

18 November 2014



Dr Martin Parkinson PSM
The Secretary
Commonwealth Treasury
1 Langton Crescent
CANBERRA ACT 2600

Dear Secretary,

Submission on the 2015-16 Federal Budget

Please find attached submission from the Law Council of Australia concerning the 2015-16 Federal Budget.

If there are any queries regarding the attached submission, please contact Nick Parmeter on (02) 6100 3750 or via email nick.parmeter@lawcouncil.asn.au

Yours sincerely

A handwritten signature in black ink, appearing to read "M Hagan".

MARTYN HAGAN
SECRETARY GENERAL

2015-16 Federal Budget

Department of the Treasury

17 November 2014

Introduction

1. The Law Council provides this submission in order to assist the Government in determining the direction of Commonwealth expenditure in the Federal justice system under the 2015-16 budget.
2. As outlined in **Attachment A**, the Law Council is the national peak body for the Australian legal profession. Through the law societies and bar associations of the states and territories, and the Large Law Firm Group Ltd (collectively referred to as the “Constituent Bodies” of the Law Council), the Law Council effectively acts on behalf of around 60,000 Australian lawyers on national and international legal and policy issues.
3. The Law Council acknowledges the Government’s objective of reducing the current federal budget deficit. This submission sets out the important longer-term economic benefits and savings from investment in legal assistance services and the federal courts and tribunals.
4. As outlined below, actuarial analysis demonstrates that early intervention in, and resolution of, legal problems leads to substantial downstream savings across a range of government funded legal, health and community services. Furthermore, the federal courts and tribunals contribute significantly to productivity and economic growth if resourced to efficiently and expeditiously resolve disputes and enforce contractual and economic rights for Australian businesses and consumers.
5. The opportunity cost of under-resourcing the justice sector is substantial and measurable, and presents a compelling case for addressing the persistent under-investment in legal assistance and justice services by the Commonwealth.
6. The Law Council would be pleased to engage further with the Department on these matters.

Background

Legal assistance sector

7. The legal assistance sector is comprised of state and territory Legal Aid Commissions (LACs), community legal centres (CLCs) and Aboriginal and Torres Strait Islander Legal Services (ATSILS).

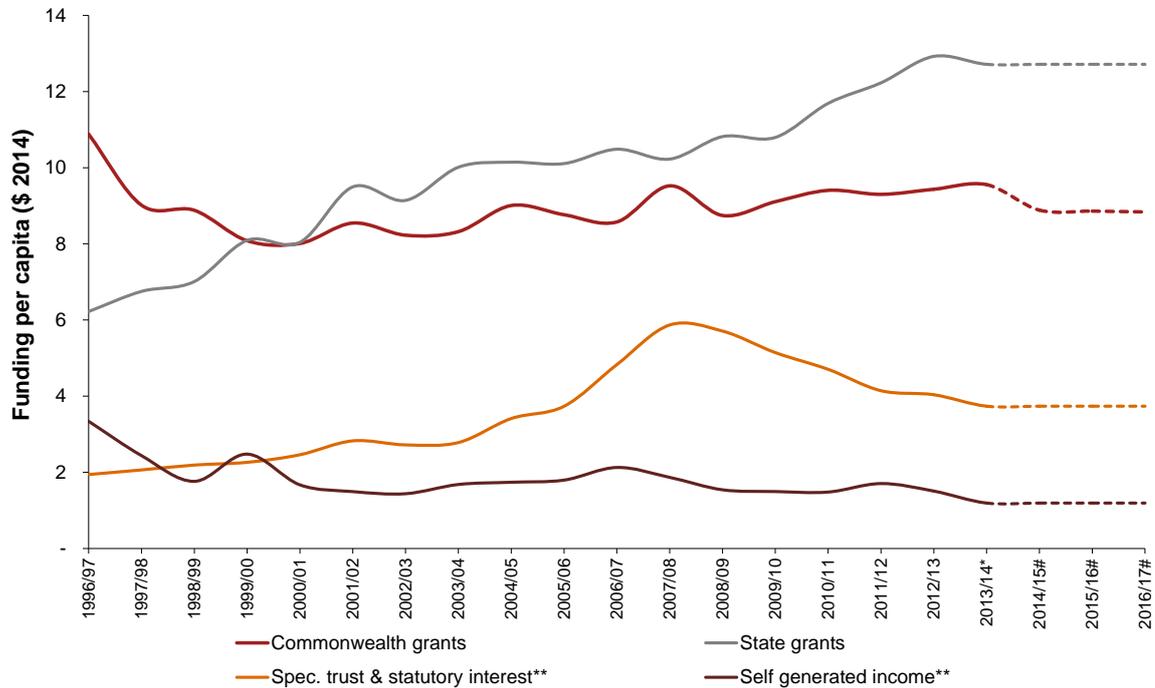
Legal Aid Commission funding

8. Funding for LACs in Australia is a joint federal-state government responsibility. The direction of Commonwealth funding is set out under the National Partnership Agreement on Legal Assistance Services (NPA). In 2014-15, total Commonwealth expenditure on LACs was around \$204.36 million,¹ or roughly 0.1 per cent of GDP.

¹<http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2014/PBS%202014-15/Downloads/PDF/01%20Treasury.ashx>. See p. 40.

The current NPA was due to expire in June 2014, but was extended by one year until 30 June 2015.²

Figure 1 – Actual real funding of legal aid commissions per capita by source (\$2014)



Source: NLA, ABS 6401.0 CPI, ABS 3101.0 Estimated Resident Population

** These are considered state sources of funding

Note: Excludes Commonwealth funding for Community Legal Centres.

9. As noted in Figure 1, above, since 1997, the Commonwealth’s contribution to legal aid funding reduced dramatically, from around \$10.88 per capita in 1996-97 to around \$8.01 per capita (in real terms, adjusted for inflation and population increases), remaining largely static ever since.
10. To place this in perspective, until 1996-97, the Federal Government’s funding contributions to LACs accounted for 55 per cent of total funding, with the remaining 45 per cent covered by State grants and interest from public purpose funds. Following the introduction of the “Commonwealth-State divide” in 1997, the Commonwealth’s share of funding fell to around 35 per cent of total funding. The projections over the foreword estimates are also for a further decline.
11. Australia's overall expenditure on legal aid (from all sources) is \$28 per capita, which is behind expenditure on legal aid in the United Kingdom. This was \$80 per capita in 2009 and, even after heavy recent cuts, presently sits at \$59 per capita, more than double the Australian expenditure.³

² Australian Government, [Budget measures: budget paper no. 2: 2014–15](#), 2014, p. 61; Australian Government, ‘[National Partnership Agreement on legal assistance services](#)’, p. 3

³ See PWC, 2009, *Legal Aid Funding – Current Challenges and Opportunities of Cooperative Federalism*, p. 4 – see <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload099f.pdf> for the Australian figure, and http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, Figure 2.15, for the UK figure.

Eligibility for access to legal aid – means testing

12. The decline in Commonwealth funding for legal aid has had significant social and economic consequences. In order to operate under existing budgetary constraints, LACs have had to increase thresholds for eligibility, to the extent that now many of those living well below the Henderson Poverty Line are ineligible for legal aid.
13. National Legal Aid (NLA) has noted that: “current means testing does not reflect the reality of having to purchase services in the private market. Tight eligibility tests are the result of insufficient funds for the purpose.”⁴

Legal aid unavailable for certain matters

14. Further, legal aid is now unavailable for certain types of matters. The vast majority of civil law matters are excluded and legal aid for criminal matters is available in matters before the Magistrates Courts only if the defendant pleads not-guilty, faces a real prospect of being acquitted or is reasonably likely to face a term of imprisonment if convicted.⁵
15. As noted by NLA in its submission to the Productivity Commission:

*Grants of legal assistance for representation in Commonwealth civil law matters are extremely limited due to the need to prioritise existing Commonwealth funding for the Commonwealth family law priorities specified in Schedule A of the National Partnership Agreement on Legal Assistance Services (NPA)... This is a reason why of the 30,000 or so Commonwealth – funded grants of aid approved in 2012-13, 94% were for family law matters while only 4% and 2% were for criminal and civil matters respectively.*⁶

16. The negative social impact of the unavailability of funding for civil law matters should not be understated. As noted by Community Law Australia:

*Australians underpaid by their employer, bullied at work or discriminated against, or in debt and facing repossession of their home, involved in a dispute with their insurer over flood damage, or who are elderly and being financially abused by their carer or family, will often find it extremely difficult to access free ongoing legal help if they can't afford a lawyer.*⁷

17. Further, as discussed in detail below, the number of unrepresented litigants in civil and criminal trials impacts heavily on the efficiency and cost of delivering justice. Substantial judicial and court registry resources must be expended providing guidance and support to unrepresented litigants, extending the length and cost of trials and significantly increasing the prospect of a mistrial or miscarriage of justice. This has been identified by the Australian Institute for Judicial Administration as one of the major, and growing, challenges facing Australian courts.
18. The Federal Government's announcement in the December 2013 Mid-Year Economic and Fiscal Outlook (MYEFO) of a further cut of \$43 million over 4 years to legal assistance services, and a further \$15 million in the May 2014-15 budget to LACs has

⁴ Ibid.

⁵ See, for example, the Victorian Legal Aid Guidelines - <http://handbook.vla.vic.gov.au/handbook/185.htm>

⁶ See http://www.pc.gov.au/data/assets/pdf_file/0011/137288/subdr228-access-justice.pdf

⁷ Community Law Australia, July 2012, *Unaffordable and Out of Reach: the Problem of Accessing the Australian Justice System*, p.3 – see http://www.communitylawaustralia.org.au/wp-content/uploads/2012/07/CLA_Report_Final.pdf

worsened this situation and it likely to lead to greater costs in the medium-to-long term.

Unmet legal need

19. There is now overwhelming evidence of substantial levels of unmet legal need in the community, with serious social and economic consequences for vulnerable Australians.
20. The NSW Law and Justice Foundation undertook a comprehensive inquiry into legal need in its 2012 *Legal Australia-Wide Survey* (LAW Survey) Report, which is one of the most significant bodies of work on legal need ever produced.
21. In its Draft Report into Access to Justice Arrangements, the Productivity Commission reviewed the findings of the LAW Survey and concluded that 17 per cent of Australians experience legal problems which they consider to be significant, which remain unresolved.⁸ Unmet legal need is particularly concentrated among the disabled, unemployed, single parents, Indigenous people, and those living in regional Australia.
22. As discussed below, the social and economic consequences of unmet legal need are likely to outweigh any savings achieved through short-term reductions to publicly funded legal assistance services and the courts. Recent reductions to LACs, CLCs and ATSILS funding – \$43 million over the forward estimates – is likely to be outstripped by downstream costs as unmet legal need increases, courts become further inundated with unrepresented litigants and demand for public health and community services rises.

Aboriginal and Torres Strait Islander Legal Services – struggling to meet demand

23. Indigenous people charged with a criminal offence are often advised and represented by ATSILS. High – and increasing – rates of arrest and imprisonment of Aboriginal and Torres Strait Islander people, however, present serious challenges for services with limited resources.
24. Current incarceration rates of Indigenous Australians are alarming. According to Dr Don Weatherburn PSM, Aboriginal and Torres Strait Islander Australians are now nearly 18 times more likely to be imprisoned than other Australians.⁹ To place this in context, this is:

*...six times larger than the disparity between African-American and white imprisonment rates in the United States.*¹⁰

25. The high rate of indigenous imprisonment comes at very high economic and social cost. On current estimates “...it is costing Australian tax-payers more than \$795 million per annum just to maintain the current level of Aboriginal imprisonment.”¹¹ This says nothing of the fact that between 2001 and 2011, the rate of Aboriginal imprisonment increased by 51 per cent, compared to 4 per cent for non-Indigenous

⁸ Productivity Commission, April 2014, Draft Report: *Inquiry into Access to Justice Arrangements*, Commonwealth of Australia, Draft Finding 2.1.

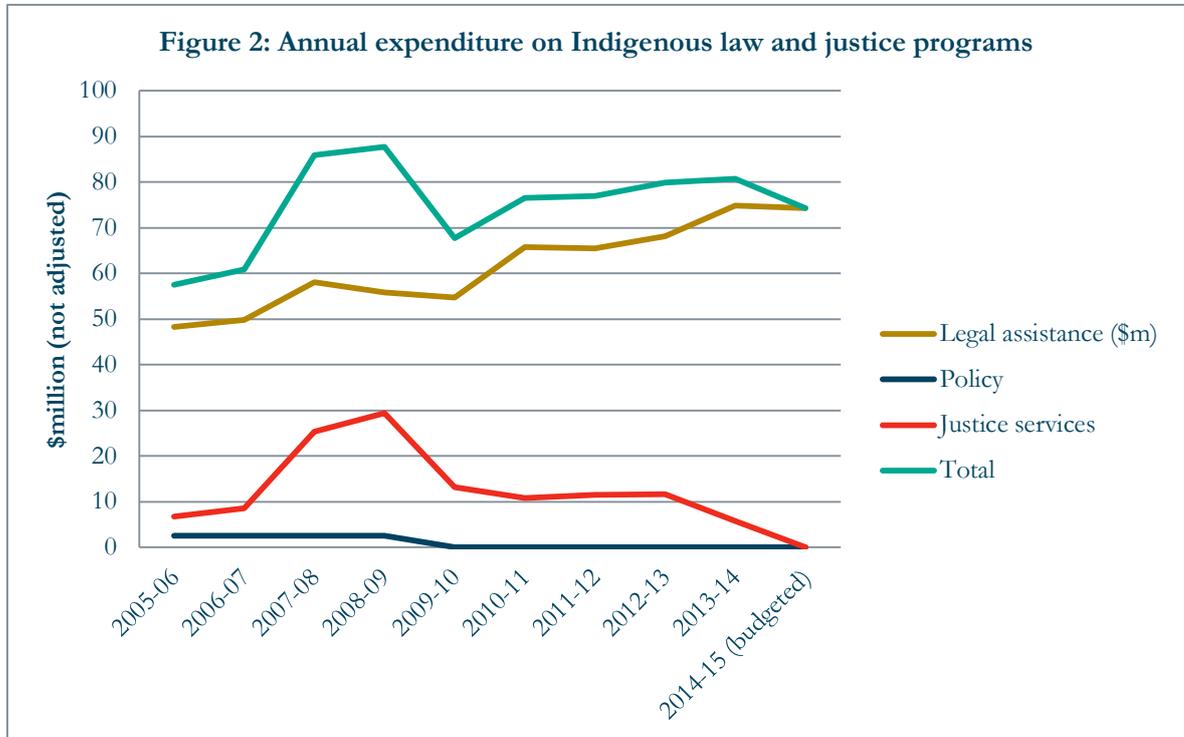
⁹ Don Weatherburn, 2014, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment*, Aboriginal Press Studies, p. 1.

¹⁰ Ibid, referring to Guerino, Harrison, & Sabol, 2011, *Prisoners in 2010*, US Bureau of Justice Statistics. See <http://www.bjs.gov/content/pub/pdf/p10.pdf>

¹¹ Don Weatherburn, 2014, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment*, Aboriginal Press Studies, p. 9.

offenders.¹² It also fails to account for the collateral costs to other justice services, community services, health services and the broader community.

26. The Law Council is particularly concerned that the increasing rate of offending and arrest of Indigenous people will overwhelm ATSILS. Seemingly, it is expected that these services will continue to meet substantially increasing demand for representation in criminal matters in spite of virtually static funding.



¹ From 2009-10, budget papers ceased providing separate figures for legal assistance and policy.

² Justice services refers to restorative justice, rehabilitation, diversion programs, etc.

Source: Attorney-General's Department Portfolio Budget Statements, 2005/6-2014/15.

27. Figure 2 demonstrates that actual expenditure on Indigenous legal aid increased from \$48.319 million in 2005-06 to \$74.311 million (budgeted) in 2014-15, an increase of just under 35 per cent. However, this does not take into account inflation and population growth, which affects the assessment of whether any real increase in funding has occurred. For example, between 2001 and 2011, the Indigenous Australian population increased at 2.3 per cent per annum, or 23 per cent overall, which is over 50 per cent higher than the average rate of increase for the broader community (1.5 per cent). On a per capita basis, this would account for over two-thirds of the increase in Federal funding over that period without considering inflation, which averaged over 3 per cent over the same period (a roughly-estimated cost increase of over 30 per cent). Further, the Indigenous population is projected to continue to grow at this rate for the foreseeable future.¹³

28. When the increasing rate of offending and imprisonment of Indigenous people is also considered, it is clear that the capacity of ATSILS to meet demand has diminished considerably over the last 10-15 years and will continue to be affected into the future.

¹² Don Weatherburn, 2014, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment*, Aboriginal Press Studies

¹³ http://apo.org.au/files/Resource/abs_estimatesandprojectionsaboriginalandtorresstraitislanderandaustralians201to2026_apr_2014.pdf, p. 37.

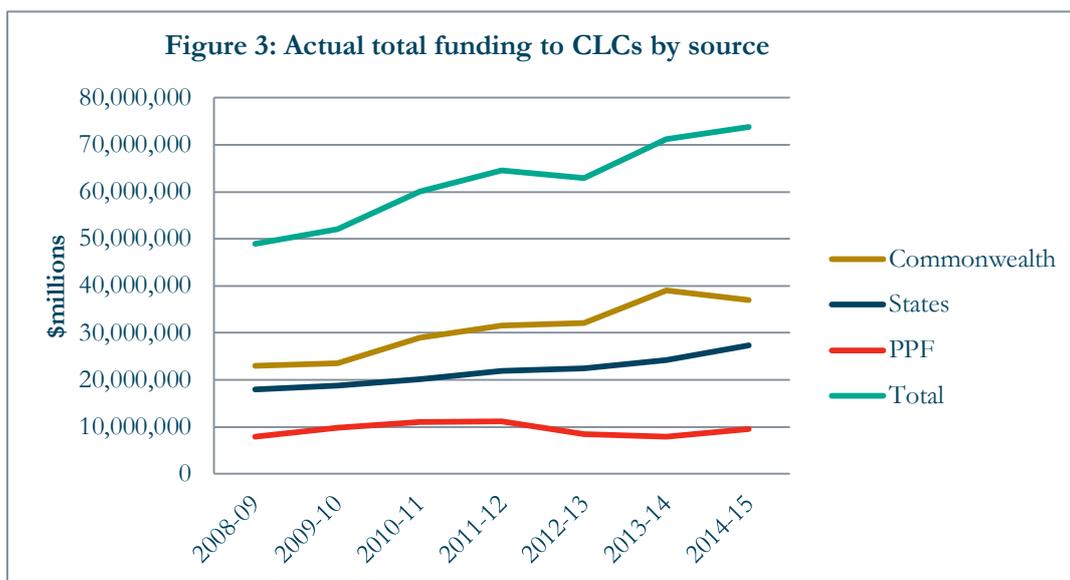
29. Further, it is also clear that the increasing demand for legal assistance from Aboriginal and Torres Strait Islander peoples is impacting significantly on LACs. For example, the Legal Aid WA’s Annual Report 2013-14 noted that:

Additional pressure continued to be placed upon the duty lawyer service in metropolitan courts as a consequence of the reduced service delivery capacity of the Aboriginal Legal Service of WA.¹⁴

30. The Report goes on to detail a substantial growth in the amount of civil and criminal law assistance provided to Aboriginal offenders and families, with substantial, unmitigated additional costs to the LAC. (It is noted that this is due to lack of capacity of the Aboriginal Legal Service to meet this demand.)
31. These matters should be considered in determining amounts allocated to Indigenous legal aid under the Federal budget.

Community Legal Services – the voluntary sector

32. As with ATSILS and LACs, government funding for CLCs has not kept pace with either increasing legal need or the cost of service provision. As a result, CLCs draw upon an enormous amount of pro bono and philanthropic work from the private profession. CLCs offer legal services, efficiently and for free, in many areas where significant legal need exists, which have been vacated by LACs due to funding constraints.



Source: Commonwealth Attorney-General’s Department (provided 17 October 2014)

33. As illustrated by Figure 3 from 2008 to 2014, actual total funding to approximately 200 CLCs throughout Australia increased from \$49 million to \$73.8 million, an increase of roughly one-third. Of this, the Commonwealth’s contribution increased from \$23 million to \$37 million, or around 38 per cent. However, funding reductions of \$19.3 million over four years announced in December 2013 mean that the downward trajectory of funding since 2013-14 is likely to continue over the forward estimates.

¹⁴ Legal Aid WA, *Annual Report 2013-14*, p. 23.

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34. CLCs attempt to fill a significant gap in unmet legal need. There is no funding stream that would enable the private sector to sustainably offer services in these areas and LACs have been forced to prioritise criminal and family law matters due to funding constraints.
 35. As noted below, there is extensive evidence that investment in CLCs and other legal assistance bodies can pay substantial dividends over the longer term, in some cases yielding returns of many times the level of funding provided.

Actuarial evidence – economic benefit of legal aid

36. The Law Council submits that there are tangible and measurable social, economic and budgetary benefits to be gained through provision of funding to legal assistance service providers. Actuarial analysis demonstrates that investment in legal aid can yield significant downstream savings in terms of the cost and efficiency of delivering justice.
37. Correspondingly, persistent failure to adequately fund legal assistance services, along with budgetary savings sought through reductions to legal assistance and law reform program funding, is in fact a false economy. Specifically, unmet legal need and increases in unrepresented parties result in significant economic costs, in terms of reduced efficiency of the courts, as well as costs arising from increased reliance on health and community services, increased unemployment, reduced productivity, social isolation, homelessness and problems associated with child welfare, increased criminal activity and higher rates of imprisonment.
38. A PricewaterhouseCoopers (PWC) report¹⁵ commissioned by NLA in 2009 estimated that each dollar spent on legal aid returns between \$1.60 and \$2.25 in downstream savings to the justice system. However, PWC notes in its report that:

*This report aims to quantify only those benefits which accrue to the efficiency of the justice system and to describe the other significant benefits which accrue to the community as a result of the provision of legal aid. **These other significant benefits result from legal aid services but were not able to be quantified within the scope of this report.***¹⁶ [Emphasis added]

39. It is noteworthy that the findings of the PWC report are corroborated in relation to the community legal sector by a separate National Association of Community Legal Centres report, which estimates the return on investment in CLCs to be approximately \$18 for every dollar spent.¹⁷ These findings are also consistent with recent reports produced in overseas jurisdictions, including the United States and United Kingdom.¹⁸
40. Further, the PWC report states that the “benefits which accrue to the efficiency of the justice system” refers only to the savings in terms of judicial resources in managing

¹⁵ PricewaterhouseCoopers, 2009, PWC Report, *Legal Aid Funding: Current Challenges and the Opportunities for Cooperative Federalism*, Report prepared for National Legal Aid. See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload099f.pdf>.

¹⁶ Ibid.

¹⁷ Judith Stubbs & Associates, *Economic Cost-Benefit Analysis of Community Legal Centres*, June 2012, National Association of Community Legal Centres. See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload0463.pdf>.

¹⁸ See summary in Allen Consulting Group, Review of the National Partnership Agreement on Legal Assistance Services, Working Paper 3, pp. 71-72. http://www.acilallen.com.au/cms_files/NPA%20Review_Working%20paper%203_Market%20analysis_final.pdf

unrepresented litigants, reduced time at trial, diversion of unmeritorious matters away from the courts, increased efficiency in the interlocutory stages and reduced chances of a mistrial.

41. The PWC report does not consider or attempt to estimate downstream savings arising from improved outcomes for vulnerable and economically disadvantaged people, through reduced reliance on other community services. The report therefore provides a very conservative estimate of savings arising from expenditure on legal assistance services.
42. The Law Council considers these additional savings are likely to be significant. For example, a person who is unrepresented in an employment dispute is at a significant disadvantage and at risk of losing their job or reaching an unsatisfactory outcome. This may result in extended leave, reduced productivity, resignation or redundancy and have a significant impact on business. It may also have extensive consequences for the individual concerned, including family problems, health and psychological issues and increased reliance on welfare or unemployment benefits.
43. A person who is unrepresented in a family dispute may also be vulnerable to an unfair or unsatisfactory outcome, with corresponding consequences reaching beyond their immediate personal affairs.
44. Similarly, a person involved in a credit or debt dispute who is unrepresented or does not have access to legal advice and assistance may face similar challenges with corresponding potential impact to tax payers from community and other services.
45. The Law Council submits that, while these costs may seem amorphous or not amenable to a clear actuarial estimate, it does not make them any less burdensome to the taxpayer. Down-stream problems created by unmet legal need imply that the benefits of investment in legal assistance services extend beyond the Attorney-General's portfolio. An all-of-government approach is the most effective response.
46. This has been recognised by the Productivity Commission in its Draft Report on Access to Justice Arrangements:

Just like access to information, lawyer advice and representation can reduce the number of unresolved disputes (and people giving up on defending their rights) and prevent the escalation of disputes. It can also increase the efficiency of the legal system (box 21.4)... Avoidance of future costs to the community (including avoidance of domestic violence, the continuation of care of children by parents, and the retention of ownership of the family home in the matter which had been subject to legally aided intervention) was estimated to range from \$200 000 to \$750 000 (the range of avoided costs depended on the age of the children).¹⁹

47. Rather than requiring the Attorney-General to attempt to meet this critical societal need within existing allocations to that portfolio, the Commonwealth should work with the States and Territories to identify national objectives for the provision of legal assistance services and agree to adequate funding to achieve them.

¹⁹ Productivity Commission, *Inquiry into Access to Justice Arrangements*, Draft Report, April 2014, Commonwealth of Australia, p. 619. See <http://www.pc.gov.au/projects/inquiry/access-justice/draft>.

Recent cuts to legal assistance services

48. Despite strong evidence demonstrating the economic benefits of investing in legal assistance services, in December 2013 the Federal Government announced funding reductions of \$43 million over 4 years to legal assistance services, apparently aimed at “law reform and advocacy” programs, in the 2013 MYEFO. The Government announced a further \$15 million reduction to LACs in the May 2014-15 budget.
49. The Law Council understands that the Government’s intention was not to affect “front-line” legal services, but to limit the capacity of those organisations to engage in “law reform and advocacy” work. In its media statement accompanying the announcement, the government stated:

The Government will achieve savings of \$43.1 million over four years by removing funding support for policy reform and advocacy activities provided to four legal assistance programmes. Funding for the provision of frontline legal services will not be affected.

The savings from this measure will be redirected by the Government to repair the Budget and fund policy priorities.

This measure implements the savings announced in the Government’s pre-election costings document.²⁰

50. The Law Council submits that the:

- notion that “law reform and advocacy” can be easily separated from “front-line” legal services, or that law reform and advocacy is less important, is highly questionable; and
- magnitude of these cuts is such that front-line legal services in all legal assistance providers will be deleteriously affected.

Law reform and advocacy – early intervention and prevention

51. The Law Council considers that attempting to delineate “law reform and advocacy” from legal services is a largely illusory distinction and undermines one of the key functions of LACs, CLCs and ATSILS – which is to engage in early intervention and prevention, as well as to inform government decision making and policy development processes.
52. For example, early intervention and prevention might include informing governments and the community about certain law reform initiatives which are having adverse and/or disproportionate legal consequences for certain sections of the community. Through such work, legal assistance services have been able to effectively reduce unmet legal need by either warning the community about certain legal risks, or informing policy makers in order to enable such problems to be dealt with en-masse as has been seen successfully in areas such as tenancy, consumer credit, debt collection, police powers and social welfare law. This has massively impacted on the target groups and freed up frontline services to deal with individualised problems, as opposed to the alternative of individually dealing with cases, which is substantially more expensive.

²⁰ See: http://www.budget.gov.au/2013-14/content/myefo/html/12_appendix_a_expense-03.htm.

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53. In addition, there is a strong economic rationale for encouraging advocacy work by legal assistance services. In its Draft Report on Access to Justice Arrangements, the Productivity Commission acknowledges the importance of advocacy work by legal assistance services, as follows:

Strategic advocacy can benefit those people affected by a particular systemic issue, but, by clarifying the law, it can also benefit the community more broadly and improve access to justice (known as positive spill-overs or externalities).

Advocacy can also be an efficient use of limited resources. It can be an important part of a strategy for maximising the impact of LAC and CLC work — as one LAC pointed out, limited funds do not allow them to focus solely on legal representation for single cases.²¹

54. Further, the Allen Consulting Report found that law reform and advocacy services had a substantial positive impact on demand for legal assistance and unmet legal need.
55. Early intervention services are defined under the NPA as services provided to assist people to resolve their legal problem before it escalates, such as legal advice, minor assistance and advocacy other than advocacy provided under a grant of legal aid.²²
56. The Allen Consulting Group's report found that preventative and early intervention legal services have the potential to increase community capability and/or mitigate escalation of legal problems, thereby reducing demand for legal assistance.²³
57. In addition, the Allen Consulting Report reiterated that "preventative and early intervention activities can contribute toward alleviating the broader impacts and associated costs of legal problems, which were identified by the LAW Survey as including impacts on health, finances and relationships."²⁴
58. The Allen Consulting Report refers to a significant number of studies demonstrating the cost/benefit analysis of preventative legal services such as community legal education, legal information and referral, as follows:

NEF Consulting (2009) found that the benefit cost ratio (BCR) of community education and prevention offered by the Southwark Law Centre was about 6:1. That is for every dollar spent on the centre's Public Legal Education program, \$6 was returned to the public.

Much of the work of community legal centres is preventative in that they reduce the need or extent to which individuals are involved with the legal system (Edgerton et al. 2006). These "invisible" benefits are difficult to isolate and are often not properly accounted for in economic valuations of legal assistance services. Edgerton et al. 2006 found that for a select number of case studies in Australia, the value of community legal centres was more than 100 times greater than the amount that community legal centres are funded per client, however this study does not isolate how much of this is due to prevented/avoided costs.

²¹ Productivity Commission, *Inquiry into Access to Justice Arrangements*, Draft Report, April 2014, Commonwealth of Australia, p. 623. See <http://www.pc.gov.au/projects/inquiry/access-justice/draft>

²² Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services*, Final Report, June 2014, viii.

²³ *Ibid.*, p. 19.

²⁴ *Ibid.*

59. These findings are supported by the work of Storer et al. which found a benefit cost ratio of 18:1 for CLCs in four regions in Australia. One of the key areas in which savings occur is in the efficiency of service provision and the timely resolution of matters, whether or not the case goes to court.²⁵

Impact on “frontline” legal services

60. The Law Council is advised that cuts of \$43 million over 4 years aimed at law reform and advocacy programs will, nonetheless, significantly impact frontline services.

61. In response to \$19 million of reductions to CLC funding, Community Law Australia announced:

*...services to be cut not only provided frontline legal help, but also drew on casework to inform and advocate for policy and legal changes that help many thousands of people.*²⁶

62. In response to the announcement of \$13.4 million in cuts to ATSILS, National Aboriginal and Torres Strait Islander Legal Services announced:

*Federal Government cuts to Aboriginal and Torres Strait Islander Legal Services will mean that even more Aboriginal and Torres Strait Islander peoples will not be able to access essential legal services and will further entrench Aboriginal and Torres Strait Islander peoples as second class citizens in their own country.*²⁷

63. This concern appears to be supported by the 2014-15 Attorney-General's Department Portfolio Budget Papers, which indicates that in 2013-14, just \$5.7 million was allocated for justice reinvestment, rehabilitation, diversion and other activities – which has all but disappeared from budget projections for the present financial year. Moreover, the Law Council has been advised that there has been little or no consultation with ATSILS about the actual level of expenditure on “law reform and advocacy”, or indeed any attempt to define what “law reform and advocacy” actually is.

Lack of legal aid funding for criminal matters

64. The Law Council is particularly concerned about the increasing unavailability of legal aid funding for criminal trials. This is occurring at the same time that stringent law and order measures are increasingly being implemented, including changes to offence definitions, higher sentencing penalties, and expanded police powers. Such a combination carries a risk that wrongful convictions or excessive sentences will occur.

65. Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid promotes the enjoyment of other rights, including the right to a fair trial, and is an important safeguard ensuring fairness and public confidence in the criminal justice process.

²⁵ Storer, J, Stubbs, J and Lux, C 2012, *Economic Cost Benefit Analysis of Community Legal Centres*, Judith Stubbs and Associates, New South Wales.

²⁶ Community Law Australia media release, ‘Road cuts to legal assistance services will fuel access to justice crisis’, 17 December 2014.

²⁷ NATSIL media release, ‘Government to defund Aboriginal Legal Services peak body and all law reform and policy positions’, 17 December 2014.

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66. The Law Council considers that there is now only a rare expectation that an accused will be entitled to legal representation (as noted above). This results in a very large number of people appearing before Magistrates Courts without legal representation, increasing the prospect of conviction and the potential for miscarriages of justice to arise.
67. Further, restrictions under legal aid guidelines are affecting the efficient administration of justice and undermining confidence in the criminal justice system. For example, criminal trials in the Supreme Court of Victoria have been stayed due to the lack of sufficient legal assistance for defendants charged with indictable offences.²⁸
68. The Law Council emphasises that a conviction can have serious consequences, even if the penalty does not involve a jail sentence. For example, a person convicted of certain offences will automatically be disqualified from a wide range of work and social opportunities. The costs of a wrongful or inappropriate conviction or sentence, are not limited to the individual concerned, but extend to the community as a whole.

Resourcing of federal courts and tribunals

69. In recent years, courts have been subject to reductions in staff in a number of registries, which have led to significant delays in processing. There has also been a decline in the level of staffing in Local Courts in regional and rural areas, resulting in delays for both hearing and filing of matters. While demand for court services, and therefore on court staff, is subject to peaks and troughs, it is incumbent on governments to ensure that unreasonable delay is eliminated.
70. The Law Council submits that funding to Federal, State and Territory courts has failed to keep pace with demand and the growing cost of service provision. Many Australian court registries are operating using antiquated filing and computer systems and have been required to cut registry and other staff. This has diminished the capacity of the courts and tribunals to deliver justice in a timely manner.
71. For example:
- the Federal Magistrates Court (now Federal Circuit Court) annual report notes that the largest number of complaints received by the Court in 2011-12 related to delays in delivery of reserved judgments.²⁹ The report also indicates an increase in matters filed with the Court and counter inquiries at Court registries,³⁰ as well as a reduction in staff.³¹ The Chief Federal Magistrate (as he then was) stated in the report:

Further administrative rationalisation, as proposed, is unlikely to relieve any of the financial pressures facing the Court. Budget constraints will make it more difficult for the Court to meet the needs of the public with resources being reduced in the next financial year.³²

²⁸ See *R v Chaouk* [2013] VSC 48 stay on the basis of no instructing solicitor. Leave to appeal by DPP refused by the Court of Appeal: *R v Chaouk* [2013] VSCA 99. See also *MK v Victorian Legal Aid* [2013] VSC 49.

²⁹ Federal Magistrates Court Annual Report 2011-12, p. 77.

³⁰ *Ibid*, part 3.

³¹ *Ibid*, p. 97.

³² *Ibid*, p. 3.

- In its Annual Report, the Family Court of Australia indicates that, since 2007, the total number of judges has declined from 40 to 30, while the caseload has remained roughly the same.³³ Similarly, the Federal Court of Australia reports that since 2007 the number of appointed judges fell from 48 to 44, while the Court's caseload increased.³⁴
- The Federal Coalition's election policy commitments issued on 5 September 2013, asserted that savings of \$30 million over four years would be achieved by "streamlining Family Court processes". The courts have already made significant savings in a number of areas and (given the high proportion of court expenditure which is fixed in nature), if this pre-election commitment is implemented by the Government, it is not easy to see how additional savings can be achieved otherwise than through a reduction of services. This will adversely impact upon the access of the community to these courts for the just and timely resolution of their disputes – and, in this field, the social cost of delay in the delivery of justice can be very significant considering the impact on families already under great stress.

72. The Law Council submits that failure by governments to properly resource the courts and tribunals is a false economy. It results in a slower, less efficient, (in some cases) unsatisfactory dispute resolution processes and leads to more expensive societal problems over the longer term.

73. The Federal Government has funding responsibility for the High Court, Federal Court, Family Court, Federal Circuit Court, Administrative Appeals Tribunal and various specialist jurisdictions, including the Fair Work Commission and other quasi-judicial commissions of inquiry established from time-to-time such as Royal Commissions.

74. Over time, the workloads and jurisdictions of each of the federal courts has increased. The increase is in part due to an increase in applications in certain areas, including immigration appeals, industrial law applications, native title, intellectual property. It is also due in significant part to the increase in complexity and volume of Federal legislation.

75. Further, the reduction in the availability of legal aid has led to a substantial increase in the number of unrepresented litigants applying to the courts. Matters involving unrepresented parties inevitably consume a substantially greater proportion of the court's time and resources and drive up the costs of dealing with those applications significantly.

Example – family law jurisdiction

76. Family law disputes are determined either by the Family Court of Australia (generally the more complex family law matters, and all family law appeals) and the Federal Circuit Court of Australia (which undertakes the majority of the family law work). Together, these Courts are referred to hereafter as "the Family Courts".

77. The Law Council is advised that the Government has progressively invested the Federal Circuit Court with significantly greater areas of work, but without a commensurate increase in resources. That Court now undertakes a very high volume of matters pursuant to both the Migration Act and the Fair Work Act. There has been a flood of such matters over the last few years, and judges of that Court now have

³³ Family Court of Australia, *Annual Report 2011-12*.

³⁴ Federal Court of Australia, *Annual Report 2011-12*.

much less time to deal with family law matters, resulting in further significantly increased delays.

78. Family law cases are taking too long to get through the system. It has long been the position of the Law Council and its Family Law Section that the Family Courts are inadequately resourced to meet the needs of the community. An under-resourced Family Courts' system means:

- delay in access to that system;
- less capacity on the part of the system to deal in a timely way with matters requiring urgent intervention;
- delay in final resolution of cases which require judicial determination;
- greater scope for the stresses and issues facing at-risk families being exacerbated or recurring as a direct result of that delay – a vicious circle in which lack of resources leads to delay, and delay leads itself to increased demand on those same resources; and
- a reduced quality of judicial decision making as a result of delayed attention to matters, and inadequate time to consider the volume of material adduced to the courts in important matters.

79. Adequate funding for courts is essential to ensure that they work effectively and provide satisfactory service to litigants. Courts should be adequately staffed to allow efficient processing of cases. In recent years, the federal courts have been subject to reductions in staff in a number of registries, which have led to significant processing delays. There has also been a decline in the level of staffing in Local Courts in regional and rural areas, resulting in delays for both hearing and filing of matters.

80. These delays could be ameliorated to a significant extent through an immediate investment in upgrading technology and online accessibility. For example, many Australian court registries are operating using antiquated filing and computer systems and have been required to cut registry and other staff. This has diminished the capacity of the courts and tribunals to deliver justice in a timely manner.

Immigration Advice and Application Assistance Scheme

81. On 31 March 2014, the Minister for Immigration and Border Protection [announced](#) that from 31 March 2014 “people who arrived illegally by boat, as well as illegally by air, will no longer receive taxpayer funded immigration advice and assistance [under the Immigration Advice and Application Assistance Scheme (IAAAS)]”.

82. Without this scheme, protection visa applicants are being left to navigate a complex legal framework without independent assistance, with adverse flow-on implications for Departmental officials tasked with assessing claims. This modest scheme contributed positively to the efficiency and fairness of the protection visa status determination process and helped to promote clear and timely articulation of claims, and quality decision making.

83. The Law Council submits that funding for the IAAAS should be reinstated.

Conclusion

84. The Law Council acknowledges the Government's objective of reducing the federal budget deficit, but reiterates that inadequately funding the legal assistance services sector and the federal courts and tribunals leads to greater longer-term economic and social costs to the community and tax payer.
85. The Law Council has submitted actuarial analysis undertaken by PWC, demonstrating that investment in legal assistance services can yield significant downstream savings in terms of the cost and efficiency of delivering justice.
86. PWC's analysis has been corroborated by several other reports and has been accepted by the Productivity Commission in its Draft Report on Access to Justice Arrangements.
87. There is overwhelming evidence that reducing legal assistance service funding is more likely to counteract the Government's objectives of restoring the federal budget to surplus. Furthermore, investing in legal assistance will facilitate greater access to justice, improved social and economic well-being and significantly reduce pressure on a highly-strained justice system.
88. Recent cuts to legal assistance services were based on the premise that savings can be achieved by redirecting funds from advocacy and policy work. However, as has been acknowledged by the Productivity Commission, advocacy can in fact be a highly efficient means of reducing demand for legal assistance and the number of disputes running through the system.
89. Currently, the federal Government's contribution to legal assistance stands at less than 35 per cent of total funding. Under current projections, that contribution will fall significantly over the forward estimates. In addition, withdrawing funding to IAAAS is likely to affect the efficiency of the Australian Government's immigration program as visa applicants seek to navigate the process unassisted.
90. Further, inadequate funding of courts and tribunals has led to slower, less efficient, (in some cases) unsatisfactory dispute resolution processes. This leads to more expensive societal problems over the longer term, diminishes productivity and effects economic growth.
91. The Law Council submits that urgent attention is needed, to prioritise funding for the proper functioning of the federal system of justice, as the fundamental third pillar of Australian democratic institutions.

Attachment A: Profile of 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 Large Law Firm Group, 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
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 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 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

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