



Law Council
OF AUSTRALIA

Office of the President

18 November 2019

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

NATIONAL LEGAL ASSISTANCE PARTNERSHIP OVERVIEW PAPER

1. The Law Council appreciates the opportunity to provide a submission to the Attorney-General's Department in response to the National Legal Assistance Partnership (**NLAP**) Overview Paper (**Overview Paper**).
2. The Law Council is grateful for the assistance of its Access to Justice Committee, Indigenous Legal Issues Committee, Indigenous Incarceration Working Group and the Law Society of New South Wales in preparation of this submission.
3. The Overview Paper has picked up on a number of issues identified within the 2018 independent reviews of the National Partnership Agreement on Legal Assistance Services (**NPA**) and the Indigenous Legal Assistance Program (**ILAP**).¹ There are, however, several issues the Law Council wishes to raise in the context of the proposed NLAP and as outlined in the Overview Paper. These are discussed in turn below.

Funding quantum

4. The Law Council appreciates that the quantum of funding provided to the legal sector is outside the scope of the Overview Paper. However, the Law Council remains concerned that the small increases in sector funding over the proposed life of the NLAP do not nearly address the funding shortfall identified by numerous reports, including the Law Council's Justice Project.² Without the provision of significant additional funding commitments to be administered under an agreed NLAP, the extreme access to justice gaps will be perpetuated and entrenched for the life of the agreement.
5. The strain on the legal assistance sector to address unmet legal need given restricted funding was noted by the NPA Review. The Reviewer acknowledged in the Final

¹ Commonwealth Attorney-General's Department, *Legal Assistance Reviews*, online at <<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/Legal-assistance-review.aspx>>.

² Law Council of Australia, *The Justice Project: Final Report* (August 2018), Legal Services Chapter, online at <www.justiceproject.com.au>.

Report the consistent narrative among stakeholders that ‘growing demand for legal assistance services coupled with the increasing costs of delivery are placing significant external pressure on the sector’ and that this ‘compromises the achievement of the NPA’s aspirations as services’ resources are focused on striving to meet demand while facing increasing costs, rather than focussing on the aspirations of the NPA’.³ Unmet legal need was also identified in the review of ILAP, where it was pointed out that submissions ‘consistently articulated the view that there is an insufficient level of funding provided for legal assistance services to Aboriginal and Torres Strait Islander peoples through the ILAP and other sources to meet the current level of legal need’.⁴

6. The Law Council has been informed by some legal sector services that they will remain under significant financial strain under anticipated NLAP distributions. This could require a reduction of staffing levels at these services and therefore a significant decrease in frontline services provided.
7. While it may be outside the scope of the present consultation, the Law Council nonetheless makes the point that if the objectives and desired outcomes of the NLAP, as outlined at page 10 of the Overview Paper, are to be achieved, unavoidably, significant additional funding will be required.

Separate and Independent funding of ATSILS

8. The Law Council continues to strongly support the position of the National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) that funding for Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) should not be administered under the NLAP and should instead retain separate and independent funding under an agreement with the Australian Government. The comments provided in this submission in response to the Overview Paper should not be viewed as negating this position.
9. The first headline recommendation of the 2018 independent review of the ILAP was that in order to facilitate a sustainable, community-controlled Indigenous legal assistance sector, Australian Government funding should continue to be delivered through a standalone, specific purpose funding program with minimum five-year funding. The Law Council disagrees with the Australian Government’s position that the funding of ATSILS should be brought into the mainstream funding agreement.
10. ATSILS play an essential role as specialised, independent, culturally safe and community-controlled organisations and are critical to principles of self-determination. The Australian Government has made important commitments to engage in a genuine partnership with Aboriginal peak bodies to improve Aboriginal and Torres Strait Islander outcomes through the Closing the Gap refresh process. Therefore, the Law Council suggests that greater focus on leadership by, and active engagement with, Aboriginal and Torres Strait Islander peoples be included in the principles of self-determination outlined in the Overview Paper.
11. The Law Council remains extremely concerned that the decision to remove separate and independent funding of ATSILS, in contravention of the recent independent

³ Urbis, *Review of the National Partnership agreement on Legal Assistance Services 2015-2020* (December 2018), 54.

⁴ Cox, Inall, Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP) 2015-2020* (February 2019), 39.

review of ILAP, undermines the steps taken to improve the over-representation of Aboriginal and Torres Strait Islander people in all facets of the justice system at a time when governments are moving towards justice Closing the Gap targets to address this issue nationally. The Law Council again emphasises that it in no way supports this move and the comments below are made while maintaining this overarching position.

12. The Law Council acknowledges that the Australian Government has sought to address these concerns by quarantining the funding of current ATSILS for at least the length of the NLAP, subject to certain exceptions. Should the NLAP proceed as proposed, the Law Council is concerned that states and territories will have the flexibility to reallocate baseline funding from an existing ATSILS to another Aboriginal Community Controlled Organisation (**ACCO**) with only a requirement to consult with the Australian Government.
13. On its face, this new model does not give the requisite certainty to existing ATSILS. Specifically, the proposed quarantining arrangements for ATSILS funding allows states and territories to reallocate Commonwealth baseline funding to another ACCO if there:
 - are serious issues relating to performance of the currently funded ATSILS that are detrimental to their present and/or potential clients;
 - is a demonstrable and substantial shift in legal need within a jurisdiction; and/or
 - is a 'more appropriate' ACCO operating within the state or territory which can clearly demonstrate it has the capability to provide more effective, culturally appropriate legal assistance services to Aboriginal and Torres Strait Islander people which results in better outcomes for current and/or potential clients.
14. The first limb is, in the view of the Law Council, valid and appropriate. However, a requirement must be included that requires such ATSILS to be accorded procedural fairness in relation to any assertions of serious performance issues and if established, given a reasonable opportunity to address any serious performance issues that are raised.
15. The Law Council supports the intention of the Australian Government to ensure that distribution of funding is based on evidence of need. However, it is not apparent that the second limb is necessary. ATSILS primarily provide criminal law services, and do so state/territory-wide. Signs are that criminal legal need is ever-increasing. While it is possible that additional legal needs such as civil legal need will require addressing, this should not form the basis of removing funding from an existing ATSILS. The Law Council recommends deleting the second limb.
16. The Law Council is particularly concerned with the ambiguity with which the third limb is framed. Under this limb it may be possible, for example, for the funding of an ATSILS to be moved to a larger ACCO the principal service delivery of which involves other services, such as health, but which also offers a legal services arm.
17. ATSILS are often best placed to understand the impact of state and territory government laws, policies and practices which are harmful and discriminatory to Aboriginal and Torres Strait Islander peoples. Accordingly, ATSILS play an essential role in holding these governments to account by raising issues of concern. Decisions to move the funding away from ATSILS to other ACCOs, which have other priorities

in different portfolios, may over time silence important advocacy which raises concerns about the harmful impact of certain government policies.

18. ATSILS are often among the most important and influential voices representing the community – such as when there is a death in custody, or a child is mistreated in detention. At a time when the Australian Government is seeking to establish a Voice to Government, the irony is apparent that it is putting a unique part of the Voice at risk.
19. Because of the risk that their funding may be moved to ‘more appropriate’ ACCOs, this decision may restrict ATSILS ability to freely advocate on these issues due to a new dependence on state and territory governments for funding and create conflicts of interest. While there is a safeguard in that a state or territory must first consult with the Australian Government if it intends to reallocate funding, it does not appear that the Australian Government can veto this decision. Any decision to reallocate the funding of an ATSILS should be made jointly between the relevant state/territory government and the Australian Government and must be based on meaningful consultation with the ATSILS prior to the making of a decision. The Law Council is of the view that there should be additional requirements for justifying a reallocation of funds that provides for transparency and procedural fairness in the decision-making process. The Law Council recommends deleting the third limb.

Restrictions on advocacy work

20. Legal assistance services play a key role in law reform, policy and advocacy, and there is little doubt that the existing restrictions create doubts as to what advocacy activities may be permissible. For example, the Victorian Access to Justice Review found that the NPA restriction was uncertain and negatively impacted the effectiveness of the preventative work undertaken by community legal centres.⁵ This is clearly not in the public interest.
21. There are numerous examples of legal assistance providers undertaking this work to the benefit of the community, some of which are described in the Justice Project.⁶ The value of this work has been recognised in a number of contexts.⁷ In 2014, the Productivity Commission stated that legal assistance providers play a key role in law reform, policy and advocacy, that it should be a ‘core activity’ of CLCs and that ‘in many cases, strategic advocacy and law reform can reduce demand for legal assistance services and so be an efficient use of limited resources’.⁸ The Commission also expressed the view that such ‘activities can benefit people directly affected by a particular issue, and, by clarifying or improving the law, they can also benefit the community more broadly and improve access to justice (through positive spill-overs)’.⁹ It recommended that the Commonwealth, state and territory governments should

⁵ Department of Justice and Regulation (Victoria), *Access to Justice Review* (2016) 432.

⁶ Law Council of Australia, *The Justice Project: Final Report* (August 2018), Legal Services Chapter, 64-66.

⁷ Eg, Liana Buchanan, ‘Community Lawyers, Law Reform and Systemic Change: Is the End in Sight?’ in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart: 2017) 141; Pascoe Pleasence et al, Law and Justice Foundation of New South Wales, *Reshaping Legal Assistance Services*, 117; Department of Justice and Regulation (Victoria), *Access to Justice Review* (2016) 432.

⁸ Productivity Commission, *Access to Justice Arrangements*, 709, 711.

⁹ *Ibid* 708.

provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services.¹⁰

22. The Final Report of the NPA acknowledges that proactive involvement by the legal assistance sector in the development of better policy and law is a desirable activity for legal assistance providers. It recommended that to address consistent perceptions amongst community legal centres that the lobbying clause precludes or constrains law reform and advocacy work, the NPA should incorporate a clearer definition of lobbying and the specific activities towards which NPA funding cannot be applied.
23. In response, the Overview Paper restates the Australian Government's policy position that lobbying and campaigning activities must not be undertaken using Commonwealth resources, and, in accordance with the 2018 review of the NPA, seeks to define 'lobbying' with the assistance of examples of activities that will and will not be permissible.
24. The primary position of the Law Council is that the NLAP remove the restriction on the use of Commonwealth funding for certain aspects of this work altogether.¹¹ The need for clarity should this prohibition remain, is critical. The role played by non-government organisations, particularly those which work closely with vulnerable groups and identify systemic solutions to common barriers to justice, is vital to a healthy and a component of freedom of expression – a value which is important to many Government members.
25. To this end, the Law Council raises concern with the proposed definition, specifically the two points listing what activities would not be permitted at page 22 of the Overview Paper. The Law Council submits that the two examples are unduly broad, and recommends the following changes:
 - removal of the phrase 'or other decision' at the end of the first point; and
 - removal of the second point altogether.
26. The Law Council strenuously opposes any attempt to limit the advocacy role of the legal assistance sector which would undermine the ability for these organisations to undertake law reform campaigns on policy matters that have systemic impact on the work of legal assistance services and are undertaken for a public benefit.
27. It is acknowledged that the Overview Paper states that it is permissible for legal assistance providers to identify strategic policy and law reform issues and then refer those matters to legal assistance peak bodies. However, the Law Council submits that there are some advocacy matters that will require the ongoing expertise of specialist legal services, and it would be appropriate for those services to remain at the forefront of the advocacy activities. Issues such as family violence, credit and debt and immigration require specialist knowledge, and where policy matters arise in these contexts, it would be insufficient for those specialist services to simply refer the matter to a peak body without an expectation of continued involvement.
28. The Law Council is also concerned that the inclusion of overly restrictive prohibitions on advocacy work using Commonwealth funds will set a precedent for state and

¹⁰ Ibid 62, 708-713.

¹¹ As reflected in the Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendations 2.12 and 2.13.

territory governments to implement similarly restrictive prohibitions with regard to the use of state/territory funding.

29. Finally, in the event that peak bodies are expected to solely undertake strategic policy and law reform activities on behalf of their members, the Law Council submits that there should be adequate resourcing to these organisations to perform this role. This is discussed further below.

Additional reporting burden

30. The Law Council is concerned that the proposed changes to the reporting requirements for legal assistance providers (particularly ATSILS) may increase the administrative burden on these services, noting that ATSILS must now report to individual state and territory governments. The Law Council is aware that a number of these services are already under financial and staffing strain and any increased performance reporting levied on the organisation will likely have an impact on service delivery.
31. While the specifics of any additional administrative burdens are best addressed by those representing the frontline serves, the Law Council supports the position that any additional administrative burdens based on new reporting requirement must be funded accordingly.

Peak bodies

32. The Law Council highlights the important role played by peak bodies for legal assistance services that will be funded under the NLAP, and notes that the proposed agreement appears to place more of an onus on these groups to lead advocacy and lead collaborative service planning.
33. The Law Council supports the need for the ongoing, sustainable and sufficient funding and support of these peak legal assistance bodies as a key element of ensuring that the objective and outcomes of the NLAP are met and supports additional resourcing for peak legal assistance bodies to assist their members during the rollout of the NLAP and beyond.

Conclusion

34. The Law Council looks forward to continuing to work with the Australian Government throughout the negotiation process as a member of the Advisory Group.
35. In the first instance, please contact Nathan MacDonald, Principal Policy Lawyer, on (02) 6246 3721 or at nathan.macdonald@lawcouncil.asn.au, if you would like any further information or clarification.

Yours sincerely



Arthur Moses SC
President