



Law Council  
OF AUSTRALIA

Office of the President

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Senator Alex Gallacher  
References Committee Chair  
Foreign Affairs, Defence and Trade Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [fadt.sen@aph.gov.au](mailto:fadt.sen@aph.gov.au)

Dear Senator Gallacher

### **Inquiry into the United Nations Sustainable Development Goals**

The Law Council welcomes the opportunity to provide this submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade (**the Committee**) regarding its *Inquiry into the United Nations Sustainable Development Goals (SDG) (the Inquiry)*.

In 2017, the Law Council commenced the Justice Project – a comprehensive, national review into the state of access to justice in Australia. The Justice Project is being overseen by an expert Steering Committee of eminent lawyers, jurists and academics, chaired by former High Court Chief Justice, the Hon. Robert French AC.

A Progress Report (**Attachment A**) was released on 14 March 2018, coinciding with the Law Council's first "Justice State of the Nation" address, delivered by Law Council President Morry Bailes and immediate past-President Fiona McLeod, SC at the National Press Club.

The Justice Project will culminate in a final report, to be released in 2018. The Law Council would be pleased to provide the Committee with a copy of the final report in due course.

### ***Connection to the Sustainable Development Goals***

From the outset, it has been clear to the Law Council that the findings of the Justice Project will have direct relevance to Australia's implementation of Sustainable Development Goal 16, especially in relation to the following targets:

- 16.3: Promote the rule of law at the national and international levels and ensure equal access to justice for all
- 16.6: Develop effective, accountable and transparent institutions at all levels
- 16.7: Ensure responsive, inclusive, participatory and representative decision-making at all levels

- 16.10: Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements, and
- 16.B: Promote and enforce non-discriminatory laws and policies for sustainable development.

In embarking upon this Project, the Law Council was informed by a recognition that:

The law underlies nearly every aspect of people's lives, including health, employment, education, housing and entrepreneurship. In many countries, unequal access to and discrimination in these sectors create real barriers to economic participation, especially for traditionally marginalized populations (youth, the elderly, women, migrants). However, these sectors depend upon legal frameworks for their operations and legitimacy. Providing people access to justice enables them to tackle these inequalities, and to participate in legal processes that promote inclusive growth.<sup>1</sup>

The growing appreciation of, and agreement with, this perspective<sup>2</sup> was one of a range of factors that directed the Law Council to focus on the human context of issues affecting access to justice. The Project's methodology therefore prioritises an examination of the justice system:

...using a people-centred perspective, based on individuals' and groups' differing perspectives and experiences of everyday legal problems and the [justice] system's responses...[that considers] how all arms of the justice system – including formal institutions – respond to the needs and capabilities of individuals experiencing disadvantage, recognising that they engage with the system at many different points.”<sup>3</sup>

The Justice Project recognises the “integrated and indivisible”<sup>4</sup> nature of the sustainable development goals by identifying that beyond formal institutions or abstract ideals, access to justice is commonplace, concrete and embedded in everyday lives. A central finding from the consultation process is that ordinary problems often have critical legal dimensions that need resolution, but often go unrecognised and untreated.<sup>5</sup>

The Justice Project has therefore focussed on justice barriers faced by those with significant social and economic disadvantage, as well as identifying what is working to reduce those barriers.

### **Methodology**

The Law Council has received 129 written submissions from organisations and individuals who either represent people who are acutely disadvantaged, socially or economically, by access to justice problems or identify as belonging to a group affected by such disadvantage.

<sup>1</sup> OECD, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All* (OECD & Open Society Foundation: 2016), n 4, p5.

<sup>2</sup> See Law Council of Australia, *The Justice Project*, “Introduction and Consultation Questions”, (August 2017) consultation paper, footnotes 2 and 3.

<sup>3</sup> Law Council of Australia, *The Justice Project*, “Introduction and Consultation Questions”, (August 2017) consultation paper, p7-8.

<sup>4</sup> Transforming our world: the 2030 Agenda for Sustainable Development, GA Res 70/1, UN GAOR, 70th sess, 4th plen mtg, Agenda items 15 and 116, UN Doc A/RES/70/1 (25 September 2015).

<sup>5</sup> Law Council of Australia, *The Justice Project*, “Progress Report”, (March 2018), p 6.

The majority of these submissions are publicly available on the Law Council website (<https://www.lawcouncil.asn.au/justice-project/justice-project-submissions>).

In addition, the Law Council conducted a series of formal discussions and site visits, with government agencies, non-government organisations, advocacy and peak bodies, legal assistance services, court and tribunal personnel, private practitioners, academics, subject matter experts and community elders. These were held in each State and Territory; in cities and rural, regional and remote areas.

The Law Council is grateful for the positive engagement by stakeholders across all jurisdictions, and the considerable willingness by many organisations and individuals to assist with the Justice Project.

### ***Emerging Themes***

As noted in the Justice Project *Progress Report*, the emerging themes identified thus far are not exhaustive or final, and further distillation of key themes and prioritisation of recommendations is still required. In particular, the Law Council is considering how the material discussed in the Project's submissions aligns with the themes identified during consultations, and in its earlier research papers. Together, these will inform its final report, to be released in 2018.

What is clear is that there is a need for urgent consideration in Australia of the critical connection between democratic rights and access to justice. Australia's long-standing reputation as a fair, open-hearted and prosperous country with a strong legal system has distracted us from an uncomfortable truth – there is a growing number of people effectively or substantially excluded from the justice system and, thus, from equality before the law. Significant reforms are necessary to ensure our justice system can serve all people and keep our democracy strong.

### ***Early recommendations***

As noted at its recent Press Club event, the Law Council has identified three early Justice Project recommendations prioritising:

- a whole-of-government approach to access to justice issues;
- the introduction of Justice Impact Tests for government policies; and
- substantial investment into the justice system.

These are briefly outlined in turn.

#### ***A whole-of-government approach to access to justice issues***

Access to justice is relevant to the objectives of a range of portfolios – from policy measures which are aimed at closing the gap, to supporting families at risk, to strengthening rural communities, to achieving better health outcomes, to supporting women's equality. The Justice Project has recommended that Australia must move beyond thinking about justice issues within the silos of law enforcement, courts and legal services and embed access to justice within multi-disciplinary policy and funding frameworks.

Effective policy for the justice system will therefore require consideration of the social and economic aspects of disadvantage, and vice-versa. Access to justice should be embedded

into whole-of-government policy thinking as an integral part of the broader policy mix required to address complex social problems.

The Justice Project has heard that many effective legal responses rely on multi-disciplinary approaches that address the immediate legal issues as well as the broader underlying factors which precipitate vulnerable people into the justice system. Approaches of this kind recognise that legal and non-legal problems are often closely interrelated, and that resolving a person's legal problems also supports their ability to resolve problems that are both related and unrelated to legal issues.

These complex, interrelated problems often seem mundane but can have disproportionately negative impacts on the lives of individuals, especially those who are already experiencing one or more forms of disadvantage. For example, Victoria Legal Aid's Health-Justice Partnership in Mildura has described how health issues faced by an elderly client who repeatedly falls in their house can be resolved or avoided through legal assistance to ensure that the property owner complies with their obligations under law – including by installing appropriate fittings such as handrails.

Recognition of the need for joined-up solutions to disadvantage and legal need has profound implications for the way we understand the role of lawyers, and how we measure and value their success. Beyond the importance of immediate legal outcomes, there is increasing evidence that access to justice is not only good from a justice perspective, but also underpins healthy, well-functioning communities.

At a system level, the Justice Project has heard that there is much room for improvement in breaking down the 'silos' between justice and other portfolios – including health, housing, families and community services – and developing whole-of-government support for collaborative, cross-sector approaches.

Better coordination across portfolios, and at different levels of Australian government, is especially important in terms of both understanding complex problems with legal aspects and designing well-targeted interventions that address the cause of legal and non-legal problems. This includes understanding common pathways into, through and out of the justice system as well as developing effective early intervention measures, and strategies to prevent legal and non-legal problems from recurring.

#### *The introduction of Justice Impact Tests for government policies*

At present, new laws and policies often increase demands and pressures across the justice system without any consideration of their downstream impacts on the system. Legal assistance services, courts, prison services and other parts of the justice system are expected to absorb these policy and law changes, sometimes substantial, sometimes incremental, without any overall impact on the availability of necessary services. While legal assistance services, courts and tribunals are stretched ever more thinly, it is the most vulnerable members of the Australian community who suffer most.

An important first step, and a key recommendation of the Justice Project, will be the introduction of Justice Impact Tests to better account for the downstream impacts of new laws and policies on the justice system, to ensure its smoother operation and to better help disadvantaged groups.

Justice Impact Tests have been introduced in the United Kingdom. These require all government policy officials to consider and plan for the impact of all government policy and legislative proposals, across all government portfolios, on the justice system. This includes

consideration of the impacts on legal aid, courts, tribunals and the judiciary, prosecuting bodies, prisons and youth justice systems. The test incorporates a ‘polluter pays’ principle – meaning that there is a presumption that the policy-owning department will meet any additional costs flowing to the justice system from its proposals. The Law Council also considers that Justice Impact Tests are also desirable to support good governance and appropriate expenditure of public money.

Stakeholders participating in the Justice Project consultation process have consistently indicated strong support for a measure of this kind.

### Substantial investment into the justice system

The Justice System is severely under-resourced and significant additional funding is required to ensure the system operates justly and fairly.

Analysis prepared by PricewaterhouseCoopers (**PwC**) for the Law Council found that the Australian Government’s share of funding contributions to Legal Aid Commissions has fallen from 55 percent of total funding in 1996-97 (with the remaining 45 percent covered by state grants and interest from public purpose funds) to 32 percent in 2016-17. PwC estimates that in the 2017-18 financial year, real per capita legal aid funding from the Commonwealth will fall to its lowest recorded level, \$8.40 (down from \$11.55 in 1996-97).

One measure of the cumulative effect of reduced funding for legal assistance is that federal funding for legal aid has declined to such an extent that despite the fact that around 14 percent of Australians live below the poverty line, just eight percent of all Australian households now qualify for legal aid.<sup>6</sup>

The Law Council estimates that at least \$390 million of additional funding per annum is required for the legal assistance system – criminal and civil – to respond to current levels of unmet demand. This includes the \$200 million per annum which was recommended by the Productivity Commission as an urgent interim measure to address civil legal needs alone; a recommendation which has not been implemented.

In addition, the Law Council recognises that further investment may be required, including to address urgent, unmet needs with respect to Aboriginal and Torres Strait Islander Legal Services or Family Violence Prevention Legal Services.

Going forward, the development of national objectives for the provision of legal assistance services should identify a minimum proportion of Australians who should be eligible for these services. The objective of this approach is to establish a fair and appropriate level of coverage for those who need it. It stands in contrast to the present approach, including the approach taken under the National Partnership Agreement on Legal Assistance Services (**NPA**)<sup>7</sup> and the Indigenous Legal Assistance Program (**ILAP**).<sup>8</sup> Currently, the NPA and ILAP both allocate an amount of funding without ensuring this will be sufficient to provide legal assistance to all who need it. This approach has allowed an inadequate and unsustainable level of funding to become an entrenched characteristic of Australia’s legal assistance

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<sup>6</sup> Productivity Commission Inquiry Report, *Access to Justice Arrangements*, Report No 72, 5 September 2014, 1016.

<sup>7</sup> See: <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/National-Partnership-Agreement-on-Legal-Assistance-Services.aspx>

<sup>8</sup> See: <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/Indigenous-Legal-Assistance-Program.aspx>

sector. These programs will be reviewed in 2018, providing an important opportunity for a different approach.

It is also the Law Council's position that the current level of funding for the Federal and Family Courts is untenable and is contributing to significant delays of up to three years in some Family Court registries – with severe consequences for families and children. The impact of year-on-year reductions in funding have been particularly severe in the context of the Federal Circuit Court's expanding general jurisdiction, particularly in relation to migration matters, and a sharp increase in the number and complexity of matters before the Family Court.

The Justice Project has heard that lack of funding for interpreter services also presents significant barriers to justice, particularly for Aboriginal and Torres Strait Islanders, people with disability and people from culturally and linguistically diverse backgrounds. Interpreters are required to ensure access to justice and equality before the law. They are fundamental to the right to a fair trial, and as the Judicial Council on Cultural Diversity has recently highlighted, they are a core component of procedural fairness in the civil justice system.

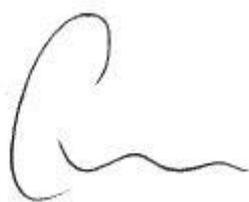
The lack of professional, trained qualified interpreters was overwhelmingly brought up in the Justice Project. Without them, miscarriages of justice can and do occur. While some work has been done to improve the availability of interpreters, enormous gaps remain and a National Justice Interpreter Scheme is needed.

The Law Council's view is that Australia cannot fulfil its obligations under the sustainable development framework unless it builds a common understanding of what access to justice looks like, and of our society as a just society – not merely one that keeps law and order. This is essential to underpin our commitment to an effective, functioning justice system, of which access to justice is an integral component.

Thank you for the opportunity to provide a submission on these matters.

Should you have any queries, please contact Leonie Campbell, Deputy Director of Policy, Policy Division (+61 2 6246 3711 or [Leonie.Campbell@lawcouncil.asn.au](mailto:Leonie.Campbell@lawcouncil.asn.au)).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morry Bailes', with a stylized, cursive flourish at the end.

**Morry Bailes**  
**President**