



Law Council  
OF AUSTRALIA

# 2019-20 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 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

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

## Acknowledgement

The Law Council is grateful for the assistance of its Family Law Section, the Law Society of New South Wales and the Queensland Law Society for assistance in preparing this submission. The Law Council is also grateful to its Access to Justice Committee, Indigenous Legal Issues Committee and Privacy Law Committee for its contributions.

## Executive summary

1. The Law Council is grateful for the opportunity to provide this submission to the Treasury for consideration in preparing the 2019-20 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, 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, an additional \$310 million per annum comprising:
    - \$120 million per annum for civil legal assistance services; and
    - \$190 million per annum for other services provided by Legal Aid Commissions, raising the share of Commonwealth funding of such services to 50 per cent.
  - The Australian Government should continue to engage and consult with the legal assistance sector to develop a sustainable funding model for legal assistance services in the future.
  - Justice Impact Tests should be introduced at the Commonwealth level to facilitate the smoother development of laws and policies which have downstream impacts on the justice system.
  - 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, 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.
  - 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.

## Introduction

4. A significant part of this submission has been informed by the findings of the Law Council's review into the state of access to justice in Australia, the Justice Project.<sup>1</sup>
5. From early 2017, until the release of the Final Report in August 2018, the Law Council undertook a comprehensive national review into the state of access to justice in Australia for people experiencing significant disadvantage. The Justice Project was overseen by an expert steering group led by the former Chief Justice of the High Court, the Hon. Robert French AC.
6. Through the Justice Project, the Law Council sought to shine a light on the justice issues experienced by 13 priority groups<sup>2</sup> identified as facing significant social and economic disadvantage by uncovering systemic flaws and identifying service gaps.
7. The Justice Project's Final Report comprises of 22 chapters and 59 recommendations. The constructive, informed recommendations in the Final Report provide a roadmap for future action, building the case for new, whole-of-government justice strategies secured by appropriate funding.
8. 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).
9. In terms of legal assistance funding, government-funded legal assistance services are often the only option for vulnerable people experiencing legal problems. Yet, federal funding for these services remains inadequate. The Law Council suggests that there is unavoidably a need for increased funding for legal assistance services.
10. 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.
11. What is clear from the Justice Project is the cost of legal assistance is a frequent and formidable barrier for 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 on this basis that the Law Council provides the following submissions as part of the 2019-2020 pre-Budget process.

## Increased funding for the legal assistance sector

12. A key tenet of the principles of equality before the law, access to justice and the rule of law – principles which underpin Australian democracy – is that legal services must be accessible and affordable. A prominent theme identified throughout the Justice Project is that the cost of legal assistance is a frequent and formidable barrier for people with complex and intersectional disadvantage.<sup>3</sup> The Justice Project highlighted that for a great number of Australians, particularly those experiencing financial or other disadvantage, no-cost or minimal cost services are critical in addressing legal needs.

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<sup>1</sup> See <[www.justiceproject.com.au](http://www.justiceproject.com.au)>.

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

As such, government-funded legal assistance services are often the first and most fundamental port of call. However, the legal assistance sector is under-resourced and under extreme pressure.

13. Each of the four publicly funded legal assistance services – Community Legal Centres (**CLCs**), Aboriginal and Torres Strait Islander Legal Services (**ATSILS**), Family Violence Prevention Legal Services (**FVPLS**) and Legal Aid Commissions (**LACs**) – play an important, unique and complementary role in providing legal help to people across Australia. While the private 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.
14. LACs and CLCs receive the majority of their Commonwealth funding through the National Partnership Agreement on Legal Assistance Services (**NPA**). The NPA was the subject of an independent review in 2018. However, the level of funding provided through the NPA has been largely excluded from the terms of reference of the review. ATSILSs primarily receive funding through the Indigenous Legal Assistance Program (**ILAP**). Like the NPA, in 2018, the ILAP was subject to an independent review which again has largely excluded funding levels from the terms of reference. FVPLSs are funded through the Indigenous Advancement Strategy (**IAS**) administered by the Department of Prime Minister and Cabinet.
15. As identified by the Productivity Commission, 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>4</sup>
16. Meanwhile, in 2015-16, CLCs are estimated to have turned away nearly 170,000 people,<sup>5</sup> a substantial increase on the previous year when nearly 160,000 people were turned away.<sup>6</sup> Furthermore, a survey of community services by the Australian Council of Social Services found that 72 per cent of CLCs reported being unable to meet demand, and only four per cent could fully meet demand. Unmet demand for their services was higher than any other category of community service surveyed, including accommodation, counselling and family support/child protection services.<sup>7</sup>
17. Throughout the Justice Project process, the Law Council heard from CLCs that it is vital that when funding is provided, it is stable and long-term. Stable funding allows CLCs to build trust and develop relationships in local communities which can encourage people to seek solutions to legal problems that may have otherwise remained unresolved. Stable funding also enables CLCs to obtain efficiency savings through continuity of staff and by reducing the resources spent on obtaining funding. These efficiency savings can then be redirected into providing services.
18. In this respect, the Law Council notes the following observation arising from the Justice Project:

*Transparent, predictable, sustainable and long-term funding models are essential to underpin successful legal assistance service delivery into the*

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<sup>4</sup> Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 719, 1020-1022 ('*Access to Justice Arrangements*').

<sup>5</sup> National Association of Community Legal Centres, *Submission to the Australian Government: Federal Budget 2018-2019* (21 December 2017) <[http://www.nacclc.org.au/cb\\_pages/submissions.php](http://www.nacclc.org.au/cb_pages/submissions.php)>.

<sup>6</sup> National Association of Community Legal Centres, *National Association of Community Legal Centres, National Census of Community Legal Centres: 2015 National Report* (2015) 9, 22 <[http://www.nacclc.org.au/cb\\_pages/reports\\_and\\_resources.php](http://www.nacclc.org.au/cb_pages/reports_and_resources.php)>.

<sup>7</sup> Australian Council of Social Service, *Australian Community Sector Survey 2014* (2014) 2, 17, 20.

*future. Regular, government-funded surveys regarding the Australian population's legal needs are required to underpin such models and to ensure well-targeted service delivery.*<sup>8</sup>

19. The need for stable and established funding for the legal assistance sector was most recently highlighted in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, where it was found that:

*... the desirability of predictable and stable funding for the legal assistance sector and financial counselling services is clear and how this may best be delivered is worthy of careful consideration. Such consideration should look at all options that may be available to supplement existing funding.*<sup>9</sup>

20. The Law Council emphasises that the most appropriate providers of legal services for Aboriginal and Torres Strait Islander peoples are community-controlled organisations, specifically the dedicated ATSilSs and FVPLSs which provide unique and culturally safe services. These services are currently experiencing extremely high levels of unmet legal need for criminal, family and civil law services. While ATSilSs have had to prioritise criminal matters, despite evidence of the need amongst Aboriginal and Torres Strait Islanders for civil assistance, they have struggled to meet existing demand.<sup>10</sup> Meanwhile, some FVPLSs estimate turning away 30 to 40 per cent of Aboriginal and Torres Strait Islander women who seek assistance for family violence matters.<sup>11</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, reinforces the urgency of these concerns.

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

21. 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 were often shifted to other areas of government spending such as health care, housing and child protection (see discussion below).<sup>12</sup> It recommended that the Commonwealth, state and territory governments should provide additional funding of around \$200 million per annum for civil legal assistance services to:

- *better align the means test used by LACs with that of other measures of disadvantage* (around \$57 million per annum) – given its finding that LACs' resources are so tight, that existing 'means tests are too mean';<sup>13</sup>
- *maintain existing frontline services* that have a demonstrated benefit to the community but were scheduled to be affected by Commonwealth funding cuts (\$11.4 million per annum);<sup>14</sup> and

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<sup>8</sup> Law Council of Australia, *The Justice Project: Final Report – Part 2* (August 2018) 4.

<sup>9</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Volume 1, 493.

<sup>10</sup> National Aboriginal and Torres Strait Islander Legal Services, Submission No 121 to Law Council of Australia, *The Justice Project* (October 2017).

<sup>11</sup> National Family Violence Prevention Legal Services, Submission No 105 to Law Council of Australia, *The Justice Project* (October 2017).

<sup>12</sup> Productivity Commission, *Access to Justice Arrangements*, 30-1.

<sup>13</sup> Productivity Commission, *Access to Justice Arrangements*, 741,1026 (Appendix H).

<sup>14</sup> *Ibid.*



- *allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted government funding (around \$124 million per annum).*<sup>15</sup>

22. The Commonwealth's contribution was estimated to be in the order of 60 per cent – or \$120 million per annum.<sup>16</sup> Importantly, the Productivity Commission's recommendation was merely for an interim funding injection to 'address the most pressing needs'.<sup>17</sup> Future funding levels should then be determined with reference to a more comprehensive assessment of legal need.<sup>18</sup>
23. While such a funding increase would go a long way in addressing unmet legal need in the area of civil law, the Justice Project confirmed that there remains urgent and ongoing unmet need for legal assistance services in the areas of criminal and family law.
24. 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 32 per cent in 2016-17.<sup>19</sup> According to recent PricewaterhouseCoopers (**PwC**) estimates, this would cost around \$190 million per annum.<sup>20</sup> The Law Council recognises that this estimate does not include the additional financial amounts required to address urgent unmet needs for CLCs, ATNILSs and FVPLSs, and should be viewed as a minimum estimate only.

**Recommendations:**

- **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, \$310 million per annum comprising:**
  - **\$120 million per annum for civil legal assistance services; and**
  - **\$190 million per annum for other services provided by Legal Aid Commissions, raising the share of Commonwealth funding of such services to 50 per cent.**
- **The Australian Government should continue to engage and consult with the legal assistance sector to develop a sustainable funding model for legal assistance services in the future.**

25. In addition, to ensure appropriate resources are provided to the legal assistance sector to meet unexpected increases in legal need, the Law Council recommends Justice

<sup>15</sup> Ibid. Due to sensitivities around the methodology employed, the Productivity Commission recommended a total funding increase of around \$200 million per annum.

<sup>16</sup> Ibid 738-9.

<sup>17</sup> Ibid 703.

<sup>18</sup> Ibid 739.

<sup>19</sup> The Commonwealth's contribution to funding of LACs has reduced dramatically since 1997, from around \$11.55 per capita in 1996-1997 to around \$8.74 per capita in 2016-2017 (in real terms, adjusted for inflation and population increases): Advice from PricewaterhouseCoopers to the Law Council of Australia, January 2018.

<sup>20</sup> The PricewaterhouseCoopers estimates were based on the level of funding which would be required in the 2018-2019 Budget.

Impact Tests accompany new government policy or legislation, as a means of determining the impact of any initiative or reform.

26. The Law Council refers to the recommendations set out in the Justice Project in this regard, which calls for the introduction of a Justice Impact Test which will ensure the downstream pressures 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>21</sup>

**Recommendation:**

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

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

27. In making the recommendations set out in this submission, the Law Council acknowledges that the Government will, and must, determine policy and funding priorities while weighing up the merits of expenditure across a variety of portfolios. However, in the Law Council's view, it is important to acknowledge that there are substantial hidden costs for individuals, communities and governments across many portfolios that result from failing to adequately fund the legal assistance sector.

28. Throughout the Final Report of the Justice Project a recurring theme is the costs (personal, community, social and economic) that arise and/or grow when people cannot access justice. These include, for example:

- unresolved problems escalating from civil, to family, to criminal matters;
- family violence victims being evicted for reasons which are not their fault, such as damage to the rental home by the perpetrator;
- 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;
- an inability to access a person's entitlements, such as unpaid wages, income support or a pension, resulting in destitution;
- an inability to seek redress as a victim of crime, to address workplace exploitation or discrimination;
- 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;
- families being split when children are unnecessarily removed from their parents;
- a greater likelihood of incarceration, including in circumstances in which charges and arrest were unwarranted; and
- a greater likelihood of people being returned to their countries of origin to face persecution, torture or death.

29. 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

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<sup>21</sup> Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendation 7.3.

opportunity and economic costs to all Australians given the loss of healthy, productive and vibrant communities.

30. 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>
31. In this regard, the Productivity Commission in the 2014 report, *Access to Justice Arrangements*, noted:

*Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging. However, not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection. Numerous Australian and overseas studies show that there are net public benefits from legal assistance expenditure. As former Chief Justice Gleeson commented:*

*'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>23</sup>

32. The Productivity Commission also noted that legal assistance services 'can prevent or reduce the escalation of legal problems, which in turn can mean reduced costs to the justice system and lower costs to other taxpayer funded services'.<sup>24</sup> To illustrate, the Productivity Commission analysed the costs avoided by providing legal assistance for family violence matters. It estimated that for those who obtain duty lawyer services when applying for an apprehended violence order (**AVO**), the probability of success was increased by between 40 and 60 per cent.<sup>25</sup> It proposed that further incidents of violence would have occurred without an AVO in between 10 and 20 per cent of cases.<sup>26</sup> Its estimates suggested that the expected benefits to the wider community from providing assistance with family violence matters may be substantial – ranging from \$1400 per case to more than \$4400 per case, depending on the parameter values chosen.<sup>27</sup> Both the wider community and individuals receiving assistance would obtain these benefits.<sup>28</sup>

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<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.accesstojusticeactiongroup.co.uk/wp-content/uploads/2011/07/towards\\_a\\_business\\_case\\_for\\_legal\\_aid.pdf](https://www.accesstojusticeactiongroup.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.

<sup>23</sup> Productivity Commission, *Access to Justice Arrangements*, 30-1, citing The Hon Murray Gleeson AC QC, State of Judicature (Speech delivered at the Australian Legal Convention, 10 October 1999).

<sup>24</sup> Productivity Commission, *Access to Justice Arrangements*, 666.

<sup>25</sup> *Ibid* Appendix K, 1059.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid* 757.

33. 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>29</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.*

*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>30</sup>*

34. The Organisation for Economic Co-operation and Development (**OECD**) similarly recognised the 'intrinsic links between access to justice, poverty reduction and inclusive growth'.<sup>31</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>32</sup>*

35. As such, 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.

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<sup>29</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.

<sup>30</sup> *Ibid* 26-7.

<sup>31</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>32</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>>.

# Resourcing for the judiciary

## Current inadequacy of funding for federal courts and tribunals

36. 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 of Australia (**Family Court**) and the Federal Circuit Court of Australia (**Federal Circuit Court**).
37. 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>33</sup>

### Increase in workload and delays

38. As raised in the Justice Project,<sup>34</sup> there are currently long delays in commencing and finalising matters in the federal courts and tribunals. 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>35</sup> For the Federal Circuit Court, the national benchmark is 'no more than 10 per cent of lodgments pending completion are to be more than 6 months old' and 'no lodgments pending completion are to be more than 12 months old'.<sup>36</sup> For the Federal Court of Australia (**Federal Court**) and the Family Court, the national benchmark is 'no more than 10 per cent of lodgments pending completion are to be more than 12 months old' and 'no lodgments pending completion are to be more than 24 months old'.<sup>37</sup>
39. The Justice Project noted that the federal courts failed to meet court efficiency targets for 2016-17,<sup>38</sup> and data from the Productivity Commission's 2019 *Report on Government Services* revealed that this was also the case for 2017-18. At June 2018, 33 per cent of matters in the Family Court had been pending for over a year and almost 16 per cent were pending for over two years. In the Federal Court, almost 35 per cent of matters in its original jurisdiction had been pending for more than 12 months, while 18 per cent had been pending for more than 24 months.<sup>39</sup> The Justice Project also noted that there was a pending backlog of cases in 2016-17.<sup>40</sup>
40. Similarly, just over 40 per cent of matters in the Federal Circuit Court had been pending for more than 6 months, while 22 per cent had been pending for more than 12 months.<sup>41</sup> Further, as highlighted in the Justice Project,<sup>42</sup> the Federal Circuit Court is failing to its meet its own performance targets in relation to the timely finalisation of final orders applications. It aims for 90 per cent of final order applications to be disposed of within 12 months.<sup>43</sup> According to the Court's *Annual Report 2016-17*, only 68 per cent of final

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<sup>33</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 4.

<sup>34</sup> *Ibid* 11-2.

<sup>35</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>36</sup> *Ibid* 7.14-5 Box 7.4.

<sup>37</sup> *Ibid*.

<sup>38</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 10.

<sup>39</sup> Productivity Commission, *Report on Government Services 2019: Courts*, Table 7A.18.

<sup>40</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 11-3.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid* 14.

<sup>43</sup> Federal Circuit Court of Australia, *Annual Report 2016-17* (2017) 43.



order applications were disposed of within 12 months,<sup>44</sup> which dropped to 62 per cent in 2017-18.<sup>45</sup>

41. As discussed in the Justice Project,<sup>46</sup> the number of matters before the federal courts and tribunals has increased. In 2016-17 alone, the Federal Circuit Court's general federal law matters workload increased by 12 per cent, and increased by almost another 3 per cent in 2017-18. The number of migration filings in the Federal Circuit Court grew nearly three-fold between 2011 and 2016.<sup>47</sup> In 2016-17 the numbers of migration matters increased by 40 per cent<sup>48</sup> and increased by almost another 7 per cent in 2017-18.<sup>49</sup>
42. The workload of the Family Court has steadily increased each year since 2011-12.<sup>50</sup> While the overall number of matters lodged in the Federal Court has not increased significantly since 2015-16,<sup>51</sup> it is notable that the number of migration appeals and related actions filed in 2017-18 increased by over 30 per cent, from 764 in 2016-17 to 1019 for 2017-18.<sup>52</sup> This contributed to an overall increase of more than 27 per cent in the Court's appellate workload overall in 2017-18 since 2015-16.<sup>53</sup>
43. The Justice Project also noted the increased workload of the AAT, particularly in its Refugee and Migration Division.<sup>54</sup> The number of applications lodged at the Administrative Appeals Tribunal (**AAT**) in 2017-18 was 14 per cent higher than the number lodged in 2016-17, which was 24 per cent higher than the number of lodgements in the previous year.<sup>55</sup> The Refugee and Migration Division of the AAT received 37,933 applications in 2017-18, the highest number of applications lodged since the establishment of the Division or its predecessor tribunals. This is a 43 per cent increase on the number of applications that were lodged in 2016-17 and double the number of lodgements in 2015-16.<sup>56</sup> Due to the high volume of applications received in this and the previous reporting year and the overall reduction in available member resources, the Division has not been able to keep pace with the growth in lodgements.<sup>57</sup> The current funding model for the Migration and Refugee Division only enables it to deliver approximately 18,000 finalised cases per year.<sup>58</sup> The Division finalised 17,960 cases in the reporting year, leaving an active caseload at 30 June 2018 of 44,436 matters, which was 82 per cent more than at the end of the previous reporting year.<sup>59</sup>
44. While the workload of the courts and tribunals has increased, there has been an insufficient corresponding increase in resources. This has placed pressure on their ability to process and resolve matters in a timely manner. A 2014 report to the Australia Government, which was only released publicly last year, reportedly found that the Federal Court, Family Court and Federal Circuit Court were on track for a combined

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<sup>44</sup> Ibid.

<sup>45</sup> Federal Circuit Court of Australia, *Annual Report 2017-18* (2018), 43.

<sup>46</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 13.

<sup>47</sup> Federal Circuit Court of Australia, *Annual Report 2016-17* (2017) 68.

<sup>48</sup> Ibid 4.

<sup>49</sup> Federal Circuit Court of Australia, *Annual Report 2017-18* (2018), 8.

<sup>50</sup> Productivity Commission, *Report on Government Services 2019: Courts*, Table 7A.2.

<sup>51</sup> Ibid.

<sup>52</sup> Federal Court of Australia, *Annual Report 2017-8* (2018) 31.

<sup>53</sup> Productivity Commission, *Report on Government Services 2019: Courts*, Table 7A.2.

<sup>54</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 15.

<sup>55</sup> Administrative Appeals Tribunal, *Annual Report 2017-18* (2018) 2.

<sup>56</sup> Ibid 31.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid 4.

<sup>59</sup> Ibid 31.

budget shortfall of \$75 million by 2017-18, which would result in further cuts to their services. Subsequent responses have not addressed this shortfall.<sup>60</sup>

### Delays in judicial appointments

45. In some cases, there have been significant delays in making judicial appointments to fill vacancies in the federal courts and tribunals. The Law Council has recently documented the delays in judicial appointments to the Family Court and the Federal Circuit Court from the information publicly available about judicial appointments and retirements. For example, since 2011, seven Judges have left the Sydney registry of the Family Court and only three new judges have been appointed. The delay between the departure of one judge and the appointment of another was 11 months in one case, and 18 months in the other two cases. In the same period, three judges of the Family Court were appointed to the appeal division, yet no new judges were appointed to the Family Court.<sup>61</sup> The Brisbane and Sydney registries have also experienced significant delays in the replacement of Federal Circuit Court judges, with delays ranging between three weeks and 21 months.<sup>62</sup>
46. The Justice Project noted that AAT is also experiencing similar resource pressures due to increased demand and delayed appointments.<sup>63</sup> The AAT has experienced a decline in the number of members. Its *2017-18 Annual Report* stated that 'the cumulative effect of member appointments over recent years means that the AAT now have some 30 fewer members than at the time of amalgamation with a caseload that has increased by 42 per cent since 2015-16'.<sup>64</sup> It noted that the delayed assignment of newly appointed members to the Migration and Refugee Division impacted on its capacity to reduce the active caseload and meet timeliness measures across many case categories.<sup>65</sup>
47. The Justice Project identified that delay in judicial appointments, particularly in rural, regional, remote (**RRR**) areas, can cause significant court backlog and subsequent delays.<sup>66</sup> It provided the example of the eight-month delay to replace Justice Myers<sup>67</sup> at the Newcastle Registry, which resulted in pushing the time it took for a case to reach trial in Newcastle's Federal Circuit Court to almost 19 months.<sup>68</sup> As a result, the workload for the two remaining judges in Newcastle was significantly increased, with each judge dealing with a projected caseload of 770 matters in the financial year 2016-

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<sup>60</sup> KPMG, *Review of the Performance and Funding of the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia* (2014), subsequently released in redacted form by the Federal Government.

<sup>61</sup> This does not include the retirement of former Chief Justice John Pascoe and the appointment of Chief Justice William Alstergren.

<sup>62</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018*, 65-80.

<sup>63</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 15.

<sup>64</sup> Administrative Appeals Tribunal, *Annual Report 2017-18* (2018) 4.

<sup>65</sup> *Ibid* 36.

<sup>66</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 13-4.

<sup>67</sup> Justice Matthew Myers was appointed as a Commissioner of the Australian Law Reform Commission to head the Inquiry into Incarceration rates of Aboriginal and Torres Strait Islander People.

<sup>68</sup> Michael McGowen, 'Turnbull government appoints new federal circuit judge in Newcastle after long delay', *Newcastle Herald* (online), 8 September 2017 <<http://www.theherald.com.au/story/4911458/after-delay-new-judge-on-circuit-court/>>. With respect to the estimated 19 months for a matter to reach trial, the best available comparator is the Federal Circuit Court's targets with respect to performance measures of timely completion of cases and timely registry services. These targets include 90 per cent of final order applications disposed of within 12 months; 90 per cent of all other applications disposed of within six months; and 70 per cent of matters resolved prior to trial: Federal Circuit Court of Australia, *Annual Report 2016-17* (2017) 43.

17, compared to the national average of 376.<sup>69</sup> The President of the Hunter Valley Family Law Practitioners, Chris White, stated that such court delays are compounding people's belief 'that the system isn't responsive to their very serious examples of domestic violence'.<sup>70</sup> White cited a matter that he had been involved in where a father with a history of drug abuse and mental health conditions, had taken his daughter to Queensland despite having very little previous contact with her. White sought an urgent hearing before the Court but was unable to secure a hearing before a judge for almost two months. He stated that 'in the meantime a little girl who doesn't know her father has effectively been kidnapped, for want of a better word, and the Court is unable to deal with that because of a lack of resources'.<sup>71</sup>

48. The Hon Giles Coakes, a former Newcastle Federal Circuit Court judge, described the delayed appointment in Newcastle as 'reckless' and 'negligent', as the increased workload on the remaining judges 'means there is the increased risk of an oversight, a mistake in calculations, or risk of not giving enough weight to a specific piece of evidence'.<sup>72</sup> In their consultation with the Justice Project, private practitioners in Townsville recalled similar experiences regarding delays in appointments of Federal Circuit Court judges and the consequent backlog in matters.<sup>73</sup>
49. As per the Justice Project, delays in the Federal Circuit Court are likely to be inevitable without additional judicial resources.<sup>74</sup> Former Chief Justice Pascoe stated, '[i]t cannot be overstated that the Court's capacity to efficiently and effectively deal with its workload is directly impacted by the availability of adequate judicial resources'.<sup>75</sup> In its 2018-19 pre-budget submission, the Law Council emphasised that 'due to significant under-resourcing and in particular, the under-provision of judges, the Federal Circuit Court is failing to meet efficiency targets'.<sup>76</sup> This remains unchanged, as the Federal Circuit Court, along with the other federal courts and tribunals, remains significantly under-resourced and under-funded and has failed to meet efficiency targets for 2017-18.

### Increase of self-represented litigants

50. The Justice Project identified that the growing numbers of self-represented litigants, in part due to the reduced capacity of legal assistance services to meet demand, are causing enormous strain on court resources and are diminishing the overall efficiency of the justice system.<sup>77</sup> The Justice Project noted that the data on self-representation in Australian courts is by no means comprehensive.<sup>78</sup> However, from the data that has been collated, or made available, it appears that all federal courts experience high numbers of self-represented litigants. In the Family Court, 24 per cent of trials in 2017-

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<sup>69</sup> Michael McGowen, 'Hunter domestic violence victims, children, at risk because of "reckless" judge shortage', *Newcastle Herald* (online), 30 June 2017 <<http://www.theherald.com.au/story/4762370/court-short-reckless-judge-shortage-puts-hunter-families-at-risk/>>.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid, quoting Giles Coakes.

<sup>73</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 14, citing teleconference consultation with a Townsville private practitioner on 6 April 2018. On 26 April 2018, it was announced that Justice Steve Middleton was appointed to the Townsville Federal Circuit Court to replace former Judge John Cocker, who was appointed to the District Court in Townsville in March 2018.

<sup>74</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 14, citing Federal Circuit Court of Australia, *Annual Report 2015-16* (2016) 68.

<sup>75</sup> Federal Circuit Court of Australia, *Annual Report 2016-17* (2017) 4.

<sup>76</sup> Law Council of Australia, Submission to the Treasury, *2018-9 Pre-Budget Submission* (31 January 2018) 13.

<sup>77</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 15.

<sup>78</sup> Ibid 24.



18 had one represented litigant and in 8 per cent of trials both parties were self-represented.<sup>79</sup>

51. There is limited information on the number of self-representing litigants in the Federal Circuit Court as its annual reports do not include information regarding the number of parties who have self-represented. However, in 2013 it was reported that there were a significant number of self-representing litigants, particularly in the areas of family law, child support, bankruptcy and migration.<sup>80</sup>

52. Furthermore, in its *2015-16 Annual Review*, the Federal Circuit Court noted that:

*Migration work presents additional demands on the Court and its administration that do not arise in other areas of the Court's jurisdiction. As many litigants in migration matters are self-represented, particularly those seeking review of protection visa decisions, there is a greater need for pro bono representation or other legal representation, particularly as legal aid is not available to protection visa applicants who are in migration detention.*<sup>81</sup>

53. To assist self-represented litigants, the Federal Circuit Court has established a pro bono scheme and a Legal Aid duty lawyer scheme for directions lists in Melbourne.<sup>82</sup> The Federal Circuit Court in Brisbane, in conjunction with HopgoodGanim Lawyers and the Bar Association of Queensland, has also established a pro bono scheme to assist self-represented litigants in migration proceedings.<sup>83</sup> Initiatives by the Federal Circuit Court to provide assistance to self-representing litigants in migration matters could suggest that there are high numbers of people self-representing in these matters, as is the case in the Federal Court.

54. The Justice Project reported that the Federal Court has indicated that the majority of the 563 people who commenced proceedings in the Court in 2015-16 as self-represented litigants were appellants in migration appeals (constituting 90 per cent of appeals).<sup>84</sup> This number increased to 677 people in 2017-18.<sup>85</sup>

55. As raised by the Justice Project, the growing numbers of self-represented litigants, in part due to the reduced capacity of legal assistance services to meet demand, are causing enormous strains on court resources and are diminishing the overall efficiency of the justice system.<sup>86</sup> The Productivity Commission found that most people who self-represent in courts do so involuntarily because they cannot afford a private lawyer or are ineligible for legal assistance.<sup>87</sup>

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<sup>79</sup> Family Court of Australia, *Annual Report 2017-18* (2018) 33.

<sup>80</sup> Productivity Commission, *Access to Justice Arrangements: Inquiry Report, Appendices B to K, Appendix F: Self-Represented Litigants* (2014) 1001.

<sup>81</sup> Federal Circuit Court, *Annual Report 2016-17* (2017) 69.

<sup>82</sup> *Ibid.*

<sup>83</sup> Federal Circuit Court, *Annual Report 2017-18* (2018) 73-4.

<sup>84</sup> Federal Court, *Annual Report 2015-16* (2016), 38-9.

<sup>85</sup> Federal Court, *Annual Report 2017-18* (2018) 38.

<sup>86</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 4, citing Public Accounts Committee, Parliament of New South Wales, *Inquiry into Court Waiting Times: Report No 133* (2002) xiii. See also Department of Justice and Regulation (Victoria), *Access to Justice Review* (2016), 472-473, 485; Rosemary Hunter et al, Law and Justice Foundation of NSW, *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (2002) 187; Hugh McDonald et al, Law and Justice Foundation of New South Wales, *In summary: Evaluation of the appropriateness and sustainability of Victoria Legal Aid's Summary Crime Program* (2017) xvii ('Victoria Legal Aid's Summary Crime Program'); Productivity Commission, *Access to Justice Arrangements*, 500, cited in Law Council of Australia, *Justice Project: Courts and Tribunals* (2018) 20.

<sup>87</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 20, citing Productivity Commission, *Access to Justice Arrangements*, 487.

56. 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>88</sup> Commentators to the Justice Project expressed concerns about self-representation among RRR Australians. 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>89</sup>
57. The Justice Project highlighted the concerns of RRR legal services in regard to individuals self-representing in family law matters. In submission to the Justice Project, the Hume Riverina Community Legal Service commented that local gaps in pro bono family law 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>90</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>91</sup>
58. One case study provided to the Justice Project highlighted the distress that self-representation can cause survivors of family violence:

*Layla had been separated from Brian, the father of her 8-year-old daughter, for 8 years. Layla had left Brian due to his violence towards her and unpredictable behaviour. After she left him he had run her over and absconded with their daughter, who was still being breastfed at the time.*

*Since separating, Layla has had a number of violence restraining orders against Brian... Brian has brought a number of actions in the Family Court over the years for contact to their daughter and Layla says that she has spent approximately \$25 000 on lawyers and can no longer afford to put money into legal fees...*

*Layla had recently relocated to Carnarvon and attended on our Carnarvon-based paralegal for assistance, as she was attending court that same day to try and renew her VRO against Brian, which had expired ... She said that Brian was using the arrangements set out in the Family Court orders as an opportunity, with the assistance of his current partner, to harass and talk Layla...*

*Although our paralegal was able to provide Layla with information and advice about her situation Layla really wanted to have some assistance in court that day, as she felt so worn down, vulnerable, anxious and disbelieved that she didn't think she could adequately represent herself. As the funding for our Gascoyne service is insufficient to attract and retain a lawyer we are*

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<sup>88</sup> Law Council of Australia, *Justice Project: Final Report - Rural, Regional and Remote (RRR) Australians* (August 2018) 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; Harris et al, 'Courting justice beyond the cityscape', 165.

<sup>89</sup> Law Council of Australia, *Justice Project: Final Project - Rural, Regional and Remote (RRR) Australians* (August 2018) 40-1, citing consultation with Townsville Community Legal Service in Townsville on 29 August 2018.

<sup>90</sup> Law Council of Australia, *Justice Project: Final Project - Rural, Regional and Remote (RRR) Australians* (August 2018) 40-1, 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>91</sup> Law Council of Australia, *Justice Project: Final Report - Rural, Regional and Remote (RRR) Australians* (August 2018) 40-1, citing consultation with Aboriginal Family Law Services in Kalgoorlie on 8 September 2017.

*limited to providing a paralegal service, which means we are not able to provide court representation to people in Layla's position.*<sup>92</sup>

59. The impact of self-representation on the individual, as well as on the court, is not insignificant. Research has found that:<sup>93</sup>
- (a) self-representing litigants generally place their substantive rights at risk as their ability to defend or assert their rights is undermined by their lack of skills and knowledge;<sup>94</sup>
  - (b) self-representing litigants are likely to lose their case more often than legally represented parties, regardless of merits;<sup>95</sup>
  - (c) proceedings commenced by self-representing litigants are more likely to be dismissed, discontinued, abandoned and struck-out;<sup>96</sup>
  - (d) processes such as negotiation, case management and hearings are often more protracted and difficult because of the burden that self-representing litigants place on the functioning of the court system;<sup>97</sup> and
  - (e) matters involving self-representing litigants generally take longer to be finalised and cause additional costs to the courts and other parties involved.<sup>98</sup> Intuitively, this may lead to higher costs orders for unsuccessful self-representing litigants and increased legal costs that are less likely to be recovered from impecunious litigants.

**Recommendation:**

- **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.**

### **Federal courts and RRR Australia**

60. A priority to come out of the Justice Project is 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>99</sup>

<sup>92</sup> Law Council of Australia, *Justice Project: Final Project - Rural, Regional and Remote (RRR) Australians* (August 2018) 40-1, 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).

<sup>93</sup> Raquel Dos Santos, Self-represented Litigants in the Australian Justice System: 10 Years of the Self-Representation Service in Australia (LawRight, speech paper presented at the National Access to Justice and Pro Bono Conference, 23 March 2017) 5 [21].

<sup>94</sup> Victorian Law Reform Commission, *Civil Justice Review Report* (2008) 565.

<sup>95</sup> Rabeea Assy, 'Revisiting the Right to Self-Representation' (2011) 30 *Civil Justice Quarterly* 267, 268.

<sup>96</sup> Elizabeth Richardson, Tania Sourdin & Nerida Wallace, 'Self-Represented Litigants, Literature Review' (Australian Centre for Court and Justice System Innovation, 2012) 27, 30.

<sup>97</sup> Rule of Law Institute, *Access to Justice, Legal Aid and Self-Represented Litigants* (3 June 2013, Rule of Law Institute of Australia) <[www.ruleoflaw.org.au/self-represented-litigants-2013](http://www.ruleoflaw.org.au/self-represented-litigants-2013)>.

<sup>98</sup> Elizabeth Richardson, Tania Sourdin & Nerida Wallace, 'Self-Represented Litigants, Literature Review' (Australian Centre for Court and Justice System Innovation, 2012) 13, 27.

<sup>99</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 73.

61. 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. In some cases, this means they give up on attending court despite the personal costs. In certain contexts, the delay in having their matter heard effectively means that their case is already lost.<sup>100</sup>
62. 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>101</sup>*

63. In its submission to the Justice Project, Regional Alliance West also raised the barriers experienced by family violence victims with respect to matters in the Family Court:

*The Family Court is based in Perth, which is approximately 950 kilometres south of Carnarvon and 450 kilometres south of Geraldton. There are no Family Court circuit visits to Carnarvon and only one every fourth months (ie three per year) to Geraldton. If matters are urgent, then litigants can apply to appear in Perth by telephone or video link but issues with technology and obtaining advice can prove difficult for these clients. Many end up being self-represented with limited legal advice.*

*Appearing in court by electronic means is difficult for anyone... but even more so for a stressed and overwhelmed person who is suffering from the effects of family violence.<sup>102</sup>*

64. 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>103</sup>*

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<sup>100</sup> Law Council of Australia, *Justice Project: Final Report - 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>101</sup> Ibid.

<sup>102</sup> Law Council of Australia, *Justice Project: Final Report - Rural, Regional and Remote (RRR) Australians* (August 2018) 40-1, 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).

<sup>103</sup> Law Council of Australia, *Justice Project: Final Report - Rural, Regional and Remote (RRR) Australians* (August 2018) 46, citing consultation with Victoria Legal Aid in Mildura on 26 September 2017.

65. Throughout 2017–18, the Federal Circuit Court sat in 30 rural and regional locations on 149 occasions as part of its circuit program, with the length of these circuits varying from single days to whole weeks.<sup>104</sup> Its *Annual Report 2017-18* noted that approximately 20 per cent of the Federal Circuit Court’s family law workload is undertaken on circuit.<sup>105</sup> Based on the then circuit schedule of the Federal Circuit Court, in 2012 it sat in 28 regional and rural locations and spent approximately 730 days on circuit.<sup>106</sup> This was the circuit schedule for the Federal Circuit Court when it had almost 43 per cent less general federal law matters and 4 per cent less family law matters.<sup>107</sup> Based on current information, the amount of days spent on circuit is unknown.<sup>108</sup> However, if on each of the 149 occasions in 2017-18 the Federal Circuit Court sat for a week, that would amount to a total of 745 days on circuit. Considering the increase in the workload of the Federal Circuit Court since 2012-13, and that the estimation of 745 days on circuit is most likely an over-estimation, the amount of time spent on circuit in RRR Australia appears significantly inadequate.
66. 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>109</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>110</sup>
67. 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>111</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>112</sup>

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<sup>104</sup> Federal Circuit of Australia, *Annual Report 2017-8* (2018) 76.

<sup>105</sup> Ibid.

<sup>106</sup> KPMG, *Review of the Performance and Funding of the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia* (2014), subsequently released in redacted form by the Federal Government.

<sup>107</sup> Federal Circuit of Australia, *Annual Report 2012-3* (2013) 40, 46; Federal Circuit of Australia, *Annual Report 2017-8* (2018) 47, 55.

<sup>108</sup> Federal Circuit of Australia, *Annual Report 2017-8* (2018) 76.

<sup>109</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 76, citing Productivity Commission, *Access to Justice Arrangements*, 19.

<sup>110</sup> Federal Circuit of Australia, *Annual Report 2017-8* (2018) 76.

<sup>111</sup> Law Council of Australia, *Justice Project: Final Report - 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 (‘Virtual Justice in the Bush’); *Bridget Harris, Lucinda Jordan and Lydia Philips, ‘Courting justice beyond the cityscape’; Justice Project Consultation with Queensland Legal Aid in Townsville on 29 August 2017.*

<sup>112</sup> Law Council of Australia, *Justice Project: Final Report - 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).



68. 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>113</sup>

69. The Justice Project concluded that while online procedures do have efficiency advantages, it needs to be balanced with local, face to face services and proceedings.<sup>114</sup> For example, since 2016 all divorce applications are filed in the Federal Circuit Court via the an electronic divorce file.<sup>115</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>116</sup>
70. 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>117</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>118</sup>
71. In its *Annual Report 2017-8*, the Federal Circuit Court 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>119</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>120</sup>

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

72. 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.
73. 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

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<sup>113</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 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>114</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 80.

<sup>115</sup> Federal Circuit Court, *Annual Report 2017-8* (2018) 20.

<sup>116</sup> Law Council of Australia, *Justice Project: Final Report - 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>117</sup> Productivity Commission, *Access to Justice Arrangements*, 20.

<sup>118</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 80.

<sup>119</sup> Federal Circuit of Australia, *Annual Report 2017-8* (2018) 76.

<sup>120</sup> Law Council of Australia, *Justice Project: Final Report - Courts and Tribunals* (August 2018) 80.

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>121</sup>

74. Most recently, in 2018 the Government commissioned PwC to review of efficiency of the operation of the federal courts, a report that has formed the basis of the Government's proposed structural reforms to the Family and Federal Circuit Courts.
75. 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>122</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.
76. 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**

77. As noted above, 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>123</sup>
78. Further to this issue, the Law Council also calls for the adoption of a judicial appointment process that promotes greater transparency and accountability of judicial appointments.
79. 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>124</sup>

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<sup>121</sup> See <<https://www.ag.gov.au/LegalSystem/Courts/Pages/Structural-reform-of-the-federal-courts.aspx>>.

<sup>122</sup> Ibid 19.

<sup>123</sup> Law Council of Australia, Submission to the Treasury, *2018-9 Pre-Budget Submission* (31 January 2018) 14.

<sup>124</sup> Law Council of Australia, Policy Statement: The Process of Judicial Appointments (September 2008).

80. The Law Council is supportive of reforms that would see judicial appointments to the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia and the AAT publicly advertised, with an independent panel to provide a shortlist to the Attorney-General of potential appointees.

**Recommendation:**

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

## Review and proposed restructure of the Australia's family law system

81. The Law Council has long advocated for increased funding for the federal courts and tribunals. The Law Council highlighted this in its submissions during 2018 in relation to the Family Court, as well as in its pre-budget submission for the 2018-19 federal budget.<sup>125</sup>
82. In the Law Council's recent submission to the Australian Law Reform Commission's (ALRC) review of the Family Law System, it noted the the failure by successive governments to properly resource the existing Australian family law system.<sup>126</sup>
83. The Law Council notes the significant structural reforms to the Family and the Federal Circuit Court which are proposed by the Federal Circuit Court and Family Court of Australia Bill 2018 and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (**the Bills**).<sup>127</sup> The Bills were introduced in Parliament in August 2018 and were referred to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) for inquiry, to which the Law Council provided a submission.<sup>128</sup>
84. The Law Council would like to reiterate its opposition to the Bills. The Law Council maintains that the monumental structural reform proposed by the Bills – the largest since the inception of the Family Court forty years ago – should not be implemented at this point in time and the Government should defer further consideration of the Bills until after the receipt and proper consideration of ALRC's report, due to be released by 31 March 2019.<sup>129</sup>
85. The ALRC's report will encompass a review on the design of the family law system, but not the structure in which that system will operate. The Law Council has expressed that it considers it amiss that a proposed structure has been designed simultaneously and

<sup>125</sup> Law Council of Australia, Submission to the Treasury, *2018-9 Pre-Budget Submission* (31 January 2018) 12-3.

<sup>126</sup> Law Council of Australia, Submission to the Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper* (2018), 5 [2].

<sup>127</sup> The Bills propose significant structural changes to the Family Court and the Federal Circuit Court. It is proposed that the Family Court and the Federal Circuit Court are amalgamated to create a new Federal Circuit and Family Court of Australia. The Government also announced that a new 'Family Law Appeal Division' in the Federal Court will also be established to hear all appeals in the family law matters from the FCFCA.

<sup>128</sup> Law Council of Australia, Submission to the Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper* (2018).

<sup>129</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (2018) 6 [3], 12 [11]; Law Council of Australia, 'Proposed Merger of the Family Court of Australia and Federal Circuit Court' (Media Release, 13 December 2018); Law Council of Australia, 'Senate Urged to Reject Courts Merger' (Media Release, 29 November 2018); Law Council of Australia, *Opinion Piece: Merging Family Courts Ahead of System Review is to Put the Cart before the Horse* (14 September 2018).



entirely separately to the ALRC's review, without knowledge of 'the nature of the legal system it is expected to deliver justice for'.<sup>130</sup>

86. Irrespective of any potential structural changes, the Law Council considers it clear that sufficient resources and sustainable funding are necessary for the federal courts and tribunals to efficiently process disputes and provide a fair outcome to participants.

87. The Law Council maintains its position expressed in response to the Bills that:

*Governments have failed to provide proper funding and resourcing to the existing family law courts system and to Legal Aid Commissions. That is overwhelmingly the source of the delays and inefficiencies and only additional funding can fix it. This is what is needed to truly help Australian families caught up in the system.*<sup>131</sup>

### **Parenting management hearings**

88. The Law Council reiterates its opposition to allocate \$12.7 million to the establishment of Parenting Management Hearings (**PMH**), as was announced in the 2017-18 Budget and proposed by the Family Law Amendment (Parenting Management Hearings) Bill 2017.

89. In its submission to the Senate Standing Committee on Legal and Constitutional Affairs, the Law Council stated that:

*the making of decisions about matters such as where a child lives, with whom a child spends time, and how a child communicates with a parent, let alone questions of parental responsibility, as each being matters that are and should remain within the remit of judicial decision-making power of judges.*<sup>132</sup>

90. The Law Council maintains that 'the Bill proposes a radical departure from the established position under Australian law' and opposes the 'purposed investiture of judicial power'.<sup>133</sup>

91. The Law Council is pleased that the Bill has not yet proceeded and restates its position that the proposed \$12.7 million to establish and operate the PMH panel should instead be allocated to improve the resourcing of the existing family law system (the Family Court and the Federal Circuit Court).<sup>134</sup>

### **Specialist lists in the Family Court**

92. In the ALRC's *Pathways to Justice Report*, it recommended that specialist Aboriginal and Torres Strait Islander sentencing courts should be established, which incorporate 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>135</sup>

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<sup>130</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018*, 12 [11].

<sup>131</sup> Law Council of Australia, 'Senate Urged to Reject Courts Merger' (Media Release, 29 November 2018).

<sup>132</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (7 February 2018), 5 [2].

<sup>133</sup> *Ibid* 5 [3].

<sup>134</sup> *Ibid* 6-7 [14].

<sup>135</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (2018) 328 ('*Pathways to Justice*').

93. The Law Society of NSW (**LSNSW**) strongly considers that 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.
94. In the family law jurisdiction, the LSNSW has written to, among others, the Commonwealth Attorney-General to support resourcing the expansion of the Family Court's Indigenous list to registries across Australia. The LSNSW considers that the pilot at the Sydney registry has resulted in very good outcomes for Indigenous families and children in keeping children safe within their own families and kin. In its view, funding to adequately resource the expansion of this list in the Family Court should be included in the 19-20 budget.
95. In the ALRC's Discussion Paper to its review of the family law system, it proposed that specialist court pathways should include, among others, an Indigenous List. In its submission to this Discussion Paper and in its submission to Committee on the Bills, the Law Council's stated that:

*the establishment of 'specialist court pathways' ought not be understood as a case management tool or approach as opposed to a means of ensuring that proceedings involving particular issues are allocated appropriate attention and resources within the Court system. Such issues can and ought to be the subject of particular attention in that context.*

*The LCA submits that any case management system ought to seek to identify a matter by the level of resources that the Court will be required to allocate to determine that matter – for example, short or contained matters (which would encompass most small property claims), complex matters (encompassing those requiring the intense allocation of judicial resources to determine the most demanding parenting and financial matters) and the balance or 'standard' matters. This approach permits a differential approach to the management of each matter within broad and objectively discernible parameters.*

*Such approach also permits the identification within such a system of matters which raise particular issues requiring more nuanced attention – for example, the Magellan program and the Indigenous List. Further, matters raising issues of family violence which require a particular approach or attention can also be identified.*

*There are a series of difficulties in constructing a case management system or pathways by reference to particular issues such as the three raised for consideration.<sup>136</sup>*

### **Complex communication needs**

96. Stakeholders of the Justice Project expressed concern about the critical shortages of appropriately trained and qualified interpreters.<sup>137</sup> The need for an improved availability of appropriately trained and culturally sensitive interpreters was overwhelmingly brought up as a key priority in stakeholder consultations and submissions, particularly in the context of recent arrivals to Australia, people who are seeking asylum and

<sup>136</sup> Law Council of Australia, Submission to the Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper* (2018) 39-40; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (2018) 24.

<sup>137</sup> Law Council of Australia, *Justice Project: Final Report - Recent Arrivals to Australia* (August 2018) 19-20.

Aboriginal and Torres Strait Islander peoples.<sup>138</sup> There is also evidence to suggest a lack of court interpreters in RRR areas. In a Justice Project consultation, Townsville Community Legal Service explained that there are very few interpreters (in all languages and AUSLAN) available in Townsville in the Federal Court and Federal Circuit Court.<sup>139</sup>

97. Access to quality interpreting services is integral in the federal jurisdiction, particularly due to the large number of migration matters involving individuals from culturally and linguistically diverse (**CALD**) backgrounds. The Federation of Ethnic Communities Council of Australia stated in its submission to the Justice Project that ‘the issue of appropriate language services is one [of] the most significant issue[s] for CALD populations who may have low English language literacy, legal literacy and institutional literacy’.<sup>140</sup>
98. The annual reports of the Federal Court, Federal Circuit Court and the Family Court do not provide information on the interpreting services within the courts. Further, the Productivity Commission’s 2019 *Report on Government Services* provides that access to interpreter services is an indicator which provides the proportion of people attending court who need an interpreter service. However, it states that no data is available for reporting against this indicator.<sup>141</sup>
99. The Judicial Council on Cultural Diversity (**JCCD**) released in 2017 recommended interpreter standards entitled *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>142</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>143</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>144</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.
100. As noted in the Justice Project, 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>145</sup> There remain outstanding recommendations from a number of previous reports (and the then-Australian Government’s 2008 commitment as part of the National Partnership Agreement on Remote Service Delivery) to develop a National

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<sup>138</sup> Law Council of Australia, *Justice Project: Final Report - Critical Support Services* (August 2018) 47.

<sup>139</sup> Law Council of Australia, *Justice Project: Final Report - Recent Arrivals to Australia* (August 2018) 21, citing consultation with Townsville Community Legal Service in Townsville on 29 August 2017.

<sup>140</sup> Law Council of Australia, *Justice Project: Recent Arrivals to Australia* (2018) 19, citing Federation of Ethnic Communities Council of Australia, Submission No 53 to the Law Council of Australia, *Submission to the Justice Project: A National Blueprint for Justice for All* (30 September 2017).

<sup>141</sup> Productivity Commission, *Report on Government Services 2019: Courts*, 7.12.

<sup>142</sup> Law Council of Australia, *Justice Project: Final Report - Critical Support Services* (August 2018) 47, citing National Accreditation Authority for Translators and Interpreters, *Judicial Council completes Recommended Standards for Interpreters Working in Court Settings* (2017) <<https://www.naati.com.au/news-events/news-events-container/updates/jccd-recommended-national-standards/>>.

<sup>143</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>144</sup> *Ibid.*

<sup>145</sup> Law Council of Australia, *Justice Project: Final Report - 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.

Aboriginal and Torres Strait Islander interpreter service. In 2014, the Productivity Commission recommended the following occur:

*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>146</sup>

101. This point was also consistently raised in submissions to the Justice Project, for example by NATSILS and the Kingsford Legal Centre. Kingsford Legal Centre 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>147</sup>
102. The National Accreditation Authority of Translators and Interpreters (**NAATI**) is funded by the Commonwealth Government to increase the number of accredited Aboriginal and Torres Strait Islander interpreters. NAATI has worked with the NT Aboriginal Interpreter Service since 2012 and is expanding its work in South Australia, Western Australia and Queensland (this initiative is known as the 'Indigenous Interpreting Project').<sup>148</sup> The Australian Government announced \$1.6 million in funding in June 2017 to the project.<sup>149</sup> However, as the NSW Bar Association noted, NAATI focuses on issuing accreditations for practitioners aiming to work as translators or interpreters and is not an employer of translators and interpreters.<sup>150</sup> Moreover, the NSW Bar observed that the Indigenous Interpreting Project 'appears to be important and worthwhile, but limited, as it has issued 96 accreditations to Indigenous interpreters over a five year period from 2012'.<sup>151</sup> In June 2017, the Australian Government announced further resourcing for Aboriginal and Torres Strait Islander interpreter services.<sup>152</sup>
103. 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;
  - (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

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<sup>146</sup> Productivity Commission, *Access to Justice Arrangements*, 66 Recommendation 22.3.

<sup>147</sup> 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>148</sup> National Accreditation Authority for Translators and Interpreters, *Indigenous Interpreting Project* <<https://www.naati.com.au/projects/indigenous-interpreting-project-iip/>>.

<sup>149</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-sculion-additional-16m-indigenous-language-interpreters>>.

<sup>150</sup> 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.

<sup>151</sup> *Ibid.*

<sup>152</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 135 (2017), [11.16].

- (c) the Productivity Commission's Recommendation 22.3 from its *Access to Justice Arrangements Report*<sup>153</sup> 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.**

## Establishment of a Federal Judicial Commission

104. As per the Law Council's recent submission to the Attorney-General's Department on the proposal to establish a Commonwealth Integrity Commission (CIC), it is recommended that a separate Federal Judicial Commission be established 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.<sup>154</sup>
105. That submission noted that, while it is suggested in the Attorney-General's Consultation Paper that consideration will be given as to whether the public sector division of the Commission could be given jurisdiction over members of the federal judiciary,<sup>155</sup> the Law Council considers that the oversight of federal judicial officers should not fall within the responsibility of the CIC. Rather, it should be the responsibility of a separate Federal Judicial Commission, established by a separate Act of Parliament and possibly based on the model of the independent judicial commission in New South Wales (NSW).
106. 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.
107. 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 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>156</sup>
108. 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.
109. 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

<sup>153</sup> Productivity Commission, *Access to Justice Arrangements*, 66 Recommendation 22.3.

<sup>154</sup> Law Council of Australia, Submission to the Attorney-General's Department, *Commonwealth Integrity Commission: Proposed Reforms* (31 January 2019) 11-2.

<sup>155</sup> Attorney General's Department, Parliament of Australia, *A Commonwealth Integrity Commission - Proposed Reforms* (2018), 5.

<sup>156</sup> *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 3.



separation of powers established in Constitution, which vests judicial power only in the judiciary as per section 71 of the Constitution.<sup>157</sup> Furthermore section 72(ii) of the Constitution provides that it is for the two House of Parliament to investigate and decide and whether a judicial officer has engaged in misbehaviour and to then remove that officer if appropriate.

110. 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 to, 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) of which the judiciary are not (although it does apply to their staff).
111. 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

### Data61's 'Regulation as a Platform'

112. The Law Council seeks a funding commitment to foster digital innovation, particularly in the field of easing the burden of regulatory compliance. It considers that the funding of Data61's 'Regulation as a Platform' should be extended and increased as necessary, to assist with the digitalisation of legislation. 'Regulation as a Platform' allows users to leverage the regulatory infrastructure to develop tools and services to help reduce the compliance burden.<sup>158</sup>
113. Data 61 has also undertaken important work in developing compliance solutions that would assist small businesses to identify their compliance obligations in a more cost-effective manner. The Law Council supports the prioritisation of funding of this service as an access to justice and red tape reduction exercise.<sup>159</sup>

### Office of the Australian Information Commissioner

114. In the Law Council's 2018-19 Pre-Budget Submission, it expressed concern that despite the relatively small increase in funding in the 2017-18 and 2016-17 budgets, the Office of the Australian Information Commissioner (**OAIC**) remained under-

<sup>157</sup> Judicial power is vest in the members of the judiciary as set out in the *Australian Constitution* ch III.

<sup>158</sup> CSIRO, *Regulation as a Platform* <<https://data61.csiro.au/en/Our-Work/Future-Cities/Optimising-service-delivery/RaaP>>.

<sup>159</sup> The Law Council has adopted this position from input provided by the Law Society of New South Wales.

resourced. While it is acknowledged that the previous Budget provided the OAIC with \$12.9 million over four years in funding as part of the establishment of the new National Consumer Data Right, it recommended that further additional funding be provided to the OAIC to ensure that it is properly resourced to manage its additional responsibilities in 2019-20, such as the operation of the mandatory Notifiable Data Breaches Scheme and the Government's biometric face matching services.<sup>160</sup>

115. The Law Council reiterates its recommendation that the level of funding for the OAIC should be increased to enable this office to effectively carry out its investigative, regulatory, dispute resolution and public education functions, and uphold the rights and protections afforded by the *Freedom of Information Act 1982* (Cth).
116. 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. The Law Council, therefore, emphasises the importance of ensuring that the OAIC is appropriately resourced to undertake its increasing functions.<sup>161</sup>

## The Australian Securities and Investments Commission and Australia Prudential Regulation Authority

117. The Law Council considers that the current level of funding for the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority should be increased. This will enable these bodies to more effectively carry out their respective investigative, regulatory and supervisory functions, as the case may be, and to assist each body to build its capacity to implement recommendations adopted by the Government from the Final Report from the Royal Commission into Misconduct in the Banking.
118. As noted previously, the Royal Commission into Misconduct in the Banking also highlighted the importance of the legal assistance sector in supporting the regulators in this area, stating:

*The legal assistance sector and financial counselling bodies are also recognised by ASIC as playing an important broader role in the financial services sector, for example by bringing issues to the attention of the regulator or providing a balancing consumer voice in policy development.*<sup>162</sup>

119. The Law Council again endorses increases to the legal assistance sector and notes the important role it plays in civil law matters such as those raised in the Royal Commission into Misconduct in the Banking.

## The Australian Competition and Consumer Commission

120. The Law Council recommends that the current level of funding for the Australian Competition and Consumer Commission (**ACCC**) should be increased to enable the ACCC to more effectively carry out its current investigative and regulatory functions,

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<sup>160</sup> Law Council of Australia, Submission to the Treasury, *2018-9 Pre-Budget Submission* (31 January 2018) 14.

<sup>161</sup> The Law Council has adopted this position from input provided by the Law Society of New South Wales.

<sup>162</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Volume 1, 492.

particularly in relation to consumer law-related investigations, support and dispute resolution.

## Australian Human Rights Commission

121. The Australian Human Rights Commission (**AHRC**) remains significantly under-resourced with complaints regularly taking over six months to reach conciliation stage. The Australian Government should adequately resource the AHRC so it can effectively carry out its investigation, complaint and conciliation functions.

## Initiatives to improve justice outcomes for Aboriginal and Torres Strait Islander peoples

### Justice reinvestment

122. The first major justice reinvestment project in Australia is the Maranguka Justice Reinvestment Project (**the Project**) in Bourke NSW, developed by Just Reinvest NSW in partnership with the Bourke Aboriginal community.<sup>163</sup> Another trial is currently underway in Cowra.<sup>164</sup> The ACT Government has taken substantial steps towards implementing justice reinvestment, and in 2017 it announced a 12-month trial of a justice reinvestment program entitled 'Yarrabi Bamirr', in coordination with the Winnunga Nimmityjah Aboriginal Health Service.<sup>165</sup> Yarrabi Bamirr provides intensive family-centric support to 10 Aboriginal and Torres Strait Islander families. A second ACT Government initiative currently underway is a two-year bail-support service trial.<sup>166</sup> The South Australian Government is also developing a trial based in Port Adelaide,<sup>167</sup> and trials are planned in Queensland and the Northern Territory.<sup>168</sup>
123. The Bourke Maranguka Justice Reinvestment Project involves Just Reinvest NSW working in partnership with local community groups to implement a framework for justice reinvestment in Bourke.<sup>169</sup> The Project is currently in its implementation phase (2016–2019); it underwent a preliminary assessment in September 2016, which found that the Aboriginal and Torres Strait Islander community governance model used in the Project 'strategically aligns' with government aspirations for 'improving economic and social conditions in Aboriginal communities and realising community priorities'.<sup>170</sup> The initial part of the Project focused on building trust between the community and service providers (including police and government agencies), identifying community priorities and developing 'Circuit Breaker' programs to reduce offending,<sup>171</sup> such as programs to

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<sup>163</sup> Just Reinvest NSW, Submission No 120 to the Law Council of Australia, *Just Reinvest NSW Submission to Law Council of Australia: The Justice Project* (13 October 2018).

<sup>164</sup> Matthew Willis and Madeleine Kapira, 'Justice Reinvestment in Australia: A Review of the Literature' (Australian Institute of Criminology Reports Series, Research Report No 9, 2018) viii ('*Justice Reinvestment in Australia*').

<sup>165</sup> Doug Dingwall, 'Govt adopts justice trial to reduce offending rate among Indigenous people', *Canberra Times* (online), 25 April 2017; Willis and Kapira, 'Justice Reinvestment in Australia', viii.

<sup>166</sup> Willis and Kapira, *Justice Reinvestment in Australia*, 40.

<sup>167</sup> Government of South Australia, *Justice Reinvestment* (2017) <<https://www.agd.sa.gov.au/projects-and-consultations/justice-reinvestment>>.

<sup>168</sup> Australian Law Reform Commission, *Pathways to Justice*, 136.

<sup>169</sup> Just Reinvest NSW, Submission No 120 to the Law Council of Australia, *Just Reinvest NSW Submission to Law Council of Australia: The Justice Project* (13 October 2018).

<sup>170</sup> KPMG, *Unlocking the Future: Maranguka Justice Reinvestment Project Preliminary Assessment* (2016) <http://www.justreinvest.org.au/wp-content/uploads/2016/11/KPMG-Preliminary-Assessment-Maranguka-Justice-Reinvestment-Project.pdf> ('*Unlocking the Future*').

<sup>171</sup> Australian Indigenous Health Info, *Maranguka Justice Reinvestment Project* (April 2017) <<http://www.healthinonet.ecu.edu.au/key-resources/programs-projects?pid=2586>>.



help young people obtain drivers licences and school holiday programs during high-risk crime periods.<sup>172</sup>

124. The preliminary assessment, analysing the results of the Project in Bourke, demonstrated significant quantitative and qualitative justice-related improvements. In 2017, there was a gross economic impact of \$3.1 million. Two-thirds of this impact is relief on the justice system itself and a further third is a broader economic impact on the region. If just half of the results achieved in 2017 are sustained, Bourke could deliver an additional economic impact of \$7 million over the next five years. Other key findings include a 23 per cent reduction in police-recorded incidence of domestic violence and comparable drops in rates of reoffending; a 31 per cent increase in year 12 student retention rates and a 38 per cent reduction in charges across the top five juvenile offence categories; and a 14 per cent reduction in bail breaches and a 42 per cent reduction in days spent in custody.<sup>173</sup>
125. The Justice Project identified that the Maranguka Project is designed in light of pathways into the criminal justice system, and aims to disrupt cycles of offending and disadvantage for individuals and communities. It is a community-driven, culturally competent, place based model, and it is grounded in an evaluative, evidence-based framework. It is an approach that shifts the focus from an individual's interactions with the justice system, to strengthening communities and recognising the integral role of non-justice system players in preventing crime and addressing disadvantage.<sup>174</sup>
126. The ALRC's *Pathways to Justice* report recommended that Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities.<sup>175</sup> The Law Council supports this recommendation of the ALRC and considers that the Australian Government, along with state and territory governments, should expand its support for piloting community-led justice reinvestment initiatives.
127. Further, the ALRC's *Pathways to Justice* report made recommendations that the Commonwealth, state and territory governments should provide support for the establishment of an independent justice reinvestment body.<sup>176</sup> In the Justice Project, the Law Council provided support for this recommendation and considers that the Australian Government should allocate funding for the establishment a national, independent justice reinvestment body to provide expertise on these initiatives, and adequately fund community-led sites in each jurisdiction.<sup>177</sup>

## Closing the Gap Refresh agenda

### Justice targets

128. In Law Council's submission to the Closing the Gap Refresh in May 2018, it noted that it has made repeated calls for the inclusion of justice targets and associated action by Australian governments to address the overrepresentation of Aboriginal and Torres

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<sup>172</sup> Morry Bailes, 'There is a Way to Reverse This National Tragedy – If We Have the Will', *InDaily* (online), 14 September 2018 <<https://indaily.com.au/opinion/2018/12/14/there-is-a-way-to-reverse-this-national-tragedy-if-we-have-the-will/>>.

<sup>173</sup> Ibid.

<sup>174</sup> Law Council of Australia, *Justice Project: Final Report - Critical Support Services* (August 2018) 45.

<sup>175</sup> Australian Law Reform Commission, *Pathways to Justice*, 137 Recommendation 4-2.

<sup>176</sup> Ibid Recommendation 4-1.

<sup>177</sup> Law Council of Australia, *Justice Project: Final Report - Critical Support Services* (August 2018) 45, Recommendation 5.2.

Strait Islander people in imprisonment.<sup>178</sup> It again submitted that justice specific targets should be included in the Closing the Gap agenda.<sup>179</sup>

129. In December 2018, the Council of Australian Governments (**COAG**) released a draft of refreshed Closing the Gap targets. For the first time, justice and youth justice targets have been included. Specifically, the draft COAG target is to reduce the rate of Aboriginal and Torres Strait Islander young people in detention by 11-19 per cent and adults held in incarceration by at least 5 per cent by 2028.<sup>180</sup>
130. The Law Council welcomes the introduction of justice targets in the Closing the Gap agenda. However, it considers that the targets are overly modest, given that Aboriginal and Torres Strait Islander over-incarceration increased by 4 per cent between 2017 and 2018.<sup>181</sup> The Law Council reiterates the recommendation from its submission to the Closing the Gap Refresh that a target be included to close the gap in rates of imprisonment of Aboriginal and Torres Strait Islander peoples by 2040.<sup>182</sup>
131. Further, the justice target included in the Closing the Gap Refresh draft targets is framed as a 'state-led' target. The Law Council has consistently called for national leadership from the Australian Government on addressing the over-incarceration of Aboriginal and Torres Strait Islander peoples given its status as a national crisis.
132. The Law Council recognises that the COAG framework discusses that the Commonwealth, states and territories share accountability for the refreshed Closing the Gap agenda and are jointly accountable for outcomes for Aboriginal and Torres Strait Islander people.<sup>183</sup> Yet, in light of the findings of the recent review into the Australian Government's implementation of the recommendations from the Royal Commission into Aboriginal Deaths in Custody,<sup>184</sup> and the lack of a government response to the ALRC's *Pathways to Justice* report, action on this issue may not be a priority for the federal government.
133. The Law Council considers that the Closing the Gap agenda requires an urgent national response, and should include justice targets which involve federal, as well as state and territory, action.

#### Targets regarding family violence and out-of-home care

134. The Law Council welcomes the addition of targets to the Closing the Gap agenda which aim to address the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care and reduce violence against Aboriginal and Torres Strait Islander women and children.<sup>185</sup>

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<sup>178</sup> See, eg, Law Council of Australia 'Call for Justice Targets on 10th Anniversary of Apology to Australia's Indigenous Peoples' (Media Release 13 February 2018) <[www.lawcouncil.asn.au/media/media-releases/call-for-justice-targets-on-10th-anniversary-of-apology-to-australias-indigenous-peoples](http://www.lawcouncil.asn.au/media/media-releases/call-for-justice-targets-on-10th-anniversary-of-apology-to-australias-indigenous-peoples)>.

<sup>179</sup> Law Council of Australia, Submission to Council of Australian Governments, *Closing the Gap Refresh* (4 May 2018) 10 [33].

<sup>180</sup> Council of Australian Governments, Statement on the Closing the Gap Refresh (Statement, 12 December 2018) 6.

<sup>181</sup> Australian Bureau of Statistics, *Prisoners in Australia* (December 2018) Table 2.

<sup>182</sup> Law Council of Australia, Submission to Council of Australian Governments, *Closing the Gap Refresh* (4 May 2018) 10 [35a].

<sup>183</sup> Council of Australian Governments, Statement on the Closing the Gap Refresh (Statement, 12 December 2018) 3.

<sup>184</sup> Department of Prime Minister and Cabinet, Deloitte Access Economics, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (2018).

<sup>185</sup> Council of Australian Governments, Statement on the Closing the Gap Refresh (Statement, 12 December 2018) 4.

135. In the Law Council's submission to the Closing the Gap Refresh, the Law Council noted its repeated calls for the inclusion of justice targets and associated action by Australian governments to address the disproportionate levels of violence experienced by Aboriginal and Torres Strait Islander people (particularly family and domestic violence).<sup>186</sup> It submitted that the Closing the Gap agenda should include justice specific targets to cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander peoples, to at least close the gap by 2040, with priority strategies for women and children.<sup>187</sup> The ALRC and National Congress of Australia's First Peoples have recently made similar recommendations.<sup>188</sup>
136. The Law Council's submission also recommended that the Closing the Gap agenda incorporate targets in respect of the number of Aboriginal and Torres Strait Islander children removed and placed into out-of-home care.<sup>189</sup> The Law Council's Justice Project has raised the disproportionate rates of Aboriginal and Torres Strait Islander children in out-of-home care, and the concerns that this generates for those individuals.<sup>190</sup> These concerns have been reflected in the ALRC's recommendation that the Commonwealth should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.<sup>191</sup> Furthermore, the Royal Commission into the Protection and Detention of Children in the Northern Territory (**Royal Commission**) specifically acknowledged the links between care and protection, juvenile detention and later adult incarceration.<sup>192</sup>
137. However, the Law Council notes its reservations about the draft targets. First, they lack any specific objectives. Secondly, they are framed as 'state-led' targets. Thirdly, the targets regarding the safety of Aboriginal and Torres Strait Islander families and households are cast as alternatives.<sup>193</sup> Both of these issues affecting Aboriginal and Torres Strait Islander families are of real national concern, as has been highlighted in the Justice Project, the ALRC's *Pathways to Justice* report and the Royal Commission. The Law Council considers that the Closing the Gap agenda should incorporate individual targets for addressing separately the issues of family violence and the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care, which have measurable objectives and include Commonwealth, as well as state and territory, action and leadership.

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<sup>186</sup> See, Law Council of Australia 'Call for Justice Targets on 10th Anniversary of Apology to Australia's Indigenous Peoples' (Media Release 13 February 2018) <[www.lawcouncil.asn.au/media/media-releases/call-for-justice-targets-on-10th-anniversary-of-apology-to-australias-indigenous-peoples](http://www.lawcouncil.asn.au/media/media-releases/call-for-justice-targets-on-10th-anniversary-of-apology-to-australias-indigenous-peoples)>.

<sup>187</sup> Law Council of Australia, Submission to Council of Australian Governments, *Closing the Gap Refresh* (4 May 2018) 10 [35b].

<sup>188</sup> Australian Law Reform Commission *Pathways to Justice*, Recommendation 16-1; National Congress of Australia's First Peoples 'National Justice Policy', 4, 11.

<sup>189</sup> Law Council of Australia, Submission to Council of Australian Governments, *Closing the Gap Refresh* (4 May 2018) 12 [47].

<sup>190</sup> Law Council of Australia, Justice Project Consultation Paper 'Aboriginal and Torres Strait Islander People' (August 2017), 37 <[www.lawcouncil.asn.au/justice-project/consultation-papers](http://www.lawcouncil.asn.au/justice-project/consultation-papers)>.

<sup>191</sup> Australian Law Reform Commission, *Pathways to Justice*, Recommendation 15-1.

<sup>192</sup> The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory noted research demonstrating the significantly increased risk of offending for children who have been in out-of-home care: Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report*, Volume 3B, Chapter 35, 7.

<sup>193</sup> 'Significant and sustained progress to eliminate the over-representation of Aboriginal children in out-of-home care' and/or 'significant and sustained progress reduction in violence against Aboriginal and Torres Strait Islander women and children': Council of Australian Governments, Statement on the Closing the Gap Refresh (Statement, 12 December 2018) 4.

## Review of the Indigenous Advancement Strategy

### Review funding strategy for service delivery to Indigenous communities

138. The Law Council considers that the IAS should be reconsidered in light of a number of reports, including the Australian National Audit Office's (**ANAO**) report, as well as the report of the Senate Finance and Public Administration References Committee on its inquiry into the Commonwealth Indigenous Advancement Strategy tendering processes.
139. One measure of a government's commitment to community empowerment is assessing how the service delivery to Aboriginal and Torres Strait Islander communities is designed and funded. The Law Council's view is that respecting the principle of self-determination and its manifestation in practice by empowering communities and individuals, is critical. The *United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)* provides a comprehensive base for the full participation of Indigenous peoples in the broader society in which they live or by which they may be governed, as well as a mandate for self-determination.<sup>194</sup> The Declaration places the responsibility on Member States to 'provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving First Nations peoples of their integrity as distinct peoples or ethnic identities, or of their cultural values'.<sup>195</sup> The principle of self-determination requires Indigenous participation in decision making, and it is submitted that service delivery to Indigenous communities should build on and contribute to this goal of Aboriginal and Torres Strait Islander empowerment.
140. In consultation with the Justice Project, the National Aboriginal and Torres Strait Islander Legal Services stated that self-determination of National Aboriginal and Torres Strait Islander peoples in this context requires governments to include Aboriginal and Torres Strait Islander peak bodies, leaders, community members and organisations in co-designing and delivering policy and services and long-term funding is needed for Aboriginal and Torres Strait Islander peak bodies and service-delivery organisations to be able to effectively participate in this work.<sup>196</sup>
141. The Law Council considers that funding of service delivery to Aboriginal and Torres Strait Islander communities should prioritise partnerships with local Aboriginal leadership and funding of Aboriginal-controlled community organisations that may be already providing local solutions to local issues. Aboriginal and Torres Strait Islander community-controlled organisations and Aboriginal and Torres Strait Islander people are most appropriately placed to provide services and speak on behalf of Aboriginal and Torres Strait Islander peoples.<sup>197</sup>
142. The Law Council is concerned that it may be a false economy to shift the funding model of the IAS from a model of high-quality community service provision targeted towards Aboriginal and Torres Strait Islander people, to a generalist model that prioritises cost efficiency rather than culturally-based expertise. In 2015, it was reported that two-thirds of the organisations that received funding under the IAS were non-Indigenous

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<sup>194</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

<sup>195</sup> *Ibid* art 8.

<sup>196</sup> Email from National Aboriginal and Torres Strait Islander Legal Service to Law Council of Australia, 11 May 2018.

<sup>197</sup> Change The Record, *Blueprint for Change* (2016) 4 < [https://www.reconciliation.org.au/wp-content/uploads/2016/11/Change-the-Record-Blueprint\\_web.pdf](https://www.reconciliation.org.au/wp-content/uploads/2016/11/Change-the-Record-Blueprint_web.pdf)>; National Congress of Australia's First Peoples, *Redfern Statement*, 11 < <http://nationalcongress.com.au/about-us/redfern-statement> >; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (2016), 34.

organisations.<sup>198</sup> The funded recipients include the Northern Territory Government, various government departments including the Department of Health and Ageing, the Department of Education and Training, the Department of Justice and Attorney-General and the Department for Correctional Services. Shire Councils, universities and other non-government agencies such as the Australia Rugby Union were also recipients.

143. The Law Council notes the findings of the New South Wales Ombudsman's report on the issue of effective funding models for Aboriginal organisations (**Ombudsman Report**), the findings of which were informed by extensive consultation with hundreds of agencies and organisations responsible for service provisions, as well as the work of the Ombudsman spanning over a decade.<sup>199</sup>

144. The Ombudsman Report found that 'substantial government investments have yielded dismally poor returns to date' and suggests that in order to change this, the reform process must make Aboriginal and Torres Strait Islander affairs core business for all agencies, where change is driven from the centre of government.<sup>200</sup> It recommended that:

*major reform to the 'infrastructure' governing Aboriginal affairs in NSW is required. The reform process must involve a true partnership between government and Aboriginal leaders. The currently fragmented approach to the planning, funding and delivery of services to Aboriginal communities, and the absence of adequate mechanisms for holding agencies to account against their responsibilities, must also be addressed. At the same time, government needs to work with Aboriginal leaders in developing strategies to facilitate greater participation by Aboriginal people in successful economic endeavours.*<sup>201</sup>

145. The Law Council endorses consideration of the findings and recommendations of the Ombudsman report which, in the view of the Law Council, support a transparent funding model that is underpinned by the principle of self-determination and which establishes true partnerships.

146. While the report examines the NSW Government's Aboriginal and Torres Strait Islander affairs strategy, its findings and recommendations are likely to be applicable nationally.

147. Further, the ANAO has assessed whether the Department of the Prime Minister and Cabinet has effectively established and implemented the IAS to achieve the outcomes desired by government.<sup>202</sup> The ANAO concluded that the IAS does not achieve the outcomes desired by government:

*The department's grants administration processes fell short of the standard required to effectively manage billions of Commonwealth resources. The basis by which projects were recommended to the Minister was not clear and, as a result, limited assurance is available that the projects funded support the department's desired outcomes. Further, the department did not:*

- *Assess applications in a manner that was consistent with the guidelines and the department's public statements;*

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<sup>198</sup> Natasha Robinson, 'Indigenous Advancement Strategy Funding Revealed', *The Australian* (online), 24 March 2015 <<https://www.theaustralian.com.au/national-affairs/indigenous/indigenous-advancement-strategy-funding-revealed/news-story/5636bff288205dfb49f79c778643f286>>.

<sup>199</sup> New South Wales Ombudsman, *Addressing Aboriginal Disadvantage: The Need to do Things Differently* (2011).

<sup>200</sup> *Ibid* 5.

<sup>201</sup> *Ibid* 5.

<sup>202</sup> Australian National Audit Office, *Indigenous Advancement Strategy Performance Audit Report* (2017).



- *Meet some of its obligations under the Commonwealth Grants Rules and Guidelines;*
- *Keep records of key decisions; or*
- *Establish performance targets for all funded projects.* <sup>203</sup>

148. In response to the Royal Commission, the Government acknowledged that the issue is not a lack of funding, it is the lack of coordination and understanding of how that money is spent and what outcomes are being achieved.<sup>204</sup> The Government acknowledged also that this is relevant to the Northern Territory and also to the Commonwealth. In its response, the Government stated that it has committed \$53 million to implement a whole-of-government research and evaluation strategy for policies and programs affecting Indigenous Australians, including the IAS.<sup>205</sup>

149. Given the above, the Law Council suggests that the IAS be reconsidered and that an approach is adopted which empowers Aboriginal and Torres Strait Islander communities and is consistent with the principles of self-determination. Such an approach would include the recognition of Aboriginal and Torres Strait Islander community strengths by requiring consultation and partnership with Aboriginal and Torres Strait Islander communities to design and deliver local solutions to local problems, and to require prioritising the funding of service delivery by organisations with local and culturally sound expertise in the assessment of funding applications.

#### **Review funding strategy to build capacity in the Indigenous service sector**

150. The Law Council considers that funding must be sufficient to build capacity in Aboriginal and Torres Strait Islander organisations and the sector more generally to meet the increased demand on the sector and services. As noted, the Law Council is strongly of the view that true partnerships with Indigenous organisations are critical to successful service delivery to Aboriginal and Torres Strait Islander people. However, unless this approach is matched by adequate investment by the Government in Aboriginal and Torres Strait Islander service sector capacity building, there is the potential risk that Indigenous organisations maybe pushed out of the market by more mature, larger scale non-Indigenous service providers.

151. In the context of NSW, increased outsourcing of public services is resulting in growing demand on the Aboriginal and Torres Strait Islander service sector. Since the NSW Department of Family and Community Services (**FACS**) undertook its Safe Home for Life Reform in 2014, NSW has seen large outsourcing of child protection services to the non-government organisations sector. This has significantly increased demand on the Aboriginal and Torres Strait Islander service sector. FACS' new commissioning model is only going to place greater demand on an already stretched and underfunded Aboriginal and Torres Strait Islander service sector.

152. However, there has not been an equivalent investment from federal, state and territory governments in building the capacity of Indigenous service provision sector to meet the increased demand. The Law Council recommends that the 2019-20 Budget should provide for up-front investment to support capacity building in the Aboriginal and Torres Strait Islander service sector to meet growing demand.

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<sup>203</sup> Ibid.

<sup>204</sup> Prime Minister, Minister for Social Services and Minister for Indigenous Affairs, 'Commonwealth Government response to the Royal Commission into the Protection and Detention of Children in the Northern Territory' (Media Release, 8 February 2018).

<sup>205</sup> Ibid.