



Law Council
OF AUSTRALIA

2021-22 Pre-Budget Submission

The Treasury

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About the Law Council of Australia

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

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

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

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

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

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

Members of the 2020 Executive as at 1 January 2020 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

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

- Queensland Law Society;
- Law Society of South Australia (Human Rights Committee);
- Business Law Section;
- Family Law Section;
- Federal Litigation and Dispute Resolution Section;
- Access to Justice Committee;
- Business and Human Rights Committee;
- Indigenous Legal Issues Committee;
- National Human Rights Committee; and
- Migration Law Committee of the Federal Litigation and Dispute Resolution Section.

Executive Summary

1. The Law Council is grateful for the opportunity to provide this submission to the Treasury for consideration in preparing the 2021-22 Federal Budget.
2. Key recommendations from the Law Council contained in this submission are as follows:
 - (a) funding for Justice Impact Tests should be provided at the Commonwealth level to facilitate the smoother development of laws and policies which have downstream impacts on the justice system;
 - (b) the Australian Government should commit significant additional resources to Legal Aid Commissions (**LACs**), Community Legal Centres (**CLCs**), Aboriginal and Torres Strait Islander Legal Services (**ATSILS**), and Family Violence Prevention Legal Services (**FVPLS**) to address critical civil and criminal legal assistance service gaps. This should include, \$370 to \$390 million per annum comprising:
 - (i) at least \$120 million per annum for civil legal assistance services; and
 - (ii) at least \$250 million per annum for other services provided by Legal Aid Commissions, restoring the share of Commonwealth funding of such services to 50 per cent.
 - (c) at a minimum, the additional funding provided in the 2020-21 Budget to the legal assistance sector to support Australians affected by the COVID-19 pandemic and January 2020 bushfires should be provided to the sector on an ongoing basis;
 - (d) in consultation with the legal assistance sector, the Australian Government should provide sufficient additional funding to LACs, CLCs and ATSILS (and their peak bodies) to ensure that they can meet the new data requirements set out under the National Legal Assistance Partnership (**NLAP**);
 - (e) the Australian Government should consult closely with the federal courts and tribunals and the legal profession, in order to undertake a full review of the resourcing needs of the judicial system, incorporating the challenges and benefits that have been identified in the context of the COVID-19 pandemic;
 - (f) in the intervening period and supported by consultation with the federal judiciary, the Australian Government should allocate additional resources to the federal courts including additional judges, registrars and other staff, in order to better meet the courts' currently considerable workload.
 - (g) the Australian, state and territory governments should invest in the judicial resourcing and facilities (including technological facilities) available in rural regional and remote Australia to increase the reach of federal courts and tribunals to these areas and improving equitable access to the justice system;
 - (h) in consultation with, and in a manner endorsed by, the federal judiciary, the Australian Government should establish and adequately resource a Federal Judicial Commission which maintains the separation of powers;

- (i) the Australian Government must ensure that when established, the proposed Commonwealth Integrity Commission (**CIC**) is adequately funded to achieve its purpose;
- (j) the Australian Government should ensure that the new Closing the Gap justice targets are backed by appropriate resourcing including for access to justice initiatives, particularly for Aboriginal community-controlled legal services, and preventative approaches spanning a wide range of health, housing, youth engagement, disability and broader services. This funding should have regard to the interdependence between justice targets and others in the National Agreement on Closing the Gap;
- (k) to address the shortage of available professional interpreters, governments (including the Australia Government) should implement a National Justice Interpreter Scheme which ensures that:
 - (i) professional, appropriate and skilled interpreters are readily available and free to people from culturally and linguistically diverse (**CALD**) backgrounds who cannot afford them, including First Nations peoples, recent arrivals, asylum seekers, and people who are trafficked and exploited, at all levels of the justice system, including legal assistance services;
 - (ii) interpreter services and courts are funded to enable the full implementation of the Judicial Council on Cultural Diversity's 'Recommended National Standards for Working with Interpreters in Courts and Tribunals'; and
 - (iii) Recommendation 22.3 in the Productivity Commission's *Access to Justice Arrangements* report, regarding the development of a National Aboriginal and Torres Strait Islander Interpreter Service, is implemented.
- (l) the Australian Government should provide immediate funding to address inadequate levels of funding for legal assistance services to provide specialist advice, representation and education for older persons;
- (m) the Australian Government should set aside funding to enable it to respond effectively to the final recommendations of the Royal Commission into Aged Care, Quality and Safety;
- (n) the Australian Government should set aside funding to enable it to effectively implement the new National Disability Strategy (**Disability Strategy**);
- (o) additional resources should be made available to ensure that groups representing diverse memberships of people with disability can effectively engage in delivery and monitoring of the next Strategy;
- (p) the Australian Government should allocate appropriate resources to respond to the emerging, urgent interim findings of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**), with particular regard to expanding:
 - (i) access to specialist legal assistance services, health-justice partnerships and legal education;

- (ii) access to early diagnosis and disability and mental health support services, particularly in rural, regional and remote (**RRR**) communities and for First Nations peoples;
 - (iii) access to hearing and Auslan interpreters within the justice system;
 - (iv) the development of a Commonwealth disability justice policy framework;
 - (v) leadership initiatives across the justice system to identify and respond to disability effectively; and
 - (vi) justice reinvestment trials;
- (q) the Australian Government should act quickly to implement the Optional Protocol to the Convention against Torture (**OPCAT**) effectively by ensuring adequate resourcing for the Commonwealth Ombudsman as the National Preventative Mechanism (**NPM**) Coordinator, as well as the NPM for federal places of detention;
 - (r) the Australian Government should continue to support the Department of Foreign Affairs and Trade's (**DFAT**) ongoing engagement with the Human Rights Council (**HRC**) and opportunities for civil society organisations to engage in this dialogue;
 - (s) the Australian Government should adequately resource the Australian Human Rights Commission (**AHRC**) to ensure that it can effectively carry out its investigation, complaint and conciliation functions and its function of enhancing public education and human rights resources.
 - (t) the Australian Government should ensure that ongoing and, if necessary, expanded funding is made available to the Australian National Contact Point to enable it to effectively fulfil its responsibilities, including to undertake promotion activities; and
 - (u) the Australian Government should support and resource the adoption of a National Action Plan on Business and Human Rights.

Legal Assistance Sector

Fair and Effective Justice System

3. Legal problems are a common occurrence in society and most Australians will experience several interactions with the legal system throughout their lifetime. Effective access to justice in these circumstances will often necessitate the assistance of a legal adviser or representative.
4. People experiencing disadvantage are often more vulnerable to legal problems and frequently have greater, and more complex legal needs than the general population. However, despite having disproportionate interactions with the justice system, Australians experiencing disadvantage are often the least able to respond effectively (both in terms of financial resources and legal capability).
5. Meeting the legal needs of Australians, particularly those experiencing disadvantage, is an ongoing joint endeavour between the Australian, state and territory governments through publicly funded legal assistance services, and the legal profession. All sides to this endeavour continually seek to ensure that the legal system is accessible and operating effectively.
6. Governments have provided additional funds to the sector through initiatives such as the NLAP agreement, state-funded programs, COVID-19 pandemic and bushfire relief/recovery packages, initiatives outside of the legal assistance sector (such as court reform, use of alternative dispute resolution and investment in other support structures) and so on.
7. Similarly, the contribution of the legal profession towards access to justice is significant – from those working in frontline legal assistance services to the pro bono contribution of the private profession and initiatives designed to address affordability concerns (for example, no-win, no-fee services, unbundled services and reduced fee arrangements). However, in many cases, the ability for the private legal profession to continually provide free or low-cost legal services is at breaking point. This is particularly the case in relation to lawyers providing their services through legal aid grants. As discussed at paragraphs 29-35 below, it is becoming increasingly difficult for the private profession to undertake legal aid work as available rates fail to reflect the costs of providing these services and generate opportunity costs as time spent on these cases limits the ability of lawyers to recover lost revenue through higher paying work.
8. While the private legal profession plays a critical role in ensuring access to justice, governments, including the Australian Government, must ultimately bear responsibility for ensuring an appropriate service safety net.
9. For many Australians, the no-cost or minimal cost services provided by government-funded legal assistance providers are often the first and most fundamental sources of support to address legal issues. Each of the four publicly funded legal assistance services – LACs, CLCs, ATSILS and FVPLS – play an important, unique and complementary role in providing legal help to people across Australia. Initiatives to by the Australian Government to improve the availability of these services in recent years are welcome. However, they have failed to meet the level required to substantially address the current ‘justice gap’.
10. The Law Council considers it particularly important in determining additional funding for the sector, that resources are provided to the legal assistance sector to meet

unexpected increases in legal need as a result of new policy initiatives or legislation. As such, the Law Council recommends Justice Impact Tests accompany new Government initiatives as a means of determining the impact of any initiative or reform and ensuring that any increased legal need can be met.¹

Recommendation:

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

Why increase funding to the legal assistance sector?

11. The downstream savings created by investment in the legal sector have been regularly recognised. In 2014, the Productivity Commission recognised the net public benefits to the community of legal expenditure and the ‘false economy’ of not doing so, given that the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection.² The International Bar Association and the World Bank Group’s 2019 analysis of legal assistance systems around the world found that investment in these systems generates downstream savings of between 2.3 (housing advice) and 8.8 (welfare systems advice) times the investment.³
12. A recurring theme throughout the Final Report of the Law Council’s Justice Project, is the costs (personal, community, social and economic) that arise and/or grow when people cannot access justice. These include, for example:
 - (a) unresolved problems escalating from civil, to family, to criminal matters;
 - (b) family violence victims being evicted for reasons which are not their fault, such as damage to the rental home by the perpetrator;
 - (c) an inability to resolve mounting debts, fines or payments, resulting in poverty and/or eviction and homelessness, as well as deteriorating mental and physical health, and in some jurisdictions, imprisonment;
 - (d) an inability to access a person’s entitlements, such as unpaid wages, income support or a pension, resulting in destitution;
 - (e) an inability to seek redress as a victim of crime, to address workplace exploitation or discrimination;
 - (f) people remaining at risk of harm, violence and exploitation – such as family violence victims, elder abuse victims, people with disability who are abused by carers, and people who are trafficked or subject to forced marriages;
 - (g) families being split when children are unnecessarily removed from their parents;

¹ Law Council of Australia, *The Justice Project: Final Report – Governments and Policymakers* (August 2018) 14-26.

² Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 30-1 (‘Access to Justice Arrangements’).

³ International Bar Association and World Bank Group, *A Tool for Justice: A Cost Benefit Analysis of Legal Aid* (2019) 19.

- (h) a greater likelihood of incarceration, including in circumstances in which charges and arrest were unwarranted; and
 - (i) a greater likelihood of people being returned to their countries of origin to face persecution, torture or death.⁴
13. These scenarios clearly have broader cost implications – such as to health, housing, social services and welfare, child protection, families, corrections, policing and justice portfolios. They also entrench individuals’ disadvantage, and the likelihood of this occurring as part of an intergenerational cycle of poverty, violence and harm – with opportunity and economic costs to all Australians given the loss of healthy, productive and vibrant communities.⁵
14. The Organisation for Economic Co-operation and Development (**OECD**) similarly recognised the ‘intrinsic links between access to justice, poverty reduction and inclusive growth’.⁶ A 2016 OECD background paper states that:
- ...individual consequences can in turn translate into greater spending on public programs such as social and health services, income supports, disability plans, employment insurance, and other services. The failure to resolve legal problems can contribute to a ‘cycle of decline’...in which one problem leads to another with escalating individual and social costs. Inability to resolve legal problems and limited access to justice may diminish access to economic opportunity, reinforce the poverty trap, and undermine human potential, which could affect growth.⁷*
15. While legal assistance services are not a ‘cure-all’ for all of these issues, the importance of these services in minimising the multitude of costs associated with failure to adequately access justice has been consistently recognised in Australian and overseas research.⁸ In this regard, the Law Council considers that the legal assistance sector will play a particularly critical role in assisting Australians (and the Australian economy) recover from the impacts of the COVID-19 pandemic.

What level of additional Commonwealth funding is required?

16. Despite the clear economic and social benefits of investment in the legal assistance sector, the sector remains critically underfunded.
17. Baseline funding for the legal assistance sector in the 2020-21 Budget reflected the NLAP Agreement between the Australian and state and territory governments which

⁴ Law Council of Australia, *The Justice Project: Final Report – Introduction and Overview* (August 2018) 18.

⁵ Ibid.

⁶ Organisation for Economic Co-operation and Development and Open Society Foundation, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All* (Issues Brief, 2016) 3.

⁷ Organisation for Economic Co-operation and Development and Open Society Foundations, ‘Understanding Effective Access to Justice’ (Workshop Background Paper, Organisation for Economic Co-operation and Development and Open Society Foundations, 2016) 12 <<http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf>>.

⁸ While the global justice evidence base is not well resourced, international studies also support findings that unresolved legal problems have social, economic and health consequences. See, eg, Pascoe Pleasence et al, ‘Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems’ in Pascoe Pleasence, Alexy Buck and Nigel J Balmer (eds), *Transforming Lives: Law and Social Process* (The Stationary Office, 2007) 67; Graham Cookson and Freda Mold, *The Business Case for Social Welfare Advice Services - An Evidence Review: Lay Summary* (University of Surrey, July 2014) 1; Citizens Advice Bureau, ‘Towards a Business Case for Legal Aid’ (Paper presented at the Legal Services Research Centre’s Eighth International Research Conference, July 2010) 2; Laura K Abel and Susan Vignola, ‘Economic and Other Benefits Associated with the Provision of Civil Legal Aid’ (2010) 9 *Seattle Journal for Social Justice* 1, 139-67.

came effect on 1 July 2020.⁹ Under the NLAP, the Australian Government will provide approximately \$2 billion over five years (roughly \$400 million per year). The Attorney-General's media release at the time this agreement was announced noted that the NLAP:

*includes additional funding of \$248 million over five years. This includes the permanent restoration of \$151 million in legal assistance funding that would have been stripped from the legal assistance sector based on decisions of former, consecutive governments.*¹⁰

18. Therefore, almost \$100 million (or \$20 million per year) over five years will be provided above the level under the previous funding agreements.
19. The Law Council considers current Commonwealth funding levels under the NLAP to be approximately half of the level required to meet demand on the sector.
20. In the Final Report of the Justice Project released August 2018, the Law Council estimated that the Commonwealth funding shortfall was at least \$310 million.¹¹ This figure comprised:
 - (a) the Productivity Commission's estimate that the Commonwealth should provide additional funding of around \$120 million per annum for civil legal assistance services;¹² and
 - (b) PwC's estimate that to return the Commonwealth's share of LAC funding to at least 50 per cent, the Commonwealth should provide \$190 million per annum.
21. The Law Council estimates that this shortfall is now at least \$370 million to \$390 million (factoring in the additional money provided under the NLAP. Given that the Productivity Commission's recommendation was made in 2014 and was suggested merely as an interim funding solution to 'address the most pressing needs', the Law Council suggests that the estimated total annual cost of the measures of \$200 million is likely to be now a significant underestimate.¹³ Further, updated estimates from PwC indicate that for the Commonwealth to return to a 50 per cent share of total funding for LACs, the level of additional funding required has increased significantly from \$190 million per annum.¹⁴
22. The Law Council calls on the Australian Government to invest significant additional resources in legal assistance services and reverse the downward trend over the past 20 years in the Australian Government's funding on a real per capita basis.¹⁵

⁹ National Legal Assistance Partnership 2020-25 <<https://www.ag.gov.au/legal-system/legal-assistance-services/national-legal-assistance-partnership-2020-25>>.

¹⁰ Hon Christian Porter MP, Attorney-General (Cth), '\$2 billion partnership to deliver legal assistance services for Australians' (Media Release, 30 June 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/2-billion-partnership-deliver-legal-assistance-services-australians-30-june-2020>>.

¹¹ Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 11, rec 2.1.

¹² Productivity Commission, *Access to Justice Arrangements*, 741, rec 21.4.

¹³ *Ibid* 703, 738-9.

¹⁴ Advice from PwC to the Law Council of Australia, June 2019.

¹⁵ *Ibid*. Funding of LACs has failed to keep pace with population growth or inflation. The most recent analysis from PwC demonstrates that the Australian Government's per capita share of total government LAC funding in real terms is at its lowest level in more than 20 years, and that this share is declining.

Recommendation:

- **The Australian Government should commit significant additional resources to Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services to address critical civil and criminal legal assistance service gaps. This should include, \$370 to \$390 million per annum comprising:**
 - **at least \$120 million per annum for civil legal assistance services; and**
 - **at least \$250 million per annum for other services provided by Legal Aid Commissions, restoring the share of Commonwealth funding of such services to 50 per cent.**

Continuation of COVID-19 package funding

23. Further funding will be essential for the legal assistance sector to manage the demands and logistical challenges arising from COVID-19. It is important to emphasise, as identified above, that prior to the pandemic, the legal assistance sector was underfunded. In the Law Council's view, the increased demand for legal assistance services as a result of the immediate and ongoing impacts of COVID-19 will continue to compound the need for improved funding and resourcing.
24. The COVID-19 pandemic has generated (and will continue to generate) even greater demand for legal assistance resources including in relation to, but not limited to:
- domestic and family violence;
 - elder law matters;
 - credit matters;
 - insurance matters;
 - superannuation claims;
 - hardship applications;
 - insolvency matters;
 - tenancy disputes; and
 - employment law.
25. In relation to the latter, the Law Council notes that the reforms currently being pursued in the industrial relations space to boost employment, improve conditions and bolster businesses,¹⁶ will have limited effect unless there is adequate funding for both employees and employers to access legal advice and representation.
26. The COVID-19 pandemic has added other pressure to this situation, including additional difficulty accessing courts and tribunal services (due to increasing delays and backlogs, see below), lack of basic technological infrastructure to enable staff to work and attend upon clients remotely, and many other novel challenges.¹⁷
27. Recognising this, the Law Council welcomed the Australian Government's 6 May 2020 announcement of an injection of an additional \$63.3 million over two years into

¹⁶ Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth).

¹⁷ See, Law Council of Australia, 'Submission to the Inquiry into the Australian Government's response to the COVID-19 pandemic' (15 June 2020).

frontline legal services to support Australians impacted by the pandemic (including \$13.5 million to improve to technological capability of frontline services).¹⁸ However, while this was greatly needed, it did not fully address the chronic underfunding of the sector by successive Australian governments. Increased ongoing, adequate and certain funding as Australia rebounds from the COVID-19 pandemic, must be a priority for the Australian Government to ensure that the legal assistance sector can meet the demands placed on it in times of crisis and beyond.

28. The 2020-21 Budget included \$31.1 million of the \$63.3 million COVID support package for the sector.¹⁹ Another \$5.8 million was provided to assist the sector in supporting those affected by the January 2020 bushfires.²⁰ In the Law Council's view, at an absolute minimum, this level of additional funding should be provided to the sector on an ongoing basis through the forward estimates. This ongoing additional funding could assist the sector to continue the improvement of their ICT capacity, ensure the additional demand for legal assistance services created by the pandemic over and above the already critical level of demand is met, improve wraparound services and ensure that private practitioner legal aid rates are sustainable. The Law Council refers to the submissions of Community Legal Centres Australia (**CLCs Australia**) and National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) for further information on how additional funding could be used to expand frontline services and better meet demand.

Recommendation:

- **At a minimum, the additional funding provided in the 2020-21 Budget to the legal assistance sector to support Australians affected by the COVID-19 pandemic and January 2020 bushfires should be provided to the sector on an ongoing basis.**

Private practitioner legal aid rates

29. The Australian legal aid system operates under a 'mixed model' of service delivery, enabling LACs to draw on both in-house expertise and the experience and acumen of the private profession.²¹ The Australian legal aid system is heavily reliant on the private profession for delivery of services.²²
30. Due to the rationing of limited funding over many years, rates paid to private practitioners by the LACs have failed to keep pace with the costs of providing legal services. In fact, the Law Council understands anecdotally that many, if not most, lawyers and firms providing these services do so at a loss. This significantly limits the availability of the private profession to provide this type of service and is a significant factor in firms declining to engage in legal aid work.
31. The Law Council also understands from lawyers at private firms that the number of paid hours granted to those who take LAC panel referrals does not accurately reflect the time required to complete the work in a professional manner. As a result, many firms and particularly those practising in family law must perform a significant number of additional unpaid hours to complete LAC work, and again severely

¹⁸ Hon Christian Porter MP, Attorney-General (Cth), 'Funding Boost to Ensure Struggling Australians Can Get Legal Assistance' (Media Release, 6 May 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/2-billion-partnership-deliver-legal-assistance-services-australians-30-june-2020>>.

¹⁹ Commonwealth of Australia, Budget 2020-21, Budget Paper No 3: Federal Financial Relations, 70.

²⁰ Ibid.

²¹ Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 12-3.

²² Ibid.

reducing the ability for the private profession to take on this work. This is compounded by the fact that many legal aid matters are often resource intensive, meaning private practitioners are not only underpaid for legal aid work, but are time restrained from taking on full fee-paying work to compensate.

32. This is an unacceptable situation that not only affects lawyers, but also severely impacts on the quality of legal support provided the clients. Clients who are referred by LACs to private practitioners are increasingly vulnerable, despite their multiple complex needs, which makes advising and representing them particularly resource intensive.
33. The Productivity Commission's 2014 *Access to Justice Arrangements* report,²³ as well as the Final Report of the Law Council's Justice Project,²⁴ identified that the sustainability of this mixed model of legal assistance service provision is in doubt unless additional funding can be provided to the LACs to improve the currently unacceptably low hourly rates paid to private practitioners. Implementation of the Recommendations above, regarding additional investment in legal assistance services, should have particular regard to the need to maintain the ongoing viability of the mixed model of legal aid service delivery through increasing private practitioner legal aid rates to reasonable levels.
34. LACs are particularly reliant on private practitioner support in RRR areas. Lawyers practising in those locations play a significant role in their communities, which would be compromised if these firms could not continue to offer their services. Indeed, the Law Council is aware that some firms in RRR areas have ceased providing legal aid services on the basis the unacceptably low hourly rates mean that private practitioners who once relied on these matters for revenue, are no longer sustainable. This widens the gap in RRR areas for access to justice with clients having to travel to another regional town to access a LAC or other service/lawyer.
35. The Law Council strongly supports an increase in private practitioner rates in RRR areas to enable lawyers in these areas to continue to undertake legal aid matters. Impacts on RRR firms will affect their ability to provide services to clients and should be considered when the Government is reviewing business support packages.

Funding to support data collection

36. A key priority of the Australian Government and the legal assistance sector through the NLAP period is to improve data collection.²⁵ The Law Council notes that there are extensive requirements under the NLAP for development of data collection capability in the sector.²⁶
37. The Law Council is generally supportive of measures that will assist in a better understanding of the legal assistance sector, including consistency in data collection and tools that will enable greater analysis of legal need, improved collaboration and planning, and contribute to evidence-based funding.

²³ Productivity Commission, *Access to Justice Arrangements*, 726-8.

²⁴ Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 12-3.

²⁵ Hon Christian Porter MP, Attorney-General (Cth), '\$2 billion partnership to deliver legal assistance services for Australians' (Media Release, 30 June 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/2-billion-partnership-deliver-legal-assistance-services-australians-30-june-2020>>.

²⁶ National Legal Assistance Partnership 2020-25 <<https://www.ag.gov.au/legal-system/legal-assistance-services/national-legal-assistance-partnership-2020-25>>.

38. However, the Law Council is aware that a number of these services are already under immense financial pressure and any increased administrative burden will likely have an impact on service delivery.
39. To meet the data collection requirements under the NLAP, sector organisations (including the peak bodies) will need to invest in data collection tools and processes, analysis, reporting and training capacity and staffing with relevant skills and experience. It is critically important that the funding to support these investments is not drawn from frontline services.
40. The Law Council understands that NATSILS and CLCs Australia have provided the Treasury with further information on the required resourcing in their pre-Budget submissions (and previously in dealings with the Attorney-General's Department and National Indigenous Australians Agency). The Law Council supports these submissions.

Recommendation:

- **In consultation with the legal assistance sector, the Australian Government should provide sufficient additional funding to Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services (and their peak bodies) to ensure that they can meet the new data requirements set out under the National Legal Assistance Partnership.**

Courts and Tribunals

41. The Law Council's Justice Project, highlighted the significance of timely, efficient and fair court systems:

The efficient and timely resolution of matters is a key feature of international court excellence. Failure to achieve such resolution can result in legal problems exacerbating or multiplying, a greater likelihood of injustice being perpetuated, and public confidence in the justice system being undermined. However, the swift and cost-effective resolution of matters must be balanced against the fair dispensation of justice. Timeliness at the expense of fairness and effective participation in the justice system can diminish the quality of justice, especially for people requiring additional support, adjustments or aids. While difficult to achieve, it is imperative that courts and tribunals are in a position to strike the balance between the objective of reducing delays and cost, and the aim to ensuring procedural fairness and providing a fair hearing to all participants.²⁷

42. The capacity of courts and tribunals to resolve matters both swiftly and fairly is hampered by insufficient resources in the face of increasing demand for services.²⁸
43. The Law Council considers that the federal courts and tribunals have been chronically under-funded and under-resourced for a substantial period of time. While the federal courts and tribunals have generally adapted well to the challenges created by the COVID-19 pandemic, the pandemic has served to underscore the

²⁷ Law Council of Australia, *The Justice Project: Final Report – Courts and Tribunals* (August 2018) 4.

²⁸ *Ibid.*

insufficient level of funding and resources with which the courts and tribunals are required to operate.

44. Efficiency and administrative savings (including through the increased use of technology to undertake court and tribunal functions as a result of the COVID-19 pandemic,²⁹ and supported by projects such as the project to harmonise the rules for family law matters across the courts),³⁰ are important components in increasing timeliness, efficiency and fairness. However, they cannot be the only solution to the current backlogs and high workloads afflicting the federal courts. These components must be supported by a significant increase in the resourcing of the courts.
45. Chronic underfunding is the most significant impediment to the timely and effective resolution of matters in the federal courts. The Law Council submits that appropriate resourcing is critical to any significant reduction in court delays and backlogs. The current demand on court services is such that the capacity to hear matters in a timely and effective manner is limited. It often takes considerable time for parties to receive a first return date, have interim disputes heard and resolved, secure trial dates and, following trial, to receive judgment. Extensive delays can exacerbate frustration and conflict between parties. Extensive delays add to the costs incurred by the users of the courts. Current wait times are unsustainable and can lead to detrimental outcomes for the parties involved. This is particularly significant in family law matters. These delays potentially expose those experiencing family violence, including children, to greater risk and may prolong sub-optimal care arrangements for children. These delays must be addressed.
46. The 2020-21 Federal Budget included an anticipated slight funding increase for the federal courts in 2020-21 compared with actual expenditure in 2019-20.³¹ This is primarily the result of an additional \$35.7 million over four years from 2020-21 to provide additional resources and judges for the Federal Circuit Court of Australia (**Federal Circuit Court**) and assist with the timely resolution of migration and family law matters.³² While this measure will see the appointment of additional judges (albeit a minimal number) and registrars to the Federal Circuit Court, it should be noted that much of this increased funding will be drawn from an increase in Federal Circuit Court filing fees for migration litigants (see further discussion at paragraphs 104-105 below).³³ The Law Council has previously raised strong concerns with this approach noting that the significant increase in filing fees may have a significant impact on the ability of migration applicants to access justice.³⁴
47. It should also be noted that despite the anticipated funding increase in the 2020-21 year, across the forward estimates, the Government anticipates overall reductions in the funding of each of the federal courts, as well as the funding provided for

²⁹ The Law Council notes that courts and tribunals have needed to adapt to a radically different way of operating due to COVID-19 containment measures. Judicial bodies have embraced virtual hearings and virtual alternative dispute resolution processes: see, eg, Family Court of Australia, *Notice to the Profession* (online, 9 April 2020) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/covid-notice-090420>>.

³⁰ The Family Court and Federal Circuit Court are currently in the process of harmonising the *Family Law Rules 2004* (Cth) and *Federal Circuit Court Rules 2001* (Cth) as they apply to the family law jurisdiction. A key objective in the harmonisation of the rules applicable in the family law jurisdiction will be to eliminate the confusion and complications experienced by litigants and practitioners arising from disparate rules and practices.

³¹ Commonwealth of Australia, Budget 2020-21, Portfolio Budget Statements 2020-21, Budget Related Paper No 1.2: Attorney-General's Portfolio, 233-57.

³² Commonwealth of Australia, Budget 2020-21, Budget Paper No 2: Budget Measures, 56.

³³ *Ibid.*

³⁴ Law Council of Australia, 'Unfair hike to FCC migration fees' (Media Release, 17 November 2020).

administration.³⁵ Given that there is no particular indication of caseloads or backlogs falling significantly (particularly as the legal system recovers from the impacts of the COVID-19 pandemic), the Law Council does not consider this approach to court resourcing justifiable. The data available from the federal courts about filing numbers and resolution statistics, suggests that user demand will continue to increase.

48. The Law Council calls on the Australian Government to commit appropriate resources to ensure that the justice system is efficient and effective by providing up-to-date and user-friendly court systems, together with appropriate alternative dispute resolution services. The longstanding delays in the federal courts and tribunals, both in respect of matters proceeding to hearing and outstanding judgments (as demonstrated below), need to be addressed.

Under-resourcing of the federal courts and tribunals

49. The Justice Project, highlighted a number of key indicators of under-resourcing of courts and tribunals, including:
 - long delays in commencing and finalising matters through the courts;
 - large judicial caseloads;
 - increases in the number of matters dealt with by the courts without corresponding increases in resources, including judges and court staff;
 - delays in judicial appointments;
 - increases in the number of self-represented litigants; and
 - longer waiting times in court foyers.³⁶
50. The below paragraphs demonstrate how these indicators continue to worsen as the level of funding and resources with which the courts and tribunals are required to operate continually fails to meet required levels.³⁷

Increases in workloads and delays

51. There are currently long delays in commencing and finalising matters in the federal courts and tribunals. As the Justice Project noted, delays in commencing and finalising matters in a court or tribunal are a critical indicator of under-resourcing.³⁸ The Productivity Commission has previously stated that measuring a court's performance relative to national benchmarks 'indicates effective management of caseloads and timeliness of court services.'³⁹

Federal Courts

52. Each year the Federal Budget outlines a set of targets for the completion of cases by the federal courts. Consistently, the Courts fail to meet many of the targets set in the Budget. For example, in 2019-20, the Family Court of Australia (**Family Court**) did not meet its target of 75 per cent of cases pending conclusion to be less than 12

³⁵ Commonwealth of Australia, Budget 2020-21, Portfolio Budget Statements 2020-21, Budget Related Paper No 1.2: Attorney-General's Portfolio, 233-57.

³⁶ Law Council of Australia, *The Justice Project: Final Report – Courts and Tribunals* (August 2018) 10.

³⁷ It should be noted that one benefit of the switch by courts and tribunals to increased use of technology for hearings and other processes has been an anecdotal decrease in many cases in the time wasted by parties and their lawyers waiting in Court buildings.

³⁸ *Ibid.*

³⁹ Productivity Commission, *Report on Government Services 2019, Part C Section 7: Courts* (2019) 7.14-5 Box 7.4.

months old as only 65 per cent of these cases were finalised within the target timeframe.⁴⁰ Similarly, the Federal Circuit Court did not meet its target of 90 per cent of final order applications to be disposed of within 12 months.⁴¹ Only 62 per cent of final order applications were disposed of within 12 months – largely due to delays in clearing the significant caseload in the Migration and Refugee Division.⁴²

53. Additionally, the backlogs of cases in the federal courts continue to rise. According to the Productivity Commission's Report on Government Services 2021, the pending caseload (an indicator of court backlogs) has increased significantly for the Federal Court of Australia (Federal Court). In the five-year period from 2014-15 to 2019-20 the total pending caseload increased by 19.7 per cent, the caseload pending for greater than 12 months increased by 31.9 per cent and the caseload pending by greater than 24 months increased by 3.7 per cent.⁴³ The Federal Court justices are dealing with significant volumes of material and increasingly complex issues.
54. In the Family Court, while the pending caseload of appeal cases has reduced over the 2014-15 to 2019-20 period, the non-appeal caseload has increased. The total pending non-appeal caseload increased by 48.6 per cent, the caseload pending for greater than six months increased by 105.21 per cent and the caseload pending by greater than 12 months increased by 195.3 per cent.⁴⁴
55. The pending caseload has similarly increased significantly for the Federal Circuit Court. In the five-year period from 2014-15 to 2019-20 the total pending caseload increased by 48.6 per cent, the caseload pending for greater than six months increased by 105.21 per cent and the caseload pending by greater than 12 months increased by 195.3 per cent.⁴⁵
56. In October 2020, the Family Court and Federal Circuit Court released their 2019-20 Annual Reports which detailed a concerning picture of grave backlogs in these Courts.
57. The Family Court's 2019-20 Annual Report revealed that 21,054 applications were filed in 2019-20, the highest filings in five years.⁴⁶ The Family Court received a seven percent increase in the number of Final Order Applications filed, an eight percent increase in the number of Applications in a Case filed and a 7.5 percent increase in the number of Applications for Consent Orders filed during 2019-20.⁴⁷ There was also a 10 percent increase in the number of Magellan cases filed in the Family Court in 2019-20.⁴⁸ The number of appeals filed in 2019-20 also increased by 11 percent from 2018-19, from 400 appeals filed in 2018-19 to 445 appeals filed in 2019-20.⁴⁹
58. The pending and growing caseload and backlogs in the Federal Circuit Court are even more concerning. The Federal Circuit Court's Annual Report 2019-20 reported 'extraordinary growth in filings in migration, as well as an increase in filings in the fair

⁴⁰ Commonwealth of Australia, Budget 2020-21, Portfolio Budget Statements 2020-21, Budget Related Paper No 1.2: Attorney-General's Portfolio, 243.

⁴¹ Ibid 245.

⁴² Ibid. See also Federal Circuit Court of Australia, *Annual Report 2019-20* (14 September 2020) 23-4.

⁴³ Productivity Commission, *Report on Government Services 2021, Part C, Section 7: Courts* (22 January 2021), table 7A.21.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Family Court of Australia, *Annual Report 2019-20* (14 September 2020) 17.

⁴⁷ Ibid 17-20.

⁴⁸ Ibid 28. Magellan cases involve serious allegations of physical abuse and/or sexual abuse of a child and undergo special case management' in the Family Court.

⁴⁹ Ibid 37.

work jurisdiction'.⁵⁰ The Federal Circuit Court's pending migration caseload has increased by 58 percent from 7,674 applications in 2017-18 to 12,158 applications in 2019-20.⁵¹

59. The backlog of pending family law Final Orders Applications in the Federal Circuit Court continued to increase, up from 17,478 cases in 2018-19 to 18,177 in 2019-20.⁵² Further, the backlog of pending family law Interim Orders Applications continued to increase, up from 9,722 in 2018-19 to 10,577 in 2019-20.⁵³
60. Family law filings in the Federal Circuit Court increased from 85,234 in 2018-19 to 85,563 in 2019-20, while the number of finalisations in family law dropped from 83,640 in 2018-19 to 82,887 in 2019-20.⁵⁴ The number of Fair Work applications filed increased from 1,295 in 2018-19 to 1,563 in 2019-20,⁵⁵ and the number of intellectual property applications also increased from 43 in 2018-19 to 57 in 2019-20.⁵⁶
61. In the general law jurisdiction of the Federal Circuit Court, there has been a small improvement in the ratio of finalised bankruptcy cases to cases filed in 2019-20. This was a result of the fact that the number of filings of bankruptcy matters decreased from 2,890 in the previous year to 1,872, with finalised cases decreasing from 2,879 in the previous year to 2,105 in 2019-20. However, in the Annual Report, it was noted that:

*due to COVID-19, on 25 March 2020, the Commonwealth Government introduced significant temporary debt relief measures which increased the debt threshold required for creditors to apply for a bankruptcy notice and increased the timeframe for a debtor to respond to a bankruptcy notice from 21 days to six months. These temporary debt relief measures will have had an impact on the bankruptcy filing figures post 25 March 2020 and it is anticipated that a substantial increase in filings will arise after the measures are lifted and will flow through to the 2020-21 financial year.*⁵⁷

62. While the workload of each of the federal courts has increased and is reasonably anticipated to increase further in 2020-21, there has been an insufficient corresponding increase in resources. As identified at paragraph 75 below, many federal judges, particularly in the Federal Circuit Court, are carrying extraordinary caseloads on their dockets. This has placed pressure on the ability for the courts to process and resolve matters in a timely manner and is exerting extreme personal pressure on judges as they try to meet these demands. Statistics fail to disclose the human burden of these delays, not just on the judiciary, but also on the individuals and families who despair at the delays they experience in having the courts assist them to resolve matters.

⁵⁰ Federal Circuit Court of Australia, *Annual Report 2019-20* (14 September 2020) 3.

⁵¹ *Ibid*, 3, 24.

⁵² *Ibid* 28.

⁵³ *Ibid*.

⁵⁴ *Ibid* 2, 25, 28.

⁵⁵ *Ibid* 45.

⁵⁶ *Ibid* 47.

⁵⁷ *Ibid* 43.

Administrative Appeals Tribunal

63. The Administrative Appeals Tribunal (**AAT**) provides independent merits review of a wide range of administrative decisions made under the laws of the Commonwealth of Australia.
64. While the AAT achieved a significant improvement in the total number of finalisations in 2019-20,⁵⁸ likely driven by additional appointments in the previous year combined with administrative improvements,⁵⁹ there continues to be a significant backlog.
65. The AAT has a target of 75 per cent of applications being finalised within 12 months of lodgement. According to the AAT's Annual Report, in 2019-20 the AAT failed to meet this target only finalising 66 per cent of cases within 12 months. The AAT attributed this to the significant increase in the volume of applications made to the AAT's Migration and Refugee Division over recent years:

*our worsening performance in 2018–19 and 2019–20 can be attributed to challenges in our operating environment, particularly in the Migration and Refugee Division. The volume of applications made to the AAT increased significantly over recent years. The number of applications lodged in the Migration and Refugee Division in each of 2017–18 and 2018–19 was approximately double the number received in 2015–16. **There was not a corresponding increase in the number of members and staff to deal with our larger workload which led to the on-hand caseload in that Division increasing in size and age.** As a result, a significant number of the cases finalised by the Migration and Refugee Division in 2019–20 were older cases. The proportion of applications completed within 12 months of lodgement in that Division fell from 36% in 2018–19 to 28% in 2019–20. With the Division accounting for more than half of the AAT's finalisations in the reporting period, we were unable to achieve our overall timeliness target. This situation is likely to continue while we work through the backlog of cases in that Division.*⁶⁰

66. The Honourable Ian Callinan AC QC, in his review of the operation of the *Tribunals Amalgamation Act 2015 (Cth)* (**Callinan Review**), found that the AAT's Migration and Refugee Division is the Division that is most in need of further funding.⁶¹ The review found that:

*... there is a real and pressing need for further Members and resources in this Division. Whilst there is such a deficit in it, reviews to be made will multiply, deserving applicants will continue to live in uncertainty, and dishonest or ineligible applicants will be able to remain within the country.*⁶²

67. Until the need for additional resources to address this backlog, in particular in the Migration and Refugee Division is met, the ability for those parties interacting with the AAT to receive access to justice in a manner which is timely, efficient and fair will be significantly impacted.

⁵⁸ Administrative Appeals Tribunal, *Annual Report 2019-20* (September 2020) 23.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* 24.

⁶¹ Hon Ian Callinan AC QC, *Review: Section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019) 22 [1.35].

⁶² *Ibid.* 23.

Fair Work Commission and Fair Work Ombudsman

68. The Fair Work Commission (**FWC**) experienced a significant increase in its workload as a result of the COVID-19 pandemic. The FWC noted in its 2019-20 Annual Report that:

While responding to the consequences of the pandemic, the Commission has also seen an increase in its caseload with substantial increases in the number of unfair dismissal matters and workplace disputes. We have responded by reallocating resources, piloting new methods to deal with matters more efficiently, and through short-term assistance from staff of other Commonwealth agencies.⁶³

69. The work of the FWC in response to the pandemic has been commendable. The Law Council recognises that an additional \$5.1 million over two years from 2020-21 was provided to the FWC in the most recent budget to respond to an increase in its workload as a result of the COVID-19 pandemic.⁶⁴
70. However, there needs to be a review of capacity and resources going forward. The ability to access staff from other federal courts and agencies might be appropriate at times, where those bodies have capacity, however, this may not always be possible. The Government should plan for future emergencies of this type where there will be an impact on employers and workers, to ensure any measures put in place by the Government can be implemented by the Commission.
71. The Government should also consider the effects of its proposed industrial relations reform on the FWC's workload. Further, increased resources for the FWC and federal courts should be commensurate with increased funding for the Fair Work Ombudsman. Reform in this area, and any area, needs to be accompanied by the ability and resources to effect the reform. In this instance, these resources should include those necessary for courts and the FWC, including for their dispute resolution functions, but also for the Fair Work Ombudsman who is statutorily required to, among other functions, monitor compliance with the *Fair Work Act 2009* (Cth) and fair work instruments.⁶⁵

Judicial appointments

72. The Justice Project identified that delay in judicial appointments, particularly in RRR areas, can cause significant court backlog and subsequent delays.⁶⁶ The Law Council submits that adequately resourcing the federal courts and tribunals involves the prompt filling of judicial vacancies and appointing sufficient numbers of judges and members to hear matters expeditiously.
73. Despite the consistently significant workloads experienced by each of the courts as outline at paragraphs 52-62 above, judicial staffing levels in each of the three federal courts have remained remarkably steady over the past five years:⁶⁷

⁶³ Fair Work Commission, *Annual Report: Access to Justice 2019-20* (23 September 2020), 6.

⁶⁴ Commonwealth of Australia, Budget 2020-21, Budget Paper No 2: Budget Measures, 55.

⁶⁵ *Fair Work Act 2009* (Cth) s 682.

⁶⁶ Law Council of Australia, *The Justice Project: Final Report - Legal Services* (August 2018) 63.

⁶⁷ The data provided in this table is drawn from the Annual reports of the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia over the period of 2015-16 to 2019-20.

Table: Federal courts staffing levels

Court	Judicial staffing level				
	2015-16	2016-17	2017-18	2018-19	2019-20
Federal Court of Australia	48	48	49	54	53
Family Court of Australia	35	34	33	34	33
Federal Circuit Court of Australia	65	64	69	69	68

74. Delays in appointing judges to positions that become vacant in the federal courts can have an ongoing impact on the operation of those courts. A delay of even as little as two months can have a significant impact, particularly in registries that already face substantial delays.
75. During a hearing before the Senate Legal and Constitutional Affairs Legislation Committee in November 2020, the Chief Executive Officer and Principal Registrar of the Federal Circuit Court of Australia provided the following statistics in relation to the significant caseloads facing judicial officers in that court:

There are 43 judges that have more than 300 matters in their docket. Taking the same cohort, there are 27 judges that have more than 400. Five judges have more than 500. Two judges have more than 600.⁶⁸

76. While it is important to note that many of the cases on these dockets will be dealt with at the registrar-level rather than the judicial level, in registries with sufficient registrar resources, these caseloads are nonetheless at critical levels, not just impacting on the parties through backlogs and delays, but also creating a potentially unsafe workplace for the judges themselves.
77. The Chief Judge of the Federal Circuit Court, the Hon William Alstergren QC, acknowledged in the Court's 2021-20 Annual Report, the impact of the significant increase in the migration law caseload of the Court without corresponding resourcing increases:

The pending migration caseload has increased from 7,674 applications in 2017–18 to 12,158 applications in 2019–20. At 30 June 2020, the clearance rate for final order applications in family law was 96 per cent. For migration applications, it was 62 per cent.

*To put that in perspective, without further resources, on current filing rates, the pending migration caseload will surpass the pending family law caseload in less than two years. **This is impacting the Court broadly, but is having a particular impact on the judges who are trying to accommodate hearing more migration cases in a finite amount of available judicial time, which necessarily comes at the expense of their other work.***

⁶⁸ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 6 November 2020 (David Pringle, Chief Executive Officer and Principal Registrar, Family Court of Australia and Federal Circuit Court of Australia).

78. The Law Council considers it critical that additional judicial positions are created to assist in addressing backlogs and delays and to alleviate the workload pressure being experienced by the judiciary. Self-represented litigants
79. The Productivity Commission found that most people who self-represent in courts do so involuntarily because they cannot afford a private lawyer or are ineligible for legal assistance.⁶⁹ The number of self-represented litigants appearing before courts and tribunals is a strong indicator of insufficient legal assistance resourcing and a significant factor in court delays and backlogs.
80. As noted in the Final Report of the Justice Project, due to the ‘complexities of law and legal procedure, courts invariably devote large amounts of time and resources to assisting self-represented litigants, which can delay proceedings and displace the costs of assistance to the more expensive end of the system’.⁷⁰ In its 2019-20 Annual Report, the Federal Court noted that the increased use of technology as a result of the pandemic had increased the difficulties for some self-represented litigants and resulted in some hearings being unable to proceed.⁷¹
81. The Federal Court reported that in 2019-20, 587 people who commenced proceedings in the Court were identified as self-represented (the majority were appellants in migration appeals).⁷² This represents a significant decrease on previous years. However, this is mostly likely due to the significant (26 per cent) decrease in filings as a result of the COVID-19 pandemic.⁷³
82. Self-representation in the Family Court has remained relatively steady over the five-year period from 2015-16, fluctuating between a level of 20-22 per cent of matters involving self-representation by at least one-party during proceedings.⁷⁴ The number of self-represented litigants during trials is significantly higher – fluctuating between 33-41 per cent.⁷⁵ In the Federal Circuit Court, the number of self-represented litigants has reduced slightly since 2015-16, from 31 per cent of cases involving at least one self-represented party, to 26 per cent in 2019-20.⁷⁶
83. These significant levels of self-represented litigants, in part due to the reduced capacity of legal assistance services to meet demand, are causing enormous strain on Court resources and are diminishing the overall efficiency of the justice system. While services which assist self-represented litigants are useful, it is important that it is important that the root cause of this issue is addressed, namely the under-resourcing of the legal assistance sector to meet demand.

Availability of court services in RRR Australia

84. It is critically important that members of the community are able to access to justice in the way that best suits their needs. This is particularly the case for Australians living in RRR Australia.
85. The courts need to accommodate the circumstances particular to these regions. Each registry of the federal courts and tribunals should be assisted to ensure it has

⁶⁹ Productivity Commission, *Access to Justice Arrangements*, 487.

⁷⁰ Law Council of Australia, *The Justice Project: Final Report – Courts and Tribunals* (August 2018) 4.

⁷¹ Federal Court of Australia, *Annual Report 2019–20* (14 September 2020) 20.

⁷² *Ibid* 31.

⁷³ *Ibid* 12.

⁷⁴ Family Court of Australia, *Annual Report 2019-20* (14 September 2020) 26.

⁷⁵ *Ibid* 27.

⁷⁶ Federal Circuit Court of Australia, *Annual Report 2019–20* (14 September 2020) 31

the resources appropriate to deal with its specific needs, whether that be additional judicial officers or improved technology and infrastructure.

86. For example, federal courts travel to RRR regions on circuit and this can sometimes be problematic for the court and for the local state courthouse and jurisdiction. As noted in the Federal Circuit Court's 2019-2020 Annual Report:

While the Court appreciates the hospitality of state and territory courts in enabling the Court to service regional and rural litigants, reliance on state facilities poses a number of challenges for the Court, including availability of courtrooms, hours of access, access to technology, court recording and resources such as telephone and video link facilities, and security arrangements.

The Court is aware of these challenges, not only for litigants and legal practitioners, but also staff, and continues to look for opportunities to improve facilities and resources, and thereby, the efficiency and value of circuits.⁷⁷

87. The Australian Government should ensure funding is made available to these local courts by liaising with state and territory courts and governments to enable circuit courts to sit and hear matters without delay and difficulty, and in a way that does not disrupt local court matters. The courts, themselves, do a commendable job in managing these requirements, but additional funding would improve these functions.
88. As noted above, the Federal Courts have generally adapted well to the challenges of the COVID-19 pandemic. The increased reliance by Federal Courts on teleconferencing and videoconferencing during the pandemic has, in many areas, improved efficiencies and reduced client costs. Appearing remotely during the COVID-19 pandemic has often occurred outside the courthouse and in law firms or homes. The reduction in the costs of appearing remotely is not only beneficial for the client, but also for law firms (including small or micro firms). While these efficiencies have been largely beneficial for practitioners in rural areas, the ability to use technology is often limited by the lack of upgraded infrastructure in a regional courthouse. Addressing this issue should be a priority for all jurisdictions to enable the measures to be truly effective.

⁷⁷ Ibid 32.

Recommendations:

- **The Australian Government should consult closely with the federal courts and tribunals and the legal profession, in order to undertake a full review of the resourcing needs of the judicial system, incorporating the challenges and benefits that have been identified in the context of the COVID-19 pandemic.**
- **In the intervening period and supported by consultation with the federal judiciary, the Australian Government should allocate additional resources to the federal courts including additional judges, registrars and other staff, in order to better meet the courts' currently considerable workload.**
- **The Australian, state and territory governments should invest in the judicial resourcing and facilities (including technological facilities) available in rural regional and remote Australia to increase the reach of federal courts and tribunals to these areas and improving equitable access to the justice system.**

Family Law System – Other critical services

Independent Children's Lawyers

89. The Law Council considers there is an urgent need to increase funding to legal aid commissions to enable more of legal representation of families and to enable them to improve the availability and quality of Independent Children's Lawyers (**ICLs**), including to fund the return of senior, experienced private practitioners to ICL work.
90. ICLs play a critical role in parenting cases where a child may be at risk of harm, including from exposure to family violence and where there may be intractable conflict between the parents. ICLs are frequently appointed by the court in complex parenting matters. They are essential in objectively presenting to the court a position that reflects the best interests of a child and to ensure that all necessary and relevant evidence is placed before the court (especially important where one or both of the other parties may be self-represented). This is highly beneficial to the court in determining parenting matters and ultimately leads to better outcomes for many children.
91. ICLs are funded, primarily, by legal aid commissions around the country, which in turn rely on Australian Government funding. However, funding for legal aid in family law has failed to keep pace with demand. In many States and Territories, legal aid is no longer available for an ICL in cases where there are allegations of family violence. Additionally, as noted at paragraphs 29-34 above, the un-commercial nature of private legal aid work means that experienced practitioners are increasingly unable to engage in this complex and demanding work.
92. Accordingly, the Law Council calls for additional funding for ICLs. As well as ensuring adequate funding for all practitioners, this may facilitate the engagement of experienced private practitioners who have the skill and expertise necessary to manage complex matters.

Family Report Writers

93. The Law Council considers that appropriately skilled family report writers are essential elements of a properly functioning family law system. Perceived problems

with the quality of some family reports are the result of a significant shortage in the number of experts prepared to undertake this work and diminution of funding of both in house family consultants and Regulation 7 family consultants. Increasingly new family report writers are unwilling to undertake Legal Aid funded family reports or Regulation 7 reports, as the fee does not adequately reflect the expertise of the family report writer and the significant work provided. The Law Council considers that more appropriate funding would facilitate the engagement of appropriately experienced family report writers.

94. In some registries, final hearings have been delayed as family report writers have not been available to prepare a report prior to the hearing.

Federal Judicial Commission

95. The Law Council of Australia has long advocated for the establishment of an appropriately constituted oversight body to deal with complaints against federal judicial officers which is at arm's length from the executive government, to ensure the independence of the judiciary and the separation of powers. As well as providing a fair mechanism to hear complaints against the judiciary, it would also ensure a fair process for judges who are the subject of allegations which might otherwise be aired in the media. It is also imperative that the Judicial Commission be funded to enable the provision of education, training and support, including pastoral care, for judicial officers.
96. This issue is particularly relevant at the present time while the Government considers the scope and model of the proposed CIC (discussed further below). It is the view of the Law Council that judicial officers should not fall within the jurisdiction of any future CIC, but rather be subject to oversight from a standalone Federal Judicial Commission. It is also relevant in the context of the Australian Law Reform Commission's current Review of Judicial Impartiality, which will explore laws relating to impartiality and bias as they apply to the federal judiciary and inform the scope and role of a Federal judicial Commission in addressing such matters.⁷⁸
97. On 27 June 2020 and closely following the publication of allegations of sexual harassment against former High Court Judge the Hon Dyson Heydon AC QC,⁷⁹ the Law Council Directors resolved to take several actions as part of a long-term commitment to eliminating sexual harassment within the legal profession.⁸⁰ These included engaging in further advocacy towards the establishment of a Federal Judicial Commission, with Law Council support contingent upon ensuring that the separation of powers is carefully maintained and that the federal judiciary is consulted and comfortable with any model proposed.
98. To further this advocacy, the Law Council has been working towards the development of a set of Principles that could underpin the establishment of a Federal Judicial Commission (**the Principles**). The Principles were formally approved by the Law Council's Directors at their most recent meeting in December 2020 and have been provided to the federal courts (including the High Court of

⁷⁸ Australian Law Reform Commission, 'Review of Judicial Impartiality' (Web Page, 11 September 2020) <<https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/>>.

⁷⁹ See, Law Council of Australia, 'Law Council President, Pauline Wright, statement regarding Hon Dyson Heydon, AC, QC' (Media Release, 22 June 2020) <<https://www.lawcouncil.asn.au/media/media-releases/statement-on-the-hon-dyson-heydon-ac-qc>>.

⁸⁰ Law Council of Australia, 'Law Council President, Pauline Wright, statement regarding sexual harassment in the legal profession' (Media Release, 27 June 2020) <<https://www.lawcouncil.asn.au/media/media-releases/statement-regarding-sexual-harassment-in-the-legal-profession>>.

Australia) for comment. They were also provided to the Attorney-General, the Hon Christian Porter MP, who advised that he will continue to carefully consider the Law Council's recommendations, including those arising from the Principles.

Recommendation:

- **In consultation with, and in a manner endorsed by, the federal judiciary, the Australian Government should establish and adequately resource a Federal Judicial Commission which maintains the separation of powers.**

Commonwealth Integrity Commission

99. The 2019-20 Budget set aside \$104.5 million (including \$10.0 million in capital funding over four years from 2019-20) for a CIC.⁸¹ However, despite delay in the establishment of the CIC, and the release of the Commonwealth Integrity Commission Bill Exposure Draft in November 2020, the 2020-21 Budget did not contain appropriation in relation to the establishment of the CIC.
100. The Fact Sheet released with the draft legislation states that a total of \$106.7 million in new funding was allocated to establish the CIC in the 2019-20 Budget over the forward estimates (a four-year period), including \$2.2 million allocated to Australian Commission for Law Enforcement Integrity (**ACLEI**) for CIC implementation activities.⁸² This funding is said to be in addition to the \$40.7 million in existing ACLEI funding for that period that will be absorbed by the CIC upon its commencement.⁸³
101. Based on the funding model proposed in the 2019-20 Budget, funding for the CIC in the 2020-21 period would have been \$22.0 million.⁸⁴ In contrast, the combined 2020-21 budget for the New South Wales Independent Commission Against Corruption and Law Enforcement Conduct Commission is \$54.5 million – more than double that allocated to the proposed CIC.⁸⁵
102. The Law Council's considers that the funding proposed for the CIC is inadequate. This is particularly the case by reference to the scope of role and funding of similar bodies and the fact that the CIC will have oversight of a greater number of staff of regulated entities.

Recommendation:

- **The Australian Government must ensure that when established, the proposed Commonwealth Integrity Commission is adequately funded to achieve its purpose.**

⁸¹ Commonwealth of Australia, Budget 2019-20, Budget Paper No 2: Expense Measures, 50.

⁸² Attorney-General's Department (Cth), *Commonwealth Integrity Commission: Fact Sheet* (November 2020) 1.

⁸³ *Ibid.*

⁸⁴ Commonwealth of Australia, Budget 2019-20, Budget Paper No 2: Expense Measures, 50.

⁸⁵ New South Wales, Budget 2019-20, Budget Paper No 4: Agency Financial Statements, 5-1: \$30.9 million for the Independent Commission Against Corruption and \$23.6 for the Law Enforcement Conduct Commission).

Migration applicants and asylum seekers

103. The Law Council remains particularly concerned that following severe funding cuts in 2014, only a small number of asylum seekers in Australia have access to government-funded legal assistance. This means that the community's costs of providing such assistance are shifted to increased burdens on courts and tribunals. However, early legal assistance can help to prevent unmeritorious claims.⁸⁶ To achieve more efficient, sustainable and fair outcomes, and reduce downstream pressures on courts and tribunals, full Commonwealth funding for the Immigration Advice and Application Assistance Scheme for all asylum seekers in need should be reinstated. In addition, the Law Council calls on the Australian Government to invest additional resources in LACs and CLCs to address gaps in migration legal assistance.
104. The Law Council further calls on the Australian Government to reconsider the significant increase to the application fees charged by the Federal Circuit Court for migration cases. The increase from \$690 to \$3,330, effective from 1 January 2021, poses a severe threat to access to justice for migrants and a fundamental rule of law issue.⁸⁷ Currently, applicants who demonstrate financial hardship can access a fee waiver but vulnerable applicants would still be required to pay a fee of \$1665.00, which is almost three times the current filing fee.⁸⁸ The Law Council also considers the \$1,826 AAT application fee charged by the Migration and Refugee Division for a hearing, to be unjustifiably high, compared with other divisions of the AAT, which are mostly set at \$952 or in some cases, have no fee at all.
105. In the Law Council's view, increasing fees is not the way to deal with the backlog of cases before the Federal Circuit Court. These increases will likely result in a significant upsurge in unrepresented applicants as people will be even less able to afford access to legal assistance after paying the application fee. This will likely increase the workload of the Federal Circuit Court and produce further delays. Rather, to deal with existing delays, the Law Council calls for an increase in funding to the Federal Circuit Court with a particular focus on the appointment of more judges well-qualified to determine migration law cases.
106. More broadly, the Law Council is concerned by the difficulties faced by asylum seekers accessing health services and other social support. In particular, it notes that spending on financial support to people seeking asylum has been reduced to just \$19.6 million in 2020-21, from \$39.5 million actual expenditure in 2019-20⁸⁹ despite growing need.
107. With respect to immigration detention, the Law Council notes the significant cost of detention that would be reduced if more low-risk detainees were released into the Australian community.⁹⁰ In addition to that direct cost, the wider economic costs of closed detention include lost productivity for the individual, family and the community. Given the cut in incoming migration numbers due to COVID-19, the Law Council considers that the release of immigrants from detention would help to address domestic labour shortages. Members of the Migration Law Committee of

⁸⁶ Law Council of Australia, *The Justice Project: Final Report – Asylum Seekers* (August 2018) 3, 23-4.

⁸⁷ See *Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020* (Cth).

⁸⁸ *Ibid.*

⁸⁹ Commonwealth of Australia, Budget 2020-21, Portfolio Budget Statements 2020-21, Budget Related Paper No 1.12: Social Services Portfolio, 219.

⁹⁰ See Andrew and Renata Kaldor Centre for International Refugee Law, 'How much does it cost to detain asylum seekers?' (Factsheet, 12 December 2019), citing figures compiled by the Refugee Council of Australia <<https://www.kaldorcentre.unsw.edu.au/publication/cost-australias-asylum-policy>>.

the Law Council's Federal Litigation and Dispute Resolution Section are aware of a positive trend of long-term detainees released from immigration detention in Melbourne in 2020 taking up jobs in fruit picking in regional Victoria where there is a high demand for labour.

108. The Law Council also calls on the Australian Government to resume migration under its humanitarian program which provides a positive contribution to the global response to refugee movements.

Closing the Gap Refresh targets

109. There is an important opportunity for the Australian Government to work with First Nations communities in true partnership to progress solutions to the overincarceration of First Nations persons, given the new National Agreement on Closing the Gap.⁹¹ The National Agreement includes 16 national targets across areas that have an impact on life outcomes for Aboriginal and Torres Strait Islander people, and for the first time, includes specific justice targets for adults and young people.⁹² However, the Law Council has raised its concerns that these announcements risk appearing hollow without substantial funding.⁹³
110. Alongside state and territory governments, the Australian Government has a critical role to play and needs to consider its policy frameworks and contributions carefully. Particular regard should be had to improved access to justice (in particular, Aboriginal-community controlled legal services). These remain clearly underfunded despite critical need.
111. As part of a preventative approach, the importance of funding culturally competent, two-way initiatives designed to build legal knowledge among First Nations communities should be reflected.
112. Policy frameworks should also have regard to addressing the underlying reasons why many Indigenous people come into contact with the criminal justice system. This includes increasing access to underlying mental health, housing, family support, youth engagement and disability services, particularly in RRR areas. Justice reinvestment approaches which bring these holistic services together in key locations should be prioritised in this regard. It is well known that better justice outcomes are inextricably linked to action on these social and health issues.
113. In addition, resources should be directed to addressing language barriers, which pose another key impediment to access to justice for First Nations people, as well as a broad range of CALD groups, including recent arrivals and asylum seekers. As identified by the Law Council in 2018, there is a major scarcity of qualified, professional First Nations and other language interpreters, both in the courts and when clients engage with lawyers and the police.⁹⁴ The Law Council is aware of a particular shortage of available, qualified interpreters in RRR areas.⁹⁵ This can lead to miscarriages of justice, including wrongful imprisonment. The Law Council is aware of increased concern during COVID-19, that technological difficulties in

⁹¹ Closing the Gap Partnership, *Closing the Gap Targets and Outcomes*, <www.closingthegap.gov.au/targets>.

⁹² Ibid.

⁹³ Law Council of Australia, 'Justice targets are just a wish list' (Media Release, 31 July 2020).

⁹⁴ See, Law Council of Australia, *The Justice Project: Final Report – Critical Support Services* (August 2018) 47. Note, interpreters are also important in broader contexts beyond the legal system, such as in the health and homeless services systems including to assist successful preventative and early intervention strategies which help ward off poor justice outcomes.

⁹⁵ Ibid.

matters where language barriers exist may be denying procedural fairness and result in a higher level of appeals.

114. As the Law Council has previously stated, the implementation of a National Justice Interpreter Scheme is necessary to address this essential service gap, especially in RRR areas.⁹⁶ The Productivity Commission's 2014 recommendation regarding the development of a National Aboriginal and Torres Strait Islander Interpreter Service should also be implemented.⁹⁷ While the Judicial Council on Cultural Diversity's 'Recommended National Standards for Working with Interpreters in Courts and Tribunals' also provide an excellent guide for the courts,⁹⁸ it is necessary to ensure interpreter services and courts are adequately funded to enable their implementation.⁹⁹

Recommendations:

- **The Australian Government should ensure that the new Closing the Gap justice targets are backed by appropriate resourcing including for access to justice initiatives, particularly for Aboriginal community-controlled legal services, and preventative approaches spanning a wide range of health, housing, youth engagement, disability and broader services. This funding should have regard to the interdependence between justice targets and others in the National Agreement on Closing the Gap.**
- **To address the shortage of available professional interpreters, governments (including the Australia Government) should implement a National Justice Interpreter Scheme which ensures that:**
 - **professional, appropriate and skilled interpreters are readily available and free to people from culturally and linguistically diverse backgrounds who cannot afford them, including First Nations peoples, recent arrivals, asylum seekers, and people who are trafficked and exploited, at all levels of the justice system, including legal assistance services;**
 - **interpreter services and courts are funded to enable the full implementation of the Judicial Council on Cultural Diversity's 'Recommended National Standards for Working with Interpreters in Courts and Tribunals'; and**
 - **Recommendation 22.3 in the Productivity Commission's Access to Justice Arrangements report, regarding the development of a National Aboriginal and Torres Strait Islander Interpreter Service, is implemented.**

⁹⁶ Ibid 48-9.

⁹⁷ Productivity Commission, *Access to Justice Arrangements*, rec 22.3.

⁹⁸ National Accreditation Authority for Translators and Interpreters, *Judicial Council completes Recommended Standards for interpreters working in court settings* (2017) <<https://www.naati.com.au/news-events/newsevents-container/updates/jccd-recommended-national-standards/>>. See, also, Judicial Council on Cultural Diversity, 'Addendum to the Recommended Standards for Working with Interpreters in Courts and Tribunals: National Accreditation Authority for Translators and Interpreters (NAATI) Certification Model' (May 2019).

⁹⁹ See, Law Council of Australia, *The Justice Project: Final Report – Critical Support Services* (August 2018).

Aged care

Legal Assistance Services

115. The Law Council acknowledges the Australian Government's funding injection for legal assistance services to uphold the rights of older people, including through health-justice partnerships.¹⁰⁰ However, the Law Council remains concerned that this funding is inadequate in light of the acute and widespread nature of elder abuse within the community and calls for substantial additional funds for legal assistance services to provide specialist advice, representation and education for older persons. These services play a fundamental, often unrecognised, role in ensuring transparency and scrutiny of aged care.
116. The underfunding of legal assistance services means that, for example, in the 2020-21 financial year, just over one per cent of approved legal aid grants (833 out of 65,664) were for persons aged 65 years and over,¹⁰¹ despite this group constituting 16 per cent of the population.¹⁰² Funding for civil legal assistance is further limited with less than a quarter of the approved grants for this group being granted to civil law matters.¹⁰³

Recommendation:

- **The Australian Government should provide immediate funding to address inadequate levels of funding for legal assistance services to provide specialist advice, representation and education for older persons.**

Royal Commission into Aged Care Quality and Safety

117. The Law Council highlights the importance of setting aside adequate funding to respond effectively to the final recommendations of the Aged Care Royal Commission. In this context, the Law Council notes that while the current and recent Royal Commissions have been welcome and necessary, such policy responses are crisis-driven and highly resource intensive.¹⁰⁴ Moreover, historically, many Royal Commission recommendations have remained unimplemented, resulting in a resurfacing of the same issues at a later date and the instigation of further inquiries.¹⁰⁵ It will be important to avoid such outcomes going forward through preventative responses.

Recommendation:

- **The Australian Government should set aside funding to enable it to respond effectively to the final recommendations of the Royal Commission into Aged Care, Quality and Safety.**

¹⁰⁰ Attorney-General's Department (Cth), 'Protecting the rights of older Australians' (Webpage) <<https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-olderaustralians/Pages/default.aspx>>.

¹⁰¹ National Legal Aid Statistics Report, 'Age' (for Financial Year 2020-2021 as at January 2021) <<https://nla.legalaid.nsw.gov.au/nlareports/reportviewer.aspx?reportname=AgeIndicator>>.

¹⁰² Australian Bureau of Statistics, Australian Demographic Statistics (Catalogue No. 3101.0, June 2019).

¹⁰³ National Legal Aid Statistics Report, 'Age' (for Financial Year 2020-2021 as at January 2021) <<https://nla.legalaid.nsw.gov.au/nlareports/reportviewer.aspx?reportname=AgeIndicator>>.

¹⁰⁴ See, Law Council of Australia, *Free and Equal: An Australian Conversation on Human Rights*, Submission to the Australian Human Rights Commission (13 November 2019) 13-5.

¹⁰⁵ *Ibid.*

Disability

Legal assistance for people with disability in RRR areas

118. In addition to the comments raised earlier in this submission regarding the need for additional resourcing of the legal assistance sector (paragraphs 3-40 above), the Law Council submits that there is an to provide additional funding to LACs operating in RRR areas to support clients with disability. This would assist LACs operating in areas where there is no prospect of engagement with specialist CLCs to provide more specialised support to those with disability and to make grants of assistance so that private lawyers can provide representation in both civil and administrative law matters.

National Disability Strategy

119. The Law Council welcomes the Australian Government's commitment to the development of the new 10-year Disability Strategy. To achieve its vision, the new Strategy must not only set out the roles and responsibilities of government generally, but identify concrete actions, attached to goals and targets within specific timeframes.¹⁰⁶

120. In this regard, the Law Council emphasises the need for funding to support the development of appropriate targets, as well as a rigorous implementation framework to underpin the new Disability Strategy.¹⁰⁷ This should be accompanied by a commitment to the collection of relevant data to enable effective monitoring and evaluation of policy and programs.

121. Appropriate funding should also be made available to enable the full and effective engagement of diverse groups of people with disability, including through their representative organisations, in the delivery and monitoring of the Disability Strategy.

Recommendations:

- **The Australian Government should set aside funding to enable it to effectively implement the new National Disability Strategy.**
- **Additional resources should be made available to ensure that groups representing diverse memberships of people with disability can effectively engage in delivery and monitoring of the next Strategy.**

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

122. The Law Council urges the Australian Government to allocate funding to respond to the emerging, urgent interim findings of the.

123. As already highlighted by the Disability Royal Commission, people with disability are significantly overrepresented in the criminal justice system. The Law Council's

¹⁰⁶ See Law Council of Australia, *National Disability Strategy*, Submission to the Department of Social Services (30 October 2020) 18.

¹⁰⁷ *Ibid.*

recent recommendations made to the Disability Royal Commission on this issue include that the Australian Government should invest in:

- an expansion of the availability of specialist legal assistance services to deliver culturally safe, informed and accessible services to persons with disability who are both accused and victims of crime, including in RRR areas and through health-justice partnerships and improved legal education;
- increased access to early diagnosis tools and corresponding disability and mental health services to guard against the predominance of people with undiagnosed or untreated conditions being funnelled into the criminal justice system in lieu of health-based responses. Careful regard should be had to the absence of such tools and services for remote communities and to responding to the needs of First Nations people with disability appropriately;
- access to Auslan and hearing interpreters within the justice system;
- leadership initiatives across the justice system to identify and respond to disability issues more effectively, and the development of a Commonwealth disability justice policy framework; and
- with state and territory governments, the establishment of an independent national justice reinvestment body to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives.¹⁰⁸

Recommendation

- **The Australian Government should allocate appropriate resources to respond to the emerging, urgent interim findings of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, with particular regard to expanding:**
 - **access to specialist legal assistance services, health-justice partnerships and legal education;**
 - **access to early diagnosis and disability and mental health support services, particularly in rural, regional and remote communities and for First Nations peoples;**
 - **access to hearing and Auslan interpreters within the justice system;**
 - **the development of a Commonwealth disability justice policy framework;**
 - **leadership initiatives across the justice system to identify and respond to disability effectively; and**
 - **justice reinvestment trials.**

¹⁰⁸ Law Council of Australia, *Criminal Justice System*, Submission to the Disability Royal Commission (17 August 2020).

Optional Protocol to the Convention against Torture

124. The Law Council considers that the COVID-19 pandemic reinforces the need for comprehensive, transparent, and independent oversight of places in which people are deprived of their liberty.
125. On 21 December 2017, Australia ratified the OPCAT¹⁰⁹ which was recognised internationally as a significant achievement during Australia's recent universal periodic review. The Law Council envisages that OPCAT will assist in preventing torture from occurring in any place of detention in Australia, as well as encouraging a culture of transparency and accountability.
126. However, there are concerns about Australia's progress in implementing OPCAT, including that resources provided to the Commonwealth Ombudsman as Australia's NPM Coordinator, as well as the NPM for federal places of detention, are insufficient and may not permit it to perform its functions effectively.¹¹⁰ For example, in the 2018-19 Budget 'the Ombudsman was allocated \$1.2 million over four years to fulfil that role'.¹¹¹ This amount is inadequate in light of the Victorian Ombudsman's estimate that 'an NPM conducting regular inspection of all primary places of detention in Victoria should comprise approximately 12 Full Time Equivalent staff and have an operating budget of approximately \$2.5 million'.¹¹²
127. The cost of poor oversight mechanisms for places of deprivation of liberty frequently leads to costly, crisis-driven inquiries, as evidenced by the Disability Royal Commission and the Royal Commission into the Detention and Protection of Children in the Northern Territory and multiple inquiries into immigration detention centres. The Law Council considers that a relatively modest increase in preventative oversight mechanisms is essential to avoiding these costs and providing Australians with greater peace of mind.

Recommendation

- **The Australian Government should act quickly to implement the Optional Protocol to the Convention against Torture effectively by ensuring adequate resourcing for the Commonwealth Ombudsman as the National Preventative Mechanism Coordinator, as well as the National Preventative Mechanism for federal places of detention.**

Human Rights Council Engagement

128. The Law Council acknowledges the important work of DFAT in supporting Australia's efforts to advance human rights as a member of the HRC (2018-20). While Australia's term has now ended, it will continue to play an active role in the HRC and it is critical that DFAT's budget allocation reflects this ongoing engagement. The

¹⁰⁹ Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

¹¹⁰ Law Council of Australia, 'Submission to the Inquiry into the Australian Government's response to the COVID-19 pandemic' (15 June 2020).

¹¹¹ Australia OPCAT Network, 'Submission on the Implementation of OPCAT in Australia to the SPT and the United Nations Working Group on Arbitrary Detention' (January 2020) 28, citing Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, Estimates, May 23 2018, 122 (Michael Johnson).

¹¹² See, Australia OPCAT Network, 'Submission on the Implementation of OPCAT' citing Victorian Ombudsman, 'OPCAT in Victoria: a thematic investigation of practices related to solitary confinement of children and young people' (September 2019), 30 [304].

COVID-19 pandemic is a powerful reminder that Australia's interests are best served through its cooperation with others in the multilateral system and respect for international law. At the same time, the pandemic has fed authoritarian trends and led to an increase in human rights violations. In this environment, Australia has a strong leadership role to play through its engagement in the HRC.

129. During its HRC term, Australia advocated for the participation of civil society in UN processes. As highlighted by the Australian Government, 'civil society organisations provide on-the-ground knowledge of challenging human rights situations around the world, offering important expertise and alternative perspectives on human rights policy and debate'.¹¹³ To this end, DFAT supported a diverse range of civil society representatives to participate at the HRC and demonstrated a commitment to consulting with civil society more broadly in advance of each HRC session. The Law Council calls on the Australian Government to allocate adequate resources to support ongoing civil society engagement in the HRC.

Recommendation

- **The Australian Government should continue to support the Department of Foreign Affairs and Trade's ongoing engagement with the Human Rights Council and opportunities for civil society organisations to engage in this dialogue.**

Funding for the Australian Human Rights Commission

130. Despite its excellent leadership, the AHRC remains significantly under-resourced with complaints regularly taking over three months to reach conciliation stage.¹¹⁴
131. Further, one of the Commission's statutory functions is human rights education to increase understanding about human rights among individuals, communities and organisations.¹¹⁵ While building an understanding about human rights, and capacity to protect them, is a key strategic aim and pillar of the AHRC's national conversation project, the AHRC finds it challenging to build capacity beyond individual workshop attendees. It considers that the key barrier to further effectiveness is resourcing.¹¹⁶
132. Human rights education initiatives build awareness of rights and responsibilities in the community.¹¹⁷ Currently, there is no dedicated funding to grow the AHRC's human rights education program. The AHRC considers that:

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

¹¹³ Department of Foreign Affairs and Trade (Cth), 'Civil society engagement and opportunities' <<https://www.dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/civil-society-engagement>>.

¹¹⁴ The time from receipt to finalisation was more than 3 months for 59 per cent of complaints: Australian Human Rights Commission, *2019-20 Complaints Statistics* (2020) 12.

¹¹⁵ Australian Human Rights Commission, *Annual Report 2019-20* (2020) 106.

¹¹⁶ *Ibid* 10.

¹¹⁷ Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Discussion Paper: A Model for Positive Rights Reform in Australia, 29 August 2019) 20.

*Increased funding and support for advocacy, community and legal organisations that work to protect and promote human rights would help support public understanding of human rights.*¹¹⁸

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

Recommendation:

- **The Australian Government should adequately resource the Australian Human Rights Commission to ensure that it can effectively carry out its investigation, complaint and conciliation functions and its function of enhancing public education and human rights resources.**

Business and Human Rights

134. As noted in the Law Council's COVID-19 Inquiry submission, there are increased risks of modern slavery occurring both domestically and internationally due to the COVID-19 pandemic.¹¹⁹ This raises important questions with respect to how the Australian Government can work with businesses to uphold human rights, including through safeguards for vulnerable workers and consumers.
135. The *Modern Slavery Act 2018* (Cth), and National Action Plan to Combat Modern Slavery 2020-25, represent an excellent starting point in this regard and resonate with growing international consensus that both governments and businesses have duties with respect to respecting, protecting and fulfilling human rights. The Law Council welcomes the Australian Government's 2020-21 Budget announcement of \$10.6 million to implement the National Action Plan to Combat Modern Slavery 2020-25.
136. To complement these developments, the Law Council calls on the Australian Government to ensure that ongoing and, if necessary, expanded, funding is made available to the Australian National Contact Point (**ANCP**). As a member of the Organisation for Economic Cooperation and Development (**OECD**), Australia is committed to implementing the OECD Guidelines for Multinational Enterprises, which includes establishing a national contact point to receive complaints against Australian companies and Australian companies operating abroad.¹²⁰ The Law Council recognises that having an effective ANCP is critical as it represents the only non-judicial, low-cost mechanism that allows individuals and communities to seek redress for harm caused by Australian companies operating abroad.
137. To this end, the Law Council is keen to ensure that the allocation of resources is sufficient to enable the ANCP to achieve its outreach and promotional strategy. This is in line with Australia's commitment to make available resources to the ANCP so that it can effectively fulfil its responsibilities, including to undertake promotion activities.¹²¹

¹¹⁸ Ibid.

¹¹⁹ Law Council of Australia, 'Submission to the Inquiry into the Australian Government's response to the COVID-19 pandemic' (15 June 2020) 27-8.

¹²⁰ Organisation for Economic Cooperation and Development (**OECD**), *Guidelines for Multinational Enterprises 2011 Edition* (2011) 18 [11].

¹²¹ Ibid 68.

138. In addition, the Law Council calls on the Australian Government to commit to implementation of the United Nations Guiding Principles on Business and Human Rights through the adoption of a National Action Plan on Business and Human Rights. The adoption of a National Action Plan on Business and Human Rights was recommended in August 2017 by a multi-stakeholder advisory group convened by the Minister for Foreign Affairs.
139. In developing a National Action Plan on Business and Human Rights, Australia can draw on international best practice. According to the Office of the High Commissioner for Human Rights in 2020, 24 countries around the world already had a National Action Plan on Business and Human Rights, and 23 other countries were in the process of developing one.¹²² In addition, several European countries have either adopted, or started to consider legislation that embeds elements of human rights due diligence (**HRDD**) into law.
140. The Law Council considers that more is required to ensure that Australia builds on the international leadership demonstrated through the passage of the *Modern Slavery Act 2018* (Cth), ensuring that it does not fall behind in other areas which complement and bolster these objectives. Its view is that the development of a National Business and Human Rights Action Plan, which addresses potential HRDD responsibilities, as well as broader educative measures, would progress this national conversation. Businesses are more in need than ever of national guidance on human rights and their application to business operations given the particular challenges and risks emerging from the pandemic.

Recommendations

- **The Australian Government should ensure that ongoing and, if necessary, expanded funding is made available to the Australian National Contact Point to enable it to effectively fulfil its responsibilities, including to undertake promotion activities.**
- **The Australian Government should support and resource the adoption of a National Action Plan on Business and Human Rights.**

¹²² Office of the United Nations High Commissioner for Human Rights, 'State national action plans on Business and Human Rights' (2020) <https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx>.