



2011-2012 Budget Submission

Department of the Treasury

28 January 2011

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Executive Summary

The legal assistance sector, comprised of legal aid commissions, community legal centres and Indigenous legal services, has been chronically underfunded since 1997, when the so-called “Commonwealth/state divide” was introduced by the Howard Government. This resulted in a substantial contraction in the Commonwealth’s share of Legal Aid funding over time.

The cuts implemented by the Howard Government have had a disproportionate effect on disadvantaged Australians, whom the Commonwealth Government is tasked to protect under the Constitution. This includes those who are in most need of protection, such as Aboriginal and Torres Straight Islander people, minorities and people with disabilities.

The Law Council of Australia (‘the Law Council’) acknowledges the \$23 million in annual funding from the 2010-2011 Budget for the legal assistance sector. This much-needed injection of funds will go some way to addressing the shortfall in funding. However, as noted below, further funds are required to address what continues to be a substantial short-fall. The following indicators provide a measure of the required increase in Commonwealth funding to this area:

- Commonwealth funding for legal aid commissions is well below the pre-1997 proportional share of funding, when funding generally represented approximately 55% to the States’ share of 45%. As principal revenue raiser, the Commonwealth contribution should be at least 50%.
- In order to return Commonwealth per capita funding levels to even the reduced 1997 rate, an additional \$39.4 million increase would be required in the 2011-2012 Budget.
- Substantial funding increases are required in order to meet the definition of socio economic disadvantage as measured by the Henderson poverty index.
- Substantial increases are also required for community legal centres and dedicated Aboriginal and Torres Straight Islander Legal Services.

The Law Council recognises the current budgetary constraints that the Commonwealth government is facing, in light of the global financial crisis, large scale disasters and a commitment to return the budget to surplus. However, the Howard cuts have now been in place for 14 years and a return to 50% funding is long overdue. A return to 50% would involve smaller increases in the 2011-2012 Budget and 2012-2013 Budget and higher increases in the 2013-2014 Budget and 2014-2015 Budget. It is proposed that funds be allocated from consolidated revenue rather than savings.

The following figures are projections based on budgeted expenditure for the 2010 – 2011 financial year the additional funding (that is, over and above already committed funding) required each year to return the Commonwealth to a 50% share of legal aid funding with the States and Territories. The figures also assume funding from the States and Territories will remain at the same levels. The figures have been prepared by PriceWaterhouseCoopers and have been adjusted for expected changes in the population and movements in the consumer price index.

- Budget 2011-2012: \$66.099 million
- Budget 2012-2013: \$71.619 million

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- Budget 2013-2014: \$80.481 million
 - Budget 2014-2015: \$93.769 million

Total: \$311.994 million

It is noted that these estimates calculate only the additional funding required to return the Commonwealth to a 50% share of the legal aid commission funding ratio. It does not include any further amounts for CLCs and ATSILS, for which the Commonwealth bears primary funding responsibility.

The Law Council also considers that there is an urgent need for Government funding to address the problem of recruitment and retention of legal practitioners in RRR areas of Australia. The Law Council is concerned that shortages of lawyers in RRR areas are negatively impacting on the ability of individuals residing in these areas to access legal services. Research undertaken in recent years has concluded that there is a shortage of lawyers in RRR areas and that the number of legal professionals working in country Australia is continuing to decline. The findings of a Law Council survey further demonstrate that this problem will only worsen in coming years.

The government initiatives prioritised by the Law Council and recommended in this submission and other Law Council submissions made to members of parliament include:

- waiving Fringe Benefit Tax (FBT) Liabilities on employer payments of employee benefits which apply to both new legal practitioners and experienced practitioners looking for a career change;
- monetary allowances and bonuses for relocation or remaining in a RRR area;
- repaying, completely or partially, HECS-HELP (or FEE-HELP) liabilities; and
- increasing opportunities for placements in RRR areas for law students and graduates.

About the Law Council of Australia

The Law Council of Australia (**Law Council**) is the peak organisation representing the Australian legal profession on issues of national and international importance. The Law Council advises governments, courts and other federal agencies on how the law and the justice system can be improved on behalf of the profession and for the benefit of the community.

The Law Council's constituent bodies comprise the state and territory law societies, bar associations and, as of 2007, the Large Law Firm Group (LLFG), all of which are more fully identified at **Attachment A** to this submission.

The Law Council welcomes the opportunity to respond by way of this submission to the call by the Treasurer on 8 December 2010 for input into the 2011-12 Budget.¹ The Law Council is committed to the principles of access to justice and has previously made submissions to the Treasury expressing its concerns regarding inadequate funding of

¹ Treasurer of the Commonwealth of Australia, *Treasurer calls for 2011-12 Budget submissions*, 8 December 2010, available at <http://www.treasurer.gov.au/displaydocs.aspx?doc=pressreleases/2010/090.htm&pageID=003&min=wms&Year=&DocType=0>

Legal Aid Commissions² and the impact the shortage of lawyers in rural, regional and remote (RRR) areas will have on country Australia.³

Legal Assistance Sector Funding

The Law Council is a strong supporter of a sound, effective legal assistance sector and urges the Government to address the underfunding of this sector in its upcoming budget considerations. While it is recognised that funding of legal aid is the responsibility of all Governments, the Commonwealth Government in particular has much ground to make up as a result of the substantial cuts to Commonwealth funding introduced in 1997.

The Law Council notes with appreciation the efforts of the Commonwealth Attorney-General in finding additional funding through reallocation of resources within his own department. The Law Council was concerned, however, that 43% of the overall \$23 million increase in annual funding had to be derived from increases in federal court filing fees, which in a number of areas were almost doubled. Increases in Federal Court fees, whilst affordable to larger companies, act as a significant barrier to small companies and individuals seeking access to justice. It is not yet known what impact the fee increases will have on legally aided clients or legal aid commissions, however this will be the subject of a review by the Attorney-General's Department by the end of June 2011. There should not be any claw-back by the Commonwealth of legal aid commission funding through these court fees.

The shortfall in Commonwealth funding flowed from a structural change by the Howard Government by which the Commonwealth abdicated its responsibility to provide legal aid to "Commonwealth persons" and thereby transferred the cost of providing legal aid for Commonwealth persons to the states and territories. The Commonwealth Government is the principal revenue raiser in the federation. Further, it is obliged to ensure adequate levels of legal aid are available across the nation. The current levels of legal aid are seriously inadequate and in some cases, because of the operation of means tests, not available at all to people who fall below the Henderson poverty line.

This is a serious structural problem which must be addressed from general revenue. Reliance on ad hoc savings from the Attorney-General's Department will not achieve the re-adjustment. The Law Council strongly submits that the Federal Government must commit to addressing the critical shortage of funding in the legal assistance sector through sustained and permanent increases in allocations of government revenue toward legal aid, CLCs and ATSILS, rather than requiring the Attorney-General's Department to cease or suspend important justice and legal policy initiatives or ramp up federal court fees to meet the Federal Government's obligations to properly fund the legal assistance sector.

The 2010-2011 Budget in Victoria saw an increase in funding to Victorian Legal Aid of \$25 million, a welcome injection of funds to the legal assistance sector. While the \$23 million increase in the Commonwealth Budget 2010-2011 was welcome, it should be noted that the increase was smaller than that granted by one state, with substantially fewer resources available to draw upon.

² Law Council of Australia, Legal Aid and Access to Justice Funding, 9 January 2009, available at <<http://www.treasurer.gov.au/displaydocs.aspx?doc=pressreleases/2010/090.htm&pageID=003&min=wms&Year=&DocType=0>>.

³ Law Council of Australia, Funding for Recruitment and Retention of Legal Practitioners in Rural, Regional and Remote Areas, 16 January 2009, available at <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F1AB81E6-1E4F-17FA-D2C5-DEBE4B470019&siteName=lca>.

The financial crisis presently facing the legal assistance sector is due in large measure to 14 years of underfunding by the Commonwealth Government. Despite current budgetary constraints, this situation cannot continue. The structural re-adjustment must commence immediately so that the Commonwealth's contribution will return to 50%.

Why provide adequate funding to the legal assistance sector?

Governments have a responsibility to fund legal aid to ensure access to justice in accordance with international obligations⁴ and commitments to ensure social inclusion. Funding for legal aid is also justified by the benefits it brings to society and individuals including upholding rule of law, providing just and effective judicial outcomes in addition to increased efficiencies in the courts and the justice system.

When legal assistance is not available to the economically and socially disadvantaged in our community, the integrity of the justice system is challenged. Regardless of means, all Australians should have access to legal services. Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance sector is therefore critical in achieving the Government's social inclusion agenda.

Access to legal representation also helps to achieve the goals of the justice system and ensures equality before the law. In criminal proceedings, for instance, a legally aided representative will assist a defendant in deciding to plead guilty or proceed to trial, to raise an effective defence, and to access diversion programs that may reduce recidivism. Legal representation therefore assists courts in making better quality decisions and appropriate sentences, while minimising the significant social costs that arise from unrepresented defendants.

Providing access to experienced legal representatives also increases the efficiency of the legal system. Experienced representatives are able to deal with issues expeditiously and minimise legal errors which can lead to aborted trials, appeals or retrials. A study conducted in 2007 by the Victorian Department of Justice found that the costs associated with an aborted criminal trial are on average \$7,419 and a criminal adjournment costs on average \$935.⁵ Further, the total average costs of a retrial (conducted over one week in the Supreme Court of Victoria) have been estimated at \$47,572.⁶ As noted in the PricewaterhouseCoopers Report commissioned by National Legal Aid:

“There is a direct relationship between the efficiency of the court and the provision of legal aid. Efficiency is achieved through the provision of information, advice, legal assistance, dispute resolution, and representation for matters that would otherwise be self-representing. Costs to the justice system are also avoided because cases are diverted from court rather than needing a hearing or decision by the court.”⁷

⁴ See: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of the Child (CRC); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Universal Declaration of Human Rights (UDHR).

⁵ Cited by Victorian Bar, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* April 2008; PricewaterhouseCoopers, p 24.

⁶ *ibid.*

⁷ National Legal Aid (prepared by PricewaterhouseCoopers), *Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law* (2009), p 25, available at: <http://www.nla.aust.net.au/res/File/Economic%20Value%20of%20Legal%20Aid%20-%20Final%20report%20-%206%20Nov%202009.pdf>.

In recent years, increasing numbers of litigants are entering the court system without legal representation, due largely to the contraction in legal aid funding. The increase in numbers of self-represented litigants that occurred following the funding restrictions placed on legal aid in 1996 have been commented upon in numerous reports by law reform commissions, parliamentary committees and other bodies.⁸ It is interesting to note that in the 2007-08 year, the Family Court of Australia reported that in almost 30% of its cases, there was at least one unrepresented litigant.⁹

Self-represented litigants have an impact on courts, in terms of both time and cost, and on the conduct and outcomes of trials.¹⁰ This has led one judge to comment that: “the question of how to cope with [unrepresented litigants] is the greatest single challenge for the justice system at the present time ... cases in which one or more of the litigants is self-represented generally take much longer both in preparation and court time and require considerable patience and interpersonal skills from registry staff and judges.”¹¹

Providing adequate funding for legal aid and access to justice may initially appear expensive, but as former Chief Justice Gleeson stated:

“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.”¹²

There is ample evidence that providing appropriate funding for legal assistance can result in substantial efficiency dividends within the justice system. In the PWC report prepared for National Legal Aid, it is noted that:

“Direct legal aid assistance in relation to court and dispute resolution services for Family Law matters has a net positive efficiency benefit for the justice system. These benefits outweigh the costs of providing these services, ranging from a return of \$1.60 to \$2.25 for every dollar spent.”¹³

This means that for every dollar invested in the legal assistance sector, there is a saving of \$1.60 to \$2.25 in the delivery of justice, meaning that the Commonwealth will actually save more than it invests by simply delivering on its funding obligations.

⁸ See, for example: Senate Legal and Constitutional References Committee, *Legal Aid Report 3*, AGPS, Canberra, 25 June 1998, [3.21-45]; Professor Stephen Parker, *Courts and the Public* (1998) ALJ 106-111; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000) Report No. 89, [5.51-67], [5.147-157]; The Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia – Final Report* (September 1999) Project No. 92: Family Law Council, *Litigants in Person* (2000) at <http://www.law.gov.au/www/flcHome.nsf/Web+Pages/C40B3532575784A2CA256B49001CF823?OpenDocument>; Rosemary Hunter, *The Changing Face of Litigation* (2002), Law Society of New South Wales, *Position Paper: Self-Represented Litigants* (27 May 2002): cited by the Australian Institute of Judicial Administration, *Forum on Self Represented Litigants* (2005).

⁹ See Family Court of Australia Annual Report 2007 - 2008, available at: http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Business/annual_reports/FCOA_ar_0708

¹⁰ For further discussion see National Legal Aid (prepared by PricewaterhouseCoopers), *Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law* (2009), available at: <http://www.nla.aust.net.au/res/File/Economic%20Value%20of%20Legal%20Aid%20-%20Final%20report%20-%206%20Nov%202009.pdf>

¹¹ Davis J, *The Reality of Civil Justice Reform: Why we must abandon the essential elements of our system* (2002) 12 JJA 155 at 168.

¹² Chief Justice Murray Gleeson, *State of Judicature* (speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).

¹³ *Ibid*, PWC, op cit 7, p ix.

The Attorney-General's Access to Justice Taskforce has recently identified the following reasons why access to justice is important:¹⁴

- Maintenance of the rule of law is fundamental to Australia's economy and prosperity as it allows planning and underpins social and economic development.
- Access to justice is an essential element of the rule of law that frames the relationship between state and society, founded upon an accepted set of social, political and economic norms.
- Access to institutions enables people to protect their rights against infringement by other people, bodies and the government and ensures accountability.
- Barriers to justice enforce poverty and social exclusion as there is a legal dimension to many of the issues commonly faced by people (eg family breakdown, credit and housing issues, discrimination, and exclusion from services).
- Legal aid can assist in ensuring that the law is applied correctly and thus the justice system returns an effective outcome. This is particularly important in cases where people's liberty or safety is at risk.

Evidence of inadequate funding

Numerous reports, inquiries and studies released over the past decade have established that the legal assistance sector is chronically underfunded.

Most recently, for example, in December 2009 the Senate Legal and Constitutional Affairs inquiry into Access to Justice concluded that:

*The committee accepts that the legal aid system is not adequately funded, and accordingly, recommends that governments and relevant stakeholders review existing funding arrangements and service delivery levels to ensure that the legal aid system is properly resourced to meet the needs of the Australian people, as well as recommending an increase in funding for legal aid service providers.*¹⁵

The Committee specifically recommended that the Government increase funding for legal aid commissions, community legal centres and Aboriginal and Torres Strait Islander legal services.¹⁶ The Report also recommended a nationwide review and modernisation of legal aid fee scales (with inbuilt inflators) so as to promote practitioners' continued participation in the system. The Law Council strongly supports these recommendations.

The Commonwealth Government has largely been responsible for the stagnation in legal aid funding over the past decade. As figures obtained by the Law Council indicate, in 1996-97 the Commonwealth contribution was \$128 million out of a total income for legal aid commissions around the country of \$264 million – which was roughly 50%. In 2009-10

¹⁴ *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, p 1.

¹⁵ Senate Legal and Constitutional Affairs Committee, 8 December 2009, *Access to Justice*.

¹⁶ Recommendations 9, 23 and 27 - Senate Legal and Constitutional Affairs Committee, 8 December 2009, *Access to Justice*.

the Commonwealth contribution dropped to roughly 33% of total income.¹⁷ This is clearly an unsatisfactory arrangement.

The shortfall in funding has traditionally been picked up by the States and Territories. However, the state income is reliant in part on interest on solicitors' trust accounts that are exposed to interest rate movements and are currently in decline due to the economic climate.

Demand has grown for legal aid services as the Australian population has grown and policy induced factors have stimulated need. In addition, various changes to law over the past ten years have resulted in an increased complexity of cases which legal aid commissions are required to fund. This increased complexity has led to an increase in the cost of cases across all courts by 78% in real terms (i.e. inflation adjusted) from 1998 to 2008.¹⁸

This decrease in funding and increase in demand has forced commissions to employ policy 'levers' to control costs, such as enforcing tougher means and merits tests and lowering fees paid to private practitioners. Fees paid to legal practitioners appear to have fallen in real terms, resulting in a reduction in the number of practitioners offering legal aid services.¹⁹ The results of inadequate funding are discussed in more detail below.

Results of inadequate funding

As detailed in a report recently conducted by PricewaterhouseCoopers entitled *Legal Aid Funding: Current Challenges and the Opportunities of Cooperative Federalism*, legal aid funding is grossly inadequate, with adverse consequences for vulnerable Australians:

- Current legal aid means tests in some jurisdictions exclude some people who are at or below the Henderson poverty level.
- There is a very serious problem in attracting and retaining able and experienced lawyers to service the needs of those who qualify for legal aid. This leads to unjust outcomes for vulnerable Australians.
- Legal aid for civil cases is minimal.
- Under-funding legal aid imposes additional costs on the justice system due to failure to settle cases early, mistrials, appeals, re-trials, inappropriate incarceration, and so forth.
- There is inequity in access to representation.

Withdrawal of private practitioners from legal aid work

The underfunding of the legal assistance sector has resulted in the level of fees paid to private practitioners undertaking legal aid work not accurately reflecting the cost of delivering access to justice. In short:

- legal aid fees are below the real cost of generally providing the necessary legal service and increases are needed to at least meet costs;

¹⁷ The figures were obtained from the National Legal Aid website:

<http://www.nla.aust.net.au/category.php?id=9>

¹⁸ PricewaterhouseCoopers report titled *Legal Aid Funding: Current Challenges and the Opportunities of Cooperative Federalism*, p4.

¹⁹ PricewaterhouseCoopers report titled *Legal Aid Funding: Current Challenges and the Opportunities of Cooperative Federalism*, , p5.

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- there is a significant withdrawal of experienced lawyers from publicly funded legal work;
 - there is some diminution in the quality of publicly funded legal representation; and
 - a greater investment in the public funding of legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

In 2003 FMRC Legal Pty Ltd was commissioned by the Law Council of Australia to produce a report on the change in the economics of legal practice over the previous decade. Their report concluded, as follows:

- Over the last decade the nature of legal practice has changed substantially in Australia. The profession has seen the development of a clear structure of a (small) group of large national firms, a “second” tier of smaller but nevertheless still substantial commercial practices, and then a very large array of small to mid-sized practices providing a more community based service.
- Fewer and fewer of these firms are finding themselves in a position to undertake publicly funded pro bono work.
- There is a belief that the increase in the cost of practice in the last decade has outstripped the increase in the hourly rate of publicly funded legal work making it difficult for firms to undertake this work and still achieve a reasonable level of return – in fact, a loss would be incurred in many instances.
- The increase in the cost of practice in the last nine years has been substantial, well ahead of CPI. It has only been through “small” productivity gains, escalating charge rates and increasing author gearing that practices have been able to maintain profit.

The focus of the FMRC report was cost per solicitor chargeable hour. The report identified that the cost of delivering a chargeable hour of legal time per employed solicitor in a major regional city was approximately \$140 per hour, including the lawyer salary and ordinary overhead costs. In a suburban practice, it was identified as approximately \$153 per hour – and in a remote country region, approximately \$132 per hour. These rates do not include any component for profit to the employer of the employed solicitor. Nor do they include any allowance for a write-down of work in progress or non-recovery of debt.

With legal aid rates in the same period being below \$130 per hour, (and more commonly ranging from \$88 to \$105 per hour), regional, suburban and country practitioners in average practices did not recover their true cost of employing a practitioner to undertake legal aid work. Most legal aid work was undertaken at a loss, which creates an enormous disincentive for private firms to take on legally assisted matters.

Therefore it is clear that legal aid is a losing proposition even if the solicitor doing the work is paid a very low salary. As a result “juniorisation” occurs of those private practitioners who undertake legal work. Law firms cannot afford to have their high charging fee earners undertaking significant volumes of legal aid work. The opportunity costs of undertaking legal aid work as against a lower volume of higher paid work means that it makes little sense for experienced practitioners to decline full fee-paying clients in favour of legal aid clients.

In December 2006 the report of TNS Social Research, commissioned by the Commonwealth Attorney-General’s Department, found that:

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- Remuneration matters, including the low hourly rate and issues with the number of hours allocated under the stage of matter payment structure, were the *key reasons* for disengagement from legal aid among all firms.
 - Approximately one in three firms that are currently practicing family or criminal law have moved away from the provision of legal aid services.
 - If nothing were to be done in terms of making legal aid more attractive for private practitioners, a larger number of firms that are currently providing legal aid would decrease their revenue in the next five years rather than increase.
 - Approximately two-thirds of firms in regional and remote areas currently provide legal aid compared with approximately half of firms across all locations. A further one in four firms in regional and remote areas that used to provide legal aid have ceased providing these services.
 - There has been a net drop-out of approximately 10% of firms doing legal aid work in family law matters in regional and remote areas.
 - There has been a net drop-out of approximately 3% for legal aid for criminal law matters in regional and remote areas.
 - Any decline in the supply of legal aid by firms in regional and remote areas is likely to have a greater impact because there are significantly fewer firms operating in these areas.

If nothing were to be done in terms of making legal aid more attractive for the private profession in regional and remote areas, a greater proportion of the firms that are currently providing legal aid would decrease their revenue from legal aid in the future rather than increase it.

In response to the findings of the TNS survey the Commonwealth Attorney-General's Department commissioned a review of remuneration arrangements for private practitioners providing legal representation services in family law matters. TNS were commissioned to explore arrangements for engaging and remunerating private practitioners. They consulted with the staff of Legal Aid Commissions as well as conducting telephone interviews with private practitioners.

In relation to remuneration the report found that:

- the key implication emerging from the research is that remuneration must be increased to ensure the sustainability of the legal aid system;
- high volume providers are currently struggling to maintain sustainable legal practices with the fees received from legally aided matters;
- to prevent further disengagement of these providers an increase in legal aid fees is recommended; and
- based on the consultation, high volume providers agreed that an increase in fees to \$190 - \$200 (GST inclusive) to match court scales, would ensure their long-term future sustainability.

The findings of the TNS surveys mirror to a large extent the findings of the Law Council's Erosion Report released in February 2004.

That report provided further evidence that:

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- there is a rise in the number of self-represented litigants for a variety of reasons, one of which is a significant lack of available publicly funded representation;
 - there is an inequity in access to representation;
 - legal aid fees are below the real cost of generally providing the necessary legal service and increases are needed to at least meet costs;
 - there is a significant withdrawal of experienced lawyers from publicly funded legal work;
 - there is some diminution in the quality of publicly funded legal representation;
 - the courts are disadvantaged by the increased number of self-represented litigants; and
 - a greater investment in the public funding of legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

In 2008 the Victorian Bar commissioned a similar study conducted by PricewaterhouseCoopers into the fees paid by Victoria Legal Aid to barristers in criminal cases. The report expressed serious concerns that the under-funding of Victoria's criminal justice system over the past 15 years could lead to increased costs from aborted trials and retrials and poorer outcomes for victims and defendants alike.

As the report identifies, to maintain the viability of a fair justice system, it is essential that the under-funding of legal aid barristers be addressed. The effective annual income of a junior legal aid barrister is less than \$40,000 p.a., real take home pay has fallen by 25% to 40% over the past 15 years while other professions have increased 15% over the same period'.²⁰ The effect of this reduction in income has been a 26% decline in barristers practising in criminal law over the past 3 years.

Unless one of the most crucial issues affecting practitioners is addressed - the rate of remuneration paid to lawyers undertaking legal aid work - there will be a steady decline in the number of practitioners willing to take legal aid cases over the next few years, which will severely compromise the availability of legal services to those most vulnerable.

The Law Council on behalf of Australian lawyers has always taken the view that lawyers in Australia are prepared to undertake publicly funded legal aid work for less remuneration than would be payable by a private client. Most Legal Aid Commission statutes require that the Legal Aid Commissions in the States and Territories ensure that the fees determined in respect of a legal service shall be less than the ordinary professional cost of the legal service.²¹

The question for Legal Aid Commissions is: "What fees should be paid for the legal services rendered by the profession to legal aid clients which is 'less than the ordinary professional cost of the service' but still somehow returns an appropriate level of remuneration whilst providing:

- the client with good services from an experienced practitioner;

²⁰ Victorian Bar, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* April 2008; PricewaterhouseCoopers, p 10.

²¹ For example see section 39 of the *Legal Aid Commission Act 1979* (NSW).

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- the Commission with a level of service to its clients which is appropriate in terms of quality; and
 - the practitioner with a level of fees which provides them with some profit and encourages them to continue providing their services to legal aid clients”.²²

Whilst all Legal Aid Commissions attempt to cut their cloth to meet the constraints of their budgets, the Law Council believes that Legal Aid Commissions have, by and large, reached a point where further efficiencies and economies cannot reasonably be expected of them. It is therefore a question of injecting appropriate funds into the system to enable the Legal Aid Commissions to implement their charter to provide appropriate legal assistance for disadvantaged members of the community. In the long run the impact of increasing fees to private practitioners undertaking legal aid work will be:

- an increase in the number of practitioners prepared to undertake legal aid work;
- an increase in the number of *experienced* practitioners prepared to resume doing legal aid work;
- a reduction in the number of self-represented litigants who currently clog the courts, creating extra expense for others negotiating the legal system, and causing delays within the system;²³ and
- optimising the delivery of legal aid to the Australian community.

What level of additional Commonwealth funding is required?

Legal Aid Commissions

As discussed above, while it is not expected that the current Government will be able to alleviate the financial crisis presently facing the legal assistance sector, created by years of underfunding, in one budget, it is imperative that the government commit to a staged approach to increasing legal assistance sector funding to pre-1997 levels to avoid plunging the legal assistance sector further into crisis. It is proposed that funds are allocated from consolidated revenue, not savings, in the following manner:

- Budget 2011-2012: \$66.099 million
- Budget 2012-2013: \$71.619 million
- Budget 2013-2014: \$80.481 million
- Budget 2014-2015: \$93.769 million

Total: \$311.994 million

As noted earlier, these figures are projections of the amount of additional funding (that is, over and above already committed funding) required each year to return the Commonwealth to a 50% share of legal aid funding. They assume funding from the States and Territories will remain static. The figures have been adjusted for expected changes in the population and movements in the consumer price index.

²² See paper entitled “Legal Costs in Legal Aid Work” presented by Bill Grant, then CEO of the Legal Aid Commission of NSW to the Law Council Access to Justice Conference Melbourne 12.8.06 pages 2-3.

²³ Numerous papers have been written about this including Family Law Council report on litigants in person – August 2000, and ALRC report “Managing Justice” pps 359-388.

While it is recognised that funding of legal aid is the responsibility of all Governments, the Commonwealth Government has much ground to make up due to the massive cuts to Commonwealth funding from 1997. There are a range of indicators that provide a measure of the increase in Commonwealth funding that is required.

- Commonwealth funding is well below the pre-1997 proportional share of funding, when funding generally represented approximately 55 percent to the States' share of 45 percent.
- In order to return Commonwealth per capita funding levels to even this reduced 1997 rate, an additional \$39.4 million increase would be required in the 2011-2012 budget.²⁴
- Substantial funding increases are required in order to meet the definition of socio economic disadvantage as measured by the Henderson poverty index.

Currently, the vast majority of people that qualify for legal aid are receiving a government benefit. Implicit in this figure is that funding restrictions on LACs have resulted in the setting of a means test that eliminates all but the very poorest of society. If the government wishes to rely on the legal aid system as a tool of social inclusion, additional funds need to be provided to LACs to allow the means test to be raised to also cover the 'working poor'.

Further, Legal Aid Commissions currently derive a large proportion of their funding mix from the various state based public purpose accounts, or the interest that accrues on lawyers' trust accounts. This source of revenue is particularly vulnerable to economic fluctuations, with the potential that distributions will be greatly reduced during economic downturns. There should be a commitment from governments that any loss suffered by the public purpose accounts does not impact upon the funding levels of the legal assistance sector.

Legal aid fees paid to private practitioners are below the real cost of generally providing the necessary legal service and increases are required to at least cover costs. There is a growing trend of the withdrawal of experienced lawyers from publicly funded legal work and a greater investment in the public funding of legal representation is required to prevent private practitioners from withdrawing their services.

Aboriginal and Torres Straight Islander Legal Services

The importance of dedicated Indigenous legal services and the pivotal role they play in helping Aboriginal and Torres Straight Islander people access the legal system has been well established. However, a shortfall in funding to dedicated Indigenous legal service providers is curtailing the most likely means by which Indigenous people can seek legal help.

Aboriginal and Torres Strait Islander Legal Services (ATSILS) are critically underfunded in all jurisdictions. ATSILS are funded almost exclusively by the Commonwealth, whilst Legal Aid Commissions (LACs) are generally funded by both Commonwealth and State/Territory Governments.

Reports suggest that, despite annual increases in funding, ATSILS effectively operate in an environment of static funding because of inflation, increases in the Indigenous

²⁴ Allowances have been made for both population growth and movements in the CPI. Over this time the CPI measured by the Australian Bureau of Statistics has increased 38 per cent. At the same time the population has also grown by approximately 15 per cent. See PWC Rpt, p 55.

population and criminality, which compromises their ability to provide a sufficient quality and quantity of services. Nationally, Indigenous people are over 13 times more likely to be convicted of an offence than non-Indigenous people. Due to the level of funding available to ATSILS, almost all of ATSILS services are directed toward criminal justice.

Community Legal Centres

Ensuring that community legal centres have adequate funding is one of the most simple and direct means to tackle the problems faced by those that have difficulties accessing the justice system.

Community legal centres (CLCs) are not-for-profit community-based organisations that provide legal advice, information and education to marginalised and disadvantaged client communities and those with special needs. CLCs use a strategic service approach to identify legal need, and plan and develop tailored services to address the needs of target groups. They provide services to more than 350,000 people each year through over 200 centres.²⁵ They are a key component of Australia's legal assistance system, and provide services which complement and extend the services provided by Legal Aid Commissions and the private profession.²⁶

Providing adequate funding to CLCs intersects with the need to improve the accessibility of legal services generally, particularly in rural, regional and remote areas, for Aboriginal and Torres Strait Islander peoples and for the most vulnerable and disadvantaged, preventing and minimising social exclusion.

The Review of the Commonwealth Community Legal Services Program conducted by the Attorney-General's Department in March 2008 confirmed that CLCs are a vital resource for the financially and socially disadvantaged. The review examined Commonwealth Community Legal Services Program data and confirmed that it is providing services to clients who are significantly disadvantaged. For example, 58% of clients received some form of income support, 82% of clients earned less than \$26,000 per annum, and almost 9% of clients had some form of disability.

In addition, there is a growing body of evidence that many disadvantaged members of the community often face a 'cluster' of problems that, if left unresolved, increase their social exclusion with long term implications for their health, employment capacity and general well being. Community legal centres' client centred approach to service delivery and focus on preventative and early intervention strategies mean that they are well placed to address this need.²⁷

The National Association of Community Legal Centres (NACLC) is the peak national organisation representing CLCs in Australia. As part of its role in advancing the interests of CLCs and their clients, NACLC advocates for a strategic service delivery model for CLCs that ensures the most effective service. This requires baseline funding for Commonwealth Community Legal Services Program funded CLCs of \$500,000 per Centre. This baseline funding is based on highly reduced costs compared to commercial practices or even government legal aid. It does not include costs specific to service delivery for CLCs in rural, regional and remote areas.

²⁵ NACLC, *Why Community Legal Services are Good Value*, http://www.naclc.org.au/multiattachments/2287/DocumentName/NACLC_value_web.pdf.

²⁶ As defined by the Attorney-General's Department: http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_CommunityLegalServicesProgram_TheCommunityLegalServicesProgram.

²⁷ Accessible here: <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437EEB6FDCA25742D007B0738>.

There are a total of 49 CLCs in rural, regional and remote areas (RRR) across Australia experiencing significant challenges in meeting legal needs. Ensuring that these CLCs have adequate funding is critical to tackling the problems faced by people who have difficulties accessing the legal system due to their RRR location. NACLC considers that the Commonwealth should consult with the CLC sector to identify the additional costs incurred by rural, regional and remote CLCs and to establish a RRR funding formula that will adequately support and assist these CLCs to provide their services.

The Law Council believes that an injection funding to bring Commonwealth State Community Legal Services Program (CLSP) funded CLCs funding in line with the baseline funding requirement, and consultation with the CLC sector to better target funding to rural, regional and remote CLCs across Australia, remains necessary to allow CLCs to continue to act as an essential tool of social inclusion. Funding levels should reflect the fact that CLCs are at the forefront of developing policies and programs to ensure fairness in access to justice.

Legal Services in Disaster Zones

Large scale disasters, such as the Black Saturday Bushfires in Victoria in 2009 and the floods that recently hit Queensland, New South Wales and Victoria, have had a devastating impact upon those affected, with significant loss of life, damage to property, wiped out infrastructure and ruined crops. Communities can often take years to recover from large scale disasters, requiring assistance from the Government, businesses, volunteer organisations and citizens.

Legal assistance is one area that is often overlooked in recovery efforts. All sorts of legal issues can arise following a major disaster, such as:

- insurance claims;
- destroyed documents, including wills, identity documents and certificates;
- inability to return to employment for extended periods of time; and
- temporary rental arrangements.

There is a distinction to be made between information and advice that is sought immediately after a disaster occurs and that which is not required until later. Immediate assistance may be sought in relation to destroyed documents (wills, identity documents and certificates), employment/income issues from not being able to work, accommodation/rental property issues, and insurance and mortgage problems. However compensation claims, disputes with insurers, more complex or intractable matters may be dealt with later and require careful referral. While many practitioners offer legal assistance free of charge or at reduced rates during disasters, this may not always be practicable, particularly given that some legal disputes may carry on for months or even years.

The response of the legal profession to recent disasters has included the provision of information and support for those affected, the public, and the media, on relevant legal issues and solutions. In some cases the legal profession has also undertaken negotiations on behalf of those affected, providing an avenue for those affected to pursue complaints, problems and claims. Two recent examples demonstrate some of the excellent work that the legal profession has undertaken, often with little or no acknowledgment.

2009 Black Saturday Bushfires in Victoria

In Victoria members of the response team included Law Institute of Victoria, Victoria Legal Aid, Federation of Community Legal Centres (CLCs), Public Interest Law Clearing House (VIC) (providing a conduit to law firm pro bono practices and barristers willing to take on pro bono legal work), Victorian Bar, Attorney-General of Victoria, Department of Justice and the Victoria Law Foundation.

These organisations worked quickly in the days following the fires to establish their respective roles and activities, for example the Bushfires Legal Help Hotline was established and took its first calls within 4 days of the bushfires. Additional tasks that these organisations were involved in include:

- establishing a web-site²⁸;
- compiling a Bushfire Legal Help handbook²⁹;
- preparing a list of legal factsheets, providing general information on legal issues in the wake of the bushfires;
- setting up drop-in clinics for those affected by the bushfires to receive legal advice;
- compiling and distributing resources and information kits for lawyers that would be working in the bushfire-affected areas; and
- setting up a Bushfire Insurance Unit with expertise in the complex areas of insurance-related law that arose in the fire's aftermath.

These services were greatly appreciated by those affected, as a young couple commented shortly after the bushfires:

*'We were shattered to come back to our home and find the whole place burnt down. Thank God we were safe. We met the legal staff at the Kinglake relief centre who helped us with all our paper work – right from getting a birth certificate for our little baby, who was only four days old, to sorting out issues with our landlord. The lawyers worked around our needs and even called us out of hours. I am so grateful.'*³⁰

2010-2011 Queensland Floods

The organisations involved in providing assistance include Legal Aid Queensland (the lead agency, who is also providing the freecall number, and hosting the Flood Legal Help web-site), Queensland Association of Independent Legal Services - represented at the steering committee by Caxton St Legal Service, QPILCH, ATSILS (who are offering pro bono services in their areas to non-indigenous clients who are flood affected) and the Queensland Bar Association. The major Departments are Justice and Attorney-General and Communities (who are managing the Recovery Centres).

This liaison has worked effectively to produce, within a week and a half, the following outcomes:

²⁸ The website can be accessed at: <http://www.bushfirelegalhelp.org.au>.

²⁹ The handbook can be downloaded at: <http://www.bushfirelegalhelp.org.au/handbook.php>.

³⁰ Bushfire Legal Help, Legal assistance and community recovery after the 2009 Victorian bushfires (2010), p 8, available at: <http://www.bushfirelegalhelp.org.au/cb_pages/images/BLH_project_report_final.pdf>.

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- established a Web-site (which is linked through the tile on the QLS web-site);³¹
 - established a free call number for advice;
 - produced 1400 posters which have been distributed to Recovery Centres;
 - established a register (at QLS) of volunteer lawyers and firms;
 - established a training program for volunteer lawyers;
 - arranged for the filming of one of those training sessions so that a resource is available both for community legal centres and other states that face similar crisis situations;
 - established a common branding for all the flood legal help advice sheets;
 - created an agreed client advice form for use by all volunteer lawyers, to ensure that client information is maintained on the Legal Aid Queensland data base;
 - CLCs have coordinated the rosters for lawyers to attend Recovery Centres, of which there are currently 35 throughout the state; and
 - assisted in content for media releases from the Queensland Attorney-General.

In addition, the Queensland Law Society:

- established a flood "tile" on their front web-page, which contains links to all the information on the Flood Legal Help web-site; useful information for practitioners, including links to all the relevant house insurance policies, in case clients need advice; and a link to an extensive advice on the effect of the flood on franchises;
- hosted three firms who were unable to access their offices;
- liaised with WorkCover on issues about volunteer lawyers and cover;
- liaised with Lexon, who have published a guide to the professional indemnity insurance cover for pro bono work;
- produced an ethics guideline on managing conflicts in pro bono advice work; and
- liaised with the Legal Service Commissioner on those guidelines published by the Ethics Centre.

Impact upon Legal Aid, ATSILS and CLCs

Legal Aid, ATSILS and CLCs are placed under great pressure in disasters, already managing with insufficient resources, then being required to cater for additional clients who require assistance. This can make it very difficult to deal with their existing client base.

The announcement by the Prime Minister that the 2010-2011 Queensland floods would cost over \$5.6 billion³² demonstrates the scale of the devastation. One of the costs that

³¹ The website can be accessed at: <http://www.legalaid.qld.gov.au/floods/Pages/default.aspx>.

needs to be considered when allocating funds through the Queensland Reconstruction Authority will be what additional funds can be granted to Legal Aid, CLCs and ATSILS in order to ensure that the legal assistance they are currently providing can continue throughout the recovery effort. It may take many months and possibly even years to resolve legal disputes that have arisen out of this tragedy.

It should be noted that many flood victims will not qualify for legal aid because of means tests and due to the fact that there is almost no legal aid available for civil disputes or claims. Although clear-cut cases will be taken by no-win/no-fee law firms, many flood victims with riskier cases will not get legal aid and will have to confront insurance companies represented by top law firms.

It is submitted that estimates of funding required for LACs, CLCs and ATSILS must incorporate an additional allowance to ensure their capacity to provide additional much needed service during times of crisis. This need was clearly identified in the wake of the 2009 Victorian bushfires. A report issued by Bushfire Legal Help in June 2010³³ made the following recommendations:

- The provision of legal assistance services in the event of a natural disaster should be recognised as an integral and vital aspect of community recovery and included in emergency plans. Delivery of legal services should be integrated into the planning and funding of Emergency Management Australia (at a national level) and Victorian State Emergency Response Plan (DIS-PLAN) in the same way as other essential services.
- In delivering emergency response services, state and national governments should consider the development of innovative, collaborative models of service delivery, with co-location of services such as housing, health, counselling and legal services. This will enable a holistic, immediate multidisciplinary response to the complex needs people will experience.
- The legal assistance sector needs to be proactive in recognising and identifying the broad range of longer-term legal problems that arise in the aftermath of a major emergency, and take steps to bring these to the attention of governments and planning bodies so that solutions can be developed.

The Law Council urges the Commonwealth Government to acknowledge the above recommendations and provide additional funding for the legal assistance sector in recognition of the roles they play in disaster recovery.

³² The Hon Julia Gillard MP, Prime Minister, Address to the National Press Club, Canberra, 27 January 2011.

³³ Bushfire Legal Help, Legal assistance and community recovery after the 2009 Victorian bushfires (2010), p 3, available at: <http://www.bushfirelegalhelp.org.au/cb_pages/images/BLH_project_report_final.pdf>.

Recruitment and Retention of Lawyers in RRR Areas

The Law Council considers that there is an urgent need for Government funding to address the problem of recruitment and retention of legal practitioners in RRR areas of Australia. The Law Council is concerned that a critical shortage of lawyers in RRR areas is negatively impacting on the ability of individuals residing in RRR areas to access legal services.

Research undertaken in recent years has concluded that there is a shortage of lawyers in RRR areas and that the number of legal professionals working in country Australia is continuing to decline.³⁴ A Law Council survey conducted in 2009 demonstrates that this problem will significantly worsen in coming years.³⁵

The survey findings also indicate that law firms in RRR areas undertake larger quantities of legal aid work than their city counterparts.³⁶ The majority of these firms also provide legal services on a pro bono basis. The Law Council believes that the impending crisis in access to justice, together with the diminished availability of other essential services such as health care, is likely to have detrimental effect on the infrastructure of these communities. The consequence of failing to address the exodus of professional services from RRR communities is that many, particularly those in rural and remote areas, will become unviable and cease to exist.

The Law Council has actively addressed this issue in the past 12 months through initiatives such as the Law Council RRR survey, establishing schemes to place and support solicitors in RRR areas to undertake legal aid work and providing professional support and services through the various Law Societies. The research conducted by the Law Council found that a collaborative approach by the government, legal profession bodies and legal firms and organisations is needed to respond to the shortage of lawyers in RRR areas.

We understand that the Federal Government has faced an unprecedented financial crisis which has had some impact on the Australian economy and, in turn, the Government's future budgetary considerations. However, the Law Council again urges the Treasury to consider the initiatives proposed in this submission, which will provide substantial benefits to the Australian community in country areas. These benefits include:

- a) reducing the burden on the legal aid system;
- b) promoting access to justice in country areas;
- c) ensuring that people who live in RRR areas are able to access legal services within their community;

³⁴ TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*, Research Report Prepared for the Commonwealth Attorney-General's Department, 2006, available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_LegalaidresearchTNSreport-December2006>; Urbis Keys Young, *The Solicitors of New South Wales in 2015 – Final Report*, The Law Society of New South Wales.

³⁵ Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey*, July 2009, available at <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=58075666-1E4F-17FA-D22C-92C2CC13DA7C&siteName=lca>.

³⁶ See also TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*, Research Report Prepared for the Commonwealth Attorney-General's Department, 2006, available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_LegalaidresearchTNSreport-December2006>, p 36.

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- d) promoting local business by encouraging legal practitioners to establish practices in RRR communities;
 - e) preserving local legal services and thereby reducing the need for expensive government advisory services either in outreach forms or in local regional centres; and
 - f) promoting the vitality of country areas by improving services available to other professional service providers, such as doctors, accountants and teachers.

Access to Justice in RRR Areas

Like many other professional groups such as doctors and allied health professionals, lawyers in RRR areas are experiencing increasing difficulties in attracting and retaining suitable staff. These problems have a direct effect on the legal sector's ability to service the legal needs of RRR communities. Many law firms and community legal centres are unable to find suitable lawyers to fill vacancies when they arise and are being impeded by the drain of corporate knowledge caused by a constant turnover of staff.³⁷

Legal services in RRR communities are delivered through a partnership of government organisations, community legal centres and the private profession. While Legal Aid and the community sector predominantly service the disadvantaged within RRR communities, the private profession also undertakes a substantial role in the delivery of legal aid and pro bono work.

The findings of the Law Council survey support the 2006 TNS Report commissioned by the Commonwealth Attorney-General, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia* (TNS Report),³⁸ which found that law firms in regional and remote areas undertake larger quantities of legal aid work than their city counterparts. Specifically, the TNS Report found that 41 per cent of law firms from regional and remote areas undertake 30 or more legal aid cases compared to only 25 per cent of firms from metropolitan areas. As noted above, 50 per cent of the participants surveyed by the Law Council indicated that their firm dealt with more than 30 legally aided cases per year.

According to the TNS Report, there are only three lawyers per 10,000 residents aged 18 years and older in remote Australia when compared to 10.7 lawyers per 10,000 in capital cities of Australia. Furthermore, legal aid providers in RRR areas are "keeping the system going" with a small number of lawyers providing significant amounts of legal aid.³⁹

The qualitative component of the TNS Report found that regional and remote lawyers were particularly concerned by the limited availability of experienced practitioners and graduates in country areas and that reliance was placed on a finite number of solicitors to carry out legal aid work.⁴⁰

Furthermore, the results of the Law Council survey indicate that more than 64 per cent of RRR lawyers who participated in the study undertook pro bono work. Therefore, if no action is taken by the government and the legal profession, the impact of shortages of

³⁷ For example, according to figures provided by Legal Aid WA, in March 2008 more than 1 in 3 legal positions in the regional community legal sector in Western Australia were vacant. See Jane Stewart, 'The WA Country Lawyers Program', a paper presented to the National Access to Justice Pro Bono Conference Sydney 14-15 November 2008, available at <http://www.a2j08.com.au/papers/Stewart_J.pdf>, p 1.

³⁸ TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*, Research Report Prepared for the Commonwealth Attorney-General's Department, 2006, available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_LegalaidresearchTNSreport-December2006>.

³⁹ Ibid, viii, p 36.

⁴⁰ Ibid, p 36.

lawyers on RRR communities will be significant. With the decrease in the number of lawyers providing legal services on a pro bono basis, those individuals requiring legal services are likely to require the assistance of either the legal aid commissions or community legal centres operating in the area. In view of the fact that legal aid providers in RRR areas are already overburdened with a high number of legally aided cases, there is a strong possibility that the ability of those individuals living in RRR communities to access justice will be seriously affected.

The Law Council also notes that community legal centres in regional areas are particularly disadvantaged as they are unable to offer competitive salaries (as compared with the government or private profession) to entice solicitors to relocate from metropolitan areas. Greater government funding of this sector and an improvement of both salaries and resourcing of community legal centres is necessary in order to address the chronic recruitment issues in this sector.

The compounding effect of the already evident shortages is likely to be further exacerbated by the impact of Australia's growing population. Current population projections indicate that the number of individuals living outside the capital areas will rise by 3 million by 2026. Furthermore, the age composition of Australia's population is projected to change considerably as a result of the population ageing. It is expected that by 2056 between 23 per cent and 25 per cent of the population will be aged 65 and older, representing a 12 per cent increase from the current figures.⁴¹

The Law Council acknowledges that issues of attraction and retention are not unique to the legal profession. Access to essential services such as health care are also impacted at present and are likely to be a serious concern in the future. However, the government has made commitments to address these issues in the health care sector. For instance, in the 2009 Budget, the Federal Government announced that it would invest \$134.4 million to reform and improve incentives to encourage medical practitioners to work and remain in the rural and regional communities. Under the scheme, the incentive amount is dependent upon the remoteness of the location to which the doctor is relocating to. For example, a doctor moving from a major city to a regional centre would receive \$15,000 whereas a doctor relocating to a very remote area would receive \$120,000.⁴²

It is the view of the Law Council that health and other professionals are much more likely to move to and remain in RRR areas if they have available to them access to various other service providers, of which lawyers are just one, within that community. A doctor, for example, is less likely to wish to remain in the community if he or she has to travel long distances to access services such as legal advice. For this reason the Law Council believes that any measures aimed at encouraging members of the legal profession to RRR areas is likely to complement initiatives already in place in regard to other professions.

Delivery of other professional services in RRR areas, such as accounting, is also likely to be affected. CPA Australia is currently conducting a study into factors affecting the long-term demand for, and supply of, professional accounting services in RRR areas of Australia. The purpose of the research project is to establish "effective strategies and policies for the education, training, and recruitment of professional staff in regional

⁴¹ Australian Bureau of Statistics, *Population Projections, Australia, 2006 to 2101*, CAT No. 3222.0, 4 September 2009, <<http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>>.

⁴² Minister for Health and Ageing, the Hon Nicola Roxon, Post-Budget Speech, Australian Institute of Policy and Science, 14 May 2009, <<http://www.health.gov.au/internet/ministers/publishing.nsf/Content/sp-yr09-nr-nrsp140509.htm>>.

communities as well as ensuring that services can meet future regional demands.”⁴³ According to CPA, the research will model the factors affecting the supply and demand of professional accounting and allied services as a basis for enhancing economic development in regional Australia.

The Law Council believes that any measures aimed at attracting members from legal and other professions to RRR areas of Australia must also be complemented by reconstruction and recovery measures and support provided to the flood-affected RRR areas of Queensland and Victoria that have been devastatingly affected due to the recent flooding disaster.

The Law Council is committed to working collaboratively with other professions and the government in developing strategies which will attract and retain professionals, and particularly legal practitioners, to RRR areas. The Law Council also believes that if this issue is not urgently addressed, the future of Australian RRR areas will be in serious doubt.

Recommended Government Initiatives

The government initiatives prioritised by the Law Council and recommended in this submission and other Law Council submissions made to members of parliament⁴⁴ include:

1. *Waiving Fringe Benefit Tax (FBT) Liabilities on employer payments of employee benefits* which apply to both new legal practitioners and experienced practitioners looking for a career change. Government could implement a scheme which waives fringe benefits tax (FBT) for those employers who offer bonuses for relocation or other benefits as part of an increased salary package. Such salary packages could also include payment (either partially or in full) of the HECS-HELP or FEE HELP debt of new legal practitioners.
2. *Monetary allowances and bonuses for relocation or remaining in a RRR area.* The Federal Government may offer monetary allowances and bonuses to encourage legal practitioners to provide services in RRR areas. Such allowances may be offered by employers as fringe benefits (on which no tax would be payable by the employer) or by the Federal Government through a benefit distribution system such as Centrelink. The Federal Government has implemented such a scheme for medical practitioners in RRR areas.⁴⁵
3. *Repaying, completely or partially, HECS-HELP (or FEE-HELP) liabilities.* Under a repayment scheme, the Federal Government would commit to paying off the legal

⁴³ CPA Australia, Accounting services in rural and regional Australia, 17 February 2009, <<http://www.cpaaustralia.com.au/cps/rde/xchg/cpa-site/hs.xsl/knowledge-practice-toolkit-business-rural-regional-services.html>>.

⁴⁴ See Law Council's submission to the Attorney-General, 25 September 2009, available at <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6C39BD18-1E4F-17FA-D241-FB5CB649D760&siteName=lca>; Minister Gillard, 2 November 2009, available at <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6C3A725E-1E4F-17FA-D240-7A47CAE423A6&siteName=lca>; Senator Fisher, 2 November 2009, available at <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6C3B287F-1E4F-17FA-D24B-891F3173BC0E&siteName=lca>.

⁴⁵ The Rural Retention Program operated largely through Medicare provides payments of up to \$25,000 pa to medical practitioners in RRR areas. The Rural and Remote General Practice Program provides for relocation expenses. In the 2009 Budget, the Federal Government announced that it would invest \$134.4 million to reform and improve incentives to encourage medical practitioners to work and remain in the rural and regional communities. Under the scheme, the incentive amount would depend on the remoteness of the location to which the doctor is relocating to. For instance, a doctor moving from a major city to a regional centre would receive \$15,000 whereas a doctor re-locating to a very remote area would receive \$120,000.

practitioner's HECS-HELP (or FEE-HELP) debt either partially or in full for those practitioners who practice in RRR areas for a certain number of years following the completion of their degrees. The Government agreed in principle to such a scheme for tertiary graduates generally in its response to the recommendations of the 2020 Summit. Further information regarding this initiative is provided below.

4. *Increasing opportunities for placements in RRR areas for law students and graduates.* Such programs could be implemented through Legal Aid offices or Practical Legal Training (PLT) providers. However, such programs are largely dependent on allocation of additional Government funding, including subsidy arrangements to offset the cost of travel and accommodation associated with undertaking legal practice work experience in RRR areas.

Waiving Fringe Benefit Tax (FBT) liabilities on employer payments of employee benefits

Fringe benefits consist of non-cash benefits that are provided by employers (that is, law firms and organisations) to solicitors employed in those firms and organisations. As noted above, the Law Council believes that this incentive would assist in attracting both new legal practitioners and experienced practitioners looking for a career change to RRR areas.

The FBT payable by an employer is calculated under the gross-up rules contained in s 5B(1A)-(1D) of the *Fringe Benefits Tax Assessment Act 1986*⁴⁶ (FBTA Act)⁴⁷ by applying the FBT rate of tax to the "fringe benefits taxable amount" (that is, to the sum of the "taxable values" of all fringe benefits for a year of tax increased by a figure based on the applicable FBT rate and the availability to the employer of Goods and Services Tax (GST) credits). FBT is imposed on the fringe benefits taxable amount which is the employer's aggregate fringe benefits amount for the year grossed-up under s 5B. From the year commencing 1 April 2006, the FBT rate is 46.5%.

The common examples of fringe benefits include: subsidised housing, living-away-from-home allowance, relocation assistance, use of a car, free holiday, debt waiver, loan, expense payment, airline transport, meals and entertainment. A "benefit" includes any right, privilege, service or facility. Some benefits are expressly excluded as fringe benefits and do not give rise to any FBT liability.⁴⁸ However, the benefits which would be most likely to attract lawyers to RRR areas, such as the housing benefit, are currently not excluded from FBT liability and the employer is required to pay FBT if it chooses to provide the benefit. It must be noted that a remote area housing benefit is an exempt benefit under s 58ZC. However, the exemption does not apply to rural or regional areas generally.

The Law Council recommends that the Commonwealth Government should waive FBT liability or introduce concessional tax treatments of those benefits which are likely to attract lawyers to RRR areas, in order to encourage employers to provide these benefits. Such incentives could also include payment (either partially or in full) of the HECS-HELP or FEE HELP debt of new legal practitioners which is discussed below.

Monetary allowances and bonuses for relocation or remaining in a RRR area

The Law Council believes that the Commonwealth Government should offer monetary allowances and bonuses to encourage legal practitioners to provide services in RRR

⁴⁶ *Fringe Benefits Tax Assessment Act 1986*, s 66.

⁴⁷ All further references to legislative provisions in this part of the submission are to the FBTA Act unless otherwise indicated.

⁴⁸ See generally Part III – Fringe Benefits of the FBTA Act.

areas. As discussed above, such allowances may be offered by employers as fringe benefits (on which no tax would be payable by the employer) or by the Commonwealth Government through a benefit distribution system such as Centrelink. The Commonwealth Government has implemented such a scheme for medical practitioners in RRR areas.

The Commonwealth provides funding to the Rural Workforce Agencies through the Rural and Remote General Practice Program (RRGPP) to deliver a number of program initiatives with the aim of improving the attraction, recruitment and retention of general practitioners in RRR areas. The RRGPP comprises of the RRGPP Rural Medical Support Forum, Rural Medical Family Network, relocation, training and remote area grants, practice sustainability and crisis grants, locum grants, and the Rural Locum Relief Program.

Repaying, completely or partially, HECS-HELP (or FEE-HELP) liabilities

The Law Council submits that the Commonwealth Government should seriously consider repayment of HECS-HELP (or FEE-HELP)⁴⁹ liabilities for graduates (and practitioners) who undertake work in RRR areas.

A similar repayment scheme was established by the Commonwealth Government in 2000-2001 as an incentive to attract doctors to work in rural and regional areas of Australia. At the 2020 Summit it was recommended that this strategy be extended to encourage a range of professionals to live and work in RRR areas, thereby helping to build community capacity and sustainable communities. The Government offered in-principle support for this recommendation.

Under a repayment scheme, the Commonwealth Government would commit to paying off the student's HECS-HELP debt either partially or in full for those students who in turn commit to practicing in RRR areas for a predetermined number of years following the completion of their degrees. Alternatively, Government could implement a scheme which waives fringe benefits tax for those employers who offer to pay (either partially or in full) the HECS-HELP debt of their employee.

Consideration must be given to what would be classified as a RRR area for the purposes of such a scheme. It appears that difficulties in attracting and retaining legal practitioners exist in varying degrees of severity according to the remoteness of the area in question. However, other large centres, such as Darwin, are also encountering significant problems in attracting lawyers. A tiered system which distinguishes between rural centres and more remote locations may ensure that a greater level of compensation is provided to those lawyers who seek employment in areas that are experiencing the greatest difficulties.

A range of policy options concerning HECS-HELP may be considered by the Commonwealth Government in order to encourage and promote RRR practice to legal practitioners. Such options would necessarily involve extensive collaboration and involvement with universities. The options included below are progressive, that is, each option represents a greater benefit to the professional from the option preceding it.

1. Partially government-subsidised university places. Under this regime, the Commonwealth Government would commit to paying part of the practitioner's HECS-HELP debt for those practitioners who in turn commit to practising in RRR areas for a predetermined number of years following the completion of their degrees. The government may additionally choose whether this would only apply to graduates, or whether the regime would apply to any legal practitioner who

⁴⁹ Any further reference to HECS-HELP should be regarded as a reference to both HECS-HELP and FEE-HELP schemes.

decided to take up employment in a RRR area, irrespective of any legal employment in the metropolitan area.

2. Fully government-subsidised university places. Under the regime, the Commonwealth Government would commit to paying the entire HECS-HELP debt incurred by practitioners for the completion of their law degrees for those practitioners who in turn commit to practising in RRR areas for a predetermined number of years. A number of options are open to government in introducing such an initiative:
 - a) The practitioner's HECS-HELP liability is to be waived in the instance when the practitioner has completed a predetermined number of years in RRR practice. In the Law Council's view, if this option is adopted, the number of years should not exceed five.
 - b) The student's HECS-HELP liability is reduced by a significant amount, for instance 50 per cent, once the practitioner has completed the first year of practice in RRR area. Following the first year, the liability is reduced incrementally, that is, 10 per cent of the initial debt each year the practitioner continues to practice in the RRR area. Thus, under this regime, the HECS-HELP liability would cease to exist after six years.

Example 1:	
Year 1 debt remaining	$\$33,996 \times 0.5$ [ie 50%] = \$16,998
Year 2 debt remaining	$\$16,998 - (\$33,996 \times 0.1$ [ie 10%]) = \$13,598.4
Year 3 debt remaining	$\$13,598.4 - (\$33,996 \times 0.1)$ = \$10,198.8
Year 4 debt remaining	$\$10,198.8 - (\$33,996 \times 0.1)$ = \$6,799.2
Year 5 debt remaining	$\$6,799.2 - (\$33,996 \times 0.1)$ = \$3,399.6
Year 6 debt remaining	$\$3,399.6 - (\$33,996 \times 0.1)$ = \$0

Note: Variations of this model are possible. For instance, it is not necessary to reduce the sum by 10 per cent of the original debt sum. The remaining debt could be reduced by 10 per cent. Thus, in the example above the \$16,998 sum could be reduced by 10 per cent, meaning that a longer period would be required to pay off the entire HECS-HELP debt.

- c) The practitioner's HECS-HELP liability is reduced incrementally with each year the practitioner spends in practice in a RRR area. For instance, the liability would be reduced by 20 per cent of the initial debt each year the practitioner remains in legal employment in the RRR area. Thus, under this regime, the HECS-HELP liability would cease to exist after five years.

Example 2:	
Year 1 debt remaining	\$33,996
Year 2 debt remaining	$\$33,996 - (\$33,996 \times 0.2$ [ie 20%]) = \$27,196.8
Year 3 debt remaining	$\$27,196.8 - (\$33,996 \times 0.2)$ = \$20,397.6
Year 4 debt remaining	$\$20,397.6 - (\$33,996 \times 0.2)$ = \$13,598.4
Year 5 debt remaining	$\$13,598.4 - (\$33,996 \times 0.2)$ = \$6,799.2
Year 6 debt remaining	$\$6,799.2 - (\$33,996 \times 0.2)$ = \$0

Note: See explanation above in relation to Example 1 as to what impact any variations may have. It is also important to note that variations in the percentage of the debt reduced each year will lead to variations in time periods taken to pay off the debt.

- d) The practitioner's HECS-HELP debt is frozen (not indexed with inflation) when they start work in a RRR area. There is no reduction to this amount beyond what the practitioner is obliged to pay out of their income for three years. After a certain number of years continuous service (for example, five years) in a RRR area, the debt is cleared.
3. Employer pays for the HECS-HELP debt of their employee. In this instance, the employer would not be subject to the fringe benefit tax (FBT) on the payment. The advantage of this option is that:
 - a) The employer and/or employee control the timing of the benefit (and any claw back) so that it can be tailored to individual circumstances;
 - b) The Government only subsidises part of the cost, being the FBT forgone, as opposed to waiving the whole HECS-HELP debt; and
 - c) The employer can pass on the cost to the employee if the benefit is taken into account in the employee's "total remuneration".

There is precedent for this option in the public sector in organisations such as the Australian Tax Office (ATO).

4. Area dependent HECS-HELP debt relief. In this instance, the reduction in HECS-HELP debt would depend on the classification of area as:
 - a) Regional
 - b) Rural
 - c) Remote
5. Hybrid model of time and area. Under this model, the reduction in HECS-HELP debt would depend on both the time the person stays in a RRR area and the remoteness of the area. For example, those practising in regional areas would be entitled to a smaller reduction of debt, when compared to those practising in remote areas.

It is important to note that adequate exit mechanisms for these options would also need to be considered.

Increasing opportunities for placements in RRR areas for law students and graduates

In June 2008, the Australian Government announced the allocation of \$5.8 million over four years for the Regional Innovations Program for Legal Services (RIPLS). The purpose of this initiative was to improve access to legal services for communities in RRR areas. Under RIPLS, legal aid commissions are eligible to obtain funding for programs which take an innovative approach to improve service delivery in RRR areas. Under the program, Legal Aid Commissions in New South Wales, Queensland, Tasmania and Western Australia have each developed initiatives expected to increase the availability of legal assistance services in RRR areas. Furthermore, the National Association of NALC is assisting students to undertake legal practice experience in a RRR centre.

Placements in RRR areas for law students and graduates are expected to assist in reducing the vacancy rate for lawyers in the RRR communities. Such programs are generally implemented through the Legal Aid offices or PLT providers. However, as noted above, such programs are largely dependent on allocation of additional Government funding, including subsidy arrangements to offset the cost of travel and accommodation associated with undertaking legal practice work experience in RRR areas.

The ANU College of Law Legal Workshop⁵⁰ piloted a program in partnership with NACLCL which placed practical legal training students with participating CLCs in RRR areas. The ANU provided assistance to CLCs with the establishment and sustaining of these placements, mentoring of the students and provision of a scholarship fund to enable participation of the students. The ANU provided financial assistance to PLT students for travel and accommodation to support this program, which is not sustainable in the long term. This pilot program commenced in September 2008 with student placements commencing from June 2009 through to October 2010.

The program has been successful in raising awareness among PLT students about legal practice career opportunities in RRR areas and linking interested PLT students from both RRR and metropolitan areas to legal practice opportunities in RRR Australia. The students who undertook the pilot program ranged in age from under 25 to 59 years. In October 2010, 14 of the 26 students who completed the pilot program were admitted to legal practice and 12 were still completing their course work components of their GDLP. Of the 14 admitted, four were working as a solicitor in a RRR area and two were intending to do so. From these four working as a solicitor in a RRR area, two were working for a non-profit legal service and two were working in private practice undertaking a substantial amount of legal aid work. The Law Council believes that additional government funding into such programs is required.

The Law Council further notes that initiatives such as those implemented by NACLCL would supplement successful programs such as those operating in New South Wales, Queensland and Western Australia. For example, in 2007 the Country Lawyers Graduate Program ('the Program') was established in Western Australia. The Program is funded with the assistance of both Federal and State Governments. In September 2007, the Commonwealth Government provided Legal Aid WA with funding over two years to establish a Co-ordination Team for the Program. The team is responsible for implementing the key phases of the Program, including the development of a graduate program, attracting experienced lawyers to the Program and improving access to continuing professional development and professional support for legal practitioners in RRR areas of Western Australia.⁵¹

The Program is an initiative of the Law Society of Western Australia, Legal Aid WA, community legal centres, the Aboriginal Legal Service of Western Australia, Family Violence Prevention Legal Services and Legal Practice Board of Western Australia, which is aimed at improving the recruitment and retention of lawyers in RRR areas by recruiting, developing and rotating graduates throughout regional Western Australia. The graduate's salary is increased progressively to \$60,000 in their fourth year. Other salary bonuses and incentives include salary packaging, payment of membership fees to the Law Society of Western Australia, and regional allowances including access to subsidised housing.⁵²

⁵⁰ See <<http://law.anu.edu.au/legalworkshop/rrr.asp>>.

⁵¹ See Jane Stewart, 'The WA Country Lawyers Program', a paper presented to the National Access to Justice Pro Bono Conference Sydney 14-15 November 2008, available at <http://www.a2j08.com.au/papers/Stewart_J.pdf>, p 3.

⁵² Country Lawyers Graduate Program, <<http://www.legalaid.wa.gov.au/LegalAidServices/employment/Pages/CountryLawyers.aspx>>.

After 12 months of operation, there were 21 legal practitioners in the program. A paper presented at the *2008 National Access to Justice and Pro Bono Conference* on the Western Australia Country Lawyers Program indicates that in the six months from March 2008 the Program had assisted in reducing the vacancy rate in the RRR community legal sector from one in three to one in four positions.⁵³

As noted in the paper, provision of housing for Program participants is the most significant concern due to the impact of the economic boom in Western Australia. Government “housing subsidies and assistance in obtaining housing will be essential for the survival and sustainability of the Program.”⁵⁴

The Law Council notes that the Report by the Access to Justice Taskforce of the Attorney-General’s Department entitled *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, released on 23 September 2009, identified that “[t]here is scope for enhancement of these initiatives through a national approach to this issue. For example, as part of its functions the proposed national coordination group could be tasked with the development of strategies for addressing the legal assistance needs of disadvantaged Australians living in regional, rural and remote Australia.”

If the Government is interested in pursuing any of these initiatives the Law Council would be happy to work with Departmental officials in developing costings and implementing the initiatives going forward.

Conclusion

The Law Council submits the following:

Legal assistance funding

1. The Commonwealth’s share of legal aid funding should be returned to a ratio of 50% as soon as possible, to address ongoing critical underfunding of the legal assistance sector. It is recommended that this be addressed by way of additional funding over 4 years, to restore the Commonwealth to pre-1997 funding levels, taking into account changes in population and movements in CPI. The necessary funding increases have been projected as follows:
 - Budget 2011-2012: \$66.099 million
 - Budget 2012-2013: \$71.619 million
 - Budget 2013-2014: \$80.481 million
 - Budget 2014-2015: \$93.769 million

Total: \$311.994 million
2. Funding for CLCs and ATSILS must be increased in line with funding for legal aid commissions, taking into account critical problems with recruitment and retention of experienced lawyers, particularly in rural, regional and remote areas. Funding increases should be made in consultation with NACLC and ATSILS regarding their

⁵³ See Jane Stewart, ‘The WA Country Lawyers Program’, a paper presented to the National Access to Justice Pro Bono Conference Sydney 14-15 November 2008, available at http://www.a2j08.com.au/papers/Stewart_J.pdf, p 2.

⁵⁴ *Ibid*, p 7.

baseline requirements to ensure they can offer their staff and clients equivalent benefits to those of legal aid commissions.

Recruitment and retention of lawyers in RRR areas

3. The Law Council is concerned by the critical shortage of lawyers in RRR areas and the corresponding impact on access to justice. Government funding is required to address this issue which will rapidly worsen. The Law Council urges the Government to consider the following recommendations to attract and retain lawyers in country Australia:
 - Implementing a scheme waiving FBT Liabilities on employer payments of employee benefits for employers who offer relocation benefits to experienced legal practitioners or salary packaging including partial or full payment of HECS-HELP or FEE-HELP debt for new practitioners.
 - Offering monetary allowances and bonuses by way of Centrelink distributions or fringe benefits for relocating or remaining in a RRR area to encourage legal practitioners to provide services in such areas.
 - Completely or partially repaying HECS-HELP (or FEE-HELP) liabilities for legal practitioners who practice in RRR areas for a certain number of years following completion of their degrees.
 - Increasing opportunities for placements in RRR areas for law students and graduates, for instance, by providing Government funding for through Legal Aid officers or PLT providers.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- 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 of the Australian Capital Territory
- Law Society of the 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 Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.