the Australian Government ensure that ACCC is adequately resourced to undertake all of its expanded functions as a result of the ACCC *Digital Platforms Inquiry*.

## Australian Human Rights Commission

154. The AHRC remains significantly under-resourced with complaints regularly taking over six months to reach conciliation stage.<sup>182</sup>
155. Further, one of the Commission's statutory functions is human rights education to increase understanding about human rights, and to lay the foundations for positive change in attitudes and behaviour among students and employers and employees in public and private sectors.<sup>183</sup> While building understanding about human rights, and capacity to protect them, is a key strategic aim and pillar of the AHRC's national conversation project, the AHRC finds it challenging to build capacity beyond individual workshop attendees. It considers that the key barrier to further effectiveness is resourcing.<sup>184</sup>
156. Human rights education initiatives build awareness of rights and responsibilities in the community.<sup>185</sup> Currently, there is no dedicated funding to grow the AHRC's human rights education program. Consequently, the AHRC currently ensures that the resources it develops for one purpose can be re-purposed for broader audiences. The AHRC considers that:

*more can be done to develop and embed a national program of human rights education, in education, workplace and other contexts. This could include greater inclusion in school curricula, and a requirement that relevant employers educate their employees about human rights.*

*Increased funding and support for advocacy, community and legal organisations that work to protect and promote human rights would help support public understanding of human rights.*<sup>186</sup>

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<sup>180</sup> Australian Government, *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (12 December 2019) 8.

<sup>181</sup> *Ibid.*

<sup>182</sup> The time from receipt to finalisation was nine months or less for 93 per cent of complaints: Australian Human Rights Commission, *2018-19 Complaints Statistics* (2019) 12.

<sup>183</sup> Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 48.

<sup>184</sup> *Ibid.* 53.

<sup>185</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Discussion Paper: A Model for Positive Rights Reform in Australia, 29 August 2019) 20.

<sup>186</sup> *Ibid.*



157. The Law Council recommends that the Australian Government should adequately resource the AHRC so it can effectively carry out its investigation, complaint and conciliation functions and its function of enhancing public education and human rights resources.

## Australian Charities and Not-for-profits Commission

158. The charitable sector contributes significantly to the Australian economy. Additional funding is required to ensure that the ACNC, as the principal regulator, continues to support the charitable sector, maintain the ongoing trust of the public in the sector and enhance the community benefit. In particular the ACNC should be adequately resourced to provide opinions or private rulings and to run test cases, as recommended in the 2018 *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review*.<sup>187</sup> Funding is required to better enable the reduction of red tape for the sector, in particular, for the ACCC and ACNC to develop a single national fundraising regulation framework for charities and not-for-profit entities, to allow community fundraising in all states and territories of Australia with consistent obligations, as an urgent priority.

## Australian Financial Security Authority

159. The Law Council is of the view that the current level of funding for the AFSA should be increased to allow it to better regulate personal insolvency practitioners and investigate alleged offences under the *Bankruptcy Act 1966* (Cth) and *Personal Property Securities Act 2009* (Cth) and where appropriate refer for prosecution.

## Sustainable Development

160. In September 2019, the Law Council announced its *Policy on Sustainable Development (the Policy)* which provides a framework to guide and encourage socially responsible economic development that protects the environment and natural resource base for the benefit of future generations.<sup>188</sup> Principle 2 of the Policy calls for the '[e]ffective integration of economic, environmental and social considerations in the decision making processes of governments and industry'.<sup>189</sup> In line with this principle, the Law Council suggests that the Government review its direct and indirect financial support to industry in light of its associated economic, environmental and social considerations, particularly with respect to financial support to industries which are not environmentally sustainable. The Government should consider how funding of such initiatives may be compatible with the better protection of a sustainable environment.
161. Principle 1 of the Policy notes that '[n]atural resources should be exploited in a manner which is sustainable or prudent or rational or wise or appropriate'.<sup>190</sup> To better ensure that Australia's natural resources are only utilised in this way, the Law Council suggests that greater financial resources be provided for research, monitoring and enforcement of Australia's environmental laws, and implementation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (currently under review). The Department of Agriculture, Water and the Environment (which, as of

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<sup>187</sup> The Treasury, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* (Report of the Review Panel, 22 August 2018) recommendations 19-20.

<sup>188</sup> Law Council of Australia, *Policy on Sustainable Development* (Policy Statement, 14 September 2019) <<https://www.lawcouncil.asn.au/media/news/sustainable-development-policy>>.

<sup>189</sup> *Ibid* 4.

<sup>190</sup> *Ibid*.

February 2020, will take on the environment-related functions from the current Department of the Environment and Energy) must be properly resourced to undertake to undertake its audit, compliance and enforcement functions. Similarly, organisations such as the Environmental Defenders Office, which seek to hold accountable those who misuse or abuse Australia's environment and natural resources, must be properly funded.