



Law Council
OF AUSTRALIA

Review of the National Partnership Agreement on Legal Assistance Services

Urbis Consulting

5 October 2018

Telephone +61 2 6246 3788 • Fax +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Context of the review	5
Funding for legal assistance services	5
Levels of funding	5
Certainty of funding	6
Evidence-based funding	7
The need for co-design, collaboration and consultation	7
The role of the private legal profession.....	7
Restrictions on advocacy work.....	9
Regional, rural and remote service delivery	10

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

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

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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

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

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

Acknowledgement

The Law Council is grateful for the assistance of its Access to Justice Committee, the Queensland Law Society and the Law Institute of Victoria in the preparation of this submission.

Context of the review

1. Thank you for the opportunity to contribute to the review of the National Partnership Agreement on Legal Assistance Services (**NPA**). The following comments are in response to the matters raised in the Discussion Paper produced by Urbis dated 1 August 2018. However, for a more comprehensive picture of what could be done to support effective legal assistance service delivery into the future, the Law Council refers to the Final Report of the Justice Project, the Law Council's own national review into the state of access to justice in Australia for people experiencing disadvantage.¹ The Legal Services Chapter of the Justice Project sets out what is both effective and necessary to meet the legal needs of diverse groups of Australians.
2. 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. The NPA serves a critically important purpose as the mechanism by which funding is received by the two largest of these subsectors, CLCs and LACs.
3. It is submitted that the review of the NPA provides a useful opportunity to consider the operation of the funding arrangements for LACs and CLCs, but also more broadly the interaction between the NPA and the decision-making, funding, administrative and policy settings for the legal assistance sector.

Funding for legal assistance services

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

Levels of funding

5. The Law Council notes that the current level of funding under the existing NPA does not address the growing funding crisis in the legal assistance sector, resulting in significant unmet legal need.
6. The Law Council has consistently advocated for increased funding to the legal assistance services, in line with the findings of numerous inquiries and reviews. Most recently, the Law Council's the Justice Project, concluded that Commonwealth, State and Territory governments should invest significant additional resources in LACs, CLCs, ATSILSs and FVPLSs to address critical civil and criminal legal assistance service gaps. This should include, at a minimum, \$390 million per annum.²
7. 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

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

² *Ibid*, recommendation 2.1.

intersectional disadvantage.³ Government-funded legal assistance services such as those provided under the NPA are often the only option for vulnerable people experiencing legal problems. Yet, federal funding for legal aid has declined to such an extent that despite the fact that around 14 percent of Australians live below the poverty line, just eight percent of all Australian households now qualify for legal aid.⁴ Meanwhile, in 2015-16, CLCs had to turn away nearly 170,000 people, which the National Association of Community Centres highlights is a conservative number.⁵

8. While it is understood that the overall quantum of funding available to the sector is outside the review's terms of reference, to meet the objectives of the NPA, there is, unavoidably, a need for increased funding. Without increasing funding to the legal assistance sector, the NPA and mechanisms such as collaborative service planning essentially involve *moving* service gaps, rather than *filling* gaps.

Certainty of funding

9. With reference to Goals 3 and 6 of the NPA review, it is submitted that funding certainty and predictability are key principles in organisational sustainability and allows for legal assistance services to plan effectively and appropriately for service provision. Funding should be made by way of transparent, consistent and evidence-based mechanisms or models taking into account legal need (including unmet legal need), and barriers to access to justice.
10. 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 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.*⁶

11. In addition, to ensure appropriate resources are provided to the legal assistance sector to meet unexpected increases in legal need, the Law Council recommends Justice Impact Tests accompany new government policy or legislation, as a means of determining the impact of any initiative or reform. We refer 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.⁷
12. Justice Project research and stakeholders also continually underlined that given the high levels of mistrust of the justice system amongst many marginalised Australians, policy and funding frameworks should reflect the importance of building trust with clients and communities. This requires long-term funding certainty, including avenues for continuing successful pilots into the future. The damage to client and community relationships which can follow the sudden demise of short-term legal assistance

³ Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018), 6.

⁴ Productivity Commission, *Access to Justice Arrangements*, December 2014, 1016.

⁵ National Association of Community Legal Centres, *Submission to the Australian Government: Federal Budget 2018-2019* (21 December 2017), 5.

⁶ Law Council of Australia, *The Justice Project: Final Report – Part 2* (August 2018), 4.

⁷ Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendation 7.3.

projects due to funding uncertainty can undermine future initiatives to increase access to justice to people in need.⁸

Evidence-based funding

13. The Law Council endorses an approach to funding legal assistance services that seeks to identify legal need in the community, and then sets a baseline level of services before arriving at an appropriate funding model. This approach would be more conducive to establishing a framework for the Commonwealth, States and Territories to agree on national objectives (such as a minimum proportion of the population who should be eligible for free legal assistance, having regard to different services' roles, services and objectives), and to provide a sufficient level of funding to meet that need, shared equally between different levels of government.
14. The Law Council considers that a major deficiency of the current NPA is that it simply binds the States to spending Commonwealth funding in certain ways, based on a Commonwealth funding offer which is seemingly disconnected from an evidence base. The review of the NPA provides an important opportunity for governments to change this approach.
15. The Law Council further considers that reviews of legal assistance services program expenditure should be accompanied by a stronger commitment to improving the ongoing evidence base regarding the Australian community's legal needs and what works in this area. In this context, it is particularly concerning that the LAW survey, which remains the most comprehensive national survey available, is based on data which is now a decade old. This does not provide an adequate evidence base on which to guide future expenditure of public funds beyond 2020, and risks overlooking emerging and critical areas of need. To ensure evidence-based service delivery into the future, a new LAW survey must be funded, as well as complementary targeted studies into the needs of difficult-to-reach communities.⁹

The need for co-design, collaboration and consultation

16. As the name suggests, an effective NPA must operate as a true partnership between parties. The Law Council therefore submits that the approach taken by government in relation to the funding and administration of the sector must be grounded in principles of co-design, and a commitment to genuine engagement between legal assistance providers in each jurisdiction.
17. In this regard, the Law Council highlights the important role played by peak bodies in this area, notably National Legal Aid and the National Association of Community Legal Centres. The Law Council supports the need for the ongoing, sustainable and sufficient funding and support of these peak legal assistance bodies as a key element of ensuring that the objective and outcomes of the NPA are met.

The role of the private legal profession

18. The Law Council considers the private legal profession to be integral to the effectiveness of the delivery of NPA objectives and represents a critical aspect of the NPA's efficiency and effectiveness both presently and into the future. While nothing

⁸ Law Council of Australia, *The Justice Project: Final Report* (August 2018), Legal Services Chapter, 26-29.

⁹ Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendation 7.8.

can replace governments' responsibility to adequately fund legal assistance services, this remains an important aspect of the NPA.

19. In particular, the efficiency and effectiveness of the legal aid system is in part reliant on private lawyers being prepared to take legal aid matters at the relatively low rate paid by LACs. The Australian legal aid system is heavily reliant on the private profession for delivery of services. For example, in 2016-17, of 41,638 Victoria Legal Aid grants of legal assistance, 29,735 (or 71 percent) were private practitioner grants.¹⁰
20. The same can be said to those in the private profession that accept referrals from community legal centres to act on a pro bono basis.
21. It is submitted that any discussion as to the future of the NPA should have regard to the sustainability of the current arrangements, in particular, the sustainability of participation by quality providers within the private sector. This could include consideration as to whether:
 - the NPA has had an impact on the participation of private lawyers in the legal aid system since its implementation;
 - whether the NPA has allowed for a shift in rates paid to private legal practitioners undertaking legal aid work closer to market rates;
 - whether participation by the private legal sector in NPA funded activity is expected to continue at current levels, including trends in rural, regional and remote areas; and
 - community legal centres require resourcing to support effective collaboration with pro bono providers, not only in making appropriate referrals but also to allow collaborative project work such as outreach clinics.
22. In 2014, the Productivity Commission found that the mixed model of legal assistance service provision was successful, but that its sustainability was in question. It found that financial incentives would be required to attract private practitioners to perform essential legal assistance work, particularly in rural, regional and remote (RRR) areas.¹¹
23. Justice Project research and stakeholders reflected similar concerns regarding the ongoing viability of the mixed service delivery model, particularly in RRR areas. For example, research has indicated that the strengths of New South Wales Legal Aid's Regional Outreach Program, which funds private and CLC solicitors to provide legal services in high-need locations where it would be inefficient to send its own solicitors, lie in these practitioners' strong links to RRR communities, commitment to facilitating access to justice and its in-built flexibility.¹² However, a 2013 independent evaluation noted that some private practitioners had indicated that Legal Aid NSW payments were so low as to make it unviable to take on legally-aided clients, raising doubts about its future viability.¹³

¹⁰ Victoria Legal Aid, *Annual Report 2016-2017* (2017) 13.

¹¹ Productivity Commission, *Access to Justice Arrangements*, 703.

¹² Jane Cipants, Legal Aid NSW, *Review of the Legal Aid NSW Regional Outreach Clinic Program (ROCP)* (August 2013) 28-29, 39.

¹³ *Ibid.*

Restrictions on advocacy work

24. The legal assistance sector funding, particularly for civil and administrative cases is fundamental to ameliorating the factors that increase the risks of marginalised living and poverty (unemployment, debt, housing, etc).¹⁴ Often, all that is required to prevent relatively minor problems expanding into more serious matters requiring regulatory response, law enforcement and/or court intervention is early legal advice and assistance of the kind provided by services funded under the NPA.
25. These frontline services are also critical to identifying, informing and responding to systemic issues. There is a vital role for legal assistance providers in undertaking early intervention, policy, advocacy and law reform work. Assisting individual clients through advice and casework enables legal assistance lawyers to not only assist the individual, but also to identify laws, policies and practices that adversely impact upon disadvantaged people or vulnerable groups in the community. Legal assistance providers are in an excellent position to identify recurring causes of legal problems, such as unclear laws, or unlawful or unfair practices.
26. As a result, it is also important to recognise the broader benefit generated by law reform and advocacy work to other members of the community. This work is crucial in identifying and encouraging reform of laws, policies and practices that are not operating effectively or equitably. For example, in some instances, the most efficient means of avoiding or resolving civil disputes, particularly those arising from unfair operation or application of a law or policy, is to advocate for legislative, policy or practice reform. Accordingly, this work constitutes a core prevention strategy.
27. There are numerous examples of legal assistance providers undertaking this work to the benefit of the community, some of which are described in the Justice Project.¹⁵ The value of this work has been recognised in a number of contexts.¹⁶ In 2014, the Productivity Commission stated that legal assistance providers play a key role in law reform, policy and advocacy, that it should be a 'core activity' of CLCs and that 'in many cases, strategic advocacy and law reform can reduce demand for legal assistance services and so be an efficient use of limited resources'.¹⁷ The Commission also expressed the view that such 'activities can benefit people directly affected by a particular issue, and, by clarifying or improving the law, they can also benefit the community more broadly and improve access to justice (through positive spill-overs)'.¹⁸ It recommended that commonwealth, state and territory governments should provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services.¹⁹
28. While the NPA does allow for legal assistance service providers to make submissions to a government or parliamentary body to provide factual information and/or advice with a focus on systemic issues affecting access to justice, it does note that funding

¹⁴ See, eg, Andrea Durbach, 'Between the Idea and the Reality: Securing Access to Justice in an Environment of Declining Points of Entry', in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017), 214-215, 230.

¹⁵ Law Council of Australia, *The Justice Project: Final Report* (August 2018), Legal Services Chapter, 64-66.

¹⁶ Eg, Liana Buchanan, 'Community Lawyers, Law Reform and Systemic Change: Is the End in Sight?' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart: 2017) 141; Pascoe Pleasence et al, Law and Justice Foundation of New South Wales, *Reshaping Legal Assistance Services*, 117; Department of Justice and Regulation (Victoria), *Access to Justice Review* (2016) 432.

¹⁷ Productivity Commission, *Access to Justice Arrangements*, 709, 711.

¹⁸ Ibid 708.

¹⁹ Ibid 62, 708-713.

should not be used to lobby governments or to engage in public campaigns.²⁰ Instead, it should be directed to the delivery of frontline services and focused on meeting the legal needs of priority clients.²¹

29. Legal assistance services play a key role in law reform, policy and advocacy, and the existing restriction creates some doubt as to what advocacy activities may be permissible under the NPA. The recent Victorian Access to Justice Review found that the NPA restriction was uncertain and negatively impacted the effectiveness of CLCs' preventative work.²² This is clearly not in the public interest. It is submitted that the NPA should be amended to remove the restriction on the use of Commonwealth funding for certain aspects of this work.²³

Regional, rural and remote service delivery

30. Finally, one key area of concern which has been a focus of both Justice Project research²⁴ and consultations to date has been the lack of legal services, including legal assistance services, which are available in RRR areas.
31. In the Law Council's view, many of the access to justice issues which face other Justice Project priority groups – such as older Australians, people experiencing family violence, or Aboriginal and Torres Strait Islander Australians – are magnified when the individuals involved live in RRR locations. While nearly 30 per cent of Australians live outside major cities in Australia, only around 10.5 per cent of practising solicitors were practising in these areas.
32. The Justice Project's RRR Australians chapter canvasses both research and stakeholder feedback regarding the formidable barriers – including distance, lack of financial means (including due to being cash poor and asset rich), poor technology, lack of transport and conflict of interest owing to a scarcity of services - experienced by many RRR residents who are unable to access help to resolve their legal problems in a timely way. As a result, these problems often spiral from relatively minor issues into far more intractable and serious matters.²⁵
33. It would be useful for the NPA reviewers to include a focus on what is needed to ensure better and more sustainable legal assistance service coverage of RRR residents into the future, having regard to the specific evidence base regarding the regions in which the most critical shortages lie.²⁶ In this regard, the Justice Project recommended that governments, peak legal assistance and legal professional bodies should cooperate to develop:
- strategies to overcome conflict of interest issues which preclude many disadvantaged people from accessing justice, including through additional investment to address a scarcity of legal services, minimum servicing

²⁰ Council of Australian Governments, *National Partnership on Legal Assistance Services: Intergovernmental Agreement on Federal Financial Relations* (2015) cl B7.

²¹ *Ibid* cl B6.

²² Department of Justice and Regulation (Victoria), *Access to Justice Review* (2016) 432.

²³ As reflected in the Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendations 2.12 and 2.13.

²⁴ See, for example, the Justice Project Consultation Paper with respect to RRR Australians: <www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/RRR%20Australians.pdf>.

²⁵ Law Council of Australia, *The Justice Project: Final Report* (August 2018), *RRR Australians* chapter.

²⁶ For more detail, see discussion in Law Council of Australia, *The Justice Project: Final Report* (August 2018), *Legal Services Chapter*, 58-64.

standards and innovative approaches such as dedicated conflict of interest locums; and

- rural, regional and remote access to justice strategies to ensure an appropriate and tailored mix of services, publicly funded and private, in areas of critical need. These strategies should be planned and tailored to meet regional circumstances, and may include: rural placement, mentoring and incentive schemes, resourcing additional legal services, increasing legal aid rates, and strengthening practitioner referral networks (including to facilitate pro bono assistance).²⁷

34. This should be coupled with a broader policy focus on addressing the access to justice challenges which are experienced by RRR residents, noting that legal assistance service delivery forms only one aspect of the broader problem.²⁸

²⁷ Ibid, recommendation 2.11.

²⁸ A range of Justice Project recommendations seek to address broader access to justice barriers in RRR locations, including recommendations 4.10, 4.12, 4.14, 5.5, 7.4. The RRR Australians chapter also identifies specific RRR priorities.